

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the Joint Application of)
Great Plains Energy Incorporated, Kansas)
City Power & Light Company and Westar) Docket No. 16-KCPE-593-ACQ
Energy, Inc. for Approval of the Acquisition)
of Westar Energy, Inc. by Great Plains Energy)
Incorporated.)

**PETITION FOR RECONSIDERATION AND
REQUEST FOR STAY**

COME NOW Great Plains Energy Incorporated ("Great Plains Energy" or "GPE"), Kansas City Power & Light Company ("KCP&L"), and Westar Energy, Inc. and Kansas Gas and Electric Company ("Westar") (collectively, "Joint Applicants" or "Companies"), and pursuant to K.S.A. 66-118b, K.S.A. 77-529 and K.A.R. 82-1-235, petition the State Corporation Commission of the State of Kansas ("Commission") for specific and limited reconsideration of a portion of the Commission's January 26, 2017 Order on Prehearing Motions ("Order"). In support of their Petition for Reconsideration ("Petition"), the Joint Applicants state as follows:

I. Background

1. On June 28, 2016, the Joint Applicants filed their Joint Application for approval of Great Plains Energy's acquisition of Westar. Throughout the course of this proceeding, Staff and numerous interveners have submitted discovery requests ("DR" or "DRs") seeking detailed information about the transaction. Some of the information requested during the discovery process was designated as confidential by the Joint Applicants.

2. On January 10, 2017, Staff filed its Motion to Declassify All Staff Testimony and Exhibits ("Motion"), arguing the Joint Applicants failed to sufficiently explain the reasons for the confidential designations and did not identify the harm disclosure would cause. Staff further

argued that regardless of whether the information in question is deemed confidential, the benefits of declassifying the information outweigh the harm of disclosure.

3. On January 20, 2017, the Joint Applicants filed their Response to Staff's Motion to Declassify All Staff Testimony and Exhibits ("Response"). The Joint Applicants asserted the confidential designations were appropriate to protect such information as: confidential financial/budget projections; specific contract terms; sensitive information that could impact pending or threatened litigation; trade secret or commercially sensitive information; information the Companies are contractually obligated to keep private; and/or critical infrastructure information. Joint Applicants explained that disclosure of these categories of confidential information could affect the Companies' standing in the capital markets, affect the Companies' stock prices, facilitate insider trading violations of the Securities Exchange Commission ("SEC") rules, disadvantage the Companies in their contract negotiations and/or subject the Companies to damages.

4. Pursuant to the January 13, 2017 Prehearing Officer Order Setting Hearing on Pending Motions, the Commission conducted a hearing on January 24, 2017 on pending motions, including Staff's Motion regarding the Joint Applicants' confidential designations. In its January 26, 2017 Order, the Commission found, *inter alia*, that "any confidential designations other than those for attorney-client privilege, attorney work-product, or critical infrastructure information which poses a security risk if made public removed."¹

5. The Joint Applicants seek reconsideration of the portion of the Order requiring the public disclosure of a very limited subset of information designated confidential by the Joint Applicants other than attorney-client privilege, attorney work-product or critical infrastructure information. Specifically, the Joint Applicants seek to retain the confidential designation with

¹ Order on Prehearing Motions (Jan. 26, 2017) ("Order"), at 8.

respect to financial modeling information provided in response to three data requests: CURB 42 and KCC Staff 153 and 169. Information from these data request responses is contained on two pages of Staff witness Gatewood's direct testimony filing (pp. 82 and 83 of the pdf of Mr. Gatewood's direct testimony filing, representing two pages of financial modeling information provided in response to KCC Staff DR 153) and approximately 132 pages of Staff witness Grady's direct testimony filing (pp. 523-655 of the pdf of Mr. Grady's direct testimony filing, representing 132 pages of modeling information provided in response to KCC Staff DR 169). Information from these data requests is also contained on approximately 149 pages of BPU witness Steffen's direct testimony (pp. 554-703 of the pdf of Mr. Steffen's direct testimony filing, representing approximately pages of financial modeling information provided in response to CURB 42). Information from these data requests is also contained on approximately 24 pages of BPU witness Lesser's direct testimony (pp. 314-328, 399-406 and 1,586-1,587 of the pdf of Mr. Lesser's direct testimony, representing approximately 24 pages of financial modeling information provided in response to CURB 42). Information from these data requests is also contained on 6 pages of KEPCo witness Dismukes' direct testimony (pp. 134-136 and 139-141 of the pdf of Mr. Dismukes' direct testimony filing, representing 6 pages of financial modeling information provided in response to KCC Staff DR 169). Joint applicants request reconsideration of the Order such that this limited information can be maintained as confidential. Joint Applicants' request for reconsideration and stay is limited to the financial modeling itself. To the extent that testimony discusses the modeling, makes reference to the results of the modeling or the like, Joint Applicants do not seek to hold those discussions or references as confidential. Joint Applicants' concerns are based on the breadth and depth of financial forecast information contained in the financial modeling that would otherwise be unavailable from any

