BEFORE THE PUBLIC SERVICE COMMISSION
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**

STAFF'S POSTHEARING BRIEF

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I. Recent History Of Kansas City Power & Light Company and Aquila, Inc. (UtiliCorp United, Inc.) Acquisition And Merger Cases

A. Introduction

The Staff will relate in some detail the recent history before the Commission respecting Kansas City Power & Light Company (KCPL) and Aquila, Inc. (UtiliCorp United, Inc.) acquisition/merger cases for a number of reasons. One reason for doing so is to give the Commissioners some perspective. If the Commissioners are under the impression that the history at the Commission is one of acquisitions/mergers being proposed, no opposition being voiced, and the acquisitions/mergers then occurring, that is not what has occurred the last two decades, particularly respecting Kansas City Power & Light Company (KCPL). Also, if the Commissioners are viewing the present case as possibly representing the best opportunity for a beneficial resolution for Aquila, based on history the Commissioners should not be over anxious. Without the proper conditions, including, among others, Great Plains Energy, Inc. shareholders funding the cost of any ratings agencies downgrades, GPE's proposed acquisition of Aquila is detrimental to the public interest. But GPE's senior management is not willing to accept that condition. The Staff believes that even if it were, the proposed acquisition still would be detrimental to the public interest for the Commission to approve a transaction that has a likelihood of ending so badly, because in the end can the ratepayers truly be protected from such bad consequences?

B. Case No. EM-91-16 KCPL – Kansas Gas and Electric (KGE)

KCPL filed an Application[1] on July 23, 1990 establishing Case No. EM-91-16 for approval for KCPL to acquire all classes of capital stock of Kansas Gas and Electric (KGE)

[1] In the Matter of the Application of Kansas City Power & Light Company for Approval of its Acquisition of All Classes of the Capital Stock of Kansas Gas and Electric, to Merge with Kansas Gas and Electric and to Incur Debt Obligations.

through a tender offer, to merge KGE into KCPL, and to incur debt obligations. KCPL was to be the surviving entity after the merger. KCPL's proposed transaction was neither sought nor agreed to by KGE. In fact, KGE opposed KCPL's proposal.

KCPL's July 23, 1990 Application stated in paragraph 3 at page 2: Kansas Gas and Electric (KGE) is a public utility involved in the generation, transmission, distribution, and sale of electric power in south central and southeastern Kansas; KGE is duly organized under the laws of the State of Kansas and its principal place of business is located in Wichita, Kansas; KGE holds appropriate certificates of public convenience and necessity granted by the Kansas Corporation Commission to transact the business of an electric public utility in certain areas, all located within the State of Kansas.

KCPL's July 23, 1990 Application stated in paragraph 6 at pages 3-4: KCPL requested that the Commission not assert jurisdiction over the acquisition of KGE's stock by KCPL and the merger of KGE into KCPL, or, in the alternative, the Commission grant approval of that acquisition and merger pursuant to Sections 393.190.1 and .2 RSMo. 1989. By its terms, Section 393.190.2, RSMo. 1989, required Commission approval of the acquisition by a Missouri electric utility of the stock of another "corporation incorporated for, or engaged in, the same or similar business," and Section 393.190.1, R.S.Mo. 1989, required Commission approval of the merger or consolidation of the works or system of a Missouri electric utility with "any other corporation, person, or public utility." In the proposed transaction, however, KGE was a utility which provided no service in Missouri and owns no plant in Missouri. KGE was incorporated in Kansas, had its principal place of business in Kansas, and provided electric service only to customers in Kansas. KCPL stated: "Applicant believes that the statutory schemes described in Sections 393.190.1 and .2, R.S.Mo. 1989, were intended to apply to Missouri-jurisdictional utilities, and to mergers or stock acquisitions by Missouri utilities which would affect the nature of the corporate entities providing electric utility service within Missouri. The proposed transaction involves the acquisition by Applicant of stock in and merger with a non-Missouri utility, with Applicant emerging as the surviving corporation. However, to resolve any possible question as to the applicability of Sections 393.190.1 and .2, R.S.Mo. 1989, Applicant is requesting authority to acquire the stock of KG&E and to merge KG&E into Applicant should the Commission deem it necessary to obtain such authority."

KCPL's July 23, 1990 Application stated in paragraph 10 at page 6: "Upon successful consummation of the tender offer, KCPL will be the holder of at least 90% of each class of the capital stock of KG&E, and will merge KG&E into KCPL at such time, pursuant to authorization granted by the Commission in accordance with Section 393.190.1, R.S.Mo. 1989, and 4 C.S.R. 240-2.060(4), assuming that such authorization is necessary. KCPL contemplates utilizing the short-form merger procedure prescribed by Section 351.447, R.S.Mo. 1989, of the General and Business Corporation Law of Missouri and K.S.A. 17-6703 of the Kansas General Corporation Code."

On December 13, 1990 KCPL filed a Withdrawal Application in Case No. EM-91-16. KCPL's Withdrawal Application stated that on November 21, 1990 The Kansas Power and Light Company (KPL) had filed an Application with the Commission, in Case No. EM-91-21, seeking approval of the acquisition of all of the outstanding shares of common and preferred stock of KGE.[2] KCPL stated that it had reviewed its own July 23, 1990 tender offer in light of KPL's Application and had concluded that it was not in the interest of KCPL's customers, employees and shareholders to compete with the value levels perceived by KPL in support of its offer for

[2] KPL had to obtain this Commission's authorization of its acquisition of KGE because KPL acquired the Gas Service Company, which is now Missouri Gas Energy, a division of Southern Union Company, in *Re Kansas Power & Light Co.*, Case No. GM-84-12, 26 Mo.P.S.C.(N.S.) 254 (1983).

KGE's shares. Therefore, KCPL's Board of Directors authorized the withdrawal of KCPL's tender offer. In an Order dated December 18, 1990, the Commission dismissed Case No. EM-91-16.

C. Case No. EM-91-213 Kansas Power and Light (KPL) - KGE

The Staff has consistently taken the position that attempting to track merger savings calls for an impossible counterfactual form of analysis. The Commission has yet to adopt a merger savings sharing proposal. The closest that the Commission came to doing so was in the merger of Kansas Power and Light Company and Kansas Gas and Electric Company, *Re Kansas Power & Light Co.*,[3] Case No. EM-91-213, Report And Order, 1 Mo.P.S.C.3d 150, 156-57 (1991).[4]

Although the Commission stated its interest in the merger savings sharing concept proposed by KPL in Case No. EM-91-213 and even directed the parties to meet to attempt to devise a merger savings tracking plan (MSTP), as noted below, no part of the cost savings tracking system (CSTS) was ever implemented. The Commission stated in its Report And Order its concerns regarding a KPL CSTS as follows:

> . . . the Commission will not approve at this time the savings sharing proposal. Staff has persuasively argued that KPL has a strong incentive to view savings as merger–related even if they are not and to classify them in the CSTS so as to increase the pool of savings subject to the sharing plan. Staff demonstrated several flaws in the CSTS which could allow nonmerger savings to seep into the pool of savings to be shared.
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> The Commission is not opposed to the concept of the savings sharing plan provided that only merger–related savings are shared. The Commission does not wish to discourage companies from actions which produce economies of scale

[3] 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

[4] Kansas Power and Light Company (KPL) was the predecessor of Western Resources Inc. and at the time of its acquisition of Kansas Gas and Electric Company (KGE), KPL owned what is now Missouri Gas Energy. On November 21, 1990, KPL and its wholly-owned subsidiary, KCA Corporation (KCA), filed an application requesting authority to acquire and merge with KGE. 1 Mo.P.S.C.3d at 151. The Commission found that it had jurisdiction of the case pursuant to Sections 393.180, 393.190, and 393.200, RSMo 1986. *Id.* at 158.

> and savings which can benefit ratepayers and shareholders alike. However, the Commission wishes to ensure that savings which would have been offset against the cost of service without the merger benefit ratepayers one hundred percent. To avoid any detriment to ratepayers it is imperative that only savings which would not have occurred absent the merger be shared by ratepayers with shareholders.
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> The Commission is not convinced that KPL's tracking plan will exclude all nonmerger savings from the pool of merger savings to be shared. . . . [T]he Commission will direct the parties to meet for the purpose of attempting to devise a method of tracking merger-related savings. If the parties are unable to agree on such a system within sixty days, the Commission will hold a hearing to gather the information necessary to decide if any tracking plan can exclude nonmerger-related savings and, if so, which system would be best suited to this purpose.

1 Mo.P.S.C. 3d at 156-57.

. . . .

> . . . the Commission has found that the savings sharing plan proposed by KPL as part of its merger application has the potential of exposing Missouri ratepayers to higher rates than would be the case without the merger which would be detrimental to the public interest. Therefore, the Commission has determined that the savings sharing plan should not be approved until the Commission can be assured that no nonmerger savings can seep into the pool of merger savings which would be shared between ratepayers and shareholders.

Id. at 159.

. . . .

> IT IS THEREFORE ORDERED:
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> 7. That the Commission's Staff be directed hereby to carefully audit Kansas Power and Light Company in future rate cases to screen out costs caused by the merger authorized herein.
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> 8. That Kansas Power and Light Company be directed hereby to keep its books so that costs associated with the merger are clearly segregated from other costs.
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> 9. That the parties to this case be directed hereby to meet for the purpose of attempting to devise a merger savings tracking plan (MSTP) which will ensure that all nonmerger related savings can be excluded from the merger savings to be shared between ratepayers and shareholders. The parties will file this plan with the Commission for its approval on or before November 22, 1991.
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> 10. That a hearing be set hereby commencing at 10:00 a.m. on December 4, 1991, at the Commission's hearing room on the fifth floor of the Truman State

> Office Building, 301 West High Street, Jefferson City, Missouri, to address the matter of the merger savings tracking plan (MSTP). This hearing should be canceled if the parties are able to agree on a tracking system acceptable to this Commission.

Id. at 161. On December 13, 1991, the Commission issued an order Adopting Staff's Suggestion And Closing Case. The Staff's suggestion the Commission adopted was that the MSTP matter be addressed in KPL's next rate case. The Commission stated that "[i]f KPL wishes to have the possibility of receiving a share of the merger savings it may use a system it considers appropriate for excluding nonmerger savings from the pool of savings which might be shared and present that approach to the Commission in its next rate case complete with the amounts to be shared. At that time the Commission will consider whether the device employed by KPL is sufficiently foolproof to permit sharing of merger savings with shareholders."

D. <u>Case No. GM-94-40 Southern Union – Western Resources</u>

As previously noted, no part of the CSTS was ever implemented. KPL filed an application in 1993, Case No. GM-94-40, to sell Gas Service to Southern Union Company, d/b/a Missouri Gas Energy: In the matter of the joint application of Western Resources, Inc., d/b/a/ Gas Service, a Western Resources Company, a Kansas corporation, and Southern Union Company, d/b/a Missouri Gas Energy, a Delaware corporation, for an order authorizing the sale, transfer and assignment of certain assets relating to the provision of gas service in Missouri from Western Resources, Inc., to Southern Union Company, and in connection therewith, certain other related transactions, Case No. GM-94-40, Report And Order (December 29, 1993).[5]

[5] As is always the case for such transactions to not be opposed / to be supported by the Staff, the Stipulation And Agreement provided for the acquisition premium to be treated below the line for ratemaking purposes. (Unanimous Stipulation And Agreement, paragraph 3). A unique provision of the Stipulation And Agreement specified that Southern Union would not implement a general rate increase in non-gas rates until it had attained a total debt to total capital ratio which did not exceed Standard & Poor's Utility Financial Benchmark ratio for the lowest investor-owned natural gas distribution company at the time a general rate increase is filed. Southern Union agreed to attain this total debt to total capital ratio within three (3) years of the closing date of the transaction. (Unanimous Stipulation And Agreement, paragraph 7).

The Commission should note that the opportunity for KCPL and Aquila to jointly perform certain utility functions to create cost reductions has existed in the past and would exist in the future absent the acquisition of Aquila by GPE. History has shown that the opportunity to create benefits through the joint operation of certain utility functions is and will be available to KCPL with other utilities aside from the present proposal where the terms and conditions will not result in offsetting the detrimental consequences of the proposed GPE acquisition of Aquila.

E. Case No. EM-96-248 UtiliCorp – KCPL

On January 19, 1996, KCPL, UtiliCorp, and KC United Corp, a Delaware Corporation ("KCU"), executed an Agreement and Plan of Merger. On February 2, 1996 KCPL and UtiliCorp filed a Joint Application seeking Commission authorization to merge in Case No. EM - 96-248 (In the matter of the joint application of Kansas City Power & Light Company, a Missouri Corporation ("KCPL"), UtiliCorp United, Inc., a Delaware corporation ("UtiliCorp"), and KC United Corp, a Delaware Corporation ("KCU"), for an order authorizing KCPL and UtiliCorp to merge with and into KCU and, in connection therewith, certain other related transactions). On May 20, 1996, KCPL and UtiliCorp having determined to revise their original transaction, executed an Amended and Restated Agreement and Plan of Merger along with KCU and Merger Sub, adding Merger Sub as a party thereto and eliminating KCU as a party thereto. Merger Sub was a Delaware corporation wholly owned by KCPL incorporated for the purpose of accomplishing the purpose of the transaction. The transaction contemplated by both the Merger Agreement and the Amended Merger Agreement was the combination of KCPL and UtiliCorp. Merger Sub was to be merged with and into UtiliCorp with UtiliCorp being the surviving corporation; UtiliCorp was to be merged with and into KCPL with KCPL under a new name being the surviving corporation ("Newco"). (Amended Application, paragraphs 3, 5).

A First Amended Joint Application was filed with the Commission on June 7, 1996 in Case No. EM-96-248 pursuant to Sections 393.180 and 393.190 RSMo 1994, and 4 CSR 2402.060(2), (6), (9), and (12). (Amended Application, introductory paragraph). Newco stated therein it would adopt the rates, rules and regulations and other tariffs of KCPL and UtiliCorp on file with and approved by the Commission. (Amended Application, paragraph 16). Moreover, Newco argued coordination of the dispatch of Newco's electric generating units and transmission facilities would permit more efficient utilization of Newco's resources to meet the combined systems' requirements and provide continued low-cost energy to Newco customers. (Amended Application, paragraph 21). Newco also said the Commission would not be required to put in place a procedure to "track" merger-generated savings:

> The Mergers do not involve what is commonly known as an "acquisition premium," a purchase of stock in excess of book value. Consequently, the Joint Applicants will not seek the recovery of an acquisition premium through rates. This will simplify the regulatory consequences of the Mergers as the Commission will not be required to put in place a procedure to "track" merger-generated savings in order to consider the possible recovery of an acquisition premium from Newco's customers.

(Amended Application, paragraph 18). Upon the closing of the Mergers, and subject to Commission approval, Newco proposed to implement a five-year regulatory plan, one of the principal components of which included a two percent rate reduction from the rate levels in effect at the time of the filing of the Joint Application, February 2, 1996, for the Missouri retail electric customers of both KCPL and UtiliCorp. (Amended Application, paragraph 19).

In the midst of Case No. EM-96-248, Western Resources launched an unsolicited merger offer for KCPL and on May 3, 1996 Western Resources filed with the Commission a competing case, Case No. EM-96-371, In the matter of the Application of Western Resources, Inc. for approval of its proposal to merge with Kansas City Power & Light Company, and other related relief. On September 20, 1996, in Case No. EM-96-248, the Joint Applicants filed a Motion To Dismiss First Amended Joint Application. The Joint Applicants related that the Amended and Restated Agreement and Plan of merger between the Joint Applicants which was the subject of the First Amended Joint Application, did not receive approval from a majority of the KCPL shareholders at a special shareholders meeting on August 16, 1996, which tabulation was finalized on September 16, 1996. Also on September 20, 1996, in Case No. EM-96-248, KCPL filed a Supplement To Motion To Dismiss First Amended Joint Application in which it stated as follows:

> KCPL takes this opportunity to inform the Commission that KCPL does not plan to intervene in the "merger" case of Western Resources, Inc. ("Western") now pending before this Commission. (Case No. EM-96-371). The conditions Western has placed upon its tender offer for KCPL stock, along with the stringent provisions of Missouri statutes governing mergers and acquisitions, virtually guarantee that the tender offer will be unsuccessful. KCPL's response to Staff Data Request 1001, attached hereto as Exhibit A, provides additional detail regarding the barriers faced by Western if it chooses to continue its hostile takeover efforts through its tender offer for KCPL stock.

F. Case No. EM-96-371 Western Resources - KCPL

On May 3, 1996, in Case No. EM-96-371,[6] Western Resources applied to the Commission for an order approving its proposal to merge with KCPL, pursuant to Sections 393.180 and 393.190 RSMo 1994 and 4 CSR 240-2.060(2), (6), (9), and (12), and rejecting the proposed merger of UtiliCorp and KCPL on the basis that such merger was detrimental to the public interest. (Application, paragraph 5). Western Resources stated that it had attempted for over a year to engage KCPL in discussions of a merger, but that KCPL had declined to enter into such discussions. (Application, paragraph 2). Western Resources asserted that on April 14, 1996 it delivered to KCPL a written proposal for a Western resources/KCPL merger, but KCPL

[6] In the matter of the application of Western Resources, Inc. for approval of its proposal to merge with Kansas City Power & Light Company, and for other related relief

responded to Western Resources' proposal by rejecting Western Resources' offer. (Application, paragraphs 3, 25). Western Resources stated that Western Resources filed with the United States Securities and Exchange Commission (SEC) an exchange offer which would be submitted to the KCPL shareholders upon the declaration of the SEC that Western Resources' registration statement was effective. (Application, paragraph 26). Western Resources claimed that the proposed UtiliCorp-KCPL merger could not match the value and benefits to customers, shareholders, and employees of KCPL that would be produced by a merger of Western Resources and KCPL. (Application, paragraphs 2, 4, 28).

Regarding the legal standard, Western Resources stated in its Application that "[i]t is reasonable and desirable that the Commission should consider the comparative advantages of a Western Resources/KCPL merger when considering whether a UtiliCorp/KCPL merger is detrimental to the public interest," and cited an Illinois Commerce Commission case and an Illinois Supreme Court decision: Illinois Power Company, Illinois Commerce Commission Docket No. 81-0818; *Illinois Power Co. v. Illinois Commerce Comm'n*, 111 Ill.2d 505, 490 N.E.2d 1255 ((1986). Western Resources did not cite a Missouri Supreme Court decision respecting a Commission case: *State ex rel. Consumers Public Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40 (Mo. banc 1944) (*Consumers*).

