STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 29th day of June, 2016.

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

ORDER DENYING MOTION FOR RECONSIDERATION

Issue Date: June 29, 2016 Effective Date: June 29, 2016

This file is a repository for documents, like this order, related to an investigation. The investigation has not grown into something more than an audit or inspection simply as a result of the issuance of orders, the filing of motions, or the existence this file. No property or other protected interest is at stake because no procedure is pending that can affect such interest. In this context, the motion for reconsideration ("motion") seeks an advisory opinion on the subject of the investigation, which the Commission has no authority to issue. For that reason, and because the motion does not address the standard for reconsideration, the Commission is denying the motion.

A. Investigation

The investigation is examining the impending acquisition ("transaction") of an electrical utility in Kansas—Westar Energy, Inc.—by Great Plains Energy, Inc. ("GPE"). GPE is a holding company that owns two Missouri electrical companies: KCPL Greater Missouri Operations ("GMO") and Kansas City Power & Light Company ("KCPL"). The investigation is focusing on the transaction's potential effects on Missouri ratepayers. Hence, the orders issued in this file relate to conducting the investigation: authorizing the investigation, shortening the time to respond to data requests, and filing a report on

the results of the investigation. Consistent with limiting this file to an investigation, the Commission also denied the only motion to intervene.[1] There is no intervention because there are no parties. There are no parties because there is no action. There is no action because no determination as to the transaction—including the threshold matter of jurisdiction—is occurring.

The Commission's relationship with Staff, outside a rulemaking or a case in which a participant is a party, is one of internal management—specifically, employer/employee. Nevertheless, Staff put its request into the format of a motion, which it filed in the Commission's Electronic Filing Information System ("EFIS"), which generated a file number. That procedure is not required by any law, and it risks the appearance that a legal action is pending, perhaps even a contested case. And the occasional casual use of the term "case" in the Commission's files increases that risk.

Despite the risk of such confusion, Staff's request for authorization and consequent creation of this file is prudent practice in circumstances like these. The reason is simple and practical: if the Commission did not want the investigation to occur, it would be much better to know before expending resources on the investigation than after. In addition, filing a request for authorization affords the opportunity for input from entities involved in the proposed investigation, and results in express public statements from the Commission. Thus, filing a request for authorization promotes administrative transparency, efficiency, and economy. But it does not create a case, contested or non-contested.

[1] EFIS No. 11 (June 9) *Order Denying Motion For Intervention*.

GPE asked for an order denying Staff's request for authorization on the grounds that the Commission has no jurisdiction over the transaction.[2] The Commission granted Staff's request for authorization in its order, by delegating to Staff[3] the Commission's investigative powers,[4] and required Staff to file a report.

The Commission made no ruling on GPE's jurisdictional question.

B. Reconsideration

GPE filed the motion for reconsideration.[5] Staff filed a response.[6] GPE filed a reply [7] and a supplement to the reply.[8]

Reconsideration is governed by the following standard.

> Motions for reconsideration shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable. [[9]]

GPE does not address that standard; does not characterize the order as unlawful, unjust, or unreasonable; and does not show its allegations' relevance to that standard. Also, the motion does not challenge Staff's exercise of the Commission's duly delegated investigative powers or the filing of a report. Moreover, GPE states that it is taking the

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[2] EFIS No. 2 (June 2) *Great Plains Energy Incorporated's Verified Opposition to Staff's Motion to Open Investigation and Request for Order Declining Jurisdiction*, page 10, paragraph 33. All dates are in 2016 except as noted otherwise.

[3] Section 386.240, RSMo 2000.

[4] These include the Commission's power to inquire of personnel and examine documents of any electrical corporation. Section 393.140(8) and (9), RSMo 2000. Section 393.140(5), (9), and (10), RSMo 2000.

[5] EFIS No. 14 (June 10) *Great Plains Energy Incorporated's Verified Motion for Reconsideration*. All references to EFIS refer to this file except as otherwise noted.

[6] EFIS No. 16 (June 13) *Staff's Response to Great Plains Energy's Motion for Reconsideration*.

[7] EFIS No. 17 (June 15) *Great Plains Energy Incorporated's Reply to Staff's Response to Verified Motion for Reconsideration*.

[8] EFIS No. 19 (June 21) *Supplement to Great Plains Energy Incorporated's June 15, 2016 Reply to Staff's Response to Verified Motion for Reconsideration*.

[9] 4 CSR 240-2.160(2).

commendable initiative to send information that it believes will be helpful to Staff before Staff even asks. [10]

Instead, the motion asks the Commission to bifurcate this investigation[11] and issue a stand-alone order on whether the Commission has jurisdiction over the transaction. GPE asks the Commission to issue such order by July 1. The Commission is denying the motion for reconsideration and is not determining GPE's jurisdictional question.

