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 Energy, Inc for Approval of the Acquisition of Westar Energy, Inc by Great Plains Energy Incorporated	))))))	Docket No. 16-KCPE-593-ACQ

RESPONSIVE BRIEF OF THE KANSAS CITY, KANSAS BOARD OF PUBLIC UTILITIES

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Pursuant to the State Corporation Commission of the State of Kansas's (the "Commission") September 27, 2016 Order Setting Procedural Schedule, the Kansas City, Kansas Board of Public Utilities ("BPU") respectfully submits this Responsive Brief to the Initial Brief filed by Great Plains Energy Incorporated ("GPE"), Kansas City Power & Light Company ("KCP&L") and Westar Energy, Incorporated ("Westar") (collectively the "Joint Applicants") on February 28, 2017.

INTRODUCTION

The pivotal inquiry in this proceeding is whether or not the Joint Applicants have satisfied their burden of establishing that GPE's proposed acquisition of Westar (the "Transaction") is in the public interest. As the BPU demonstrates in this Brief, the evidentiary record in this proceeding establishes that the Joint Applicants fail to satisfy their burden, and the Commission should therefore deny the Joint Application. GPE seeks this Commission's approval to acquire Westar in a transaction worth a total of $12.2 billion, which translates to approximately $60 per Westar share,[1] consisting of 85% cash and 15% GPE common stock, a 51% premium[2] over Westar's undisturbed stock price, and an assumption of Westar's outstanding debts.[3] This Transaction requires GPE to "sacrific[e] its strong financial profile" while "tripl[ing] its debt, leaving little financial flexibility."[4] Put simply, in its desire to acquire Westar, GPE committed to a price that is too high. The price is too high for a utility of its size to afford,[5] and it is too high for the value Westar brings.[6]

Financing this Transaction requires a "highly aggressive" strategy of "financial engineering" that will leave GPE with "permanent leverage"[7] and at the mercy of factors beyond its control.[8] GPE's higher tolerance for financial risk comes at a time when financial analysts argue utilities must de-lever their balance sheets due to uncertainty about the future value of

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1 Because the Transaction includes a stock component, the final value will not be known until the Transaction closes.

2 The 51% transaction premium is calculated against Westar's November 3, 2015 stock price of $39.51. For the reasons discussed in Section II.A., the BPU agrees with Staff that this is the appropriate date to use. Should the Commission determine March 9, 2016 is the appropriate date to use, the transaction premium is still an unreasonable 36%.

3 Exhibit BJS-60 at 77 (internal pagination page 65). The consideration for this Transactions includes GPE stock. As a result, the final per share value will not be known until the Transaction closes.

4 Exhibit JAL-10, Moody's Investor Services May 31, 2016 Rating Action, at 3.

5 *See e.g.* Exhibit JAL-47, Wolfe Research May 31, 2016 Article, at 8 ("It's rare that a smaller company (GXP has a market cap under $5B) buys a larger one (WR is $8.6B) unless the buyer has executed much better over time, which is not the case here"); Exhibit JAL-56, Investing Daily Article at 2 ("we're concerned that the smaller, lower-performing Great Plains could turn out to be a "groomzilla" since it's willing to almost triple its debt, while risking a lower credit rating to unite with its better-performing and higher-capitalized peer").

6 *See e.g.* BPU-3, GPE May 2, 2016 BoD Presentation, at Slide 19 (showing Wall Street analysts pricing a Westar deal in a $48-$55 per share price range, with a 8% to 26% premium.

7 BPU-5, Moody's May 18, 2016 Letter at 6.

8 *Id.*, at 5.

regulated utilities.[9] The financing required to complete this transaction leaves GPE with "little room for error within [its] forecast assumptions,"[10] without being downgraded below investment grade.[11] These forecast assumptions rely heavily on the merger related "savings" that GPE claims to anticipate. Yet the only savings analysis in the record is Mr. Kemp's pre-bid analysis, which was completed with limited information during the crush of an "auction" for Westar.[12] The record shows that Mr. Kemp's analysis is riddled with incomplete or incorrect data, erroneous assumptions and inconsistent calculations. These errors greatly increase the risk of GPE being unable to service the significant debt this Transaction requires, forcing it to either raid Westar and KCP&L for cash or risk insolvency.[13]

It is no secret that GPE will rely on the cash generated post-merger by its public utility operating companies, KCP&L and Westar, to service the Transaction related debt, and that the "ring fencing" provisions belatedly advanced by the Joint Applicants in their Rebuttal Testimony are structured to allow GPE the flexibility to use its operating subsidiaries as "lending institutions."[14] While the Joint Applicants have put forward a set of conditions they assert will protect ratepayers from this harm, as discussed in Section I.C.ii. of this Brief, these protections are foreseeably inadequate to protect ratepayers. As Mr. Ruelle testifies, "[a]rchitecting a merger

[9] BPU-15, SNL January 1, 2017 Letter at 1.

[10] BPU-5, Moody's May 18, 2016 Letter at 5.

[11] *Id.*, at 3-4 ($60 per share transaction to leave GPE "weakly rated in the Baa3 category, with no cushion to absorb a negative credit event").

[12] Rebuttal Testimony of Thomas Flaherty, at 18:14-17 ("timeframes in auctions (approximately a month for savings analysis in this transaction)…does place a premium on analysis prioritization and on finding workarounds to analysis when data limitations might exist.").

[13] BPU-5, Moody's May 18, 2016 Letter, at 4.

[14] Vol. II Tr. 435:22-436:6 (Commissioner Feist-Albrecht)

is tricky. …just moving a staircase six inches can affect a load-bearing wall…even making the whole construction infeasible."[15] Here, the Commission is being asked to approve a Transaction that is so precariously structured that the Joint Applicants assert the Commission has virtually no flexibility to mitigate risks to utility consumers or to protect the public interest without causing "the deal to unravel."[16] The record in this case illustrates that this Transaction, when evaluated under the Commission's merger standards, is not in the public interest and should be rejected.

ARGUMENT

Joint Applicants' filing of an application long on assertions, but short on facts, fails to satisfy their burden of showing this transaction is in the public interest. As the Commission summarized at the outset of this proceeding, Kansas statutes do not contain a specific standard for mergers.[17] Instead, this Commission examines mergers by considering a series of factors to determine whether or not the merger is in the public interest. "In essence, the question is whether the public interest is served by approving the merger as determined by the specific facts and circumstances of each case."[18] Under the Commission's standards, the "Joint Applicants bear the burden of proof in this case, and must demonstrate through the evidence in the record a sufficient basis upon which to approve the merger."[19] Applying this guidance and the particular facts of this Transaction, the following Commission factors are critical:

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15 Rebuttal Testimony of Mark Ruelle, at 12:4-7.

16 *Id.*, at 11:33-12:3 ("It may be tempting…to try to impose one's own thoughts and preferences to 'improve upon' one or more of these elements, should the Commission approve the Transaction. This risks pulling too hard on any particular thread and can cause the deal to unravel"). *See also* Joint Applicants' Initial Brief at 66 (warning that altering the conditions contained in Exhibit DRI-3 would make the Transaction "infeasible").

17 Order on Merger Standards, at ¶2.

18 Docket No. 97-WSRE-676-MER, Order on Merger Application at ¶18.

19 Docket No. 97-WSRE-676-MER, Order on Merger Application at ¶18.

(a) The effect of the transaction on consumers, including:

(i) the effect of the proposed transaction on the financial condition of the newly created entity as compared to the financial condition of the stand-alone entities if the transaction did not occur;

(ii) reasonableness of the purchase price, including whether the purchase price was reasonable in light of the savings that can be demonstrated from the merger and whether the purchase price is within a reasonable range;

(iii) whether ratepayer benefits resulting from the transaction can be quantified;

(iv) whether there are operational synergies that justify payment of a premium in excess of book value;

* * *

(c) Whether the proposed transaction will be beneficial on an overall basis to state and local economies and to communities in the area served by the resulting public utility operations in the state

* * *

(d) Whether the proposed transaction will preserve the jurisdiction of the KCC and the capacity of the KCC to effectively regulate and audit public utility operations in the state.

* * *

(g) Whether the transaction will reduce the possibility of economic waste; and

* * *

(h) What impact, if any, the transaction has on the public safety.[20]

As discussed below, this Transaction, when considering the entirety of the record evidence, is simply too heavily leveraged and too fraught with risk – ultimately to be borne by retail and wholesale electric customers - to be in the public interest. The Joint Applicants argue that this Transaction "just makes sense"[21] and that withholding approval would somehow deprive

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[20] The BPU recognizes it does not address all factors. This should not be taken as a sign the BPU believes the Joint Applicants have met unaddressed standards. Rather, the BPU focuses on those factors it believes are most compelling and relevant to the case the BPU has developed.

[21] Joint Applicants' Initial Brief, at 7.

customers of benefits. These bald assertions cannot supplant the lack of credible analysis and reliable factual support for the Joint Application. The Joint Applicants, who bear the burden in this proceeding, have sought the Commission's authorization based only on a deeply flawed savings analysis, unsupported by credible record evidence. This analysis fails to assuage the well-founded concerns of the financial risks associated with this Transaction which have been discussed at length by sophisticated market analysts such as Moody, S&P, Fitch, Wolfe Research, and others. The Joint Applicants' proposed ring fencing conditions offer no meaningful protection against these well-established risks. For ease of review, this Brief is structured on the same issue by issue format as the hearing.

I. Public Interest (including overview of transaction, buyer and seller rationale, Kansas merger standards, and future regulatory impact)

A. Transaction Overview

While GPE and Westar have discussed a possible merger for "decades,"[22] GPE began its pursuit of Westar this time in early 2015, and had numerous conversations throughout the year.[23] Though GPE may not have known it, Westar had also caught the attention of Bidder A and Bidder B, whose CEOs had both approached Westar's CEO, Mr. Ruelle, on multiple occasions.[24] Westar made it clear early on that it was not interested in being the buyer, or engaging in a merger of equals out of concern about the "anticipated benefits to Westar shareholders."[25]

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22 Vol. I Tr. 25:16-18 (Hack) ("This transaction culminates decades of interest between the companies in combining their businesses.").

23 BJS-60 at 54.

24 *Id.*, at 65.

25 *Id.*, at 54.

Westar was explicit that "any business combination transaction would have to be structured as a purchase of Westar at a premium to market prices, and that both the premium and the certainty of closing the transaction would be important" considerations.[26] This left GPE, the "smaller, lower-performing" party, with the quandary of how to finance the purchase of its "better-performing and higher capitalized peer."[27]

As the investment community points out, it is "rare to see a small company buying a larger one" because such a transaction introduces a "multitude of risks."[28] At the outset, GPE was aware it was entering into territory with "more risk than the typical utility merger"[29] when it cautioned its Board that it would be "important to maintain valuation discipline when assessing strategic transactions."[30] It identified a transaction in the range of $45.50 to $47.50 per share, which represented a 20% to 25% market premium, payable in 30% cash and 70% GPE common stock as an offer that would be "beneficial to the customers, employees, shareholders and other stakeholders of both companies."[31]

In the month following GPE's initial offer, Westar's stock began a climb which saw it outperform its peers by approximately 7% despite having a ten-year average of trading around

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26 *Id.*, at 54.

27 JAL-56, Investing Daily Article at 2.

28 JAL-47, Wolfe Research May 31, 2016 Article at 1 ("We have a lot of issues with the WR deal, as it introduces a multitude of risks")

29 JAL-56, Investing Daily Jun 2, 2016 Article at 1-2 ("we're concerning that the smaller, lower-performing Great Plains could turn out to be a 'groomzilla,' since its willing to almost triple its debt, while risking a lower credit rating to unite with its better-performing and higher capitalized peer").

30 BPU-1, GPE October 2, 2015 BoD Presentation, at Slide 8.

31 *Id.*, at Slide 3.

3% below its peers.[32] On November 11, 2015 Westar retained Guggenheim Securities, LLC ("Guggenheim") to advise it on several issues, including the potential for a transaction.[33] During a December 9, 2015 presentation, Guggenheim identified a list of potential strategic counterparties that did not include GPE[34] - despite the fact that Mr. Bassham had already made an initial offer - out of concern that GPE would not be able to finance an acquisition of this size.[35] Before entering into a formal process, Westar approached Bidder A after determining it was the long-term bidder most likely to meet the transaction criteria the Westar Board identified, including the certainty of value and the ability to finance and secure regulatory approval.[36] In January of 2016, after considering Westar's 2015 internal forecast, Bidder A concluded it was not interested in acquiring Westar.[37]

By February of 2016 Westar's "stock price and valuation metrics [were] near historical highs."[38] This stock performance gave Westar's management the opportunity to lock in value for its shareholders while shifting the responsibility for the many risks facing Westar, and the

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32 BPU-10, December 9, 2015 Guggenheim Presentation at Slides 2-3.

33 BJS-60, at 65.

34 BPU-10, December 9, 2015 Guggenheim Presentation, at Slide 14.

35 Vol. I Tr. At 180:1-10 (Ruelle) ("We weren't sure that Great Plains would be willing to finance a transaction like this. Party…the sizes of the equity issuance that would be required. It is a big transaction for Great Plains").

36 BJS-60 at 68-69; Vol I Tr. At 179:19-180:18 (Bidder A selected for having the "desired characteristics…where there would be no question about its ability to finance a company of our size. …Bidder A was somebody that nobody would have batted an eye about their ability to [write] a 7 or $8 billion check").

37 BJS-60, at 69.

38 BPU-11, February 23, 2016 Guggenheim Presentation, at Slide 11.

regulated utility industry as a whole. Once considered part of a "historically stable sector,"[39] Westar found itself facing "[h]eadwinds against long-term growth" and the threat of rising interests rates,[40] a concern that SNL has noted is "[p]erhaps the biggest obstacle facing investor-owned utilities.[41] Upon the advice of its advisor, Guggenheim, Westar decided a more formal process was the best way to identify the "maximize potential value."[42] Guggenheim contacted a total of 16 companies, 9 of which, including GPE, entered into confidentiality and standstill agreements.[43]

By March of 2016 GPE was considering a transaction as high as $55 per share, and had realized that "given [Westar's] larger relative market capitalization" a transaction would "require the deployment of significant financial and operational resources" and would likely leave GPE "fully leveraged" with "sizeable financing market exposure given external equity and debt capital requirements."[44] GPE realized that, given these risks, any transaction would need to be "predicated on solid post-transaction integration [and] financial/operational performance management."[45] At $55 per share, GPE was at the high end of the range Wall Street analysts[46]

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[39] BPU-9, November 19, 2015 Guggenheim Presentation, at Slide 6.

[40] BPU-10, December 9, 2015 Guggenheim Presentation, at Slide 7.

[41] BPU-16, SNL December 23, 2016 Article at 1.

[42] BJS-60 at 58.

[43] *Id.*

[44] BPU-2, GPE March 29, 2016 BoD Presentation, at Slide 4.

[45] *Id.*, at Slides 4, 31.

[46] *See e.g. Id.*, at Slide 21 (Pricing acquisition in the range of $48 to $54, with a premium in the range of 8% to 26%)

and Guggenheim[47] had identified for a possible Westar acquisition. Further, while GPE knew Westar preferred cash, it acknowledged that a $55 per share transaction paid in 75% cash would require equity "likely approaching maximum market access limits."[48]

On April 5, 2016, GPE and 4 other companies submitted preliminary non-binding indications of interest with the following details: [49]

- GPE proposed $54.50 per share, 65% payable in cash and 35% in GPE common stock.[50]
- Bidder B proposed $50.50 per share, 50% payable in cash and 50% in common stock of Bidder B.
- Bidder D proposed a range of up to $55.11 per share in cash on a fully-diluted basis.
- Bidder E proposed acquiring Westar for $53.00 per share, 33% payable in cash and 67% in common stock of Bidder E.
- Bidder F said it might be willing to acquire Westar for $52.00 per share in cash.

