BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Great Plains Energy	)	Case No. EM-2016-0324
Incorporated's Acquisition of Westar	)	
Energy, Inc. and Related Matters	)	

RESPONSE OF
GREAT PLAINS ENERGY INCORPORATED
TO STAFF'S INVESTIGATION REPORT

Great Plains Energy Incorporated ("GPE" or "Company") hereby responds to Staff's Investigation Report ("Staff Report") filed on July 25, 2016 regarding the Company's impending acquisition of Westar Energy, Inc. ("Westar").

I. Introduction

GPE appreciates the fact that the Commission expedited the deadline for the Staff Report to be filed in this proceeding. Time is truly of the essence to resolve the question of this Commission's jurisdiction to approve or disapprove GPE's acquisition of Westar (the "Transaction" [1]) because the application for approval of the Transaction by the Kansas Corporation Commission ("KCC") was filed on June 28, 2016 and, pursuant to Kansas statutory requirements, the KCC must issue an order in that proceeding no later than April 24, 2017. GPE thus expects to close the Transaction in the second quarter of 2017. In addition, GPE is pursuing long-term financing for the Transaction, and the uncertainty of whether the Transaction will be subject to the approval of this Commission is likely to impact pricing negatively and may adversely impact participation in such financing until this uncertainty has been resolved.

[1] "Transaction" refers to the transactions that will occur under the Agreement and Plan of Merger ("Agreement") that GPE entered into with Westar on May 29, 2016. Pursuant to the Agreement, Westar will be merged with and into "Merger Sub" (100% of the outstanding equity interests of which will be owned by GPE), with Westar emerging as the surviving corporation. Immediately following the merger, Merger Sub will cease to exist, and GPE will acquire all of the capital stock of Westar.

While the Staff Report refrained from using the inflammatory rhetoric that characterized its earlier pleadings in this docket, it still lacks objectivity. The Staff Report simply reached the same conclusions that Staff had previously reached when it filed its *Motion to Open an Investigation* on June 1, 2016, before any documents or information pertaining to the Transaction had been provided to Staff.

In this response GPE will address many of the material topics contained in the Staff Report, correcting the most significant mistakes and pointing out obvious omissions, as well as countering the result-oriented nature of the Staff Report. GPE's decision not to address any particular matter in the Staff Report does not indicate agreement or acquiescence by GPE, but simply reflects GPE's judgment that no discussion is needed. In this response, GPE will generally address matters in the same order as they were discussed in the Staff Report, although GPE will not use the same topic headings.

Further, GPE will demonstrate that (1) the Commission does not have jurisdiction to approve or disapprove the Transaction; (2) Staff's arguments regarding potential detriments of the Transaction to Missouri customers are mistaken, one-sided, speculative and/or exaggerated; and (3) the Commission already has jurisdiction under its existing plenary ratemaking authority over Kansas City Power & Light Company ("KCP&L) and KCP&L Greater Missouri Operations Company ("GMO"), allowing it to protect Missouri customers in the rate case proceedings based on existing ratemaking principles reflecting actual impacts subsequent to the closing of the Transaction.

A. Response to Staff's "Reactions to the Announcement"

Staff chose a number of excerpts from media reports, consistent with its pre-determined assessment of the Transaction. See Staff Report at 6-11. These excerpts selected by Staff are problematic for many reasons, and should be given little consideration. For example:

- The first excerpt is portrayed by Staff as a verbatim quotation of a conversation between GPE and Goldman Sachs. However, the article from which the excerpt was drawn clearly reports in the first sentence immediately after the sentence selectively quoted by Staff: "OK, that's not a precise transcript." See Attachment 1 setting forth the entirety of that Bloomberg article.
- How did Staff decide which excerpts to include in its *Investigation Report*?
    - We do not know because Staff does not reveal that information in the Staff Report. We do know, however, that there are other reports that Staff did not select which characterize the transaction more favorably than the passages selected by Staff.[2]
- Are the excerpts selected by Staff for inclusion in the Staff Report useful for the Commission's purposes in determining its jurisdiction to approve the Transaction?
    - No. These excerpts represent nothing more than snippets of an opinion of a particular author at a point in time and in the absence of detailed review or due diligence on the Transaction. There is nothing indicating that they are sufficiently reliable to be used for any substantive purpose by the Commission.

[2] For example, according to the Kansas City Business Journal the "Great Plains-Westar deal: It's a 'no-brainer'," etc. See Attachment 2

Despite the numerous problems with these excerpts, Staff relies upon them to draw a series of fairly sweeping concerns on page 11 of the Staff Report. While reliance on such unreliable information indicates what one can only interpret as a potential lack of Staff objectivity, the result-oriented nature of the Staff Report becomes readily apparent upon closer inspection of the concerns Staff apparently draws from the excerpts it selected for inclusion in the Staff Report. Without providing an exhaustive list, examples of notable liberties Staff has taken with these excerpts can be found on page 11 of the Staff Report where:

- Staff raises a concern "that GPE is taking on too much debt in order to acquire Westar, resulting in lower ratings and a higher future cost of capital for GPE, and perhaps, for KCP&L and GMO," yet none of the excerpts included in the Staff Report asserts that GPE's credit ratings have been lowered. Even more telling, though, is the fact that one of the excerpts included in the Staff Report notes that Moody's affirmed the long-term and short-term credit ratings of KCP&L, GMO and Westar with stable outlooks. (Staff Report, page 9)
- Staff raises a concern "that an aggressive effort to harvest synergy savings from the transaction may result in significant job losses for the Missouri work force of GPE, KCPL and GMO," yet none of the excerpts included in the Staff Report predicts job losses in Missouri.
- Staff raises a concern "that integration of the companies may result in decreased operational efficiency, reliability and safety" yet none of the excerpts included in the Staff Report addresses these topics.
- Staff raises a concern "that GPE may transfer jobs and investment to Kansas given its increased presence there" even though none of the excerpts included in the Staff Report

suggests jobs or investment otherwise slated for Missouri will be transferred by GPE to Kansas.

