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 Inc. and for Other Related Relief	))))))	**Case No. EM-2007-0374**

POST-HEARING BRIEF OF CITY OF ST. JOSEPH

COMES NOW the City of St. Joseph, Missouri (hereinafter referred to as "St. Joseph"), by and through counsel, and submits its post-hearing brief in this matter.

Section 393.170, RSMo, provides that before a certificate of convenience and necessity shall be issued to an electrical corporation by the Commission, the corporation must file municipal franchises with the Commission "showing that it has received the required consent of the proper municipal authorities." The Commission has an ongoing responsibility, under its broad jurisdiction and authority, to ensure that the public utilities it regulates maintain compliance with this, and all other, statutory requirements. *See,* for example, Section 386.040 and Section 393.140 (1) and (5), RSMo. The Commission should condition approval of the instant merger upon a demonstration by the merged entity that it possesses such "required consent of municipal authorities" in the form of valid, current city franchises.

St. Joseph supports the request of the City of Kansas City that Commission approval of the Joint Application be conditioned upon the negotiation of a single, unitary franchise between KCPL/Aquila and the City of Kansas City within nine (9) months of the Commission's approval of the merger. (Exhibit 400, Rebuttal Testimony of Wayne Cauthen, p. 3, l. 16 – p. 4, l. 2.) St. Joseph submits that the Commission should broaden such a condition to clearly

require that the merged entity obtain a franchise in the name of the merged entity from each municipality in which it provides service, including St. Joseph.

After the merger, the current Aquila properties will be renamed and will operate under the name, “KCPL Greater Missouri Operations.” (Exhibit 22, John Marshall Surrebuttal, p. 16, ll. 16-19; T-2221, ll. 10-22.) Black Hills will retain the name “Aquila” in other states, and the Missouri Aquila entity will become “KCPL Greater Missouri Operations.” (T-2221, l. 24-T-2222, l. 4.) There is no evidence in the record that this post-merger entity, “KCPL Greater Missouri Operations” or “Aquila d/b/a KCPL Greater Missouri Operations,” has any municipal franchises in any such name, nor that it has the authority or consent to operate through assignment from any other municipal franchises.

Exhibit 1200 in this case, attached to this brief, is a sworn affidavit by the City Attorney of the City of St. Joseph, Ms. Lisa Robertson, attesting to the fact that it is the position of the City of St. Joseph “that a franchise is required to do business within the City” and that “neither Aquila nor Great Plains Energy has any current valid franchise from the City of St. Joseph that authorizes operation within the City or in the City’s rights-of-way.” (Exhibit 1200, Paragraph 2.) The affidavit further states that “Aquila is not in compliance with the lawful requirements for operating within the rights-of-way in the City of St. Joseph and has refused demands to obtain a franchise as required by law.” (*Id.*)

The letter attached to Exhibit 1200, from attorney Dan Vogel to Renee Parsons, counsel for Aquila, summarizes the legal basis for St. Joseph’s position regarding the Aquila franchise issue. The last two pages of Exhibit 1200 (which also constitute Exhibit 1201) document the requirements and limitations of the St. Joseph City Charter. St. Joseph is a home-rule municipality and its charter expressly prohibits franchises in excess of twenty years in duration. (Exhibit 1200, page 3; Exhibit 1201, *St. Joseph City Charter Section 13.2*.) The notion

maintained by Aquila that it holds a “perpetual franchise” from the City of St. Joseph is negated by these facts.

Ms. Robertson’s affidavit (Exhibit 1200) shows that the experience of the City of Kansas City with regard to its franchise agreement with Aquila is not unique. Aquila’s franchise from the City of Kansas City expired on December 31, 2006. (Exhibit 400, Cauthen Rebuttal, p. 4, l. 5.) Negotiations began on a new franchise agreement, but were stalled. (*Id.,* ll. 5-10.) The City of Kansas City extended the Aquila franchise temporarily, until December 31, 2008. (*Id.,* ll. 9-10; T-2153, l. 20 – T-2154, l. 3; T-2158, ll. 1-13.) Aquila has never had a franchise agreement with the City of St. Joseph, nor has KCPL or Great Plains Energy, nor does KCPL Greater Missouri Operations. (Exhibit 1200, Affidavit of Lisa Robertson.)