On April 11, 2016, the Westar Board decided to seek definitive proposals from all five companies that had submitted indications of interest, and each company was given access to an electronic data room containing confidential information about Westar.[51] With the benefit of the data room access, several bidders expressed concerns about a transaction with Westar. In a May

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47 *See e.g.* BPU-10 December 9, 2015 Guggenheim Presentation at Slide 35 (valuing a cash transaction in the range of $43 to $51, with a premium in the range of 8.7% to 30.1%); BPU-12 April 11, 2016 Guggenheim Presentation at Slide 5 (Wall Street identify price targets in the range of $42.50 to $48.00, with an acquisition value of up to the "mid $50s").

48 BPU-2, GPE March 29, 2016 BoD Presentation, at Slide 31.

49 BJS-60, at 71.

50 BPU-2, GPE March 29, 2016 BoD Presentation, Slide 4 (recommending bid in range of $53.00 to $55.00 per share, presenting a premium of 20% to 25%, with a consideration mix of 65% cash and 35% GPE stock)

51 BJS-60, at 71.

2016 presentation, Guggenheim identified seven pieces of feedback, all but one of which were cautious or negative and included disappointment in Westar's growth rate and the inability to crunch the numbers in a way that would support a transaction.[52]

Following this feedback, only three parties submitted definitive bids: [53]

- GPE increased its offer by $3.50 to $58.25 per share, and increased the cash component of its bid from 65% to 85% payable in cash with 15% in GPE common stock with a collar.
- Bidder D, the previous highest bidder, increased its maximum bid of $55.11 to a range of $54.00 to $56.00, but abandoned its previous all cash bid for one payable 45% in cash and 55% in common stock of Bidder D.
- Bidder E *decreased* its offer from $53.00 to $51.00 per share, and from 33% cash to 20% cash with 80% Bidder E common stock.

Despite GPE being significantly smaller than Bidder D and Bidder E and having the lowest identified growth rate,[54] GPE's bid of $58.25 per share was $2.25 higher than the next bid. GPE was the only bidder that increased both its per share price and the cash component of its bid. GPE's offer also included a collar, which GPE believed Westar would view favorably,[55] and proposed a merger agreement with terms more favorable to Westar than other bidders.[56] GPE's bid was also

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52 BPU-13, May 25, 2016 Guggenheim Presentation, at Slide 12 (bidder's "growth better than [Westar's]"; "Growth prospects less than anticipated"; "After running the numbers, we have trouble getting to the market price on the basis of a DCF analysis"; "A deal at current price does not meet our hurdle rate on an equity IRR basis"; Identification that one bidder dropped out "due to a perceived lack of upside in the forecast").

53 BJS-60 at 61. Bidder F provided an oral indication of interest stating it would be interested in acquiring Westar for $52.00 per share in cash, but needed additional time. Bidder F never ended up putting forward a definitive bid.

54 BPU-13, May 25, 2015 Guggenheim Presentation at Slide 14 (Market Caps: GPE $4.8B; Co. 2 $12.6B; Co. 3 $54.4B); Slide 16 (GPE's bid 85% cash/15% stock; Co. 2 45% cash/55% stock; Co. 3 20% cash/80% stock. Standalone EPS Growth Rates: GPE 5.6%, Co. 2 9%, Co. 3 7.3%).

55 BPU-8, GPE May 18, 2016 BoD Presentation, at 23.

56 BJS-60, at 62.

now the most cash heavy by a significant margin after Bidder D reduced its previous all cash bid to one composed of just 45% cash following further due diligence.

Despite GPE's bid being significantly ahead of the others, Guggenheim asked GPE and Bidder D to consider improving their terms, and to submit best and final bids. On May 26, 2016, Bidder D and GPE submitted their best and final bids, with the following details:

- Bidder D increased its bid to $56.00 per share, which was the top of the range it had previously offered, but again amended its consideration mix from 45% cash, 55% common stock to $25.00 in cash and the remainder in Bidder D common stock.[57]

- GPE increased its bid to $60.00 per share, comprised of 85% cash and 15% GPE common stock with a 7.5% collar. GPE further agreed to several additional changes to the merger agreement, each of which benefited Westar.[58]

At this point, GPE had effectively bid against itself and its offer was now $4.00 higher than the next bid. In fact, GPE's *previous* bid of $58.25 topped Bidder D's best and final offer by more than $2.00 per share. GPE had increased its October 2015 maximum initial offer of $47.50 by $12.50 per share, shifted from a 30% cash consideration mix to one that is 85% cash, and increased from a maximum 25% premium to a 51% premium over the November 3, 2015 undisturbed stock price. Even accepting the Joint Applicants' position on the unaffected stock date, this Transaction results in a 36% premium, a more than 10% jump from GPE's initial plan. As Mr. Ruelle testifies GPE underwent a "big stretch" to give Westar "[e]verything we cared about" and "exceeded our

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57 *Id.*, at 62.

58 *Id.*, at 62-63. GPE agreed to: (i) increase the fee it would pay Westar if the Transaction failed to gain regulatory approvals; (ii) decrease the fee Westar would pay if it terminated the Transaction in favor of a more favorable offer; (iii) increase the fee GPE would pay Westar if GPE's Board changed its recommendation on the merger; (iv) increase the fee GPE would pay Westar if GPE terminated the merger to be acquired by another company; (v)agreeing to add an $80 million fee GPE would pay Westar if GPE's shareholders failed to approve the stock issuance proposal; (vi) removal of GPE's right to terminate the Transaction prior to the GPE shareholder meeting in order to pursue another transaction.

expectations."[59] Westar and Great Plains Energy executed the merger agreement, and on May 31, 2016, issued a joint press release announcing the merger.[60] On June 28, 2016, a little less than one month after the transaction was announced, Joint Applicants filed their application with the Commission for approval of this Transaction.

B. GPE's Smaller Size and Capitalization When Combined With Westar's Motivation to Crystalize Near Historic Valuation Metrics Results in a Transaction That is Not in the Public Interest (Buyer and Seller Rationale)

The timeline of this Transaction is well documented and transparent. GPE approached Westar hoping for a merger of equals as a way to mitigate concerns it held about the future of the industry. Westar, however, seeing many of those same concerns, sought to protect the value to its shareholders by capitalizing on skyrocketing stock performance through a sale where the premium to market prices and the certainty of closing the sale would be primary considerations.[61] It appears Westar heeded its advisor Guggenheim's advice that this was a perfect time to crystalize value for Westar's shareholders,[62] advice consistent with Guggenheim's public opinion that "[i]t's been a great multi-year run for regulated electrics but it's time to move on."[63] In selecting GPE as the winning bid, Westar secured not only the highest bid available, but the bid with the highest cash component by more than 50% ($51 per share versus $25 per share).[64]

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59 Vol. I Tr 269:8, 23 (Ruelle).

60 BJS-60, at 65.

61 BJS-60, at 54.

62 *Id.*, at 68.

63 BPU-15, SNL January 13, 2017 Article, at 1.

64 GPE's final bid was $60 per share, payable in 85% cash, which translates to $51 per share. Bidder D's best and final bid was $56 per share, payable in just $25 cash.

As a result, the Commission is being asked to approve an unusual and risky Transaction. It is unusual for the smaller GPE to be acquiring the larger, better performing Westar.[65] Transactions like this make the investment community nervous, because they introduce "a multitude of risks" including the need to leverage up the balance sheets to make the financing possible.[66] As Wolfe Research, one of the Wall Street analysts GPE included in its Board of Director Presentations,[67] points out: "We view this merger announcement as generally concerning for a variety of reasons. It's rare that a smaller company (GXP has a market cap under $5B) buys a larger one (WR is $8.6B) unless the buyer has executed much better over time, which is not the case here."[68] *Investing Daily* additionally notes that "it's never a good sign when the betrothed [Westar] wants to marry for the sake of marrying, rather than true love (or some higher strategic motive)" indicating investors' concern that Westar's selection of GPE was focused more on crystalizing shareholder value than on potential synergies.[69]

It is also unusual because GPE is the *only* bidder during the auction process to continually increase its bid and consideration mix. While GPE continuously increased its per share price, other bidders, once they had access to the Westar data room, expressed serious concerns over Westar's growth potential and either decided against submitting a definitive bid, or offered bids that were overall less favorable to Westar. The reaction of these sophisticated

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65 JAL-47, Wolfe Research May 31, 2016 Article, at 1; JAL-56, Investing Daily Jun 2, 2016 Article, at 2.

66 JAL-47, Wolfe Research May 31, 2016 Article at 1.

67 *See, e.g.* BPU-2, GPE March 29, 2016 BoD Presentation, at Slide 21.

68 JAL-47, Wolfe Research May 31, 2016 Article, at 3.

69 JAL-56, Investing Daily Jun 2, 2016 Article, at 2.

entities who refused to go above $56.00 per share under any condition aligns nearly perfectly with the assessments of Wall Street analysts, who saw the "mid $50s" as the top end of the range for an acquisition.[70] The stock market also echoes these concerns. When the transaction was announced, GPE's stock dropped from $31.00 to $28.00 per share. Mr. Ives testifies that this drop is to be expected because there was "no information and no knowledge out there for investors of how to react, so as per typical, I saw a drop in our price because they didn't know what they didn't know."[71] And yet, despite "a number of meetings with investors after that announcement explaining the merits of the deal, the rationale,… how [GPE] saw things progressing forward"[72], GPE's stock price at the beginning of the hearing in this proceeding had fallen even further to $26.93.[73] GPE's stock decline, which remains significantly below its pre-merger announcement price of $31.00 per share, is an obvious indication that the market views the merger as having far greater downside risk than upside benefit.

The Joint Applicants attempt to dismiss the facts of this case with assertions that this Transaction "just makes sense." But it is hard to see how a Transaction that requires GPE to "sacrifice[e] its strong financial profile" while "tripl[ing] its debt"[74] can be considered to make any sense, especially when the Transaction clocks in at a price that far exceeds those identified

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[70] BPU-13, May 25, 2016 Guggenheim Presentation, at 6.

[71] Vol. IV Tr. 991:1-4 (Ives).

[72] Vol. IV Tr. 991:4-8 (Ives).

[73] Vol. IV Tr. At 989:7-992:7 (Ives).

[74] Exhibit JAL-10, Moody's Investor Services May 31, 2016 Rating Action, at 3.

by Wall Street analysts, the other sophisticated bidders in the auction process, and even Westar's own advisor.[75]

The Joint Applicants acknowledge that this Transaction presents risks, but assert their proposed ring fencing conditions will protect customers. However, as discussed in Section I.C.ii. of this Brief, the ring fencing provisions are largely illusory and offer no meaningful protection against the risks the BPU and other parties have identified in this proceeding. Finally, the Joint Applicants claim the Transaction will produce benefits sufficient to offset any remaining risk.[76] However, as discussed in Section III.A. of this Brief, the sole savings analysis in this record is so riddled with flawed assumptions, inconsistencies and inaccuracies as to be devoid of analytical or persuasive value. As a result, the Joint Applicants have failed to show that this Transaction is in the public interest.

C. The Transaction Will Adversely Affect the Commission's Capacity to Effectively Regulate KCP&L and Westar in the Future (Future Regulatory Impact)

Merger standard (d) requires the examination of whether this Transaction will "preserve the capacity of the KCC to effectively regulate and audit public utility operations in the state." The Transaction before the Commission is a delicately structured one. GPE will be burdened by massive financial obligations if this Transaction goes forward, and the sole source of funds from which to satisfy those obligations will be its regulated utility subsidiaries. As a result, approval of this Transaction will likely repeatedly leave this Commission with the dilemma of having to choose between allowing the exploitation of utility customers in the name of servicing holding company debt, or protecting customers and allowing the parlous financial condition of a utility

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75 *See supra* note 47.

76 Joint Applicants' Initial Brief at 15.

holding company to hobble the service capabilities of its utility operating companies. While the Joint Applicants assert this is a risk GPE and its shareholders will bear alone, the record demonstrates that KCP&L's and Westar's financial wellbeing will be inextricably linked to GPE's following the Transaction.[77] The Joint Applicants' argument also ignores this Commission's interest in ensuring the financial health of GPE, who, post-Transaction would be the parent company of the two largest Kansas jurisdictional utilities, covering more than 1.5 million Kansas ratepayers.[78] Further, as Moody's recognized, even a "slight" change in the regulatory treatment of other agencies like the Missouri Public Service Commission or the Federal Energy Regulatory Commission could result in GPE being downgraded below investment grade.[79] This raises the very real concern that a decision by another regulatory agency could leave this Commission saddled with a holding company with a below investment grade rating.

i. This Transaction Creates an Inherent Conflict Between the Interests of GPE and the Protection of Kansas Ratepayers that Limits the Commission's Ability to Effectively Regulate

This proceeding has already provided a clear example of how this Transaction could negatively impact the Commission's ability to regulate. When the Joint Applicants filed their application with this Commission, they made no mention of the fact that this Transaction relies on the Commission changing the methodology it currently employs to set KCP&L's rates. Currently, KCP&L's rates under this Commission, the Missouri Public Service Commission and the Federal Energy Regulatory Commission are set using GPE's consolidated capital structure.[80] GPE, who

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77 *See* Section II.D.ii.

78 Direct Testimony of Terry Bassham at 4:12-13.

79 BPU-5, Moody's May 18, 2016 Letter, at 4.

80 BPU-7.

has since made it clear that the continued application of a consolidated capital structure would be fatal to this Transaction, failed to raise this concern with the Commission. As Staff witness Mr. Gatewood testifies, had Staff and other parties not raised the issue themselves, this "threshold issue" would have remained unaddressed until future rate cases, at which point the "options for the Commission might be self-limiting."[81] In fact, Mr. Gatewood's analysis "and the Joint Applicant's own Financial Model shows that if the Commission approves this Transaction, it will practically have 'bound' future Commissions to using the operating-utility capital structure in order to maintain the financial health and investment grade bond ratings of Westar, KCPL, and GPE."[82]

The capital structure issue is just one example of the dilemmas this Commission would face while trying to balance GPE's debt service imperatives against the obligations of KCP&L and Westar to provide reliable and efficient service to the customers of Kansas. Each of these dilemmas stems from the fact that GPE has no assets independent of its utility subsidiaries, nor separate employees.[83] As a result, if this Transaction is approved, GPE's subsidiaries will constitute virtually the entirety of GPE, and, as Dr. Lesser testifies these subsidiaries:

> will be required to provide GPE all of the cash it needs to meet the additional financial obligations associated with the purchase of Westar. These obligations will include interest payments on the $4.4 billion in new debt GPE intends to issue to finance the merger, required dividend payments on the $750 million in convertible preferred stock the company will issue, and interests payments on the $3.3 billion in existing Westar debt GPE will assume if the merger is completed. As Mr. Bryant testifies, these obligations will total about $170 million per year.[84]

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81 Direct Testimony of Adam Gatewood at 29:14-16.

82 Direct Testimony of Adam Gatewood, at 29:21-30:3.

83 Lesser, 88:1-2; GPE, Form 10-K Report for the year ending December 31, 2015 ("GPE 2015 10-K"), February 24, 2016, p. 6. Available at: https://www.sec.gov/Archives/edgar/data/54476/000114306816000106/gxp-12312015x10k.htm

84 Direct Testimony of Jonathan Lesser, at 87:8-15.

Yet, "a sustained increase in utility dividend payout…will hurt the utilities' financial ratios"[85] increasing the potential that Westar or KCP&L will be downgraded. Under the assumptions GPE provided to Moody's, this Transaction will require a "large increase" in the average payout ratio for both Westar and KCP&L, which would still only cover a maximum of 75% of GPE's obligations.[86] As Moody's notes, "this gap could be filled with higher dividends paid by the utilities, cost-sharing arrangements or a combination of the two. If Great Plains opts to finance its dividends on its own, it would be credit negative for the entire family."[87] Moody's further opines:

> [W]e believe that if Great Plains requires higher dividends from its utilities, it will concern regulators in Kansas and Missouri and could result in some form of ring-fence-type provision between Great Plains and its regulated subsidiaries, or heightened contentiousness in the regulatory relationship. The former could be a credit positive for the utilities-but negative for Great Plains-while the latter would be a significant negative for the utilities and Great Plains, alike.[88]

As a result, approval of this Transaction would leave the Commission between a rock and a hard place: permit GPE to further extract cash in the form of dividend payments from Westar and KCP&L and risk a credit downgrade or service deterioration for those utilities, or restrict GPE's ability to use its subsidiaries as "lending institutions"[89] and cause a "credit negative for the entire family."[90]

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85 Moody's July 7, 2016 Issuer In-Depth at 6, attached to the Direct Testimony of Adam Gatewood.