By a First Amended Application filed July 2, 1996 in Case No. EM-96-371, Western Resources more specifically requested, among other things, that the Commission issue an order approving: the merger of KCPL with Western Resources pursuant to Section 393.190.1 RSMo 1994; the acquisition and exchange of KCPL stock by Western Resources pursuant to Section 393.190.2 RSMo 1994; and the merger of Western Resources and KCPL pursuant to its general regulatory authority conferred by Section 393.180 and Section 393.190.1 and .2 RSMo 1994.

On October 4, 1996, the Staff, Public Counsel, and Western Resources filed in Case No. EM-1996-371 a Joint Motion Respecting Establishment Of Procedural Schedule in which they related that on August 15, 1996 the proposed UtiliCorp-KCPL merger received an affirmative vote of less than 50% of KCPL's shareholders voting, and, as a consequence, that proposed merger had failed. The Staff, Public Counsel, and Western Resources noted that UtiliCorp and KCPL on September 20, 1996 filed in Case No. EM-96-248 their Motion To Dismiss First Amended Joint Application.

On March 10, 1997, Western Resources filed Suggestions Of Western Resources, Inc. Regarding Procedural Schedule in Case No. EM-96-371 in which it stated that on February 7, 1997 it and KCPL signed an Agreement and Plan of Merger. Western Resources related that it had withdrawn its exchange offer which was the basis for its filing Case No. EM-96-371 and therefore was suggesting that the Commission take no further action in Case No. EM-96-371 at that time, and that it and KCPL would file a Joint Application seeking approval for their proposed merger. On March 18, 1997 the Commission issued a Notice stating it would issue its order closing Case No. EM-96-371 if no objection to such an action was received by March 31, 1997. On March 31, 1997 Western Resources filed a Response in which it stated that it and KCPL intended to file a Joint Application for Commission approval of their proposed merger, as soon as practical, and, in light of this, Western Resources had no objection to the closing of Case No. EM-96-371. On April 2, 1997, the Commission closed Case No. EM-96-371.

G. Case No. EM-97-515 Western Resources - KCPL

On May 30, 1997 in Case No. EM- 97-515, Western Resources, Inc. (Western Resources) and Kansas City Power & Light Company (KCPL) filed a Joint Application for Commission approval of the merger of KCPL with Western Resources. On June 17, 1998 in Case No. EM-

97-515, Western Resources, Kansas Gas and Electric Company (KGE), KCPL, and NKC, Inc. (Westar), pursuant to Sections 393.180, 393.190, 393.200, RSMo 1994 and 4 CSR 240-2.060(2), (6), (8), (9), and (12) filed a First Amended Joint Application for an order approving the merger of Western Resources' utility business (referred to as KPL), KGE and KCPL into a new electric subsidiary of Western Resources. As a part of the transaction, Western Resources would become a nonutility holding company. Western Resources, a Kansas corporation, operated its utility operations under its trade name KPL (Kansas Power and Light), and its subsidiary, KGE, was also a Kansas corporation. (Application, paragraph 1.a.). The subsidiary into which KPL, KGE, and KCPL were to be merged was at the time named "NKC, Inc.," but it was anticipated that NKC would be renamed "Westar Energy, Inc." (Westar). (Application, introductory paragraph). After the merger, KPL, KGE and KCPL were to operate as separate divisions of NKC/Westar just as KGE and KPL operated as separate divisions of Western Resources before the proposed merger. (Application, paragraph 13.d.).

The Joint Applicants asserted that the Commission's ability to regulate KCPL's electric utility operations would be enhanced by the holding company structure where all of Western Resources' electric utility assets reside in a single corporate entity because under the holding company structure all employees involved in Western Resources' electric utility business would be located in NKC/Westar. (Application, paragraph 13.d.).

If there are competing proposals and neither proposal is detrimental to the public interest, the not detrimental to the public interest standard of Section 393.190.1 requires the Commission to (1) determine which of the rival proposals is more / most in the public interest and (2) authorize which of the proposals is more / most in the public interest. Thus, if neither of the proposals on its own is detrimental to the public, can the Commission choose between the two proposals solely on the basis of which one is the better proposal? Would the Commission have to approve one of the two rival proposals as meeting the not detrimental to the public standard, as being more in the public interest? The answer is "yes." Also, if the transaction has been completed / consummated, but the Commission order authorizing the transaction is not valid, the issue is not moot. When challenged, an invalid Commission order must be set aside by the court and there must be further proceedings before the Commission.

The Missouri Supreme Court's decision in *State ex rel. Consumers Public Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40, 44, 46 (Mo. banc 1944) (*Consumers*) is the basis for the discussion in the immediately preceding paragraph. While the Missouri Supreme Court *en banc* in 1934 in *City of St. Louis* called the appropriate standard to be used "not detrimental to the public interest," the Missouri Supreme Court *en banc* in 1944 in *Consumers* called the appropriate standard to be used "in the public interest." In *Consumers*, the three interconnected companies Consumers Public Service Company (Consumers Public Service), Missouri Public Service Corporation (MPS) and Missouri Power & Light Company (MPL) (collectively, Intervenors) appealed from the judgment of the Circuit Court affirming an Order of the Commission authorizing the sale by Iowa Utilities Company (Iowa Utilities) and the purchase by Grundy Electric Cooperative (Grundy) of the electric system of Iowa Utilities in Missouri. Intervenors asserted that they were serving areas adjacent to the area served by Iowa Utilities, that they had ample generating plant and facilities for supplying the area in question, that the sale to Grundy would constitute an unwarranted invasion of the area served by them and that the sale to Grundy would frustrate their plans for the area, thus, resulting in injury to the electric service rendered to the public in the area. *Id.* at 41-43.

The Missouri Supreme Court related that the Iowa Utilities property was old, obsolete and in need of repairs and betterments to render adequate service to its customers. Grundy stated that necessary improvements would be made in order that better and more adequate service would be rendered. The rates charged by Grundy were shown to be slightly lower in most instances compared to the rates then charged by Iowa Utilities. At the date of the hearing, 95% of the then present customers of Iowa Utilities had made application for membership in Grundy and no customers of Iowa Utilities had entered a protest to the granting of the transfer to Grundy. 180 S.W.2d at 42.

Consumers Public Service maintained that its acquisition of the Iowa Utilities system would result in improved and adequate service to the public, but the offer of Consumers Public Service to purchase Iowa Utilities was conditioned on its ability to refinance itself. Also, there was evidence that in certain areas, service provided by Consumers Public Service was not satisfactory. MPL showed that it had ample and adequate sources of electric power for the area and that Grundy's acquisition of Iowa Utilities would interfere with the most practical methods of integration of facilities in northwest Missouri. 180 S.W.2d at 42-43.

Grundy filed a motion to dismiss the appeal on the grounds that, among other things, the appeal was moot because the sale had been fully consummated and that it, Grundy, was operating the purchased property. The Missouri Supreme Court held that the case was not moot because if the Commission Order authorizing the sale to Grundy was invalid, the Court must set it aside, and any further proceedings must be before the Commission. 180 S.W.2d at 44.

The Court held that when two utilities are vying to acquire a third utility, the utility whose operation of the area under all circumstances would best serve the public interest, and not just which utility could first obtain a contract for purchase, should be the basis for the decision regarding which utility should be authorized to engage in the transaction:

> Therefore, when two utilities can reasonably be said to be operating in the same general territory, and the question before the Commission is whether or not one of them should be allowed to take additional locations which either might make arrangements to serve, the other must be held interested in the matter in the sense the term "interested" is used in Section 5689. That was the situation in this case. Both the Cooperative and the Consumers Company had lines approximately seven miles of the property sought to be acquired. Both were operating in the same area, even in the same county, in which this property was located and both (according to the evidence) had negotiated to acquire it and could make arrangements to do so and to operate it. **The question of which one should be permitted to acquire it must be decided on the basis of whose operation of the area would best serve the public interest under all the circumstances and not merely upon which could first obtain a contract for purchase.** A contract found to be against public interest or the Commission's regulatory policy could not be permitted to stand in this situation any more than a contract for unapproved rates. We hold that Consumers Company was sufficiently "interested" to have the right to intervene and likewise the right to apply for a rehearing, when the Commission decided that a competitor could take over these new locations adjoining the general territory in which both were operating. Our conclusion also is that this company had the further right, because of such interest, to seek a review in the circuit court and appeal to this court from its adverse decision. The motion to dismiss must be overruled as to the Consumers Company.

180 S.W.2d at 46; Emphasis supplied.

Regarding the criteria for the approval of the proposed transfer, the Court further stated:

> ...we think the Commission did consider and decide the question of whether, under the particular circumstances of this case, it would be in the public interest (including the interest of the public in the whole area involved) to approve or deny the proposed transfer, and that it based its approval upon the conclusion that this transfer would be in the public interest. Furthermore, we hold that such a conclusion was reasonable upon the evidence showing the rural character of the Missouri communities involved, their present poor service, the prospect of what better service might be reasonably expected from either applicant for the territory, the financial condition, management, and prospects of both, the sentiment of the people in these communities and their almost unanimous desire to become members of the Cooperative. . . .

180 S.W.2d at 48.

Analysis performed by the Commission when two utilities are seeking to acquire a third utility is which of the two vying utilities is more beneficial. The Commission has not taken the approach that the matter is solely for the selecting utilities to decide so long as the transaction with the prevailing utilities is not detrimental to the public. The Commission has looked to which of the possible transactions is more beneficial.

On May 30, 1997, KCPL and Western Resources filed a Joint Application for the approval of the merger of KCPL with Western Resources, which established Case No. EM-97-515, In the matter of the Joint Application of Western Resources, Inc and Kansas City Power & Light Company for Approval of the merger of Kansas City Power & Light Company with Western Resources, Inc. other related relief. On June 17, 1998 Western Resources, Kansas Gas and Electric Company (KGE), KCPL, and NKC, Inc. filed a First Amended Joint Application with the Commission. On July 20, 1999, the Joint Applicants, Staff, Public Counsel, and Missouri Department of Natural Resources filed a Nonunanimous Stipulation And Agreement. No nonsignatory party requested a hearing so the Commission treated the stipulation and agreement as unanimous pursuant to 4 CSR 240-2-115. The Commission issued an Order Approving Stipulation And Agreement on September 12, 1999. *Re Western Resources, Inc. and Kansas City Power & Light Co.*, 8 Mo.P.S.C.3d 306 (1999).

The KCPL Board of Directors voted to terminate its merger agreement with Western Resources in an emergency Sunday meeting on January 2, 2000. Under the terms of the merger agreement, either KCPL or Western Resources could terminate the merger if it was not consummated on or before December 31, 1999. The merger was announced in 1997 but was reworked in 1998 because Western Resources' stock price rose so high. Western Resources' stock closed at $43.13 per share on March 18, 1998 when the reworked merger transaction was announced and closed at $16.94 per share Friday, December 31, 1999. Western Resources' shares fell 49 percent in 1999 as the value of Western Resources' investments in Protection One, the home security company, and Oneok, the natural gas producer, fell. KCPL's shares lost 26% in value in 1999.

H. Case No. EF-2003-0465 Aquila Encumbrancing Application

As the Commission is well aware, Section 393.190.1 RSMo 2000 contains no express standard for the Commission's determination of whether to approve a request to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . ." The Commission is also well aware of the Missouri Supreme Court's holding in *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393 (Mo. banc 1934) that "not detrimental to the public" is the appropriate standard:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public good in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public'".

The Commission has expressly stated it is using the standard of "not detrimental to the public interest" in determining whether to approve transactions under Section 393.190.1.

The recent Aquila encumbrancing case *In the Matter of the Application of Aquila, Inc. for Authority to Assign, Transfer, Mortgage or Encumber its Utility Franchise, Works or System in Order to Secure Revised Bank Financing Arrangements*, Case No. EF-2003-0465, Report And Order, 12 Mo.P.S.C.3d 375, 378 (2004) is relevant. The detrimental risk recognized by the

Commission relating to Aquila's proposal in Case No. EF-2003-0465 is not as great as the detrimental risk to KCPL's creditworthiness and in turn the KCPL Regulatory Plan and KCPL itself. In Case No. EF-2003-0465, the Commission explained what it meant by the "not detrimental to the public interest" standard as follows:

> The Commission concludes a detriment to the public interest includes a risk of harm to ratepayers. In reviewing a recent merger case involving the same parties, the Supreme Court of Missouri ruled that . . . "(w)hile (the Commission) may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered (the premium) . . . when evaluating whether the proposed merger was detrimental to the public."[12] In other words, the Commission could not have known whether the acquisition premium would result in rate increases. But it should have looked at the premium's reasonableness. Likewise, the Commission cannot know whether the encumbrances will result in rate increases. But the Commission should look at the reasonableness of the risk of the increases. This analysis conforms to the concept that . . . "(n)o one can lawfully do that which has a **tendency** to be injurious to the public welfare."[13]
>
> [12] *State ex rel. AG Processing Inc., v. Public Service Commission,* 120 S.W.3d 732, 736 (Mo. banc 2003).
>
> [13] *State ex rel. City of St. Louis v. Public Service Commission,* 73 S.W.2d 393, 399-400 (Mo. banc 1934)(emphasis supplied).

Id.; Emphasis in original. In Case No. EF-2003-0465, Aquila asked the Commission for authority to pledge its Missouri regulated assets to support a $430 million, three-year term loan, and a $100 million, 364-day term loan. The Commission denied Aquila's request on the basis that granting Aquila's application would be detrimental to the public interest: "The detriment to the public interest is the unreasonable risk of harm to Missouri ratepayers compared to the minimal benefit Aquila would receive." *Id.* at 378.

I. Case No. EM-2000-292 UtiliCorp – St. Joseph Light & Power (SJLP)

In *Re UtiliCorp United, Inc. and St. Joseph Light & Power Co.*, Case No. EM-200-292, 9

Mo.P.S.C.3d 454, 471 (2000),[7] UtiliCorp United, Inc. (UtiliCorp) and St. Joseph Light & Power Co. (SJLP) filed a Joint Application for authority to merge SJLP with and into UtiliCorp, pursuant to Section 393.190.1 RSMo 1994. The Staff contended that the costs associated with the merger would exceed savings attributable to the merger. The Commission stated: "If this is true, then the merger might be detrimental to the ratepayers of both companies because the cost of service for the combined company would be higher than it would have been without the merger and the higher cost of service would ultimately be reflected in higher rates." 9 Mo.P.S.C.3d at 457. The Staff challenged UtiliCorp-SJLP's estimates of merger savings in two areas: (1) energy cost savings from joint dispatch and (2) inflation rate for UtiliCorp's overhead costs. The Commission rejected the Staff's arguments. *Id.*

In addition to approving the merger itself, UtiliCorp and SJLP requested that the Commission approve their Regulatory Plan. UtiliCorp asserted that approval of the Regulatory Plan was necessary to allow its shareholders the opportunity to recover its $270 million dollar investment required to acquire the ownership of SJLP. On December 14, 2000, the Commission authorized the merger, but declined to approve the Regulatory Plan. 9 Mo.P.S.C.(N.S.) at 460, 473, 479-80. UtiliCorp summarized its proposed Regulatory Plan as follows:

> 1. Upon the closing of the merger, a five-year rate moratorium for the SJLP operating division will be put in place (Rate Freeze);
>
> 2. During the fifth year of the rate moratorium, UtiliCorp will initiate general rate cases for the retail electric, gas and steam operations of the SJLP division with the new rates to take effect at the conclusion of the moratorium. The rate filings will include an accounting of the **merger synergies** realized during the moratorium period and the balance of the acquisition premium yet to be recovered (5th year rate case);

[7] In the matter of the Joint Application of UtiliCorp United, Inc. and St. Joseph Light & Power Company for authority to merge St. Joseph Light & Power Company with and into UtiliCorp United, Inc., and, in connection therewith, certain other related transactions. Case No. EM-2000-292 became *State ex rel. AG Processing v. Public Serv. Comm'n*, 120 S.W.3d 732 (Mo. banc 2003)

> 3. In the rate cases and for ratemaking purposes, fifty percent (50%) of the unamortized balance of the acquisition premium paid by UtiliCorp for SJLP will be included in the rate bases of the SJLP division's retail electric, gas and steam operations and the annual amortization of the acquisition premium will be included in the expenses allowed for recovery in cost of service, provided that UtiliCorp proves to the Commission that **merger synergies** are at least equal to 50% of the premium costs and other costs to achieve the **synergies**. The return allowed on this premium, for the recovery period, will be based on the capital structure of sixty percent (60%) debt and forty percent (40%) equity (Partial Recovery of Premium in Rates);
>
> 4. The balance of the retail electric, gas and steam rate bases will be allowed a return based upon a SJLP division capital structure of forty-seven percent (47%) debt and fifty-three (53%) equity for the period covered by the Regulatory Plan which approximates the capital structure recommended by the Staff in SJLP's last rate case (frozen capital structure);
>
> 5. The allocation of UtiliCorp's corporate and intra-business unit costs to UtiliCorp's MPS division shall exclude for ratemaking purposes the SJLP factors from the methodology for the period covered by the Regulatory Plan (MPS Allocations).

Id. at 472-73; emphasis added. The UtiliCorp-SJLP merger was consummated by UtiliCorp and SJLP on December 31, 2000.

J. <u>Case No. EM-2000-369 UtiliCorp – Empire</u>

As with the proposed UtiliCorp-SJLP merger and Regulatory Plan, the Commission authorized the UtiliCorp-Empire merger, proposed pursuant to Section 393.190.1 RSMo 1994, and rejected the proposed UtiliCorp-Empire Regulatory Plan, in a December 28, 2000 Report And Order, *Re UtiliCorp United, Inc. and The Empire District Electric Co.*, Case No. EM-200-369, 9 Mo.P.S.C.3d 512, 520, 531, 539 (2000).[8] As with the proposed UtiliCorp-SJLP merger, the Staff contended that the costs associated with the merger would exceed savings attributable to the merger. 9 Mo.P.S.C.3d at 517-18. The Staff challenged UtiliCorp-Empire's estimates of

[8] In the matter of the Joint Application of UtiliCorp United, Inc. and The Empire District Electric Company for authority to merge The Empire District Electric Company with and into UtiliCorp United, Inc., and, in connection therewith, certain other related transactions. Case No. EM-2000-292 became *State ex rel. AG Processing v. Public Serv. Comm'n*, 120 S.W.3d 732 (Mo. banc 2003)

merger savings in three areas: (1) energy cost savings from joint dispatch; (2) inflation rate for UtiliCorp's overhead costs; and (3) labor reductions claimed as merger savings. The Commission rejected the Staff's arguments. *Id.* at 518-19.