In light of the inconsistencies, irregularities and unsupported "conclusions" throughout the "Reactions to the Announcement" section of the Staff Report, the Commission should accord it no weight in determining whether it possesses jurisdiction to approve the Transaction.

II. Staff's Allegations Regarding the Amended Stipulation and Agreement in Case No. EM-2001-0464 and Hypothetical Detriments to the Public Interest

A. Case No. EM-2001-0464

1. Compliance with Paragraph 6: Financial Conditions

a. Generally

As explained on pages 22-27 the Staff Report, Staff reviewed the various Financial Conditions contained in the *First Amended Stipulation and Agreement* in Case No. EM-2001-464 ("GPE Stipulation") and found, with the limited exception discussed below, that GPE and KCP&L have fully complied with the financial conditions.

b. Compliance with Paragraph 6e

With regard to Condition 6e (Financial Reports), Staff noted that KCP&L may be technically in violation of this condition since it has not provided reports directly to Staff in recent years in compliance with this condition. However, Staff also noted that it has access to the required financial information through other means. KCP&L's records show that in 2005, reporting of the six key financial ratios was replaced by reporting on the three key financial ratios defined in Case No. EO-2005-0329 (the Comprehensive Energy Plan) and required by Commission order in Case No. EF-2005-0498. KCP&L reported these three key financial ratios through the end of 2013. In 2013, Standard & Poor's changed its credit rating methodology to

focus on two key financial ratios that are different from or calculated differently than the three key financial ratios previously used. This change has made the reporting of the three key financial ratios defined in 2005 no longer relevant.

c. *Compliance with Paragraph 6g*

Staff acknowledges that KCP&L has maintained separate debt and that KCP&L's debt is investment grade. This is all that is required under this condition. Thus, Staff's discussion of its additional "concerns" in past rate cases about the financing activities of GPE and GMO affecting KCP&L are not relevant to a discussion of this condition. Nevertheless, the Company will refute the concerns raised by Staff.

In the 2012 KCP&L and GMO rate cases (Case Nos. ER-2012-0174 and ER-2012-0175), KCP&L and GMO each recommended a cost of debt based primarily on the debt issued by or on behalf of each utility subsidiary. The short-term tenor debt issued by GPE in 2010 was "only for the benefit of GMO" as recognized by the Commission Order in Case No. ER-2010-0355. The refinancing of maturing Aquila issued debt required GMO to use intercompany loan arrangements with GPE for debt issuances in 2010 through 2012. With sufficient standalone historical financial information after GPE's acquisition of Aquila's Missouri electric operations in 2008, GMO was able to refinance the debt issued in 2010 when it matured in 2013 by issuing its own senior notes directly to investors with a weighted average maturity of 21.4 years. It was in GMO's best interest to issue short-term tenor debt through GPE until it could issue longer-term tenor debt on its own. KCP&L issued 30-year debt in 2011 which both reduced the weighted average cost of KCP&L debt and extended the weighted average maturity of KCP&L debt. This decision was in KCP&L's best interest. The debt financing decisions at each utility subsidiary are, and have been, made in the best interest of that subsidiary.

Staff characterizes, without support, the GPE equity units as "high-cost." However, the equity units were not high cost. The Commission's Order in Case No. ER-2010-0355 recognized at p. 127 that "[i]t was cheaper for GPE to raise capital through the equity units because a portion of the quarterly distribution is tax deductible." The Commission on p. 127 of that Order found that "the Equity Units were a lower cost alternative to issuing common stock and would ultimately cost ratepayers less." The equity units along with common equity were issued to support credit quality for both KCP&L and GMO in the midst of the largest construction program in the Company's history. Funds from the issuance of the equity units and common equity were contributed to each utility subsidiary. In order for each utility subsidiary to benefit from the lower cost equity units, both KCP&L and GMO recommended using a consolidated capital structure instead of each utility subsidiary's stand-alone capital structure that had higher equity ratios. Thus, the decision to issue the equity units was in the best interest of both KCP&L and GMO.

d. *Compliance with Paragraph 6h*

Staff alleged in KCP&L and GMO's 2012 rate cases that GPE's financial support for GMO caused KCP&L to have a higher cost of debt. S&P assigns KCP&L an anchor stand-alone risk profile of "a-" based on its business and financial risk matrix, but gives KCP&L a "BBB+" rating based on the group credit profile (which includes GMO). Likewise, S&P assigns GMO an anchor stand-alone risk profile of "bbb" based on the business and financial risk matrix, but gives GMO a "BBB+" rating based on the group credit profile. The only difference between KCP&L and GMO's stand-alone risk profiles is the business risk profile of each company. The two companies' financial risk profiles are the same. The difference in business risk profile is due to the competitive position for each company which is based on their regulatory environment.

KCP&L is regulated in both Missouri and Kansas, and has a "Strong" competitive position. GMO is regulated only in Missouri and has a "Satisfactory" competitive position. The difference in regulatory environments explains the difference between KCP&L and GMO's anchor stand-alone risk profiles assigned by S&P and has nothing to do with GPE's financial support of GMO.

e. Summary of Compliance with Paragraph 6: Financial Conditions

In summary, the Commission should conclude, based upon Staff's analysis, that GPE and KCP&L have substantially complied with each of the financial conditions (Conditions 6a – 6k) contained in the GPE Stipulation.