The experience of the City of St. Joseph corroborates the testimony and argument of the City of Kansas City as to the importance of the municipal franchise issue. St. Joseph requests that merger approval be conditioned on Aquila or the merged entity negotiating a new municipal franchise with the City of St. Joseph, specifically, within nine (9) months of the Commission’s approval of the instant merger. In short, a municipal franchise is an absolute condition of operation under both state and local law, and Aquila is in current violation of that legal duty. A merger cannot be approved that allows the applicant to continue to operate in blatant violation of law.

As previously stated, Section 393.170, RSMo, provides that before a certificate of convenience and necessity shall be issued to an electrical corporation by the Commission, a verified statement of the president and secretary of the corporation shall be filed with the Commission “showing that it has received the required consent of the proper municipal authorities.” The Commission has an ongoing responsibility, under its broad jurisdiction and

authority, to ensure that the public utilities it regulates maintain compliance with this, and all other, statutory requirements. *See,* for example, Section 386.040 and Section 393.140 (1) and (5), RSMo. As stated in Mr. Vogel's letter to counsel for Aquila: "In light of the court's ruling in *StopAquila.Org v. Aquila, Inc.,* 180 S.W.3d 24 (Mo. Ct.App. 2005), Aquila is certainly on notice of the significance of the franchise authority in conducting business within a jurisdiction." (Exhibit 1200.) The failure of Aquila to address the problem, despite years of notice, underscores the need for Commission action to insist that franchise consent of the City, as required by Section 393.170, RSMo, and City Charter, is mandated as a condition of the merger.

Admissibility of Exhibit 1200

The City of St. Joseph offered Exhibit 1200 into evidence at hearing, on April 28, 2008. A copy of Exhibit 1200 is attached to this brief. The exhibit is a sworn affidavit by the City Attorney of the City of St. Joseph, Ms. Lisa Robertson, described and discussed above.

KCPL/GPE/Aquila objected to Ms. Robertson's affidavit, claiming they needed an opportunity to cross-examine her concerning same. The Commission is not bound by the technical rules of evidence. Section 386.410, RSMo. Moreover, the affidavit includes matters that may be taken by official notice, such as the City's Charter provisions.

In addition, the City of St. Joseph is not seeking findings of fact and conclusions of law concerning whether Aquila is in possession of a current, valid franchise from the City. The purpose of Ms. Robertson's affidavit (Exhibit 1200) is simply to demonstrate to the Commission that legitimate questions exist as to whether GPE, or KCP&L, or Aquila or KCPL Greater Missouri Operations have "received the required consent of the proper municipal authorities" as required by Section 393.170, RSMo. These questions are significant as to the conditions of

merger approval sought by the Cities of St. Joseph and Kansas City in this case. It is Aquila that has the burden to prove that it, in fact, has a franchise with the City as required by law, something that it has not done and cannot do.

Finally, the objections to Ms. Robertson's affidavit, and to the attached letter dated September 24, 2007 from franchise attorney Dan Vogel to Renee Parsons, are unfounded, as the letter shows that Aquila is on notice of the franchise deficiency, and even under strict rules of evidence, such evidence would be admitted for such purpose.

The Robertson affidavit and the Vogel letter make it clear that there is an ongoing legal dispute as to the absence of the electric utility franchise in St. Joseph. The purpose of the affidavit (Exhibit 1200) is to demonstrate to the Commission that Kansas City is not the only municipality served by Aquila that has issues about the current status of Aquila's franchise. This adds weight to Kansas City's proposal to condition any approval of the proposed merger in this case upon terms related to municipal franchises.

