BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief	))))))	**Case No. EM-2007-0374**

MOTION TO DISMISS

COMES NOW the Office of the Public Counsel and for its Motion to Dismiss states as follows:

1. On or about January 24, 2007,[1] a series of four or five meetings were held with just one or two Commissioners attending each meeting, a procedure that evades the requirements of the Sunshine Law.[2] Commissioners Murray, Appling and Clayton participated in these meetings.[3] Mr. Chesser and Mr. Downey each testified that they had

[1] There is a response to a Staff Data Request that indicates a date of January 17, 2007, but that seems to simply be a mistake. In any event, it is not material to this request whether the meetings took place on January 17 or January 24.

[2] If three or more Commissioners together had had these discussions with Mr. Chesser and Mr. Downey, such discussions would have been public meetings of a public governmental body pursuant to Sections 610.010(4) and 610.010(5) RSMo 2000. Section 610.020.1 requires that "All public governmental bodies shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to advise the public of the matters to be considered…."

[3] Commissioner Jarrett did not; he is not implicated in any way in the matters raised herein. Chairman Davis participated, but has since voluntarily recused himself. Accordingly, references to "the Commissioners" are to Commissioners Murray, Appling and Clayton. Although the record shows that Mr. Chesser and Mr. Downey met with all five of the then-serving Commissioners, former Commissioner Gaw has since left the Commission and will not have the same opportunity to challenge this pleading that still-

not requested these individual meetings. Mr. Chesser and Mr. Downey[4] also each testified that they said the same thing in each of the meetings. From their perspective, it certainly would have been more convenient to hold a single meeting rather than four or five meetings. Whether or not this procedure was used to intentionally evade the requirements of the Sunshine Law, there was clearly no effort made to set up a meeting that would have required public notice. As it transpired, no notice was given to the public or to the Public Counsel about these meetings.

2. These discussions with Commissioners were critical to Great Plains moving forward with its plans to finalize a merger with Aquila. In a July 19, 2006, memo to the Great Plains board of directors, Terry Bassham, Chief Financial Officer of both Great Plains and KCPL, stated: "The regulators [*sic*] response to this plan and its concepts will be critical to our final evaluation of the transaction. Although it is not timely to speak to

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serving Commissioners have. Since former Commissioner Gaw will not participate in the decision, this pleading draws no conclusions about his involvement.

[4] November 28, 2007, Deposition of Michael J. Chesser (Chesser Deposition), page 141. November 28, 2007, Deposition of William H. Downey (Downey Deposition), pages 41-42. Because the transcripts of two days of hearings have not been made available, a number of citation herein are to the depositions. The depositions were taken less than a week before the hearing, and there appear to be few instances in which the deposition testimony was not confirmed at the hearing. Although the transcripts of the depositions of Mr. Chesser and Mr. Downey have not yet been formally admitted into the record in this case, the Commission's practice has been to admit depositions, even when there are questions raised as to their admissibility. See, *e.g.*, Case Nos. ER-2007-0002 and WC-2006-0082.

Although transcripts of the hearings held December 5 and 6 have not been made available, a review of the electronic recording of those hearings reveals that both Mr. Chesser and Mr. Downey confirmed at those hearings that they met with each of the Commissioners. Mr Chesser confirms this at nine hours and nine minutes and again at nine hours and thirty-four minutes into the recording of the December 5 hearing; Mr. Downey at thirteen minutes into the December 6 hearing.

the regulators at this point, discussions with them in Phase II will clearly impact our ability to make a final offer."[5] Before it would make a final bid for Aquila, before it would set its final price, before it would publicly announce the deal, Great Plains had to know that no Commissioner had any objection to the three "support mechanisms"[6] that Great Plains would later submit for Commission approval. Great Plains believed that these discussions were so absolutely critical that they were **required** in Great Plains' Final Bid:

> In order to deliver a transaction which will create the immediate and sustainable long term value for Aquila and Great Plains' shareholders, we require informal discussions with regulators prior to the execution of a definitive merger agreement for this transaction. Our bid is subject to holding these discussions concurrent with the negotiation of the definitive Merger Agreement.[7]

Great Plains needed these discussions with Commissioners to "yield comfort"[8] around its ability to get approval consistent with its proposed regulatory treatment. The three support mechanisms or ratemaking treatments discussed with the Commissioners are: 1) a 50/50 split of synergies in the first five years; 2) regulatory amortizations for Aquila; and 3) recovery of the actual cost of Aquila's high cost of debt.[9] Mr. Chesser and Mr. Downey did not just explain the mechanics of the transaction (the Black Hills piece of the deal, the Gregory acquisition subsidiary, etc.) to the Commissioners, they explained in detail what the joint applicants needed the Commission to approve once the issues were

[5] Exhibit 26, page 3.
[6] Chesser Deposition, page 39.
[7] Exhibit 121, page 2. Note the conspicuous lack of reference to any value, immediate or otherwise, for ratepayers.
[8] Exhibit 26, page 3.
[9] Chesser Deposition, pages 39-40.

before the Commission for a decision.