2. Compliance with Paragraph 7: Prospective Merger Conditions

The Staff Report claims that GPE has violated Paragraph 7 of the GPE Stipulation because GPE has stated its intention to acquire Westar Energy, a Kansas public utility, without seeking this Commission's approval. See Staff Report at 28-29. Because the phrase "public utility" is not defined in the GPE Stipulation to include non-Missouri public utilities, and because Westar is a public utility only under Kansas law, GPE has not violated Paragraph 7.

The relevant sentence in Paragraph 7 states:

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

Contrary to Staff's argument, this provision does not and cannot confer jurisdiction on the Commission to approve or disapprove the Transaction under its Section 393.190.2 authority. It is well established that an "agency's subject matter jurisdiction cannot be enlarged or conferred by

consent or agreement of the parties." Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991). Importantly, this lack of jurisdiction to approve the Transaction does not limit the Commission's authority over KCP&L and GMO, and its ability to protect Missouri customers through its retail ratemaking powers. Because the GPE Stipulation does not define "public utility," that term must mean what it is defined to be under Missouri law.

Section 386.250(1) states that the jurisdiction, supervision, powers and duties of the Commission extend to "the manufacture, sale, or distribution of … electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; … [emphasis added]." Similar "within the state" language applies to gas corporations, telecommunications companies, water corporations, and sewer systems. See § 386.250(1)-(4). It is these Missouri-based "public utility corporations," collectively referenced in Section 386.250(5), that are subject to the Commission's jurisdiction.

Westar has never been recognized by this Commission as a "public utility," an "electrical corporation," or an affiliate of a "public utility." Therefore, Paragraph 7 of the GPE Stipulation does not apply to the Transaction.

Beyond these statutory definitions, the Missouri Supreme Court has held that a public utility corporation must offer its services to the public in order to be subject to the Commission's authority. In State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918), the Court held that an electrical corporation, as defined in Section 386.020(15), is not subject to regulation by the Commission unless it is offering electricity "for public use."[3] In the absence of offering electricity as a public service in Missouri, an entity is not "a public utility, within the meaning of

[3] The Danciger case has continued to be binding precedent for almost one hundred years. See Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227, 232 (Mo. App. W.D. 1995); State ex rel. Cirese v. PSC, 178 S.W.2d 788, 790 (Mo. App. K.C. 1944).

the Public Service Commission Act." Id. Westar has no customers in Missouri and does not offer electricity to the public in Missouri. Because it is neither a "public utility" nor an "affiliate of a public utility" under Missouri law, Paragraph 7 does not apply to GPE's acquisition of Westar.

At the hearing where the GPE Stipulation was presented, Commissioner Murray inquired about Paragraph 7, asking whether "the parties believe that that [provision] gives the Commission jurisdiction over an unregulated holding company that it would otherwise not have." See Tr. 32, Vol. 2, In re Application of Kansas City Power & Light Co. for an Order Authorizing its Plan to Reorganize itself into a Holding Company Structure, No. EM-2001-464 (July 5, 2001). Counsel for GPE stated that this provision was "inconsistent" with past Commission "holdings on other holding company mergers of parents." Id. This comment properly referred to prior Commission decisions that declined to exercise any jurisdiction over a holding company, regardless of whether it was acquiring a Missouri public utility or a public utility in another state. Although GPE agreed to submit itself to the jurisdiction of the PSC on certain matters set forth in the Stipulation, there is no provision where GPE agreed to seek Commission approval if it acquired public utilities operating outside of Missouri.

Consistent with this approach, Staff counsel advised that "different parties can interpret the statute differently," and that the GPE Stipulation "was an effort to establish in certain areas what arguably the holding company would not contest in a way of coming before the Commission in certain instances." Id. 33. He observed that "the Commission is always free, if it so chooses, to assert that it will not exercise jurisdiction in a particular situation." Id. (emphasis added). Staff did not claim that GPE's acquisition of a non-Missouri public utility would require Commission approval.

Similarly, Public Counsel did not assert that the GPE Stipulation required the Company to seek Commission approval regarding the acquisition of a non-Missouri public utility. OPC properly noted that "the facts of the particular case will continue to control as to whether jurisdiction will be exercised." Id. at 34.

Staff's interpretation of Paragraph 7 must be rejected because it would have the practical effect of this Commission regulating the conduct of a holding company that is not a public utility in Missouri or any other state and that is conducting business outside the boundaries of Missouri. While states "have long regulated the siting, construction, and operation of electric generating facilities located within their borders," the practical effect of Staff's position is to control commercial activity by an entity that is not a public utility in Missouri which is taking place wholly outside Missouri. North Dakota v. Heydinger, 2016 WL 3343639 at 7 (8th Cir. June 15, 2016). This extraterritorial and extra-jurisdictional reach advocated by Staff is improper and not authorized by Missouri law.

If the Commission were to accept Staff's argument and choose to exercise jurisdiction over the Transaction, its order would likely be preempted by Section 203 of the Federal Power Act, which regulates mergers and acquisitions of public utility holding companies like GPE operating in interstate commerce. Such a decision would also be a potential violation of the dormant Commerce Clause of the U.S. Constitution. Id. at 5-7 (Minnesota statute prohibiting power sales from outside the state that would contribute to carbon dioxide emissions is preempted by § 201(b)(1) of the Federal Power Act), aff'g 15 F. Supp. 3d 891, 916-19 (D. Minn. 2014) (statute held to be impermissible extraterritorial legislation and a per se violation of the dormant Commerce Clause). See also Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1297-99 (2016) (Federal Power Act preempts Maryland PSC order directing utilities to enter into

contracts with new generating plants where FERC had approved PJM's wholesale electricity capacity auction to address resource adequacy issues); New Jersey Bd. of Pub. Util. v. FERC, 744 F.3d 74, 95-102 (3d Cir. 2014) (upholding FERC's elimination of New Jersey and Maryland generation exemptions from PJM capacity markets).

