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**

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

On July 1, 2008 the Commission issued its Report and Order in this case. That order is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons:

1. The Commission's decision to hear evidence about the Iatan projects but not the LaCygne projects was arbitrary and capricious. The Commission made the following ruling about evidence concerning LaCygne:

> Q. [By Mr. Dottheim] Will all of the LaCygne 1 environmental enhancements be completed within the time frame of the KCPL regulatory plan?
>
> MR. ZOBRIST: Judge, I'm going to interpose an objection. As I understand the Commission's ruling, it was that the interrelationship of the Iatan projects with GPE's acquisition of Aquila was to be explored in this session, not other projects of the CEP. So I believe this is not relevant to the inquiry that the Commission permitted us -- permitted Staff to inquire into at this time.
>
> JUDGE STEARLEY: Mr. Dottheim, your response?
>
> MR. DOTTHEIM: Well, I believe it is -- it is relevant. It's related to the comprehensive energy plan of which Iatan 1 and 2 projects are parts and LaCygne 1 is another principal part.
>
> JUDGE STEARLEY: Mr. Zobrist, any further?
>
> MR. ZOBRIST: I have nothing further to add.
>
> JUDGE STEARLEY: Okay. I believe that is starting to exceed the scope of our limitations imposed last week, Mr. Dottheim. I'm going to sustain the

objection.

MR. MILLS: Judge, may I ask a clarifying question?

JUDGE STEARLEY: Certainly.

MR. MILLS: Is the scope -- well, I think I -- perhaps I understand this from the ruling. Is the scope limited to solely construction projects at Iatan 1 and Iatan 2 and we're not allowed to inquire into other construction projects within the comprehensive energy plan?

JUDGE STEARLEY: I believe we restricted to those between the Iatan projects and the acquisition of Aquila.

MR. MILLS: Okay. So any other construction expenditures or capital expenditures of KCPL are off limits?

JUDGE STEARLEY: It would depend on the nature. I mean, I will take up individual objections made to individual questions and how those might relate to the creditworthiness of the company –

MR. MILLS: Okay.

JUDGE STEARLEY: -- but I'm -- but I'm following this as the general guideline as -- in

which we restricted the scope of the testimony.

MR. MILLS: Okay. And so just so I'm clear when I get to my questioning, any questions

about LaCygne are off limits?

JUDGE STEARLEY: I'll take up any objections at that time to your questions.

MR. MILLS: Okay.

JUDGE STEARLEY: I'm not sure the context of questions you'll be asking, Mr. Mills, so

I'm not going to give you a premature ruling on anything.

MR. MILLS: Okay. I -- okay. Then may I ask for a clarification of the ruling on Mr. Dottheim's question about LaCygne, the basis for disallowing that question?

JUDGE STEARLEY: I believe Mr. Zobrist stated it succinctly, that we were talking about -- or it allowed the interrelationship between the Iatan projects and Great Plains Energy acquisition, and Mr. Dottheim's question had strayed into the territory beyond the scope of that limitation. We can read back Mr. Dottheim's question in particular --

MR. DOTTHEIM: Judge?

JUDGE STEARLEY: -- if you wish. Yes, Mr. Dottheim.

MR. DOTTHEIM: If I could also direct you to issue No. -- No. 10 on the second list of issues and order of opening statement, witnesses and cross-examination. It's not labeled by a one or a two, but it's on page 9.

JUDGE STEARLEY: I'm not finding my copy, Mr. Dottheim. Could you bring yours forward to me?

MR. DOTTHEIM: Yes. I don't have a second copy but I don't think you'll find the words Iatan 1 or Iatan 2 or just the word Iatan. I think the reference is to the Kansas City Power & Light regulatory plan which LaCygne 1 is part.

MR. ZOBRIST: Well, Judge, that -- that is absolutely correct. However,

> Great Plains and KCPL filed a motion to limit the scope of the evidence, and that was sustained by the Commission with the exception of the interrelationship between the Iatan projects and Great Plains Energy's acquisition of Aquila. So I understood that the Commission's ruling narrowed the breadth of that issue that Mr. Dottheim is referring to.
>
> JUDGE STEARLEY: And that is my position as well. We did limit the scope, Mr. Dottheim. Thank you.
>
> TR. 241-1412

Both Iatan and LaCygne are parts of the Comprehensive Energy Plan approved in Case No. EO-2005-0329, and the failure of KCPL to complete the LaCygne projects as set out in the Comprehensive Energy Plan has as much bearing on the financial condition of KCPL/GPE and its ability to achieve synergy savings as does its progress on the Iatan projects. There was no rational basis to hear evidence about one but not the other. KCPL/GPE conceded that the projects at Iatan 1 and LaCygne were the same:

> Q. Now, from a -- sort of a high-level perspective, what -- what are Iatan 1 projects that are included in this CEP?
>
> A. Included is an SCR bag house and scrubber.
>
> Q. And what are the LaCygne projects included in the CEP?
>
> A. Same.
>
> TR. 2438

2. At pages 19-20, the Commission cites to a number of cases to support its conclusion that it can lawfully exclude evidence – even through an offer of proof – if it believes the evidence would cause "unfair prejudice, confusion of issues, delay, waste of time, or cumulativeness." None of the case cited have anything to do with cases heard by an administrative agency.

