PUBLIC VERSION

**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 Plaints Energy Incorporated.	))))))	Docket No. 16-KCPE-593-ACQ

KANSAS ELECTRIC POWER COOPERATIVE, INC.'S POST-HEARING BRIEF

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I. INTRODUCTION

The evidence of record demonstrates that the proposed acquisition of Westar by GPE is not in and does not promote the public interest, is not consistent with this Commission's merger standards and, unless appropriately conditioned, the Application[1] should be rejected.

There are many questions raised by this transaction, but the threshold question before this Commission is how much financial risk from GPE's proposed acquisition of Westar can be tolerated before the Commission must conclude that the transaction as proposed does not serve the public interest? *See In re Western Resources, Inc.*, Docket No. 97-WSE-676-MER, Sept. 28, 1999 ("1999 Merger Order"), ¶ 18. No party to this proceeding disputes the fact that this acquisition is a financial stretch for GPE. As demonstrated below, the transaction, if approved, will leave GPE very highly leveraged as a result of a $12.2 billion purchase price that is significantly more than twice GPE's $4.8 billion market capitalization and that includes an acquisition premium of more than $4.9 billion above book value. These expenditures push post-acquisition GPE to the edge of a credit ratings downgrade and will limit the company's ability to react to unforeseen exigent circumstances. Critical to GPE's financial well-being going forward will be its ability to avoid credit rating downgrades by promptly deleveraging after closing the transaction and, in order to deleverage, GPE must realize all of the synergy savings it has projected and more; the record is clear that they will not.

Joint Applicants effectively ask this Commission to trust that they can manage these risks, but there are warning signs that cannot be ignored. First, Joint Applicants have grossly over-estimated the synergy savings essential to its ability to deleverage. GPE quantified $4.3 billion

[1] Joint Application, *In re Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co. and Westar Energy, Inc. for Approval of the Acquisition of Westar Energy, Inc. by Great Plains Energy Inc.,* 16-KCPE-593-ACQ, June 28, 2016 ("Application"). The citations and record locations of testimony and exhibits upon which KEPCo relies are provided at the end of this brief in the Table of Testimony and Exhibits Cited.

of operational savings on a net present value basis ($600 million less than the $4.9 billion above book value acquisition premium it must pay), but that savings estimate is wildly inaccurate. The unrebutted evidence of record is that, when mathematical and other errors in Joint Applicants' calculation of merger savings are corrected, the estimated merger savings are overstated by between $1.03 and $1.407 billion, leaving them from between $1.7 and $2.0 billion short of covering the $4.9 billion acquisition premium. *See* Section V.A.1, *infra*. This savings shortfall is no doubt the origin of Joint Applicants' argument that Merger Standards (a)(ii) and (a)(iv) are not relevant to this case despite the plain language of those standards.

On March 6, 2017, Moody's Investors Service, a ratings agency upon which Joint Applicants rely, downgraded the long-term ratings of GPE, including its senior unsecured rating, to Baa3 from Baa2. In so doing, Moody's makes it clear that the financing structure of the transaction produces weak financial metrics that will strain the company.

> We believe that Great Plains' management and board of directors have adopted a higher risk tolerance for leverage than had been exhibited prior to this transaction, a long-term credit negative. Great Plains will have limited financial flexibility for some time following the merger and could potentially be under greater pressure if regulatory support in Kansas and Missouri wanes or if there is a softening of regional macro-economic fundamentals.

Ratings Action, Moody's Investors Service (March 6, 2016)[2]; *see* Section VI.B.3, *infra*.

GPE's projections of earnings per share ("EPS") [redacted] Joint Applicants presented the May 2016 EPS forecasts as evidence supporting the reasonableness of the purchase price. [redacted]

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[2] The Moody's Investors Service March 6, 2016 ratings downgrade announcement is included at Appendix A and is also available at https://www.moodys.com/research/Moodys-downgrades-Great-Plains-Energy-to-Baa3-from-Baa2-and--PR_362946?WT.mc_id=AM~RmluYW56ZW4ubmV0X1JTQl9SYXRpbmdzX05ld3NfTm9fVHJhbnNsYXRpb25z~20170306_PR_362946.

