

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great)	
Plains Energy Incorporated, Kansas City Power)	Case No. EM-2007-0374
& 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.)	

STATEMENT IN DISSENT TO REGULATORY LAW JUDGE'S
EVIDENTIARY RULING AND
OBJECTION TO PROCEDURAL IRREGULARITY

This Commissioner is compelled to issue a Statement in Dissent and Objection to a number of procedural matters in this case. Such a filing by a Commissioner is unusual in that there is not an underlying written order to which this Commissioner can dissent. The objectionable Orders were rulings made by the regulatory law judge during the course of the evidentiary hearing in which evidence proposed by staff and other parties, identified generally in the procedural schedule as "Anonymous Public Allegations/Comments Related to Proposed Acquisition," was excluded from the record. This Commissioner disagreed with those rulings and dissents with supporting reasons herein.

Additionally, this Commissioner attempted to raise these issues before the voting¹ members of the Commission during the April 30, 2008, regular public Agenda meeting. During that meeting, this Commissioner would have moved the Commission to overrule

¹ Because of prior Commissioner recusals, Commissioners Murray, Jarrett and Clayton are the only voting Commissioners involved in the case.

the decision of the regulatory law judge since the Commissioners have the ultimate power to render evidentiary rulings.² However, this Commissioner was denied that possibility by the acting Chair,³ who withdrew the issue from discussion at the April 30, 2008, Agenda meeting. This unprecedented procedural maneuver deprived ratepayers of a public vote on the issue in deference to the unaccountable regulatory law judge. The erroneous evidentiary rulings and subsequent procedural actions create significant clouds of uncertainty over any future decisions in this case.

EVIDENTIARY RULINGS

First of all, this Commissioner agrees that the regulatory law judge is within his authority to issue evidentiary rulings and this dissent does not question that power. The Commission delegates the authority for the regulatory law judge to act in the place of the Commissioners in managing the procedural aspects of the case.⁴ Generally, the Commissioners act during their open, public meetings with advance public notice, through Orders voted on by a majority of the Commission and not during evidentiary hearings.⁵ The Commission, however, is the statutorily responsible entity that is held accountable for Orders in the case and parties have “appealed” to the full Commission in the face of an adverse evidentiary ruling by the regulatory law judge.⁶

In this case, the staff proposed an extensive witness list of 12-15 witnesses involving a number of issues generally identified in the “Second List of Issues and Order

² §386.240, RSMo 2000; *State ex rel. Associated Natural Gas Co. v. Public Service Commission of State of Mo.*, 37 S.W. 3d 287. (Mo. App. 1996); see Tr. 90; Tr. 211.

³ Pursuant to section 386.140, RSMo 2000, Commissioner Connie Murray has been appointed “acting chair” in place of Chairman Jeff Davis.

⁴ 4 CSR 240-2.120; 4 CSR 240-2.130.

⁵ 4 CSR 240-2.020.

⁶ §386.240, RSMo 2000; Tr. 90; Tr. 211; Tr. 670; see also Case No. GC-2006-0491, Orders dated January 12, 2007, December 12, 2006, December 5, 2006, November 3, 2006 and September 5, 2006, Case No. WC-2008-0079, Order dated February 8, 2008, Case No. ER-2006-0315, Response to Questions of Commissioner Gaw dated November 2, 2006.

of Opening Statements, Witnesses and Cross Examination,” as “Anonymous Public Allegations/Comments Related to Proposed Acquisition.” Staff’s proposed procedural schedule specifically delineates the following topics:

*Would the adoption of GPE/KCPL’s gift and gratuity practice for Aquila be detrimental to the public interest?

*Does KCPL have adequate control of the Iatan projects to be able to operate the non-dispatch functions of Aquila in addition to those of KCPL in a manner not detrimental to the public interest?

*Does the Commission have adequate information to determine whether the public allegations/comments it has received regarding GPE/KCPL are accurate and such conduct in the operation of the non-dispatch functions of Aquila would be detrimental to the public interest?

On April 17, 2008, the Joint Applicants filed “Great Plains Energy’s and KCPL’S Motion to Limit Scope of the Proceeding to Evidence to Whether the Proposed Acquisition of Aquila by Great Plains Energy Inc. is Not Detrimental to the Public Interest” in an effort to exclude testimony in the record. On April 24, 2008, the regulatory law judge sustained, in part, the Joint Applicants’ Motion and excluded evidence that was scheduled to take three days and 12-15 witnesses. Staff, the Office of Public Counsel and certain Intervenors requested to make Offers of Proof in an effort to preserve evidence on appeal. The presiding officer relied on 4 CSR 2.130(3) to reject the parties’ request to preserve the testimony in the record. This portion of the rule states:

The presiding officer shall rule on the admissibility of all evidence. Evidence to which an objection is sustained, at the request of the party seeking to introduce the same at the instance of the commission, nevertheless may be heard and

preserved in the record, together with any cross-examination with respect to the evidence and any rebuttal of the evidence, unless it is wholly irrelevant, repetitious, privileged or unduly long. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings shall be unnecessary and need not be taken.