In Liles,[1] the Southern District Court of Appeals reviewed the lower court's ruling in a criminal jury trial:

> The trial court has broad discretion respecting the relevance and admissibility of evidence. State v. Adams, 229 S.W.3d 175, 186 (Mo.App. 2007).

[1] State v. Liles, 237 S.W.3d 636, 638-639 (Mo. Ct. App. 2007)

It is granted discretion because of concerns about prejudice, confusion of the issues, and interrogation that is only marginally relevant. *Id*. An appellate court must clearly find an abuse of such discretion to interfere with a trial court's evidentiary ruling. *Id*. at 186-87.

Evidence, although logically relevant, is inadmissible absent legal relevance -- i.e., probative value outweighing its risks of unfair prejudice, confusion of issues, misleading the jury, delay, waste of time, or cumulativeness. State v. Anderson, 76 S.W.3d 275, 276 (Mo. banc 2002). This means logically relevant evidence is excluded unless its benefits outweigh its costs. *Id*. Further, with respect to the admission of evidence, appellate courts review for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Ibid*. at 277.

Stevinson[2] was also a jury trial:

Respondent property owners brought an action claiming a temporary nuisance against appellant landfill operators in regard to the operation of its landfill. A jury returned a verdict in favor of respondents. On appeal, the court reversed the verdict. The court held that in an action for damages for a temporary nuisance, **it was error for the trial court to allow evidence and instruct the jury on reduction in fair market value of respondents' property. Reduction in fair market value constituted permanent damages, which were not recoverable for a temporary nuisance.** The court also held that the nuisance claim was a compulsory counterclaim and therefore, it was error for the trial court to allow evidence of damages occurring before respondents filed their counterclaim for abuse of process and malicious prosecution in appellant's prior defamation action. Moreover, the court ruled that the trial court erred in admitting a deed into evidence as an admission by appellant of its intention to create a nuisance. The court concluded that the language of the deed failed to establish intent to create a nuisance. The case was remanded for a new trial. *Ibid*.; emphasis added.

Cohen[3], although perhaps not a jury trial, involved a very narrow question of law:

In one of his points on appeal, Husband asserts the trial court erred in finding Glen Hancock's relationship with Wife "irrelevant" to the proceedings. Husband claims there was substantial evidence presented that Mr. Hancock was living with Wife and that Wife was using her income to support Mr. Hancock. Thus, Husband concludes, this evidence should have been considered by the trial court because it is "very relevant to the issue of maintenance."

…

In this case, the trial court specifically found that because "Glen Hancock is neither married to [Wife] nor providing support to [Wife], his status is irrelevant

[2] Stevinson v. Deffenbaugh Indus., 870 S.W.2d 851 (Mo. Ct. App. 1993)

[3] Cohen v. Cohen, 178 S.W.3d 656, 664-665 (Mo. Ct. App. 2005)

> to this cause in all respects." In Brown v. Brown, 673 S.W.2d 113, 116 (Mo. App. 1984), this court found that because support from a cohabitant is not "property" of a spouse seeking maintenance and is irrelevant to the issue of a spouse's ability to support herself through appropriate employment, "evidence of support by the cohabitant cannot be utilized to deny a spouse a right to maintenance." Thus, this court finds that the trial court did not abuse its discretion in finding that Mr. Hancock is irrelevant to the case concerning Wife's right to receive maintenance.

Midwest[4] was also a jury trial and establishes the proposition that "prejudicial" as that term applies to evidence **only** has meaning in the context of a jury trial:

> Village now contends the trial court erred in overruling its objection and in denying its new trial motion because "testimony that Village had not paid the bills of the project architect" was "irrelevant and inflammatory." Village argues that "Midwest wanted to prejudice the jury against Village by introducing wholly irrelevant testimony that would cause the jury to believe that Village was some type of deadbeat that did not pay its bills."
>
> In support of its argument, Village calls our attention to Conley v. Kaney, 250 S.W.2d 350 (Mo. 1952), for the proposition that a trial court should exclude evidence pertaining to collateral matters if it would "cause prejudice wholly disproportionate to the value and usefulness of the offered evidence," *Id*. at 353, and Slusher v. Jack Roach Cadillac, Inc., 719 S.W.2d 880 (Mo.App. 1986), in which the court stated that **evidence is prejudicial "if it tends to lead the jury to decide the case on some basis other than the 'established propositions in the case.**'" Id. at 882.

Boehmer[5] was also a jury trial and the appeals court affirmed the trial court's admission of evidence:

> Since the evidence was admissible for one valid purpose, it could not properly be excluded; no specific limitations concerning its purpose or effect were requested, so we do not have that question before us. It is possible that a slightly different phase of the question would have been developed if counsel had specifically objected to the testimony of Dr. Holt's experiments on the ground that they were made after the plaintiff's last operation; we find no such objection. Moreover, this was evidence on a collateral matter in which the trial court has a large discretion.
> …
> We note again that this case has come to us upon questions on the admissibility

[4] Midwest Materials Co. v. Village Dev. Co., 806 S.W.2d 477, 495 (Mo. Ct. App. 1991)

[5] Boehmer v. Boggiano, 412 S.W.2d 103, 110 (Mo. 1967)

of evidence, -- and that is what we have ruled upon.