B. Staff's Hypothetical Detriments to the Public Interest

On pages 29-55 of the Staff Report, Staff discusses several hypothetical "detriments to the public interest" that could occur in any merger or acquisition. Notably, however, Staff only makes passing mention of the significant savings – approximately $65 million in the first full calendar year after closing, rising to approximately $200 million in the third full year after closing – that GPE estimates will be enabled by the Transaction. Staff also fails to mention that these Transaction-related savings will benefit customers by keeping the rates for electric service paid by the customers of GPE's utility subsidiaries at lower levels, than would be possible in the absence of the Transaction.[4]

Moreover, even though Staff failed to analyze these Transaction-related savings when discussing hypothetical detriments, Staff candidly conceded: "It is not possible now to predict whether, or the extent to which, any of these detriments will occur." (Staff Report, p. 73) While GPE appreciates the Staff's candor in acknowledging that the hypothetical detriments it raised might not occur at all or might not occur to any meaningful extent, Staff's failure to discuss either the Transaction-related savings or the Regulatory Commitments that are a part of the agreement between GPE and Westar exposes the Staff Report's serious flaws.

[4] Even though Staff is clearly aware of these customer benefits, Staff nevertheless writes on page 73 of the Staff Report that "…Staff is unaware of any benefits that the proposed transaction will confer on the Missouri ratepayers of KCPL and GMO…."

GPE recognizes and respects the Commission's critical role in ensuring that KCP&L and GMO's Missouri customers continue receiving safe, reliable and adequate service at just and reasonable rates, even though the Commission does not have jurisdiction to approve or reject the Transaction. GPE expects that the Commission will fully exercise its jurisdiction and statutory authority over GPE's Missouri public utility subsidiaries in the context of future rate cases to ensure that KCP&L and GMO continue to provide safe, reliable and adequate service at just and reasonable rates.

In fact, Exhibit B to the Agreement sets forth a host of conditions that GPE expects to agree to in the context of rate cases of GPE's Missouri utility subsidiaries after closing the Transaction and in the context of obtaining approval of the Transaction from the KCC. See Attachment 3. These conditions, which address and mitigate the hypothetical concerns discussed in the Staff Report, cover the following topics: (1) Transaction costs and acquisition premium; (2) Rate case filing plans; (3) Allocation of costs among affiliates; (4) Protection from adverse capital cost impacts; (5) Transaction financing; (6) Capital structures of Parent and utility subsidiaries; (7) Other financing-related matters; (8) Capital requirements; (9) Service quality and reliability; (10) Books, records and information; (11) Collective bargaining; (12) Low-income assistance; and (13) Charitable and community involvement.

GPE – through its utility subsidiaries operating in Missouri – expects to negotiate and implement these conditions consistent with long-standing precedent as a part of the first KCP&L and GMO rate cases initiated following the close of the Transaction. Through the ratemaking process, the Commission itself will be able to exercise its lawful authority over GPE's subsidiary public utilities – KCP&L and GMO – that are unquestionably subject to the Commission's jurisdiction. It is unnecessary for the Commission to attempt to go beyond its lawful jurisdiction

and to assert authority to approve or disapprove an acquisition by GPE of a Kansas electric utility.

1. Financial

On page 29 of the Staff Report, Staff writes that "GPE's intention to take on a debt burden of $8 to $9 billion is necessarily a matter of concern . . ." but does not indicate the source of its asserted "GPE intention." If GPE assumes that Staff is referring here to the bridge facility that GPE has negotiated with Goldman Sachs in the event short-term financing of the transaction becomes necessary, then Staff has clearly overstated GPE's long-term debt financing plan. If GPE assumes that Staff is referring to the combination of GPE's long-term debt financing plan and the assumption of Westar's existing debt, then Staff has failed to mention Westar's operating cash flow that supports its existing outstanding debt. Either way, Staff has exaggerated GPE's debut burden to support its suggestion that the issuance of debt at GPE will have at least an indirect impact on KCP&L and GMO since the financing of the Transaction could impact GPE which could affect the credit ratings of KCP&L and GMO. (Staff Report, pp. 30-31)

Nevertheless, despite the falsity of Staff's premise for this concern, the following conditions contained in Exhibit B of the Agreement directly address those Staff concerns ("Parent" as used in the Agreement means GPE):

a. *Protection from adverse capital cost impacts* – Parent will agree that its subsidiary utilities' capital costs used to set rates shall not increase as a result of the transaction.

b. *Transaction financing* – Parent will agree that its subsidiaries' utility customers shall not bear any financing costs associated with the transaction, including, but

not limited to, any interest expense associated with any debt issued to finance the transaction and any replacement or refinancing of such debt.

c. *Capital structures of Parent and utility subsidiaries* - Parent and its utility subsidiaries will maintain separate capital structures to finance the activities and operations of each entity unless otherwise approved by the Kansas Corporation Commission. Parent and its utility subsidiaries will maintain separate debt, which is separately rated by national credit rating agencies, so that none will be responsible for the debts of affiliated companies and separate preferred stock, if any, unless otherwise authorized by the Kansas Corporation Commission. Parent and its utility subsidiaries will maintain investment grade credit ratings.

d. *Other financing-related matters* - Parent will agree that utility subsidiaries shall not guarantee notes (or enter into make-well agreements, etc.) of one another, or Parent or any of Parent's other affiliates, absent prior approval of the Kansas Corporation Commission; that no utility stock or assets shall be pledged as collateral for obligations of any entity other than the utility absent prior approval of the Kansas Corporation Commission; and that each utility subsidiary shall be held harmless from any business and financial risk exposures associated with another utility subsidiary, Parent or its other affiliates.