Although UtiliCorp proceeded with the merger with SJLP after the Commission's December 14, 2000 UtiliCorp-SJLP merger Report And Order, UtiliCorp chose not to proceed forward with the merger with Empire after the similar December 28, 2000 Report And Order respecting the proposed UtiliCorp-Empire merger. Under the merger agreement, either UtiliCorp or Empire could terminate the agreement without penalty if the needed regulatory approvals were not obtained by December 31, 2000. On January 2, 2001, UtiliCorp terminated the merger agreement with Empire. The Arkansas Public Service Commission had rejected the proposed UtiliCorp-Empire merger and the Kansas Corporation Commission had deferred taking action the proposed UtiliCorp-Empire merger by December 31, 2000. (UtiliCorp's and Empire's 2000 Annual Reports).

K. Case No. EM-96-149 Union Electric Company (UE) – CIPSCO Inc.

The Application of Union Electric Company (UE), a Missouri corporation, filed on November 7, 1995, pursuant to Chapter 393, RSMo. 1994, and 4 CSR 240-2.060(3) and (4), for an order authorizing certain mergers and other transactions, which was docketed by the Commission as Case No. EM-96-149. [9] CIPSCO Incorporated (CIPSCO) was an Illinois corporation and the parent corporation to its wholly-owned electric and gas utility subsidiary Central Illinois Public Service Company (CIPS). CIPSCO was the parent corporation to its

[9] In the matter of the Application of Union Electric Company for an order authorizing: (1) certain merger transactions involving Union Electric Company; (2) the transfer of certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) in connection therewith, certain other related transactions, *Re Union Electric Co.*, Case No. EM-96-149, Report And Order, 6 Mo.P.S.C.3d 28 (1997).

wholly-owned subsidiary CIPSCO Investment Company (CIPSCO Investment). CIPSCO Investment was an Illinois corporation and managed approximately $100 million in non-utility investments. (Application, introductory paragraph, paragraphs 1, 2, 3). "The final resulting corporate structure will be that UE, CIPS and CIPSCO Investment will become wholly-owned subsidiaries of Ameren (collectively, the "Merger Transactions")." (Application, paragraph 5). Ameren Corporation (Ameren) was a newly formed Missouri corporation which was owned 50 percent by UE and 50 percent by CIPSCO. After the mergers, Ameren became a registered public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA). (Application, paragraphs 3, 6).

Subject to the terms and conditions of the agreement between UE and CIPSCO, UE was to transfer to CIPS certain assets, real estate, leased property, easements and contractual agreements, which assets generally constituted UE's retail electric and gas systems located in the State of Illinois that were necessary or useful in the performance of UE's duties to the Illinois public within its Illinois service territory with respect to the provision of retail electric and gas service. The proposed transfer did not include any of UE's electric transmission or generating assets located in the State of Illinois and did not include any assets located in the State of Missouri. (Application, paragraph 7). This part of the proposed UE-CIPSCO transactions was dropped from Case No. EM-96-149 and did not occur until approved by the Commission in Case No. EO-2004-0108, which is generally referred to as the AmerenUE Metro East transfer case, *Re Union Electric Co., d/b/a AmerenUE,* Report And Order On Rehearing, 13 Mo.P.S.C.3d 266 (2005). UE and CIPS were to, and did, enter into a Joint Dispatch Agreement (JDA), which would govern the joint dispatch of their generating systems, and also were to, and did, enter into a General Services Agreement: "UE and CIPS will also enter into a Joint Dispatch agreement which will govern the joint dispatch of their generating systems and a General Services agreement governing the performance of intercompany services." (Application, paragraph 13).[10]

The Staff will not repeat portions of its Prehearing Brief.

II. 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?

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?

See Prehearing Brief and preceding section respecting Section 393.190.1 RSMo.

Not seeing a need to engage in a discussion of the recent Aquila South Harper judicial decisions, the Staff notes the Western District Court of Appeals' decision in *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n,* 848 S.W.2d 593, 596-97 (Mo.App. 1993). Said case was an appeal of the Commission's determinations regarding applications for certificates of public convenience and necessity filed by various entities to construct, own, operate and maintain intrastate natural gas pipelines and in one instance to also operate a local gas distribution company. Missouri Gas Company (MoGas) and Intercon Gas, Inc. (Intercon) filed competing proposals to serve from Sullivan to Fort Leonard Wood, Missouri. The Commission awarded certificates of public convenience and necessity to all of the applicants except Intercon.

[10] The JDA and the operation of the Commission's affiliate transaction rules became a matter of great dispute among AmerenUE and various parties before the Commission. The most recent JDA terminated at December 31, 2005 and has not been replaced with a subsequent JDA between AmerenUE and AmerenCIPS.

MoGas filed a motion to dismiss Intercon's appeal as moot because the MoGas pipeline from Sullivan to Ft. Leonard Wood was completed during the pendency of the appeal.

The Western District Court of Appeals held: (1) Intercon's appeal was not rendered moot by MoGas' completion of the pipeline pending appeal; (2) MoGas' completion of the project under authority of the Commission, if set aside on appeal, could be taken into consideration by the Commission on remand as a relevant circumstance; and (3) if upon remand MoGas was not successful in obtaining a certificate of convenience and necessity to operate the pipeline that it had constructed, the Commission would have authority to seek to enjoin its operation. The Western District Court of Appeals did not say that upon the judicial determination that the Commission's Order authorizing the certificate of convenience and necessity was invalid, the Commission's Order was void and the Commission was required to seek to enjoin MoGas' operation of the pipeline that it had constructed:

> As reflected in *State ex rel. Consumers Public Service Co.*, if the PSC order authorizing the certificate to MoGas is determined to be invalid, it can be ordered to be set aside and the cause remanded to the PSC. If upon remand MoGas was not successful in obtaining authority to operate its pipeline, the PSC would have authority to seek to enjoin its operation. *Public Serv. Comm'n v. Kansas City Power & Light Co.*, 325 Mo. 1217, 31 S.W.2d 67 (Mo. banc 1930). However, this is not to say that the completion of the project, under authority of the PSC that is later set aside on appeal, cannot be taken into consideration in determining the public interest in the event of remand. Orders of the PSC are made on the basis of the public interest. *State ex rel. Consumers Pub. Serv. Co.*, 180 S.W.2d at 44. The PSC would be entitled to consider any relevant circumstance.
>
> Intercon's appeal is not rendered moot by MoGas having completed its pipeline pending appeal.

848 S.W.2d at 596-97.

The Court in *Intercon* cited *Public Serv. Comm'n v. Kansas City Power & Light Co.*, 325 Mo. 1217, 31 S.W.2d 67 (Mo. banc 1930) (hereinafter referred to as *KCPL*)[11] for its statement that if upon remand MoGas was not successful in obtaining authority to operate its pipeline, the Commission would have authority to seek to enjoin its operation. The Court did not state that the Commission was required to seek to enjoin the operation of the MoGas pipeline before it determined on remand whether to authorize MoGas to operate the pipeline it had constructed.

In the *KCPL* case, the Commission brought an action in circuit court to enjoin KCPL from rendering electric service to the public over a six-mile extension of transmission line from Fairville in Saline County to Miami in Saline County. The Commission had authorized the existing transmission line, but there was no allegation that the Commission had authorized KCPL to operate in Saline County. 31 S.W.2d at 67-68, 71. KCPL contended that a certificate of convenience and necessity was not required from the Commission to construct and operate an extension of an existing transmission line. *Id.* at 69.

The Commission contended that the transmission line was constructed by KCPL without authority from the Commission and for which no certificate of convenience and necessity was issued by the Commission. Furthermore, it should be noted that the Commission contended that certain telephone lines and systems would be deleteriously affected by inductive interference from the placement of the transmission line extension complained of, so that adequate service could not occur over the telephone lines and systems so interfered with. 31 S.W.2d at 68.

KCPL's demurrer to the Commission's petition for an injunction was overruled by the circuit court, which rendered judgment enjoining KCPL from the operation or use of the

[11] Respecting certificates of convenience and necessity, a distinction should be kept in mind. The Commission has over the years of its existence issued certificates of public convenience and necessity to serve an area and certificates of convenience and necessity to construct facilities, generation and/or transmission, outside of a utility's particular service territory.

transmission line until it applied for and obtained a certificate of convenience and necessity from the Commission and authority from the Commission to provide electric service over the line. KCPL appealed and the Missouri Supreme Court affirmed the judgment of the circuit court. 31 S.W.2d at 67, 72.

In *State ex rel. Consumers Public Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40 (Mo. banc 1944), Consumers Public Service Company, Missouri Public Service Corporation and Missouri Power & Light Company appealed from the judgment of the Circuit Court affirming an Order of the Commission authorizing the sale by Iowa Utilities Company (Iowa Utilities) and the purchase by Grundy Electric Cooperative (Grundy) of the electric system of Iowa Utilities. Grundy filed a motion to dismiss the appeal on the grounds that the appeal was moot because the sale had been fully consummated and it, Grundy, was operating the purchased property. The Missouri Supreme Court held that the case was not moot because if the Commission Order was invalid, the Court must set it aside, and any further proceedings must be before the Commission. 180 S.W.2d at 41-44. The Commission's Order was not overturned, and there is no further Commission action or judicial review to consult for guidance.

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 and/or addressed in testimony?
   (a) Future regulatory plan additional amortizations
   (b) Future ratemaking treatment for transaction and transition costs

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? 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?

The Missouri Supreme Court visited the question of the breadth of the Commission's review in 1986 in *Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482 (Mo. banc 1986)(*Love 1979 Partners*), and held the Commission appropriately looked broadly at the circumstances presented in making its determination to approve the transfer of Union Electric Company's steam system. *Love 1979 Partners* involved the sale of certain facilities of UE comprising part of its system necessary or useful in the performance of its electric utility service duties to the public and the whole of its system necessary or useful in the performance of its steam utility service duties to the public. The elements of the program were as follows: (1) UE's sale of its downtown St. Louis steam loop to Bi-State Development Agency (Bi-State), a public agency, (2) UE's sale of its Ashley plant to Thermal Resources of St. Louis, Inc. (Thermal), (3) the discontinuance of UE's steam distribution operation and its replacement by Bi-State as the supplier of steam to UE's steam customers, (4) Thermal's operation of the steam production and distribution facilities by contract with Bi-State, (5) the temporary supply of electric power from Ashley until UE constructed alternate facilities and (6) the construction of a refuse-to-steam plant by Thermal. 715 S.W.2d at 485.

The steam customers that intervened argued, *inter alia*, that the program was not in the public interest because it was not feasible and economic. *Inter alia*, the Commission in granting the requested approval found that the overall plan was not detrimental to the public interest. "It rejected the users' argument that the plan would produce an unreasonable increase in rates for steam, and held that the fact of an initial rate increase was not ground for disapproving the plan." 715 S.W.2d at 485-86. Certain steam customers obtained review by the Circuit Court, which set aside the Commission's Order. There was a direct appeal to the Missouri Supreme Court, which reversed the decree of the Circuit Court and sustained the Order of the Commission. *Id.* at 484.

The Court noted that "[t]he users have no right to the maintenance of the existing rate structure. There was strong likelihood that the rates would have been increased even if UE had remained the owner of the steam facilities." 715 S.W.2d at 487. The Missouri Supreme Court also held in *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31-32 (Mo.banc 1975) that customers do not have a protected property interest in the present level of utility rates. In *Love 1979 Partners*, the Court further stated respecting the steam customers' suggestion that the governing contracts would subject steam customers to unreasonable rate increases, that in general, customers are not entitled to a guarantee of the status quo:

> The final suggestion is that the governing contracts will subject steam customers to unreasonable rate increases. **As we have said earlier, the customers are not entitled to a guarantee of the status quo in the furnishing of steam. The Commission could conclude that the present facilities are obsolescent and uneconomic, and that rate increases would be anticipated even if UE were to continue the operation.** It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. The users complain of a "ratchet" effect, in which the new rates may go up but not down. **The Commission might well conclude, however, that the new level had to be guaranteed in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.**
>
> This case is very different from one in which we review a civil judgment for damages, to make sure that each element is supported by substantial evidence. **The problems presented to the Commission involve subjective evaluations of economic factors.** There is no sure method for predicting whether a project will succeed. **Questions of analysis and judgment are committed by law to the decision of the Commission,** which has the assistance of a technically trained staff and is better equipped to make decisions of this kind than we are. **The users are asking us to substitute our judgment for its judgment. We decline to do this because we are persuaded that the Commission's decision is a permissible one under the record.** There are times when the courts must step in to protect the public against arbitrary or unauthorized administrative action, but the users do not persuade us that such intervention is necessary or proper in this case.

715 S.W.2d at 490; Emphasis added. The Commission's charge was not limited to determining whether the entities acquiring the facilities being transferred had the financial and technical capacity to carry through on the project. *Id.*

In *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732 (Mo. banc 2003), the Missouri Supreme Court described the standard applicable to UtiliCorp's acquisition of and merger with SJLP as "whether or not the merger would be 'detrimental to the public.'" *Id.* at 735. In its holding the Supreme Court, consistent with its prior decisions, directed that the Commission consider all circumstances in determining whether to approve the merger as follows:

> The judgment is reversed, and the case is remanded. The circuit court shall remand the case to the PSC to consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public. Upon remand the Commission will have the opportunity to reconsider the totality of all of the necessary evidence to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and SJLP.

Id. at 737.

From the foregoing it is apparent that, regardless of whether the standard used is described as "not detrimental to the public interest" or "in the public interest," in making its determinations the Commission looks at the broad picture and considers not only all the present circumstances but also the reasonably expected future circumstances and the effects of the Commission's determinations on those reasonably expected future circumstances.

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?

If two regulated electrical corporations such as Aquila and KCPL, are owned by the same parent company they are affiliates. The Commission's affiliate transaction rule has for its stated purpose that it "is intended to prevent regulated utilities from subsidizing their nonregulated operations." As used in the rule, affiliate is broadly defined as follows:

> Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated electrical corporation.

4 CSR 240-20.015(1)(A). A "regulated electrical corporation" as used in the foregoing definition is an electrical corporation as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapter 393, RSMo. 4 CSR 240-20.015(1)(I). Section 386.020(15), RSMo. Supp. 2007 defines an electrical corporation as follows:

> "Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others

Thus, if both Aquila and KCPL are both owned by Great Plains Energy, Inc. they will be both electrical corporations and affiliated entities with respect to each other under the Commission's rule. As a result transactions between them that include "the provision, purchase or sale of any information, asset, product or service, or portion of any product or service" from one to the other as part of an unregulated business operation of either are subject to the requirements of the rule. 4 CSR 240-20.015(1)(B).

Therefore, if a regulated electrical corporation enters into any transaction with an affiliated regulated electrical corporation that involves "the provision, purchase or sale of any information, asset, product or service, or portion of any product or service" as part of an unregulated business operation, then the transaction is subject to 4 CSR 240-20.015.

The generation, transmission, distribution and utility support functions that KCPL is to provide Aquila would be unregulated business operations of KCPL and, therefore, they would be subject to the affiliate transactions rule. Likewise if KCPL provides human resources, legal services, or accounting services, they would also be subject to the rule. The Joint Applicants request for waiver of the affiliate transaction rule, 4 CSR 240-20.015, provides no detail. Also no agreement(s) exist covering the transactions between KCPL and Aquila that are intended to occur. Even if any agreement(s) existed covering the intended transactions, the transactions would still be covered by the Commission's electric affiliate transaction rule, 4 CSR 240-20-015.

III. Credit Worthiness: GPE's Proposed Acquisition Of Aquila Places KCPL's Creditworthiness At Unreasonable Risk

Is the credit worthiness of KCPL and Aquila as a result of the GPE acquisition of Aquila dependent on the expectation that GPE/KCPL will seek and the Commission will authorize a regulatory plan similar to that contained in the KCPL Stipulation and Agreement in Case No. EO-2005-0329 subsequent to Commission authorization of GPE's acquisition of KCPL?

If yes, will KCPL's credit worthiness, and thereby the purpose of the KCPL Regulatory Plan, be negatively affected if Aquila is unable to obtain such a Regulatory Plan?

Is the current expected cost and schedule outcome relating to KCPL's infrastructure commitments from the Case No. EO-2007-0329 Regulatory Plan an indication of GPE and KCPL's ability to complete the acquisition transaction in a manner that is not detrimental to the public interest?

Is KCPL's creditworthiness affected by GPE's decision not to seek recovery from Missouri ratepayers of any of the debt repurchase costs of Aquila's existing debt that GPE will refinance post-closing?

The Commission should have considerable skepticism that GPE/KCPL will maintain its investment grade rating if it is authorized to take on the acquisition of Aquila in addition to completion of the KCPL Regulatory Plan which includes the Iatan 1 and Iatan 2 projects but also includes the phase 2 environmental enhancements for LaCygne 1, which have been moved outside the KCPL Regulatory Plan timeframe. This lack of confidence should be based on the record respecting the performance to date regarding the KCPL Regulatory Plan and the record respecting the proposed acquisition.

Starting on page 28 of the August 27, 2007 GPE-Aquila joint proxy statement/prospectus that was mailed to GPE and Aquila stockholders on or about September 4, 2007, stockholders are directed to a discussion of the risk factors that they should consider in evaluating the transaction. On page 31 appears the following:

> ***KCP&L and Aquila have construction-related risks.***
>
> KCP&L's comprehensive energy plan includes the construction of Iatan No. 2 and environmental retrofits at two existing coalfired units. KCP&L has not recently managed a construction program of this magnitude. There are risks that actual costs may exceed budget estimates, delays may occur in obtaining permits and materials, suppliers and contractors may not perform as required under their contracts, the scope and timing of projects may change, and other events beyond our control may occur that may materially affect the schedule, budget and performance of these projects. The merger will increase Great Plains Energy's ownership of Iatan Nos. 1 and 2, and thus our exposure to the risks associated with those units. Aquila owns 18% of both Iatan generating units. Great Plains Energy's post-acquisition ownership percentages of the Iatan generating units would be 88% of Iatan No. 1 and about 73% of Iatan No. 2.

