

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Great Plains Energy, Inc.'s )  
Acquisition of Westar Energy, Inc., and )  
Related Matters. )

**Case No. EM-2016-0324**

**STAFF'S RESPONSE TO GREAT PLAINS ENERGY'S  
MOTION FOR RECONSIDERATION**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and hereby responds to *Great Plains Energy's Motion for Reconsideration*, urging the Commission to **DENY** the same for the reasons set forth below:

***GPE's Verified Motion:***

1. On June 10, 2016, Great Plains Energy, Inc. ("GPE"), filed its *Verified Motion for Reconsideration* in response to the Commission's *Order Granting Leave To File Reply Late, Granting Staff's Motion To Open An Investigation, and Directing Filing* issued on June 8, 2016. Therein, GPE prayed as follows:

GPE requests that the Commission bifurcate the legal question regarding the Commission's jurisdictional authority to approve GPE's acquisition of Westar Energy, Inc. ("Westar"), a Kansas public utility from its receipt and ultimate disposition of the report resulting from Staff's investigation. GPE requests that the Commission issue its order on the legal question no later than July 1, 2016. This is the only aspect of the Commission's June 8 Order for which GPE seeks reconsideration.<sup>1</sup>

2. Why does GPE seek reconsideration of this aspect of the Commission's *Order*? GPE explains,

In significant acquisitions such as this Transaction, uncertainty of process, particularly of regulatory approval, is disruptive to the financial markets and specifically to investors in GPE and Westar. Reasonably

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<sup>1</sup> *GPE's Verified Motion for Reconsideration*, p. 1 (this paragraph is not numbered).

expeditious resolution of the legal question regarding the Commission's jurisdictional authority to approve the Transaction is essential to avoid financial harm to GPE and/or Westar in terms of the ability to both finance and close the Transaction.<sup>2</sup>

3. GPE goes on to say that "prompt resolution of this legal question will not hinder or compromise Staff's investigation in any way"<sup>3</sup> and that "[t]he legal issues relating to the Commission's jurisdictional authority to approve the Transaction have been fully briefed by GPE, Staff and Public Counsel. If, after further consideration of the five separate pleadings that have already been submitted on that legal question, the Commission has further questions regarding its approval authority, there is sufficient time between now and July 1 for the Commission to order supplemental briefing, oral argument or both."<sup>4</sup>

4. GPE "respectfully requests that the Commission issue its order on that legal question no later than July 1."<sup>5</sup>

#### ***Staff's Response:***

5. First of all, Staff wonders why the hurry? The Transaction is not due to close for a year, according to reports in the media.<sup>6</sup> GPE states, "Closing is expected to occur in the Spring of 2017."<sup>7</sup> As GPE correctly noted, the Commission has already put this matter on a fast track out of deference for GPE: "GPE also appreciates that in requiring the submission of Staff's report by July 25, the Commission has endeavored to

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<sup>2</sup> GPE's *Verified Motion for Reconsideration*, p. 4, ¶ 8.

<sup>3</sup> GPE's *Verified Motion for Reconsideration*, p. 4, ¶ 9.

<sup>4</sup> GPE's *Verified Motion for Reconsideration*, p. 3, ¶ 5.

<sup>5</sup> GPE's *Verified Motion for Reconsideration*, p. 4, ¶ 10.

<sup>6</sup> S&P Global Ratings, May 31, 2016. Ratings Direct: Great Plains Energy Inc. Ratings Affirmed, Outlook Revised To Negative On Proposed Acquisition Of Westar Energy: "The parties expect the transaction to close by mid-2017."

<sup>7</sup> GPE's *Verified Motion for Reconsideration*, p. 3, ¶ 9.

act expeditiously.”<sup>8</sup> For some reason, not explained in *GPE’s Verified Motion*, GPE cannot or will not submit its application to the Kansas Corporation Commission until the question of Missouri’s jurisdiction is resolved: “if the Commission fails to resolve the jurisdictional issue regarding approval authority or asserts jurisdiction to approve the Transaction, GPE will have lost six weeks.”<sup>9</sup> A footnote then points out that GPE and Westar expect to jointly file at the KCC on July 1, 2016, and that that agency must then determine the matter within 300 days.<sup>10</sup> That would appear to leave plenty of time for this Commission to take up Staff’s investigation report, including a memorandum of law regarding jurisdiction. In Staff’s experience, utility companies seeking regulatory approval generally file applications concurrently with every regulatory body that could possibly have any authority over the proposed transaction. Those agencies that determine that they do not, in fact, have sufficient contacts with the transaction in question then simply issue orders noting their lack of jurisdiction.<sup>11</sup> GPE and Westar have elected to not pursue this normal avenue in this case. Why is that? One can only speculate since GPE does not provide any guidance on the subject.