Barrett was also a jury trial, and it simply cites to Boehmer:

Personal representatives also claim under their first point that they were entitled to present evidence on the circumstances of the disposition of their mother's assets to Carmen Flynn because Carmen testified that they asked about Demme, Jr.'s assets at his funeral. This, they contend, **placed them in a bad light before the jury** as greedy and uncaring. We find no abuse of discretion because the trial court has large discretion in determining admissibility of evidence on a collateral matter. Boehmer v. Boggiano, 412 S.W.2d 103, 110 (Mo. 1967).

…

In addition to finding no abuse of discretion on this account we observe that the rejected testimony related to the personal representatives in their individual capacity and not as personal representatives.

Barrett v. Flynn, 728 S.W.2d 288, 293 (Mo. Ct. App. 1987)

In several of the cases cited by the Commission, the appeals court upheld the trial court's decision to allow evidence, and so give little support to the Commission's decision to not allow an offer of proof. Furthermore, all of the cited cases dealt with much narrower questions than the one faced by the Commission here.

3. The second full paragraph on page 20 is almost a verbatim cite from Cohen, except it leaves out one complete sentence that appears in the middle of the Cohen paragraph. The Commission said:

> The fact-finder's rulings will not be disturbed by an appellate court unless an abuse of discretion is shown. "An abuse of discretion is shown when the trial court's ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration."
> Report and Order, page 20; citations omitted.

Cohen said:

> The trial court is granted broad discretion in determining the relevance of evidence and the trial court's rulings will not be disturbed by this court on appeal unless an abuse of discretion is shown." **"Evidence is considered relevant if it tends to prove or disprove a fact in issue or corroborates other relevant evidence."** Id. "An abuse of discretion is shown when the trial court's ruling is 'clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'"
> Cohen, supra, at 664; emphasis added; citations omitted.

4. The Commission erred when it stated that:

> Additionally, Staff launched an investigation into the codes of corporate conduct of the Applicants, with particular emphasis on the companies' policies regarding gifts and gratuities apparently out of an interest to determine if there was any merit to the hearsay allegations contained in the anonymous letters directed to the Commission.

There is no evidence in the record that Staff's investigation was "launched" based on the anonymous letters to which the Commission refers. The investigation of gifts and gratuities was begun before the letters arrived.

5. A basic problem with the Commission's various rulings on issues that were mentioned in the anonymous letters is that the Commission treated any issue that happened to be raised in anonymous letters as "hearsay" simply because it was raised in those letters. A relevant issue does not become relevant, and the sworn testimony of a witness about matters within his ken do not become hearsay simply because they have been mentioned in anonymous letters. As Public Counsel pointed out to the Presiding Officer, if such were the case, any party could remove problematic issues from any case just by arranging to have anonymous letters mentioning those issues delivered to the Commission. (TR. 2108). It is unfortunate that, in its haste to file a list of issues, one overworked party (the Commission Staff) listed two important issues under a somewhat misleading heading. But such a formatting choice does not frame the

issues. See paragraph 7 below.

6. The Commission notes that Staff planned to call 15 witnesses on what the Commission refers to as "the Iatan construction issues," citing to Issue X in Staff's Second List of Issues. (Report and Order, page 20). Those issues are shown as:

> **X. Additional Amortization / Credit Worthiness – Hearing Days: April 30 – May 1**
>
> Is the credit worthiness of KCPL and Aquila as a result of the GPE acquisition of Aquila dependent on the expectation that GPE/KCPL will seek and the Commission will authorize a regulatory plan similar to that contained in the KCPL Stipulation and Agreement in Case No. EO-2005-0329 subsequent to Commission authorization of GPE's acquisition of KCPL?
>
> If yes, will KCPL's credit worthiness, and thereby the purpose of the KCPL Regulatory Plan, be negatively affected if Aquila is unable to obtain such a Regulatory Plan?
>
> Is the current expected cost and schedule outcome relating to KCPL's infrastructure commitments from the Case No. EO-2007-0329 Regulatory Plan an indication of GPE and KCPL's ability to complete the acquisition transaction in a manner that is not detrimental to the public interest?
>
> Is KCPL's creditworthiness affected by GPE's decision not to seek recovery from Missouri ratepayers of any of the debt repurchase costs of Aquila's existing debt that GPE will refinance post-closing?

7. The Commission refers to the "anonymous allegations issue" (page 20). Nothing in the record indicates that there is an "anonymous allegation issue." The Staff's issue list reads:

> **XI. Anonymous Public Allegations/Comments Related to Proposed Acquisition – Hearing**
> Days: May 2 - 5
> (a) Would the adoption of GPE/KCPL's gift and gratuity practice for Aquila be detrimental to the public interest?
> (b) Does KCPL have adequate control of the Iatan projects to be able to operate the nondispatch functions of Aquila in addition to those of KCPL in a manner not detrimental to the public interest?
> (c) 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?