The KCPL Regulatory Plan Stipulation And Agreement clearly addresses what the non-GPE / non-KCPL Signatory Parties to that document sought to prevent GPE / KCPL from asserting is beyond GPE's and KCPL's control:

> . . . KCPL understands it has the responsibility to take prudent and reasonable actions in an effort to achieve the goal of maintaining its debt at investment grade levels. KCPL understands that it is incumbent upon it to take prudent and reasonable actions that do not place its investment grade debt rating at risk. KCPL further agrees that any negative impact from its failure to be adequately insulated from the Great Plains Energy, Inc. ("GPE") business risks as perceived by the debt rating agencies will not be supported by its Missouri jurisdictional

> customers. KCPL recognizes its obligation to continue to prudently manage costs, continuously improve productivity, and maintain service quality during the Regulatory Plan. KCPL further recognizes that any finding by the Commission that KCPL has failed to prudently manage its costs, continuously improve productivity, and maintain service quality during the Regulatory Plan will negate the obligation of the Signatory Parties contained in this section.
>
> The non-KCPL Signatory Parties commit to work with KCPL to ensure that based on prudent and reasonable actions, KCPL has a reasonable opportunity to maintain its bonds at an investment grade rating during the construction period ending June 1, 2010. . . .

Re Kansas City Power & Light Co., Case No. EO-2005-0329, Report And Order, 13 Mo.P.S.C.3d 568 (July 28, 2005)(Stipulation And Agreement not published).[12]

Mr. Michael W. Cline states at page 4 of his February 25, 2008 testimony (Ex. 38HC) that in January 2008 GPE asked S&P's through its Ratings Evaluation Service and Moody's through its Ratings Assessment Service to evaluate a regulatory proposal reflecting its revised approach described in his and Messrs. Bassham's and Giles' February 25, 2008 testimonies. He explains that copies of their presentations to S&P's and Moody's are attached as Schedules MWC-18HC and MWC-19HC to his February 25, 2008 testimony, Ex. 38HC. Mr. Cline further states: ** ____

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Exhibit 124HC is the letter dated January 8, 2008 from Moody's Investors Service (Moody's) to Mr. Michael W. Cline, Treasurer and Chief Risk Officer, GPE for which GPE requested that Moody's assess the expected rating outcome for GPE and KCPL in view of the proposed merger for which GPE has changed several assumptions around the transaction and has

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[12] In the Matter of a Proposed Regulatory Plan of Kansas City Power & Light Co.; Provisions of the Stipulation And Agreement were subsequently by *Re Kansas City Power Light Co.*, Case No. EO-2005-0329, Order Approving Amendments To Experimental Regulation Plan, 13 Mo.P.S.C.3d 608 (August 23, 2005).

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asked Moody's to assess the impact on the ratings of GPE and KCPL relative to the proposed changes to Moody's previous understanding of the transaction. The letter explains that **_____

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____.** (Ex. 124HC, p. 1).

The Staff would draw the Commission's attention to the following assumptions / statements on page 4 of the Moody's January 8, 2008 letter which the Staff has highlighted below:

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(Ex 124, p. 4). **____

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__________________________________. ** (Vol. 18HC, Tr. 2359, ln. 5 – Tr. 2360, ln. 15).

Exhibit 125HC is the letter dated January 7, 2008 from Standard & Poor's Rating Evaluation Service (S&P's) to Mr. Michael W. Cline, Treasurer and Chief Risk Officer, GPE for which GPE requested that S&P's provide feedback on the ratings effect on the ratings of GPE and Aquila of potential changes in the regulatory conditions attached to the acquisition of Aquila and sale of Strategic Energy, Inc. in the scenario presented. (Ex. 125HC, p. 1). **________

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Business Profile

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(*Id.* at 2-3). Mr. Cline testified that there was nothing in either the January 7, 2008 letter from Moody's or the January 8, 2008 letter from S&P's that GPE/KCPL considered to be in error of a material nature warranting contacting Moody's or S&P's regarding and thus no such contact occurred. (Vol. 19, Tr. 2605, ln. 6 – Tr. 2506, ln. 18).

Mr. Bassham testified that GXP is GPE's stock ticker identification and ILA is Aquila's stock ticker's identification. (Vol. 18HC, Bassham, Tr. 2335, lns. 16-21). **

[13]

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[13] The Crossroads generating facility is referred to twice in the Joint Application Of Great Plains Energy Incorporated, Kansas City Power Light Company And Aquila, Inc.:

> … The result of the merger is that Great Plains Energy will effectively acquire Aquila's Missouri electric and steam operations, as well as its merchant services operations, which primarily consist of the 340 MW Crossroads generating facility in Mississippi, and certain residual natural gas contracts.

(Ex. 32, p.5).

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(Vol. 18HC, Tr. 2360, ln. 24 – Tr. 2361, ln. 10).

On March 20, 2008, S&P's Ratings Services raised its long-term corporate credit rating on Aquila to BB- from B+. S&P's March 20, 2008 RatingsDirect Research Update stated that if the GPE transaction closes, S&P's will raise its corporate credit rating on Aquila to the corporate credit rating of the new parent, GPE. S&P's further said that if the GPE transaction fails to close, it would remove the Aquila rating from CreditWatch, affirm the BB- corporate credit rating on Aquila and assign an outlook, but that **"[i]mprovements to the rating would likely be hindered by** . . . [t]he company does not earn a cash return on construction work in progress and **it does not have access to any form of accelerated amortization**. . . ." (Ex. 137, p. 2; Emphasis added).

On April 2, 2008 S&P's Ratings Services said that its BBB corporate credit and its other ratings on GPE and its subsidiaries remain on CreditWatch with negative implications, where they were originally placed on the day of the announcement of GPE's proposed acquisition of Aquila. S&P's further stated the following referring to (a) the regulators working with GPE's

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> ... Great Plains Energy will also acquire Aquila's steam operations in St. Joseph, Missouri, as well as its merchant services operations, which primarily consist of the 340 MW Crossroads generating facility in Mississippi, and certain residual natural gas contracts.

(Id. at 8).

utility subsidiaries, (b) GPE's utility subsidiaries access to adequate and timely recovery of all costs, (c) increased financial risk due to the purchase of Aquila, (d) the necessity of obtaining the appropriate regulatory safeguards, and (e) GPE making no other compensating conditions to its joint capital plan:

> Following the merger with Aquila, if Great Plains' utility subsidiaries will have access to adequate and timely recovery of all costs and regulators will work with the utilities to prevent material cash-flow degradation during the their [sic] joint capital plan, Standard & Poor's will remove the ratings from CreditWatch. At that time, we would likely affirm the 'BBB' corporate credit ratings on Great Plains and its affiliates, and assign a stable outlook. The stable outlook would reflect the improved business profile due to the sale of Strategic Energy, and the increased financial risk due to the purchase of Aquila.
>
> If Great Plains chooses to proceed with the Aquila acquisition without obtaining the appropriate regulatory safeguards and assuming the company makes no other compensating modifications to its plan, lower ratings on Great Plains and Kansas City Power & Light Co. could result.

(Ex. 136). Mr. Cline related that the term "appropriate regulatory safeguards" means "additional amortization." (Vol. 19, Cline, Tr. 2581, ln. 10 – Tr. 2582, ln. 3).

Messrs. Downey and Cline made an April 10, 2008 presentation, Wall Street Access and Berenson & Company - Midwest Utilities Seminar, in Chicago. A transcript of the presentation records that, among other things, Mr. Cline stated that Aquila would file for an additional amortization mechanism in its next rate case if a regulatory plan, including an additional amortization mechanism, cannot be negotiated with principals after the close of the acquisition:

> We have withdrawn our request for an Aquila amortization order in this case. Instead, we would initiate discussions with interested parties following the close of the transaction to develop a regulatory plan for Aquila similar to the comprehensive energy plan at KCP&L. An additional amortization mechanism for Aquila would be one component of such a regulatory plan. If an agreement with the parties cannot be achieved, **we would file our own proposal for this in the next rate case**.

(Ex. 139, April 10, 2008 transcript, p. 3, Cline; Emphasis supplied). Mr. Downey commented on the cost of the Iatan 1 and Iatan 2 projects and the reforecast process as follows and even notes the presence of construction cranes and a particular construction crane at the Iatan site:

> . . . In spite of some things, you might have seen in the media and concern about whether things are in trouble. I think we have it. These are very big projects. There is at the Iatan site 40 cranes right now in a very small space. You cannot find 40 cranes in all of downtown Kansas City. It includes the second-biggest crane that is available in the United States. This is a massive undertaking. There are about 1,600 laborers working up there right now. It will go over 2,000 as the weather gets warmer and as we are in high gear. 2008 and 2009 are the main construction years. The projects are largely bought out, but labor availability and labor productivity are challenges not only for us at this site but also for the industry in general as we move through all of this.
>
> **It is about execution and the believability of this**. . . .
>
> **We are in the middle of a cost reforecast on Unit 1 and Unit 2. We did it for a number of reasons.** When we did the original control budget estimate, we were about 25% engineered on this job. We are over 70% engineered now. . . .
>
> **We are seeing upward pressure.** Labor, I talked about, but the cost of just about everything has gone up. I think, in the last year, the cost of building projects like this grew about 29%; I think about 19% of that in the last six months alone. . . . There are challenges in all of this. Nevertheless, I believe strongly that when this plant is in service that it will be among the most competitive plants in this generation in this country. . . .

(*Id.* at 7, Downey; Emphasis supplied).

KCPL's CEP includes environmental enhancements at its LaCygne 1 generating unit which KCPL operates and manages and jointly owns with Westar Energy, Inc. The KCPL Regulatory Plan Stipulation And Agreement in Case No. EO-2005-0329 reflects on page 42 that KCPL's 2009 rate case (Rate Case #4 - the Iatan 2 in-service rate case) will include prudent expenditures for Flue Gas Desulfuration (FGD) and the Baghouse enhancements at LaCygne 1. GPE's March 25, 2008 Edward Jones Mid-Cap Utility Conference PowerPoint slide presentation

(Ex. 123) in New York City delivered by Mr. Cline shows on page 4 that these LaCygne Phase 2 enhancements have been moved to 2011 as follows:

> **LaCygne**
> **Phase 1**: Unit 1 SCR – Completed on schedule, under budget, and performing per specification
>
> - **Phase 2**: Unit 1 – bag house and scrubber environmental upgrades
>   - Project Definition Report completed in Q3 2007
>   - Revised cost estimated higher than initial estimates
>   - **Work moved to 2011** [Emphasis added]

(See also Vol. 18HC, Bassham, Tr. 2339, ln. 25 – Tr. 2340, ln. 15). GPE's April 10, 2008 Wall Street Access and Berenson & Company - Midwest Utilities Seminar PowerPoint slide presentation (Ex. 139) in Chicago delivered by Mr. Cline shows on page 21 that these LaCygne Phase 2 enhancements have yet to be done, but the line showing that they have been moved to 2011, when they are still scheduled to occur, was dropped from the slide as follows:

> **LaCygne**
> **Phase 1**: Unit 1 SCR – Completed on schedule, under budget, and performing per specification
>
> - **Phase 2**: Unit 1 – bag house and scrubber environmental upgrades
>   - Project Definition Report completed in Q3 2007
>   - Revised cost estimated higher than initial estimates

One slide that is consistent in both presentations is a slide on page 10 of the March 25, 2008 presentation (Ex. 123) and on page 9 of the April 10, 2008 presentation (Ex. 139) which compares the original and revised GPE/KCPL proposals. This comparison also appears on the last page of Exhibit 122 which is a copy of the letter and brochure attached to the Notice of Ex Parte Contact filed by Chairman Davis on April 10, 2008. The form letter from Mike Chesser and Bill Downey is dated April 3, 2008 and is addressed to "To Our Friends" respecting the proposed Aquila acquisition. The comparison of the original and revised GPE/KCPL proposals shows the following, including that additional amortizations "will" be in a future regulatory plan for Aquila:

Revised vs. Original Proposal
What Has Changed
In Missouri

Previous "ask"	**Current "ask"**
•Immediate approval for retention of 50% of utility operational synergies ($260 million net of transition costs) over 5 years	•Recovery of utility operational synergies through traditional ratemaking process •Regulatory lag expected to provide opportunity for the retention of approximately 50% of the synergies
•Recovery of 50% of transition costs ($45 million) over 5 years	•Recovery of 100% of updated transition cost ($58.9 million) over five years
•Recovery of 100% of the transaction costs ($95 million) over 5 years	•Recovery of 100% of the revised transaction costs ($64.9 million) over five years •Company no longer requesting recovery of CIC and Rabbi Trust for Senior Aquila officers
•Recovery requested of actual interest costs in Aquila customer rates	•No recovery of Aquila actual interest costs in excess of equivalent investment grade costs
•Authorization to use additional amortizations in Aquila rate cases to meet credit metrics, consistent with KCP&L's treatment	•Will include as a component in a future regulatory plan for Aquila

Amounts shown are total amounts before allocations between Missouri and Kansas jurisdictions

Section III.B.1.q. of the KCPL Regulatory Plan Stipulation And Agreement, Case No. EO-2005-0329, states as follows:

> **q. Cost Control Process for Construction Expenditures**
>
> KCPL must develop and have a cost control system in place that identifies and explains any cost overruns above the definitive estimate during the construction period of the Iatan 2 project, the wind generation projects and the environmental investments.

On May 7, 2008 GPE/KCPL made an SEC Form 8-K filing (Late-Filed Ex. 305) containing, among other things, the following information respecting its projected cost for its ownership share and in-service date of the Iatan 1 and Iatan 2 projects based on its reforecasting effort:

Iatan 1 – KCPL's 70% ownership share[14]		**Iatan 2 – KCPL's 55% ownership share**[15]	
Dec 06 CBE:[16]	$255-264MM	Dec 06 CBE	$837-914MM
May 08 Reforecast:	$330-350MM	May 08 Reforecast	$994MM-$1.051B
Increase:	$ 75- 86MM	Increase:	$157MM- 137MM
% Increase:	33% top end	% Increase:	15% top end
Orig. Date For In-Service:	Year-end 2008	Orig. Date For In-Service:	Summer 2010
Reforecast Date For In-Service:	Feb. 2009	Reforecast Date For In Service:	Summer 2010

The SEC Form 8-K filing (Late-Filed Ex. 305) identified as the drivers of the reforecasting effort the following:

> On May 7, 2008, KCP&L announced the completion of a cost and schedule update for the Iatan 1 environmental project and the Iatan 2 coal plant construction project. This updated assessment was driven by several factors, including (a) the combined projects reaching a milestone of 70% - 75% of the engineering work completed; (b) the integration of the Iatan 2 "Balance of Plant" schedule and quantity estimates from Kiewit Industrial Corporation into the master schedule and budget; and (c) continued challenging construction market trends, including rapidly escalating costs for construction materials and services, the level of global investment in power production facilities, the decline in the value of the U.S. dollar, and constrained labor availability. . . .

** ____

[17] ____

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[14] KCPL, 70%; Aquila, 18%; and Empire, 12%.

[15] KCPL, 55%; Aquila, 18%; Empire, 12%; MJMEUC, 12%; Kansas Electric Power Cooperative, Inc. (KEPCO), 3%

[16] CBE = Control Budget Estimate = Definitive Estimate

[17] The Charter of the CEP Oversignt Committee provides in most relevant part, as follows:

Purpose

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The Comprehensive Energy Plan (CEP) Oversight Committee (Committee) is charged with providing governance and oversight to the CEP projects and will be in effect through the life of the CEP. In addition, this committee will provide support and advice to the CEP project teams.

Membership

The CEP Committee consists of members of the senior leadership team and other key stakeholders of Kansas City Power & Light Company (KCP&L) representing the disciplines embedded in the projects. The Committee members will be appointed by the KCP&L President and Chief Executive Officer and approved by the Great Plains Energy Chairman of the Board and Chief Executive Officer.

Responsibilities and Activities

The following are the responsibilities and common recurring activities of the Committee in carrying out its purpose. These activities are set forth as a guide with the understanding that the Committee may diverge from this guide, as appropriate, given the circumstances:

- Monitor project level decision making processes.
- Confirm the projects in terms of strategic alignment, cost, benefits, deliverables and scope.
- Review, test, and analyze project reports and other pertinent information to ensure internal, cost and scheduling controls are operating as designed.
- Review and approve relevant reports prior to submission to the Commissions and/or other regulatory bodies.
- Review and approve applicable Board of Director reports prior to distribution to the Board .
- Review management's assessment of key vendor contract performance including any bonus and/or penalty assessments.

(Ex. 133).

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[redacted].** (Vol. 18HC, Bassham, Tr. 2380, ln. 4 – Tr. 2382, ln. 11).

Mr. Cline stated that he thought S&P would be interested in the results of the reforecast of the Iatan 1 and Iatan 2 projects, but he did not expect that the results of the reforecast would have a negative effect on S&P's analysis of GPE/KCPL. Incongruously, Mr. Cline claimed the reforecast could have a positive effect on S&P's analysis depending upon the manner in which GPE/KCPL presented the reforecast and the financing plan that would follow from and be ascribed to an increase in the cost of the Iatan 1 and Iatan 2 projects. (Vol. 19, Tr. 2585, ln. 12 – Tr. 2586, ln. 8).

Section III.B1.f. of the KCPL Regulatory Plan Stipulation And Agreement, Case No. EO-2005-0329 is entitled "Financing Plan To Be Subsequently Filed By KCPL For Commission Authorization," and on pages 6 and 17 of the KCPL Regulatory Plan Stipulation And Agreement, it is shown that Appendix B is the Anticipated Five-Year (2005-2009) Budget Financing Plan Summary provided by KCPL to the Signatory Parties. Appendix B shows for the five-year period 2005-2009 KCPL equity contributed from GPE as projected to be $563.6 million, KCPL debt refinancings (existing senior notes) projected to be $385.0 million and KCPL debt new financings projected to be (commercial paper: $190.4 million and new capital: $250.0 million) $440.4 million:

Anticipated Five-Year Budget Financing Plan Summary

	Projected					
	2005	2006	2007	2008	2009	Total
Issuances						
KCP&L Debt Refinancings						
Existing Senior Notes	160.0	0.0	225.0	0.0	0.0	385.0
New Financings						
Commercial Paper	101.0	0.0	22.3	0.0	67.7	190.4
New Capital	0.0	0.0	0.0	250.0	0.0	250.0
KCP&L Equity (Contributed From GPE)						
New Capital Expenditure Funding	0.0	150.0	213.6	100.0	100.0	563.6
Total Issuances	$261.0	$150.0	$460.9	$350.0	$167.0	$1389.0

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.** (Vol. 20HC, Cline, Tr. 2592, ln. 23 – Tr. 2596, ln. 8).