86 BPU-3, GPE May 2, 2016 BoD Presentation, at 10.

87 Moody's July 7, 2016 Issuer In-Depth at 4, attached to the Direct Testimony of Adam Gatewood.

88 *Id.* at 6.

89 Vol. II Tr. 435:22-436:6 (Commissioner Feist-Albrecht)

90 Moody's July 7, 2016 Issuer In-Depth at 4, attached to the Direct Testimony of Adam Gatewood.

Concerns about this conflict between GPE and its public utility operating companies are amplified by the fact the terms of the Transaction do not include independent Boards of Directors for Westar or KCP&L. As currently structured, the Board of Directors of GPE are also the Board of Directors of Westar and KCP&L. As Joint Applicants' witness Mr. Reed explains:

> The duty of any director of a publicly traded company or subsidiary of a publicly traded company is to act as a fiduciary in the best interest of the stockholder or stockholders that own that company….In the case of the utility board members, they will be looking out for what's in the best interest of the stockholder, singular, in this case Great Plains Energy.[91]

Here, if GPE's financial condition deteriorates, the Board's first priority is to ensure the regulated utility subsidiaries provide cash sufficient to meet GPE's debt service obligations. If the Commission were to determine, notwithstanding the threat that this conflict poses to the quality of service available to Kansas ratepayers, to authorize the Transaction, then it must implement prophylactic conditions to protect ratepayers. As advocated by Mr. Gorman, this Commission should require the Joint Applicants to maintain an independent Westar and KCP&L Board that would make dividend payment decisions and interact with other affiliates and GPE in a manner that is consistent with Best Utility Practices in operating its regulated utility operations in Kansas.[92] Such an approach would at least remove some of "the potential opportunities for mischief."[93]

The Joint Applicants' attempts to interpose the fragility of their proposed Transaction as grounds for the Commission to decline the robust customer protections minimally necessary to

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91 Vol. III Tr. 547:3-11 (Reed).

92 Direct Testimony of Michael Gorman Direct, at 25:6-10.

93 *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Order 84698, Case No. 9271, at 74 (Pub. Serv. Comm. of Md. 2012) *available at* http://webapp.psc.state.md.us/Intranet/casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9200-9299\9271\\278.pdf. The Commission took judicial notice of this Order during the hearing.

ensure this Transaction is in the public interest make a compelling argument against approval of the Transaction in any form. As Mr. Ruelle cautions: “It may be tempting…to try to impose one’s own thoughts and preference to ‘improve upon’ one or more of these elements [of the merger], should the Commission approve the Transaction. This risks pulling too hard on any particular thread and can cause the deal to unravel.”[94] Moody’s has expressed similar concerns, noting that if the Commission were to include things like “customer credits, rate freezes” as part of its approval, it would jeopardize the cash flows upon which GPE will be dependent, a “significant credit negative.”[95] The Transaction’s claimed inability to withstand meaningful and effective customer protections without becoming “infeasible”[96] provides strong confirmation that this Transaction is too fragile to be in the public interest.

ii. The Joint Applicants’ Financial Commitments and Ring Fencing Provisions Do Not Protect Ratepayers from Transaction Related Harm

The Joint Applicants assert[97] their proposed financial commitments and ring fencing provisions – which surfaced in their current form only in rebuttal testimony, thus evading responsive testimony and much meaningful cross-examination, – protect ratepayers from all of these risks. Examination of these proposals reveals they are largely illusory and contain little genuine protection against the risks this Transaction poses for Kansas customers. Even accepting *arguendo* these provisions were developed with sufficient clarity and absence of conditionality to provide the kind of protections necessary, consistent and reliable enforcement remains an

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94 Rebuttal Testimony of Mark A. Ruelle, at 11:33-12:3.

95 JAL-50, at 3.

96 Joint Applicants’ Initial Brief, at 66.

97 *Id.*, at 57.

aspiration that promises to overtax the resources of the Commission and consumers should Joint Applicants' "commitments" become inconvenient to them. As Commissioner Feist Albrecht notes, the Joint Applicants' latterly discovered interest in ring-fencing nevertheless leaves the Commission with "43 different commitments that they are trying to enforce from today to, you know, in perpetuity in some instances," which will be a complex and time consuming obligation.[98] Additionally, a number of the conditions are dependent on whether or not Commission Staff or affected consumers can establish that increases in costs are causally related to the Transaction, language that Commissioner Emler wisely noted is an open door to litigation.[99]

The Joint Applicants have asserted they intend to keep Westar's and KCP&L's capital structures at approximately 50% debt and equity.[100] In reality, Condition 10 would allow KCP&L's and Westar's capital structures to climb to 65% debt (35% equity).[101] This restriction purports to address Dr. Lesser's recommendation that the Commission (i) limit the dividend payments GPE can require from Westar and KCP&L to a specific percentage of Westar's and KCP&L's earnings, or (ii) require Commission approval for Westar and KCP&L to make dividend payments to GPE.[102] But neither Condition 10 nor any other proposal advanced by the Joint Applicants does any such thing. Allowing Westar's and KCP&L's debt to climb to 65% of their capitalization imposes no meaningful restriction, nor would it prevent GPE from draining its

98 Vol. IV Tr. At 926:6-8 (Commissioner Feist Albrecht).

99 Vol. IV Tr. 979:1-16 (Ives).

100 Direct Testimony of Kevin Bryant, at 18:3-6.

101 DRI-3 at Condition 10.

102 DRI-3 at Condition 10; Direct Testimony of Jonathan Lesser, at 110:1-7.

subsidiaries of cash in a manner that will negatively impact the subsidiaries' credit ratings and deprive them of the resources necessary to ensure reliable service at just and reasonable rates.

As Mr. Ruelle testified, "utilities ought to be financed ball park 50/50. They shouldn't be 60/40. They shouldn't be 40/60." [103] The Joint Applicants' witness Mr. Hevert also testifies that a "more balanced 50/50" capital structure is "proper for utilities"[104] and that his research indicated the average equity, at both the holding company and operating utility level, is just over 52%.[105] For a little perspective, this Transaction will leave GPE with a capital structure of 59% debt and 41% equity [106] a significantly more balanced capital structure than the 65% debt 35% equity Condition 10 would permit for Westar and KCP&L. Yet, even at only 59% debt, this Transaction will cause Moody's to downgrade GPE to the lowest investment grade rating available and has produced a record replete with evidence of the negative impacts this level of debt will have on GPE's financial health.[107]

Should this Transaction proceed, GPE will be compelled to turn to Westar and KCP&L for the cash necessary to service Transaction-related debt at the holding company level. As a result, should Westar's or KCP&L's financial health deteriorate to a point that its capital structure is even approaching 65%, there is no doubt that this Transaction is the cause. As Mr. Hevert testifies,[108] a change from the 50/50 capital structure operating companies like KCP&L and Westar should

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103 Vol. I. Tr. 235:2-3 (Ruelle).

104 Vol. IV Tr. 845:11-14 (Hevert)

105 Vol. IV Tr. 885:21-886:11 (Hevert)

106 Vol. III Tr. 769:15-19 (Bryant).

107 *See infra.* Section D.i

108 Vol. IV. Tr. 926:12-927:21 (Hevert)

maintain to one approaching the limit permitted under Condition 10 would result in marked increases in the cost of capital, the cost of debt, and ultimately the cost of rates that Kansas ratepayers will pay.

Further, Condition 10 cannot be reconciled with Condition 18, which states that "For ratemaking purposes, Westar and KCP&L agree to the use of an actual utility-specific capital structure with an equity share of no less than 45 percent and no more than 53 percent; provided, however that Westar and KCP&L may petition the Commission for relief from this condition for reasons not related to the Transaction."[109] It is not clear how the Joint Applicants can commit to using "actual utility-specific capital structures" that would have equity components between 45% and 53% (implying debt of 55% to 47%, respectively), when Condition 10 permits Westar's and KCP&L's capital structures to deteriorate as far as 65% debt, 35% equity. Should this Transaction proceed, the Commission will undoubtedly be required to determine which condition should prevail.

It is possible the Joint Applicants intend Condition 18 to permit the use of a hypothetical capital structure. Under such an interpretation, Westar or KCP&L could still dividend cash up to GPE (until such behavior causes it to hit 65% debt), while Westar's and KCP&L's rates would be set as if their capital structure was no more than 55% debt/45% equity. As a threshold matter, such an outcome would make a mockery of the Joint Applicants' argument in this proceeding that the use of a consolidated capital structure is fundamentally unfair because it results in rates that do not reflect the capital actually being deployed to provide utility service.[110] Additionally, the availability of such a reading creates an opportunity for GPE to drain KCP&L and Westar of cash,

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[109] DRI-3 at Condition 18.

[110] Joint Applicants' Initial Brief, at 39.

while basing rates on a hypothetical capital structure with significantly higher equity. Artificially increasing the equity component in this manner will result in higher rates, which, it should be noted, would make available even more cash to be upstreamed to GPE in the form of dividends to carry GPE's Transaction-related debt service. The Federal Energy Regulatory Commission has warned that a holding company's ability to manipulate a utility's capital structure "can create an incentive for the corporate parent of a regulated utility to maintain an equity-rich capital structure in the subsidiary"[111] and views the "obligation to protect ratepayers from excessive rates" as including "those that could result from manipulation of a regulated subsidiary's capital structure."[112] The Federal Communication Commission has similarly recognized that "[t]he equity investor's state is made less secure as the company's debt rises, but the consumer rate-payer's burden is alleviated. It is these conflicting interests that the Commission is to reconcile."[113] In short, neither of Joint Applicants' proposed Conditions 10 nor 18 offer any reliable protection to ratepayers, and both proposed Conditions are fertile grounds for litigation.

Similarly, so many of Joint Applicants' other proposed conditions either reduce to foreseeable ineffectiveness or shift a burden of persuasion in litigation to parties other than the Joint Applicants that they appear to have been designed more as a test of reading comprehension than as a genuine effort to mitigate the prospects of Transaction-induced harm to consumers. For example, Commitment 11 "commits" that GPE, KCP&L, and Westar will maintain the separation

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111 *Transcontinental Gas Pipe Line Co.*, Opinion No. 414, 80 FERC ¶ 61,157 at 61,665, *order on reh'g*, Opinion No. 414-A, 84 FERC ¶ 61,084 at 61,415, *reh'g denied*, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998), *rev. denied sub nom. N.C. Utils. Comm'n v. FERC*, 203 F.3d 53 (D.C. Cir. 2000) (per curiam).

112 *Transcontinental Gas Pipe Line Co.*, Opinion No.414-A, 84 FERC ¶ 61,084, 61,412 (1998).

113 *Communications Satellite Corp. v. FCC*, 611 F.2d 883, 903-904 (D.C. Cir. 1977).

of their regulated business operations from their unregulated operations "unless express Commission *approval is sought* to alter such structure."[114] Commitment 11 does not require the Joint Applicants obtain actual approval. It merely requires the Joint Applicants to *seek approval* before combining regulated and unregulated operations. Commitment Nos. 13 and 14 actually place the burden of persuasion as to causation of a credit downgrade on parties other than the Joint Applicants, by limiting Joint Applicants burden under Commitment No. 13 to the production of evidence, and limiting the effectiveness of Commitment No. 14 to situations in which a causal relationship between a credit rating downgrade and the Transaction is established by a party other than the Joint Applicants.

Further, though Joint Applicants' claim goodwill will not be considered during Westar rate proceedings,[115] Commitment Nos. 16 and 20 are mere aspirational statements of intention, rather than a commitment to undertake an actual, enforceable commitment not to record Transaction-induced goodwill on the books of either of the public utility operating companies. In the absence of such a definitive commitment – and the Joint Applicants simply state (Exh. DRI-3 at 8) that "goodwill arising from the Transaction will be maintained on the books of GPE" without reference to excluding such goodwill from the books of the operating companies – push down accounting remains optional over a variety of circumstances and the "commitment" stated in Commitment No. 16 is rendered meaningless and unenforceable. Condition 19 would establish a *de minimis* evidentiary burden for establishing causation of benefits to justify recovery of merger transition costs – *e.g.*, executive severance payments – requiring only that Joint Applicants "identify where all transaction costs are recorded" and that the incurrence of transition costs "facilitated the ability

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[114] DRI-3, at 11.

[115] Rebuttal Testimony of Steven Busser, at 25:2-8.

to provide benefits to its Kansas customers." The latter standard is so amorphous as to be utterly meaningless as a condition of recovery of transition costs from utility customers.

The inability of the Joint Applicants to suggest meaningful ring-fencing conditions should concern this Commission. As Mr. Reed explained, the Joint Applicants are sensitive to ring-fencing conditions because "Great Plains had stretched to make this work. They did. And that's when you're most sensitive to those kinds of issues."[116] This begs the question: If GPE is so sensitive to slight changes in the regulatory environment, how can the Commission expect the company to be able to weather a negative credit event?

GPE insists their proposal is "comprehensive and effective,"[117] yet this is directly contradicted by the evidentiary record in this proceeding. In conducting its credit rating analysis of GPE, Moody's analysis assumed "No ring-fencing type provisions are introduced that would significantly limit the upstream dividend capabilities of Westar or the Great Plains utilities."[118] As Moody's explained, GPE's ability to increase dividends from the subsidiary operating companies will weigh negatively on the financial condition of the operating companies. In separate opinions, both Moody's and Fitch explained ring-fencing conditions would be a credit positive for GPE's utility subsidiaries. Moody's even noted that some form of ring-fence type provisions "could be a credit positive for the utilities."[119] Taking a more critical view, Fitch explained it would "consider a two-notch downgrade if GXP relies heavily on hybrid issuance to finance the acquisition, follows an aggressive financial policy, and/*or there is limited regulatory ring-fencing*

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116 Vol. III Tr. at 572:20-22 (Reed).

117 Joint Applicants' Initial Brief, at 68.

118 BPU-5, Moody's May 18, 2016 Letter, at 9.

119 Moody's July 7, 2016 Issuer In-Depth at 6, attached to the Direct Testimony of Adam Gatewood.

of Westar post-merger."[120] Meaningful ring fencing provisions would be a credit positive for KCP&L and Westar, but a credit negative for GPE. Here, Joint Applicants' have confirmed the proposed ring-fencing conditions being proposed do not trigger the concerns of the rating agencies,[121] which is compelling evidence that the conditions do not offer meaningful protection for ratepayers.

Finally, the Joint Applicants' repeated complaint that they were deprived the opportunity to proffer negotiated ring fencing conditions is without foundation. The Joint Applicants assert that their "overtures were summarily rejected without counter-suggestions or further discussion of potential conditions or ring-fencing measures."[122] However, the Joint Applicants never approached the BPU to negotiate or even discuss ring fencing provisions prior to filing their rebuttal testimony, despite the fact that several of the newly introduced provisions claim to respond to Dr. Lesser's concerns. As a result, rebuttal testimony was the first time the BPU or any of its experts saw the provisions the Joint Applicants now assert remedy the many concerns the BPU has with this Transaction. Further, the credibility of these provisions largely relies on the testimony of Mr. Reed, a witness newly introduced in the rebuttal round of testimony, whose testimony is therefore left untested by the witnesses for any other party. The Joint Applicants have made it clear that any variation on the commitments in DRI-3 would cause this Transaction to be "infeasible,"[123] making it difficult to understand how any negotiations – had the Joint Applicants even attempted them – would have been fruitful. Therefore, the Joint Applicants' claims are belied

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[120] Fitch's June 1, 2016 Ratings Action, at 2, attached to the Direct Testimony of Adam Gatewood.

