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 KCP&L Greater Missouri Operations Company for a variance from 4 CSR 240-20.015.	))))	Case No. EE-2017-0113

RESPONSE TO OPPOSITION TO
MECG APPLICATION TO INTERVENE

COMES NOW, the Midwest Energy Consumers Group, and for its Response to Great Plains Energy Incorporated, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collective "Joint Applicants") Opposition to MECG's Application to Intervene, respectfully states as follows:

1. On October 12, 2016, the Joint Applicants filed their Application for an alleged variance from the Commission's affiliate transaction rule. Simultaneously, the Joint Applicants filed a Stipulation and Agreement ("Staff Settlement") with the Missouri Public Service Commission Staff. MECG asserts that this docket is an "alleged" request for a variance from the affiliate transaction rule because in reality this is an end around attempt by the Joint Applicants to receive approval for their acquisition of Westar Energy. Rather than properly seeking explicit Commission approval for that acquisition, as required by Section 393.190 and the Great Plains' commitment in Case No. EM-2000-0464, the Joint Applicants have sought to improperly obtain implicit approval for the Westar acquisition through an alleged affiliate transaction variance. Joint Applicants apparently postulate that, by approving affiliate transactions between the Missouri utilities and Westar, the Commission is implicitly approving Westar as an affiliate.

2. The fact that this is actually an implicit request for approval of its acquisition of Westar is best demonstrated by a side-by-side comparison of the Non-Unanimous Stipulation executed in this case with the Stipulation and Agreement executed in Case No. EM-2016-0213

where Algonquin / Liberty Utilities made an explicit and transparent request for Commission approval of its acquisition. That comparison demonstrates that many of the provisions of the Staff settlement are identical to those contained in the Empire merger. Interestingly though, the Empire provisions were not reached in the context of an affiliate transaction waiver docket, but rather in an explicit request for Commission approval of the Empire acquisition.

3. In addition to obscuring the true-intention of this docket from the Commission, the Joint Applicants then go to great lengths to prevent any other entities from informing the Commission as to the actual purpose of this case. Specifically, the Joint Applicants take the unprecedented step of objecting to each and every intervention request filed in this case. Specifically, the Joint Applicants object to the intervention of actual customers (MECG and MIEC); labor unions (IBEW 412, 1464 and 1613 and Laborer's International Union of North America); environmental interests (Renew Missouri and Sierra Club) as well as interests represented by Brightergy; Consumers Council of Missouri and the City of Independence. By silencing the voices of these interested entities, the Joint Applicants seek to limit critical input that will form the basis of the record needed to ensure that the terms and conditions of the merger treat Missouri customers equitably.

4. Joint Applicants' effort to shield this transaction from the scrutiny of interested parties as well as that of the Commission places customers in Missouri at a significant economic disadvantage. Specifically, while Joint Applicants have refused to explicitly seek Commission approval for the immediate transaction, the Joint Applicants have made such a filing in Kansas. In the context of that Kansas filing, the Joint Applicants have made certain commitments designed to avert any detriment associated with the acquisition of Westar. Included in these commitments is an <u>unconditional</u> prohibition from ever seeking recovery of either transaction

costs or the acquisition premium paid by Great Plains to acquire Westar.[1] In the Staff Settlement, however, the prohibition against recovery of an acquisition premium is conditioned.[2] Similarly, the prohibition against Great Plains seeking recovery of transaction costs is similarly conditioned in the Staff Settlement.[3]

5. The commitments made by Great Plains in the Kansas docket regarding acquisition premium and transaction costs are a basic customer protection. Indeed, in the recent settlement approving the Algonquin acquisition of Empire District Electric, Algonquin expressly agreed not to seek any recovery, directly or indirectly, of either the acquisition premium[4] or