There is nothing in either (a) or (b) that directly relates to the anonymous letters; they are important issues with respect to an analysis of whether the merger will be detrimental to the merger. The Commission's **sole basis** for finding "wholly irrelevant" any evidence on these two issues is that they were listed by the Staff under the heading that mentions anonymous allegations. (TR. 2107-2109)

8. The Commission's discussion at pages 21-22 is premised on the mistaken notion that parties wanted to introduce evidence about the anonymous letters themselves, when what the parties actually wanted to do was introduce evidence about issues that happened to be mentioned in the letters. No party had the anonymous letters marked as exhibits; no party attached them to its testimony. There is absolutely nothing in the record – except for the one heading in the List of Issues filed by Staff – that indicates that any party was planning to do anything with the anonymous letters. The Commission states that "Having sworn competent testimony in the record is certainly superior to any hearsay letters or testimony surrounding them." But the Commission refused to allow "sworn competent testimony" on issues that happened to be mentioned in the letters.

The Commission cites to Marco Sales[6] for the proposition that it should not rely on hearsay, and Public Counsel agrees that the Commission should not so rely. But Marco Sales dealt with a situation in which the Commission used as the "linch-pin" of its decision hearsay testimony of a sworn witness. Here, the Commission never allowed the Staff[7] to call witnesses, so it is only rank speculation that their testimony would have been hearsay. In fact, several witnesses did testify on other issues, and their testimony establishes that they are certain to have

[6] State ex rel. Marco Sales, Inc. v. Public Service Com., 685 S.W.2d 216 (Mo. Ct. App. 1984)

[7] Although the Staff's List of Issues shows that Staff planned to call these witnesses, all parties would have been free to cross-examine them, so the Commission's refusal to allow these witnesses to testify detrimentally affected Public Counsel as well as Staff and other parties.

direct knowledge of the issues on which Staff sought to call them. For example, KCPL/GPE witness Lora Cheatum has direct responsibility in the area of gifts and gratuities practices, and KCPL/GPE witness Terry Foster has direct responsibility for the Iatan project.

9. The Commission cites Roorda[8] for the proposition that it is not a due process violation to deny a party the opportunity to make an offer of proof if the evidence sought to be offered is wholly irrelevant, repetitious, privileged, or unduly long. Roorda says:

> In his third point, Roorda argues that the Board's decision must be reversed because he was denied procedural due process and his right to a fair hearing, in that he was not given an opportunity to make certain offers of proof during the hearing, as required by § 536.070(7), which states that, in any contested case:
>
> > Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, unless it is wholly irrelevant, repetitious, privileged, or unduly long.
>
> We disagree.
>
> The City argues that the Board did not err in refusing to accept Roorda's offers of proof because under the express terms of § 536.070(7), they are not required to be received as to evidence which is "wholly irrelevant, repetitious, privileged, or unduly long." The evidence about which Roorda complains, claims the City, falls within one or more of those exclusions since (1) it was wholly irrelevant; (2) it would require the Board to examine the private, closed personnel records of Department employees other than Roorda; and (3) it would have taken an unduly long amount of time to receive the evidence concerning other allegedly similar incidents of prohibited but unpunished secretly-recorded conversations, and to establish the proper foundation as to whether they were sufficiently similar to be even remotely material and probative.
>
> Roorda's brief makes it clear that the evidence about which he complains in this point is the same as that referred to in his second point. As illustrated by our discussion of that point, the nature and extent of this excluded evidence was sufficiently explained and preserved for appellate review during the hearing, either in the testimony that was presented or in the numerous narrative and documentary offers of proof and other statements Roorda's attorney was permitted to make during the hearing before the Board. We have already held that this evidence was properly excluded by the Board as "irrelevant" under § 536.070(8). Since it was "wholly irrelevant" under § 536.070(7) as well, the Board did not

[8] Roorda v. City of Arnold, 142 S.W.3d 786, 799 (Mo. Ct. App. 2004)

> abuse its discretion or otherwise err in refusing Roorda's requests to make further offers of proof. Point denied.

As noted above, the Roorda court had already determined that the evidence was wholly irrelevant, so it was proper to deny the offer of proof. The court found:

> In particular, the Board's hearing officer correctly ruled that the evidence offered by Roorda as to Chief Fredeking's subjective motives in ordering Roorda's termination, including his alleged personal animosity towards Roorda, was not relevant and had no bearing on any of the issues before the Board for its determination. In Heinen v. Police Personnel Board of Jefferson City, 976 S.W.2d 534 (Mo. App. W.D. 1998), the hearing officer refused to allow the police officer who had been discharged (Heinen) to elicit, on cross-examination, certain testimony from the police chief who fired him (Brewer) in order "to prove that Brewer had a continuing problem with inability to control his temper in his relationships with subordinates, and that the real reason he had terminated Heinen was out of personal animosity." Id. at 542. This court proceeded to reject Heinen's procedural due process claim as follows:
>
> Brewer's subjective motive in ordering Heinen's termination was irrelevant to the issue before the Board. The sole issue was whether or not Heinen had failed to conduct himself in a manner consistent with good behavior and efficient service. Chief Brewer's motives were irrelevant to the question before the Board.
>
> Id. So it is here. It simply does not matter that Chief Fredeking may have been intensely displeased with Roorda for other reasons, or that Roorda may also have committed other acts of misconduct sufficient to independently justify his termination, as none of that evidence would have refuted the charges against him in any way and all of it was irrelevant. It was enough that the Board properly found, on the basis of competent and substantial evidence presented to it, that Roorda did what he was alleged to have done by the City in the June 18 Notice and June 20 termination letter, and that dismissal was an authorized punishment for those offenses.

