

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

MISSOURI ENERGY)	
CONSUMERS GROUP,)	
)	
Complainant,)	
)	
v.)	File No. EC-2017-0106
)	
WESTAR ENERGY, INC.,)	
)	
Respondent.)	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS,
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY DETERMINATION**

COMES NOW Respondent, Westar Energy, Inc. (“Westar Energy” or the “Company”), and, pursuant to 4 CSR 240-2.070(7) and 4 CSR 240-2.117(1), respectfully states the following to the Missouri Public Service Commission (Commission) as its Memorandum of Law in Support of Motion To Dismiss, or in the alternative, Motion for Summary Determination:

BASIS FOR DISMISSAL OR SUMMARY DETERMINATION

There is no genuine issue as to any material fact, and, as a matter of law, the Complaint must be resolved in favor of Westar Energy because Complainant has alleged no violation of any tariff, statute, rule, order, or decision in that:

- (1) Complainant relies on future conduct, as the transaction identified has not taken place;
- (2) Westar Energy does not own the generating facility identified by Complainant; and,
- (3) Even if the transaction described by Complainant were to take place, neither Westar Energy nor Westar Generating would “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, nor by any means, direct or indirect, merge or consolidate

such works or system, or franchises, or any part thereof, with any other corporation, person or public utility” in violation of Section 393.190, RSMo.

The standard for approval of Westar Energy’s Motion for Summary Determination requires a showing that: (1) there is no genuine issue as to any material fact; (2) that the moving party is entitled to relief as a matter of law as to all or any part of the case; and, (3) the Commission determines granting summary relief is in the public interest.¹

(1) COMPLAINANT RELIES ON FUTURE CONDUCT

Section 386.390.1, RSMo, allows complaints before the Commission regarding:

... any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission.

Further, Missouri law is clear that the power to issue a declaratory judgment is a judicial remedy that is not available to administrative agencies. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W. 2d 69 (Mo. banc 1982) More specifically, this Commission has "no power to declare or enforce any principle of law or equity." *Lightfoot et al. v. City of Springfield*, 361 Mo. 659, 669, 236 S.W. 2d 348, 352 (Mo 1951).

The Complaint rests on the following factual allegation:

On May 31, 2016, Terry Bassham, CEO of Great Plains Energy, announced to the Commission and OPC by email that GPE and Westar Energy, Inc. (“Westar”), had entered into an agreement for GPE to acquire the Topeka, Kansas-based Westar. GPE indicated it did not intend to seek Missouri Commission approval for the acquisition.

(Complaint, para. 11) There is no allegation that Westar Energy has sold the subject asset.

Moreover, the statute in question is self-policing in that it provides, in part, that “[e]very such

¹ See, Commission rule 4 CSR 240-2.117(E).

sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.”

There is no basis to allege a violation of this statute until a transaction has occurred, and if it does occur in violation of 393.190, RSMo, it is void. Given that there is no violation alleged, the Commission has no authority to issue declaratory judgments, and the statute in question already provides a remedy, it is in the public interest to issue a summary determination in favor of Westar Energy and avoid the unnecessary use of the resources of the Commission, Staff, and the Company.

(2) WESTAR ENERGY DOES NOT OWN THE GENERATING FACILITY IDENTIFIED BY COMPLAINANT

The Complaint is premised on the fact that “Westar Energy owns 40% of the State Line Combined Cycle Plant in Joplin, Missouri” and “the Commission has granted Westar a Certificate of Convenience and Necessity. . . .” (Complaint, para. 10)

As can be seen from the *Order Approving Application to Transfer Assets and Order Granting Certificate of Convenience and Necessity* cited by Complainant, the Commission ordered, in part, that “Westar Generating, Inc. is granted a certificate of convenience and necessity” (*See In the Matter of the Application of The Empire District Electric Company*, Case Nos. EM-2000- 145 and EA-2000-153, (*Order Approving Application to Transfer Assets and Order Granting Certificate of Convenience and Necessity*, issued May 26, 2000) 9 Mo.P.S.C.3d 136)

Westar Generating, Inc. continues to own this interest in the State Line unit. This ownership interest does not provide the Commission with jurisdiction over Westar Energy.

(3) NEITHER WESTAR ENERGY NOR WESTAR GENERATING HAS INDICATED IT WILL “SELL, ASSIGN, LEASE, TRANSFER, MORTGAGE OR

**OTHERWISE DISPOSE OF OR ENCUMBER THE WHOLE OR ANY PART”
WESTAR GENERATING’S INTEREST IN THE STATE LINE UNIT**

The proposed transaction referred to by Complainant is more fully described as follows:

On May 29, 2016, Great Plains Energy (“GPE”) entered into an Agreement and Plan of Merger (“Agreement”) with Westar Energy to acquire 100% of the stock of Westar Energy. The Agreement provides that “Merger Sub” (which has now been officially named “GP Star, Inc.” and 100% of the outstanding equity interests of which will be owned by GPE) will be merged with and into Westar Energy, with Westar Energy emerging as the surviving corporation. Immediately following the merger, GP Star, Inc. will cease to exist, and Great Plains Energy will become the owner of all of the capital stock of Westar Energy.

