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**

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner dissents from the majority's[1] Report and Order approving Great Plains Energy Incorporated ("GPE"), Kansas City Power & Light ("KCPL"), and Aquila Inc's ("Aquila") request to merge Aquila with a subsidiary of GPE. The applicants failed to meet their burden of proving that the transaction is not detrimental to the public interest. The approved transaction as well as the applicants' original proposal place far too much risk on the shoulders of both companies' ratepayers. Aquila shareholders will enjoy the immediate benefit because of the price being paid for their shares. GPE and KCPL shareholders also have much to gain if the transaction is successful. However, this Commissioner has great concerns that in the near future KCPL and Aquila will be back to the Commission looking for "regulatory support" or "additional amortizations" to protect their financial integrity. These terms translate into higher utility rates for all of the applicants' customers. While there is the possibility that the merger will be a success, this Commissioner believes there is simply too much risk

[1] Because of prior Commissioner recusals, Commissioners Murray, Jarrett and Clayton are the only voting Commissioners involved in the case.

for a speculative benefit that may not occur. Even if those benefits materialize, they will not occur for many years in the future.

For the reasons that follow, this Commissioner must dissent and forewarn future Commissions that the companies may be back in the future with requests for financial help.

"SOUNDS LIKE A GREAT IDEA"

If one is familiar with the recent history associated with KCPL and Aquila, conventional wisdom and common sense suggest that such a merger, on its surface, makes a great deal of sense. GPE/KCPL have had a successful financial run in recent years[2] and have effectively begun construction of a significant expansion of necessary generation facilities at Iatan 2.[3] GPE/KCPL have stepped forward to initiate dialogue on climate issues,[4] new efforts at energy efficiency,[5]new efforts for effective Demand

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[2] Exh. 9, p. 11, lns. 17-18, Schs. MWC-4 (HC) & MWC-5 (HC) (Cline Supplemental Direct); *see In The Matter Of Kansas City Power & Light Company Of Kansas City, Missouri, For Authority To File Tariffs Increasing Rates For Electric Service Provided To Customers In The Missouri Service Area Of The Company, And The Determination Of In-Service Criteria For Kansas City Power & Light Company Wolf Creek Generating Station And Wolf Creek Rate Base And Related Issues*, Case No. EO-85-185; *In The Matter Of A Stipulation And Agreement* ***Reducing*** *The Annual Missouri Electric Revenues Of Kansas City Power & Light Company*, Case No. ER-94-197 (emphasis added); *In The Matter Of The Investigation Of Kansas City Power & Light Company's Customer Class Cost Of Service And Rate Design*, Case No. EO-94-199; *In The Matter Of The Stipulation And Agreement* ***Reducing*** *The Annual Missouri Retail Electric Revenues Of Kansas City Power And Light Company*, Case No. ER-99-313 (emphasis added). *See also* Form 10-K filings for years 2000 through 2005. http://www.sec.gov/cgi-bin/browse-edgar?type=10-k&dateb=&owner=include&count=40&action=getcompany&CIK=0001143068; Exh. 10, p. 17, lns. 4-7 (Cline Surrebuttal).

[3] *In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company*, Case No. EO-2005-0329.

[4] *In the Matter of the Resource Plan of Kansas City Power & Light Company Pursuant to CSR 240-22*; Case No. EO-2007-0008.

[5] Kansas City Energy Efficiency Forum, Sept. 14, 2007, <http://www.kcenergyfuture.com>; "KCP&L's Energy Efficiency Programs: Partnerships that Make a Difference," http://www.kcenergyfuture.com/eehandout.pdf.

Response programs,[6] and "smart metering."[7] In recent years, KCPL has received exceptional treatment from the Commission through authorized rates of return that exceed national averages, including one award that was the nation's highest for a traditionally-regulated, vertically integrated electric utility.[8]

Meanwhile, Aquila has struggled to recover from a string of questionable business decisions and poorly executed endeavors. Its ventures into unregulated sectors were painfully unsuccessful.[9] Aquila had one power plant under threat of demolition because of poor planning[10] and its shareholders have been required to fund its extraordinarily high debt costs because the Commission has been unwilling to allow it to recover those costs in rates.[11] Prior to the conclusion of this case, Aquila's weakened financial status was

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[6] *See* Kansas City Power and Light Company, P.S.C. MO. No. 7, Sheet 21. *In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company,* Case No. EO-2005-0329, Report and Order (issued July 28, 2005), Attachment 1, Stipulation and Agreement, Paragraph III.B.5.

[7] "KCP&L Wins 'Best Practices Award For Utility Marketing' For Its Innovative ThermoCalc Integrated Media Campaign," Business Wire, Oct. 26, 2006, <http://findarticles.com/p/articles/mi_m0EIN/is_2006_Oct_26/ai_n27028707>.

[8] This Commissioner has opposed the grants of inappropriately high Returns on Equity in *In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Begin the Implementation of Its Regulatory Plan* Case No. ER-2006-0314 and *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan,* Case No. ER-2007-0291.

[9] *See In The Matter Of The Application Of Aquila, Inc. For Authority To Assign, Transfer, Mortgage Or Encumber Its Franchise, Works Or System,* Case No. EF-2003-0465.

[10] *See In the Matter of the Application of Aquila, Inc. for Specific Confirmation or, in the Alternative, Issuance of a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain a Combustion Turbine Electric Generating Station and Associated Electric Transmission Substations in Unincorporated Areas of Cass County, Missouri Near the Town of Peculiar,* Case No. EA-2005-0248, *State ex rel. Cass County, Missouri v. Public Service Commission,* Docket No. CVI05558CC (Circuit Court of Cass County), and *In the Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage, and Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri Near the town of Peculiar,* Case No. EA-2006-0309, *State ex rel. Cass County v. Public Service Com'n,* ___S.W. 3d___, WL 564611 (Mo.App., W.D., March 4, 2008)

[11] *See In the matter of Aquila, Inc. d/b/a Aquila Networks-MPS and Aquila Networks-L&P, for authority to file tariffs increasing electric rates for the service provided to customers in the Aquila Networks-MPS and Aquila Networks-L&P area,* Case No. ER-2005-0436, *In the matter of Aquila, Inc. d/b/a Aquila Networks-L&P, for authority to file tariffs increasing steam rates for the service provided to customers in the Aquila Networks-L&P area,* Case No. HR-2005-0450; and *In the matter of Aquila, Inc. d/b/a Aquila Networks*

recognized as "junk" by credit rating agencies.[12] In its efforts to climb back to "investment grade," Aquila has been forced to sell off many of its well-performing divisions, including all of its international endeavors, a few of its regulated utilities in other states and all unregulated business ventures.[13]

Both utilities are in the Kansas City Metropolitan Area with adjacent service territories and appear well suited to merge with joint headquarters and combined facilities to achieve synergy savings. In theory, the stronger utility takes over the weaker utility for the final product being one western Missouri holding company operating various units capable of maximizing greater economies of scale and being able to finance even larger projects to serve their combined customers.

Such factors could easily lead one to believe that a merger, at any cost, between the two companies was preferable to having the weaker of the two continuing to struggle.

DEVIL IS IN THE DETAILS

However, one must scrutinize the transaction at a deeper level, beyond a simple review, and consider the implications of the merger. Career PSC staff have argued that this transaction fails to meet its standards for approving such a merger because of the price being paid to Aquila shareholders, how the case was filed, how the deal included lucrative provisions to benefit shareholders, how risk was shifted to ratepayers, the current capital constraints faced by GPE/KCPL and inadequate planning and preparation. The staff, the Office of Public Counsel (OPC) and other parties, thus, concluded that the

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L&P and Aquila Networks MPS to implement a general rate increase in electricity, Case No. ER-2004-0034.

[12] *See* Exh. 1 (Bassham Direct); Exh. 200 (Dittmer Rebuttal); Exh. 10 (Cline Surrebuttal); Exh. 8 (Cline Supp. Direct).

[13] "Company News; Aquila Sells Its 70% Stake In Electricity Distributor," *New York Times*, October 12, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9B06E0DF133AF931A25753C1A9649C8B63>.

transaction was detrimental to the public interest. The Commission should have heeded the recommendations of its career staff and the other non-utility parties, applied greater scrutiny to the transaction and denied the application in the interests of the rate paying public. There is too little benefit for ratepayers when compared to the real and significant risk if the acquisition or integration falters.

Moreover, this is the wrong transaction at the wrong time. GPE/KCPL are in the midst of completing a number of significant capital projects. These projects, which include Missouri's largest utility construction project since the early 1980s in Iatan 2, were clearly identified in the Comprehensive Energy Plan (CEP) as part of a global settlement among a number of parties.[14] GPE/KCPL committed to placing their focus entirely on those capital projects.[15] In exchange for that commitment, the non-utility parties agreed to allow the companies the opportunity to seek additional cash flow through "additional amortizations."[16] "Additional Amortizations" may also be characterized as accelerated depreciation, which is a component of the revenue requirement and is used in rate making. More amortizations or depreciation allowances increase rates and improve the cash flow of the utility. The increased cash flow would provide the companies with the regulatory support necessary to maintain certain credit metrics and satisfy Wall Street during a period of significant investment.[17] The Commission endorsed the arrangement because of GPE/KCPL's need for the investment and the risk it faced in being downgraded prior to the units being placed in service.

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[14] *See also In the Matter of a Proposed Experimental Regulatory Plan for Kansas City Power and Light Company*, Case No. EO-2005-0329.
[15] *Id.*, Stipulation and Agreement, ¶¶ III.B.1.a and III.B.1.i.
[16] Tr. 23:2986-3020.
[17] *Id.*

However, despite the supposed cash crunch faced by GPE/KCPL, the applicants now suggest that they have the cash to purchase another utility during this time period.