3. Great Plains needed to not only give the Commissioners this detailed information, but to get something in return. Great Plains wanted to have "conversations"[10] or "discussions"[11] with regulators; Mr. Chesser and Mr. Downey were going to lay out "the dimensions of the deal" and "listen for reactions."[12] They wanted to get "indications"[13] that the Commissioners would approve synergy sharing and regulatory amortizations. Mr. Chesser "felt **good**" about the reaction of the Commissioners; he understood that Aquila CEO Richard Green did as well.[14] After their meetings, Mr. Chesser testified that he and Mr. Green "had a general conversation that said that we both had a **favorable** impression from the meetings."[15] Mr. Green went even farther: he said that Mr. Chesser reported back "similar **support**" from both Kansas and Missouri regulators.[16] "Good" and "favorable" and "support" are not difficult words. They are commonly used and commonly understood. All of them are on the positive side of neutral. Mr. Chesser told the Commissioners about the ratemaking treatment Great Plains needed from the Commissioners, and got the positive reaction he was listening for.

4. The Joint Applicant's own documents show that these were not simply informational briefings. Great Plains needed a "takeaway" from the meetings. It needed indications that synergy sharing and regulatory amortizations **would be approved** by the

[10] Exhibit 105, page 11.
[11] Exhibit 101, page 3.
[12] Chesser Deposition, pages 63, 125.
[13] Exhibit 302, page 1.
[14] Chesser Deposition, page 127; emphasis added.
[15] Chesser Deposition, page 139; emphasis added.
[16] Exhibit 203, page 1; emphasis added.

Commissioners. In an email dated November 22, 2006 from Rick Green to the Aquila board, Mr. Green stated:

> Before signing a definitive agreement, [Great Plains] will seek informal **indications from the Missouri Public Service Commission that they will be allowed** to retain a "significant" portion of synergies as well as extend their Iatan II regulatory compact to Aquila's Iatan II interest….
> (Exhibit 302, page 1).4.

5. These discussions with regulators were so critically important that they share equal weight with the due diligence efforts:

> The result of the Phase II due diligence and discussions with regulators could result in one of three outcomes. We could confirm our original bid range and finalize a bid within that range, we could reduce or increase our original bid, or we could decide not to proceed with a final bid submission.[17]

Thus the transaction and the attendant ratemaking treatment, as presented in the Joint Application, are structured as they are because both the feedback from Commissioners and the due diligence was positive. Because of the favorable reaction from each of the Commissioners (and from its due diligence), Great Plains was encouraged to proceed with a final bid for Aquila.

STATEMENT OF THE LAW

6. Public Service Commissioners exercise quasi-judicial power and are subject to the same rules of conduct that apply to the judiciary.[18]

[17] Exhibit 101, page 3.

[18] "[T]he courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them." Union Electric Co. v. Public

7. Supreme Court Rule 2, Code of Judicial Conduct, Canon 3B(7)[19] requires a judge to accord to every person legally interested in a proceeding or his lawyer a full right to be heard according to the law and, except as authorized by law, to neither initiate nor consider *ex parte* **or other communications concerning a pending or impending proceeding.**

8. Canon 3E(1) states that a judge shall recuse in a proceeding in which his partiality might reasonably be questioned. Furthermore, commentary to 3E(1) makes it clear that a judge must disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

9. Canon 3B(7) outlines the evidence a judge can lawfully hear. Specifically, the rule provides that a judge must not independently investigate facts in a case and must consider only the evidence presented.

10. In Moore v. Moore, 134 S.W.3d 110, (Mo App S.D. 2004), a family court Commissioner without notice to the parties directed an independent investigation and report and used this *ex parte* communication made outside the presence of the parties as a basis of his decision regarding child custody. The appeals court emphasized the importance of the appearance of impropriety. While the Commissioner thought he was impartial, it was the appearance of impartiality that governs recusal. Litigants are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial.

Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979) [the "Slavin case"].

[19] All citations to Canons herein refer to the Code of Judicial Conduct.

The test for recusal is not whether the court is actually biased or prejudiced, but rather, whether a reasonable person would have a legitimate basis to find an appearance of impropriety and thereby doubt the impartiality of the court.

11. In McPherson v. United States Physicians Mutual Risk Retention Group, 99 S.W.3d 462 (Mo App W.D. 2003), the Court said "A judge's impartiality might reasonably be questioned if a reasonable person would have a factual basis to doubt the judge's impartiality. Graham v. State, 11 S.W.3d 807, 813 (Mo. App. 1999)" The public's confidence in the judicial system is the paramount interest. Canon 3(E)(1) does not limit recusal to instances of actual bias, but is much broader. Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 248, 246 (Mo. App. 1999). "'No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit [a] case in a court where the litigant sincerely believes the judge is . . . prejudiced.'" State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943 (Mo. banc 1986) quoting State ex rel. McNary v. Jones, 472 S.W.2d 637, 639 (Mo.App. 1971).

12. Missouri courts have held that the appearance of impartiality is scarcely less important than actual impartiality:

> Acts or conduct which give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct which inexorably bespeak partiality.
>
> As emphasized in State v. Lovelady, 691 S.W.2d 364, 365[1] (Mo.App. 1985), the law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or his prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he is so. State v. Garner, 760 S.W.2d 893, 906

(Mo. App. 1988).