[121] Vol. 3 Tr. at 742:8-16 (Bryant).

[122] Joint Applicant's Initial Brief, at 65.

[123] *Id.*, at 66.

by the late arrival of the new ring fencing provisions and their utter inflexibility on the terms, behaviors that are not indicative of a sincere desire to negotiate.

II. Financial Issues (including capital structure, treatment of gain on sale, acquisition premium, reasonableness of purchase price, and financial impact on utilities, GPE, and shareholders)

A. November 3, 2015 Correctly Identifies Westar's Undisturbed Stock Price

The BPU agrees with Staff that the November 3, 2015 stock price of $39.51 represents Westar's undisturbed stock price. Applying that price, the Transaction results in a 51% market premium. The Joint Applicants argue any market premium should be calculated against Westar's March 9, 2016 stock price of $44.08, which would reduce the premium to a still hefty 36%.[124] Given the significance of the transaction premium to the financial issues topic, and the dispute over the correct stock price to use, the BPU finds it prudent to address this issue at the outset of this section.

The most compelling reason for using the November 3 stock price comes from Westar itself, who acknowledges that it represents the "unaffected price of Westar's stock; that is the date when the Westar stock price was not impacted by merger speculation. On November 3, 2015, Westar released earnings and had an earnings call, after which the possibility of an acquisition became a topic of speculation in the market, thus affecting the stock price."[125] Westar's concern that speculations of a transaction following the November 3 earnings call affected its stock price is borne out by the record in this proceeding. Despite trading an average of 3% below its peers over the course of 10 years, in November 2015 Westar began to outperform these same peers by

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124 *Id.*, at 76.

125 Response to Staff 384, attached to the Direct Testimony of Justin Grady.

approximately 7%.[126] By late February, 2016 – still prior to the Joint Applicants' preferred March 9, 2016 date – Westar's stock was "near historical highs."[127] As Westar itself states, this historically uncharacteristic stock performance directly follows the introduction of speculation about "the possibility of an acquisition [which] affect[ed] the stock price." [128] Guggenheim also used the November 3 date in the analyses it prepared for Westar's Board.[129] This is compelling evidence that Westar correctly identified November 3 as the "date when the Westar stock price was not impacted by merger speculation."

By contrast, the Joint Applicants argue March 9, 2016 better represents Westar's unaffected stock price.[130] March 9, 2016 is the day before the publication of a Bloomberg article leaking rumors that the auction had begun. The Joint Applicants rely exclusively on the testimony of Mr. Hevert, a witness first introduced in the Joint Applicants' rebuttal round of testimony for their argument that March 9 represents the "*best*" date for identifying the undisturbed stock price.[131] This position is contradicted by Westar's own words, which referred to the March 9 date as a "second benchmark" for the unaffected stock price because it predated the Bloomberg article that "further impacted" its stock.[132] Mr. Hevert's testimony is further contradicted by the fact that Guggenheim continued to reference the November 3 date as late as May 29, 2016 when it was

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126 BPU-10, December 9, 2015 Guggenheim Presentation, at Slides 2-3.

127 BPU-11, February 23, 2016 Guggenheim Presentation, at Slide 8.

128 Response to Staff 384, attached to the Direct Testimony of Justin Grady.

129 *See e.g.* BPU-13, May 25, 2016 Guggenheim Presentation, at Slide 14; BPU-14, May 29, 2016 Guggenheim Presentation, at Slide 16.

130 Joint Applicants' Initial Brief at 75-76.

131 *Id.* at 76.

132 Staff 384, attached to the Direct Testimony of Justin Grady.

evaluating GPE's final offer.[133] As a result, the Commission should credit Westar and Guggenheim as the more knowledgeable and credible sources on the unaffected stock price.

Finally, the record in this proceeding illustrates just how significant of an impact rumors and speculation of a transaction can have on a utility's stock price: Westar's stock price on November 3, 2015 was $39.51, which jumped to a 52-week high of $52.90 by late May, 2016, after speculation of a Transaction leaked to the market.[134] Accordingly, November 3, 2015 represents the most conservative date, and eliminates any question of whether or not the stock price is impacted by transaction related rumors and speculation.

B. The Purchase Price Is Not Reasonable

Merger Standard (a)(ii) requires an examination of the "reasonableness of the purchase price, including whether the purchase price was reasonable in light of the savings that can be demonstrated from the merger and whether the purchase price is within a reasonable range." An inquiry into whether or not the purchase price in this Transaction is reasonable has two prongs. First, whether the purchase price was a reasonable one to pay for Westar, and second whether it is a price GPE, as the purchaser, can reasonably afford. Here, we have a Transaction where the party with the lowest market cap nonetheless put forward a bid $4.00 per share higher than the next bid. Further, GPE's $60 per share commitment far exceeds the expectations the Wall Street analysts, Guggenheim, and the investment community. As a result, GPE has committed to a price that significantly overvalues Westar, and has required GPE to engage in risky financial engineering in

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[133] BPU-14, May 29, 2016 Guggenheim Presentation, Slide 16.

[134] BPU-14, May 29, 2016 Guggenheim Presentation, at Slide 4. The premiums of this Transaction as measured against these stock prices are as follows: 51.1% premium over the November 3, 2015 price; 36.1% premium over the March 9, 2016 price; 13.4% premium over the May 6, 2016 date.

order to afford. The overinflated purchase price will require GPE to triple its debt.[135] Given the absence of effective ring fencing conditions that increased debt level will invariably affect ratepayers adversely. As discussed in Section II.C. and III.A, the purchase price is unreasonable in light of the savings this Transaction might produce.

i. The Transaction Overvalues Westar

The best evidence in this record of Westar's value is the bidding behavior of the other auction participants which illustrates that GPE overpaid for Westar by as much as $4.00 per share. The other auction participants are sophisticated and knowledgeable utilities who had access to the same information about Westar as GPE. Further, the bidding behavior of the other participants is nearly identical to the stock market reaction to this Transaction, the expectations of Wall Street Analysts, and even the expectations of both Westar's and GPE's advisors.

With the exception of GPE, the other utilities' behavior followed a similar pattern. After reviewing the information in the data room, bidders expressed serious concerns, including:

- "Growth prospects less than anticipated";
- "After running the numbers, we have trouble getting to the market price on the basis of a DCF analysis"
- "A deal at current price does not meet our hurdle rate on an equity IRR basis"; [136]

These concerns about Westar's performance and growth rates are borne out by the record in this case. Westar's Long-Term Earnings per Share ("EPS") Growth in 2015 was approximately 4%, a more than 50% decline from its approximately 9% growth rate five years earlier.[137] And while slower growth is an industry wide concern, according to Guggenheim, the drop in Westar's growth

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135 Exhibit JAL-10, Moody's Investor Services May 31, 2016 Rating Action, at 3.

136 BPU-13, May 25, 2016 Guggenheim Presentation, Slide 12.

137 BPU-9, November 19, 2015 Guggenheim Presentation, at Slide 8

rates outpaced those of its peers.[138] Guggenheim explained that Westar's consensus growth and market valuation was "less favorable" than other similarly situated peers.[139] Additionally, over the past decade, Westar had "traded on average ~3% lower than peers."[140] Bidders appear to have credited this historic stock performance over Westar's stock performance during the auction period itself, which saw it rise to "near historical highs." [141] It seems likely that these sophisticated utilities agree with Mr. Ruelle's assessment that nobody "would exclusively look at [a] limited period of performance [of a stock price] and then sort of calculate an acquisition price of it. I mean it's one of the things they look at, but I don't think I would consider it a driver of it."[142]

As a result, after contemplating the Westar data room information, two parties decided to drop from the bidding process. Of the three who submitted definitive bids, one decreased both its per share offer by $2.00 and the cash component of its offer by 13%, the second increased its per share bid by less than a dollar, but changed from an all cash bid to one payable only 45% in cash.[143] This behavior mirrors that of Bidder A, the party Westar approached before initiating the auction, who walked away from the deal after reviewing Westar's forecast information.[144]

A $60 per share transaction is also significantly higher than Westar's own advisor expected. In a December 9, 2015 presentation Guggenheim identified ranges for a possible

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138 *Id.*

139 *Id.*, at Slide 10.

140 BPU-10, December 9, 2015 Guggenheim Presentation, at Slide 3.

141 BPU-11, February 23, 2016 Guggenheim Presentation, at Slide 8.

142 Vol I Tr. at 174:17-23 (Ruelle).

143 BJS-60 at 61. The third bidder was GPE, who by contrast increased both its per share price and the cash component of its bid.

144 *Id.*, at 69.

transaction based on the metrics of other electric utility combinations, and, for a cash transaction, identified a range of $45 to $55 per share, with a premium of between 8.7% and 30.1%.[145] This analysis, like those of the Wall Street analysts, lines up almost identically with the behavior of all the auction participants *except* GPE. Even assuming the use of a March 9 stock price, GPE's offer includes a market premium six percent higher than the top end Guggenheim calculated.

In late May, Guggenheim gave a presentation to the Westar Board to evaluate GPE's $60 per share offer. As part of this presentation Guggenheim used 8 different valuation methods, 7 of which fell materially below GPE's $60 per share offer, and the 8th only barely toped $60, and required the use of Westar's March 9 stock price which had already been inflated based on market speculation.[146] Guggenheim's own analyses produced the following results:[147]

- Discounted Cash Flow Analysis produced a range of $37.48 to $54.46
- Selected Precedent Transaction Analysis produced a range of $36.81 to $57.76
- Selected Publically Traded Companies Analysis produced a range of $34.88 to $57.38
- Precedent Transaction Premia Analysis produced a range of $45.44 to $61.71 when using the March 9, 2016 stock price, and a range of $45.44 to $55.31 when using the November 9, 2015 unaffected stock price.[148]
- Precedent Multiples of Rate Base analysis produced a range of $40.32 to $54.18
- Illustrative Infrastructure Returns Analysts analysis produced a range of $37.87 to $52.26
- Westar's 52-Week Trading Range was $34.11 to $46.35
- Research Price Targets analysis produced a range of $42.50 to $48.00

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145 BPU-10, December 9, 2015 Guggenheim Presentation, at Slide 35. This analysis also uses a December 4, 2016 stock value of $42.08, which already reflects speculation about the potential transaction and is therefore already more favorable.

146 BPU-14, May 29, 2016 Guggenheim Presentation, at Slide 8.

147 *Id.*

148 *Id.*, at Slide 16.

Again, Guggenheim's own analyses corroborate the bidding behavior of the other auction participants and illustrate how significantly GPE overpaid. Importantly, the market itself has never priced Westar's stock anywhere close to the Transaction price. Westar's stock price jumped by more than 6% on the day the Joint Applicants announced the Transaction, rising from $52.92, its 52-week high at that point, to $56.33.[149] BPU witness Mr. Steffen tracked Westar's stock price from December 31, 2015 through December 9, 2016, and at no point during that time did Westar's stock go above $57.36, which occurred on October 16, 2016.[150] By this point, the investing community had the full details of the Transaction, including all of the details contained in the application before this Commission, and yet Westar's stock remained nearly $3.00 below the $60 share value contemplated by this Transaction. Thus, the market clearly does not believe the value ascribed to Westar by GPE's offer is realistic.

It is true that GPE had no knowledge of how other parties behaved given the confidential nature of the auction. However, any argument that this fact makes the bidding behavior of the other parties irrelevant misunderstands the Commission's merger standards, which examine "whether the public interest is served by approving the merger as determined by the specific facts and circumstances of each case."[151] The Commission has the obligation to evaluate the full record before it in making its determination of whether or not this Transaction advances the public interest, and that record includes significant evidence that GPE agreed to a price that is not reasonable.

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149 BJS-57 (Westar stock prices); BPU-13, May 25, 2016 Guggenheim Presentation, at Slide 4 (identifying $52.92 as the 52 week high).

150 *Id.*

151 Docket No. 97-WSRE-676-MER, Order on Merger Application at ¶18.

Further, GPE's bid far exceeds the range identified by the Wall Street analysts it included in its own Board presentations, which identified a "mid $50s" transaction with a maximum premium of 26% as the high end of reasonable.[152] It is telling that every other bidder stuck to the range Wall Street expected, making GPE's behavior a clear outlier. Based on the record, it appears GPE lost sight of the "import[ance] of maintain[ing] valuation discipline when assessing strategic transactions" during the auction process and made a poor business decision.[153] This poor business decision resulted in GPE stretching itself into realms of increasing financial risk in order to finance an unjustified purchase price. This Commission is in no way bound to accept that this business decision or the Transaction that it generated is in the public interest.

The contiguous nature of GPE's and Westar's service territories cannot explain such a disparity between GPE's bid and the expectations of Wall Street, Guggenheim, the market, or the behavior of the other bidders. First, any savings that result from the fact that GPE and Westar are neighbors should be captured in the Enovation savings analysis. However, that savings analysis "was not used specifically or solely to develop the offer price nor was it used to confirm the appropriateness of GPE's offer price."[154] As a result, GPE's decision to pay $60 per share is in no way supported by any additional savings it thinks it could extract from this Transaction given its familiarity with Westar.

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152 *See e.g.* BPU-2, GPE March 29, 2016 BoD Presentation, at Slide 21; BPU-3, GPE May 2, 2016 BoD Presentation, at Slide 19; BPU-8, at Goldman Presentation Slide 16; BPU-12, BPU-12 April 11, 2016 Guggenheim Presentation, at Slide 5; BPU-13, May 25, 2016 Guggenheim Presentation, at Slide 6.

153 BPU-1, GPE October 2, 2015 BoD Presentation, at Slide 8.

154 Staff 241, attached to the Direct Testimony of Justin Grady.

Further, GPE and Wall Street all expected and assumed that Ameren had an interest in acquiring Westar.[155] As one Wall Street analyst noted, a Westar-Ameren transaction "makes strategic sense…given (1) geographic proximity that should allow for meaningful synergies and (2) both companies' transmission focus."[156] GPE informed its board that "Ameren is likely involved and aggressively pursuing a potential acquisition" because Westar represented a "logical fit with efficiencies and an attractive equity story."[157] The identity of the other bidders are confidential, so there is no way of knowing whether Ameren actually was one of the auction participants. However the fact remains that several analysts saw Ameren as a very likely participant because its geographic proximity would create significant synergies. Despite this fact, those same analysts still anticipated a transaction of no more than $55 per share. Finally, as Moody's recognizes, any benefit arising from the contiguous service territories is not "transformative and de-risking in the respect that it can offset a material degradation to financial metrics."[158] This Transaction, which trades GPE's strong financial performance and leaves it positioned "as a weak Baa3 holding company"[159] cannot be justified by unsupported claims of geographic synergies.

Finally, GPE's own analyses do not support the Transaction price. GPE's advisor, Goldman Sachs performed DCF analyses to calculate several ranges of potential Transaction prices. None of these analyses can be used to support the reasonableness of the purchase price.

155 BPU-3, GPE May 2, 2016 BoD Presentation, at Slides 1, 4, 11, 19.

156 *Id.*, at Slide 19.

157 BPU-8, GPE May 18, 2016 BoD Presentation, at Slide 17.

158 JAL-50, at 4.

159 *Id.*, at 4.