Even before the Commission approved the KCPL Regulatory Plan Stipulation And Agreement on July 28, 2005 and August 23, 2005, KCPL filed on June 22, 2005 its Application in Case No. EF-2005-0498 for authority to issue up to $635 million principal amount of certain debt securities and to enter into interest rate hedging instruments to meet the new financing and refinancing requirements outlined in Appendix B of the KCPL Regulatory Plan Stipulation And Agreement. The Commission issued an Order Approving Financing on November 13, 2005 in Case No. EF-2005-0498. On December 27, 2007, in Case No. EF-2008-0214, KCPL filed an application requesting that the Commission issue an Order by March 1, 2008 granting KCPL an increase in the amount of debt securities it is authorized to issue of up to $1.4 billion principal amount through December 31, 2009 and to enter into interest rate hedging instruments in conjunction with the debt securities issued under said authorization. On February 14, 2008, the Commission issued its Order Approving Financing in Case No. EF-2008-0214.

One of the various KCPL employees associated with the Iatan 1 and Iatan 2 projects called by the Staff as witnesses was Stephen T. Easley, KCPL's Senior Vice President of Supply. As KCPL's Senior Vice President of Supply, Mr. Easley directs the efforts of KCPL's entire generation fleet, coal procurement, off-system sales and purchases, and capacity planning – integrated resource planning. (Vol. 21, Easley, Tr. 2647 – 2649). Since the departure of the third Iatan Project Director, David Price, Mr. Easley had been serving in that capacity on an interim basis. (*Id.* at 2650, lns. 8-21; Vol. 19, Downey, Tr. 2487, ln. 19 – Tr. 2488, ln. 1). Mr.

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Downey commented on the additional commitment of time to the Iatan site by KCPL senior management due to Mr. Price's departure:

> Since Dave Price's departure of -- I made a decision along with our other senior management to spend additional time there along with Steve Easley, our senior vice president of construction, to maintain continuity of management across the process.
>
> Steve and I have been involved from the very beginning with this. Given the importance of it to the company, to Kansas City Power & Light, we felt the need to be up there. I'm up there several times a week. Steve is up there full-time. That obviously will change as we bring on our new vice president of construction.
>
> But -- so in recent months, I've spent at least a day and more likely two days a week up at the site, at least for significant parts of the day.

(Vol. 19, Downey, Tr. 2488, ln.14 – Tr. 2489, ln. 4).

GPE/KCPL frequently cites that the Iatan 1 and Iatan 2 projects reforecast was performed at least in part because of the stage of engineering completion that had been reached. Mr. Easley testified that he did not recall that there were any set points when the reviews would occur:

> Q. Was it always intended that there would be a reforecast done of the Iatan 2 and the Iatan 1 projects?
>
> A. I think when we started the estimates that there was an expectation that we would review those estimates as the project matured.
>
> Q. Was there any determination as to any set points when those reviews would occur?
>
> A. Not that I recall.

(Vol. 21, Easley, Tr. 2670, ln. 22 – Tr. 2671, ln. 5).

Mr. Brent Davis has been a KCPL employee since 1980 and since November 2007 has been the Iatan Unit 1 Project Director. Prior to being Iatan Unit I Project Director, he worked on the Iatan 2 project from June 2006 until November 2007. (Vol. 21, Davis, Tr. 2713 - 2715). Mr. Davis identified that work started on risk and opportunity tables in March or April 2007 before

Dave Price arrived at Iatan as the Project Director in May 2007 and Mr. Price continued the work. (*Id.* at 2716-17).[18] Mr. Davis said that the risk and opportunity table work was not referred to as a reforecast but ultimately became or lead to the reforecast:

> Q. Okay. Can you identify at -- an approximate date or time when that event occurred, when the risk and opportunity table or analysis changed and the reforecast process or work commenced?
>
> A. We formally kicked off the reforecast in early December, 2007.
>
> Q. What was the reason for the change?
>
> A. In compiling risk and opportunity items?
>
> Q. Yes.
>
> A. We had seen enough movement that we felt like a reforecast was warranted and a more detailed look at those risk and opportunity items.

(*Id.* at 2717, lns. 12-23). He related that the depletion of the contingency for Iatan 1 quicker than had been planned was one of the indicators that lead to the reforecast. He said that the contingency was depleted quicker than planned because of a variety of factors "many of which

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[18] Mr. Easley defined the term "risk and opportunity table" as follows:

> It was a table of perceived risk, meaning cost pressures or schedule pressures, and opportunities meaning places where costs could be saved or a schedule could be shortened for the project.

(Vol. 21, Easley, Tr. 2668, lns. 10-14). Mr. Downey explained the term as follows:

> . . . And the table was a way of capturing changes and the interactions between and among contractors and ourselves with regard to decisions being made in the field.
>
> And in a number of cases, those would impact cost in terms of increasing cost in some cases, impact them in terms of decreasing cost. This was a process by which we were capturing systematically those kind of changes month by month and keeping track of them and using them to identify and sense trends with regard to cost and schedule.

(Vol. 19, Downey, Tr. 2474, ln. 16 – Tr. 2475, ln. 1).

are contained in the line items on the R&O [risk and opportunity] table for unit 1. There were scope items, there were some price consideration." (*Id.* at 2721, lns. 16-18).

Terry Foster is the Director of Project Controls for KCPL. He has been in that position since October 2007. He is currently Project Controls Manager for the Iatan 1 and Iatan 2 projects for KCPL. Prior to being Director of Project Controls for KCPL, he was Project Controls Manager for the Iatan 1 and Iatan 2 projects working for a contractor to KCPL. His responsibilities include: cost tracking reporting and trending; development of the integrated schedule, the tracking of the schedule to weekly and biweekly updates, and the trending of the schedule; and project reporting for the Iatan 1 and Iatan 2 projects. (Vol. 21, Foster, Tr. 2753 – 2755). He testified that in the April/May 2007 timeframe he and his cost engineering manager decided to start a risk and opportunity table and after Dave Price became the Project Director in May 2007, the risk and opportunity table was formalized and was to be used going forward. (*Id.* at 2756, ln. 17 – Tr. 2757, ln. 13). Mr. Foster identified why it was decided to change the analysis from a risk and opportunity table to a reforecast:

> Q. Okay. Could you provide what is your understanding as to why the -- the analysis changed?
>
> A. As we looked at the trends on the R&O table, and if the trends on the change -- there were change orders that were taking place within our system. As we took a look at what was happening from a schedule perspective in a couple of areas, we realized that we were going to need to reforecast the project.
>
> Q. And the trends you were seeing, was that relating to both Iatan 2 and to the Iatan 1 projects?
>
> A. Yes.
>
> Q. And the trends that you referred to, could you be more specific as to what those trends were?
>
> A. As associated with unit 1, there were trends with the R&O table with the magnitude of change orders utilizing what contingency we had in addition -- in

addition to some schedule performance issues we were having with one of our contractors.

(*Id.* at 2761, ln. 7 – Tr. 2762, ln. 1).

Exhibit 132HC is a document provided by GPE/KCPL in response to Public Counsel Data Request No. 1006 in Case No. EM-2007-0374. Mr. Foster identified the pages attached to the first page/cover page to Exhibit 132HC as information that went to Dave Price about January 18, 2008 (Vol. 21, Foster, Tr. 2758, lns. 5-20): "This information was collected and assembled as the cost reforecast effort took place through December and the first couple of weeks of January. I was absent from work during that period of time. I believe that effort was led by Dave Price." (Vol. 21, Foster, Tr. 2759, lns. 6-11). Mr. Foster stated that the reforecast effort started December 5, 2007 and that he returned to work January 14, 2008. (*Id.* at 2759, ln. 20 – Tr. 2760, ln. 2, 21 – Tr. 2761, ln. 2). After the first page/cover page to Exhibit 132HC appears a page which shows headings "Iatan Unit 1 Estimated Risk as of January 1, 2008" and "Iatan Unit 2 Estimated Risk as of January 1, 2008" (Vol. 21, Tr. 2672, lns. 16-18; Tr. 2720, lns. 3-7; Tr. 2758, ln. 21 –Tr. 2759, ln. 4; Vol. 19, Tr. 2526, ln. 18 – Tr. 2527, ln. 10) above new projections for the cost of the Iatan 1 and Iatan 2 projects. Mr. Foster saw this page and the pie charts that are part of Exhibit 132HC the week of January 14, 2008. (Vol. 21, Tr. 2759, ln. 24 – Tr. 2760, ln. 10).

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Mr. Downey identified the pages attached to the first page/cover page to Exhibit 132HC as pages he believed as developed at Dave Price's direction and which he saw for the first time as part of a meeting he had with Dave Price on a Saturday in January 2008. (Vol. 19, Downey, Tr. 2476, ln. 21 – Tr. 2477, lns. 3, 21-22). The numbers were to be presented to the CEP Oversight Committee the following Tuesday morning, but the decision was made not to do so:

> We both had a long conversation about what these were and weren't, and what we had – what else we needed to do. We mutually agreed that there was a lot that needed to be done, that this -- this was nice input, but that's all it was; it wasn't a fully vetted reforecast.
>
> And we needed to get all that done and we needed to do it appropriately to -- before we were anywhere near ready to disclose publicly and to -- to do all the things that we needed to do to talk with our board and all of those things.
>
> So what we did then in the oversight meeting that following Tuesday was to walk through the nature of the work that needed to be done, the processes and the steps that needed to be taken and explain that it would take longer than we thought.

(*Id.* at 2477, ln. 22 – Tr. 2478, ln 25).

Mr. Chesser stated that it was his understanding that the original target for the reforecasting to have been completed was in February 2008. (Vol. 19, Chesser, Tr. 2525, lns. 20-25). Mr. Chesser testified that he had previously seen the pages to Exhibit 132HC, other than the first page/cover page repeating the Public Counsel's Data Request, around the end of January 2008 when Bill Downey and Dave Price met with him and briefed him on the numbers before they were going to be meeting with the CEP Oversight Committee later that week. (*Id.* at 2527, lns. 11-22). Mr. Chesser related that a decision was made whether to proceed forward with these numbers: "Dave and Bill both recommended to me that these numbers needed further vetting before we had sufficient confidence level on them, and I agreed with that, that we would take the time to do the additional vetting." (*Id.* at 2528, lns. 1-5). He identified the additional vetting as the process that concluded in the release of a reforecast last month, May 2008 for the Iatan 1 and Iatan 2 projects. (*Id.* at 2528, ln. 24 – Tr. 2529, ln. 12).

Although Mr. Chesser said that he thought that it is very unlikely that a downgrade would result by the rating agencies from approval of the transaction as presently proposed by the Joint Applicants, Mr. Chesser was loath to say that he would recommend to the GPE Board of Directors that they agree to a condition that any increase in cost as a result of a downgrade, as a consequence of the merger, would be borne by GPE shareholders rather than by KCPL ratepayers. In fact, Mr. Chesser said: ". . . that just seems to me to be somewhat an abhorrent approach." (Vol. 19, Tr. 2539, ln. 22 – Tr. 2541, ln. 4). Mr. Downey said there although he and KCPL's financial team think there is a very strong probability that KCPL's credit ratings will remain what they are if the Commission approves the Joint Applicants' pending proposal, there is some risk that KCPL's credit rating may go down if the Commission approves the Joint Applicants' pending proposal. (Vol. 19, Downey, Tr. 2496, lns. 17-23; Tr. 2498, lns. 11-19; Tr. 2499, lns. 4-12). After repeated evasions, Mr. Downey finally answered the question that the Public Counsel asked him whether as CEO he was willing to tell the Commission that if KCPL is downgraded to below than investment-grade as a consequence of the merger is the company willing to take on that risk and absorb the increased cost resulting from such a ratings downgrade? (*Id.* at 2497, ln. 17 – Tr. 2504, ln. 15). Mr. Downey said: "I would not accept the risk." (*Id.* at 2504, lns. 14-15).

Mr. Bassham stated that if the Commission approved the Aquila acquisition as GPE/KCPL now proposes the transaction, GPE/KCPL is "very confident" there would not be a negative change in KCPL's credit rating, but he said that there is a risk of downgrade as a consequence of the merger along with the effect of other things. (Vol. 17, Bassham, Tr. 2319, lns. 6-15; Tr. 2321, lns. 14-22; Tr. 2323, ln. 18 – Tr. 2325, ln. 4). Mr. Bassham testified that if the Commission approved the Aquila acquisition as GPE/KCPL now proposes the transaction, except the Commission denies recovery from ratepayers of the transaction costs, "I don't believe that in and of itself that one adjustment would cause our credit rating to change." (*Id.* at Tr., 2319, ln. 16 – Tr. 2320, ln. 6). Asked if GPE/KCPL would be willing to accept as a condition for Commission approval of the acquisition that GPE shareholders rather than KCPL ratepayers pay any increased cost of debt if a downgrade occurs as a consequence of the merger, Mr. Bassham responded: "I wouldn't do that . . . We are coming back to the Commission in the future with rate increases, and the Commission will be able to look at what has occurred and why it's occurred, and how it's occurred . . . Making a blanket promise at this point is not something that I think's necessary." (*Id.* at 2320, ln. 24 – Tr. 2321, ln. 13; Tr. 2325, lns. 16-18).

The Staff called as a witness Max Sherman, who is employed as Vice President Strategic Initiatives of Aquila. He testified to his qualifications and experience – including power plant development and construction with Commonwealth Edison, Entergy and Aquila – and his job duties as an employee of Aquila including being the commercial lead in negotiation of Aquila's participation in Iatan 2. As part of his Aquila job duties, he has attended Joint Owners Meetings as one of Aquila's representatives. (Vol. 21, Sherman, Tr. 2835-38).

He testified that a reforecast of the construction at Iatan was begun in October 2007 that was originally to be completed by the end of 2007, the completion date slipped to January 22, 2008, then the reforecast process started over. (Vol. 21, Sherman, Tr. 2840). Mr. Sherman testified that he had been involved in a full scale reforecast of a nuclear plant in the past because there was a significant risk it was not going to be built on budget and on time and that, based on his experience, the Iatan reforecast was undertaken because Iatan 1 was not going to be built within budget and there was a significant risk Iatan 2 was not going to be built on budget and on time. (*Id.* at 2839, 2842-2845). He said that construction at Iatan 1 was over budget before February 14, 2008. (*Id.* at Tr. 2846). In his opinion Iatan 2 could be built on time, but doing so would cause it to be over budget. (*Id.* at. 2848-2849).

The Staff called as a witness James Rose, who is employed as Senior Manager in the Risk Assessment Audit Services Department of Aquila. He testified to his qualifications, including his certification as a public accountant, his extensive experience with accounting and auditing. (Vol. 21, Rose, Tr. 2806-2807). He related he participated in procurement invoice auditing of construction at Iatan and attended the Joint Owners Meetings since April 2007, except for possibly one, on behalf of Aquila for risk management purposes. (*Id.* at 2808-2809, 2815). With regard to cost control risks at Iatan, Aquila employee Mr. Rose testified, in part, as follows:

> . . . Specifically, through the review that we've done on the invoicing, we've noticed that the -- some of the charges that are coming through, it's obvious that nobody was reviewing those invoices or there was very little review of the invoices being done.
>
> And that is -- pretty much lines up with what we've seen in the Ernst & Young reports, that they did not have a process really set up to review new invoices. And through that -- I mean, that's -- you know, turns -- you know, turns -- ties into your costs and your controls there.

(Vol. 21, Rose, Tr. 2812). Mr. Rose also testified he was an author of a memorandum dated February 15, 2008 which stated the cost and schedule of the construction at Iatan was being reforecasted and that Dave Price – the third or fourth project director – was leaving. Mr. Rose attended the February 14, 2008 meeting where Great Plains revealed that information. (*Id.* at 2813-2818; Ex. 146). Mr. Rose testified reforecasts are performed if there are issues with the forecast/budget, it is under pressure, or has been exceeded. (Vol. 21, Rose, Tr. 2819-2820). Because cost, schedule and change in personnel in project management all affect risk, they also affect creditworthiness. (*Id.* at 2818). At the February 14, 2008 meeting Great Plains acknowledged that the budgeted numbers for the Iatan 1 project were no longer "reality":

> Q .... And what did they say to indicate that those were not reality?
>
> A. It was actually one of the joint owners from Empire during discussions made the -- made the statement that, "The numbers that we are looking at, this is not reality." And Mr. Easley acknowledged that, as -- as did the other members of the project team that was there.
>
> Q. And what's your understanding of them not being reality? What's that based upon?
>
> A. Well, I think if you go back -- somebody earlier testified today about the -- in talking about your risk and opportunity where there's costs that are known that are not included in the current numbers, you're talking about those numbers. The -- the information that they were presenting at that time did not include costs that were out there that were -- that were known, basically. They may not have been incurred yet, but they knew that they were on the horizon.
>
> Q. Well, did the numbers that were current at that point in time in terms of the budget include a contingency?
>
> A. Yes.

(*Id.* at 2822-23).

. . . .

> Q. ... With regard to the construction at Iatan 1, what's your understanding -- what does it mean to you to not be reality with regard to the original budget and with regard to the contingency that was built into that?
>
> A. I believe at that time the contingency was already used up and they were -- they'd acknowledged that they were going over budget. The -- but some of the numbers that were on the reports that they were handing out did not include some costs that -- that were out there that they knew about. And that's where the "not reality" comment came from in the statement.
>
> Q. That's a characterization that you made, though?
>
> A. No. It's a characterization that the joint representative from Empire made.
>
> Q. And you may have said that, and if so, I apologize for covering ground again. But who made -- who for Kansas City Power & Light Company at that meeting made the acknowledgment that the numbers were --

> A. Steve Easley did and the other members, I believe, Brent -- was it Brent? Let's see. Mr. Foster and Mr. Price [sic; *Brent Davis intended*] basically nodded their heads in agreement.
>
> Q. Well, who was present there for Kansas City Power & Light Company?
>
> A. That would be Mr. Easley, Mr. Price [sic; *Brent Davis intended*] and Mr. Foster, among others.

(*Id.* at 2825-26; Tr. 2827-28).

Counsel for GPE/KCPL's cross-examination of Mr. Rose is revealing regarding what was communicated by GPE/KCPL at the Joint Owners Meetings regarding the risk and opportunity tables and reforecast activities of GPE/KCPL:

> Q. The date of your memo is February 15th referring to the meeting on February 14th; is that correct, sir?
>
> A. Yes.
>
> Q. And at that time, you knew that the reforecast was in process being conducted by the project leadership team at Iatan?
>
> A. Would you clarify which reforecast?
>
> Q. There's only been one reforecast according to the evidence here. What other reforecast are you speaking of?
>
> A. Well, what we were being communicated is -- to the joint owner team was that there was a reforecast that was started in October of 2007 that would be completed in December of 2007, at the end of that year.
>
> Q. And that was not completed, was it?
>
> A. We were told that it was completed. The January 10th meeting, Dave said that it was done, it was going to be -- or was going to be presented to the leadership team there at KCP&L, I think on the 22nd, that morning, and then to the joint owners on the twenty -- or that afternoon and then at the Commission then the following day.
>
> Q. Okay. And that never occurred, did it?
>
> A. The -- the meetings or the ...