[1] See, Direct Testimony of Darrin Ives, Kansas Corporation Commission Case No. 16-KCPE-593-ACQ, filed June 28, 2016. (Page 4: purpose of testimony is to "Confirm GPE's commitment to not request recovery of acquisition premium or transaction costs related to the Transaction.") (Page 7: "We are not seeking to include in KCP&L's or Westar's revenue requirement any transaction costs or acquisition premiums in connection with the Transaction.") (Page 11: "Significantly, GPE commits that it will not request inclusion of goodwill for this Transaction, inclusive of the acquisition premium and transaction costs, in the revenue requirements of either KCP&L or Westar at any time.") (Page 21: "Similar to the Transaction costs, KCP&L is not requesting inclusion of acquisition premium, or goodwill, in KCP&L's or Westar's revenue requirements.") (Page 22: "As noted earlier, a significant benefit to Kansas customers is GPE's commitment to not seek inclusion in KCP&L's or Westar's revenue requirements of any transaction costs or acquisition premium.") (Page 27: "Additionally, as GPE is not asking for customers to pay any transaction costs or any portion of the acquisition premium, there is no need for tracking savings and benefits and savings to customers will be larger and earlier than had GPE requested recovery of these costs.).

[2] See, Stipulation and Agreement, filed October 12, 2016, provision B(1): "Goodwill associated with the premium over book value of the assets paid for the shares of Westar stock (referred to for purposes of this Stipulation as "Acquisition Premium") will be maintained on the books of GPE. The amount of any acquisition premium paid for Westar shall not be recovered in retail rates, unless otherwise ordered by the Commission. Nothing herein shall preclude any party to this Stipulation from taking a position in any future ratemaking proceedings involving either KCP&L or GMO regarding the ratemaking measures and adjustments necessary to ensure no impact from the acquisition premium on rates. ***Neither KCP&L nor GMO will seek direct or indirect recovery or recognition in retail rates of any acquisition premium through any purported acquisition savings "sharing" adjustment (or similar adjustment) in current or future rate cases; provided, however, that if any party to any KCP&L or GMO general rate case proposes to impute the cost or proportion of the debt GPE is using to finance the Transaction to either KCP&L or GMO for purposes of determining a fair and reasonable return for either utility, then KCP&L and GMO reserve the right to seek, in any such rate case, recovery and recognition in retail rates of the acquisition premium***.

[3] See, Stipulation and Agreement, filed October 12, 2016, provision B(2)

[4] See, Stipulation and Agreement, Case No. EM-2016-0213, filed August 4, 2016, provision D(1): "Goodwill associated with the premium over book value of the assets paid for the shares of Empire stock (referred to for purposes of this stipulation as "Acquisition Premium") will be maintained on the books of LU Central. The amount of any acquisition premium paid for Empire shall not be recovered in retail rates. Nothing herein shall preclude any party to this Agreement from taking a position in any future ratemaking proceedings involving Empire regarding the ratemaking measures and adjustments necessary to ensure no impact from the acquisition premium on rates. Empire will not seek direct or indirect recovery or recognition of any acquisition premium through any purported acquisition savings "sharing" adjustment (or similar adjustment) in future rate cases.").

transaction costs.[5] More significantly, Great Plains made a similar unconditioned commitment not to seek recovery of the acquisition premium when it acquired Aquila.[6] Finally, as regards transaction costs, the Commission disallowed Great Plains request to recover these costs.[7] Clearly, absent Commission scrutiny and the implementation of customer protections, Missouri operations and rates will be at an economic disadvantage to Kansas where such scrutiny is taking place.

6. In its Response to the MECG application to intervene, the Joint Applicants raise a number of flawed technical arguments. First, Joint Applicants argue that, despite its status as a corporation, MECG should be required to identify the members of MECG.[8] The argument is contrary to the Commission's regulations and has previously been rejected by the Commission.

4 CSR 240-2.075(2) specifies the contents of applications to intervene. That rules requires a list of all members, if the associated is not incorporated. "If any applicant is an association, other than an incorporated association or other entity created by statute, a list of all of its members." As Joint Applicants readily admit, MECG is incorporated with the Missouri Secretary of State. As such, the Joint Applicants' argument is misplaced.

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[5] See, Stipulation and Agreement, Case No. EM-2016-0213, filed August 4, 2016, provision D(1): "Transaction costs include, but are not limited to, those costs relating to obtaining regulatory approvals, development of transaction documents, investment banking costs, costs related to raising equity incurred prior to the close of the Transaction, payments to employees who invoke severance payment agreements, and communication costs regarding the ownership change with customers and employees. Empire will not seek either direct or indirect rate recovery or recognition of any transaction costs through any purported acquisition savings "sharing" adjustment (or similar adjustment) in any future rate cases.").