6. Second, the question of jurisdiction has hardly been “fully briefed.” Rather, the Commission has received pleadings written in haste, under deadlines. The Commission understands this point, which is why it has directed that Staff’s investigation report, due July 25, 2016, include a memorandum of law, an interval allowing a thorough and considered discussion of the law, supported by ample

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<sup>8</sup> *GPE’s Verified Motion for Reconsideration*, p. 3, ¶ 6.

<sup>9</sup> *GPE’s Verified Motion for Reconsideration*, pp. 3-4, ¶ 7.

<sup>10</sup> *GPE’s Verified Motion for Reconsideration*, p. 4, n. 1.

<sup>11</sup> GPE pleadings in this case list several examples of such orders issued by this Commission.

research. Staff suggests that no one will benefit from an over-hasty consideration of the complex legal question of jurisdiction in this case.

7. The question of jurisdiction is really, “jurisdiction to do what?” The Commission has already recognized that it has jurisdiction to investigate and to consider the possible deleterious effects of the proposed transaction on Missouri ratepayers. As the Commission put it, “The Commission has a duty to determine whether the transaction threatens Missouri ratepayers. If so, the Commission must also determine whether any appropriate remedy requires the Commission to have jurisdiction over the transaction.”<sup>12</sup> The issue of jurisdiction over the proposed transaction, to prohibit it or to impose conditions upon it, is not now before the Commission. The Commission recognized this, too:

Ruling on the motion does not require the Commission to determine its jurisdiction over the transaction. The transaction is not before the Commission in this action, no application for authorization of the transaction is pending in any other action, and neither Staff nor OPC has asked the Commission to bar the transaction. If the investigation substantiates a threat to Missouri ratepayers, remedies may be available other than ruling on the transaction.<sup>13</sup>

8. One point, at least, is clear: the question of jurisdiction to remedy any likely detriments to the interests of Missouri ratepayers should not be determined until the investigation designed to discover those detriments, if any, has been completed. For this reason, Staff must oppose GPE’s *Verified Motion for Reconsideration*, because it puts the cart before the horse. In fact, it would be improper for the Commission to take up the question of jurisdiction separately from the question of what action it might

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<sup>12</sup> *Order Granting Leave To File Reply Late, Granting Staff’s Motion To Open An Investigation, and Directing Filing*, p. 6.

<sup>13</sup> *Id.*

take because administrative tribunals are prohibited from addressing purely theoretical questions.<sup>14</sup>

9. Third, bifurcating the legal issue from the rest of Staff's investigation would certainly impede that investigation because, were the Commission to announce that it lacked jurisdiction to take certain remedial actions early in the investigation, Staff would necessarily tailor its inquiry to the areas where the Commission had determined that it could act. For this reason, too, Staff must oppose GPE's *Verified Motion for Reconsideration*.

### ***Conclusion:***

10. The proposed transaction, having an enterprise value in excess of \$12 Billion, is very large. In fact, it is almost three times the current value of GPE.<sup>15</sup> GPE already has debt of \$4.2 Billion.<sup>16</sup> Add to that the \$8.6 Billion GPE will pay for Westar and the \$3.6 Billion of Westar's debt that GPE will assume, and GPE will have debt of \$16.4 Billion.<sup>17</sup> The purchase price includes a large acquisition premium. All of these are matters requiring careful consideration of the public interest. News reports mention cost-saving synergies. Those synergies will have to be rich, indeed, to service a debt load as large as GPE will be left with. It may be that the proposed transaction, overall, will benefit the public; but that remains to be seen. It is already clear that the proposed transaction brings a significant risk of a credit downgrade, which means higher rates

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<sup>14</sup> ***State Tax Commission v. Administrative Hearing Commission***, 641 S.W.2d 69, 75 (Mo. banc 1982): "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise."

<sup>15</sup> GPE's current market capitalization is \$4.67 Billion, Yahoo Finance, retrieved June 13, 2016. \$12.3 Billion divided by \$4.67 Billion equals 2.633.

<sup>16</sup> Morningstar, retrieved June 13, 2016.

<sup>17</sup> Westar's current market capitalization is \$7.978 Billion, Yahoo Finance, retrieved June 13, 2016.

due to a higher cost of capital. This proposed transaction requires careful, thoughtful scrutiny.

**WHEREFORE**, Staff prays that the Commission will **DENY** GPE's *Verified Motion for Reconsideration*; and grant such other and further relief as the Commission deems just in the circumstances.

Respectfully submitted,

**/s/ Kevin A. Thompson**

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 13<sup>th</sup> day of June, 2016, on the Public Counsel and on counsel for GPE, KCPL and GMO.

**/s/ Kevin A. Thompson**