Additionally, the evidence at hearing suggested that GPE/KCPL are having difficulties with cost overruns and accidents related to their on-going construction projects.[18] While some of these difficulties may not be the fault of KCPL or GPE, these projects should be completed at a time free from distraction. Some projects have been delayed beyond the years of the CEP[19] and some contemplated projects have been canceled due to unforeseen reasons.[20]

More time may also offer Aquila the opportunity to shed its "junk" status as it continues to follow its strategies for returning to "investment grade."[21] The most surprising testimony during the evidentiary hearing was the praise offered to Aquila for its efforts at improving its performance and position in the community.[22] Aquila shareholders and ratepayers may have an interest in seeing Aquila return to "investment grade" without such a sale.[23] Now is not the time for a merger for either company.

UNIQUE CHARACTER OF CASE

The Commission cannot lose sight of how this case was started, how it was filed and what relief was requested. All of the applicants' preparation in the case, including the purchase of rating agency opinions, alleged communication with regulators and the completion of due diligence reports, were focused on several, controversial regulatory policies. These requests included the unprecedented policy of using regulatory

[18] Tr. 19:2479-2481, 2484; Exh. 305, Securities and Exchange Commission Form 8-K, p. 2-3.
[19] *Compare* Exh. 123, 138 *and* 139.
[20] *Application of Kansas City Power & Light Company for the Opening Of A Proceeding To File Status Report On Wind Investments,* Case No. EO-2008-0224, Application And Status Report On Wind Investment, Jan. 4, 2008.
[21] Tr. 4:408, 411-412.
[22] Tr. 23:3074.
[23] *Id.*

amortizations to fund part of the transaction (potentially violating the agreement in the CEP),[24] of placing Aquila's higher debt costs into rates paid by the customers of both companies (which is in direct conflict of past agreements among staff, OPC and Aquila),[25] of advancing 50% of the projected synergy savings without regard to those savings actually being achieved (which has never been authorized or allowed in Missouri),[26] and authorizing an acquisition adjustment to cover expenses in the transaction (which is in conflict with Commission policy).[27]

Had the original proposal been presented, the Commission would have faced requests for regulatory treatment of issues valued at least $397.15 million and up to $466.15 million being placed into rates paid by the companies' customers.[28] These extraordinary requests were the cornerstone of the opposition and the facts on which the opponents of the transaction based their cases. Much of the information relied upon by the applicants was considered "Highly Confidential" and beyond the review of the public. Additional questions were raised regarding the communication of such provisions to the Commissioners in advance of the hearing with allegations of commitments to support the transaction prior to the evidentiary hearing. Armed with concerns over the process and a potent case against the extraordinary and unprecedented rate making requests, the

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[24] *See In the Matter of a Proposed Experimental Regulatory Plan for Kansas City Power and Light Company,* Case No. EO-2005-0329.
[25] *See* n. 11, *supra*; *see also* Ex. 203.
[26] Exh. 100, Staff Report, pp. 43, 46-48.
[27] *Id.* at 49-53.
[28] The Applicants' original proposal requested special regulatory treatment for certain costs to be included in rates in the next general rate case filing. Their proposal included "transaction costs," ($69.3 million), which includes executive severance packages, Tr. 9:1304, "transition costs" ($33 million), Tr. 9:1304, authorizing GPE/KCPL to recover Aquila's actual cost of debt based on "junk" status ($120 million), Exh. 38, p. 4, Sch. MWC-17 (Cline Additional Supplemental Direct), advance 50% of the Applicants' estimate of synergies through an allocation in rates ($129.85 million), Exh. 100, Staff Report, p. 43, and authorizing "additional amortizations"($45 to 114 million), Exh. 105, p. 25, to support the continued construction costs of the CEP. These costs total $397.15 to 466.15 million.

opponents to the transaction were able to disrupt the case through pre-hearing motions and opening statements.

It is not uncommon that parties before the Commission will change their positions while a case moves through the process, however, in this instance, the applicants asked for a delay in the proceedings to produce a completely different transaction. The applicants had the luxury to witness the reactions of Commissioners and then amend their proposal with a better view into Commissioners' concerns. By allowing the applicants to consider new strategies, the Commission abdicated its responsibility in presiding over and processing this case. The Commission should have reconvened the evidentiary hearing and rendered a decision based on the testimony proposed for the December evidentiary hearing.[29] If the applicants were not prepared to move forward, the case could have been dismissed and refiled at the applicants' leisure. In this case, however, the applicants were given the extraordinary privilege of rethinking their strategy following a week of questioning by Commissioners and filing a more palatable, less lucrative proposal in an effort to satisfy regulators. Despite having their testimony and reports fully briefed and filed in anticipation of the December hearing, the opposing parties learned that they would have to face a new case requiring new analysis. The case languished as the applicants were given two and a half months to prepare a revised strategy.

The opponents of the transaction were subjected to a number of rather unique and unorthodox circumstances in opposing the transaction. Aside from the allegations made during the December evidentiary hearing and the subsequent delay in the proceedings,

[29] Dissenting Opinion of Commissioner Robert M. Clayton, February 14, 2008.

motions were left pending for months while the case as on hold;[30] the majority authorized its own outside counsel law firm to enter its appearance in the case on behalf of the applicants;[31] two Commissioners chose not to participate in the case;[32] a motion to dismiss was filed alleging inappropriate conduct on the part of the Commissioners;[33] evidentiary rulings by the regulatory law judge eviscerated the case of the opponents of the transaction;[34] and efforts by this Commissioner to overrule the regulatory law judge were rebuffed by others.[35]

The above irregularities suggest a need for closer scrutiny and deliberate efforts at gaining public trust in the Commission's final decision and insuring all parties are afforded due process.

"DO THE SYNERGY SAVINGS ADD UP?"

The applicants have the burden to prove that this transaction is not detrimental to the public interest. On a purely financial level, lack of detriment can be established by estimated savings or cost reductions that can be realized from the transaction. Achievable synergies are the prize for both shareholders and ratepayers who both bear the risk of the transaction. For shareholders, savings may result in lower costs and improved earnings during periods of regulatory lag, and for ratepayers, cost reductions may trickle down in the form of lower utility rates, following the next rate case. To show lack of detriment on a financial basis, one must, at the very least, establish that the likely savings from the acquisition will be greater than the costs of the transaction and

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[30] *Id.*
[31] Letter to Counsel, April 23, 2008; Statement of Dissent to Waiver of Conflict of Interest, April 30, 2008.
[32] Notice of Recusal, December 6, 2007; Notice of Recusal, April 24, 2008.
[33] Motion to Dismiss, December 14, 2007; *but see* Commissioner Clayton's Opinion and Response to Public Counsel's Motion to Dismiss, January 2, 2008.
[34] Report and Order, pp.18-30, July 1, 2008.
[35] Statement in Dissent to Regulatory Law Judge's Evidentiary Ruling and Objection to Procedural Irregularity, May 13, 2008.

implementing the transition. Allegations of synergy savings must be carefully scrutinized to identify realistic, reliable and achievable forecasts of cost reductions and exclude inflated figures or unrealistic estimates. The applicants have the burden of identifying prioritized integration plans with estimates of the likelihood of achieving synergies. One cannot assume that savings will easily flow from the integration of two separate and different corporate entities. In fact, synergy savings are not automatic and in electric utility merger cases, synergy savings of 10% are simply not achievable after the period of integration.[36] If savings are unlikely, inflated or unachievable, the known costs of the transaction may doom the merger or acquisition with none of the parties realizing any benefit and potentially suffering harm through higher rates and costs. Such a transaction could then be described as detrimental to the public interest.[37]

The applicants propose synergy savings of $305 million to be realized within five years while $755 million in savings will be achieved within ten years. These figures were then adjusted to be Missouri-specific for the first five years in the amount of $222 million and a ten year estimate of $549 million.[38] The majority accepted as true that every dollar of savings suggested by the applicants would be achieved and the Report and Order goes to great lengths to endorse and support these alleged synergy savings. The witnesses supporting these allegations are the same hired experts who have collectively charged $9 million, an amount that far exceeds the entire annual budget of the OPC ($880,809) and exceeds 69% of the entire annual PSC utility budget ($12,987,109).[39]

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[36] Exh.300, p.4 (Brubaker Rebuttal).
[37] Tr. 7:1036.
[38] Exh. 37, p. 3 (Bassham Additional Supplemental Direct).
[39] Tr. 21:2896-2897; *see also* Staff Post-Hearing Brief, p. 84.

In contrast, the opponents of the transaction presented compelling evidence and arguments questioning these proposed savings. Staff argued primarily that the applicants did not file their case properly or supply the necessary information to conform with section 393.190, RSMo. 2005. Staff additionally argued that even if the application did not violate section 393.190, RSMo 2005, in any event, "merger savings cannot be accurately measured,"[40] because there is no foolproof manner to track savings over the course of multiple years due to changing costs, modified fuel expenditures and varying staffing levels and pay grades.[41] A subsequent audit cannot identify savings leaving the Commission unable to offset the identifiable "transaction costs" or "transition costs," which are known and measurable. Given that the bulk of savings are not anticipated until the year 2013, 2018 or beyond, that the staff members conducting the audit will most likely be different and the fact that most, if not all, of the current Commissioners will no longer be serving, the lack of continuity and institutional knowledge may further cloud future evaluations of this transaction.

