

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

Midwest Energy Consumers Group,)	
)	
Complainant,)	
)	
v.)	File No. EC-2017-0107
)	
Great Plains Energy, Inc.)	
)	
Respondent.)	

**INITIAL POST-HEARING BRIEF OF
MIDWEST ENERGY CONSUMERS' GROUP**

COMES NOW the Midwest Energy Consumers' Group ("MECG") and hereby submits its Initial Post-Hearing Brief. In this brief, MECG will address the scope and meaning of the Great Plains Energy ("GPE") settlement commitment in Case No. EM-2001-464. Given GPE's failure to comply with this settlement commitment, incorporated into the Commission's order as a condition underlying its authorization for KCPL to reorganize into a holding company structure, the Commission should find that GPE has failed to comply with its order from that case. As a result, the Commission should order GPE to file for Commission approval of the GPE acquisition of Westar Energy, Inc.

I. PROCEDURAL STATUS

On October 11, 2016, MECG filed its Complaint against GPE.¹ On October 31, 2016, GPE filed its Answer as well as its Motion to Dismiss. Following responses to the GPE Motion to Dismiss, the Commission held an oral argument on December 21, 2016 to

¹ MECG subsequently amended its Complaint. On November 22, 2016, MECG filed its First Amended Complaint. On December 28, 2016, MECG filed its Second Amended Complaint.

consider the GPE Motion to Dismiss. On January 4, 2016, the Commission issued its Order Denying Motion to Dismiss and Scheduling Evidentiary Hearing. In that Order, the Commission scheduled an evidentiary hearing in this matter for February 1, 2017.

Prior to that hearing, the parties filed a *Joint Stipulation of Facts and List of Issues, Request to Take Official Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment*. That document provides for ten (10) stipulated facts. On January 24, 2017, the Commission issued its *Order Canceling Evidentiary Hearing*. On January 25, 2017, the Commission issued its *Order Admitting Exhibits and Setting Briefing Schedule*. In that Order, the Commission accepted seven (7) exhibits into evidence. Additionally, that Order provides for initial briefs to be filed by January 31, 2017.

II. JURISDICTIONAL STATEMENT

Section 386.390 provides that the Commission may hear complaints related to any violation “of any rule or order or decision of the commission.” In its underlying Complaint,² MCEG alleges that GPE violated the Commission’s *Order Approving Stipulation and Agreement and Closing File* in EM-2001-464³. As such, the Commission’s has jurisdiction to hear MCEG’s Complaint.

III. CASE NO. EM-2001-0464: KCPL REORGANIZATION

On February 26, 2001, KCPL filed for Commission approval to reorganize itself into a holding company structure. Under the plan, KCPL would become a wholly-owned

² *Second Amended Complaint*, filed December 28, 2016.

³ Exhibit 2. *Order Approving Stipulation and Agreement and Closing File*, Case No. EM-2001-464, issued July 31, 2001.

subsidiary of Great Plains Energy. On July 9, 2001, the parties executed their First Amended Stipulation and Agreement. Relevant to the immediate proceeding, that Agreement contained the following stipulation:

GPE agrees that it will not, directly or indirectly, acquire or merge with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility unless GPE has request prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction.⁴

The importance of this provision is clear. Prior to the reorganization, the Commission had certain jurisdiction over KCPL. Included in this jurisdiction was the authority to approve the issuance of any stocks and bonds.⁵ Since the issuance of stocks and bonds was the financing mechanism that made acquisitions possible, the Commission had implicit authority over any KCPL merger activities.

Following the reorganization, however, certain functions would necessarily be accomplished at the parent company level. For instance, the issuance of stocks and bonds would now be handled by the parent company. Recognizing that the Commission would have limited jurisdiction over the parent company, the Commission may have lost its authority to approve the issuance of stocks and bonds and, by necessity, the authority to approve of merger activities as a result of the KCPL reorganization.

For this reason, the reorganization settlement included the provision which allows the Commission to approve GPE's acquisition of public utilities. Effectively, since the issuance of stocks and bonds underlying an acquisition would now be accomplished by

⁴ Exhibit 1. *First Amended Stipulation and Agreement*, Case No. EM-2001-464, at page 13; Section 7. Hereinafter referred to as "Reorganization Condition".