Only one of the DCF analyses produces a range that would include a $60 per share transaction, and it contains four fundamental flaws. First, it relies on GPE's synergies assumptions, which the record in this proceeding illustrates suffer from numerous flaws.[160] Second, it assumes GPE would retain 100% of these savings, which stands in stark contrast to the Joint Applicants pledge to provide "100% of the efficiency benefits to customers every time rates are reset through a rate case."[161] Third, it assumes these savings will continue forever, an assumption that Guggenheim[162] and GPE's own expert Mr. Kemp disputes.[163] Fourth, and finally, it assumes that these cost savings would be eternally free of income tax liability.[164] Lest there be any question about the significant impact of these errors, it is important to remember that Guggenheim also conducted a DCF to evaluate the reasonableness of the $60 per share offer, and produce a range of $37.48 to $54.46, a range which again, is corroborated by Wall Street's expectations and the behavior of the other auction participants.

In the rebuttal round of testimony the Joint Applicants introduced a new analysis conducted by Mr. Hevert, a witness new to the rebuttal round of testimony. Mr. Hevert conducted an analysis that reviewed comparable transactions and produced results that purport to show that this Transaction is reasonable.[165] Because Mr. Hevert's analysis was first introduced in the rebuttal round of testimony, no other witness has had the opportunity to examine this analysis or offer

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[160] BJS-60, at 74.

[161] Joint Applicants' Initial Brief, at 98.

[162] BPU-9, November 19, 2015 Guggenheim Presentation, at Slide 12.

[163] WJK-1, Fn. 3.

[164] Direct Testimony of Justin Grady, at 32:15-16.

[165] Direct Testimony of Robert Hevert, at 38-40.

testimony on the validity of Mr. Hevert's assumptions or the accuracy of his calculations. Further, as Mr. Hevert notes, none of these transactions are directly comparable to the Transaction before the Commission[166] which is why the Commission should focus on how analysts and other parties have valued *this* Transaction. It is telling however, that Mr. Hevert's method of calculating transaction premia differs from the methods employed by any other party in this record, and results in a 22% premium for this Transaction, which stands in stark contrast to the either 36% or 51% premium every other analyst and witness have calculated in the record in this proceeding.

ii. The Transaction is Too Expensive for GPE to Reasonably Afford

It is clear from GPE's internal documents that it never intended to pay as much as it did. GPE's initial offer was for between $45.50 and $47.50 per share, payable in 30% cash, representing a 20% to 25% market premium.[167] At the time, GPE recognized it could offer an all cash preliminary offer, but that such an approach "places a larger financing burden on [GPE]." By the time it increased its offer price to $54.50 per a share, 65% payable in cash, representing about a 25% premium,[168] GPE felt "the equity offering size is executable despite approaching the upper end of historical precedents."[169]

When its $54.50 per share offer was not in the lead, GPE's only option was to explore "various financing alternatives to increase the cash component of our bid."[170] GPE engaged both S&P and Moody's to assist in the process. It initially provided each of the rating agencies with

[166] *Id.*, at 40:9-12.

[167] BPU-1, GPE October 2, 2015 BoD Presentation, at Slide 25.

[168] BJS-60, at 69.

[169] BPU-2, GPE March 29, 2016 BoD Presentation, at Slide 33.

[170] BPU-3, GPE May 2, 2016 BoD Presentation, at Slide 4.

three scenarios "geared towards locating the outer boundaries" of GPE's financing abilities, with Scenarios II and III "intended to help identify boundaries/ break-points.[171] Scenarios I through III all involved $58.00 per share prices for an approximately $8 billion transaction and examined cash components ranging from 75% in Scenario I to 85% in Scenario III.[172]

Fearing the existence of "a handful of very credible strategic bidders" who would be "aggressively participat[ing]" in the auction, GPE went back to Moody's and S&P with Scenarios IV and V, which involved $60 per share price, for a transaction value of approximately $8.6 billion.[173] Mr. Bassham testifies that the rating agencies have provided "assurances" that GPE will maintain an investment grade credit rating, and that this is evidence the Transaction at $60 per share will still leave GPE on "solid financial ground." This statement simply cannot be reconciled with what Moody's actually said about this Transaction. As a threshold matter, contrary to Mr. Bassham's testimony, no credit rating agency has provided any "assurance" that GPE, Westar, or KCP&L will maintain any specific ranking.[174] The rating agencies based their review on assumptions and financial information GPE provided them.[175] As a result, these ratings will be affected by the extent to which this information, including information about merger related savings, is incorrect or simply does not materialize. Moody's states this

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171 *Id.*, at Slide 9.

172 BPU-4, Moody's May 12, 2016 Letter, at 1-2.

173 BPU-5, Moody's May 18, 2016 Letter, at 1-2.

174 *See e.g. Id.*, at 8 ("Please note that Moody's conclusions are based upon the scenario(s) presented by you…in accordance with our usual policy, existing assigned credit ratings are subject to revision or withdrawal by Moody's at any time, without notice, in the sole discretion of Moody's.").

175 Vol III, Tr. 595:8-16 (Bryant).

explicitly when it warns that by increasing to a $60 per share transaction, GPE is "taking marked steps of financial risk that differ [from the $58 per share transaction]" and that:

> under the degree of leverage [in a $60 per share transaction], Great Plains would be weakly rated in the Baa3 category, *with no cushion to absorb a negative credit event.* For example, if financial performance were to underperform forecast assumptions for any reason, or the degree of regulatory support offered by Kansas, Missouri, or the FERC were to deteriorate slightly, it is highly likely that a negative action for Great Plains would follow.[176]

Moody's statement directly contradicts the Joint Applicants' claim that GPE will have the "financial resources" to "absorb the financial impact of significant negative events"[177] if this Transaction is approved. Further, this increasing tolerance for financial risk has caused Moody's to note that, if the Transaction proceeds, it will "also incorporate a qualitative view that the financial policies of Great Plains management and board of directors has become decidedly more tolerant of risk-a credit negative and a deviation from what we have incorporated into our ratings historically."[178]

Moody's concerns about this Transaction go beyond just GPE. The risk to GPE is so high, that Moody's warns of the "contagion risk" to KCP&L, Westar and GMO on a longer term basis, saying:

> [I]t is possible that the credit ratings for Westar, KCP&L and GMO could be constrained or negatively impacted going forward. While no change to the utility ratings would likely occur at close of the transaction, the high amount of family leverage would begin to weight on upward ratings mobility of the subsidiaries, due to the contagion risk at the parent level and increased need for upstream dividend support. [A $60 transaction] leverage would weaken the positioning of Westar, KCPL and GMO within their respective ratings categories.[179]

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176 BPU-5, Moody's May 18, 2016 Letter, at 3-4 (emphasis added).

177 Joint Applicant's Initial Brief, at 35.

178 BPU-5, Moody's May 18, 2016 Letter, at 4.

179 *Id.*

Fitch and S&P share Moody's concerns that this Transaction has the potential to negatively impact KCP&L and Westar. S&P revised its outlook for Westar from stable to negative in recognition of the "potential for lower ratings on Westar after the merger closes, if the combined entity's financial performance weakens"[180] Fitch warns that the "elevated leverage at GXP would negatively weigh on Westar's and KGE's ratings and could result in a one or two notch downgrade."[181] Accordingly, it is clear the record does not support Mr. Bassham's assertions that the credit rating agencies have provided any assurance about GPE's, Westar's or KCP&L's future ratings.

Mr. Bassham further asserts that OMERS' and Goldman Sachs' involvement is evidence that GPE can finance this Transaction while remaining financially sound. To the contrary, their involvement is further evidence that this a Transaction too pricey for GPE to reasonably afford. For a little perspective, GPE was the *only* party who submitted a final bid that included such a complicated financing plan. While GPE required the use of a fully committed bridge facility, a combination of "common equity, equity-linked securities and debt issues" and the involvement of an equity linked investment from OMERS, the other two bidders planned to finance using cash on hand.[182] The comparison of GPE's financing plan against the other bidders is strong and clear evidence of just how far out on a limb GPE had to crawl to make this deal. Additionally, the whole purpose of the bridge facility was to alleviate Westar's concerns about GPE's ability to finance the Transaction.[183]

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180 JAL-49 at 2.

181 JAL-48 at 1.

182 BPU-13, May 25, 2016 Guggenheim Presentation, at Slide 10.

183 Direct Testimony of Kevin Bryant, at 9:4-7.

Further, an examination of OMERS' and Goldman's involvement in this Transaction illustrates that each entity felt it necessary to engage in risk shifting behavior before being willing to participate. OMERS' participation was contingent on a non-refundable $15 million payment from GPE,[184] the ability to designate a Board observer in the event that GPE is downgraded below investment grade, and the ability to designate two Board members if GPE misses its dividend payments for two quarters.[185] Goldman Sachs, who stands to make $70 million in fees associated with the bridge financing,[186] spread the risk around to a syndicate of 13 other lenders.[187]

Finally, Mr. Bassham argues the fact that Westar was willing to accept approximately $1.3 billion worth of consideration in the form of GPE stock is evidence that they have confidence in GPE's long term financial health. First, it's worth reiterating that GPE's stock continues to lag its pre-announcement levels by more than $4.00 per share.[188] This is clear evidence the market in general disagrees with Mr. Bassham's assessment of this Transaction. GPE seemed to realize its stock performance would be of concern to Westar, which is why it introduced the 7.5% collar, which provides Westar with "additional value certainty."[189] Second, to put it bluntly, Westar had no choice. As Guggenheim reported to the Westar Board: "We have communicated to bidders the preference for cash consideration, nonetheless, both of the bidders

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184 Vol. I Tr. at 118:3-6 (Bassham).

185 BPU-8, Goldman Sachs Presentation Slide 27.

186 Direct Testimony of Keven E. Bryant, at 9:11-14.

187 BJS-60, at 170.

188 Direct Testimony of Kevin E. Bryant, at 10:16-19.

189 BJS-60, at 78.

have proposed a stock component in their offers, for various reasons."[190] As a result, GPE's offer represented Westar's best opportunity, because it was not only the highest, by a $4.00 per share margin, but represented a more than 50 percent increase in cash above the second highest bidder. Even Mr. Bassham admits that this is a cash heavy deal.[191] An unbiased review of the evidence in this record paints a clear picture. GPE agreed to a transaction that far exceeds its reasonable ability to pay.

C. Operational Synergies Do Not Support the Acquisition Premium

Merger Standard (a)(iv) requires examination of whether there are "operational synergies that justify payment of a premium in excess of book value." At the time GPE and Westar executed the merger agreement, the book value of Westar's equity was approximately $4.9 billion and its projected 2016 rate base was $7.1 billion.[192] GPE has agreed to pay approximately $8.6 billion for Westar, meaning that "GPE has agreed to pay $1.70 for every dollar of Westar's rate base and $2.30 for every $1 of Westar's book equity. Said differently, Great Plains has agreed to pay $2.70 for every $1 of Westar's equity that is currently invested in utility assets and earning a return regulated by either the KCC or FERC."[193] This Transaction therefore results in a $4.9 billion Acquisition Premium.

The BPU agrees with Staff that standard (a)(iv) continues to be relevant, even in cases where the applicants are not requesting recovery of the Acquisition Premium in rates. This

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190 BPU-13, May 25, 2016 Guggenheim Presentation, at Slide 15.

191 Vol. I Tr. At 122:18-20 (Bassham).

192 Direct Testimony of Justin Grady, at 9:15-10:4; BJS-60, at 143; Staff DR 141, attached to Direct Testimony of Justin Grady.

193 Direct Testimony of Justin Grady at 10:5-12.

Transaction involves incredible financial risk that cannot be fully contained to GPE and its shareholders. The record illustrates that GPE will be fully reliant on Westar and KCP&L to provide sufficient cash flows to service its Transaction related debt. Regardless of whether or not the Acquisition Premium is reflected in rates, it is a critical element in understanding the risky nature of this Transaction, and in evaluating the impact it will have on the financial health of GPE, KCP&L, and Westar should this Transaction proceed. The Commission should therefore examine whether or not the $4.9 billion Acquisition Premium is justified by the approximately $1.3 billion net present value of expected savings. [194] Such a disparity illustrates that the significant risks this Transaction poses are not offset by synergies that can be reasonably expected.

The Joint Applicants assert the net present value of the savings that will result from this Transaction are approximately $4.3 billion.[195] As a threshold matter, even accepting the Joint Applicants' own calculation-which, as discussed in Section III.A. the Commission should not, this Transaction does not present synergies sufficient to cover the Acquisition Premium. It is true that the Commission has previously approved transactions where the Acquisition Premium was larger than the net present value of expected savings.[196] However, this merger standard must be viewed in conjunction with the Commission's other standards, their focus on the public interest, and must also take into consideration the significant financial engineering that went into structuring this Transaction. Unlike the ITC transaction, for example, this *is* a transaction that

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194 Direct Testimony of Jonathan Lesser at 83, Table 12; Direct Testimony of Boris Steffen, at 61:7-14.

195 Supplemental Direct Testimony of Kevin Bryant, at 8:5-7.

196 *See* Direct Testimony of Justin Grady, at 51:14-16.

relies on synergies, and standard (a)(iv) provides useful insight into whether or not this Transaction is in the public interest.[197]

The Joint Applicants' assertion that this Transaction will produce savings with a net present value of $4.3 billion cannot be reconciled with the stock market's reaction to the Transaction. In an efficient stock market, there is no more powerful evidence of a merger's potential benefit than that of the market reaction to the announcement. Here, Mr. Steffen analyzed the stock market reaction to this Transaction and found the market anticipates the value of cost savings to be approximately $1.3 billion,[198] though a stock market examination cannot reveal the nature of the savings so additional analysis is required to determine whether or not these savings are merger specific.[199]

Additionally, the Joint Applicants' net present value calculation of the savings suffers from several flaws that, once corrected, reduce it from $4.3 billion to approximately $1.3 billion, consistent with the stock market's reaction to this Transaction. As Dr. Lesser testifies, Mr. Bryant's net present calculation of the expected savings errs in the following ways:

- Mr. Bryant's calculation assumes a weighted average cost of capital (WACC) value of 7.25%, when KCP&L's current WACC is 7.94%, and Westar's is 7.99%. Mr. Bryant's use of this lower WACC improperly inflates his net present value calculation.[200]

- Second, Mr. Bryant's analysis assumes an inflation rate of 2.4%, which is inconsistent with Mr. Kemp's use of a 2.0% inflation rate when he conducted his

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[197] *In the Matter of the Joint Application of ITC Great Plains, LLC, et. al.*, Docket No. 16ITCE-512-ACQ, at ¶30 (KCC 2016).

[198] Direct Testimony of Boris Steffen at 13:9-20; BJS-3.

[199] Vol. IV Tr. 803:10-19 (Steffen). *See also* Section III. A of this Brief for a discussion of Savings.

[200] Direct Testimony of Jonathan Lesser at 80:21-81:2.

savings analysis. Mr. Bryant's use of a higher inflation rate also inflates his net present value calculation. [201]

- Third, Mr. Bryant double counts the present value savings for the year 2020 because the annuity formula he uses in his calculation starts in that year.[202]

- Fourth, Mr. Bryant fails to discount the assumed annual savings from 2020 onwards back to 2016, the base year of his analysis.[203]

- Fifth, Mr. Bryant's calculation of the present value of revenue requirement reductions across CapEx reductions is far larger than the present value of the CapEx reductions themselves, which is financially impossible.[204]

Making just the corrections discussed above reduces Mr. Bryant's net present value calculations by nearly half, going from $4.3 billion to $2.4 billion [205] $2.4 billion is still an inaccurate and inflated figure because it includes Mr. Kemp's flawed assumptions about the savings associated with the early generation retirements and CapEx reductions.[206] Since these elements of Mr. Kemp's savings analysis are not actually merger related savings, it is inappropriate to include them in a calculation of the net present value of the expected savings. Correcting for this error further reduces the net present value of the synergies to $1.3 billion.[207] Mr. Steffen's correction of the errors he identified in Mr. Bryant's net present value calculation also resulted in a reduction from $4.3 billion to $1.3 billion.[208]

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201 *Id.* at 81:3-7.

202 *Id.*, at 81:8-9.

203 *Id.*, at 81:10-11.

204 *Id.*, at 81:12-14.

205 *Id.*, at 82, Table 11.