Q. The reforecast that you're referring to, that -- that never occurred, did it?

A. As far as what was being communicated to us as joint owners at those meetings, there was a reforecast that was done during that period of time that was completed.

Q. Did you ever see that reforecast?

A. No.

Q. Do you know anyone at Aquila who saw that reforecast?

A. No.

Q. Have you ever seen a document called a reforecast that was produced either in December of 2007 or January 2008?

A. No. Only what they were communicating to us in the joint owners meetings.

Q. And what you understood at the meeting in February was that the reforecast process was still ongoing; isn't that true?

A. They had started a new reforecast at that point in time because the other one -- there were issues with that.

Q. Right. It hadn't been completely vetted, correct? Isn't that what Mr. Easley said at this meeting?

A. At this meeting?

Q. Let me call your attention to the last --

A. Okay.

Q. -- page on the bottom of Exhibit 146. Does it not state, "KCPL indicated that a new project is underway to validate these numbers through collection of additional data support"?

A. Yes, new project at that point in time.

Q. And so you're saying that this project to validate these numbers is a new reforecast?

A. At that point in time, yeah -- yeah, they said they had started to redo the reforecast and had started to -- they were going back to their senior management to vet those numbers further to gather more data but --

Q. Because -- go ahead.

A. Okay. But again, you know, what we were being told in -- that late fall, the October, November, December time frame by the project team is different than what was communicated later.

Q. Well, isn't it true that they told you in February that the numbers that were being examined in December and January were not reliable and required further vetting and analysis?

A. I don't think they said "reliable." They just -- they said that they wanted to go back and vet those more with management and gather more data.

Q. And validate them, correct?

A. Yes.

Q. And you knew that that process was ongoing at the time that you wrote this memo with Mr. Thomas, correct?

A. Yes. Well, I mean, that was part of what they were telling us at this meeting.

Q. Right. And do you understand -- now, you've been here the last day or so, haven't you, sir?

A. Yeah.

Q. Okay. And do you understand that the reforecast that is about to be presented to the GPE board is a product of that validation process?

A. Yes.

(Vol. 21, Rose, Tr. 2829-2833).

IV. Merger Synergy Savings

1. Are the estimates of savings from synergies reliable?

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

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

2. Is it likely that 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?

Introduction:

The Commission may approve the proposed transaction only if the Joint Applicants show that it is more-likely-than-not that the transaction will not be detrimental to the public interest. Rule 4 CSR 240-3.115(1)(D); *State ex rel. AG Processing, Inc. v. Public Service Commission,* 120 S.W.3d 732, 736 (Mo. banc 2003). "What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. * * * Approval should be based on a finding of no net detriment." *In the Matter of Union Electric Co.,* 13 Mo.P.S.C.3d 16, 40 (October 6, 2004). Staff's analysis strongly suggests that the potential detriments likely to follow from approval of the present proposal far outweigh any possible benefits and, for that reason, the Commission must deny the Joint Application.

It is in the area of estimated savings due to postulated synergies that the Joint Applicants urge the Commission to find sufficient public benefits to tip the balance in favor of the proposed transaction. These purported savings will all result from the consolidation of the operations of Aquila and KCPL once both companies are in the hands of a common owner. The Joint Applicants have consistently estimated the Missouri-jurisdictional share of these savings at $549 million over ten years, with $222 million in the first five years.[19] These savings will, the Joint Applicants assure the Commission, "substantially exceed the transaction and transition costs that are needed to accomplish the merger."[20] Those costs will amount to $90 million and the Joint Applicants request that they be amortized over five years.[21] By "amortized over five years," the Joint Applicants intend that Missouri ratepayers will pay an additional $18 million in rates for each of the first five years following the transaction.

The Joint Applicants are confident that the Commission will subtract $90 million from $222 million and, noting the positive result of $132 million, find that there is no public detriment and approve the proposed transaction.[22] As an added measure of persuasion, the Joint Applicants note that the proposed transaction has been approved by the Federal Energy Regulatory Commission (FERC), and by other interested state Commissions in Colorado, Iowa, Kansas, and Nebraska.[23] Only the approval by this Commission is now wanting.[24]

Staff urges this Commission to withhold its approval. Staff urges this Commission to scrutinize that estimate of $222 million, because the $90 million that the ratepayers will pay over five years is certain and not at all speculative. Staff suggests that the estimated synergy savings in this case are overstated, inflated, and frankly unreliable. The Joint Applicants' own hired expert, William Kemp, testified that "An important measure of the public interest test is the long-term impact on rates to customers -- Do the ratepayers receive a price benefit from the

[19] Bassham, Additional Supp'l Direct, 3; Tr. 9:1223. On a total-company basis, the figures are $755 million over ten years and $305 million over the first five years. Tr. 9:1222.
[20] Tr. 9:1223.
[21] Bassham, Additional Supp'l Direct, 5; Tr. 9:1223. Missouri jurisdictional transaction costs are $47.2 million and Missouri-jurisdictional transition costs as $42.8 million. *Id.*
[22] Bassham, Additional Supp'l Direct, 5, 6; Tr. 9:1223. Note that ratepayers will receive only about $100 million of the estimated savings, the rest will be directed to GPE via regulatory lag. Bassham, Additional Supp'l Direct, 3-4; Giles, Additional Supp'l Direct, 5-6.
[23] Tr. 9:1231.
[24] *Id.*

transaction?"[25] Kemp's answer to this question was, that in the sixth year following the transaction, "rates would be lower than they would otherwise be." [26]

Synergy Savings:

Although the level of synergy savings predicted by the Joint Applicants exceeds the savings actually achieved in other electric-industry mergers and consolidations,[27] the Joint Applicants nonetheless boast to the Commission that "[t]here should be no doubt that synergies will be achieved by this transaction."[28] The savings will arise from the integration and centralization of the operations of Aquila and KCPL and, in the absence of this operational integration and centralization, the Joint Applicants warn that there will be no savings.[29] The Joint Applicants urge the Commission to trust them on this, because their estimations are conservative and they have "not taken credit for other synergies that will occur in the future but that cannot be clearly quantified today."[30] By contrast, Public Counsel's expert witness James R. Dittmer calls the estimated savings "overstated" and "uncertain."[31] Who is the Commission to believe?

In view of the unreserved zeal with which the Joint Applicants seek to sell this deal to this Commission, it is worth noting that their advice to their own shareholders is full of reservations and equivocations. In a joint proxy statement/prospectus dated August 27, 2007, the

[25] Tr. 7:1025.
[26] Tr. 7:1029. Kemp admitted that "managing ratepayer expectations will be a challenge for both the Commission and for the applicants." Tr. 7:1030.
[27] Kemp, Supp'l Direct, 18, 19.
[28] Bassham, Additional Supp'l Direct, 6.
[29] Giles, Additional Supp'l Direct, 1.
[30] Bassham, Additional Supp'l Direct, 6. Presumably, these are the fuel and purchased power synergies referred to by Kemp, Supp'l Direct, 15.
[31] Dittmer, Rebuttal,

Joint Applicants identified "[t]he risk of cost savings and synergies not being achieved" as a "key risk" of the proposed transaction.[32] The prospectus goes on to say:[33]

> Great Plains Energy's board of directors noted that expected cost savings and synergies are estimates, that they may change and that achieving the expected cost savings and integration synergies is subject to a number of risks and uncertainties.
>
> * * *
>
> • *Integration.* Great Plains Energy's board of directors evaluated the challenges inherent in the combination of two business enterprises of the size and scope of Great Plains Energy and Aquila, including the possibility the anticipated cost savings and synergies and other benefits sought to be obtained from the merger might not be achieved in the time frame contemplated or at all.

Finally, the prospectus provides:[34]

> ***The anticipated benefits of combining the companies may not be realized.***
>
> We entered into the merger agreement with the expectation that the merger would result in various benefits, including, among other things, synergies, cost savings and operating efficiencies. Although we expect to achieve the anticipated benefits of the merger, achieving them cannot be assured.
>
> Approximately $275 million, or roughly 43%, of our total estimated cost savings and synergies over the first five years following the merger are expected to come from reductions in Aquila's corporate overhead and other costs currently allocated to the assets and businesses to be sold by Aquila to Black Hills. These costs are not being recovered through Aquila's Missouri utility rates, and are not expected to be recovered through Aquila's or KCP&L's utility rates following the merger. These reductions are expected to result from the elimination of corporate support positions and duplicative third-party services, as well as other overhead cost reductions. Although we expect to eliminate these costs following the completion of the merger, if we are not able to eliminate these costs as anticipated, the results from operations of the combined company will be negatively impacted.
>
> * * *
>
> There is no assurance regarding the amount of benefit-savings, or other regulatory treatment, in rate cases occurring after the closing of the Transactions.

Where the stakes include the possibility of federal prison for misleading investors, the Joint

[32] Late–filed Ex. 147:5; Bassham, Tr. 9:1368, ln. 1 to 1370, ln. 9.
[33] Late–filed Ex. 147:64 and 67; Bassham, Tr. 9:1370, ln. 21 – 1371, ln. 8; 1371, ll. 9-20.
[34] Late-filed Ex. 147:28, 30. Emphasis in the original.

Applicants' enthusiasm is palpably more subdued.

The Joint Applicants assert that approval of the proposed transaction will result in two types of synergy savings: "created savings" and "enabled savings."[35] "Created synergies," resulting from the consolidation of redundancies and economies of scale, are a direct result of the transaction; while "enabled synergies," the result of transfers of skills, adoption of best practices, and increased marketplace leverage, are not a direct result, but are facilitated or enabled by the transaction.[36] Dittmer, Public Counsel's expert witness, testified that the "enabled savings" of $59 million could be achieved without the transaction.[37] The Joint Applicants find savings in four areas:[38]

AREA	SAVINGS
Non-fuel O&M Departmental Budget Reductions	$87 million
Non-fuel O&M Integration Projects	$33 million
Supply Chain	$131 million
Projects that Decrease Purchased Power or Increase Revenue	$54 million
Total:	**$305 million**[39]

The Joint Applicants calculated the savings using Aquila's historical non-fuel O&M spending for 2006 as a base.[40] The base savings were then escalated by 3.1 percent per annum over five years and ten years in order to forecast the final figure for each of those periods.[41] Finally, it is the fact that Aquila and KCPL operate in adjacent service territories that makes any synergies available at all.[42]

[35] Zabors, Supp'l Direct, 6.
[36] Zabors, Supp'l Direct, 6; Kemp, Supp'l Direct, 6.
[37] Dittmer, Rebuttal, 13, 28.
[38] Zabors, Supp'l Direct, 6.
[39] Total-company basis.
[40] Zabors, Supp'l Direct, 6-10.
[41] Zabors, Supp'l Direct, 6-10; Tr. 7:1104.
[42] Kemp, Supp'l Direct, 8, 16, and Tr. 7:1016, 1034; Marshall, Surr., 7. Dittmer, Rebuttal, 47.

Non-fuel O&M Departmental Budget Reductions:[43]

In this area, savings of $87 million are predicted from reduction of payroll, economies of scale and reductions in non-labor spending.[44] Some 355 jobs out of Aquila's total of 1,254 will be eliminated on Day 1, with another 56 eliminated by the end of the first five years, for a total of 411.[45] The surviving members of Aquila's workforce will all become employees of KCPL.[46]

There is no question but that firing 411 people will result in savings – those salaries just won't be paid anymore.[47] The Commission should ask itself, in this regard, whether it is in the public interest that 411 Missouri workers should lose their jobs in difficult economic times.[48] Another inescapable albeit unintended consequence of mass terminations is a failure of service quality.[49] The estimated savings from economies of scale and elimination of redundancies may not be as great as predicted because Aquila's Kansas City-area electric utility operation is already a component in a larger concern.[50]

Non-fuel O&M Integration Projects:

In this area, savings of $22 million are projected from the elimination of Aquila's headquarters building and attached parking garage.[51] Additional savings of $11.5 million are projected to result from consolidating five existing service centers into two and the implementation of automated meter reading (AMR) for 310,000 to 330,000 Aquila customers.[52] However, the fact is that Aquila's headquarters and garage will probably be sold at a loss of $20

[43] "O&M" is "Operations & Maintenance."
[44] Zabors, Supp'l Direct, 10.
[45] Zabors, Supp'l Direct, 14 and Sch. RTZ-9; Tr. 7:1121-1122; Tr. 9:1410.
[46] Tr. 7:1114.
[47] Estimated by Zabors at about $50 million per annum. Tr. 9:1417.
[48] Most these will be professional management employees. Tr. 7:1079.
[49] Staff Report, 11, 16.
[50] Dittmer, Rebuttal, 36.
[51] Zabors, Supp'l Direct, 10.
[52] Zabors, Supp'l Direct, 11; Tr. 7:1099.

million to $30 million.[53] The Missouri share of this loss will be $11.3 million to $15.4 million.[54] Likewise, the Joint Applicants have announced no projections of the costs that will be incurred in providing work spaces for those Aquila employees that are not fired.[55]

Supply Chain:

In this area, the Joint Applicants estimate savings of $131 million, including $98 million in synergy savings from eliminating duplicate expenditures, adopting best prices currently available to either KCPL or Aquila, applying best demonstrated management practices from each company, leveraging greater scale and scope of spending, reducing unneeded reserve equipment and materials, a larger purchasing organization, reducing managerial overhead, and increased sharing of labor, equipment and material;[56] plus $33 million in additional savings from $90.9 million in reduced capital spending on sourced materials through "improved strategic sourcing in supply, delivery and corporate as the capital process is made more efficient."[57] Of course, it will cost $5.3 million to achieve the projected supply train savings; the fleet management savings will cost $1.5 million.[58]

It is noteworthy that this category of alleged savings has grown an incredible 261.8% since the Joint Applicants' initial direct testimony in this case. Initially the Joint Applicants represented there would be $50 million of supply chain synergy savings over the first five years.[59] The Joint Applicants do not adequately address the question of what amount of savings either entity could achieve on its own, absent the acquisition, thus clarifying what portion of those projected synergies are actually attributable to the consolidation of operations. Both KCPL

[53] Dittmer, Rebuttal, 38-9.
[54] Dittmer, Rebuttal, 40.
[55] Dittmer, Rebuttal, 38.
[56] Buran, Supp'l Direct, 3.
[57] Zabors, Supp'l Direct, 13.
[58] Buran, Supp'l Direct, 13, 18, and Sch. WPB-4.
[59] Ex. 30, p. 11, ll. 16 – 17.

and Aquila have ongoing programs to improve employee performance, refine supply chain access, and improve vendor pricing.[60] KCPL's Regulatory Plan obligates KCPL to prudently manage costs, continuously improve productivity, and maintain service quality during the Regulatory Plan.[61] Yet, the KCPL executive responsible for procurement testified that consortium buying has not been considered as a vehicle for KCPL to create supply chain savings on a stand-alone basis.[62]

Despite the contention that one source of savings will be leveraging better pricing, no single vendor has been identified as the source of such savings.[63] If the contract-by-contract method of merger-supply-chain-synergy-savings analysis alluded to by the Joint Applicants had truly been employed, it would seem that such a fact would have necessarily surfaced. GPE/KCPL, when buying for Iatan, is purchasing for an endeavor with a scope greater than just GPE/KCPL's share, as Iatan is jointly-owned by several utilities including Aquila. There is no indication in this record that items purchased for Iatan cost less because GPE/KCPL is purchasing on behalf of an entity larger than itself. Further, risks to the ability to achieve the projected savings – such as volatility in the utility industry -- do not appear to have been taken into account as adjustments to the 2006 baseline used in the calculation of the potential supply chain savings, despite the fact that the Joint Applicants acknowledge factors such as supply constraints could limit the ability of a utility of any size to leverage favorable pricing from a vendor.[64]

While little or no consideration was apparently given to potential limitations to the ability of a combined entity to achieve favorable pricing, even to the extent of merely estimating the

[60] Tr. 11:1519, ln. 14, to 1520, ln. 9.
[61] KCPL Regulatory Plan Stipulation & Agreement, Case No. EO-2005-0329, at 19.
[62] Tr. 11:1505 (Cheatum).
[63] Tr. 11:1503-1504.
[64] Tr. 11:1506, 1507-1508.

percentage of the projected savings that could be susceptible to market risks,[65] the projected supply chain synergy savings were escalated assuming inflation of 3.1% per year in costs, thus exaggerating the potential savings by increasing projected costs.[66] This adjustment is flawed for at least two reasons: first, the costs to achieve were not similarly adjusted,[67] and second, the bulk of the estimated synergy savings are projected to occur in the fifth year.[68] Thus, the Joint Applicants would have this Commission look at the exaggerated present value of speculative projected supply chain synergy savings as compared to an understated cost-to-achieve figure that will be incurred regardless of whether any savings are ever realized or not.[69] Even more worrisome, the costs to achieve were not adjusted for known risks in the utility industry and other factors likely to increase the cost of the costs to achieve.[70]

Projects that Decrease Purchased Power or Increase Revenue:

The Joint Applicants point to an array of projects under this heading, including:[71]

- Optimization of Sibley 3, including induced draft booster fans, moving load following operations to other units, improving the effectiveness of soot-blowing with instrumentation, upgrading coal blending facilities, and applying KCPL's cyclone boiler combustion expertise, saving $17 million in purchased power over 5 years.

- Combine both companies' combustion turbine (CT) operations, saving $3.1 million over 5 years.

- Improving plant heat rate at the Aquila plants, saving $0.6 million over 5 years.

- Implementing KCPL's Boiler Tube Failure Reduction and Cycle Chemistry Improvement ("BTFR/CCI") program on the Aquila coal-fired fleet, worth $5.6 million over 5 years.

[65] Tr. 11:1509.
[66] *Id.*
[67] Tr. 11:1512.
[68] Tr. 11:1510.
[69] Tr. 11:1512.
[70] *Id.*
[71] Zabors, Supp'l Direct, 12; Steinke, Supp'l Direct, 3.

- Reduced outages needed for boiler cleaning at Sibley 1 and 2, saving $1.6 million over 5 years.