By their objections to Exhibit 1200, Aquila and KCPL seek to throw roadblocks in the way of St. Joseph for daring to suggest that Aquila does *not* hold a valid and current franchise from St. Joseph. This is consistent with the disdain and disregard which Aquila has consistently demonstrated for local governmental authority in general, as illustrated by appellate court decisions in recent years. *See,* for example, *StopAquila.Org v. Aquila, Inc.,* 180 S.W.3d 24 (Mo. Ct.App. 2005); *State ex rel. Cass County v. Public Service Commission,* No. WD 67739 (Mo. Ct.App. 2008). The strenuous objections raised by KCPL and Aquila to Exhbit 1200 further demonstrate this corporate disdain for local governmental authority.

Exhibit 1201 is the certified copy of St. Joseph City Charter Section 13.2. Since that document is part of Exhibit 1200, the offer of Exhibit 1200 included an

offer of Exhibit 1201. The Commission may take administrative notice or official notice of Exhibit 1201, which is a properly certified copy of a portion of the City Charter of St. Joseph. (T-2230, ll. 17-21) Exhibit 1201 was received into evidence (T-2230, l. 24 – T-2231, l. 4, and l. 10), but the objections to Exhibit 1200 were taken under advisement with the case. (T-2231, ll. 5-9) Exhibit 1200 should also be received in evidence.

Conclusions

Commission approval of the Joint Application should be conditioned upon a demonstration by the merged entity that it possesses the "required consent of municipal authorities" in the form of valid, current city franchises.

Commission approval of the Joint Application should be conditioned upon the negotiation of a single, unitary franchise between KCPL/Aquila and the City of Kansas City within nine (9) months of the Commission's approval of the merger.

Commission approval of the Joint Application should be conditioned upon Aquila (and/or KCPL Greater Missouri Operations) negotiating a new municipal franchise with the City of St. Joseph within nine (9) months of the Commission's approval of the merger.

Exhibit 1200 should be received in evidence.

WHEREFORE, the City of St. Joseph submits its Post-Hearing Brief in this case.

Respectfully submitted,

/s/ William D. Steinmeier

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COUNSEL FOR THE CITY OF ST. JOSEPH, MISSOURI

CERTIFICATE OF SERVICE

I hereby certify that the undersigned has caused a complete copy of the attached document to be electronically filed and served on the Commission's Office of General Counsel (at gencounsel@psc.mo.gov) and the Office of Public Counsel (at opcservice@ded.mo.gov), and to be served electronically or by U.S. Mail on counsel of record, on this 2nd day of June 2008.

/s/ William D. Steinmeier
William D. Steinmeier

STATE OF MISSOURI)
)
COUNTY OF BUCHANAN)

AFFIDAVIT

I, Lisa Robertson, being duly sworn upon my oath, depose and state the following:

1. I am the City Attorney of the City of St. Joseph, Missouri, a home-rule municipality. I have served as City Attorney since 1994.

2. Attached to this Affidavit is a true and accurate copy of correspondence, dated September 24, 2007, setting forth the position of the City of St. Joseph, Missouri, including the City's notice to Aquila that a franchise is required to do business within the City by use of its rights-of-way and that neither Aquila nor Great Plains Energy, Inc. has any current valid franchise from the City of St. Joseph that authorizes operation within the City or in the City's rights-of-way. Aquila is not in compliance with the lawful requirements for operating within the rights-of-way in the City of St. Joseph and has refused demands to obtain a franchise as required by law.

3. Also attached to this Affidavit is the City's Charter provision (St. Joseph Charter Section 13.2) setting forth the requirements for a franchise, setting a durational limit of twenty years on such a franchise, and further establishing the franchise requirements also as set forth in City Code requiring a franchise to operate within the City rights-of-way.