C. The Scope of this File

GPE argues that there is no reason for the Commission to refrain from ruling on GPE's jurisdictional question, but the reasons are several, and include the following.

First, no law requires the Commission to rule on GPE's jurisdictional question. Jurisdiction should always be among the considerations when the Commission purports to make a statement of legally binding effect, whether in a rulemaking or in a case. But neither of those procedures is occurring in this investigation.

Second, a ruling on GPE's jurisdictional question is unnecessary to the investigation. The investigation addresses the transaction's possible impact on Missouri rate payers. GPE acknowledges the Commission's duty to investigate that matter.[12]

Third, any ruling must stand on relevant facts. No procedure with any mechanism of any kind for finding facts has been instituted by the Commission or sought by Staff or

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[10] EFIS No. 14 (June 10) *Great Plains Energy Incorporated's Verified Motion for Reconsideration*, page 5, paragraph 11.

[11] EFIS No. 14 (June 10) *Great Plains Energy Incorporated's Verified Motion for Reconsideration*, first page, Section I.

[12] EFIS No. 14 (June 10) *Great Plains Energy Incorporated's Verified Motion for Reconsideration*, page 5, paragraph 12.

even by GPE. Various such procedures exist at law, generally when some statement of legally binding effect is at issue, but no such procedure is occurring in this investigation.

Fourth, in procedures to make statement of legally binding effect, the Commission solicits various interested entities' input. Such input may be either required by law or desired under sound policy. For example, the Commission gives notice in rulemakings and non-contested cases, so as to give interested entities the opportunity to be heard when the Commission deems it potentially helpful. The law requires such notice in a contested case.[13] No contested case is pending as to the transaction. Because procedures for input are absent, GPE's jurisdictional question would be less than fully argued. Moreover, Staff's report is due on July 25 and the motion seeks a ruling by July 1, making the ruling sought even more premature.

Fifth, though by no measure least in importance, the courts have instructed the Commission to issue no advisory opinion. An advisory opinion results when a tribunal purports to make a legal determination outside the procedure legally prescribed for making such determination.

> Like other administrative agencies, the Commission is not authorized to issue advisory opinions. The Commission, the circuit court, and this court should not render advisory opinions. "The function of each is to resolve disputes properly presented by real parties in interest with existing adversary positions." The Commission was restricted to determining the complaint before it, and it should not be issuing decisions with "no practical effect and that are only advisory as to future, hypothetical situations." "The petition must present a 'real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.' " [[14]]

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[13] Section 536.067, RSMo Supp. 2013.

[14] *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State of Missouri*, 392 S.W.3d 24, 38 (Mo. App., W.D. 2012) (citations omitted).

In that case, the advisory opinion was requested in the context of a complaint. No complaint is pending related to the transaction, nor any application or petition to authorize the transaction, nor any other extant controversy in which the Commission can grant real relief.

The courts' language on this point is direct. "[M]erely speculating that the PSC would, at some later date, . . . attempt to assert regulatory authority [and] asking for an advisory opinion regarding whether such an assertion of authority, were it ever to occur, would be proper" is not enough to generate a controversy ripe for adjudication.[15] With no legal determination pending on which GPE's jurisdictional question has any effect on any legally protected interest, a ruling would constitute an advisory opinion, which the law unequivocally bars.

D. Past Orders

GPE alleges that the ruling it seeks is consistent with Commission practice. In support, GPE cites orders of past commissions. Past Commission orders may offer a helpful analysis when they apply similar provisions of law to similar facts. In each of GPE's cited orders, the Commission concluded that it had no jurisdiction over the merger or acquisition.

But each of GPE's cited orders, and related filings as set forth in the appendix to this order, shows that those investigations differ from this investigation. In GPE's cited orders, the Commission determined that jurisdiction was absent in an order denying a request to investigate. An order denying a request to investigate is no longer GPE's objective; the motion asks for a stand-alone advisory opinion. In GPE's cited orders, the

[15] *Ameren Transmission Co. of Illinois v. Pub. Serv. Comm'n of the State of Missouri*, 467 S.W.3d 875, 880 (Mo. App. W.D. 2015).

merger or acquisition was between two holding companies. Though the positions, allegations, and arguments are still evolving in this investigation, the filings allege that the transaction is between a holding company and an electrical company.

GPE's premise is that a single holding company's involvement negates the Commission's jurisdiction. GPE cites no authority for that premise. GPE also cites no order in which the Commission made such a statement and, even if it did, past Commission orders do not bind the Commission.[16] Therefore, the Commission is not departing from previous Commission practice.

E. Certainty

GPE argues that the conduct of its business, including the transaction, requires certainty. GPE assumes that Staff or OPC or both may file a response to its supplement, and that GPE must file a response to the report, because the Commission will issue an order on the report. Such filings and rulings, GPE assumes, will further delay the certainty it craves.