- Applying KCPL's expertise at energy efficiency to Aquila's customers, saving $13 million over 5 years.

- Applying Aquila's expertise to KCPL's billing processes, saving $12.8 million over 5 years.

In considering these purported synergies, one wonders why they could not be implemented even without the proposed transaction. Public Counsel's witness James Dittmer testified that all of the so-called "enabled synergies" could be achieved even without consummating the proposed transaction.[72]

Tracking Synergy Savings:

The Joint Applicants offer to track the synergy savings actually achieved as a further inducement to the Commission to approve the proposed transaction:[73]

> [I]f the Commission so desires, Great Plains Energy is willing to track synergy savings achieved. The synergies achieved can be compared to the transaction and transition cost amortization and to the extent the synergies do not cover the amortization, the cost would continue to be deferred until such time that the demonstrated savings from the merger exceeds the related cost.

The Joint Applicants' proposed tracking mechanism is found in the testimony of Lori Wright: "I suggest establishing base period costs and then each year subsequent to the Merger comparing that year's actual costs to the base year costs, as adjusted for inflation. The net decrease in expense would be considered synergy savings."[74] Wright proposes 2006 as the base year, because it served as the test year in an Aquila rate case and a KCPL rate case and so is well-

[72] Dittmer, Rebuttal, 13, 28, 33.
[73] Bassham, Add'l Supp'l Direct, 6-7. In fact, KCPL witness Marshall testified that "we intend to track these synergies for our senior management team and workforce as well as for our board to show that we do, in fact, perform them." Tr. 7:1150-1151.
[74] Wright, Direct, 5-6.

known in detail to all the stakeholders.[75] Wright would adjust the calculation for known and measurable changes such as wage increases and inflation.[76]

This proposal seems fair indeed, but the reality is that it is a sham. Wright herself admits:[77]

> Tracking synergy savings with any degree of accuracy is problematic at best as business operations are not conducted in a static environment, but rather under constant change, including customer growth, technological improvements, etc. Tracking will become more difficult each successive year after the Merger.

Staff's consistent view is that merger savings cannot be accurately tracked and notes that this Commission has never accepted a merger savings tracking device.[78] Indeed, this Commission has previously recognized that merger savings cannot be reliably tracked.[79] Expert witness Maurice Brubaker vehemently disagreed with the adequacy of Wright's proposed tracking mechanism, stating:[80]

> This approach assumes that, but for the merger, base year costs will escalate at the rate of inflation. This completely ignores any reductions in cost that may be achieved as a result of normal business operations, improvements in efficiency and reductions in head count as a result of productivity improvements through technology and other means, changes in practices and policies with respect to employee benefits, and any other actions that are normally taken as a matter of course in operating an electric utility.

Conclusion:

The Joint Applicants' own expert witness, William J. Kemp of Black & Veatch, testified that the estimated synergy savings, at 10% of Aquila and KCPL's combined non-fuel O&M costs for 2006, are "significantly" higher than the 1% average of actually realized synergy

[75] Wright, Direct, 6.
[76] Wright, Direct, 6.
[77] Wright Direct, 5.
[78] Staff Report, 46, 48.
[79] *See supra,* § I in general and subsection I.C., discussing Case No. EM-98-213, in particular.
[80] Brubaker, Rebuttal, 7.

savings in 15 electric utility transactions.[81] Maurice Brubaker, an expert witness for certain industrial intervenors, agrees that the estimated synergies are "significantly above the average" and notes that "[g]iven the aggressive nature of Applicants' synergy claims, it would not be wise to decide this case based on the assumption that these claimed savings are certain to be realized."[82] Staff's expert witness, Robert Schallenberg, called the estimated savings "overstated";[83] while Public Counsel's expert witness James Dittmer characterized the estimates as "overstated" and "uncertain."[84] Moreover, the transaction will weaken the financial positions of both Great Plains and KCPL.[85] Great Plains Energy itself admitted in a response to a Data Request that only half of electric industry mergers have been successful.[86]

An old saw has it that experience is the best teacher. The record herein shows that the experience in the electric utility industry is that 1 out of 2 mergers or consolidations are unsuccessful and that synergy savings of 10% are simply not achieved. William Kemp, the Joint Applicants' own expert witness, agreed that the ratepayers will pay more if the projected level of synergy savings are not realized.[87] Public Counsel's witness, James Dittmer, testified that the transaction might very well lead to a credit-rating downgrade for KCPL if the projected synergies are not all realized.[88]

> We are paying above traditional cost of service rates just to keep the credit rating acceptable, and now we are exposing that credit rating to a downgrade through this purchase through the other costs -- if the company is not allowed to recover all the costs that they were asking for in this case or in the next rate case where they do ask for regulatory amortization on the Aquila side.

[81] Tr. 7:1034, *and see* Kemp, Supp'l Direct, 22. Brubaker characterizes Kemp's figures as showing that the Joint Applicants' estimates are "quite aggressive." Brubaker, Rebuttal, 10.
[82] Brubaker Rebuttal, 4, 11.
[83] Staff Report, 11.
[84] Dittmer, Rebuttal, 5.
[85] Staff Report, 1.
[86] Staff Report, 21-22.
[87] Tr. 7:1036.
[88] Tr. 13:1680, 1681, 1684, and 1755.

William Kemp testified that the long-term impact on ratepayers is an important measure of the public interest.[89] By that measure, the Commission must reject this transaction.

V. 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?

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?

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?

In the prayer of their joint application filed April 4, 2007, the joint applicants request the Commission to issue an order "[g]ranting KCPL and Aquila a waiver from the affiliate transaction rule to the extent deemed necessary. (Ex. 32, p. 21). Earlier in the joint application the joint applicants clarify they are "request[ing] a waiver from the provisions of the affiliate transactions rule under 4 CSR 240.20.015, as it might pertain to transactions between Aquila and KCPL. (Ex. 32, p. 19). Aquila is and is planned to be regulated by this Commission as to its retail electric operations in Missouri. (Great Plains witness Bassham Direct, Ex. 1, pp. 2-3). Similarly, KCPL is and is planned to be regulated by this Commission as to its retail electric operations in Missouri. As a major component of how they anticipate merger synergies, the joint applicants plan to leave Aquila with no employees by either transferring them to Great Plains or KCPL, or by firing them. (Great Plains witness Bassham Direct, Ex. 1, p. 7; Great Plains witness Downey Direct, Ex. 13, p. 4; Great Plains witness Wright Direct, Ex. 29, p. 7). Their plan is that, post-merger, Great Plains, KCPL and Great Plains Energy Services, Inc. employees

[89] Tr. 7:1025.

will provide all the personnel services needed to serve Aquila customers. (Great Plains witness Bassham Direct, Ex. 1, p. 7; Great Plains witness Wright Direct, Ex. 29, pp. 7-8). Great Plains witness Terry Bassham, Executive Vice-President, Finance and Strategic Development of Great Plains and Chief Financial Officer of both Great Plains and KCPL, expressly testifies that the plan is that, post-merger, Great Plains Energy Services, Inc., a wholly-owned subsidiary of Great Plains, and KCPL will provide human resources, legal and accounting services to Aquila. (Great Plains witness Bassham Direct, Ex. 1, p. 7). Despite Mr. Bassham's testimony, Great Plains/KCPL responded to the Staff in a data response that "KCPL employees will perform all generation, transmission, distribution and utility support functions for both KCPL and Aquila." (Staff witness Schallenberg Rebuttal, Ex. 100, Staff Report p. 64).

The Joint Applicants contend 4 CSR 240-20.015 does not apply to transactions between KCPL and Aquila because KCPL and Aquila both are now and post merger will be utilities this Commission regulates. (Joint Application, Ex. 32, p. 19) However, if the Commission disagrees, they request a variance that would relieve KCPL and Aquila from compliance with the rule for transactions between them. (Joint Application, Ex. 32; Great Plains witness Giles Surrebuttal, Ex. 15, pp. 7-8).

Rules are construed by the same principles used to construe statutes and the purpose of construing them is to give effect to the intent of the drafter. (*State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, --- S.W.3d ----, 2008 WL 2102419 (Mo. banc, 2008). The ultimate intent of the Commission with regard to 4 CSR 240-20.015 is found in the statement of the purpose of the rule published in the Code of State Regulations. In part, that purpose statement provides: "This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. . . . The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities." Great Plains witness Chris Giles testimony following regarding the rule is accurate, but incomplete:

> The affiliate transaction rules are premised on asymmetric pricing to prevent a public utility from subsidizing its affiliates. Therefore, goods and services provided by a public utility to any affiliate are to be priced at the higher of market value or the cost to the public utility in providing the goods and services. Conversely, goods and services provided by any affiliate to a public utility are to be priced at the lower of market value or the cost to the public utility in providing the goods and services to itself. In this way, the public utility should be indifferent as to whether it sells or receives goods and services from an affiliate or a third party.

If "affiliates" is replaced with "nonregulated operations" in the foregoing, then it more accurately captures the scope of the rule. If KCPL provides goods or services to Aquila, the fact that KCPL is regulated by the Commission does not transform those goods or services from being nonregulated activities of KCPL for purposes of 4 CSR 240-20.015. Similarly, if Aquila provides goods or services to KCPL, the fact that Aquila is regulated by the Commission does not transform those goods or services from being nonregulated activities of Aquila for purposes of 4 CSR 240-20.015. While it may not be the only way they could use regulated operations to subsidize nonregulated operations if allowed to ignore 4 CSR 240-20.015, Aquila and KCPL would have the opportunity to do so by timing their rate cases so the historical periods used for setting new rates do not coincide.

If the goods and services KCPL is to provide to Aquila are "regulated activities" for Aquila or KCPL, then their provision must be authorized by the Commission. Section 393.190.1, RSMo. 2000. None of the joint applicants have requested Commission authority for these transactions pursuant to section 393.190.1, RSMo. 2000. (Joint Applications, Ex. 32; Staff witness Schallenberg Rebuttal, Ex. 100, Staff Report p. 65). If they are not "regulated activities" then they are subject to 4 CSR 240-20.015.

Based on their request, the joint applicants are seeking to avoid 4 CSR 240-20.015 for any and all transactions between KCPL and Aquila. Further, given the breadth of the request, it appears they are also seeking relief from compliance with the recordkeeping requirements of 4 CSR 240-20.015(4), including the requirement in subpart (B) that the regulated utility keep the records of its transactions with affiliates in a form agreed to by the Staff, the Office of the Public Counsel and the regulated utility. Such an unsupported and broad request should be denied. (Staff witness Schallenberg Rebuttal, Ex. 100, Staff Report pp. 65-66).

VI. 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?

This Commission should reject shareholder recovery of transaction costs from ratepayers based on the following grounds: (1) for the same reason that this Commission has consistently applied the net original cost rule when setting rates and rejected the recovery of acquisition premiums—doing so increases rates without improved utility service to ratepayers, (2) because KCPL is not a party to the merger transaction and is not responsible for any transaction costs, (3) because the joint applicants' quantification of the transaction costs is questionable, (4) because Great Plains' cost controls are inadequate, and (5) because merger-related synergies in regulated operations are not the only potential benefit of the proposed merger. Transaction costs should not be directly charged to ratepayers through cost of service amortizations; therefore, this Commission should reject the joint applicants' request to establish transaction cost based regulatory assets for KCPL and Aquila. The joint applicants propose the regulatory assets be amortized over a five-year period and that KCPL, and Aquila, have the opportunity to include the annualized amount of the regulatory asset established for it in cost of service for recovery from its Missouri ratepayers.

Recovery of transaction costs by directly charging them to ratepayers through cost of service amortizations is detrimental to the public; however, that detriment would be but one of the circumstances the Commission must consider in determining whether to authorize the joint applicants to close the transaction proposed in this case.

In the prayer of their joint application filed April 4, 2007 that initiated this case (Ex. 32), the joint applicants, in paragraph (f), request the Commission to issue an order:

> Authorizing KCPL and Aquila to establish a regulatory asset and amortize into cost of service costs associated with the Merger, including both transaction and transition-related costs, as properly allocated to KCPL's and Aquila's Missouri-regulated operations and excluding the non-incremental labor costs of the integration team, over a five (5) year period beginning on January 1, 2008, or the month immediately following consummation of the Merger, whichever occurs later;

"Transaction costs" are costs necessarily incurred to consummate a transaction—costs such as attorneys' fees for agreement review and execution, and bankers' fees for deal valuation and equity placement. (Staff witness Schallenberg Rebuttal, Ex. 100, Staff Report p. 51; Great Plains witness Bassham, Vol. 15, Tr. 1929; Great Plains witness Wright, Vol. 15, Tr. 1989-90; Great Plains witness Wright Direct, Ex. 29, pp. 3-4; Great Plains witness Zabors Direct, Ex. 30, pp. 12-14; Great Plains witness Zabors Supp. Direct, Ex. 31, pp. 14-15; Great Plains witness Bassham Direct, Ex. 1, p. 16). In contrast, "transition costs" are costs incurred to integrate the operations of Aquila and KCPL. (Great Plains witness Bassham, Vol. 15, Tr. 1929; Great Plains witness Wright Direct, Ex. 29, p. 4; Great Plains witness Zabors Direct, Ex. 30, pp. 12-14; Great Plains witness Zabors Supp. Direct, Ex. 31, pp. 14-15).

As explained below, it is the Staff's understanding the joint applicants presently are requesting that, for transaction costs they assign to Aquila's operations in Missouri regulated by this Commission, the amount of $28.7 million be amortized over five years ($28.7 million / 5 years = $5.74 million/year) and the resulting $5.74 million be available for inclusion in cost of service for setting Aquila's rates. Similarly, its is the Staff's understanding the joint applicants presently are requesting that, for transaction costs they assign to KCPL's operations in Missouri regulated by this Commission, the amount of $18.5 million be amortized over five years ($18.5 million / 5 years = $3.7 million/year) and the resulting $3.7 million be available for inclusion in cost of service for setting KCPL's rates in Missouri. Some indication of the importance of this transaction cost issue to the joint applicants is found in the testimony of Great Plains witness Bassham, Executive Vice-President, Finance and Strategic Development of Great Plains and Chief Financial Officer of both Great Plains and KCPL, he gave on April 24, 2008 where he said that if the Commission disallowed the recovery of transaction costs but otherwise approved the transaction as proposed the transaction would close. (Great Plains witness Bassham, Vol. 15, Tr. 1983-1983). Michael Chesser, chairman of the board and chief executive officer of Great Plains testified similarly on April 29, 2008. (Staff witness Chesser, Vol. 19, Tr. 2538).

Because different witnesses use different terms with the same meaning in this case, those terms and meanings as defined in testimony follow:

- Costs to achieve = transaction costs plus transition costs (Great Plains witness Zabors Supp. Direct, p. 14; Great Plains witness Zabors Direct, pp. 12-15; Great Plains witness Wright Direct, pp. 3-4).
- Goodwill = purchase price plus transaction costs less fair market value (book value) (Great Plains Witness Wright Direct, Ex. 29, pp. 2-3;)

- Goodwill = acquisition adjustment (Great Plains witness Wright, Vol. 15, Tr. 2012-2014).
- Merger premium = acquisition premium (Great Plains witness Wright, Vol. 15, Tr. 2014).
- Acquisition adjustment = acquisition premium plus transaction costs (Great Plains witness Wright, Vol. 15, Tr. 2012).
- Acquisition premium = purchase price less fair market value (book value) (Great Plains witness Wright, Vol. 15, Tr. 2012).

Treat Merger Transaction Costs like Acquisition Premium

In State ex rel. AG Processing, Inc. v. Public Service Commission, 120 S.W.3d 732 (banc 2003), the Missouri Supreme Court held the Commission had to consider UtiliCorp United, Inc.'s request for the opportunity to recover a $92 million acquisition premium made as part of its request for authority to acquire St. Joseph Light & Power Company. On remand the Commission issued a Second Report and Order on February 26, 2004, where, despite a position statement by the postmerger entity—Aquila, Inc. f/k/a UtiliCorp United, Inc.—that it would not seek to recover the acquisition premium through customer rates, the Commission expressly rejected any opportunity to recover the acquisition premium through rates stating:

> As a general rule, only the original cost of utility plant to the first owner devoting the property to public service, adjusted for depreciation, should be included in the utility's rate base. That principle is known as the net original cost rule.
>
> The net original cost rule was developed in order to protect ratepayers from having to pay higher rates simply because ownership of utility plant has changed, without any actual change in the usefulness of the plant. If a utility were allowed to revalue its assets each time they changed hands, it could artificially inflate its rate base by selling and repurchasing assets at a higher cost, while recovering those costs from its ratepayers. Thus, ratepayers would be required to pay for the same utility plant over and over again. The sale of assets to artificially

> inflate rate base was an abuse that was prevalent in the 1920s and 1930s and such abuses could still occur.

Re UtiliCorp United, Inc., 12 Mo.P.S.C.3d 388, 389-90 (2004). To allow recovery of the transaction costs of a merger would have the same effect of artificially inflating rate base as allowing recovery of an acquisition premium. It would create an additional incentive to sell a utility since, if the buyer is able to recover all or part of the transaction costs through customer rates, a buyer will be willing to pay a higher purchase price than it would otherwise. On this basis alone the Commission should reject the request to create a regulatory asset for transaction costs. However, granting the request is inappropriate for other reasons as well.

The Facts

The joint applicants request that the majority of the transaction costs for Great Plains' acquisition of Aquila should be given regulatory accounting treatment on the books of KCPL and Aquila by being placed in regulatory assets with five year amortization periods. (Great Plains witness Bassham Direct, Ex. 1, p. 16). If the Commission creates such regulatory assets, then Aquila and KCPL each may seek for the annualized amount of the respective regulatory asset to be included in its cost of service used for setting the rates charged its customers. (Great Plains witness Wright, Vol. 15, Tr. 2007-2009).