On page 31 of the Staff Report, Staff writes "[I]t is more likely than not that at the conclusion of the [Standard & Poors] review the rating will be downgraded." It should be made clear that this statement only relates to a "CreditWatch negative" assessment by S&P which S&P has not done and Staff has provided no evidence that such an assessment will be made by S&P.

GPE believes that no such evidence exists. On page 32, Staff writes that it ". . . is not sure how Moody's would rate the subsidiaries if GPE is downgraded to below investment grade." Yet again, however, Staff has provided no evidence suggesting that Moody's contemplates a downgrade of GPE below investment grade, and GPE asserts that no such evidence exists. Furthermore, Moody's affirmed the credit rating outlook as stable for both KCP&L and GMO. On page 33 of the Staff Report, Staff writes that "[C]onsequently, using GPE's consolidated capital structure allowed for a matching of costs with the cost drivers, which includes leverage issued at GPE." As discussed earlier, KCP&L and GMO's recommendation to use a consolidated capital structure allowed each utility subsidiary to benefit from the lower cost equity units that were issued at the holding company level and used to fund equity contributions to the utility subsidiaries. The equity units no longer exist, so there is no need to continue using the consolidated capital structure.

GPE understands the importance of and has committed to maintain an investment grade rating for itself and its public utility subsidiaries. GPE has specifically agreed to make regulatory commitments in both Kansas and Missouri that its subsidiary utilities' capital costs used to set rates shall not increase as a result of the Transaction. Such conditions squarely address Staff's hypothetical "financial detriments."

2. Resource and Operational

Staff also raises concerns related to the complexity of allocations of KCP&L payroll and related costs in future rate cases. (Staff Report, pp. 36-37). GPE recognizes that the KCP&L and GMO Cost Allocation Manuals must be updated after Westar is acquired by GPE. However, such updates will not be overly complex, and can be accomplished with minimal changes to the

CAM, which has been the subject of discussions among KCP&L, GMO, Staff and Public Counsel in Case No. EO-2014-0189.

Staff also raises the “fear” that “tasking these [KCP&L] employees with, first, the acquisition and integration of Westar and, second, the operation of Westar, would necessarily result in a loss of operational efficiency and the subsidization of GPE’s acquisition by Missouri ratepayers.” (Staff Report, p. 37). Such fears are unfounded for a number of reasons.

First, Mr. Heidtbrink specifically addresses this topic in his direct testimony before the KCC (Heidtbrink Direct, p. 5-6, 10; filed with the Commission on July 1, 2016 as part of GPE’s Second Notice of Submission). He also reviewed the benefits to be produced from GPE’s intent to draw on and utilize the best practices of both Westar and GPE’s utility subsidiaries as it integrates the operations of these businesses. But even though Staff was provided with this testimony, Staff chooses not to discuss it in the Staff Report.

Additionally, Westar is a well-run enterprise operating on solid financial footing with more than 2,500 employees who provide safe and reliable service to more than 700,000 customers in Kansas. The vast majority of those employees will continue performing their current duties after the Transaction closes. Staff ignores these facts by speculating that KCP&L employees will become overwhelmed due to the Transaction.

Furthermore, as discussed in the Direct Testimony of William Kemp in the KCC merger proceeding (and contained in the Notice of Second Submission, Appendix A), GPE estimates that approximately $65 million in Transaction-related savings will be achieved in the first full year after closing, that achieved savings are estimated at nearly $200 million in the third full year after closing and that these achieved savings will continue to benefit customers on a permanent basis thereafter. See Notice of Second Submission, Appendix A, pp. 197-198, and pp. 362-396.

These savings—unattainable by GPE or Westar on a stand-alone basis—ensure that customers will receive substantial benefits in the form of lower future rate increases than would be possible in the absence of the Transaction. Savings that result from the Transaction are an ongoing reduction to the level of anticipated increases in KCP&L and GMO cost of service. These reductions will permanently benefit Missouri customers through rate levels that will be lower than would be possible in the absence of the Transaction. As a result, the Staff's "fear" related to the operational efficiencies and the "subsidization" of GPE's acquisition by Missouri ratepayers is unwarranted.

3. Service Quality

The Staff Report also discusses hypothetical issues related to quality of service and the experiences of MGE and Aquila related to such matters. (Staff Report, pp. 38-51). The Staff correctly notes that the Staff has considerable information about KCP&L and GMO's service quality, including the companies' call center performance, meter reading performance, and reliability metrics including SAIDI, CAID, SAIFI and MAIFI. (Staff Report, p. 41). As the Commission is aware, KCP&L and GMO report such information on a regular basis to Staff. Consequently, Staff will quickly know if the quality and reliability of service provided by KCP&L and GMO begins to decline.

GPE, KCP&L and GMO also recognize the importance of quality of service issues and continuously strive to provide their customers with top tier customer service. As explained by GPE witness Charles Caisley in his direct testimony before the KCC, for five of the last seven years, KCP&L has been in tier one of the EEI Reliability rankings. See Notice of Second Submission, Appendix A, p. 284. KCP&L and GMO are strongly committed to maintaining and

improving upon this demonstrated track record and level of excellent customer service in the future following the close of the Transaction.

Although KCP&L and GMO already provide the Staff and other interested parties with a vast amount of information related to quality of service, KCP&L and GMO are willing to review the level of current reporting of customer service metrics, and establish reasonable conditions in the first KCP&L and GMO rate cases following the close of the Transaction to ensure that their high quality of service continues in the future. KCP&L and GMO are also aware that the Commission has considerable tools to ensure that public utilities under its jurisdiction provide safe, reliable and adequate service at just and reasonable rates, including adjustments to authorized rates of return on equity. KCP&L and GMO understand that the Commission and its Staff take these matters very seriously, and they remain committed to maintaining an excellent level of service to their customers in Missouri and Kansas.