The staff further found the manner in which synergies were calculated focused on achieving a financial result to justify the transaction rather than having a prioritized and realistic plan for a successful integration, for maintenance of high standards of customer service and maintenance of reliable utility service.[42] The applicants' savings goal was pegged to support the costs of the original transaction, which ranged from $397.15 million up to $466.15 million.[43] Further, because the synergies were identified without a comprehensive plan of integration, without a joint operating agreement, without a plan of

[40] Exh. 100, Staff Report, p.46.
[41] *Id.* at 46-48.
[42] Tr. 23:3049.
[43] *See* n. 28, *supra.*

integration with specific goals to accomplish, items prioritized with likelihood of success and without a request for Commission permission for those specific plans of merger, that the savings estimates were simply not credible. Staff argued that a more specific and detailed application with proposals for merger and accompanying plans of integration would have enabled the staff to more completely assess the proposed synergies.[44]

Other opponents to the transaction, including the OPC and the Industrial Intervenors, argued that many of the estimates were speculative and simply not supported by adequate analysis. Staff and OPC witness, Dittmer, both categorize the estimated synergy savings as "overstated."[45] The Industrial Interveners' witness, Brubaker, warns, "given the aggressive nature of Applicant's synergy claims, it would not be wise to decide this case based on the assumption that these claimed savings are certain to be realized."[46]

The transaction opponents identified specific examples of alleged savings that warranted rejection.[47] The largest category of savings was argued to be "supply chain modifications, implementation of 'best practices' and 'strategic sourcing' that, in April 2007, were estimated to achieve $50 million in savings.[48] Curiously, the applicants updated their estimates with an August filing asserting that they would achieve more than $131 million of the same category of savings.[49] This additional $81 million is an increase of 261.8 % and makes up over 59% of the total proposed five year synergies identified.

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[44] Tr. 23:3078-9.
[45] Exh. 100, Staff Report, p. 11; Exh. 200, p. 5 (Dittmer Rebuttal NP and HC Versions).
[46] Exh. 300, p. 11 (Brubaker Rebuttal).
[47] Exh. 18, pp. 18-19 (Kemp Supplemental Direct).
[48] Exh. 30, pp. 11-12 (Zabors Direct).
[49] Exh. 31, p. 11 (Zabors Supplemental Direct).

The applicants asserted this connection without adequate support as they failed to identify a single vendor as the source of such savings.[50]

Additionally, the transaction opponents argued that certain savings could be accomplished by two independent companies without any merger or acquisition. OPC witness Dittmer identified $59 million in alleged "savings" that are not dependent upon consummation of the merger,[51] including Sibley facility improvements ($17 million), combining CT operations ($3.1 million), improving Aquila's heat rate in certain generation facilities ($600,000), improving KCPL boiler tube reduction ($5.6 million), Sibley facility boiler cleaning ($1.6 million), implementing KCPL energy efficiency measures ($13 million), improving Aquila's billing practices $12.8 million) and installing Automated Meter Reading equipment for Aquila ($5 million). With the exception of the estimate of energy efficiency programs, all of the others can be accomplished without the proposed transaction by two independent utilities.[52]

The applicants boast that each entity brings a unique and effective way of dealing with a number of operations enabling these savings. If the Commission authorizes the companies to recognize these "best practices" that should have been available to all Missouri utilities, it is making a finding of the prior rates being imprudent. That is, all utilities in the state should implement the same practices to achieve a lower cost in their operations. "Best practices" should be available to all utilities through some sort of roundtable discussion to allow for their implementation without the risk that comes with a merger or acquisition.

[50] Exh. 200, p. 5 (Dittmer Rebuttal NP and HC Versions).
[51] Exh. 200, Sch. JRD-1 (Dittmer Rebuttal NP and HC Versions).
[52] *Id.*

There are savings identified by the applicants that are less speculative but carry other concerns or risks. The only certain figure of savings comes from the elimination of Aquila facilities and staff. The sale of Aquila's headquarters for $22 million will generate some savings.[53] The elimination of staff may raise $87 million in savings, however, the additional cost reductions through elimination of staff raises questions of planning and quality of customer service. The applicants plan to reduce the Aquila workforce by 1/3 or 355 employees on day one with an additional 56 employees eliminated in the first five years. These reductions amount to 411 employees terminated to achieve savings of $87 million. Additionally, customer service centers among the utilities will be reduced from five to two, potentially raising $11.5 million in savings.[54]

By accepting these proposals, without specific plans of implementation or allowances for problems in the transition, the majority assumes that these two companies with two different cultures will merge seamlessly – without any employee turmoil or impediments. The staff testified at hearing that such a bold plan without support ignores potential employee problems, differences in business culture, union employee integration, and how integration responsibilities will be allocated and shared by departing and remaining employees.[55] It also ignores potential increases in salaries and costs of equipment and office space for employees taking on tasks associated with the integration as well as the increased tasks that will remain with the entity having twice the number of responsibilities.[56]

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[53] *Id.* at 37-40.
[54] Staff Post-Hearing Brief, p. 65 (citing Exh. 31, pp. 10, 14 and Sch. RTZ-9 (Zabors Supplemental Direct) and Tr. 7:1121-1122, 9:1310).
[55] Tr. 23:3072-3074.
[56] Exh. 100, p. 37-40 (Dittmer Rebuttal NP and HC).

Because of these reductions, quality of service may suffer and, in response, new costs may be incurred to avoid violation of PSC quality mandates. Closing 60% of the customer service centers and implementing automated meter reading for 310,000 to 330,000 Aquila customers may lead to problems requiring attention by utility staff.[57]

To justify the transaction on a purely financial basis, savings must, at a minimum, exceed the costs of the transaction. The parties agree that the known acquisition "transaction costs" amount to $47.2 million, which include costs like experts, attorneys, financing costs and other professional fees.[58] In addition, GPE/KCPL requests that the "transition costs," which are "necessary" to integrate the companies and lead to the synergy savings, be recoverable in the amount of $42.8 million. "Transition costs" allegedly represent costs such as third-party costs to support the integration from legal, Human Resources, Information Technology and process integration perspectives.[59] At a minimum, these synergies must produce savings of over $90 million to justify the transaction.[60]

The savings are speculative and cannot be tracked while the costs are certain. The applicants cannot carry their burden that the transaction is not detrimental to the public interest.

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[57] *See Staff of the PSC v. Laclede Gas Co.*, Case Nos. GC-2006-0318 & GC-2006-0431. The case addressed quality of service issues associated with implementation of Automated Meters. *In the Matter of Atmos Energy Corporation's Tariff Revision Designed to Consolidate Rates and Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of the Company*, Case No. GR-2006-0387. This case addressed quality of service issues involving call center consolidation.

[58] All figures are Missouri-jurisdictional amounts adjusted to reflect costs and savings for Missouri ratepayers.

[59] Exh. 31, p. 15 and Sch. RTZ-11 (Zabors Supplemental Direct).

[60] *See also* n. 28. The applicants' current proposal requests inclusion in rates of "transaction costs," for $47.2 million and "transition costs," valued at $42.8 million.

CUSTOMER SERVICE

Today, Aquila and KCPL both have acceptable call center performance and Aquila has been identified as having the superior customer service operation of the two.[61] Merger savings are usually found through reductions in staff and facilities leading to the potential for a decline in service quality for customers. If customer service declines, this is a non-financial detriment to the public interest and it must be considered. Customer service standards should remain the same or be increased rather than permit the applicants to reduce their current standards and merely meet minimal service quality metrics.

The Staff Report cites the merger of Southern Union Company (MGE) and Western Resources Inc.'s Missouri gas properties as a past merger where customer service deteriorated resulting in a detriment to the public. Following the merger in 1994, MGE, staff and OPC opened a docket to investigate the billing and customer service practices of the merged company. In 1995, that investigation resulted in 37 recommendations being presented to the management of MGE. During 1996, complaints reported to the Commission's Consumer Services Department increased by approximately 75% over those reported prior to the merger. Customer service declined to the point that staff and OPC filed complaints against the utility. Many factors were identified as causing MGE's service problems from workforce reductions to high rates of employee turnover.[62]

While staff acknowledges that the performance of one utility following a merger does not necessarily mean the same will happen following another merger, this example

[61] Exh. 100, Staff Report, p.70, 72-76.
[62] *Id.* at 72.

cannot be ignored. Like with the present merger application, both utilities in the prior case had solid records of good customer service and both argued that customer service would not be a problem following the merger of the two companies.[63] Despite those plans, the surviving utility still encountered significant problems in customer service following the consummation of a merger.[64] Based on the fact that, collectively, staff has been involved in more than 24 merger cases, it has the experience to identify and avoid those problems.[65] The majority chose to ignore this experience and discredit the testimony of the career staff.

The applicants propose continuing to serve KCPL and Aquila's customers and to provide transitional services to Black Hills while terminating 1/3 of Aquila's workforce. The proposed transaction lacks serious planning and controls to ensure that the disruption to service quality is minimized. It seems improbable that a consolidation of service centers, termination of 411employees and a merger of separate entities with different processes, practices and workforces will occur without tremendous disruption to service quality. This Commissioner cannot endorse a proposal to enable the customer service quality of these two companies to deteriorate.

Unfortunately, if customer service declines, the Commission will be faced with the prospect of either sanctioning poor service, authorizing higher rates to prop up the level of service or imposing penalties without an increase in rates to punish the utilities.

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[63] *Id.*; *In The Matter Of The Joint Application Of Western Resources, Inc., D/B/A Gas Service, A Western Resources Company, A Kansas Corporation And Southern Union Company, D/B/A Missouri Gas Energy, A Delaware Corporation, For An Order Authorizing The Sale, Transfer And Assignment Of Certain Assets Relating To The Provision Of Gas Service In Missouri From Western Resources, Inc. To Southern Union Company, And In Connection Therewith, Certain Other Related Transactions*, Case No. GM-94-40, William E. Brown Direct, p. 4, and Eugene N. Dubay Direct, p. 9.