206 Section III.A. of this Brief addresses the issues with Mr. Kemp's savings analysis.

207 Direct Testimony of Jonathan Lesser at 83, Table 12.

208 Direct Testimony of Boris Steffen at 60:13-61:14.

The Joint Applicants seek to avoid their burden of establishing that the $4.9 billion Acquisition Premium is justified by arguing this merger standard is not relevant to this proceeding.[209] As a threshold matter, the Joint Applicants' claim the acquisition premium "cannot have any impact on customers" because it is not being collected in rates is inaccurate.[210] Joint Applicants' witness Mr. Ives testifies, GPE will retain some of the Transaction related savings "to recover costs associated with transactions of this nature."[211] Further, to the extent this Transaction does not result in the savings, the Joint Applicants expect (a nearly certain outcome given the flaws in their savings analysis) GPE will be required to pull more cash from the subsidiaries to satisfy its debts. As discussed in Section I.C of this Brief, GPE's reliance on Westar and KCP&L for cash could impact KCP&L's and Westar's rates.

As support for their position, Joint Applicants misapply the Commission's Order approving the acquisition of ITC Great Plains.[212] First, the Commission's holding on the applicability of standard (a)(iv) in that case was based, in part, on the fact that the Commission had "limited ability to regulate" ITC Great Plains, which is certainly not the case here.[213] Second, the Commission found that "Since the Transaction is not premised on operational synergies, whether operational synergies exist to justify payment of a premium in excess of book value is not material in determining whether the Transaction is in the public interest."[214] Here,

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209 Joint Applicant Brief, at 96.

210 Joint Applicant Brief, at 96.

211 Ive's Rebuttal, at 52:12-16.

212 Joint Applicants' Initial Brief, at 18.

213 *In the Matter of the Joint Application of ITC Great Plains, LLC, et. al.*, Docket No. 16-ITCE-512-ACQ, at ¶30 (KCC 2016).

214 *Id.*

Joint Applicants' have stated with absolute clarity that this transaction is premised on obtaining operational synergies.[215] As a result, the Commission's holding in the ITC Order does not prohibit an examination standard (a)(iv) in this proceeding.

Finally, the Joint Applicants have made it clear they will seek recovery of the Acquisition Premium if any party, at any time, advocates for the use of a consolidated capital structure.[216] This Commission currently sets KCP&L's rates using GPE's consolidated capital structure, and several parties in this proceeding have argued that methodology should continue. As a result, parties have *already* advocated for the use of a consolidated capital structure, and the question of the appropriate capital structure is likely to be a central dispute in the upcoming Westar and KCP&L rate cases. Accordingly, it is not only appropriate to examine this issue in this proceeding, but is required under Merger Standard (a)(iv). The record illustrates that there are insufficient operational synergies to justify the nearly $5 billion dollar Acquisition Premium, supporting the BPU's position that this Transaction is not in the public interest.

D. The Transaction Will Leave GPE, KCP&L, and Westar Financially Weaker Than on a Standalone Basis (Impact on GPE, Utilities, and Shareholders)

Merger Standard (a)(i) requires an examination of the "effect of the proposed transaction on the financial condition of the newly created entity as compared to the financial condition of the stand-alone entities if the transaction did not occur." GPE's willingness to overpay for Westar sacrifices its relatively strong financial position and leaves GPE little financial flexibility. Contrary to the Joint Applicants' claims, the harms stemming from this Transaction cannot be contained at the holding company level, because GPE's, KCP&L's and Westar's financial health

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215 Rebuttal Testimony of Mark Ruelle, at 5:6-7, Rebuttal Testimony of Kevin Bryant, at 4:20-5:2, Rebuttal Testimony of Terry Bassham, at 20:22-21-1.

216 Joint Applicants' Initial Brief, at 3, fn. 2.

will be inextricably linked following the Transaction.[217] As Moody's explains, increasing debt at the GPE's holding company level "result[s] in declining credit quality across the entire family, since the utilities would shoulder the burden of paying even more debt service."[218] As a result, this Transaction will leave KCP&L and Westar subjected to "a sustained increase in utility dividend payout" which "will hurt the utilities' financial ratios…[and] could pressure their credit profiles."[219] As a result, the evidence presented illustrates this Transaction will negatively impact the financial health of GPE, Westar and KCP&L, and is therefore not in the public interest.

ii. The Transaction Will Transform GPE from a Financially Strong Company to One Barely Maintaining Investment Grade

GPE's standalone financial condition is strong and improving. "Great Plains has historically operated with negligible holding company debt and a focus on executing utility capital plans and improving the regulatory relationship and support in its primary jurisdiction."[220] "Prior to the announcement about GPE's intent to acquire Westar…[Moody's] had been expecting a slow and steady improvement to Great Plain's cash flow and debt."[221] There is little doubt that the improvements in GPE's financial condition will reverse as a result of this Transaction. As far back as March of 2016, GPE realized a Transaction would "likely fully leverage" GPE's "improving standalone credit capacity."[222] This transaction will cause GPE's

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217 Direct Testimony of Jonathan Lesser, at 111:15-112:2.

218 Moody's July 7, 2016 Issuer In-Depth at 6, attached to the Direct Testimony of Adam Gatewood.

219 *Id.*

220 BPU-5, Moody's May 18, 2016 Letter, at 6.

221 JAL-50 at 1.

222 BPU-2, GPE March 29, 2016 BoD Presentation, at Slide 14.

financial profile to deteriorate to the point that Moody's warns will "result in consolidated financial metrics [that] reflect levels that are typically associated with a speculative grade [i.e. below investment grade] financial profile in 2018."[223] This fact directly contradicts the Joint Applicants' assertions that GPE can close this Transaction and remain on solid financial ground.

The highly leveraged nature of this Transaction runs directly contrary to the advice of the investment community, who see a turbulent future for regulated utilities. "The sector, which has yielded strong financial performance in recent years, is falling out of favor with Wall Street analysts in 2017."[224] Concerned about the impact of rising interest rates and the potential for corporate tax reform, analysts warn that "reducing leverage is the most important driver across all sectors."[225] Investors are advised to "avoid utilities with over-levered holding companies"[226] and that the "best positioned companies" to weather this storm are "those with profitable non-utility businesses, low holding company debt, stronger balance sheets including the potential for stronger dividend growth, and those with stronger non-renewable investment pipelines."[227] This Transaction will take GPE in the exact opposite direction, leaving it increasingly vulnerable to the market forces that so concern the analysts at Guggenheim, J.P. Morgan and Wall Street generally.[228] Moody's expressed similar concerns explaining that the Transaction will leave

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[223] BPU-5, Moody's May 18, 2016 Letter, at 4.

[224] BPU-15, SNL January 13, 2017 Article, at 1.

[225] *Id.*

[226] *Id.*, at 2.

[227] *Id.*, at 1.

[228] *See e.g.* Vol. III Tr. At 599:6-600:25 (Bryant).

GPE "little room for error" without facing a downgrade below investment grade in an economic environment of rising interest rates that are "outside of management control."[229]

The Joint Applicants argue that they have mitigated this risk through the use of interest rate swaps.[230] However, as GPE acknowledged in its Board presentations, the use of these interest rate management tools cannot fully eliminate the risk associated with debt issuances.[231] Interest rates remain a relevant consideration to this Transaction given the likelihood that GPE may need to refinance its debt if it finds itself facing negative cash flow, a very real possibility if the Commission restricts GPE's access to dividends from KCP&L and Westar in order to protect ratepayers.

Further, even clinging onto investment grade will require upstream dividends from KCP&L and Westar at levels likely to negatively impact those utilities' credit profiles.[232] In the scenarios it provided to Moody's, GPE assumed a dividend payment of around 70%, which Moody's notes is a "large increase" from the GPE's average payout ratio of 63% and Westar's 56%, a change Moody's views a credit negative.[233] Even with such a large increase, the dividends assumed are only enough to cover, at most, 75% of the consolidated dividend and holding company interest.[234] If GPE requires a substantial increase from Westar's and KCP&L's average payouts, it will still lack the funds necessary to fully service the Transaction related debt.

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229 BPU-5, Moody's May 18, 2016 Letter, at 5.

230 Direct Testimony of Kevin Bryant, at 14:3-15:5.

231 BPU-8, GPE May 18, 2016 BoD Presentation, at Slide 24.

232 Moody's July 7, 2016 Issuer In-Depth at 6, attached to the Direct Testimony of Adam Gatewood.

233 BPU-4, Moody's May 12, 2016 Letter, at 10.

234 *Id*.

As Moody's notes, "this gap could be filled with higher dividends paid by the utilities, cost-sharing arrangements or a combination of the two. If Great Plains opts to finance its dividends on its own, it would be credit negative for the entire family."[235] As Mr. Bryant testified, should GPE find itself facing negative cash flows, it could decide to further increase the dividends from KCP&L and Westar, refinance its debt, or raise further equity.[236]

Importantly, any additional increases in the dividends from KCP&L and Westar would have a negative impact on those utilities' credit ratings.[237] If GPE decides to issue additional equity to remedy a shortfall, it will be turning to an investment community that has "move[d] on" from regulated utilities[238] and will look very skeptically at a company asking for investment after validating all of Moody's concerns about the riskiness of this Transaction. Similarly, should GPE need to refinance its debt, its ability to do so will be impacted by its credit rating (which will likely have been further downgraded if it is facing negative cash flows), and by the increasing interest rate environment. As a result, it is clear that GPE will require dividend payouts in significant excess of those it included in its representations to rating agencies-a fact that could lead to further downgrade of GPE, or a downgrade for KCP&L and Westar.

The Joint Applicants attempt to cast this credit deterioration as only a "near-term" concern.[239] However, "at no point of the forecast period do consolidated financial metrics return to the level Great Plains is currently producing…let alone approach what was expected prior to

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[235] Moody's July 7, 2016 Issuer In-Depth at 4, attached to the Direct Testimony of Adam Gatewood.

[236] *See e.g.* Vol. III Tr. At 752:7-25 (Bryant).

[237] BPU-4, Moody's May 12, 2016 Letter, at 10.

[238] BPU-15, SNL January 13, 2017 Article, at 1.

[239] Direct Testimony of Kevin Bryant, at 7:1-12.

the transaction."[240] Further, GPE has produced no credible plan to delever following the Transaction, causing Moody's to consider the Transaction related leverage "permanent leverage in the Great Plains capital structure."[241] Fitch has similarly noted GPE is on track for a "one or two notch downgrade…absent a firm and credible commitment to deleveraging."[242] This concern is amplified by the fact Kansas and Missouri service territories are not high growth areas, which Moody's believes will further restrict GPE's ability to pay down this debt.[243] By Moody's own calculations, GPE's holding company cash demands will be around $450 million annually.[244] If KCP&L bore its proportional share of that obligation it "would translate into at least $160 million of dividends from KCPL to cover its share of the full amount of parent interest and dividend expense, or 100% payout of its LTM 1Q16 Net Income."[245]

The Joint Applicants' try to contradict these concerns through the rebuttal testimony of Mr. Bryant, including his Table 1, which purports to show GPE will have $494 million dollars of net free cash flows to service the Transaction related debt. As a threshold matter, it is important to recall that, because Table 1 was first produced as part of Mr. Bryant's rebuttal testimony, no other party has had the opportunity to file testimony addressing it. The Joint Applicants assert the table is appropriately part of their rebuttal case, as it only became relevant in response to the

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240 BPU-4, Moody's May 12, 2016 Letter, at 9.

241 BPU-5, Moody's May 18, 2016 Letter, at 6.

242 JAL-48 at 1.

243 BPU-5, Moody's May 18, 2016 Letter, at 6.

244 JAL-51, at 3.

245 *Id.*

arguments of Staff and other parties.[246] But this argument cannot be reconciled with the numerous concerns Moody's and others raised about GPE's inability to cover Transaction related debt, and failure to put forward a path to deleveraging. The Joint Applicants' decision to hold such critically important information until rebuttal testimony not only deprived other parties of the ability to respond, but has deprived this Commission of having a full record to evaluate the fundamental question of whether or not GPE can afford this Transaction.

Based on the record available, however, it is clear that Table 1 is based on [**BEGIN CONFIDENTIAL INFORMATION]** [redacted][9]

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246 Joint Applicants' Response to Joint Motion to Strike and for Sanctions Against Joint Applicants, at 11-12, filed with the Commission on January 20, 2017.

247 [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] **[END CONFIDENTIAL INFORMATION]** Mr. Bryant testifies that the table is meant to be an "illustration", but it is not clear what value there is in an illustration that can never come to pass. As a result, this Table is at best an analytically useless illustration that should be entirely disregarded by this Commission.

In short, Table 1 is the perfect example of the need for a credible and codified plan to delever. Staff's cross examination of Mr. Bryant's Table 1 illustrates just how important it is to have the opportunity to examine and challenge the assumptions that underlie a repayment plan. Absent a codified plan and a complete record, this Commission has no ability to judge the credibility, accuracy, or plausibility of the Joint Applicants' claims that GPE will have sufficient cash available to service the Transaction related debt. And yet, despite knowing this was a concern for Moody's, and for Fitch, and for the parties in this proceeding, as of the hearing in this proceeding, GPE *still* had no written plan for paying down its debt.[253]

[redacted]

[253] BPU-18.

iii. KCP&L's and Westar's Financial Health is Inextricably Linked to GPE

The standalone strength of Westar and KCP&L will also be damaged in this Transaction. Despite the Joint Applicants' statements to the contrary, the evidence in this case illustrates that this Transaction's negative impact on GPE will be felt and reflected in the creditworthiness of KCP&L and Westar.

Westar and KCP&L are both expected to have improving standalone financial health due to numerous factors such as the conclusion of several environmental capital plans and rate cases that will roll into rate base capital expenditures for new wind generation, customer information system advances and general infrastructure improvements.[254] These improving financial metrics put both Westar and KCP&L on the path towards a credit upgrade.[255] As a result of this Transaction, however, "the limited parent financial flexibility at GPE, weak consolidated financial metric and demand for increased utility dividends will constrain the rating of KCP&L at Baa1, despite the expected standalone financial improvement over the next several years."[256] Moody's has made it clear that "Great Plains' two current subsidiaries, along with Westar, will have a more highly leveraged parent after the transaction, which will remove the positive overhang of expected financial improvement associated with upcoming rate cases."[257] As a result of this Transaction, even *maintaining* Westar's and KCP&L's current credit rating is evidence of financial harm. These utilities' ratepayers will be denied the benefits that come from

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[254] JAL-50, at 2.

[255] Direct Testimony of Justin Grady, at 54:4-6.

[256] JAL-51, at 4.

[257] Moody's July 7, 2016 Issuer In-Depth at 1, attached to the Direct Testimony of Adam Gatewood.

credit rating improvements in exchange for the obligation to fund “higher dividends than would otherwise be necessary to service Great Plains’ debt and shareholder dividends.”[258]

In fact, it is clear that GPE is relying on these improving metrics to fuel this Transaction. As Moody’s notes, once all of the expected capital expenditures are rolled into rate base, and are therefore earning an allowed return, Westar and KCP&L “will contribute significant amounts of cash flow through 2020.”[259] It is this cash flow GPE will deploy to service its debt. Of course, what is good for GPE’s ability to pay down debt is not necessarily in the public interest, and any “regulatory intervention” on behalf of customers to impose things like “customer credits, rate freezes and/or a more contentious regulatory relationships post-transaction” would harm the “future cash flow production of GPE…and the financial improvements [Moody’s is] currently anticipating could be jeopardized-a significant credit negative.”[260] Moody’s statement is direct confirmation of the concern the BPU and other parties have raised that this Transaction incentivizes GPE to operate Westar and KCP&L in a manner that protects this available cash flow, and not the efficient and reliable provision of service. Moody’s statement is also further evidence of the intrinsically linked nature of GPE’s, Westar’s and KCP&L’s financial health. Moody’s warns that if GPE “were to increase parent debt to be approaching 40% of consolidated debt, it could have negative ratings implications” for the subsidiaries.[261] S&P also warns that it

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[258] Moody’s July 7, 2016 Issuer In-Depth at 1, attached to the Direct Testimony of Adam Gatewood.