⁵ Section 393.180.

GPE, this provision provides the basis for continued Commission authority over the acquisition of other public utilities.

Ultimately this Reorganization Condition was adopted by the Commission. As part of its authority to approve utility reorganizations, Section 393.250.3 provides the Commission with the authority to “impose such condition or conditions as it may deem reasonable and necessary.” Relying on this authority, the Commission placed several conditions on its approval of the KCPL reorganization. Included in these conditions was the Reorganization Condition.

IT IS THEREFORE ORDERED:

(3) That the First Amended Stipulation and Agreement, filed on July 9,, 2001, is deemed to be unanimous. Further, the Commission finds the First Amended Stipulation and Agreement to be reasonable and approves the same. Kansas City Power & Light Company, Great Plains Energy, Inc., and Great Plains Power, Inc., are directed to comply with its provisions.

(4) That Kansas City Power & Light Company is authorized to reorganize as described in its application referred to in Ordered Paragraph 2, above, subject to the conditions contained in the First Amended Stipulation and Agreement referred to in Ordered Paragraph 3.⁶

This docket is important for three reasons. ***First***, pursuant to Section 393.250.3, the Commission had the authority to impose conditions underlying its approval of any utility reorganization. ***Second***, pursuant to this authority, the Commission included as a condition to KCPL’s reorganization that GPE seek Commission approval for its acquisition of any public utility. ***Third***, the Reorganization Condition was designed to preserve Commission jurisdiction over utility acquisitions that would otherwise be lost as a result of the KCPL reorganization.

⁶ Exhibit 1, page 13.

IV. WESTAR ENERGY IS A PUBLIC UTILITY WITHIN THE MEANING OF THE REORGANIZATION CONDITION.

As indicated, GPE committed to seek Commission approval for its acquisition of a “public utility”. The Commission made this commitment a condition to its approval of the KCPL reorganization.

On May 29, 2016, GPE announced that it had entered into an Agreement and Plan of Merger by which it would acquire all of the stock of Westar Energy.⁷ Westar Energy is a public utility operating in the State of Kansas with approximately 702,000 customers.⁸ Despite the Reorganization Condition, GPE has not sought Commission approval to acquire Westar.⁹ In fact, in an email directed to the Commission, the Chief Executive Officer of GPE pointed out that it was GPE’s position that the merger is not subject to the approval of the Missouri Commission.¹⁰

While GPE admits that Westar is a public utility, GPE asserts that the acquisition is not subject to Missouri Commission approval. Specifically, as detailed in its Motion to Dismiss, GPE believes that “[b]ecause this transaction does not involve a Missouri public utility, the Commission has no jurisdiction to approve or disapprove it”.¹¹ Effectively, GPE now wants to rewrite the Reorganization Condition, previously agreed to by it, to limit the condition solely to the acquisition of “Missouri” public utilities. As the following demonstrates, GPE’s attempt to rewrite the Reorganization Condition fails for four reasons.

⁷ Stipulated Fact #1. See, *Joint Stipulation of Facts and List of Issues, Request to Take Official Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment.*

⁸ Stipulated Fact #2.

⁹ Stipulated Fact #10.

¹⁰ Stipulated Fact #9.

¹¹ *Supplemental Motion to Dismiss of Great Plains Energy Incorporated and Suggestions in Support*, filed December 2, 2016, at page 1.

First, during the on-the-record presentations in which the Commission was considering the KCPL Reorganization, GPE witnesses repeatedly told the Commission that the Reorganization would not reduce the Commission’s jurisdiction. For instance, the KCPL’s Senior Director of Regulatory Affairs and Risk Management stated: “The other comment I wanted to make -- and I’ll be glad to answer any other questions you have – absolutely nothing changes from the Commission's standpoint on this transaction. The Commission has every bit as much authority under this restructure as it does today.”¹² In addition, KCPL’s Chief Executive Officer pointed out:

Certainly the holding company structure adds, if anything, another layer of regulation that we must submit to, but we are willing to undergo that for the -- for the ability to run our businesses along the business lines that we've outlined in our application. We feel that this structure respects the responsibilities of the Commission to our ratepayers as well as respects the responsibilities of our management to our investors.¹³