public source. All other confidential designations in testimony may be removed per the terms of the Order. Further, because the information in these three data request responses contains such highly sensitive financial information that the risk of disclosure to the Companies results in significant harm, the Joint Applicants seek a stay of the portion of the Order which requires the removal of the confidential designation pertaining to information in Staff's direct testimony filing containing the financial modeling information provided by the Companies' responses to data requests CURB 42 and KCC Staff 153 and 169.

II. Argument

6. Discovery and disclosure of trade secrets and confidential commercial information is governed by K.S.A. 66-1220a. Section 66-1220a states, in pertinent part:

The state corporation commission shall not disclose to or allow inspection by anyone, including, but not limited to, parties to a regulatory proceeding before the commission, any information which is a trade secret under the uniform trade secrets act (K.S.A. 60-3320 et seq., and amendments thereto) or any confidential commercial information of a corporation, partnership or individual proprietorship regulated by the commission unless the commission finds that disclosure is warranted after consideration of the following factors:

- (1) Whether disclosure will significantly aid the commission in fulfilling its functions;
- (2) the harm or benefit which disclosure will cause to the public interest;
- (3) the harm which disclosure will cause to the corporation, partnership or sole proprietorship; and
- (4) alternatives to disclosure that will serve the public interest and protect the corporation, partnership or sole proprietorship.²

"The Commission is prohibited from disclosing or allowing inspection of confidential information by other parties in a proceeding unless the Commission analyzes the factors and concludes disclosure is warranted."³

² K.S.A. 66-1220a(a) (emphasis added).

7. Of the more than 1600 data requests issued by Staff and interveners in this matter, the Joint Applicants designated 234 of their responses as “confidential.”⁴ In its January 26, 2017 Order, the Commission mandated that the parties file revised testimony by 8:00 a.m. on January 30, 2017 removing “any confidential designations other than those for attorney-client privilege, attorney work-product or critical infrastructure information which poses a security risk if made public.”⁵ The Joint Applicants file this Petition to address information contained in Staff’s testimony that was provided in responses to only three data requests: CURB No. 42 and KCC Staff Nos. 153 and 169 (the “Forward-Looking Financial Responses”).

8. The Forward-Looking Financial Responses relate to detailed financial model output that was used by the Joint Applicants to assess the financial viability of the transaction. They consist of detailed forecasts of all of the Companies’ (*i.e.*, KCP&L, including its Missouri operations, and Westar, including KG&E) financial plans through 2020, which include details regarding income statement and balance sheet expectations, capital expenditure expectations, cash flow expectations, earnings per share expectations and dividend per share expectations,

³ In the Matter of the Petition of Sprint Commc'ns Co. L.P., Sprint Spectrum L.P., & Nextel W. Corp., d/b/a Sprint, to Conduct Gen. Investigation into the Intrastate Access Charges of United Tel. Co. of E. Kansas, United Tel. Co. of S. Cent. Kansas, & United Tel. Co. of Se. Kansas, d/b/a Embarq., 08-GIMT-1023-GIT, 2009 WL 10185925, at *3 (June 12, 2009) (citing Mobil Expl. & Producing U.S. Inc. v. State Corp. Comm'n, 258 Kan. 796, 820, 908 P.2d 1276 (1995); see also Sw. Bell Tel. Co. v. State Corp. Comm'n, 6 Kan.App.2d 444, 455-57, 629 P.2d 1174, 1183-84 (1981) (same).

⁴ The responses marked “confidential” by the Joint Applicants fall into one or more of seven categories:

- (1) Confidential financial information/budget projections, the disclosure of which could affect the Companies’ standing in the capital markets, affect the Companies’ stock price, facilitate insider trading violations of SEC rules, and/or disadvantage the Companies in their contract negotiations;
- (2) Specific contract terms or other information contained in the contracts that could be used by existing or future vendors to the disadvantage of the Companies;
- (3) Sensitive information that could impact pending or threatened litigation;
- (4) Advice of counsel or other outside experts, advisors, or consultants;
- (5) Trade secret or commercially sensitive information, the disclosure of which would harm the Companies competitively and/or prevent the Companies from protecting such information as allowed under Kansas law;
- (6) Information the Companies are contractually obligated to be kept private, in which the failure to do so could open the Companies to damages; and
- (7) Critical infrastructure information which poses of a security risk if made public.