Lisa Robertson

IN TESTIMONY WHEREOF, I have set my hand and affixed my official seal at my offices in the state and county first above written, on the 23rd of April, 2008.

Paula Heyde
Notary Public

My Commission expires: 6-29-08

PAULA HEYDE
Notary Public - Notary Seal
STATE OF MISSOURI
Buchanan County
My Commission Expires June 29, 2008

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September 24, 2007

Ms. Renee Parsons
Attorney at Law
20 West Ninth Street
Kansas City, Missouri 64105

Re: Aquila Franchise

Dear Ms. Parsons:

In light of the pending sale of electric assets of Aquila, Inc. to Great Plains Energy, Inc., we are writing on behalf of the City of St. Joseph to restate the City's position that neither Aquila nor Great Plains Energy, Inc. has any current franchise with the City that authorizes operation within the City or in the City's rights-of-way. While the City is prepared to discuss terms for granting such a franchise to Aquila and/or to any successor of the operations, we request that Aquila and Great Plains Energy, Inc. provide us with information as to their intent to seek such a franchise before or as a condition of closing on any such transfer.

In a letter dated December 15, 2006, you refer to Special Ordinances No. 951 and No. 566 granting a predecessor corporation, St. Joseph Electric Light and Power Company, a franchise to operate electric works within the City. You further state that such franchise was a perpetual franchise and, therefore, you imply that this franchise grants Aquila perpetual authority as well. As previously expressed to you, the City does not agree that Aquila has any franchise authority with the City.

First, your claim that the franchise granted by Ordinances Nos. 951 and 566 are perpetual because they have no duration is simply not accurate. Ordinance No. 951 granting the franchise specifically was limited by the qualification that the grant was "subject to future action by the Mayor and City Council." Ordinance No. 566 amended that franchise, and substituted a limitation that the grant of the Franchise was "during the life of said corporation." Accordingly, the original franchise is subject to Council action and the amended franchise is further limited in duration to the life of the original corporation. Both or either provisions prevent the franchise from being considered "perpetual" as asserted in your letter.

Further, there is no dispute that the "predecessor" corporation, St. Joseph Electric Light and Power Company, was merged out of existence and no longer exists as a valid corporation. Therefore, even if the prior franchise had continued, it ceased upon the expiration of that corporate life. According to the Missouri Secretary of State records, on December 31, 2000, St.

Joseph Light & Power Company, a Missouri corporation, was merged into Utilicorp United, Inc., with only Utilicorp United, Inc remaining as the "surviving corporation." The corporate life of St. Joseph Electric Light and Power Company is expired and the new corporation did not obtain a new franchise relative to the new corporation. For this reason, we need not even rely on the further qualification granting complete Council discretion, which was replaced by Ordinance No. 566, but for which the Council would still have authority to repeal.

In addition, the City is a home rule municipality and its charter expressly prohibits franchises in excess of twenty years in duration. ***See St. Joseph Charter §13.2.*** To the extent that the franchise amendment was a unilateral change, the Charter amendment clearly supersedes such unilateral amendment and would further result in expiration of the original franchise even if the corporation had not expired.

Finally, note that the franchise to St. Joseph Electric Power and Light Company did not authorize a grant to its successors or assigns and, as noted above, was expressly limited to the life of the "said corporation."

For these and other reasons, the City continues to assert that no lawfully required franchise exists, and under any view, Aquila proceeds at significant risk in continuing to refuse to obtain a current franchise authorizing it to do business within the city. In light of the court's ruling in ***StopAquila.Org v. Aquila, Inc. 180 S.W.3d 24 (Mo. Ct. App., 2005),*** Aquila is certainly on notice of the significance of the franchise authority in conducting business within a jurisdiction. By this letter, we also advise Great Plains Energy, Inc., if it becomes a successor, that it would remain subject to the legal requirement to obtain a franchise in order to lawfully operate within the City. We hope that this letter will facilitate the prompt resolution of obtaining a franchise for Aquila, regardless of any change in ownership that may be contemplated. We look forward to your response.