While KCPL was eager to tell the Commission that it would have “every bit as much authority under this restructure as it does today” and that it “respect[ed] the responsibilities of the Commission to our ratepayers”, it is apparent that this was simply rhetoric designed to expedite the approval of its corporate reorganization. As mentioned, given its statutory authority, the Commission would have had authority over the Westar acquisition prior to the KCPL reorganization. Now, however, when the Reorganization Condition is implicated, GPE conveniently claims that the Commission does not have the jurisdiction that it once had. Rather than being able to consider all acquisitions, as the Commission was once able, GPE now claims that the Commission may only consider acquisitions involving Missouri public utilities. Certainly, such a position is contrary to that previously espoused by GPE’s Chief Executive Officer as well as its Director of

¹² Exhibit 3, Transcript (Volume 2), Case No. EM-2001-464, pages 15 and 75 (emphasis added).

¹³ *Id.* at pages 15 and 37.

Regulatory Affairs. Clearly, GPE is no longer concerned with the “responsibilities of the Commission to [its] ratepayers.”

Second, it would be meaningless to have included a Reorganization Condition that only extended Commission authority to the approval of acquisitions involving Missouri public utilities. Specifically, Section 393.190 already requires that any Missouri utility seek Commission approval prior to selling or merging the company.

No. . . electrical corporation. . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public. . . without having first secured from the commission an order authorizing it so to do.

Recognizing that any Missouri public utility would have to seek Commission approval before selling the utility, it would be redundant and unnecessary to require GPE, as the purchasing utility to seek Commission approval as well. Given this, it would be pointless to include a Reorganization Condition that requires GPE to seek Commission approval to purchase a Missouri public utility. The only way to give meaning to such a provision is to interpret it to require GPE to seek Commission approval for its purchase of **any** public utility.

Third, it is clear that the Reorganization Condition is designed to allow the Commission to protect ratepayers from harmful acquisitions undertaken by GPE at the holding company level. In fact, during the on-the-record presentation in the reorganization case, GPE admitted that the settlement “respects the responsibilities of the Commission to our ratepayers.”¹⁴

¹⁴ Exhibit 3, Transcript (Volume 2), Case No. EM-2001-464, pages 15 and 37.

Given the consumer protection nature of the Reorganization Condition, it is ludicrous to limit that condition to only acquisitions of Missouri public utilities. After all, harm to ratepayers comes not only from the acquisition of Missouri public utilities; harm can also come from the acquisition of non-Missouri public utilities. In light of the consumer protection nature of the Reorganization Condition, that condition should be interpreted in a manner that protects consumers from acquisitions with non-Missouri as well as Missouri public utilities.

For instance, assume a scenario in which GPE attempts to purchase Duke Energy, a public utility with a market capitalization that is 10 times larger than GPE. Given GPE's assertion that the Reorganization Condition only applies to GPE's acquisition of Missouri public utilities, the Missouri Commission would be powerless to protect Missouri ratepayers from such an acquisition. Clearly, given that harm can come to ratepayers from GPE's acquisition of non-Missouri, as well as Missouri, public utilities, the Reorganization Condition should be applied to GPE's acquisition of any public utility.

Fourth, had GPE truly intended for the Reorganization Condition to apply only to its acquisition of only Missouri public utilities, it would have been simple for GPE to have limited the condition in such a manner. Specifically, all GPE would have had to do was to include the word "Missouri" in front of public utilities. Given this simple clarification, GPE's failure to include such a description was likely a result of the fact that none of the parties intended the condition to be so limited. On the other hand, recognizing that the other parties intended for the condition to have a broad meaning, they included the phrase "public utilities" in a broad manner. Again, recognizing GPE's

failure to object to the use of such a broad term, when a clarification was readily at hand, dictates that this customer protection condition should be interpreted in a manner that preserves the maximum jurisdiction for the Commission to protect customers.