[64] Tr. 23:3051.

[65] *See* nn. 47 and 50, *supra,* and nn. 63-67, *infra.*

Once again, the focus of the applicants should have been on the customer service rather than on the accounting benefits.

IS THIS GOING TO HURT MY CREDIT?

Much of the testimony in this case revolved around estimates and expectations of how the credit markets would view the companies' post-merger credit. Rating agency opinions were filed as exhibits and arguments were made suggesting either the alleged strength or weakness of GPE/KCPL and Aquila. This Commissioner believes that the Commission will be facing this issue again in the future when GPE/KCPL returns for financial help.

As reflected in note 28 above, the applicants' original proposal included a number of beneficial rate making provisions that were contemplated while the case was being prepared. These requests were valued at $397.15 million up to $466.15 million, and, if approved, would have been added into customer utility rates. The boards of both companies considered these requests when deciding on a purchase price of Aquila shares. Credit rating agencies such as Standard and Poor's and Moody's took into account these assumptions when drafting their credit outlooks for the post-merger companies.[66] While this Commissioner does not endorse those rate making requests, they would have helped maintain or improve many positive financial metrics in evaluating the credit worthiness of GPE/KCPL.

Even with the favorable rate making provisions, staff warned that such a transaction would hurt GPE/KCPL's credit rating and began its report by stating:

> GPE does not have the financial strength to acquire Aquila and absorb Aquila's financial difficulties without seriously weakening GPE's financial condition. GPE's acquisition of Aquila will weaken

[66] *See* Exh. 8, Schs. MWC-4 (HC) & MWC-5 (HC) (Cline Direct).

> KCPL's financial condition at a time when KCPL is committed to significant capital expenditures. When the GPE acquisition of Aquila was announced on February 7, 2007, Standard & Poor's placed KCPL's debt ratings on CreditWatch with negative implications.[67]

However, such rate making treatment was not awarded or even requested by GPE/KCPL in the final, amended proposal. Many of the assumptions supporting the original transaction and the credit rating agency opinions are no longer present. The absence of those provisions will leave GPE/KCPL to absorb Aquila's higher debt costs ($120 million), absorb the transaction costs ($47.2 million), abandon any up front allocation of estimated synergies ($129.85 million) and the order will not include any specific request or grant of "additional amortizations" beyond what GPE/KCPL already has been granted, valued between $45 and 114 million.[68] While as of this date, GPE/KCPL have not been adversely affected by lowered credit ratings, this company may very well be in danger of lower credit worthiness, causing higher debt costs and placing in jeopardy necessary financing to complete its commitments in the CEP. Subsequent opinions from credit rating agencies continue to make assumptions apart from what the majority ordered.[69] OPC witness, Dittmer, offered competent testimony that if the estimated synergy savings are not achieved in a timely fashion, this proposed transaction may lead to a credit-rating downgrade for KCPL:

> We are paying above traditional cost of service rates just to keep the credit rating acceptable, and now we are exposing that credit rating to a downgrade through this purchase through the other costs – if the company is not allowed to recover all the costs that they were asking for in this case or in the next rate case where they do ask for regulatory amortization on the Aquila side (sic).[70]

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[67] Exh. 100, Staff Report, p. 1.
[68] *See* n. 28.
[69] Exhs. 124 (HC) and 125 (HC).
[70] Tr. 13:1680.

This Commissioner believes that the majority recognizes this concern and attempts to protect ratepayers with conditions disallowing transaction costs and allocating all increased debt costs caused by credit downgrades as shareholder obligations. While this is a laudable goal, it will actually lead to additional financial burdens on GPE/KCPL that could lead, in turn, to a worsening of credit and higher costs without the ability to recovery in rates. This potential downward spiral may occur at a time when GPE/KCPL are in the midst of significant capital projects. The Commission was already assisting GPE/KCPL with beneficial amortizations and the company decided to spend more money to buy another utility.

The Commission cannot ignore other decisions that shed light on GPE/KCPL's credit worthiness. Recently, GPE/KCPL sold its unregulated business Strategic Energy, for $300 million.[71] GPE/KCPL suspended its plan of investing in additional wind generation because of adverse conditions in financial markets.[72] The company has also delayed or suspended Phase 2 of the La Cygne capital project originally part of the CEP and it will not be completed until 2011.[73] While these steps may improve the short-term viability of the utility, they cannot hide the uncertainties in financial markets or the cash flow obligations of the company. Lastly, this Commissioner believes that the Commission should be mindful that as GPE/KCPL nears the end of its CEP, that another CEP may be in store for GPE/KCPL/Aquila customers. Additional projects and needs for credit quality may lead to further negotiations for "additional amortizations" in a future

[71] Tr. 25:3163; Exhs. 136 and 137.
[72] *See Application of Kansas City Power & Light Company for the Opening Of A Proceeding To File Status Report On Wind Investments,* Case No. EO-2008-0224, Application and Status Report on Wind Investments, January 4, 2008.
[73] Exhs. 123, 138 and 139.

CEP.[74] Unfortunately, much of the testimony related to this topic was ruled inadmissible by the regulatory law judge and will be unavailable to a reviewing court.

The result of these questionable financial circumstances may lead to GPE/KCPL returning to the Commission for "regulatory support" to address credit downgrades and the higher debt costs from lesser credit ratings. Because of the majority order endorsing this acquisition or merger; it will be hard for the Commission to deny such beneficial rate making treatment as the Commission may be blamed for approving the transaction. This transaction could be the beginning of a cycle that involves the Commission and the post acquisition companies attempting to protect the companies' financial integrity. This risk to these companies, to the shareholders and to the ratepayers cannot be ignored and it certainly illustrates a potential detriment to the public interest.

NOW IS NOT THE RIGHT TIME

At this time, staff argues that these two companies are stronger standing alone rather than together. The two utilities appear to be on contradictory cycles, Aquila on the rebound while KCPL is facing significant financial challenges. Aquila is on track to improve its credit rating without this transaction sometime in 2010-2011.[75] Aquila's higher debt costs will mature and may lead to lower debt costs at that time.[76] Furthermore, KCPL should complete Iatan 2 and most of the accompanying environmental projects sometime in the same time period allowing for those costs to be added to rate base and included in rates. As KCPL nears completion of this CEP, as it seeks authorization to place these assets in rate base and as the Commission authorizes

[74] Exh. 139, p. 10.
[75] Tr. 4:408-409, 411-412.
[76] Tr. 4:432.

the corresponding higher rates, the Commission will no longer be faced with granting special treatment through "additional amortizations."

Rather than wait until 2011-2012 when both companies are on stronger financial footing, this transaction will weaken KCPL's financial condition by consolidating it with a weaker Aquila during a time of significant construction costs. This is not a risk worth taking. In the near future, many of the contentious issues will no longer be relevant and Missouri may well have two relatively strong utilities with headquarters in the western side of the state. Two separate utilities would attract capital with Commission mandated focus on consumer service rather than merger-related cost savings. Risk would be spread among two entities with two sets of shareholders and ratepayers rather than all of the risk being borne by one.

GPE/KCPL's share of the capital projects are estimated at $1.3 billion.[77] According to this CEP, the years 2008 and 2009 require the highest amount of cash outlays. During the same time period, GPE/KCPL will be spending more than $1.7 billion to buy out Aquila shareholders.[78] GPE/KCPL argued during the hearing that their pending requests for additional amortizations were abandoned, but that they reserved the right to return in future cases to make such a request. The Commission must be mindful that if the acquisition or the construction projects do not work out as anticipated, more "additional amortizations" with higher rates may be necessary. Now is not the time for this transaction.

[77] *Id.*
[78] Exh. 1, p. 8 (Bassham Direct).

THIS IS NOT THE STAFF'S FIRST MERGER AND ACQUISITION CASE

The majority makes findings which discredit the testimony of opponents of the merger application. The Report and Order dismisses the format of the staff testimony, staff's experience, staff's criteria for approving mergers and dismisses the staff's consistent approach to merger or acquisition cases during the past thirty years.[79] Staff's