During the course of the evidentiary hearing and prior to the evidentiary ruling, the presiding officer asked this Commissioner his thoughts on the presiding officer's plan to exclude part of the testimony. This Commissioner disagreed with the regulatory law judge in that conversation and continues to disagree with the ruling. The record is unclear whether the presiding officer inquired of the other members of the Commission in terms of "polling" the Commissioners for their position.⁷ It is further unclear in the record why the regulatory law judge would have inquired of this Commissioner only to reject this position in exchange of another, absent some direction.

This Commissioner believes that the issues raised by staff and other parties are critically important and relevant to the eventual decision in the case. Two of Missouri's electrical utilities seek to combine multiple service territories involving hundreds of thousands of customers and billions of dollars in invested plant. The Commission should err on the side of inclusion of evidence and accept all relevant information to both utilities, their capital investment plans, their efforts at prudent decision-making and the impact on customers of both utilities. While this Commissioner agrees that some of the evidence may be excludable, the Commission is certainly equipped to sort through the information, identify the relevant, material evidence and make reasonable and lawful decisions based on the record. Because of this ruling, the Commission will not even

⁷ See e.g., Tr. 90; Tr. 211.

accept certain testimony and the evidentiary hearing is now complete without further opportunities to admit evidence the staff and other parties deem important.

The Joint Applicants and the regulatory law judge have suggested that the anonymous letters received by the Commission can best be described as unauthenticated hearsay and that this Commission cannot rely on the averments within the letters. This Commissioner agrees. However, these allegations have caused the staff to investigate the claims in the letters and staff seeks to admit relevant information obtained through its investigation. It is this new information that should be considered by the Commission in determining whether the merger is “detrimental to the public interest.”

Lastly, by issuing this ruling, the Commission is being inconsistent with prior evidentiary decisions in this case. The Industrial Intervenors⁸ sought to exclude evidence through a Motion In Limine of synergy savings because of how the case was pleaded. The Commission, including this Commissioner, rejected the Motion and ruled that it would take a broad view of relevant factors in sorting out its decision. The Commission in this instance has switched its position and is now taking a narrow view of relevant factors and excluding the staff’s evidence. Further, the General Assembly has directed that technical rules of evidence do not apply to Commission proceedings which encourages the Commission to take a broad view of relevant evidence.⁹

PROCEDURAL IRREGULARITIES

This Commissioner also objects to the procedural games being played by the acting Chair of the Commission on this case. In order to discuss this Commissioner’s concerns with the evidentiary rulings, this Commissioner requested that a “Case

⁸ Staff concurred in the Industrial Intervenors’ Second Motion in Limine.

⁹ §386.410, RSMo 2000.

Discussion” item related to the instant case be placed on the Agenda meeting for discussion on April 30, 2008.¹⁰ This request was granted although the public notice did not include a reference to “Evidentiary Rulings” as requested by this Commissioner.

At the beginning of the April 30, 2008, Agenda, the acting Chair of the case, announced that the case discussion item related to this case was being withdrawn. When this Commissioner inquired of the Chair as to why the case was being withdrawn, considering it had been included at the request of a fellow Commissioner, the acting Chair announced that it was her “prerogative” as Chair. After review of the Missouri statutes and rules, this Commissioner found no “prerogatives” relating to the Chair of the Commission either for the duly appointed Chair or by an acting Chair. The acting Chair has set a dangerous precedent of depriving her colleague of the ability to call up issues for public debate and for the opportunity to overrule the decisions of unaccountable Commission employees.

Without the ability to discuss this case in an open forum and the regulatory law judge’s decision to not refer this matter to the Commission for decision as is authorized in 4 CSR-2.130(4),¹¹ this Commissioner has no opportunity to record his dissent to the regulatory law judge’s decision to exclude the testimony. This Commissioner was further led to believe that the matter would be brought up for discussion in public setting for a possible vote. Instead, either the evidentiary ruling is being allowed to stand

¹⁰ See Agenda and Minutes of April 30, 2008.


¹¹ “In extraordinary circumstances where prompt decision by the commission is necessary to promote substantial justice, the presiding officer may refer a matter to the commission for determination during the progress of the hearing.” 4 CSR 240-2.130(4); see also Tr. 90; Tr. 211.

because the Commission is deferring to the regulatory law judge or, the Commission directed the regulatory law judge to act by informal "polling" outside of the record.¹²

In either event, the staff of the Missouri Public Service Commission has had much of its case summarily excluded from the record without any public debate, discussion or vote, in a matter that involves critical electricity service to the western side of the state with billions of dollars at stake. This case is one of the largest and most significant cases the Commission will adjudicate for years to come. The standard of proof of the parties in persuading the Commission is whether the transaction is "detrimental to the public interest." Staff believes this information has probative value in addressing that issue. Unfortunately, neither the Commission nor a reviewing court will have access to that information in evaluating the case.

For the foregoing reasons, this Commissioner dissents.

Respectfully submitted,


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 13th day of May 2008.

¹² See FN 6 supra.