[6] See, Case No. EM-2007-0374, *Report and Order*, issued July 1, 2008, at page 121 ("The Applicants do not request authorization to recover the acquisition premium component of goodwill associated with the merger.").

[7] *Id.* at page 127 ("Transaction costs are generally not recovered through rates but rather charged to shareholders because transaction costs consist of costs incurred by both the acquiring company as well as the acquired company to complete the transaction, and not to facilitate the provision of utility service – such costs are properly considered to be a part of the purchase price of the acquisition. . . Transaction costs do not meet the normal criteria for traditional expenses used to establish rates. These costs are not used or useful nor necessary for the provision of safe and adequate service. These costs are investor costs incurred in the buying and selling of their stock. These are the costs of a non-regulated holding company. Great Plains and its Board decided to incur these costs. Recovery of these transaction costs would result in regulated utilities subsidizing their non-regulated parent companies.").

[8] Joint Applicants' response at ¶3.

7. Not only is a list of members not required by Commission rules, it has previously been rejected by the Commission. In Case No. GC-2016-0297, Laclede Gas raised an identical argument to that now raised by the Joint Applicants.

> Absent such information [the identification of MIEC members], it is impossible for the Commission or Respondents to determine whether MIEC has a cognizable interest in this proceeding and whether or how that interest may or may not differ from that of the general public, as required by Commission Rule 4 CSR 240-2.075(3)(A)). For all the Commission and Respondents know, MIEC may be intervening at the direction of an industrial customer that is not even located in the respective service territories of Laclede Gas or MGE – a circumstance that would raise serious questions about its interest in intervening in this proceeding. Or MIEC may be intervening on behalf of no utility customer at all, but simply as a means of keeping abreast of developments in the proceeding and gathering information that may be of use to it in other proceedings.[9]

Given the clarity of its intervention rule, the Commission summarily rejected Laclede's attempt to expand the requirements of the rule and granted MIEC's intervention.[10]

8. Next, Joint Applicants advance a very limited view of the Commission's intervention standard. Specifically, Joint Applicants assert that MECG has failed to demonstrate that it "has an interest which is different from the general public" or "which may be adversely affected by a final order from the case." Joint Applicants fail to recognize that the Commission, consistent with its ultimate purpose of protecting the general public, has liberally granted interventions.

For instance, Ameren recently sought to intervene in a KCPL rate case. There, several parties opposed Ameren's intervention on the basis that Ameren would not be adversely affected by a Commission decision, since such an order for KCP&L is not binding on Ameren. While

[9] *Response to Application to Intervene of Missouri Industrial Energy Consumers and Request to Defer Ruling Pending Identification of MIEC Members Represented in this Proceeding,* Case No. GC-2016-0297, filed June 6, 2016, at pages 2-3.
[10] *Order Regarding Applications to Intervene,* Case No. GC-2016-0297, issued July 12, 2016.

Ameren was not a KCPL customer and would not be directly affected by any decision in the KCPL rate case, the Commission nevertheless allowed for such intervention.

> "[N]o direct pecuniary or property rights, or infringement of civil rights of a person, must be involved before [an applicant] could be a party to a proceeding before the Commission". It has been the Commission's practice to liberally grant intervention to organizations that promote various public policy positions in order to consider a full range of views before reaching a decision. Ameren Missouri's arguments are persuasive that Ameren Missouri has an interest different than that of the general public, that it may be adversely affected by a final order in this case, and that its participation as a party would serve the public interest. The Commission concludes that Ameren Missouri's application satisfies all requirements of Commission Rule 4 CSR 240-2.075, and intervention will be granted.[11]

Given that it "has been the Commission's practice to liberally grant intervention", and since MECG members will be adversely impacted by the detrimental nature of the Great Plains / Westar merger, the Commission should grant the MECG application to intervene.