On April 4, 2007, with the joint application, Great Plains asserted the transaction costs, excluding the non-incremental labor costs of the integration team, totaled $95 million of which Great Plains characterized $42 million as being "deal transaction costs." (Great Plains witness Bassham Direct, Ex. 1, p. 16; Great Plains witness Zabors Supp. Direct, Ex. 31, p. 14 and Sch. RTZ-10). The $95 million amount is an estimate. Starting on page 28 of the August 27, 2007 GPE-Aquila joint proxy statement/prospectus, stockholders are directed to a discussion of the risk factors that they should consider in evaluating the transaction. On page 31 appears the following:

> ***We will incur significant transaction and merger related transition costs in connection with the merger.***
>
> We expect to incur costs associated with consummating the merger and integrating the operations of the two companies, including approximately $95 million in transaction costs. The transaction costs will be included as a component of the purchase price for purposes of purchase accounting, except to the extent Great Plains Energy receives regulatory authorization to amortize such costs. The amount of transaction and transition costs expected to be incurred by each of us are preliminary estimates and are subject to change. Great Plains Energy currently estimates transition costs associated with the merger to be approximately $45 million over a period of five years, with substantially all of such costs being incurred through the first year after completion of the merger. Great Plains Energy continues to assess the magnitude of these costs, and, therefore, these estimates may change substantially, and additional unanticipated costs may be incurred in the integration of the businesses of Great Plains Energy and Aquila. Although Great Plains Energy believes that the elimination of duplicative costs, as well as the realization of other efficiencies related to the integration of the businesses, will offset incremental transaction and merger related costs over time, we cannot assure you that this net benefit will be achieved in the near term, or at all.

In additional supplemental direct testimony filed in February 2008, Great Plains recategorized $13.6 million in severance costs from transaction costs to transition costs. (Great Plains witness Bassham Add'l. Supp. Direct, Ex. 37, pp. 4-5; Great Plains witness Bassham, Vol. 15, Tr. 1930-1932; Great Plains witness Wright, Vol. 15, Tr. 1990; Great Plains witness Zabors, Vol. 21, Tr. 2922).

In addition to recategorizing $13.6 million in severance costs from transaction costs to transition costs, in its February 2008 prefiled testimony, Great Plains also removed from its amortization request what it described as the Great Plains' share of Aquila executive change in control cost ($8.9 million), the tax gross-up of that Aquila executive change in control cost ($0.5 million) and the Rabbi trust that represents Aquila's supplemental executive retirement plan

($7.3 million) totaling $16.7 million. (Great Plains witness Bassham Add'l. Supp. Direct, Ex. 37, pp. 4-5; Great Plains witness Zabors Supp. Direct, Ex. 31, Sch. RTZ-10; Great Plains witness Zabors, Vol. 21, Tr. 2921-2922).

As a result of the reclassification and reduction in February 2008, the amount of the transaction costs Great Plains requests be amortized is now $65 million, not $95 million. (Great Plains witness Bassham Add'l. Supp. Direct, Ex. 37, p. 5; Great Plains witness Zabors Supp. Direct, Sch. RTZ-10; Great Plains witness Zabors, Vol. 21, Tr. 2921-2922).

Under their theory that they should have the opportunity to recover from ratepayers their transition and transaction costs because they must incur those costs to obtain any merger-related synergy savings, the joint applicants assert transition and transaction costs should be allocated by state based on the retail, wholesale and merchant operations of KCPL and Aquila in proportion to projected savings, as adjusted based on GWh sales of electricity. (Great Plains witness Rush, Ex. 23, p.6 and Sch. TMR-1; Great Plains witness Giles Add'l. Supp. Direct, Ex. 39, pp. 4-6 and Sch. CBG-1). In his Additional Supplemental Direct testimony Great Plains witness Chris B. Giles presented the following Schedule CBG-1:

Missouri Allocations

Total ($m)	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Gross Synergies	$30	$56	$62	$74	$82	$85	$87	$90	$93	$96	$755
Customer Retained Synergies	$0	$15	$30	$62	$62	$82	$85	$87	$90	$93	$606
Transition	$0		($6)	($12)	($12)	($12)	($12)	$6)			($59)
Transaction	$0	($6)	($13)	($13)	($13)	($13)	($7)				($65)
Customer Benefit	$0	$3	$5	$37	$37	$57	$72	$87	$90	$93	$482
Cumulative Customer Benefit	$0	$3	$8	$46	$83	$140	$212	$299	$389	$482	

Allocations are taken from the Supplemental Direct Testimony of Tim Rush and found on Schedule TMR-1

KCPL MO Allocation 28.44%	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Customer Benefit	$0.0	$0.9	1.5	$10.6	$10.6	$16.3	$20.5	$24.7	$25.6	$26.4	$137.1
5 yr. Benefit						$39.8					

MoPub Allocation 35.17%	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Customer Benefit	$0.0	$1.1	$1.8	$13.1	$13.1	$20.1	$25.4	$30.6	$31.7	$32.7	$169.6
5 yr. Benefit						$49.2					

St. Joe Electric Allocation 8.34%	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Customer Benefit	$0.0	$0.3	$0.4	$3.1	$3.1	$4.8	$6.0	$7.3	$7.5	$7.8	$40.2
5 yr. Benefit						$11.7					

St. Joe Steam Allocation 0.80%	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Customer Benefit	$0.0	$0.0	$0.0	$0.3	$0.3	$0.5	$0.6	$0.7	$0.7	$0.7	$3.9
5 yr. Benefit						$1.1					

Missouri Allocation 72.75%	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Synergies	$0.0	$10.9	$21.8	$45.1	$45.1	$59.7	$61.8	$63.3	$65.5	$67.7	$440.9
Transition	$0.0	($4.3)	($8.6)	($8.6)	($8.6)	($8.6)	($4.3)				($42.8)
Transaction	$0.0	($4.4)	($9.5)	($9.5)	($9.5)	($9.5)	($5.0)				($47.2)
Customer Benefit	$0.0	$2.3	$3.8	$27.1	$27.1	$41.6	$52.5	$63.3	$65.5	$67.7	$350.8
5 yr. Benefit						$101.8					

SCHEDULE CBG-1

In that schedule the Allocation of transition and transaction costs to the Missouri operations of KCPL are (each annual amount multiplied by 28.44% and divided by 72.75%):

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Transition	$0.0	($1.7)	($3.4)	($3.4)	($3.4)	($3.4)	($1.7)	$0.0	$0.0	$0.0	($16.8)
Transaction	$0.0	($1.7)	($3.7)	($3.7)	($3.7)	($3.7)	($2.0)	$0.0	$0.0	$0.0	($18.5)

In summary, the joint applicants propose to amortize the amounts in the rightmost two columns below for transition and transaction costs over five years for potential recovery from KCPL and Aquila Missouri ratepayers:

	Total	Missouri total	KCPL(MO)	Aquila
Transition	$59 M	$42.8 M	$16.8 M	$26.0
Transaction	$65 M	$47.2 M	$18.5 M	$28.7

The joint applicants argue that the majority of the transaction costs for Great Plains' acquisition of Aquila should be given regulatory accounting treatment on the books of KCPL and Aquila by being placed in regulatory assets with five year amortization periods is "that the costs to achieve the Merger are necessary to achieve the Merger-related synergy savings." (Great Plains witness Bassham Direct, Ex. 1, p. 16).

KCPL is not Responsible for Transaction Costs

KCPL is not a party to the merger transaction. (Application, Ex. 32, Exhibit 4 to application; Great Plains witness Bassham Direct, Ex. 1, p. 6). KCPL and Great Plains have no agreement for KCPL to pay Great Plains' transition or transaction costs. (Great Plains witness Wright, Vol. 15, Tr. 1995). Great Plains witness Lori Wright, the controller of both Great Plains and KCPL, testified that the transaction and transition costs of Great Plains' proposed acquisition of Aquila are ultimately being recorded at Great Plains—some costs are initially incurred by KCPL who records them, but then those costs are then reimbursed to KCPL by Great Plains. (Great Plains witness Wright, Vol. 15, Tr. 1990-1995). It is appropriate that Great Plains bear these costs because they are costs the board of directors Great Plains chose to incur. (Staff witness Schallenberg Rebuttal, Ex. 100, Staff Report p. 51).

Because KCPL is not a party to the proposed merger transaction and is not responsible for any of the transaction costs, there should be no opportunity for KCPL to recover any of the transaction costs from the Missouri customers of KCPL. The Staff has found no precedent where this Commission has authorized a utility to record parent company expenses on the books and records of the utility absent an agreement that obligates the utility to pay the expenses.

Questionable Transaction Cost Quantification

During the hearings held in April of 2008, Great Plains witnesses acknowledged under oath that transaction costs can readily be distinguished from transition costs. (Great Plains witness Wright, Vol. 15, Tr. 1990; Great Plains witness Bassham, Vol. 15, Tr. 1929-1930). Great Plains witness Zabors specifically identified Great Plains witness Wright as an expert in assigning costs as transaction or transition costs. (Great Plains witness Zabors, Vol. 21, Tr. 2895-2896). Despite transaction costs being readily distinguishable from transition costs, in additional supplemental direct testimony filed in February 2008, Great Plains recategorized \$13.6 million in severance costs from transaction costs to transition costs. (Great Plains witness Bassham Add'l. Supp. Direct, Ex. 37, pp. 4-5; Great Plains witness Bassham, Vol. 15, Tr. 1930-1932; Great Plains witness Wright, Vol. 15, Tr. 1990; Great Plains witness Zabors, Vol. 21, Tr. 2922).

Further adding to the uncertainty of the quantification of the transaction costs is the lack of controls at Great Plains or KCPL to ensure that such costs are properly categorized, or even appropriately incurred. Bridge Strategy Group worked for and billed Great Plains for the services it provided, not KCPL. (Great Plains witness Zabors, Vol. 21, Tr. 2889-2890, 2902-2903; 2905). As of April 24, 2008 Bridge Strategy Group had billed Great Plains \$4.3 million categorized as transaction costs and about \$5.2 million categorized as transition costs. (Great Plains witness Wright, Vol. 15, Tr. 2001; Exs. 126, 128 and 129; Great Plains witness Zabors, Vol 21, Tr. 2896-2897). Bridge Strategy Group's invoices show the billing period, an amount for "Professional fees," an amount for "Expenses," a total due, identification of those working on the matter, and a breakdown of the total due into the categories of "transaction costs" and "transition costs." (Ex. 128). On their face they provide no other detail for the amounts charged.

As the only support for its billings, Bridge Strategy Group provided one line descriptions of the work performed by each individual for whom it billed fees together with the amount billed for that individual, and Great Plains requested no additional support. (Ex. 129; Great Plains witness Zabors, Vol. 21, Tr. 2907-2909, 2912-2913, 2917-2919). There is no evidence Bridge Strategy Group provided receipts or any other information to support its expense charges. (Great Plains witness Wright, Vol. 15, Tr. 2004; Great Plains witness Zabors, Vol. 21, Tr. 2909-2910; 2918-2919). It is not standard practice at Great Plains and KCPL to require receipts before paying expenses. (Great Plains witness Wright, Vol. 15, Tr. 2004). The billing payment practices used by Great Plains and KCPL do not assure that they pay only reasonable and prudent expenses.

Bridge Strategy Group's engagements for Great Plains are so informal they are memorialized only by summarized terms found in letters. (Exs. 127 and 130; Great Plains witness Zabors, Vol. 21, Tr. 2899-2901).

Great Plains' and KCPL's controller, Lori Wright, testified that the controls in place to assure transaction and transition costs are just and reasonable consist of an individual responsible for ensuring the billing is accurate and appropriate authorizes payment—for Bridge Strategy Group billings John Marshall—and accounting group review for appropriateness by comparing the billing with a vendor list for whether it appears the vendor would perform those types of services and that, similarly, the payment approval process consists of a responsible person review followed by review for authority of the responsible person to approve payment. (Great Plains witness Wright Vol. 15, Tr. 1996-1999). For Bridge Strategy Group billings, John

Marshall was, and is, responsible for the accuracy of billing, including the categorization of costs as transaction or transition costs, and authorizing invoice payment. (Great Plains witness Wright, Vol. 15, Tr. 2004-2007). John Marshall's accountability for authorizing payments is to his supervisor. (Great Plains witness Wright, Vol. 15, 2007). John Marshall did not testify that the payments Great Plains made to Bridge Strategy Group were reasonable or prudent.

James Rose, a certified public accountant and senior manager in the risk assessment audit services department of Aquila, testified that with regard to cost control of the construction at Iatan I and II, as supported by an Ernst & Young audit, KCPL performed little if any review of invoices received. (Vol. 21, Tr. 2806, 2809-2812). There is no reason to believe it did so with regard to merger transaction costs either.

Savings-Based Allocation Should Be Based On All Savings

If one accepts the proposition that because transaction costs must be incurred to realize merger savings those transaction costs should be allocated based on merger-related savings—a proposition with which the Staff disagrees, then those transaction costs should be allocated on the basis of all merger-related savings, not just those of regulated, wholesale and merchant operations as the joint applicants propose. Great Plains predicts $607 million of synergy savings over five years—$302 million for "corporate" operational savings and $305 million for "regulated" operating synergies. (Great Plains witness Zabors Supp. Direct, pp. 6-8 and Sch. RTZ-6; Ex. 123, p. 12). Aquila asserts the "corporate" operational savings would be more accurately reflected as being $221 million due to events during 2007, although 2006 information was otherwise used in this case. (Great Plains witness Zabors Supp. Direct, Ex. 31 Sch. RTZ-6 and Vol. 21, Tr. 2923-2926). The controller of both Great Plains and KCPL, Ms. Wright, and a Great Plains' outside witness, Mr. Zabors, both acknowledge the transaction costs must be incurred to realize the $302 million of "corporate" operational savings. (Great Plains witness Wright, Vol. 15, Tr. 2011; Ex. 123, p. 12; Great Plains witness Zabors Vol. 21, Tr. 2923-2924).

Despite Great Plains' rationale that there should be an opportunity to recover transaction costs from Aquila and KCPL customers because they are costs that must be incurred to achieve merger-related synergy savings, Great Plains ignores that these same transaction costs must be incurred to achieve the $302 million of "corporate" operational savings as well. This is shown in the explanation of the development of the allocators Great Plains uses for allocating transaction costs found in the testimony of Great Plains witnesses Rush and Giles. (Great Plains witness Rush Supp. Direct, Ex. 23 and Great Plains witness Giles Add'l. Supp. Direct, Ex. 39, pp. 4-6 and Sch. CBG-1).

If the proposition that responsibility for bearing transaction costs should be allocated based on projected merger-related savings is accepted, then the transaction costs should be allocated based on all of the projected merger-related savings, not just those merger-related savings projected for regulated operations.

Re Union Electric Co.

In their prehearing brief Great Plains, KCPL and Aquila quote from Re Union Electric Company, 6 Mo.P.S.C. 3d 28 (Feb. 21, 1997), as support for the Staff having "concurred with the request of merging utilities to amortize transaction and transition costs over time." That case was resolved by a stipulation and agreement. KCPL and Aquila (then known as UtiliCorp United, Inc.) represented, inter alia, by James Fischer, William Riggins and James Swearengen were signatories to that stipulation and agreement (Id. at 31) which, among others, includes the following provision:

13. No Acquiescence

> None of the signatories to this Stipulation And Agreement shall be deemed to have approved or acquiesced in any question of Commission authority, accounting authority order principle, cost of capital methodology, capital structure, decommissioning methodology, ratemaking principle, valuation methodology, **cost of service methodology or determination,** depreciation principle or method, rate design methodology, cost allocation, **cost recovery,** or prudence, that may underlie this Stipulation and Agreement, or **for which provision is made in this Stipulation And Agreement.**

(Emphasis added.) Id. at 57. As it did when this same case was cited to it by Aquila in Case No. EM-2000-292 (Re UtiliCorp United, Inc., 12 Mo.P.S.C.3d 388 (2004) regarding recovery of the acquisition premium it paid for St. Joseph Light and Power Company, this Commission should summarily dismiss the invitation to rely on Re Union Electric Company. Specifically, in Re UtiliCorp United, Inc. the Commission stated:

> UtiliCorp also cites two Commission cases in which it argues that the Commission has allowed for the indirect recovery of acquisition premium. UtiliCorp indicates that in the case in which the Commission approved Union Electric Company's merger with Central Illinois Public Service Company, it allowed for the recovery of the acquisition premium through operation of an earnings-sharing grid. UtiliCorp also points out that in the case in which the Commission approved Kansas City Power & Light Company's plan to merge with Western Resources, Inc., it approved a rate freeze that would allow enough time for the company to recover the acquisition premium through the operation of regulatory lag. While what UtiliCorp says about those two cases is correct, it is important to note that both cases were resolved through unanimous stipulations and agreement that were approved by the Commission. In neither case did the Commission purport to establish any policy that would apply to UtiliCorp's request to recover its acquisition premium in this case.

(footnotes omitted). Re UtiliCorp United, Inc., 12 Mo.P.S.C.3d at 391. While the Commission has accepted, as part of an overall settlement of a case, the opportunity to recover merger transaction costs from ratepayers in isolated instances, the joint applicants have provided no support that this Commission has ever allowed a utility the opportunity to recover merger transaction costs from its customers when that issue is before it as a separate and distinct matter for decision. The joint applicants in this case have simply provided no compelling ground(s) to cause this Commission to change its approach and allow the joint applicants the benefits of the opportunity to recover from KCPL and Aquila customers the transaction costs of this merger between Aquila and a subsidiary of Great Plains. This Commission should deny the joint applicants request that the Commission authorize KCPL and Aquila to establish regulatory assets and amortize into cost of service the transaction costs of the merger.

VII. Name Change

Joint Applicants seek, if the Commission authorizes the acquisition of Aquila by GPE, authority to change the name of Aquila to some undisclosed new name. (Ex. 32, wherefore clause (i)). While the Commission has made a name change available through a more informal process than other requests, rule 4 CSR 240-2.060(5) requires the following:

> (5) A name change may be accomplished by filing the items below with a cover letter requesting a change of name. Notwithstanding any other provision of these rules, the items required herein may be filed by a nonattorney. Applications for approval of a change of name shall include:
>
> (A) A statement, clearly setting out both the old name and the new name;
>
> (B) Evidence of registration of the name change with the Missouri secretary of state; and
>
> (C) Either an adoption notice and revised tariff title sheet with an effective date which is not fewer than thirty (30) days after the filing date of the application, or revised tariff sheets with an effective date which is not fewer than thirty (30) days after the filing date of the application.

None of these requirements are met. Unless the new name is disclosed, the Commission has no opportunity to review the proposed new name to determine whether it would cause customer confusion, or otherwise not be in the public interest; therefore, until the new name is proposed, and the other requirements of 4 CSR 240-2.060(5) are met, the Commission should not entertain the request for authority to change the name of Aquila.

VII. Conclusion

For the foregoing reasons, the Staff requests that the Commission deny the Joint Application of Great Plains Energy, Inc., Kansas City Power & Light Company, and Aquila, Inc.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, hand-delivered, transmitted by facsimile or electronically served to all counsel of record this 3rd day of June, 2008.

/s/ Kevin A. Thompson