10. The Commission, without ever hearing even an offer of proof, concludes that any evidence would have only contained “a small kernel of relevant evidence.” In Roorda, the central question was “Did Roorda take actions that should get him fired?” As a result, Roorda’s attempts to interject the question of “Does the person firing me have a grudge?” clearly would have lead to wholly irrelevant evidence. Even if Roorda had been able to prove beyond a shadow of a doubt that the person firing him had a grudge, that would not have affected the outcome of his case at all. Here the central question is “Weighing all the potential detriments

and all the potential benefits, is this merger not detrimental to the public interest?" The Commission completely shut out evidence – even an offer of proof – of potential detriments. There is no basis for concluding that the evidence excluded would have included only a kernel of relevant evidence. Furthermore, the two Commissioners who voted in favor of the Report and Order said in open meetings that they found the decision to be "a very close call." Without examining every kernel of evidence about potential detriments, it is impossible to say that they made the right call.

11. The Commission, more than a month after ruling that an offer of proof would not be allowed because the evidence would have been "wholly irrelevant," suddenly finds new reasons to support its decision to deny the offer of proof. At pages 24-25, the Commission – without offering any party the opportunity to address the decision, concludes that allowing the offer of proof "would also have been repetitive and caused undue delay." The Commission does not specify what evidence the offer of proof would have repeated, and the record seems to have no evidence whatsoever, for example, about KCPL's gifts and gratuities policy as compared to Aquila's. The Commission also does not explain what it means by "undue delay." The Commission scheduled the (resumed) hearing for April 21-25, April 28-May 2, and May 5-7, 2008. The hearing – without the offers of proof – concluded well before the end of the day on May 1, so there were more than four full days of hearing remaining in the Commission-ordered schedule. There is no reason to believe that the offer of proof would have taken any significant portion of those four days. The Commission also refers to "a clock ticking between the Applicants with regard to when the contract will expire." This reference is apparently to the August 6, 2008 date, after which the Applicants would have to renew their merger agreement. First, the only reason the hearing did not conclude in December 2007 is because the Applicants

asked for a months-long recess. Second, a date in August should not have dictated whether the Commission can make a full record of potential detriments from this merger in the first few days of May.

12. The Commission, at page 25, notes – incorrectly and without any citation to the record – that Staff's concerns with KCPL's code of ethical conduct and gifts and gratuities policy were "prompted only by the anonymous letters filed at the Commission…." The Commission also noted – again incorrectly and again without citation to the record – that "the source for the purported[9] evidence upon the business ethics and gratuities inquiry is also the anonymous letters." (Report and Order, page 26) The actual source of the evidence – had the Commission allowed it – would have been sworn testimony of witnesses at the hearing, perhaps augmented by documentary evidence obtained in discovery and admitted at the hearing.

13. The Commission similarly makes an unsubstantiated claim with respect to the CEP projects. At page 30, the Commission notes – again incorrectly and again without citation to the record – that "the basis for Staff's request of an expansive inquiry into the CEP was based upon the anonymous hearsay letters." The Staff, Public Counsel and other interested entities regularly get information from and have meetings with KCPL about the progress of the CEP projects. Nothing in the record demonstrates that this information obtained in the normal course of Staff's and Public Counsel's ongoing monitoring, rather than the anonymous letters, caused the heightened concern over the progress of the CEP projects and the possible impact on the merger.

The Staff, with some limited participation from Public Counsel and the Industrial

[9] Webster's Third New International Dictionary (1976) defines "purported" as "suspected of being; reputed; rumored." The Commission constantly refers to the evidence that it refused to hear as "purported evidence." Without endorsing the appropriateness of modifying "evidence" with the adjective "purported" in this context, Public Counsel repeats the Commission's phrase for the sake of accurately describing the Report and Order.

Intervenors, conducted a series of depositions of KCPL and Aquila employees in which the progress of the CEP projects was a major point of inquiry. The Staff cover letter requesting subpoenas (March 11; number 247 on the Commission's docket sheet) makes no mention of any anonymous letters. That letter simply states that the depositions were sought in an effort to obtain information relevant to whether it is detrimental to the public interest for Great Plains Energy to acquire Aquila. Staff lists the following seven general lines of inquiry, and again, no mention of anonymous letters or anonymous allegations is made:

> (1) the state of the financial health of Great Plains Energy; (2) whether, under current circumstances, there will be negative financial consequences to Great Plains Energy, Kansas City Power & Light Company and/or Aquila if Great Plains Energy acquires Aquila; (3) the consequences of the payment of the cash value of Aquila's non-Missouri utility assets to Aquila's shareholders instead of using those funds to finance Aquila's current Missouri utility construction needs; (4) Great Plains Energy's new position regarding the likelihood that Great Plains Energy can produce enough synergies while avoiding service deterioration and past experience in achieving savings; (5) how well Kansas City Power & Light Company actual results compare to prior commitments it has made to this Commission, including financial estimates made in those commitments; (6) how Great Plains Energy and Kansas City Power & Light Company actually conduct business in comparison to their codes of conduct, ethics, integrity, transparency and how that compares to how Aquila conducts business, in particular respecting third party vendors; and (7) how construction at Iatan is affecting the financial health of Great Plains Energy and Kansas City Power & Light Company as well as their ability to execute all the merger/consolidation commitments they claim they will perform without detrimental results.