9. Interestingly, while Great Plains argues that a restrictive standard be applied to applications to intervene in this case, it has previously relied upon a more liberal standard. Recently, KCPL sought to intervene in Case No. ET-2016-0246 concerning Ameren's electric vehicle charging station tariff. There, KCPL filed an application to intervene which summarily asserted: "[a]lthough the Company does not currently know what position it will take in this case, its interests will be directly affected and could be adversely affected by a final order issued in this case."[12] Clearly, Great Plains inconsistently seeks to apply a much more liberal standard when it seeks to intervene than it does when its customers seek to intervene in a Great Plains case.

[11] *Order Regarding Ameren Missouri's Application to Intervene*, Case No. ER-2014-0370, issued December 3, 2014, at page 3.
[12] *Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for Leave to Intervene Out of Time*, Case No. ET-2016-0246, filed October 28, 2016, at page 3.

10. Additionally, the Joint Applicants claim that MECG fails to distinguish its interests from those already represented by Staff and the Office of Public Counsel. It is well established that the Staff, like the Public Service Commission, is supposed to balance the interests of both customers and the utility shareholders. As such, MECG's interests are clearly distinct from those represented by the Staff.

Similarly, MECG's interests are different from that of the Office of the Public Counsel. Specifically, while Public Counsel represents the interest of all ratepayers, MECG only represents the interests of commercial / industrial customers and not residential ratepayers. The Commission has previously recognized that this is a real distinction. Specifically, the Commission recognized this distinction in granting the opposed intervention of the Consumers Council of Missouri, a residential ratepayer advocate.

> Respondents point out that CCM represents residential ratepayers, which is the same task given to OPC. . . . [Consumer's Council of Missouri] also points out that while it represents residential ratepayers, OPC represents all ratepayers; thus, its interests are not necessarily represented by OPC. . . . The Commission finds that CCM and MIEC have an interest different from that of the general public in that CCM and MIEC represent interests of residential and industrial ratepayers, respectively, that are not the same as the interests of all ratepayers. Further, those interests may be adversely affected by a final order arising from the case, and that granting them intervention would serve the public interest. Thus, the Commission grants the applications to intervene filed by CCM and MIEC.[13]

Just as it recognized that CCM represented an interest distinct from that represented by Public Counsel, the Commission should recognize that MECG represents an "interest different from that of the general public" and grant MECG's application to intervene.

11. Finally, the Joint Applicants argue that MECG should be denied intervention because "any issue related to the rates charged to those customers and the tariffs under which

[13] *Order Regarding Applications to Intervene*, Case No. GC-2016-0297, issued July 12, 2016.

they take service will be decided in future general rate cases."[14] Such an argument is consistent with the Joint Applicants failure to understand the standard and law governing Missouri utility mergers.

12. In the past the Commission has felt free, as the Joint Applicants now suggest, to defer issues associated with a merger to future general rate cases. In 1999, the Commission considered Aquila's acquisition of St. Joseph Light & Power. Rather than consider the impact of acquisition premium in its application of the "not detrimental to the public interest" standard, the Commission simply deferred that issue for consideration in a future general rate case.

On appeal, the Missouri Supreme Court found that it was unlawful for the Commission to defer merger related issues to a general rate case.

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.[15]

Just as it was unlawful for the Commission to defer consideration of the acquisition premium issue in the Ag Processing case, it would be unlawful for the Commission to defer consideration of merger related issues associated with Great Plains' acquisition of Westar for future rate cases. For this reason, it is not appropriate, as the Joint Applicants now suggest, to deny MECG's intervention and defer MECG's issues with the Westar acquisition until a future general rate case.

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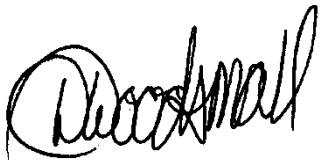
[14] *Opposition of Joint Applicants to Midwest Energy Consumers Group's Application to Intervene*, at ¶2.
[15] *State ex rel. Ag Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 735 (Mo. banc 2003).

WHEREFORE, MECG respectfully requests that the Commission reject the Joint Applicants opposition and grant MECG's Application to Intervene.

Respectfully submitted,



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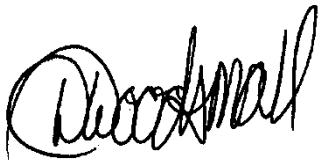
CERTIFICATE OF SERVICE

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.



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Dated: November 7, 2016