4. Affiliate Transactions

With regard to the Missouri affiliate transaction rules discussed in the Staff Report (pp. 51-55), KCP&L and GMO intend to file at an appropriate time applications for a variance from some of these rules for transactions between KCP&L and/or GMO and Westar, to become effective when the acquisition of Westar by GPE is consummated. As Staff noted, such a variance was granted by the Commission when GPE acquired Aquila (now GMO), a Missouri regulated public utility. See *Report and Order* at pp. 183-91, 252-65, In re Joint Application of Great Plains Energy, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated, Case No. EM-2007-0374 (July 1, 2008). KCP&L and GMO expect the Commission to agree that the asymmetrical pricing requirements of the affiliate transaction rules are not intended to apply to

transactions between retail rate regulated utilities. Requiring asymmetrical pricing in such circumstances would only serve to cause one state's retail rate regulated customers to subsidize another state's retail regulated rate customers. This would certainly reach far beyond the intent of the Commission's affiliate transaction rule. Regardless, this issue may be handled under the Commission's typical process of reviewing requests for variances from Commission rules, and it does not need to be reviewed in the context of a merger application.

III. Legal Principles And Prior Commission Decisions

Staff's lengthy discussion of numerous Missouri cases fails to provide even one example of where either this Commission or a court has construed the provisions of Chapter 386 or 393 to exercise jurisdiction over the acquisition of a non-Missouri public utility by a Missouri public utility holding company.[5] Contrary to Staff's opinion, neither the Commission nor any court has ever found that the "Commission has the same jurisdiction over [a holding company's] activities that it has over those of a public utility such as KCP&L or GMO." See Staff Report at 67.

Staff interprets the word "controlling" in the Section 386.250(1) description of the Commission's jurisdiction over electricity and gas operations, and in the Section 386.020(15) definition of "electrical corporation" as providing the basis for the Commission to exercise jurisdiction over GPE's acquisition of Westar. See Staff Report at 60-61. However, Staff cannot cite a Commission decision that supports this view, let alone any Missouri appellate judicial decision interpreting the statutes in this way.

Staff makes no attempt to discuss or distinguish almost a dozen cases where the Commission "has consistently found that the Commission does not have jurisdiction over

[5] As discussed above, the Commission's lack of jurisdiction over GPE's acquisition of Westar does not affect its broad authority over KCP&L and GMO.

transactions at the holding company level." See Order Dismissing Application for Lack of Jurisdiction, In re Advanced TelCom, Inc. and Shared Commun. Services, Inc., No. XM-2005-0111 (2004).

The Commission has consistently held steady to this position over many years, regardless of whether the holding companies own telecommunications, electrical, gas, or water and sewer corporations. When SBC Communications acquired Ameritech in 1998, the PSC found that "there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies." In re Merger of SBC Commun., Inc. and Ameritech Corp., Report and Order, No. TM-99-76, 1998 Mo. PSC LEXIS 48 (Oct. 8, 1998). Accord In re Proposed Merger of Verizon Commun., Inc. and MCI, Inc., No. TM-2005-0370 (May 3, 2005). Similarly, when Ameren Corporation acquired Cilcorp, Inc., a holding company that owned Central Illinois Light Company, an Illinois public utility, the Commission declined to exercise jurisdiction over the transaction. It specifically rebuffed Staff's invitation to review joint dispatch issues. See Order Closing Case, In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp., No. EO-2002-1082 (June 13, 2002).

A variety of other holding company transactions by telecommunications, water and sewer companies is consistent with these orders. See Order Closing Case, In re Proposed Acquisition of Mo.-Am. Water Co. and Am. Water Works Co. by the German Corp. RWE AG, No. WO-2002-206 (2001); Order Closing Case, In re United Water Mo., Inc. for Authority for Lyonnaise American Holding, Inc, to Acquire the Common Stock of United Water Resources. Inc., No. WM-2000-318 (Dec. 7, 1999); Order Dismissing Application for Lack of Jurisdiction, In re Joint Application for Transfer of Control of Eclipse Telecomm. Inc., IXC Comm. Serv. Inc. and

Telecom One. Inc. to Cincinnati Bell, Inc., No. TM-2000-85 (Oct. 28, 1999); Order Denying Motion to Reconsider Order Closing Case, In re Proposed Merger between GTE Corp. and Bell Atlantic, No. TM-99-261 (Apr. 22, 1999); Order Regarding Jurisdiction and Dismissing Application, In re Commun. Central of Georgia, Inc. and Davel Commun. Group Inc. for Approval of Merger and Transfer of Control, No. TM-98-268 (Jan. 22, 1998); Order Dismissing Application, In re Application of ALLTEL Commun.. Inc. to Merge with Certain Wholly Owned Subsidiaries of ALLTEL Mobile Commun., Inc., No. TM-98-153 (Dec. 24, 1997).

If the Commission were going to depart from these precedents, it might have done so when two holding companies that each owned regulated Missouri public utilities sought to merge. But, in its Report & Order that declined to review the merger of holding companies that owned Missouri-American Water Co. and St. Louis County Water Co., the Commission agreed with Staff's position that since "the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company," "…the Commission should follow this practice now, and decline to assert jurisdiction." See Report & Order, In re Merger of American Water Works Co. with Nat'l Enterprises Inc. and the Indirect Acquisition by American Water Works Co. of St. Louis Water Co., No. WM-99-224, 1999 Mo. PSC LEXIS 183 at *3 (Mar. 23, 1999).