13. The combination of a judge's questions and statements may create an appearance of impropriety. See, Williams v. Reed, 6 S.W.3d 916 (Mo. Ct. App. 1999), at 922-23; McPherson at 490. There may be insufficient evidence of actual bias, but the question is whether the judge's impartiality might reasonably be questioned, not whether the judge was, in fact, biased. Robin Farms, 989 S.W.2d at 247.

14. In Smith by and through Smith v. Armontrout, 632 F.Supp. 503, 507, n.7 (W.D. Mo. 1986), Federal District Judge Scott Wright held that an *ex parte* conversation between a judge sitting on a case and a witness about the issues in the case improper:

> [W]hile Gerald Smith's case was pending before the Missouri Supreme Court in January, 1986, one of the judges on that court initiated *ex parte* communications with one of the psychiatrists who had examined Smith. Such *ex parte* contact not only violates that court's own canons of ethics, *see* Mo.S.Ct.R. 2, Canon 3(A)(4) (prohibiting judges from initiating *ex parte* communications concerning pending proceedings), it also strikes at the very heart of the adversarial system. Nothing can undermine the fairness of a judicial proceeding more than when a judge turns his back on the adversary system -- where each side has an equal opportunity to test its opponent's evidence by means of cross-examination – and conducts his own *ex parte* investigation of the facts. *See Reserve Mining Co. v. Lord*, 529 F.2d 181, 184-88 (8th Cir. 1975). Under these extraordinary circumstances, it clearly appears that the state court's conclusion concerning Smith's competency was not the product of a full and fair hearing.

15. Federal rule 28 USCS Section 455(a) provides that: “Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The relevant consideration under Section 455(a) is the appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855, (1988). “The

very purpose of 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg, at 2205. If a reasonable man or woman apprised of all of the circumstances would question the judge's impartiality, then an appearance of impartiality is sufficient to trigger recusal and thereby promote confidence in the judiciary by avoiding even the appearance of impropriety. Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994).

DISCUSSION

16. A reasonable person would understandably believe that these secret meetings and Great Plains' reliance on the reactions of the Commissioners during those meetings give a strong appearance of impropriety and partiality to the utility. Actual bias or partiality is not the issue, nor is it necessary in determining the appropriateness of recusal. Even an appearance of impropriety commands recusal.

17. The more significant and overriding consequences will be the damage done to the public's view of the Public Service Commission and the perception of a ratepayer's ability to obtain fair, just, and impartial hearing on the evidence and law.

18. Commissioners Murray, Appling and Clayton have conducted themselves in such a manner that their recusal is necessary. While a request for recusal would be appropriate, and the Commissioners should certainly concede that there is a marked appearance of impropriety and the public's faith in their impartiality has been destroyed, recusal would leave the case in limbo. With four Commissioners recused from the case, there would be no way for the Commission as a body to act. Relief could be neither granted nor denied. In this extraordinary circumstance, where a majority of the tribunal

is tainted by participation in secret discussions, outright dismissal is the most appropriate course. Whether or not any of the Commissioners intended anything inappropriate, that is not the controlling issue on whether they are required to recuse. Under the Canons of Judicial Conduct 2.03, Commissioners, like judges, must avoid even the appearance of impropriety. The test is whether a reasonable person would view the circumstances as having the appearance of partiality and impropriety. The Commissioners were briefed *ex parte* on what would be the contested issues in this case, for the express purpose of allowing one party to judge their reactions to those issues, and that party decided the reactions were favorable to its positions on those issues. Giving one party reason to believe it will receive favorable treatment on the issues is – by definition – a lack of impartiality. Even if Great Plains was wrong in its interpretation of the Commissioners' reactions, there is still the appearance of impartiality.

19. The secret discussions between the utility CEOs and the Commissioners puts the Commission and its decision-making process in a negative light, suggesting that utility companies have access to Commissioners not available to ratepayers and undue influence over those Commissioners. Given the Commissioners' positive reaction to Great Plains' regulatory support mechanisms, how can the public have any confidence that those Commissioners will now be neutral on those same issues? The simple answer is that it cannot.

20. There may be response to this Motion to Dismiss citing the “rule of necessity,” but that rule does not apply in this situation. The rule of necessity provides that if only one particular judge can hear a matter that must be adjudicated, that judge

will be allowed to hear the matter even if there is some cause to disqualify him. Here, the joint applicants caused the situation in which they deliberately and consciously compromised the impartiality of the tribunal. They should not now be able to use the rule of necessity to allow that apparently partial tribunal to nonetheless decide the issues. While dismissal may seem a harsh result, it is one that the joint applicants have brought upon themselves, and it is not unduly harsh when the public confidence in the Commission and its ratemaking process are at stake. Moreover, although the joint applicants have compromised the tribunal with respect to the issues that they briefed the Commissioners on and to which they got a positive reaction, a deal with substantially different parameters may not be so tainted.

WHEREFORE, Public Counsel respectfully requests that this matter be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered or emailed to all parties this 13th ay of December 2007.

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