[79] *In The Matter Of The Joint Application Of The Utility Companies Comprising Union Electric System For Permission And Authority (I) To Merge Missouri Utilities Company, Missouri Power & Light Company And Missouri Edison Company With And Into Union Electric,* Case No. EM83248xxxxx01*; In The Matter Of The Application Of The Kansas Power And Light Company And The Gas Service Company For Authority Of The Commission Pursuant To Section 393.190 RSMo. 1978 (i) To Merge The Gas Company With And Into The Kansas Power And Light Company And (ii),* Case No. GM85186xxxxx01*; In The Matter Of The Application Of Utilicorp United Inc., A Missouri Corporation ("Utilicorp Missouri") And Utilicorp United Inc., A Delaware Corporation ("Utilicorp Delaware") For Authority To Merge Utilicorp Missouri With And Into Utilicorp Delaware A,* Case No. EM8726xxxxxx01*; In The Matter Of The Application Of The Raytown Water Company For Authority To Reorganize Through Corporate Merger,* Case No. WM8730xxxxx01*; In The Matter Of The Joint Application Of Arkansas Power & Light Company ("AP&L"), Associated Natural Gas Company ("ANG") And Arkansas Western Gas Company ("AWG") For Approval Of The Acquisition Of AP&L's Interest In ANG By AWG To Be Effected By A Merger,* Case No. GM88100xxxxx01*; In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service (Utilicorp), A Delaware Corporation, The Liberal Gas Company (Liberal), A Kansas Corporation, And Seward County Gas Company (SCGC), A Kansas Corporation,* Case No. GM89112xxxxx01*; In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service, A Delaware Corporation, And Michigan Energy Resources Company, A Michigan Corporation, For Approval Of The Merger Of MERC With And Into Utilicorp,* Case No. GM89151xxxxx01*; In The Matter Of The Application Of United Cities Gas Company For An Order Authorizing The Acquisition And Merger Into It Of Union Gas System, Inc.; Authorizing The Issuance Of $15,000,000 Principal Amount Of First Mortgage Bonds, Series R, 11.32%, Due,* Case No. GM9062xxxxx01*; In The Matter Of The Application Of Greeley Gas Company, A Delaware Corporation, For An Order Authorizing The Merger Into It Of Greeley Gas Company, A Colorado Corporation, And Standard Gas Supply Corporation, A Colorado Corporation,* Case No. GM91355xxxxx01*; In The Matter Of The Merger Of GWC Corporation With And Into United Water Resources Inc. And The Indirect Acquisition By United Water Resources Inc. Of More Than Ten Percent (10%) Of The Total Capital Stock Of Capital City Water Company,* Case No. WM94191xxxxx01*; In The Matter Of The Joint Application Of Vogel Sewer System Inc. And West Elm Place Corporation For An Order Authorizing The Merger Of Vogel Into West Elm, With West Elm Being The Surviving Corporation, And For Approval Of Related Tariff Changes,* Case No. SM95144xxxxxx01*; In The Matter Of The Application Of Greeley Gas Company, A Division Of Atmos Energy Corporation And OHGC Acquisition Corporation For Authority To Merge With Oceana Heights Gas Company And For Authority Of Atmos Corporation To Issue And Sell Up To 400,000,* Case No. GM9618xxxxx01*; In The Matter Of The Application Of Union Electric Company For An Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) The Transfer Of Certain Asssets, Real Estate, Leased Property, Easements And Contractual Agreement,* Case No. EM96149xxxxx01*; In The Matter Of The Application Of United Cities Gas Company, An Illinois And Virginia Corporation, For An Order Approving The Merger Of Monarch Gas Company, An Illinois Natural Gas Utility, With And Into United Cities Gas Company,* Case No. GM96180xxxxx01*; In The Matter Of The Joint Application Of Atmos Energy Corporation And United Cities Gas Company For An Order Authorizing Atmos Energy Corporation And United Cities Gas Company To Merge, With Atmos Energy Corporation Being The Surviving Corporation,* Case No. GM9770xxxxx01*; In The Matter Of The Application Of Southern Union Company For Authority To Acquire 854,300 Shares Of Atmos Energy*

involvement in over twenty major electric, gas, water or sewer company merger cases has led to a thorough and thoughtful approach to reviewing such transactions. Some of those merger or acquisition cases have been resolved through settlements while others have been opposed.[80] Some of those past cases have involved Aquila,[81] while others have involved KCPL or Great Plains,[82] while others, still, involved previous attempts at a

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Corporation Upon The Merger Of Atmos Gas Corporation And United Cities Gas Company, Case No. GF97194xxxxx01; *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power & Light Company For Approval Of The Merger Of Kansas City Power & Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM97515xxxxx01; *In The Matter Of The Merger Of American Water Works Company With National Enterprises, Inc. And The Indirect Acquisition By American Water Works Company Of The Total Capital Stock Of St. Louis County Water Company,* Case No. WM99224xxxxx01; *In Re: Merger of Cedar Hill Estates Water Company, Inc. into KMB Utility Corporation,* Case No. WM-2003-019410; *In The Matter Of The Transfer Of Assets, Including Much Of Southern Union's Gas Supply Department To Energyworx, A Wholly Owned Subsidiary,* Case No. GO-2003-035424; *In The Matter Of The Transfer Of Assets Of Hillcrest Utilities Company From Blomeyer Investments, Inc. To Brandco Investments, LLC.,* Case No. WM-2007-026110; *In The Matter Of The Transfer Of Assets Of Hillcrest Utilities Company From Blomeyer Investments, Inc. To Brandco Investments, LLC.,* Case No. SM-2007-026210; *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-2007-037410; *In The Matter Of The Transfer Of Assets Of Swiss Villa Utilities, Inc. To The Black Oak Mountain Resort Property Owners Association,* Case No. WO-2007-041024.

[80] Tr. 23:3080-1.

[81] *In The Matter Of The Application Of Utilicorp United Inc., A Missouri Corporation ("Utilicorp Missouri") And Utilicorp United Inc., A Delaware Corporation ("Utilicorp Delaware") For Authority To Merge Utilicorp Missouri With And Into Utilicorp Delaware A,* Case No. EM8726xxxxxx01; *In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service (Utilicorp), A Delaware Corporation, The Liberal Gas Company (Liberal), A Kansas Corporation, And Seward County Gas Company (SCGC), A Kansas Corporation,* Case No. GM89112xxxxx01; *In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service, A Delaware Corporation, And Michigan Energy Resources Company, A Michigan Corporation, For Approval Of The Merger Of MERC With And Into Utilicorp,* Case No. GM89151xxxxx01; *In Re UtiliCorp United, Inc. and St. Joseph Light & Power Co for authority to merge.,* Case No. EM-2000-0292; *In Re UtiliCorp United, Inc. and The Empire District Electric Co. for authority to merge,* Case No. EM-2000-0369.

[82] *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power & Light Company For Approval Of The Merger Of Kansas City Power & Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM97515xxxxx01; *In The Matter Of The Application Of The Kansas Power And Light Company And The Gas Service Company For Authority Of The Commission Pursuant To Section 393.190 RSMo. 1978 (i) To Merge The Gas Company With And Into The Kansas Power And Light Company And (ii),* Case No. GM85186xxxxx01; *In the Matter of the Application of Kansas City Power & Light Company for Approval of its Acquisition of All Classes of the Capital Stock of Kansas Gas and Electric, to Merge with Kansas Gas and Electric and to Incur Debt Obligations,* Case No. EM-91-16; *In The Matter Of The Application Of The Kansas Power And Light Company And KCA Corporation For Approval Of The Acquisition of All Classes of the Capital Stock of Kansas Gas and Electric Company, to Merge With Kansas Gas and Electric Company, To Issue Stock, and Incur Debt Obligations,* Case No. EM-91-213; *In the Matter of the Application of Western Resources, Inc., For Approval of Its Proposal To Merge With Kansas City Power & Light Company, and Other Related Relief,* Case No. EM-96-371; *In the Matter of the Application of Western Resources, Inc., For Approval of Its*

merger between the two.[83] Some of the mergers were successfully completed while others were abandoned. This is not staff's first "merger" case and its analysis should be given much more deference than the majority allows.

The majority questions the format of the Staff Report, which was compiled by a division director who has been employed by the agency for 31(+) years. The format was also the product of Commission direction after Commissioners expressed concerns over disorganized pieces of testimony involving many different divisions and employees.[84] The author's credibility was attacked for not preparing testimony in prior merger cases yet he participated in past merger cases at various levels, most notably in a supervisory capacity.[85] The majority questioned whether he wrote the Report yet he took responsibility and credit for all aspects of the Report aside from the legal conclusions that provided support to staff's position.[86]

Further, the Staff Report has greater credibility because it assures an orderly, efficient and customer service-focused integration, instead of focusing on financial incentives unrelated to customer service. Staff argued that the applicants deviated from past Commission practice and erred in how its case was pleaded and organized.[87] Also, staff expressed concern over the proposal's lack of detail in any specific plan of

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Proposal To Merge With Kansas City Power & Light Company, and For Other Related Relief, Case No. EM-96-371; *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power And Light Company For Approval Of The Merger Of Kansas City Power And Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM-97-515.

[83] *In The Matter Of The Joint Application Of Kansas City Power And Light Company, Utilicorp United, Inc., And Kansas City United Corp., For An Order Authorizing Kansas City Power And Light And Utilicorp United, Inc. To Merge With And Into Kansas City United Corp., And In Connection Therewith, Certain Other Related Trans-Actions,* Case No. EM-96-248.

[84] *See* Attachment A.

[85] Tr. 13:1806-1807.

[86] Tr. 13:1812-1816.

[87] Tr. 23:3063-65.

integration, joint operation plan, plans of dispatch and that without such planning; the applicants have left too much at risk for a successful merger.

> We have in essence these micro plans to do—consolidate different segments of KCP&L and Aquila. We don't have that pulled together. In fact, from the things I see is there's this day one that they plan to start all the stuff or almost all the stuff on the day after they close on the transaction, and that's to me and the Staff, that's – that's not acceptable. I mean, the idea that you can do all that and not have a bunch of implementation issues is just-- . . .
>
> The scope of work that they want to do, but you're moving people, you're going to have work groups be consolidated, and they're going to have to be providing service because the customers aren't going to expect a different -- a different service on the day before the merger, or whatever you call this thing, and the day after, and you're going to have that kind of a shift.
>
> Plus people are learning. You know, when you're moving people, just your normal sources of information and stuff, they're disrupted, you know, and you're going to have a -- supposedly you have a significant reduction in the work force, so people that I normally could go to and talk to one day are now gone. I'll now be working with another group of people that, you know, I may know them but I don't know them very well. I certainly don't know them in a work setting yet, that I'm going to have that all happen.
>
> Those are the types of things that, using a term that seems in vogue now, be vetted, that that's -- that that is the level of what I would say if you're really going to move into execution and implementation, you've got to get down to that level of people involvement and stuff, and then looking at -- knowing that things are not going to work the way you want. I mean, you're going to run into people problems. You're going to run into vendor problems.[88]

The staff found the transaction as proposed to be "high-level" and unrealistic in "Day One" implementation raising significant questions of whether the transaction will be a

[88] Tr. 3041-3043.

success.[89] The applicants failed to supply a plan that identifies priorities and goals of integration with assessments of likelihood of savings or success.[90] The analysis of integration, satisfying quality of service and savings that would result, should lead to a more reasonable purchase price.