In the face of this daunting line of Commission decisions that are directly contrary to Staff's recommendation in this proceeding, Staff quotes at length from the United States Supreme Court's decision in North American Co. v. SEC, 327 U.S. 686 (1946). See Staff Report at 61-62. Only after several pages does Staff acknowledge that the Supreme Court's entire focus was on the 1935 Public Utility Holding Company Act ("PUHCA") which Congress repealed in Section 1263 of the 2005 Energy Policy Act ("EPAct 2005"). See Staff Report at 63. In its

place, Congress enacted PUHCA 2005, shifting federal jurisdiction from the Securities and Exchange Commission to the Federal Energy Regulatory Commission ("FERC"). EPAct 2005 also granted FERC enhanced authority over interstate holding company mergers and acquisitions in Section 1289 ("Merger Review Reform"), which amended Section 203 of the Federal Power Act. See 16 U.S. Code § 824b.[6]

The concerns of the Supreme Court in the North American case were understandable at the time, given the expansive holdings of the North American Company which extended to dozens of public utilities operating in 17 states and the District of Columbia, including the non-contiguous states of Missouri, Michigan, California and Virginia. Id. at 691-92. Notably, there are only four public utilities[7] directly or indirectly affected by the Transaction in this proceeding, and they operate in the contiguous states of Missouri and Kansas. North American does not hold that a commission can or should disregard the corporate distinctions of a holding company and its subsidiaries. To the contrary, North American declares that public utility holding companies that own utilities operating in more than one state are governed by federal law, not state law.

Staff also relies upon May Dep't Stores Co. v. Union Elec. Light & Power Co., 107 S.W.2d 41, 43-44 (Mo. 1936), which was a contractual dispute involving overcharges, not the acquisition of a non-Missouri public utility by a Missouri holding company. See Staff Report at 59, 61. In that case the corporate distinctions between Union Electric ("UE") and its subsidiary utility (Cupples Station Light, Heat & Power Co.) were disregarded because UE was selling

[6] FERC Order No. 669, 71 Fed. Reg. 1348 (Jan. 6, 2006). "Section 1289 of EPAct 2005 amended section 203 of the FPA, granting FERC greater review of public utility mergers, acquisitions, asset dispositions, and holding company mergers and acquisitions." *The Urge to Merge: A Look at the Repeal of the Public Utility Holding Co. Act of 1935*, 12 Lewis & Clark L. Rev. 903, 920 (2008).

[7] Kansas Gas and Electric Company is a Kansas public utility that is a wholly-owned subsidiary of Westar Energy, Inc.

electricity but charging the rates of its subsidiary, which the Court held to be "not proper or lawful" and an "evasion of the law." Id. at 55. Given the Court's finding that subsidiary Cupples Station was not operated as a separate public utility, and was, in essence, a sham or dummy corporation being manipulated by UE for its own purposes, it was appropriate to disregard the corporate existence of the subsidiary, contrary to the general rule that respects corporate distinctions. Id. at 53-54, 58.

Separate corporations, like GPE and its subsidiaries KCP&L and GMO, "are to be regarded as distinct legal entities, even if the stock of one is owned partly or wholly by the other." Mid-Missouri Tel. Co. v. Alma Tel. Co., 18 S.W.3d 578, 582 (Mo. App. W.D. 2000). Therefore, the ownership of capital stock in one corporation by another "does not itself create identity of corporate interest as between the two." Central Cooling & Supply Co. v. Director of Revenue, 648 S.W.2d 546, 548 (Mo. 1982) (noting these principles are followed by other states). In light of this authority, the Court of Appeals has declared that "our Supreme Court has advised that the doctrine of corporate entity is valid and substantive in nature, and should 'be ignored with caution, and only when the circumstances clearly justify it.'" Mid-Missouri Tel. Co. v. Alma Tel. Co., 18 S.W.3d at 582. Such circumstances occur only where the control exercised by the parent is so total that, for example, the subsidiary has grossly inadequate capital; pays the salaries, expenses and losses of the subsidiary; the subsidiary has substantially no business; and the formal legal requirements of the subsidiary are not observed. Collet v. American Nat'l Stores, Inc., 708 S.W.2d 273, 283-84 (Mo. App. E.D. 1986). Moreover, such control must be exercised "to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or an unjust act." Id. at 284. See Weitz Co. v. MH Washington, LLC, 631 F.3d 510, 520-21 (8th Cir. 2011) (noting Collet as the leading Missouri case on these issues).

The Staff Report alleges no facts to suggest that the corporate structures of GPE, KCP&L and GMO should be disregarded. Consequently, cases like May Dep't Stores, where improper or fraudulent conduct occurred, have no bearing on GPE's acquisition of Westar.

In a final attempt to support its novel expansive and extraterritorial interpretation of Section 393.190.2, Staff cites Southern Union Co. v. Missouri PSC, 289 F.3d 503 (8th Cir. 2002). However, Southern Union Co. was itself both a Missouri gas corporation, as well as a public utility under Section 386.020(18) and (42). The Eighth Circuit stated: "Through its Missouri Gas Energy division, Southern Union provides natural gas service to over 480,000 customers in central and western Missouri." Id. at 505. Clearly, Southern Union was subject to the Commission's regulatory authority under Sections 393.110 through 393.295, including the merger and acquisition requirements of Section 393.190.2. Id.

By contrast, GPE does not provide electrical service to any customers, either in Missouri or elsewhere. The sole basis for this Commission's regulatory authority over GPE is the 2001 GPE Stipulation which, as discussed above in Section II(A)(2), contains a list of specific matters on which GPE agreed to be subject to the jurisdiction of the PSC on a limited basis. There is no provision in the GPE Stipulation requiring the Company to seek the approval of this Commission regarding the acquisition of public utilities in other states. Contrary to Staff's conclusion, there was no "commitment" or "acknowledgement" by GPE that it would seek PSC approval of future acquisitions of non-Missouri utilities.[8] See Staff Report at 72.