Very truly yours,

Daniel G. Vogel

cc: Lisa Robertson, City Attorney
Mark English, Great Plains Energy, Inc.

STATE OF MISSOURI
County of Buchanan } ss.
City of St. Joseph

I, Paula Heyde, City Clerk of the City of St. Joseph, County and State aforesaid, do hereby certify that the foregoing and annexed instrument of writing is a true and correct copy of the original, on file in the office of the City Clerk of Section 13.2 "Granting of franchises" of the Charter of the City of St. Joseph, Missouri.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the City of Saint Joseph, aforesaid.

Done at the City Clerk's office in the City of St. Joseph, this 23rd day of April 20 08

Paula Heyde
City Clerk

By _____
Deputy

Oxley Printing

(c) *Withdrawal of petitions*. A recall petition may be withdrawn at any time prior to the forty-fifth (45the) day preceding the day scheduled for a vote of the City by filing with the City Clerk a request for withdrawal signed by at least twenty (20) members of the Petitioners' Committee. Upon the filing of such request, the petition shall have no further force or effect and all proceedings thereon shall be terminated.

(d) *Vacancy*. If any such office becomes vacant by resignation or otherwise prior to the election, the question of recall shall not be submitted, and unless there are other matters to be voted upon, the election, if a special election, shall be cancelled.

Sec. 12.6. Effect of recall.

If a majority of the qualified voters voting on the question of recall shall vote in favor of the recall, then a vacancy in that office shall exist, regardless of any defect in the recall petition. If a majority of the qualified voters shall vote against the recall, the official shall continue in office. Any official who has been recalled shall be ineligible to hold any other elective or appointive office during the remainder of the term for which he/she was originally elected. Any official who is retained in office by a recall election shall not again be subject to recall for a period of six (6) months after certification of the results of the election.

Sec. 12.7. Conduct of recall elections.

Notice of recall elections shall be given and publicized and such elections shall be conducted, the returns canvassed, and the results thereof declared in all respects as in other City elections.

ARTICLE XIII. FRANCHISES

Sec. 13.1. Definitions.

The term "public utilities," for purposes of this article, shall be defined to include, but not limited to, any person or entity engaged in the business of supplying light, water, power, heat, transportation or public communications systems, together with all plants, apparatus, equipment, and distribution facilities necessary to such business, as well as any other service or facility so declared to be by any statute or ordinance.

Sec. 13.2. Granting of franchises.

Prior to the establishment, acquisition, or operation of a public utility within the City, any individual, agent, partnership, trust, estate, joint venture, corporation, or other business entity desiring to establish, acquire, or operate a public utility within the City shall make application to the City Council for a non-exclusive franchise.

All public utility franchises and all renewals, extensions and amendments thereof shall be granted only by ordinance. No such ordinance shall be adopted within less than one hundred twenty (120) days after application therefor has been filed with the Council, nor until a full public hearing has been held thereon. No exclusive franchises shall ever be granted, and no franchise shall be granted for a longer term than twenty (20) years. Nor franchise shall be transferable directly or indirectly, except with the approval of the Council expressed by ordinance, after a full public hearing.

Sec. 13.3. Right of regulation.

All public utility franchises, whether it be so provided in the ordinance or not, shall be subject to the right of the Council to:

(a) Repeal the same for misuse or nonuse, or failure to comply therewith.

(b) Require proper and adequate extension of plant and service, and the maintenance thereof, at the highest practicable standards of efficiency.

(c) Establish reasonable standards of service and quality of products, and prevent unjust discrimination in service or rates.

(d) Make an independent audit and examination of accounts at any time, and require reports annually.

(e) Require continuous and uninterrupted service to the public, in accordance with the terms of the franchise, throughout the entire period thereof.

(f) Control and regulate the use of the City streets, alleys, bridges, and public places, and the space above and beneath them.