At the hearing, staff was questioned about other tangible or intangible factors that should be evaluated when determining whether the transaction is detrimental to the public interest. These factors go beyond mathematical analysis of simply reviewing alleged savings against costs of the integration or merger. Staff argued that while there are a few perceived benefits including the increase in size of the company achieving increased economies of scale, and benefits of adjacent service territories; the staff found many negative factors including the questionable financial status of the post-merger utilities, potential for a clash of employee cultures, disruptions in service because of staff departures, resentment among remaining staff, loss of the ability to have two separate entities fighting for capital in the marketplace, rather than one, and the consolidation of risk placed on a single entity rather than spread among several utilities for large capital projects (such as Iatan 2).[91] Further, staff did not believe that any leadership changes at either utility post-merger suggested a benefit or a detriment to the public interest.[92]

This Commissioner disagrees with how the majority criticizes the transaction opponents for not performing certain analysis or providing additional updates to their evidence. The applicants filed their case in April 2007 and then modified the proposal in

[89] Tr. 3050.
[90] Tr. 3050.
[91] Tr. 23:3068-3078.
[92] Tr. 23:3070.

August 2007.[93] Then, following the unique continuance granted during the first evidentiary hearing, the applicants filed yet another amended proposal with different requests. The majority chose to blame the opponents for not filing testimony in a certain way and it fails to find any fault on the part of the applicants for unilaterally delaying the case, for oddly asking for leave to modify their proposal or for getting a second evidentiary hearing within the same case after gauging the mood of regulators.

The opponents faced a moving target in terms of mounting a defense to the application, which raises due process concerns. Budgetary constraints also played a role in how the opponents chose to challenge the proposed merger. The OPC apparently could not afford to update its expert's testimony following the new proposal filed in 2008.[94] Applicant witnesses were compensated in the amount of $9 million, which is an amount significantly greater that the entire budget of OPC and more than 69% of the Missouri Public Service Commission budget.[95] The majority questioned the opponent witnesses' credibility for not performing a "bottom-up" review yet most of the opponents did not have the funds, the staff or the data to complete a comparable analysis in response.[96] Further, the majority did not address the inherent bias associated with such purchased expert testimony.

The majority should not have discarded the staff's analysis and it should have acknowledged staff's warnings of potential "public detriment."

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[93] KCPL Supplemental Direct Testimony and Schedules, August 8, 2007.
[94] Tr. 13:1666, 1720, 1724-1725, 1767-1768.
[95] Tr. 21:2896-2897.
[96] Tr. 13: 1724-1725.

OBJECTIONS: SUSTAINED

On April 16, 2008, the staff filed its second list of issues in preparation of the newly scheduled evidentiary hearing and, later that day, GPE/KCPL filed a Motion to Limit Scope of the Proceeding specifically identifying certain issues raised by staff that should be excluded from the evidentiary hearing.[97] Four principal issues were challenged and were subject to an evidentiary ruling of the regulatory law judge ("RLJ"). Those issues are summarized as

> (1) An inquiry into four anonymous letters that, during the course of this proceeding, were directed to various Commissioners, either participating or not participating in this matter; the subject of which pertained to Applicant's (sic) financial ability to effectuate the proposed merger.
>
> (2) An inquiry into the Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy.
>
> (3) An inquiry into a plan for regulatory "Additional Amortizations" that appeared in the Applicant's original application but was subsequently removed and is not being requested.
>
> (4) An extensive inquiry into the KCPL's Comprehensive Energy Plan ("CEP") set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects.[98]

The evidentiary hearing was reconvened on April 21 and, pursuant to an Order of the RLJ, the staff and other parties responded to the motion on April 24. The RLJ issued his ruling from the bench on April 24, although the scope and exact content of the ruling were not available for review in written form until a day before the conclusion of the

[97] Aquila did not join in this motion.
[98] Report and Order, p.15.

hearing. The majority adopted the decision of the RLJ and those findings are specifically set out in the majority Report and Order beginning on page 14.

This Commissioner believes that the RLJ's broad and far-reaching evidentiary rulings were in error. These rulings summarily excluded at least four categories of relevant issues, over fifteen potential witnesses and several weeks of scheduled testimony. The rulings misconstrue the type of evidence staff proposed and ignore specific examples of public detriment. The majority's definition of "not detrimental to the public interest" is narrowly drawn in a way that permits the majority to ignore many allegations of detriment beyond basic financial data or comparisons of costs and savings. Through its evidentiary rulings, the majority fails to recognize the implications of the transaction beyond how the applicants' framed the issues. Four days after the evidentiary hearing resumed in April, the staff learned that its evidence, obtained through a lawful and timely investigation, was to be excluded from the record. Unfortunately, these rulings occurred at a time when the transaction opponents had already modified their cases twice to address the applicants' evolving positions.

The Commission is an administrative agency associated with the executive branch and not part of the judiciary. It is subject to different rules of procedure and it is statutorily different in how it receives evidence. The General Assembly has directed that technical rules of evidence do not apply to Commission proceedings, which encourages the Commission to take a broad view of relevant evidence.[99] Additionally, the Commission acts without the assistance of a jury, which means that, like in a bench-tried case, it is able to sort through evidence and avoid relying on any evidence later found to

[99] §386.410, RSMo 2000.

be inadmissible.[100] Reviewing courts will presume that such a fact finder will not be influenced or prejudiced by any potentially inadmissible evidence.[101] While the fundamental rules of evidence apply to administrative cases, there is no question that they are relaxed in such proceedings.[102] Further, courts have delegated a certain amount of authority to administrative agencies because of their expertise in particular areas.[103] The Commission is well-equipped to sort through evidence in reaching a conclusion and it is illogical to assume that it is unable to hear evidence and balance its probative value versus its prejudicial effect.

Because of this expertise, this Commissioner agrees with the majority that the Commission is given wide discretionary latitude in admitting or excluding evidence and rendering findings of fact and conclusions of law. However, this Commissioner strongly disagrees with the majority's evidentiary ruling which runs "clearly against the logic of the circumstances . . . and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration."[104] Unfortunately, the majority relies on the delegation of authority and it

> seek[s] to avoid the fatal consequence of the evidentiary deficiency by the classic hue and cry of virtually limitless discretion possessed by the Commission, the admonition that courts should not substitute their judgment for that of the Commission, and the indulgence of deference for decisions of the Commission because of its expertise in the complicated and highly sophisticated matters it is legislatively ordained to resolve. Judicial recognition thereof when and where appropriate, however, does not

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[100] *State v. Anders*, 975 S.W.2d 462, 466 (Mo. App., W.D. 1998).
[101] *State v. Ernst*, 164 S.W.3d 70, 74-75 (Mo. App., S.D. 2005).
[102] *State ex rel. Church's Fried Chicken v. Board of Adjustment of the City of St. Louis*, 581 S.W.2d 861, 864 (Mo. App., E.D. 1979); *State ex rel. Bond v. Simmons*, 299 S.W.2d 540, 545 (Mo. App. 1957); *State ex rel. American Tel. & Tel. Co. v. Public Service Com'n,* 701 S.W.2d 745, 754-5 (Mo. App., W.D. 1985).
[103] *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69, 74 (Mo. Banc 1982); *Love 1979 Partners v. Public Service Com'n of Missouri,* 715 S.W.2d 482, 490 (Mo. Banc 1986).
[104] *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App., 2005).

> dictate blind acceptance of every order cut and every decision handed down by the Commission. . . . Unbridled bureaucracy is the subtle destroyer of people's rights . . .[105]

This Commissioner believes the majority made a significant mistake in how it disallowed this relevant and material evidence.

In ruling on the list of four issues, the majority ruled on each in the following matter,

> (1) Purported evidence regarding the anonymous letters is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.
>
> (2) Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.
>
> (3) While the Commission believes that any purported evidence regarding a future plan for regulatory "Additional Amortizations" is irrelevant, it is not wholly irrelevant, and the Commission will preserve this evidence in the record as an offer of proof.
>
> (4) An extensive inquiry into KCPL's CEP as set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects is overly broad and the scope of any offered evidence in this regard will be restricted to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.
>
> (5) The witnesses that the Applicant's (sic) have requested to be released in this matter will not be released to the extent they can provide testimony on the Applicant's credit-worthiness.

[105] *State ex rel. Marco Sales, Inc. v. Public Service Com'n*, 685 S.W.2d 216, 220-221 (Mo. App., 1984).

(6) Witnesses from Aquila that were to provide testimony solely on the issue of the anonymous communications are released and do not have to appear before the Commission.[106]

1. Anonymous Letters

This Commissioner wishes to be very clear. This Commissioner does not believe that the letters as unsigned, unsubstantiated documents containing hearsay or potentially double hearsay should be permitted as evidence, by themselves, as proof of the matter stated. These documents lack foundation and would not be subject to any cross examination. However, upon receipt of such anonymous letters, the Commission generally directs its staff to investigate the letters' allegations, pursuant to section §393.140, RSMo. 2005. In this case, the public has been led to believe that the staff would investigate and make findings.[107] It is the fruit of that investigation that led to the staff's proposals to call certain company witnesses to address concerns suggesting potential "detriment to the public interest." Staff argued that the issues selected were not "frivolous" and that the issues developed "after the evidentiary hearings in this case were suspended on December 6, 2007."[108] In fact, staff cites past experiences with anonymous letters which were received in association with Aquila. Following a thorough review of the allegations, staff summarized its findings in a report to the Commission. Aquila even welcomed the review and applauded the exoneration that came with it.[109]

This Commission has an obligation to fully investigate complaints and staff was prepared to move forward with evidence strictly limited to whether the merger was

[106] Report and Order, p. 18-19.
[107] "KCP&L Isn't Disclosing Cost Overruns of Plant Near Weston, Anonymous Letter Says," Everly, Steve, *Kansas City Star*, Feb. 14, 2008.
[108] Staff's Response In Opposition To Great Plains Energy's and KCPL's Motion To Limit Scope of the Proceeding To Whether Evidence Relating To Issues II Through IX of the Second List of Issues Is Not Detrimental To the Public Interest, April 24, 2008, p. 1.
[109] *Id.* at p. 4.

detrimental to the public interest. Instead of receiving and considering the evidence, the majority claimed it "wholly irrelevant" and excluded it. The majority cited a previously received anonymous letter in another KCPL financing case.[110] This Commissioner supported rejection of the letter but, unlike here, staff performed no investigation and it did not propose to present any substantial findings.[111] If one were to analogize, consider a criminal court case in which an anonymous allegation is made to the police. While the allegation itself would not be admissible at trial, the allegation would lead to an investigation that, in turn, would possibly lead to relevant and material evidence.