It is simply rank and demeaning speculation on the part of the Commission that its Staff – but for some anonymous letters – did not have the knowledge and ability to discover these issues, begin investigating them, and attempt to bring them before the Commission for consideration as potentially causing detriments that would weigh against approval of the merger.

14. The Commission found Public Counsel witness Dittmer to be credible, and qualified as an expert in the areas on which he testified. Having done so, the Commission then proceeded to completely misconstrue his testimony in two crucial respects in order to discount

his testimony. First, the Commission states that "Throughout Witness Dittmer's live testimony regarding synergy savings he made reference to agreeing with the Applicants' math with regard to their synergy calculations, but qualified his answers by stating, and/or implying, that the Commission could not have faith in the mathematical analysis." (Report and Order, page 52). The "mathematical analysis" is simple, and Mr. Dittmer never stated or implied that he took issue with it. The "mathematical analysis" referred to is simply subtracting costs from estimated synergies. What Mr. Dittmer took issue with the accuracy of the estimates of synergy savings. When he qualified his answers by stating that "the math works," he clearly meant that if one subtracts a number from another the resulting answer brooks no argument. But if one does not agree that the numbers accurately represent the dollar figures at issue, as Mr. Dittmer clearly explained, agreement with the arithmetical result of the equation does not represent agreement with the conclusion drawn from it. Mr. Dittmer testified in response to cross examination from KCPL/GPE:

> Q. Let's turn to page 12 for a minute of your testimony. [Exhibit 208] There at the top of that page you've got a table I'd like to visit with you about. There's a couple of highly confidential numbers that I don't want to necessarily get into. There on that page you've included a table that analyzes the net cost to ratepayers for the first five years following the merger if the original applicant's rate plan was approved. Is that what that table was designed to show?
>
> A. Yes, it is.
>
> Q. Now, that table, which was based upon the original regulatory plan, does not reflect the revised regulatory plan that was filed on February 25; would that be correct?
>
> A. That is correct.
>
> Q. When you filed this testimony, the joint applicants were including a request to recover the incremental actual costs of debt in excess of the regulatory interest costs that were currently being collected in Aquila's rates; is that right?
>
> A. That is correct.
>
> Q. And now that the joint applicants have withdrawn their request for the incremental actual cost of debt, I'd like to ask if we merely eliminated that figure, the incremental actual cost of debt, which is shown on that page, it is a highly confidential number, but if we eliminated that single number, wouldn't that single change to the table result in a positive number for the benefit of consumers during

the first five years?

A. I would agree the math works that way, but again, it takes full faith and belief in the top number [synergy savings] shown.

(TR. 1666-1667)

Mr. Dittmer made it clear that he took issue with the accuracy of the numbers – the estimates of synergy savings – not the "mathematical analysis." For example, just before the exchange quoted above, Mr. Dittmer referred to "synergy savings, which are again suspect." (TR. 1665). And his disagreement with the calculation of the synergy savings was one of the main points in his prefiled testimony (Exhibit 208).

Second, the Commission misconstrues Mr. Dittmer's testimony about the "death spiral." The Commission stated: "Mr. Dittmer's 'death spiral' testimony is found not to be credible and will be given no weight, because it was based upon the hypothetical that no synergies would be realized and he has already testified in this matter that the merger would result in significant synergy savings." The Commission quotes a portion of Mr. Ditttmer's live testimony to support its misconception that his testimony about the death spiral "was based upon the hypothetical that no synergies would be realized." But Mr. Dittmer's testimony was clearly based on the hypothetical that "you determine that synergy savings won't cover all the costs they're trying to recover in this proceeding." Far from presuming **no synergies**, Mr. Dittmer explained that a death spiral could result if synergy savings are less than what KCPL/GPE estimate them to be and are not sufficient (under the recovery mechanism adopted) to allow recovery of actually-expended transition costs. Mr. Dittmer's testimony presumed that there would be **some synergies**, just not enough to cover the costs sought to be recovered in a rate case. Because the Commission misconstrued the testimony about the possibility of a death spiral, it failed to include this risk when it weighed detriments against benefits.