Certainty is available in the procedures that the law provides, as described above, and has been secured by parties to recent actions before this Commission. An example appears in *In the Matter of the Application of South Central MCN LLC for Approval of Transfer of Assets and a Certificate of Convenience and Necessity*.[17] In that case, the applicant's initial pleading set forth two claims for authorization: one to do business as a public utility, and another to purchase assets from a municipality.[18] As to the latter claim, the applicant sought dismissal, arguing that it had filed that claim in an

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[16] Section 386.490.2, RSMo Supp. 2013.

[17] File No. EA-2016-0036.

[18] File No. EA-2016-0036 EFIS No. 1 (August 19, 2015) *Application*.

abundance of caution but that the Commission lacked jurisdiction over a purchase from a municipality.[19] Over opposition,[20] the Commission dismissed that claim.[21] That applicant's practice in that case produced the type of certainty that GPE desires because the ruling had a real effect on an element of a pending case.

Further, GPE agrees that the Commission has jurisdiction over KCPL and GMO.[22] Those entities may be the focus of any remedy, if needed, to protect Missouri ratepayers from the transaction. If so, a ruling on GPE's jurisdictional question does not represent the certainty that GPE seeks.

F. Summary

Nothing requires the Commission to make the ruling that the motion seeks. The motion asks—without addressing the standard for reconsideration—for a ruling outside of any case, without the involvement of interested parties, and before even receiving Staff's report. That request resembles nothing that GPE has shown the Commission to have done in the past, so past Commission practice does not support the motion. A procedural context in which GPE may obtain effective relief is available, but the motion seeks a mere advisory opinion, which the law forbids. The Commission will deny the motion and is not determining GPE's jurisdictional question.

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[19] File No. EA-2016-0036 EFIS No. 45 (December 18, 2015) *Motion for Partial Disposition*.

[20] File No. EA-2016-0036 EFIS No. 50 (January 15) *City Utilities Response in Opposition to SCMCN Motion for Partial Disposition*.

[21] File No. EA-2016-0036 EFIS No. 55 (February 10) *Order Granting Motion For Partial Disposition*.

[22] EFIS No. 19 (June 21) *Supplement to Great Plains Energy Incorporated's June 15, 2016 Reply to Staff's Response to Verified Motion for Reconsideration*, page 5, paragraph 10.

THE COMMISSION ORDERS THAT:

1. *Great Plains Energy Incorporated's Verified Motion for Reconsideration* is denied.

2. This order shall be effective when issued.

BY THE COMMISSION

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney, Rupp, and
Coleman, CC., concur.

Appendix: GPE's Cited Orders

In re Proposed Acquisition of AT&T Corp. by SBC Commun., Inc.,	" . . . a merger of two non-regulated parent corporations [.]" [23]
In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp.	" . . . the proposed acquisition of Cilcorp, Inc., the parent of regulated Central Illinois Light Company (Cilco), by Ameren Corporation, the parent holding company of Union Electric Company, d/b/a Ameren UE ." [24]
In re Proposed Acquisition of Mo.-Am. Water Co. and Am. Water Works Co. by the German Corp. RWE AG	" . . . the proposed acquisition of . . . parent company American Water Works Company by the German [c]orporation RWE AG." [25]
TM-99-261 *In re Proposed Merger between GTE Corp. and Bell Atlantic*	" . . . the similarities between its proposed merger and the merger that was the subject of Case No. TM-99-76. In case No. TM-99-76, after oral argument, the Commission found that it did not have jurisdiction to examine a merger of two non-regulated parent corporations [.]" [26]
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.	"American Water owns Missouri-American Water Company (MAWC), a Missouri corporation that operates as a regulated water utility in Missouri. National owns Continental Water Company (Continental), which in turn owns St. Louis County Water Company (SLWC), a Missouri corporation that operates as a regulated water utility in Missouri." [27]
In re Merger of SBC Commun. Inc. and Ameritech Corp.	"[T]he Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger." [28]

[23] File No. TM-2005-0355, EFIS No. 6 (April 19, 2005) *Order Closing Case*, page 2.

[24] File No. EO-2002-1082, EFIS No. 1 (May 20, 2002)*, Motion to Review Proposed Acquisition of Cilcorp by Ameren Corporation*, first page, first paragraph.

[25] File No. WO-2002-206, EFIS No. 8 (December 13, 2001), *Order Closing Case,* first page, first paragraph.

[26] File No. TM-99-261, EFIS No. 7, *Order Denying Motion to Reconsider Order Closing Case* (April 22, 1999) first page, first paragraph.

[27] File No. WM-99-224, EFIS No. 15 (March 23, 1999) *Report & Order*, page 3.

[28] File No. TM-99-76, Not available in EFIS, 1998 WL 996180 (October 20, 1998) *Report & Order*, second paragraph.