Any evidence found during the investigation of the anonymous letters with proper foundation and relevance to whether the transaction is "not detrimental to the public interest," should have been admitted, or at least heard in the record for the tribunal to consider. The finding of "wholly irrelevant" restricts the Commission's ability to receive the evidence and a reviewing court is without the record to render a decision. The majority mischaracterizes the staff's attempt to introduce the findings of its investigation that stemmed from the letters. Staff was not seeking to introduce the letters by themselves but as part of other evidence that would be established with proper foundation.

2. GPE Code of Ethical Business Conduct/gift and gratuity policy

The applicants' codes of ethics or practices are also relevant to this proceeding and the majority was incorrect in making a finding that such evidence is "wholly irrelevant." Adoption of different models of "best practices" are mentioned in support of the transaction. The applicants allege such "best practices" will lead to significant

[110] Report and Order, p. 23.
[111] *Application of Kansas City Power and Light Company for Authority to Issue Debt Securities,* EF-2008-0214.

savings justifying the acquisition.[112] The staff identified its own "best practices" that should be adopted by GPE/KCPL. The staff argued that because GPE/KCPL's share of the capital program is now valued at over $1.3 billion,[113] Aquila's Code of Ethics and its gift/gratuity policy must be adopted. The staff argues that this is an additional example of why the transaction is "detrimental to the public interest." This stems from the fact that the acquisition will lead to a larger concentration of Iatan being owned and operated by the single company without the checks and balances from another stakeholder.

Much of the majority Report and Order addresses "best practices" when supporting the transaction. It is fundamentally unfair for the negatives or concerns of the transaction to be ignored. It is further unfair to the parties that this evidence was deemed irrelevant and completely excluded from the record.

3. "Additional Amortizations" and the CEP

What makes this case unique is the presence of the CEP and the "additional amortizations," that help fund it. The increased cash flows from the "additional amortizations" protect GPE/KCPL during completion of their construction projects. The CEP was the result of a carefully negotiated agreement among stakeholders. The parties acknowledged GPE/KCPL's need in constructing new generation facilities and the parties also understood the burdens GPE/KCPL faced in financing the projects. Prior to this agreement, no other utility had ever successfully reached such an agreement and, with the exception of Empire District Electric which has now successfully implemented its own regulatory plan, no other utility had benefited from the extra cash flow. The CEP is truly

[112] *See* Exhs. 18 (Kemp Supplemental Direct), 30 (Zabors Direct) and 31 (Zabors Supplemental Direct).
[113] Report & Order, ¶¶ 440, 442.

the first of its kind in recent Missouri history. In theory, the plant will be built and the company will be protected from adverse credit ratings.

However, significant questions have been raised when the company opts to purchase another utility during such a time of difficult cash flows and sizable investment. While the applicants chose to not specifically ask for an award of "additional amortizations" in this case, they did not give up the opportunity to make such a request in future cases. The majority found this issue to be irrelevant, yet not "wholly irrelevant," and allowed limited testimony on the subject. But in its ruling, the majority fails to understand that GPE/KCPL are entitled to continue to seek the protection of "additional amortizations" during the life of this CEP, through 2010. GPE/KCPL may be entitled to additional cash flows if the CEP credit metrics reflect a downgrade in credit rating. Regardless of capital investment or whether they are purchasing another company, if KCPL/GPE's credit metrics fall below certain standards, the Commission will be asked to add in more cash to protect the utility. GPE/KCPL have already been awarded $21,679,061, which was added into rates in Case No. ER-2006-0314,[114] and $10,723,827, which was additionally placed into rates in Case No. ER-2007-0291.[115] Rate cases in 2009 and 2010 will contemplate additions to GPE/KCPL's revenue requirement. It also appears that Aquila will be permitted to ask for its own "additional amortizations" for its share of Iatan 2.[116] Unfortunately, most of the evidence on this topic was excluded.

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[114] *In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Begin the Implementation of Its Regulatory Plan*, Case No. ER-2006-0314.

[115] *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan*, Case No. ER-2007-0291.

[116] Pending rate cases filed by Aquila and KCPL, at this time, do not suggest requests for "additional amortizations," although parties' positions may change as the cases progress. *In the Matter of the*

Further, while "additional amortizations" are a relevant topic for the current CEP, they are also relevant to potential future CEPs.[117] "Additional amortizations" were designed to attract capital investment, to help build infrastructure and to prepare for future needs in the public service. It appears that this procedure is now being used for the strategic purchase of another utility. The Commission and the court should have the opportunity to review this material so that the transaction can be fully evaluated with future consequences in mind. While the parties were permitted to make a limited offer of proof associated with these issues, a great deal of testimony was excluded from the record.

Lastly, these rulings are inconsistent with prior evidentiary decisions in maintaining a broad view of relevant evidence. The industrial intervenors[118] sought to exclude evidence through a Motion In Limine of synergy savings because of how the case was pleaded. The Commission, including this Commissioner, rejected the Motion and ruled that it would take a broad view of relevant factors in sorting out its decision. These rulings go in the opposite direction by narrowly restricting what evidence comes before the Commission.

CONCLUSION

It is this Commissioner's sincere hope that this transaction is a success, that the synergies savings are achieved, that rates are reduced, that the integration is painless, that

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Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Continue the Implementation of Its Regulatory Plan, Case No. ER-2009-0089; *In the Matter of the Application of Aquila, Inc. dba KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service*, Case No. ER-2009-0090; *In the Matter of the Application of Aquila, Inc. dba KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Steam Heating Service*, Case No. HR-2009-0092.

[117] Exh. 138, p. 10. Mr. William Downey, CEO of KCPL, discusses the company's intentions to engage stakeholders for future CEP projects.

[118] Staff concurred in the Industrial Intervernors' Second Motion in Limine.

reliability is improved and that customers receive exceptional service. This Commissioner also hopes the shareholders financially benefit from the transaction. A successful merger with such results is definitely in the public interest.

However, many concerns have not been addressed suggesting significant challenges in the future. Mergers do not always work out. KCPL and Aquila have been involved in seven mergers cases in the last 18 years.[119] Four of those attempts failed for various reasons[120] while one of applications was approved only not to be pursued or consummated.[121]

Based on the above analysis, this Commissioner concludes that the applicants did not meet their burden of proving that the proposed transaction is not detrimental to the

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[119] *In The Matter Of The Application Of Kansas City Power & Light Company For Approval Of Its Acquisition Of All Classes Of The Capital Stock Of Kansas Gas And Electric To Merge With Kansas Gas And Electric, To Merge With Kansas Gas And Electric,* Case No. EM-91-16; *In The Matter Of The Application Of The Kansas Power And Light Company And KCA Corporation For Approval Of The Acquisition Of All Classes Of The Capital Stock Of Kansas Gas And Electric Company, To Merge With Kansas Gas And Electric Company, To Issue Stock, And Incur Debt Obligations*, Case No. EM-91-203; *In The Matter Of The Joint Application Of Kansas City Power And Light Company, Utilicorp United, Inc., And Kansas City United Corp., For An Order Authorizing Kansas City Power And Light And Utilicorp United, Inc. To Merge With And Into Kansas City United Corp., And In Connection Therewith, Certain Other Related Trans-Actions,* Case No. EM-96-248; *In The Matter Of The Application Of Western Resources, Inc., For Approval Of Its Proposal To Merge With Kansas City Power & Light Company, And For Other Related Relief,* Case No. EM-96-371; And *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power And Light Company For Approval Of The Merger Of Kansas City Power And Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM-97-515; *In Re UtiliCorp United, Inc. and St. Joseph Light & Power Co. for authority to merge*, Case No. EM-2000-292, *In Re UtiliCorp United, Inc. and The Empire District Electric Co. for authority to merge,* Case No. EM-2000-369.

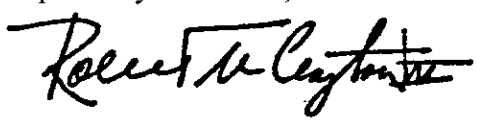
[120] *In The Matter Of The Application Of Kansas City Power & Light Company For Approval Of Its Acquisition Of All Classes Of The Capital Stock Of Kansas Gas And Electric To Merge With Kansas Gas And Electric, To Merge With Kansas Gas And Electric,* Case No. EM-91-16; *In The Matter Of The Joint Application Of Kansas City Power And Light Company, Utilicorp United, Inc., And Kansas City United Corp., For An Order Authorizing Kansas City Power And Light And Utilicorp United, Inc. To Merge With And Into Kansas City United Corp., And In Connection Therewith, Certain Other Related Trans-Actions,* Case No. EM-96-248; And *In The Matter Of The Application Of Western Resources, Inc., For Approval Of Its Proposal To Merge With Kansas City Power & Light Company, And For Other Related Relief,* Case No. EM-96-371; *In Re Utilicorp United, Inc. And The Empire District Electric Co. for authority to merge,* Case No. EM-2000-369.