For all these reasons, the phrase “public utilities” as used in the Reorganization Condition should be interpreted broadly to include GPE’s’ acquisition of any public utility, whether located in Missouri or another state. Recognizing that GPE has announced that it is acquiring Westar Energy, a public utility within the meaning of the Reorganization Condition, GPE is required to seek Commission approval for the acquisition. In light of the fact that GPE has informed the Commission that it does not seek to seek such authority,¹⁵ it is incumbent on the Commission to order GPE to file for the Commission’s approval.

V. IN THE ALTERNATIVE, WESTAR ENERGY IS THE AFFILIATE OF A PUBLIC UTILITY WITHIN THE MEANING OF THE REORGANIZATION CONDITION.

As indicated, the Reorganization Condition extends not only to public utilities, but also to the “affiliate of a public utility, where such affiliate has a controlling interest in a public utility.” As the previous section indicates, the Commission has jurisdiction over this transaction as a result of the fact that Westar Energy falls within the scope of a “public utility” as that term is used in the Reorganization Condition. In addition, the MEGC complaint points out that the Commission also has jurisdiction over the transaction as a result of the fact that Westar Energy is an affiliate with controlling interest over Westar Generating, Inc., a Missouri public utility.

¹⁵ Stipulated Fact #9.

The definitions contained in Section 386.020 lead to the unmistakable conclusion that Westar Generating is a Missouri public utility. Specifically, Section 386.020(42) defines “public utility” as including electrical corporations. That section continues on to note that each electrical corporation “is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission.” Section 386.020(15) defines an electrical corporation as a “corporation” “owning, operating, controlling or managing any electrical plant.” Section 386.020(14) broadly defines electrical plant as “all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity.”

The stipulated facts reveal that Westar Generating, Inc. holds a Certificate of Convenience and Necessity “to construct, install, own, operate, control, manage and maintain electric facilities in Jasper County, Missouri.”¹⁶ Relying on this certificate of convenience and necessity, Westar Generating constructed and currently owns a 40% share of the State Line Combined Cycle Generating Facility located near Joplin, Missouri.¹⁷

Clearly, the State Line Combined Cycle Generating Facility meets the definition of “electrical plant” in Section 386.020(14). As such, given its ownership of this electric plant, Westar Generating is an electrical corporation as defined in Section 386.020(15). And, given the definition of public utility found in Section 386.020(42), Westar Generating is a public utility.

¹⁶ Stipulated Fact #6 and 7. See also, Exhibit 7, *Order Approving Application to Transfer Assets and Order Granting Certificate of Convenience and Necessity*, Case Nos. EM-2000-145 and EA-2000-153, at page 5.

¹⁷ Stipulated Fact #5.

Established as a Missouri public utility, it is clear that GPE's acquisition of Westar Energy fits within the scope of the Reorganization Condition. Specifically, that provision extends to GPE's acquisition of the "affiliate of a public utility, where such affiliate has a controlling interest in a public utility." As mentioned, Westar Generating is a public utility. Further, it is admitted that Westar Energy "owns 100% of the stock of Westar Generating."¹⁸ Therefore, Westar Energy is an affiliate with a controlling interest in a public utility (Westar Generating). Given this, GPE's acquisition of Westar Energy again falls within the scope of the Reorganization Condition.

VI. CONCLUSION

As the foregoing brief demonstrates, whether considered as a public utility or an affiliate of a public utility, the acquisition of Westar Energy clearly falls within the scope of the Reorganization Condition. This condition was created: (1) to preserve the Commission's jurisdiction that existed prior to the KCPL reorganization and (2) to protect ratepayers from the detrimental effects of GPE's merger and acquisition activities.

It is important that the Commission preserve and exercise its jurisdiction in this matter. Abandonment of its authority in this regard will result in the Commission being unable to review future GPE acquisitions and ratepayers inevitably being subjected to the negative consequences of those future transactions. Moreover, given the similarity between the GPE Reorganization Condition to the Laclede Reorganization Condition, a decision to decline jurisdiction here will inevitably preclude the Commission from exercising jurisdiction over future Laclede acquisitions.

¹⁸ Stipulated Fact #4.

For all of these reasons, MECG urges the Commission to find that GPE's acquisition of Westar Energy falls within the scope of the Reorganization Condition and order GPE to file an application for Commission approval of that transaction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: January 31, 2016