15. The Commission's purported approval of the merger was unlawful and void

because it was not made by a majority of the Commission. Only two of the five Commission members voted in favor of the Report and Order. The Missouri Supreme Court in Philipp Transit Lines[10] stated that:

> § 386.130 [RSMo 200], provides that "while individual commissioners may hold 'investigations, inquiries and hearings' * * *, the final act must be that of the commission as a body at a meeting attended by a quorum * * *. **In order that there should have been a valid order, it was necessary that it should appear that it had been adopted by the commission, acting at least by a majority**, and at a stated meeting, or a meeting properly called and of which all the commissioners had been notified and had an opportunity to be present." (*Ibid*., at 700-701; emphasis added)

The Philipp Transit Lines decision was based on an earlier New York decision which stated: "In order that there should have been a valid order, it was necessary that it should appear that it had been adopted by the Commission, acting at least by a majority and at a stated meeting…."[11] The Court in Philipp Transit Lines went on to note that such a requirement was consistent with its understanding of the general rule as it was stated in 2 Am. Jur. 2d Administrative Law § 227 (1962):

> The powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts, and, specifically, acts involving discretion and judgment, particularly acts in a judicial or quasi-judicial capacity, are **official only when done by the members formally convened in session, upon a concurrence of at least a majority, and with the presence of a quorum** or the number designated by statute. [emphasis added]

This statement in AmJur clearly shows that there is a requirement that the body act by a concurrence of at least a majority, and the reference to "majority" can only refer back to "members" because the notion of a quorum is not introduced until the next clause. The presence of a quorum is a separate and additional requirement. Thus, the requirement for a valid order is that there be **both** a majority of members in concurrence **and** a quorum present at the vote. The

[10] State ex rel. Philipp Transit Lines, Inc. v. Public Service Com., 552 S.W.2d 696, 700-701 (Mo. 1977)

[11] People v. Whitridge, 144 A.D. 486, 490 (N.Y. App. Div. 1911), at 490.

former of these requirements was not met here. The requirement that the Commission act by a majority of its members is even more important where, as here, two of the members voluntarily chose not to be present or participate in the voting.

16. The Commission erred in its response to Public Counsel's Motion to Dismiss filed on December 13, 2007 (and incorporated herein by reference). The Commission could have dismissed the case, three Commissioners could have recused themselves, or the Commission could have stated that it was proceeding under the so-called "rule of necessity." The Commission and the Commissioners did none of these, but rather simply denied any appearance of impropriety and proceeded with the case. The Commission erred in adopting an extremely lenient standard as to conduct that would disqualify a Commissioner: "An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence."[12] The Commission erred in finding that: "It is arguable as to whether the Judicial Canons apply to the Commissioners of administrative agencies."[13]

17. The Commission erred in finding that the "'public interest' necessarily must include the interests of both the ratepaying public and the investing public…." (Report and Order, page 234) The Commission, despite a plethora of citations throughout the Report and Order, does not provide any citation for this rather extraordinary pronouncement of its newly-discovered role of protecting utility investors. It appears that this new principle is grounded, at least in part, on State ex rel. Public Water Supply District[14] cited on the previous page. That

[12] Order Denying Motion To Dismiss, issued January 2, 2008.
[13] *Ibid.*, at page 8. Although the Commission stated that it was arguable that the Canons apply, it found "persuasive" arguments that they do not.
[14] State ex rel. Public Water Supply Dist. No. 8 v. Public Service Com., 600 S.W.2d 147, 155 (Mo. Ct. App. 1980)

case is about the "necessary and convenient for the public interest" standard that applies to certificates of convenience and necessity rather than the "not detrimental to the public interest" standard applicable here. But more importantly, that case does not stand for the principle that the Commission must take into consideration the interests of utility investors. Indeed it stands for just the opposite: that any concern for the utility investors is merely "incidental:"

> By its brief amicus curiae, the Missouri Rural Water Association presents the law of other jurisdictions. The presentment reflects two approaches to the question. The first approach is that preference given an existing utility is merely a guideline for the Commission. The controlling factor is the public interest and such interest is a matter of policy to be determined by the Commission. It is suggested that such an approach applies a balancing process, giving weight to adequacy of service and desirability of competition. It is suggested by such an approach that adequacy or inadequacy of a facility alone is not determinative, see In re Mason, 134 N.J. Super. 500, 342 A.2d 219 (1975); Keith v. Bay Springs Telephone Company, 251 Miss. 106, 168 So.2d 728 (Miss. 1964), and Utah Light and Traction Company v. Public Service Commission, 101 Utah 99, 118 P.2d 683 (Utah 1941). See also 73 C.J.S. Public Utilities § 42 (1951).
>
> The alternative approach is premised upon an existing facility not rendering adequate service. This approach includes the opportunity for the existing facility to provide the requested service, and it requires the requesting facility to show it can provide better service than the existing facility. This is the prevailing rule in Illinois, although the decision contained a dissent urging the matter should be one of policy left to the Commission's discretion, see Chicago and West Towns Railways v. Illinois Commerce Commission, 383 Ill. 20, 48 N.E.2d 320 (1943).
>
> Missouri authority tends to uphold the first approach or the application of the balancing test to the issue of allowing competition. Ozark Electric Cooperative v. Public Service Commission, supra, holds that adequacy of facilities is not an exclusive criterion. State ex rel. Electric Company of Missouri v. Atkinson, supra, points out that the policy is to protect the public and directs the concern of the public interest to the question of destructive competition. It can be further concluded that our own state's policy against competition is a flexible one created to protect the public first and concerning itself with the existing utility only in an incidental manner.
>
> *Ibid.*, at 154-155

Neither can the Commission rely on the other case it cites in this section of the Report and Order. For example, the Commission cites a Sho-Me Power case.[15] But that case makes no mention of

[15] In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351

balancing investors' interests with ratepayers' interests, but rather balancing the interests of various groups of ratepayers:

> Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Sho-Me has pointed out advantages it perceives for rural electric cooperatives organized pursuant to Chapter 394 that do not exist for regulated electric companies. Sho-Me says that rural electric cooperatives, in addition to providing power to rural areas with reliability and at the lowest cost, are designed to improve the quality of life in rural areas. Sho-Me states that rural electric cooperatives are engaged in economic development and in providing other public services such as television programming and other types of utility services in rural areas. It believes that the majority of its membership will not be allowed to receive these additional services as long as Sho-Me remains a regulated electric company pursuant to Section 393. Regardless of the truth of Sho-Me's claims, it operates through its membership and that membership represents approximately 72 percent of the total retail customers served by Sho-Me. Cabool and West Plains together represent approximately 4 percent of the total retail customers of Sho-Me. Balancing the public interest in sheer numbers would unquestionably lead to the conclusion that Sho-Me should be allowed to convert to a rural electric cooperative pursuant to Chapter 394.
> *Ibid.*, at 1993 Mo. PSC LEXIS 48, 26-28 (Mo. PSC 1993)

In Sho-Me, the Commission goes so far as to define the public interest balance based solely on the number of customers in different groups. Investors do not even enter into the picture.

18. The Commission errs at page 249 when it bases its decision on the conclusion that "there is no conclusive, competent evidence that there would be either an upgrade or downgrade in the current credit ratings of Great Plains, KCPL, or Aquila in relation to approval of the proposed merger." This conclusion both misstates the appropriate standard and improperly shifts the burden of proof. As the Commission correctly notes elsewhere in the Report and Order, "the Applicants bear the burden of proof of satisfying the [not detrimental to the public interest] standard in order to gain approval of their proposed merger." (page 234) But when the Commission bases its decision on a conclusion that no party has conclusively proved a particular

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Corporation to a Chapter 394 Rural Electric Cooperative, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 Mo. PSC LEXIS 48, 1993 WL 719871, (Mo. P.S.C.).

detriment, the Commission improperly shifts the burden. Furthermore, if the appropriate standard is "conclusive" evidence, Applicants have not met their burden of showing conclusively that there will not be a downgrade. To the contrary, several KCPL/GPE witnesses readily agreed that there is some risk of a downgrade as a result of the merger.

19. As the Commission noted in its Report and Order in Case No. ER-2006-0314, both the probability and the significance of a particular event must be analyzed to determine risk:

> When discussing risk, one should keep in mind not only the *probability* of an event coming true (or not coming true) but also the *importance* of the event. For example, the probability of a coin landing on "heads" to decide which team receives the ball at the beginning of a football game is 50%. Likewise, a revolver with six cartridge chambers, three of which have bullets, after the chamber is spun, has a 50% chance of firing a bullet on the first pull of the trigger. Yet, the importance of the result of the coin flip versus the importance of the revolver firing the bullet on the first pull of the trigger hardly needs to be explained.
> (Report and Order, issued December 21, 2006 in Case No. ER-2006-0314, pages 34-35.)

Here the Applicants recognize the severity of the consequences of a rating downgrade, and acknowledge that there is some risk of it occurring as a result of the merger. Yet the Commission fails to recognize these two facts as a serious detriment. If a downgrade occurs, the uncontroverted evidence is that a "death spiral" is possible. Neither of these events (downgrade and death spiral) is "totally speculative."[16] The former is conceded by KCPL/GPE witnesses, and the latter is based upon uncontroverted sworn testimony of a witness the Commission found credible and qualified. Under the holding of the AGP[17] case, the Commission must analyze these detriments and include them in the "balancing" process. The Commission failed to do so.

20. The Commission erred in making its 285-page Report and Order effective only ten days after its issue date, allowing only six business days to evaluate it in the context of the entire record and prepare an application for rehearing. The Commission's July 9 Order Granting,

[16] Report and Order, page 243.
[17] State ex rel. AG Processing, Inc. v. PSC, 120 S.W.3d 732 (Mo. 2003)

in Part, Motion for Extension of Effective Date only added one business day to the time allowed for filing applications for rehearing. More importantly, given KCPL/GPE and Aquila's express intent to make irreversible changes to both utilities beginning the morning of July 14[18], the Commission erred in granting authority to consummate the merger and to make these irreversible changes without allowing itself the opportunity to consider applications for rehearing. Even if the Commission were to have been persuaded by applications for rehearing, it did not allow itself the ability to consider and take action on them before the merger had taken place and irreversible changes had been made to both utilities. The way the Commission has structured its approval makes the statutorily-granted rehearing process meaningless unless: 1) Public Counsel were to have prepared and filed an application for rehearing in an impossibly short period of time; and 2) the Commission were to have exercised its discretion to take up and rule on that application for rehearing in an extraordinarily expedited fashion. Both of these actions would need to have been completed by close of business on Friday July 11 (only ten days after the Report and Order was issued) to have had any effect on given KCPL/GPE and Aquila's announced plans to make significant irreversible changes beginning Monday morning July 14.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its Report and Order issued July 1, 2008.

[18] See "Joint Response of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc. in Opposition to Motion for Extension of Effective Date" filed July 8, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 11th day of July 2008.

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