[259] JAL-50, at 3.

[260] JAL-50, at 3.

[261] JAL-51, at 2.

could downgrade "GPE *and its subsidiaries* if GPE's financial risk profile remains weak after the merger."[262]

III. Savings and Integration

As the Joint Applicants themselves note, "[t]his case is one of the most important for the State of Kansas that the Commission will decide during its tenure so the Commission should have accurate and complete information in the record to consider in its deliberation."[263] The record illustrates that this Transaction will leave GPE with "little room for error"[264] making it critically important the Commission have a robust and reliable savings analysis upon which to base its decision. However, the Joint Applicants have produced only a pre-bid savings analysis, conducted with limited input from GPE and no direct input from Westar, resulting in an analysis based exclusively on high-level assumptions, many of which prove invalid upon closer examination.[265] As Mr. Steffen testifies, the Commission's requirement that savings be "demonstrated" and benefits "quantified" requires the Joint Applicants to put forward a savings analysis this is "sufficiently supported that [it] can be independently verified through reasonable means, using accepted methods for evaluating merger transactions."[266] Mr. Steffen examined Mr. Kemp's savings analysis to evaluate "whether or not his calculations were sufficiently documented so they could be understood, whether his assumptions were factually

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262 JAK-12, at 1.

263 Joint Applicants Motion to Reopen the Record, at 3.

264 BPU-5, Moody's May 18, 2016 Letter, at 5.

265 BPU-26, at 1.

266 Direct Testimony of Boris Steffen at 14:3-11.

supported and whether his methodologies were appropriately applied" [267] and found "several flaws and errors that cause him to significantly overstate savings." [268] The unreliable nature of the savings analysis is a serious concern for a Transaction as precariously structured as the one the Joint Applicants' have placed before this Commission.

The Joint Applicants attempt to rehabilitate the errors in their savings analysis by asserting their integration process has reaffirmed their confidence of achieving expected synergies.[269] However, the Joint Applicants' assertions lack any factual support, and rely on a process that the Joint Applicants themselves acknowledge is ongoing and incomplete.[270] As a result, the Joint Applicants have failed to "demonstrate through the evidence in the record a sufficient basis upon which to approve the merger."[271]

A. Joint Applicants' Fail to Demonstrate Sufficient Savings to Offset the Risks of this Transaction

An examination of the Joint Applicants' savings analysis is perhaps the most critical element of this proceeding, because it goes directly to the impact this Transaction related debt will have on the financial integrity of GPE, Westar and KCP&L. The Joint Applicants have asserted that the financial risk this additional debt poses will be mitigated by the savings this merger will generate.[272] Accordingly, an examination of whether or not

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267 Vol. IV Tr. 820:4-14 (Steffen).

268 Direct Testimony of Boris Steffen at 15:9-11.

269 Rebuttal Testimony of Steven Busser, at 6:18:22.

270 BPU-24, at 1.

271 Docket No. 97-WSRE-676-MER, Order on Merger Application at ¶18.

272 Direct Testimony of Kevin Bryant, at 15:9-18.

the record supports such an assertion is vital to the determination of whether this Transaction promotes the public interest. As a threshold matter, it is difficult to reconcile the Joint Applicants' assertion that these savings will offset the financial risk of this Transaction with their statement that ratepayers will see 100% of the savings.[273] The Joint Applicants assert that rejecting this Transaction will mean depriving Kansas ratepayers access to Transaction related synergies.[274] However, the record makes it hard to accept that any savings will be left after GPE satisfies its obligations. Following the Transaction, GPE's holding company cash demands will be approximately $450 million a year,[275] $170 million of which is directly related to this Transaction.[276] And yet, even taking the Joint Applicants' saving analysis at face value, this Transaction will only produce $63 million in savings in 2018, building to a maximum of $199 million by 2020.[277] These facts make it clear that the Joint Applicants' promise to share 100% of the savings "as rates are reset in the normal ratemaking process"[278] will translate into rate cases where no savings remain to benefit ratepayers.

The issue of savings is relevant to at least three of the Commission's merger standards: merger Standard (a)(i), which requires an examination of the "effect of the proposed transaction on the financial condition of the newly created entity as compared to

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273 Joint Applicants' Initial Brief, at 98.

274 Rebuttal Testimony of Terry Bassham, at 6:7-9.

275 JAL-51, at 3.

276 Direct Testimony of Jonathan Lesser at 87:10-15.

277 Direct Testimony of William J. Kemp, Schedule WJK-3.

278 Rebuttal Testimony of Steven Busser, at 10:12-14.

the financial condition of the stand-alone entities if the transaction did not occur;" merger standard (a)(ii), which requires an examination of whether the purchase price is "reasonable in light of the savings that can be demonstrated from the merger;" and merger standard (a)(iii) which requires an examination of whether ratepayer benefits resulting from the transaction can be quantified. As Mr. Steffen testifies, the requirement that merger savings be "demonstrated" and the resulting benefits to ratepayers be "quantified" requires the Joint Applicants' savings analysis be "verifiable by reasonable means."[279] The Joint Applicants therefore bear the burden of putting forward "analyses sufficiently supported that they can be independently verified using accepted industry methodologies."[280] The Joint Applicants' pre-bid savings analysis cannot be verified by reasonable means, and includes "savings" associated with events unrelated to the Transaction, and which will occur regardless of whether or not this Transaction is approved. As a result, the Joint Applicants have failed to satisfy their burden of demonstrating "through the evidence in the record"[281] that there are transaction related savings sufficient to offset the clear risks of this Transaction.

i. The Savings Analysis Was Developed During the Auction Period With Insufficient Information and Without Any Direct Involvement from Westar Resulting in Numerous Errors

The only savings analysis available for this Commission's consideration is the Enovation analysis, led by Mr. Kemp. Mr. Kemp's analysis was developed during the bidding period of the auction with limited time and limited information. Mr. Kemp's firm Enovation Partners, lacked

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279 Direct Testimony of Boris Steffen at 33:7-18.

280 *Id.*, at 33:9-10.

281 Docket No. 97-WSRE-676-MER, Order on Merger Application at ¶18.

access to Westar personnel and had limited access to GPE personal during the analysis process.[282] As a result, the savings analysis has no direct input from Westar, despite the fact that the Joint Applicants have conceded the "significant role" Westar has played in their integration process.[283] The result is an analysis resting exclusively on high-level assumptions[284] despite the fact that Mr. Kemp's own criteria require an analysis be "based on detailed, realistic analysis of the relevant function" where "less accurate high level assumptions [are] minimized."[285] This is a risk inherent with an auction conducted analysis. As Mr. Busser testifies "[w]hen you go through things in …an abbreviated time frame like we did as part of the process, there's always going to be errors."[286]

As to be expected, Mr. Kemp's savings analysis is filled with incomplete information, inaccurate assumptions, and errors. For example, BPU witness Mr. Krajewski testified that accepting Mr. Kemp's savings analysis would result in the merged company falling below the Southwest Power Pool's ("SPP") planning reserve margins.[287] Mr. Kemp asserts that Mr. Krajewski made "several factual errors, particularly around Westar's loads and resources that invalidate his conclusion."[288] In support of his criticism, Mr. Kemp cites to his work paper, provided in response to BPU Data Request 3-14. Mr. Krajewski, however, relied on BPU 3-14 only for information regarding generator retirement assumptions.[289] Mr. Krajewski relied on

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[282] BPU-26.

[283] Vol. IV Tr. at 1213:8-16 (Busser).

[284] BPU-27.

[285] Direct Testimony of William Kemp at 16:13-14.

[286] Vol. V. Tr. at 1215:14-17 (Busser).

[287] Direct Testimony of John A. Krajewski, at 24:3-8.

[288] Rebuttal Testimony of William Kemp at 16:21-22.

[289] JAL-3, page 1, line (d1).

Westar's response to BPU Data Request 3-21[290] for the information on Westar's load, resources, sales, and purchases. A simple comparison of Mr. Krajewski's capacity calculation, contained in Exhibit JAK-3, and the information Westar provided, contained in Exhibit JAK-6, illustrates that Mr. Krajewski's analysis uses the *exact* information in the *exact* same format that Westar provided.[291] Specifically: [292]

- Mr. Kemp asserts Mr. Krajewski's calculation failed to take into account the benefits of demand-side management (DSM) resources for meeting peak load responsibility. This is incorrect. Mr. Krajewski used the "peak native load forecast" information Westar provided, which as the asterisk by line a) indicates "includes reduction for WattSaver and Interruptible Contracts" and therefore *does* reflect DSM benefits.[293]

- Mr. Kemp asserts that Mr. Krajewski inaccurately represents capacity sales. This is incorrect. Mr. Krajewski's calculations uses the capacity sales information Westar provided in response to BPU 3-21.[294]

- Mr. Kemp asserts that Mr. Krajewski fails to take into account the retirement of three units: Lawrence Energy Center Unit 3, Tecumseh Energy Center Unit 8, and Hutchinson Energy Center Steam Unit 4. This is incorrect. The retirement of these three units pre-date and are unrelated to this Transaction.[295] As such, the impact of their retirement is included in the projected planning reserve margin calculations and data Westar provided in response to BPU Data Request 3-21. Westar is the most knowledge and credible source on how these retirement impact their reserve margins, and Mr. Krajewski's analysis faithfully uses the information Westar has provided.

- Mr. Kemp asserts that Mr. Krajewski fails to take into account the 30% capacity accreditation of Westar wind plants. This is incorrect. Again, because Mr. Krajewski's analysis simply adopts and incorporates the information Westar provided about its own system, the wind capacity accreditation *is* reflected in his analysis. Further, Mr. Kemp's

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290 JAK-6.

291 Compare Exhibit JAK-3, at 1.

292 Rebuttal Testimony of William Kemp, at 17:1-15.

293 Compare JAK-3 at page 1, line a) with JAK-6 at 2, line a).

294 Compare JAK-3 at page 1, line c) with JAK-6 at 2, line c).

295 *See* WPD-26; JAL-31, Direct Testimony of Boris Steffen at 28:2-4.

30% wind capacity accreditation is an assumption based on KCP&L's experience with its wind facilities.[296] The record illustrates that this assumption significantly *overstates* Westar's actual capacity accreditation, which averages 19%.[297]

- Mr. Kemp asserts that Mr. Krajewski understates Westar's capacity purchases by a factor of two. However, Mr. Krajewski's analysis uses the capacity purchase figures Westar provided in response to BPU 3-21,[298] meaning it is Mr. Kemp's analysis that *overstates* Westar's capacity purchases by a factor of two.

Mr. Kemp's flawed assumptions have the effect of inflating the amount of generation that could be retired, thus significantly inflating the savings the Joint Applicants assert can be achieved through this Transaction. This is a perfect example of the risks placed on the ratepayers and the public interest if the Commission approves this Transaction on the basis of a savings analysis that lacks the direct input of one of the merging parties. The information Westar provided about its own system in response to BPU Data Request 3-21 illustrates the significant errors and incorrect assumptions contained in Mr. Kemp's savings analysis. These errors have serious consequences. As JAK-3 illustrates, if you apply Mr. Kemp's generator retirement assumptions to the information Westar provided about its projected planning reserve margin, Westar is left with a shortfall starting as soon as 2018.[299] As the Joint Applicants stated, "At the time of the Westar transaction completion, the Westar load and KCP&L/KCP&L GMO load will still have separate SPP reserve margin requirements just as they do today. The requirements will not change based on the transaction."[300] As a result, Mr. Kemp's assumption that the Joint Applicants will be able to shut

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296 BPU-33 ("The 30% estimated capacity accreditation assumption was part of the acquisition due diligence process. …This factor was based on KCP&L's experience with the SPearville wind farm operations.").

297 BPU-33.

298 Compare JAK-3 at line f) and JAK-6 at line f).

299 JAK-3 at page 1 line g).

300 JAK-7.

down a significant number of generators that they are not able to shut down absent the Transaction is not supported by any factual evidence.

ii. The Savings Analysis Inappropriately Includes Savings Not That are Not Merger Specific

The merger standards require the Joint Applicants to "demonstrate" the existence of Transaction related savings, and to "quantify" the benefits to ratepayers. Satisfying these requirements is a two-step process. First, the Joint Applicants must identify savings that could not occur but for this Transaction,[301] and second the Joint Applicants must produce a savings analysis sufficiently supported to be verified by reasonable means. The Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines ("DOJ Merger Guidelines") provide useful guidance in evaluating whether savings "can be demonstrated from the merger" as required by merger standard (a)(ii):

> The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.…
>
> Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and what each would be merger-specific.
>
> Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. [302]

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[301] Direct Testimony of Jonathan Lesser, at 4:14-19.

[302] U.S. Dep't of Justice & Fed'l Trade Comm'n, *Horizontal Merger Guidelines,* at 30 (1992) as revised (2010), *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

The DOJ Merger Guidelines further note that "If a merger affects not whether by only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency."[303] As Mr. Kemp testifies, the Guidelines' definition "reflects the [DOJ's] considerable experience in evaluating potential mergers."[304]

The primary driver of Joint Applicants' savings analysis is the early "retirement" of Westar and KCP&L generation units by the end of 2019,[305] however, as discussed below, these savings are not merger specific and are therefore improperly included. Mr. Kemp's merger analysis assumes the closure of a total of five KCP&L generating units at three plants—(1) KCP&L Sibley Units 1-2 by the end of 2018; (2) KCP&L Montrose Units 2-3 by the end of 2018; and (3) KCP&L Sibley Unit 3 by the end of 2019—and five Westar generating units at three of that company's plants—(1) Lawrence Energy Center Units 4-5 by the end of 2018; (2) Murray Gill Units 3-4 by the end of 2018; and (3) Tecumseh Energy Center Unit 7 by the end of 2018.[306] As an initial matter, a number a majority of the KCP&L units Mr. Kemp assumes will be retired are in fact units owned not by KCP&L, but by GMO.[307]

However, all five of the Westar generating units and four of the five KCP&L generating unit retirements identified by Mr. Kemp were identified for retirement prior to the Transaction, making it difficult to see how these retirements have any relation to the Transaction.[308] Further,

[303] Horizontal Merger Guidelines at 30 fn 13.

[304] Rebuttal Testimony of William Kemp, at 14:9-10 (In response to the question "Has another definition of merger-related benefits been put forward that supports the reasonableness of the approach you have used in this regard?").

[305] Direct Testimony of John Krajewski, at 9:12.

[306] Exhibit JAL-2.

[307] Vol. VI Tr. at 1392:3-8 (Ives).

[308] See JAL-30, JAL-31 and JAL-32.

neither KCP&L nor Westar have conducted a detailed cost-benefit study of Mr. Kemp's accelerated retirement assumptions, meaning Mr. Kemp's analysis in this area has not been verified.[309] Additionally, the record illustrates that neither KCP&L nor Westar have made any decisions about whether or not this Transaction will allow for the retirement of *any* generators-let alone the ones Mr. Kemp includes in his analysis. As KCP&L's Director of Energy Resource Management explained "many factors impact retirement decisions, [and] KCP&L is currently evaluating what generating facilities may be retired and has not at this point identified any retirements as a result of the merger being approved."[310]

Mr. Kemp attempts to distract from these concerns by asserting that his generator retirement analysis is intended to be just a "representative portfolio."[311] The Joint Applicants further assert that identification of particular generators can only happen through a full Integrated Resource Plan ("IRP").[312] The fact that generator retirements require a full IRP process illustrates how complex and multifaceted the question of if and when a unit is retired will be. It also supports Dr. Lesser's testimony that these analyses are critical to identifying whether accelerated retirement of generating units would provide any savings, and whether those savings are attributable to this Transaction.[313] For example, many of the proposed generation retirements appear largely driven by the SPP's reduction in capacity requirements, and not "efficiencies" gained from this

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[309] Exhibit JAL-24.