See Response at 2-3.

⁵ Order at 8.

among other forward looking projections. None of this information is publically available, nor typically provided externally to the Companies for such an extended future period. Public disclosure of this information over such an extended future period, and no other utilities produce it, and its public availability will place GPE (including KCP&L and its Missouri operations) and Westar (including KG&E) at a significant disadvantage in the market for the foreseeable future by enabling potential acquirers of GPE and/or Westar access to detailed financial forecast information that would otherwise be private. Access to such private information could enable the mounting of hostile acquisition efforts by potential acquirers, and/or negatively impact the Joint Applicants' ability to raise capital, that would not otherwise be possible and this could harm the interests of GPE and Westar.

9. Irreparable harm will likely result from declassification of the detailed financial modeling projections and information contained in the responses to CURB 42 and Staff DR numbers 153 and 169 that the Joint Applicants have designated as confidential in these proceedings and which is contained in the previously specified sections of Staff witness Gatewood, Staff witness Grady, BPU witness Steffen, BPU witness Lesser and KEPCo witness Dismukes' direct testimony filings. This would impose a significant risk of substantial harm to the Companies (the third factor in the Section 66-1220a analysis),⁶ which the Companies believe can be avoided by this limited request for reconsideration.

10. Moreover, the fourth factor in the Section 66-1220a analysis obligates the Commission to consider alternatives to disclosure that will serve the public interest and protect the utilities' interest in maintaining confidentiality.⁷ The Joint Applicants have endeavored to ensure that the vast majority of information related to their application is made public.

⁶ See K.S.A. 66-1220a(a)(3).

⁷ See K.S.A. 66-1220a(a)(4).

Nevertheless, there are some materials that the Joint Applicants and the Commission (in its Protective Order) have recognized should be maintained confidentially.⁸ As explained above, the Joint Applicants have now narrowed their confidentiality requests to just three responses—those containing confidential, material, non-public, forward-looking financial information—and the Commission is already very familiar with an alternative that will allow the Commission to consider this very sensitive information without disclosing it publicly.

11. The Commission is more than capable of maintaining the confidentiality of this information while conducting an efficient, fulsome evidentiary hearing. Indeed, the Commission frequently conducts confidential sessions during litigated proceedings before the Commission. These proceedings allow the Commission to serve the public interest while protecting the confidential commercial information of the regulated entities before it. The process is not nearly as inconvenient as Staff suggests and, given the limited amount of information Joint Applicants seek to protect from public disclosure and the substantial competitive and economic risks attendant to disclosure of the Forward-Looking Financial Responses, the balancing of harms/interests falls squarely in the Joint Applicants' favor.

12. Despite the importance the Joint Applicants placed on confidential, non-public, financial information/budget projections in their Response to Staff's Motion to Declassify, the Commission did not specifically address any of the Joint Applicants' concerns regarding the Forward-Looking Financial Responses in its Order. Rather, the Commission's Order limits its analysis (in paragraphs 12 and 13) to the Joint Applicants' requests to maintain the confidentiality of information related to "the number of projected job losses [and] the identity of

⁸ See Order Designating Prehearing Officers; Granting Intervention to the Citizens' Utility Ratepayer Board; and Protective and Discovery Order (Jul. 14, 2016) ("Protective Order"), at 5.

power plants targeted for closure.”⁹ The Commission analyzed these two types of information and determined that there was “little harm of disclosure to the Joint Applicants when weighted against the public’s right to review information on potential plant closing and job losses that could have major impacts on local communities.”¹⁰ Based on its analysis of the plant closing/job loss information, the Commission ordered that all of the Joint Applicants’ confidentiality designations¹¹ be removed.¹² Joint Applicants understand and appreciate the public’s need for information regarding jobs and generating plants, but believe the Commission’s decision is too broad with respect to forward looking financial information and, in that specific regard does not sufficiently address the third and fourth factors of the Section 66-1220a analysis.