(Material Facts, para. 6; Verified Application, File No. EC-2017-0106, para. 6)

Westar Generating is, and will continue to be, a wholly owned subsidiary of Westar Energy. There is no change even proposed in regard to the ownership of the State Line unit, or the ownership of Westar Generating.

The only change proposed regards the ownership of Westar Generating’s parent. The Commission has found in the past that changes in ownership at that level do not invoke the Commission’s jurisdiction.

The Commission “has consistently found that the Commission does not have jurisdiction over transactions at the holding company level.” See *Order Dismissing Application for Lack of Jurisdiction, In re Advanced TelCom, Inc. and Shared Commun. Services, Inc.*, No. XM-2005-0111 (2004). The Commission has consistently held this position in regard to telecommunications, electrical, gas, water or sewer industries.

When SBC Communications acquired Ameritech in 1998, the PSC found that “there is nothing in the statutes that confers jurisdiction to examine a merger of two nonregulated parent corporations even though they may own Missouri-regulated telecommunications

companies.” *In re Merger of SBC Commun., Inc. and Ameritech Corp.*, Report and Order, Case No. TM-99-76, 1998 Mo. PSC LEXIS 48 (Oct. 8, 1998). *See also Order Closing Case, In re Proposed Merger of Verizon Commun., Inc. and MCI, Inc.*, Case No. TM-2005-0370 (May 3, 2005).

Similarly, when Ameren Corporation acquired Cilcorp, Inc., a holding company that owned Central Illinois Light Company, an Illinois public utility, the Commission declined to exercise jurisdiction over the transaction. It specifically rebuffed Staff’s invitation to review joint dispatch issues. *See Order Closing Case, In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp.*, No. EO-2002-1082 (June 13, 2002).

A variety of other holding company transactions by telecommunications, water, and sewer companies is consistent with these orders. *See Order Closing Case, In re Proposed Acquisition of Mo.-Am. Water Co. and Am. Water Works Co. by the German Corp. RWE AG*, Case No. WO-2002-206 (2001); *Order Closing Case, In re United Water Mo., Inc. for Authority for Lyonnaise American Holding, Inc. to Acquire the Common Stock of United Water Resources, Inc.*, Case No. WM-2000-318 (Dec. 7, 1999); *Order Dismissing Application for Lack of Jurisdiction, In re Joint Application for Transfer of Control of Eclipse Telecomm. Inc., IXC Comm. Serv. Inc. and Telecom One, Inc. to Cincinnati Bell, Inc.*, Case No. TM-2000-85 (Oct. 28, 1999); *Order Denying Motion to Reconsider Order Closing Case, In re Proposed Merger between GTE Corp. and Bell Atlantic*, Case No. TM-99-261 (Apr. 22, 1999); *Order Regarding Jurisdiction and Dismissing Application, In re Commun. Central of Georgia, Inc. and Davel Commun. Group Inc. for Approval of Merger and Transfer of Control*, Case No. TM-98-268 (Jan. 22, 1998); *Order Dismissing Application, In re Application of ALLTEL Commun., Inc. to*

Merge with Certain Wholly Owned Subsidiaries of ALLTEL Mobile Commun., Inc., Case No. TM-98-153 (Dec. 24, 1997).

In its Report & Order that declined to review the merger of holding companies that owned Missouri-American Water Co. and St. Louis County Water Co., the Commission agreed with Staff's position that since "the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company," "...the Commission should follow this practice now, and decline to assert jurisdiction." *See Report & Order, In re Merger of American Water Works Co. with Nat'l Enterprises Inc. and the Indirect Acquisition by American Water Works Co. of St. Louis Water Co.*, No. WM-99-224, 1999 Mo. PSC LEXIS 183 at *3 (Mar. 23, 1999).

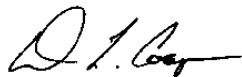
The proposed transaction concerns the merger of two non-regulated parent companies. As such, there is no jurisdiction over the Transaction based on Westar Generating's ownership interest in the State Line unit.

WHEREFORE, Westar Energy prays the Commission grant this motion to dismiss, or in the alternative, its motion for summary determination, as well as such other relief as the Commission deems reasonable and just.

Respectfully submitted,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Dean L. Cooper MBE #36592
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
Phone: (573) 635-7166
E-mail: dcooper@BrydonLaw.com

ATTORNEYS FOR WESTAR ENERGY, INC.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 31st day of October, 2016, to:

Missouri Public Service Commission
Governor's Office Building
Jefferson City, Missouri 65102
staffcounsel@psc.mo.gov

Office of the Public Counsel
Governor's Office Building
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

David Woodsmall
MECG
David.woodsmall@woodsmalllaw.com

John B. Coffman
Consumers Council
john@johncoffman.net