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[8] As noted above, the jurisdiction of an agency like the Commission is limited to what was granted by the legislature and cannot be enlarged or expanded by the agreement of the parties. Tetzner v. Department of Social Services, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014); Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991).

Given the Staff Report's failure to provide any administrative order or judicial precedent that supports the exercise of Commission jurisdiction under Section 393.190.2 over GPE's acquisition of a non-Missouri public utility, its legal analysis must be rejected.

IV. Conclusion

If the Commission asserts jurisdiction over this Transaction because GPE owns public utilities in Missouri, it will send a clear signal to the electric utility acquisition and merger market that transactions involving Missouri public utility holding companies should be avoided. This will have a profoundly negative effect on Missouri companies at both the unregulated holding company level and the regulated utility subsidiary level by erecting barriers to business combinations that non-Missouri companies will not face. It will also drive down the value of Missouri companies both at the holding company level and the regulated subsidiary level.

To appreciate these significant negative implications, it is necessary to understand the size and changing nature of electric utility market today. We are in an era of acquisitions, mergers and consolidation. As a result of mergers, the number of publicly traded investor owned electric utilities continues to decline, from approximately 100 companies two decades ago to approximately 70 in 2000. Today, there are 42 such investor-owned publicly traded utilities (including recent merger announcements). This recent acceleration in merger activity is notable. Since 2014 there have been 16 corporate utility mergers of greater than $1 billion, while in the prior three-year period of 2011-2013, there were only seven. Compared to the first quarter of 2015, total "deal value" in 2016 increased by 508% from $6.8 billion to $41.4 billion, and the average size of a transaction increased by 93% from $972 million to $1.9 billion.[9] In general,

[9] http://www.pwc.com/us/en/power-and-utilities/publications/assets/pwc-na-power-and-utilities-deals-q1-2016.pdf

these acquisitions are driven by rapid changes in the generation resource mix and the expansion of transmission infrastructure, with renewable energy continuing to penetrate the electricity market.[10]

While traditional synergy cost savings are generally recognized as the primary rationale for most mergers in the utility sector, as is true for the Transaction, there are other drivers as well. Environmental regulations, including the Clean Power Plan have created a strong incentive for mergers with companies whose assets have a lower carbon footprint.[11] This is certainly a factor in GPE's proposed acquisition of Westar, which seeks to lower overall corporate risk through increased access to a more diversified energy portfolio that will benefit Missouri customers.

Apart from the lack of legal authority, the assertion of jurisdiction by the Commission over the Transaction would create an additional regulatory barrier that would not only jeopardize this Transaction, but have a chilling effect on all transactions involving Missouri utilities. The length of time to complete large acquisitions has been rapidly decreasing in recent years, from an average of 8.7 months in 2010 to 6.15 months in 2013.[12] If the Commission asserted approval jurisdiction over this Transaction, the time to close the deal will increase, as will the risk to complete transactions involving other holding companies with Missouri subsidiaries. This would put those Missouri-based holding companies at a significant disadvantage in the highly competitive market of utility acquisitions and mergers. This competitive disadvantage, brought on by an additional Missouri regulatory burden, will likely reduce GPE's value, as well as that of

[10] http://www.pwc.com/us/en/power-and-utilities/publications/assets/pwc-na-power-and-utilities-deals-q2-2016.pdf
[11] https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/us-evaluating-ma-through-a-changing-utility-lens-pdf.pdf
[12] https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/us-evaluating-ma-through-a-changing-utility-lens-pdf.pdf

every holding company with Missouri subsidiaries in its system. It will ultimately have a deleterious effect on the regulated utility subsidiaries over which the Commission has clear jurisdictional authority, such as KCP&L and GMO.

WHEREFORE, Great Plains Energy Incorporated requests that the Commission reject Staff's recommendation that it order GPE to seek Commission approval prior to acquiring Westar. Instead, GPE requests that the Commission issue an order stating that (1) the Commission does not have jurisdiction to approve or disapprove GPE's acquisition of Westar, and (2) the Commission does have jurisdiction under its ratemaking authority over KCP&L and GMO to protect Missouri customers in course of rate case proceedings that occur subsequent to the closing of GPE's acquisition of Westar.

Dated: July 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the below named parties by email or U.S. mail, postage prepaid, this 1st day of August 2016.

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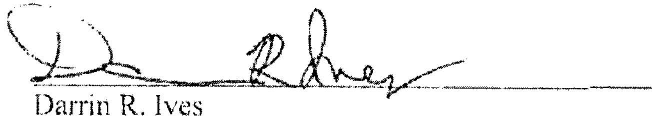
VERIFICATION

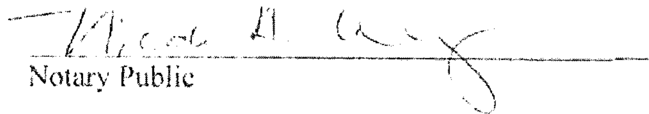
STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Darrin R. Ives, being first duly sworn, on his oath and in his capacity as Vice President—Regulatory Affairs of Kansas City Power & Light Company, states that he is authorized to execute the foregoing on behalf of Great Plains Energy Incorporated, has knowledge of the matters stated herein, and that said matters are true and correct to the best of his knowledge and belief.



Darrin R. Ives

Subscribed and sworn to before me this 1st day of August, 2016



Notary Public

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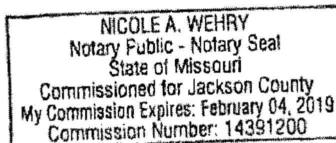

NICOLE A. WEHRY
Notary Public - Notary Seal
State of Missouri
Commissioned for Jackson County
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