13. Further, the Commission relied on a statement made in its April 20, 2004 Order Conditionally Approving Sale of Missouri Eastern Gas Systems as its rationale to require the public release of all confidentially designated information, except for material covered by attorney/client communication or attorney work product privilege and critical infrastructure information, which poses a security risk if made public. Reliance on this order for the proposition that all information should be public, except for the narrow exceptions noted above, misconstrues the order. In that case, Aquila, Inc. ("Aquila") had designated, without explanation, all of the exhibits related to its proposed sale of certain assets as "confidential." In the passage cited by the Commission, the Commission was reminding Aquila about its obligation to review its confidential designations and explain the harm of disclosure. That same passage goes on to state:

⁹ Order at 7.

¹⁰ Id.

¹¹ The Commission did permit the Joint Applicants to maintain their confidentiality designations for: “(1) material covered by attorney/client communication or attorney work product privilege; and (2) critical infrastructure information which poses a security risk if made public.” Order at 8. Neither of those categories is at issue in this Petition.

¹² Id.

Aquila should, for the record in this proceeding, identify specific information in its motions and reports that Aquila claims as "Confidential" and explain how the economic and competitive interests of the Company would be harmed. Aquila is directed to file a pleading within five (5) days after service of this order to designate portions of its Exhibits it claims as "Confidential" and to explain the reasons why the "Confidential" designation is proper for those portions.

On April 26, 2004, Aquila complied with the Commission's April 20, 2004 requirement to provide an explanation as to its designations and harm of disclosure. A more analogous order from that same docket, which actually addresses specific claims of confidentiality, is the Commission's July 12, 2005 Order on Motions Challenging Confidential Designations. In that order, the Commission reviewed specific documents, including non-public, forward-looking financial projections. Upon completion of its review, the Commission stated:

[T]he Commission agrees with Aquila that a company's non-public financial projections, market value estimates, and strategic plans, which are generated by the company and not available publicly from other sources, should be treated as confidential. A company should not be required to disclose such information in advance of processes used under federal securities laws and other well-established means for making financial information available publicly if release of the information would harm the company and be detrimental to the public interest. Aquila has demonstrated that harm could occur if Aquila's own estimates of remaining asset values were released to the public. Also, disclosure of Aquila's strategies relating to future implementation of its financial plan could cause competitive or economic harm by compromising future commercial transactions.

These are precisely the documents contained in the Forward-Looking Financial Responses. Absent compelling rationale to the contrary, the Commission should treat the Forward-Looking Financial Responses consistently with the exact same type of information under scrutiny in the Aquila order.

14. The Joint Applicants have already declassified certain information related to plant closings, which was, in part, the focus of the Commission's reasoning in its Order. Undersigned counsel who spoke on that issue during Tuesday's hearing apologizes for not making this point clear that day. The Joint Applicants have disclosed this information and accept the

Commissions’ Order concerning the vast majority of information previously designated as “confidential” in accordance with the terms of the Protective Order.¹³ But, the Forward-Looking Financial Responses contain a specific, confidential category of information that must be protected from public disclosure. Accordingly, the Joint Applicants respectfully request that the Commission reconsider its Order with respect to Forward-Looking Financial Responses and allow the Joint Applicants to maintain the confidentiality of the information contained in those responses.

III. Request for Stay

15. The Commission should stay its order regarding the Forward-Looking Financial Responses until the issues raised in this petition can be resolved. As indicated above, the Joint Applicants have significant concerns regarding the Commission’s Order. Specifically, the Joint Applicants have asked the Commission to reconsider its Order with respect to the confidentiality of the Forward-Looking Financial Responses (Data Request CURB No. 42 and KCC Staff Nos. 153 and 169 responses), the disclosure of which may cause the Companies irreparable harm due to the nature and extent of non-public, material, financial information/budget projections contained in those responses. Given the concerns the Joint Applicants have regarding the Commission’s decision, and the potentially drastic consequences of publicly disclosing the information contained in the Forward-Looking Financial Responses, it makes sense for the Commission to consider the points raised in this Petition and issue a ruling on reconsideration before requiring the parties to disclose the financial modeling information included in their direct testimony filings that was provided in the Forward-Looking Financial Responses without the “confidential” designations placed upon them in accordance with the Protective Order issued in this matter.

¹³ Protective Order at 5.

