

**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**

**RESPONSE TO NOTICE**

COME NOW the Office of the Public Counsel and the Industrial Intervenors (Ag Processing Inc a Cooperative, Sedalia Industrial Energy Users' Association and Praxair Inc.) and for their Response to Notice state as follows:

1. On April 21, 2008, shortly before the evidentiary hearing in this case resumed, Commissioner Gunn issued a Notice to Parties. The Notice stated that Commissioner Gunn was until April 16, 2008, an employee of the law firm that represents two of the Joint Applicants, but that Commissioner Gunn nonetheless intends to participate in this case unless concerns are raised by any of the parties. In his Notice, Commissioner Gunn directs that any party objecting to his participation "should file that objection in the case with its supporting reasons." Commissioner Gunn indicates that he may participate despite objections, but that he "will take [them] into consideration" in making his decision about participation.

2. With all due respect, and with some trepidation about offending a new Commissioner just two days into a six year term, respondents point out that the procedure Commissioner Gunn has set out in his Notice is inconsistent with the Judicial Canons. Canon 3.E(1)(b) provides:

A judge **shall** recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

...  
(b)... a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.... (emphasis added).

This Canon does not offer a judge the opportunity to direct parties to explain to him whether and why they might object to his participation, and then provide that judge with discretion to weigh those reasons and, in effect, determine his own qualification or disqualification. Rather it is phrased in the absolute: a judge **shall** recuse when a lawyer with whom he practiced law served on the case.<sup>1</sup> Surely the prohibition is even stronger when the lawyer with whom the judge practiced has been and still is one of the lead attorneys for one of the important parties in the matter, actively continues to represent that party in the case, continues to try issues, continues to file briefs, continues to argue motions before his former associate, employee or partner and, indeed, was sitting at counsel tables when Commissioner Gunn made his sole appearance in the proceeding.

3. Commissioner Gunn avers in his notice that he was in a separate office from the lawyers representing parties in this case, that he did not discuss the case with them, that his compensation was not directly tied to their participation in this case, and that he believes he could be impartial. Respondents have no present reason to doubt any of these averments, but they are not relevant because disqualification is mandatory pursuant to Canon 3.E(1)(b).

4. We are aware that Commissioner Gunn is apparently eager to sit in judgment on this case and, if he were to have participated, might have recognized that his sworn duty to protect the public interest required him to cast a vote to deny the authority sought in this case.

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<sup>1</sup> While Canon 3.F does allow for remittal of disqualification, the procedure for remittal does not permit a judge to solicit or seek remittal or waiver.

Nonetheless, the Judicial Canons do not permit any individual party or parties to waive mandatory disqualification, nor do they allow Commissioner Gunn to solicit or seek remittal of his disqualification.

WHEREFORE respondents respectfully submit this Response to Notice.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 23rd day of April 2008.

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