[121] *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power And Light Company For Approval Of The Merger Of Kansas City Power And Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM-97-515.

pubic interest. There is simply too much risk for all the stakeholders with limited potential benefit. This application, unfortunately, began as a ratepayer financed transaction with many guarantees and protections for the applicants, while also posing significant detriments to the ratepayers. Even now, with many of these items off the table, the Commission is left with the prospect of financially damaging all three applicants with a transaction that staff, OPC and others predict will face many difficult challenges ahead. With no concrete integration plans, a focus on savings rather than service, the distraction from complicated and difficult construction projects, the prospect of a credit downgrade and the likely possibility that the Commission will be expected to protect these companies in the future with higher ratepayer obligations, this Commissioner firmly believes that the application is detrimental to the public interest and must be denied.

For the foregoing reasons, this Commissioner dissents.

Respectfully submitted,



Robert M. Clayton III
Commissioner

Dated this 17th day of September 2008,
at Jefferson City.

Year 2007 **Month** February

Agenda Date 2/1/2007

9th Floor

Governor Office Building

200 Madison Street, Suite 900

Jefferson City , Missouri 65101

Jeff Davis (JD): P, **Connie Murray (CM):** P, **Steve Gaw (SG):** P, **Robert Clayton (RC):** P, **Linward Lin Appling (LA):** P, **Staff:** P

Approval of Minutes of Last Agenda Meeting

Agenda Date	JD	CM	SG	RC	LA	Action
1/30/2007	Y	Y	Y	Y	Y	Approved as submitted.

★ **For Good Cause**

WD **Withdrawn**

Tariff and New Orders

Commissioner Votes	Case / Tracking No.	Company Name/Brief Description	Action	Dissent	Concur	Lead Staff/Additional Staff Contact (s)
JD CM SG RC LA Y Y Y Y Y	IT-2007-0187	Southwestern Bell Telephone, L.P. -- Report and Order	Approved as submitted.			Stearley
JD CM SG RC LA Y Y N N Y	EO-2005-0156	Aquila Networks - MPS -- Order Denying Motion for Rehearing	Approved as submitted.			Pridgin

Case Discussion

Commissioner Votes	Case No.	Company Name/Brief Description	Action	Lead Staff/Additional Staff Contact (s)
	SO-2007-0071	Central Jefferson County Utilities, Inc. -- Post Hearing Discussion	Discussed	Stearley
	GR-2006-0387	Atmos Energy Corporation -- Case Discussion	Discussed	Dippell

Other Discussion

Commissioner Votes	Other Discussion	Brief Description	Action	Lead Staff/Additional Staff Contact(s)
★ JD CM SG RC LA Y Y Y Y Y		Request by Praxair for documents distributed at recent Brown Bag	Voted to release information.	Dale

Attachment A

meeting.

Commission Scheduling Matters	-	Discussed	Davis
Legislation	-	Discussed	Davis
Budget	-	Not discussed	Davis
Other	-	N/A	Davis
Litigation	-	Not discussed	Davis
Personnel	-	Not discussed	Davis

P = Present A = Absent Y = Yea T = Present via telephone N = Nay X = Non Participating

The Sunshine Law requires advance notice of items that may be closed. See sec. 610.022.2.

- Litigation (may be closed under sec. 610.021(1) RSMo)
- Personnel (may be closed under sec. 610.021(3) and/or (13) RSMo)

Missouri Public Service Commission - Minutes of Agenda Meeting

Friday, January 26, 2007
10:30 AM

PSC Agenda Room, Governor Office Building, 200 Madison Street, Suite 900

Jeff Davis (JD): P, **Connie Murray (CM):** P, **Steve Gaw (SG):** P,
Robert Clayton (RC): P, **Linward Lin Appling (LA):** P, **Staff:** P

Approval of Minutes of Last Agenda Meeting

WD **Withdrawn**

★ **For Good Cause**

Tariff and New Orders

Case Discussion

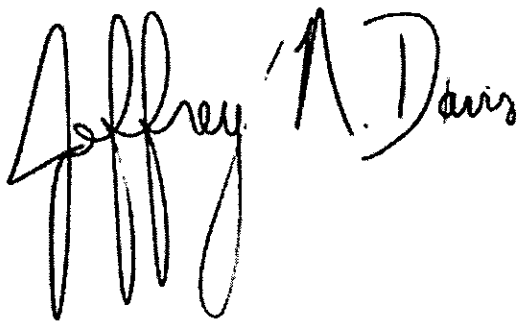
Other Discussion

Item No.	Commissioner Votes	Brief Description
1.		Brown Bag Luncheon Meeting -- *Henderson*

Description: Other

Action: Discussed

P = Present **A = Absent** **Y = Yea** **T = Present via telephone** **N = Nay** **X = Non Participating**



1/31/2007

Chairman

SUNSHINE LAW REQUEST

TO: Colleen M. Dale
Secretary of the Missouri Public Service Commission

FROM: David Woodsmall

DATE: January 31, 2007

RE: Request for Memorandum Presented and Discussed at January 26, 2007 PSC Agenda

Pursuant to Section 610.023 RSMo 2000, I hereby request, on behalf of Praxair Inc., a copy of ***all*** memoranda, or other records or documents presented to the Commission and discussed at the Commission's January 26, 2007 open meeting. It is my understanding that one portion of your memorandum contained a proposed rewrite of Chapter 2 of the Commission's rules. I have already received that proposed rewrite. As such, this Sunshine request seeks all memoranda and other records presented and discussed at the January 26 public meeting, excluding the Chapter 2 proposed rewrite.

As required by Section 610.023.3, "each request for access to a public record shall be acted upon as soon as possible." "If access to the public record is not granted immediately, the custodian shall give a detailed explanation for the cause for further delay."

I would note that Section 610.027 provides the possibility of penalties, fines and attorneys fees in the event that access to such public record is not granted as soon as possible. Moreover, recent court decisions have indicated that this liability is ***personal*** to each individual agency member. Finally, I would note that it is the agency's responsibility to undertake a search for those documents It is not sufficient to merely question whether those documents have been "retained" by the Commission. Moreover, it is not appropriate to attempt to shield such documents from public review by claiming that the documents were retained by Staff employees, but not the individual Commission members.

Please contact me at 573-635-2700 when this record is available for inspection and copying or if you have any questions regarding this request or the legal obligations imposed on the Commission under a Sunshine Law Request. In order to avoid any delay, I will inspect at the Commission's premises.

Memorandum

To: Commissioners
Division Directors
From: Cully Dale
Date: January 25, 2006
Re: **Process Improvements Brown Bag**

The adjudication division has the following suggestions for streamlining the procedures for major cases. In addition, the Chapter 2 rewrite is attached, which embodies any changes necessary to accomplish these goals. The new Chapter 2 also incorporates other efficiencies and generally streamlines the language and requirements of the chapter.

1. Pre-filed Testimony.

a. If possible, make it shorter.

b. Put as much as possible in attached schedules. Particularly, experience and education should be in an attachment; discussion of previous commission positions, instructions or decisions should be in a separate attachment (if included at all).

c. Draft it in "issue" components. This makes it easier for the RLJ and Commissioners to put necessary materials for any given day of hearing and makes for easier reference when writing a decision, which is necessarily by issue.

d. Do a summary for the RLJ of each issue and the position on the issue. Experts tend to gear their testimony to the opposing experts, but the real audience is the group of people who will draft and decide the issues. If the witness cannot articulate his/her position and support therefore, the testimony is unusable. In addition, witnesses should clarify how the parties' positions relate to each other.

e. Always clarify your own position.

f. Save legal arguments and analyses for the briefs.

2. Briefs.

a. Make them shorter.

b. Cite case law, not previous Commission decisions. Always cite the Commission's authority to decide an issue, what the standard is and who has the burden of proof. Even if this is boilerplate, it needs to be there, in no more than two sentences.

c. Make a clear statement of what the issue really is, why it matters and what the Commission should decide. This includes arguments about potential ramifications.

d. Be exhaustive in the prehearing brief and cursory in the post-hearing brief. Use the post-hearing brief to bring the issues current (for example, noting settlement or compromise) and adding transcript cites.

e. Minimize the need to cross-reference.

f. Cite to the evidence. If the RLJ cannot find the supporting fact in the record, it will not be included in the order.

3. Cross-Examination.

a. If you have no questions, don't ask any.

b. Witnesses should answer leading questions: yes, no, maybe, sometimes or I don't know.

c. Lawyers should only ask leading questions on cross.

d. Lawyers should object immediately to all blather in the record (see b) and move to strike the extraneous verbiage.

e. Witnesses should be encouraged to be succinct and pointed in their responses to questions from the bench and during redirect. Long, rambling responses serve to confuse the bench, give the other side ammunition and muddy up the record.

4. Supplemental Filings.

a. All parties are always welcome to file proposed findings of fact and conclusions of law, and are free to not file them if they do not wish to do so. When the Commission asks for responses to particular questions, the bench is seeking information, not argument. Although parties are likely to file argument anyway, it is not a substitute for information.

b. Please point out bench mistakes soon enough and clearly enough for the RLJ to be able to fix them.

c. Weigh in on issues raised by other parties. The RLJs greatly appreciate responsive pleadings that direct them to the case or statute that disposes of the issue.

d. If the bench asks a question that is a non-sequitor, tell the bench so in no uncertain terms.