[310] Exhibit JAL-26.

[311] Vol V. Tr. at 1273:15 (Kemp).

[312] Vol. VI. Tr. at 1402:11-18.

[313] Direct Testimony of Jonathan Lesser, at 51:13-14.

Transaction.[314] SPP's own estimates show this reduction will save the organization's load serving members, of which Westar and GPE are a part, approximately $90 million annually or $1.4 billion over the next 40 years.[315] Each of these concerns and complexities highlights the BPU's concern that the largest component of Mr. Kemp's savings analysis is speculative and not linked in any meaningful way to this Transaction.

Even assuming it were proper to include the retirement of these generators at all, Mr. Kemp makes several errors that invalidate his claims of generator related savings. First, Mr. Kemp's position is that this Transaction will allow for the "advanced" retirement of these generators, yet when calculating his savings he continues to incorporate the savings from the retirement for the entirety of his analysis. Mr. Kemp's analysis for Sibley Unit 1 illustrates this fundamental flaw. As a threshold matter Sibley Units 1 and 2, both of which are included in Mr. Kemp's retirement analysis, will actually be repowered, not retired.[316] Further, when calculating the retirement related savings for Sibley Unit 1, Mr. Kemp's analysis assumes that Sibley Unit 1 would be retired January 1, 2020 absent this Transaction, and that due to this Transaction, it can retire on January 1, 2019.[317] In other words, this Transaction permits a one year advancement in the retirement. However, when calculating the savings resulting from retiring Sibley Unit 1, he includes the O&M savings for 2019, but then also includes the O&M savings in 2020 all the way through the end of his analysis.[318] Under Mr. Kemp's own assumptions, the Transaction only permitted Sibley Unit 1 to

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[314] BPU-29.

[315] BPU-29.

[316] Vol. V. Tr. at 1248:20-1249:1 (Kemp).

[317] Vol. V. Tr. at 1248:9-19 (Kemp); BPU-28 at 2.

[318] BPU-28 at 1.

retire one year early. Mr. Kemp's inclusion of any savings beyond that one year violates the DOJ Merger Guidelines' definition of merger specific efficiencies,[319] a definition Mr. Kemp testifies that "is consistent with the KCC's applied standard.,"[320] As a result, Mr. Kemp's analysis vastly overstates[321] any generator related savings, because it ignores the requirement that if a merger affects "not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency."[322]

Further, as Dr. Lesser explains, Mr. Kemp assumes the generating units identified for accelerated retirement incur operating costs but never generate any electricity that is sold into the SPP market and do not provide required reserve capacity.[323] Yet KCP&L and Westar's internal analyses related to generation retirements quantified and accounted for this loss in revenue.[324] Westar's analysis shows that, over the period 2017-2020, retirement of the identified generating units and the resulting loss of generation from them would increase the cost of electricity to ratepayers by over $43 million. Over the ten-year period, Westar forecasts an increase in costs of over $157 million.[325] As Dr. Lesser shows in Table 6 of his testimony, between 2017 and 2020, KCP&L estimates an increase in non-firm energy costs of $313.5 million. KCP&L's own estimate

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319 Horizontal Merger Guidelines at 30, note 13.

320 Rebuttal Testimony of William Kemp, at 14:16.

321 Keeping with the Sibley Unit 1 example, instead of just including the 2019 O&M savings of 3,349, he inappropriately includes the 13,636 for years 2020 through 2023 (where his analysis ends) for a savings total of 16,985. BPU-28 at 1, Sibley Unit 1 at O&M Savings. This inflates the Sibley Unit 1 Transaction related savings by a factor of 5.

322 Horizontal Merger Guidelines at 30, note 13.

323 Direct Testimony of Jonathan Lesser, at 50:16-18.

324 Exhibit JAL-35.

325 Direct Testimony of Jonathan Lesser 61:15-18.

of the additional non-firm generation costs during the four-year period is almost as large as Mr. Kemp's entire merger savings - $352 million.[326] Including Westar's estimated $43 million increase in generation costs means that the companies' estimated increases in generating costs alone will exceed Mr. Kemp's net NFOM savings of $352 million.[327] Dr. Lesser calculates that "over the ten-year period, 2017- 2026, the estimated increases in costs are far larger. KCP&L estimated a total increase in its non-firm energy costs $1.06 billion. Adding that to Westar's estimate of $157 million in additional wholesale energy costs means an overall increase of over $1.2 billion."[328] Mr. Kemp attempts to rebut this criticism by arguing that Dr. Lesser's analysis relies on an out of date IRP, when in fact Dr. Lesser relied on the IRP the Joint Applicants supplied in response to a request for the most current information available.[329] Mr. Kemp also tries to assert that Dr. Lesser's argument is invalid because when one generator retires, the revenue lost from that generator is "picked up" by the remaining operating units in the region.[330] However, the "region" Mr. Kemp refers to is the "SPP market area," which includes many utilities other than the Joint Applicants, and Mr. Kemp has performed no analysis to determine how much of this lost revenue might realistically be picked up by other GPE or Westar generators through the operation of the SPP market.[331]

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326 *Id.*, at 62:11-14.

327 *Id.*, at 63:1-2.

328 *Id.*, at 62:6-14.

329 *Id.*, at 53:17-22, *See also* JAL-30.

330 Rebuttal Testimony of William Kemp at 19:1-13.

331 BPU-34.

Savings attributable to generation are not the only "savings" the Commission should disregard in this proceeding. Mr. Kemp's analysis includes savings that Joint Applicants admit have nothing to do with this transaction. For example, Mr. Kemp estimates the T&D CapEx savings to be $214.1 million for the period of 2018-2020, which is 77 percent of total estimated CapEx savings during that period.[332] Mr. Kemp's basis for his assumed reductions are a reduction in spending on distribution system capital.[333] These estimates and assumptions which are contradicted by other Joint Applicants' witness. First, Mr. Noblet testifies the $214.1 million is not a reduction in spending on distribution system capital, but stems from the "re-prioritization" and "project realignment" of transmission projects.[334] Second, and most importantly, the Joint Applicants admit the $214.1 million in "savings" has nothing to do with this Transaction. Joint Applicant's explain:

> Many of the transmission projects are determined by the southwest Power Pool ("SPP") through its planning process. The SPP performs planning studies each year in response to North American Electric Reliability Corporation ("NERC") reliability compliance, economics, transmission service requests and generation interconnection requests. As a result of these studies, some future projects are determined to be no longer needed and some new projects are added. In addition, for transmission projects that have discretion on constructing, we anticipate that by reviewing the new combined priorities between the Westar and KCP&L territories, some projects will be able to be deferred, delayed, and a few even might be accelerated. *Overall, during the period of 2018 through 2020, $214 million of the approximate $1.8 billion dollar T&D capital expenditure plan has been determined as not needed by the SPP or may be deemed a lower priority and potentially deferred to future years.*[335]

[332] Direct Testimony of Jonathan Lesser, at 72:1-4.

[333] *Id.*, at 73:5-6.

[334] Rebuttal Testimony of Kevin T. Noblet, at 33:6-10.

[335] BPU-39, at 1.

For the reasons clearly articulated by the Joint Applicants, the Commission should disregard Mr. Kemp's T&D savings as they will occur with or without this merger.

B. The Results of the Integration Process Are Not in the Record, and Cannot be Considered

As discussed above, the Joint Applicants have asked this Commission to approve a transaction that they assert is "one of the most important for the State of Kansas that the Commission will decide in its tenure"[336] on the basis of a flawed savings analysis. This contradicts the Joint Applicants' own recognition that "the Commission should have accurate and complete information in the record to consider in its deliberations."[337] The Joint Applicants' control the timeline of this Transaction. Nothing forced them to come to this Commission with an auction developed savings analysis when more formal, better vetted savings analyses were apparently underway through the Integration Process. Mr. Busser has testified that the Joint Applicants used Mr. Kemp's savings analysis because they knew that "the schedule gave us ample time to affirm and refine these original estimates."[338] However, the Joint Applicants have failed to ensure information about these affirmations and refinements is included in the record for this Commission's review. [339]

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[336] Joint Applicants' Motion to Reopen the Record at 3.

[337] *Id.*

[338] Rebuttal Testimony of Steven Busser Rebuttal, at 23:1-8.

[339] *See e.g.* Vol. V Tr. at 1219:7-1220:8 (Busser); BPU-23 (Where the BPU requested confirmation of whether integration plans referenced in testimony were available in the record, and the Joint Applicants confirmed that while "detailed plans exist" (but were not provided) they are not available in the record); BPU-24 (Where the BPU requested information about updated information regarding costs to achieve was available in the record and the Joint Applicants assert the amount "have not yet been finalized" and confirmed the information was not available in this docket); BPU-25 (Where the BPU requests information regarding the Joint Applicants' assertion that the integration process has identified "additional efficiencies" and the Joint Applicants responds that "no decisions have been made" on efficiencies, that the efficiencies have not be quantified, and that this information is therefore not in the record).

For example, Mr. Busser asserts on the stand that he gave a presentation on December 20, 2016 that allegedly supports his oft repeated claim that the integration process has identified additional savings.[340] However, Mr. Busser failed to include this presentation when he filed his rebuttal testimony on January 9, 2017. To the BPU's knowledge, neither this document nor any of the other "updated" information upon which Mr. Busser's testimony relies is in the record for this proceeding. As a result, the Joint Applicants have made numerous assertions about the savings available from this Transaction without any record support and have deprived this Commission and the other parties from being able to evaluate the veracity or credibility of those assertions. As a result, the Commission should give no weight to the numerous instances where witnesses for the Joint Applicants have claimed increased confidence in the savings available from this Transaction. Absent record evidence to support such claims, they remain pure speculation that should not be relied upon when evaluating a Transaction as risky and impactful as the one currently before the Commission.

IV. Environmental Impacts, Economic Impacts, Competitive Impacts, and Transmission and Wholesale Rates

Joint Applicants' Initial Post-Hearing Brief argues that the Commission should not consider the effect of the Transaction on transmission or wholesale rates or on wholesale or transmission competition in this docket because those issues are jurisdictional to FERC.[341] That claim is simply not true. The outcome of this docket will have a direct and immediate impact on the transmission component of retail ratepayers subject to this Commission's jurisdiction.

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[340] Vol. V Tr. at 1222:12-19 (Busser)

[341] Joint Applicants' Initial Brief, at 107-108.

Joint Applicants have admitted that KCP&L's Transmission Delivery Charge ("TDC") is applicable to KCP&L's Kansas retail customers.[342] Moreover, they concede that roughly half of this TDC rate is established under KCP&L's FERC-filed transmission formula rate, while the rest is established by other factors, such as SPP and NERC charges and assessments.[343]

The cost of capital under the FERC-filed transmission formula rate is based on GPE's consolidated cost of capital, and not on separate costs of capital asserted for GMO and KCP&L.[344] An increase in capital costs flows through the transmission formula rate automatically, without a hearing or review by the FERC or this Commission.[345] Thus, if there is a downgrade in GPE's rating by a rating agency (which downgrade, in fact, just occurred last week, on March 6, 2017, when Moody's downgraded GPE's rating from Baa2 to Baa3 – the lowest rating before hitting "junk" status), the cost of capital to GPE will increase, automatically flowing through the transmission rate component of KCP&L's customers and Westar's customers.[346] This will increase costs to retail (and wholesale) ratepayers without any Commission or FERC review. Accordingly, that cost is directly related to this Transaction.

There are other costs arising from this Transaction that will directly affect retail ratepayers. The BPU is the only utility with direct interconnections with both Westar and KCP&L.[347] The BPU's power supply and resources are located in the service territories of, or

342 BPU-20.

343 *Id.*

344 BPU-7.

345 Vol. VI. Tr. 1586:5-24.

346 Direct Testimony of John A. Krajewski, at 15:1 – 18:2.

347 The BPU is an agency of the Unified Government of Wyandotte County and Kansas City, Kansas. While the BPU's elected Commission is responsible for setting rates for customers served by the BPU, there are other customers in Wyandotte County that are not served by the BPU, but instead

contractually are delivered through, both Westar and KCP&L using firm, Point-To-Point transmission service. Under the SPP's tariff and rules, if a utility such as the BPU has the option of taking power off the SPP grid at two different interconnection points using SPP firm, Point-To-Point transmission service, that utility (here, the BPU) pays the lower of the two zonal rates for such transmission service pursuant to SPP OATT Schedules 7 and 8.[348] Post-Transaction, if GPE combines the Westar and KCP&L zones to create a single firm, Point-To-Point transmission rate, that rate will increase the BPU's transmission costs for these deliveries by 148%, or $2.9 million per year.[349] This additional $2.9 million cost to the BPU is not due to any increased costs to Westar, KCP&L or GPE. It is simply the direct effect of combining the two systems into one, for transmission delivery point purposes under SPP OATT Schedules 7 and 8: *the direct effect of eliminating competition between Westar and KCP&L.* Nothing else will have changed except that the BPU and its ratepayers, along with every other retail ratepayers in the KCP&L Kansas service territory, will have to pay more money for the same service. Given the high level of debt that GPE has incurred to attempt to undertake this Transaction, and given the recent downgrade in GPE's credit rating by Moody's, there is an incentive for GPE to consolidate the Westar and KCP&L transmission zones as quickly as possible.

In light of this issue, neither the Joint Applicants nor GPE has promised to hold transmission customers harmless from the increased rates that will be caused by combining the

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are served at retail by Westar (Bonner Springs, Kansas) or by KCP&L (Edwardsville, Kansas). As an agency of Wyandotte County, the BPU is here, among other reasons, to try and protect those Wyandotte County ratepayers. The Commission's grant of intervention in this proceeding to the BPU did not contain any conditions or limitations on the BPU's participation.

348 Direct Testimony of John A. Krajewski, at 6:18 – 8:15, 18:3 – 21:2.

349 *Id.*

Westar and KCP&L transmission zones under the SPP. Nor have the Joint Applicants or GPE promised not to undertake such a combination.[350] Under cross-examination, Mr. Ives attempted to downplay this possibility by stating that GPE has not attempted to combine the GMO and KCP&L transmission zones at this time – approximately nine years after the acquisition of GMO by GPE.[351] The fact is, however, that the record does not contain any evidence that such consolidation of GMO and KCP&L would raise firm transmission rates (thus generating more revenue for GPE) or increase costs to any firm transmission customer(s).

Finally, while Mr. Ives stated that to his knowledge Westar and KCP&L have not competed for such new projects in the past, there is nothing to preclude such competition – and the efficiencies and economies it typically brings – in the future.[352] Here, the Transaction will decrease competition, especially competition within the SPP to be awarded the right to construct new transmission facilities (and earn a return on and of the associated investment). Westar and KCP&L currently have the ability to compete for the right to construct such new facilities. Similarly GPE currently competes for the development of transmission through GPE Transmission Holding Company, it's a merchant construction subsidiary which partially owns Transource. This Transaction would remove Westar and GPE as competitors for future transmission project developments. A reduction in competition could lead to increases in costs and less efficiencies. Under these circumstances, the record illustrates that the Transaction will have a direct adverse effect on transmission and wholesale rates and on wholesale and transmission competition.

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[350] Vol. VI. Tr. at 1593:10-14 (Ives); Direct Testimony of John A. Krajewski, at 23: 3-11.

[351] Vol. VI. Tr. at 1607:1-6 (Ives).

[352] Vol. VI. Tr. at 1594:12 – 1595:20.

CONCLUSION

For the reasons discussed above, the Joint Applicants have failed to satisfy their burden of establishing through record evidence that this Transaction is in the public interest, and the BPU respectfully requests that the Commission reject the Joint Application.

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Dated this 13th day of March, 2017.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing public version of the Reply Brief of the Kansas City, Kansas Board of Public Utilities, has been served on the following parties by means of Electronic Service on March 13, 2017:

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