16. Under K.S.A. 66-1181, the Commission can grant a stay of its order so that it is not effective upon service of the order. K.S.A. 66-1181 provides:

All orders or decision of the commission shall become operative and effective upon service of the order or decision, in accordance with the provisions of subsection (a) of K.S.A 77-530 and amendments thereto, unless otherwise ordered by the commission ***or a stay is granted. The commission may grant a stay or suspend, in whole or in part, the operation of any order or decision*** of the commission in accordance with the provisions of K.S.A. 77-528 and amendments thereto. After the lapse of the time period in which judicial review of such order may be taken, such determination and orders shall be held to be conclusive as to the matters involved in any suit to enforce such order or in any collateral suit or proceedings. (Emphasis added).

K.S.A. 77-528 further provides:

Until the time at which a petition for judicial review would no longer be timely, a party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

17. The Joint Applicants believe that the Commission will reconsider its decision regarding the confidentiality of the Forward-Looking Financial Responses after it has an opportunity to review the concerns addressed in this petition for reconsideration.¹⁴ Given the potential serious and irreversible consequences of publicly disclosing the information contained in the Forward-Looking Financial Responses, the Joint Applicants respectfully request that the Commission stay the effectiveness of its Order—only with respect to testimony containing the Forward-Looking Financial Responses—until the Commission issues an order on reconsideration.¹⁵ This could occur after the hearing and would give all parties the opportunity to address the legal issues and consequences, and strategize the type of alternatives envisioned by K.S.A. 66-1220a(a)(4). Further, given the narrow scope of the confidential information at

¹⁴ See Southwestern Bell Telephone Co. v. State Corporation Comm'n, 6 Kan.App.2d 444, 629 P.2d 1174 (1981) (a utility's financial forecasts or projections are "worthy" of confidential protections).

¹⁵ Id. at 454 ("disclosure of the confidential information, if wrongful, cannot be corrected on later review").

issue, neither the Commission nor the parties would be inconvenienced by holding small portions of the hearing in confidential session in the event such became necessary.

WHEREFORE, the Joint Applicants respectfully request that the Commission reconsider the portion of its January 26, 2017 Order on Prehearing Motions related to the confidential designations on the Joint Applicants' responses to CURB 42 and KCC Staff 153 and 169, and further, to stay the effectiveness of its Order as to those three Forward-Looking Financial Responses such that the following portions of the following testimony shall be maintained as confidential:

- Two pages of Staff witness Gatewood's direct testimony filing (pp. 82 and 83 of the pdf of Mr. Gatewood's direct testimony filing, representing two pages of financial modeling information provided in response to KCC Staff DR 153);
- Approximately 132 pages of Staff witness Grady's direct testimony filing (pp. 523-655 of the pdf of Mr. Grady's direct testimony filing, representing 132 pages of modeling information provided in response to KCC Staff DR 169);
- Approximately 149 pages of BPU witness Steffen's direct testimony (pp. 554-703 of the pdf of Mr. Steffen's direct testimony filing, representing approximately pages of financial modeling information provided in response to CURB 42);
- Approximately 24 pages of BPU witness Lesser's direct testimony (pp. 314-328, 399-406 and 1,586-1,587 of the pdf of Mr. Lesser's direct testimony, representing approximately 24 pages of financial modeling information provided in response to CURB 42); and

- Six pages of KEPCo witness Dismukes' direct testimony (pp. 134-136 and 139-141) of the pdf of Mr. Dismukes' direct testimony filing, representing six pages of financial modeling information provided in response to KCC Staff DR 169).

Respectfully submitted,

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VERIFICATION

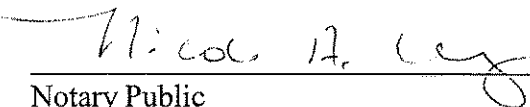
STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Darrin R. Ives, being duly sworn, on oath state that I am Vice President – Regulatory Affairs of Kansas City Power & Light Company, that I have read the foregoing Joint Applicants’ Petition for Reconsideration and Request for Stay and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief.

GREAT PLAINS ENERGY INCORPORATED

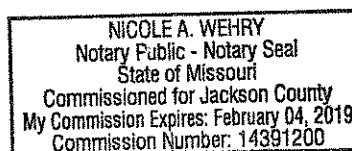
By: 
Darrin R. Ives

The foregoing was subscribed and sworn to before me this 27th day of January, 2017.


Notary Public

My Commission Expires:

Feb. 4, 2019



CERTIFICATE OF SERVICE

I do hereby certify that on the 27th day of January, 2017, I electronically filed via the Kansas Corporation Commission's Electronic Filing System, a true and correct copy of the above and foregoing with a copy emailed to all parties of record.

Robert J. Hack

Robert J. Hack