[redacted]. GPE testified that, after the October Board meeting, GPE stopped providing the Board EPS projections. *See* Section VII.B.4, *infra*. This shows [redacted] that were not included in Joint Applicants' evidentiary presentation. Moreover, it seems inconceivable that, in the face of a transaction of this magnitude [redacted], that GPE would not continue to project and report to its Board on the impact of the pending transaction on such a critical metric. In addition, sensitivity analyses conducted by KEPCo witness Dr. Dismukes show that the reduction of projected synergy savings and rate case revenues substantially curtails Joint Applicants' ability to deleverage the transaction. *See* Section VII.B.5, *infra.*

The financial community's willingness to finance a transaction does not equate to that transaction serving the public interest. To the investment community, if the transaction is riskier, it costs more to finance. If a transaction fails and a company weakens, that company's credit ratings are downgraded, investors require an even higher expected return on investment (meaning it costs more for the company to raise capital), and investors decide where their money should be invested. For customers of a public utility in Kansas, if a transaction results in a weakened public utility, those customers are left with a financially weakened company, higher financing costs, higher risks of deteriorating service quality, and all of the competitive and economic ramifications such developments bring. This Commission's merger standards do not ask whether a transaction can be financed, they ask the questions that are essential for the Commission to decide whether a proposed transaction will serve the public interest. The GPE acquisition of Westar as proposed will not serve the public interest. In order for this transaction to serve the public interest, any approval must be conditioned upon strong and unequivocal ring-fencing and financial integrity conditions. The conditions proposed by Joint Applicants are not comprehensive or unequivocal enough to protect customers from the risks of this transaction. KEPCo has modified and supplemented Joint Applicants' conditions in order to obtain the protection required in light of the issues posed by this specific transaction. *See* Section VII.C, *infra*.

II. KEPCO'S INTEREST IN THIS PROCEEDING.

KEPCo is a generation and transmission cooperative serving member-owner distribution cooperatives that, in turn, serve approximately 300,000 Kansans across about two-thirds of the state. KEPCo has a significant interest in the outcome of this proceeding, and the Commission recognized those interests when it granted its unchallenged motion to intervene. Aug. 2, 2016 Order at ¶¶ 2, 5 (finding KEPCo meets legal requirements of intervention).

Mr. Mark Doljac, KEPCo's Director of Rates and Regulation, testified about KEPCo's close operational and business ties with Westar and KCP&L. He explained that KEPCo (i) takes Network Integration Transmission Service from the Southwest Power Pool ("SPP") over both Westar's and KCP&L's transmission facilities (Doljac Direct at 4:10-16), (ii) purchases a substantial portion of its energy and capacity needs pursuant to a cost-based power supply agreement with Westar (*id.* at 3:16-20), and (iii) is a co-owner with KCP&L and Westar of the Wolf Creek Nuclear Plant and with KCP&L of the Iatan 2 coal plant(*id.* at 4:6-9). Mr. Doljac explained that costs resulting from the proposed transaction impact the rates paid by KEPCo under three cost based formula rates: Westar's Generation Formula Rate, Westar's Transmission Formula Rate ("TFR"), and KCP&L's TFR. Mr. Doljac showed how these formula rates operate and demonstrated that Joint Applicants' proposed transaction could have a significant impact on the delivered power costs borne by KEPCo, which must be recovered from KEPCo's members and their retail consumers.

KEPCo's interests are properly before the Commission and assist to inform the Commission's assessment of the transaction's wide-ranging impacts. Order on Merger Standards at ¶ 5 ("central concern is whether the merger will promote the public interest"); *see also* Order, *In re Kan. City Power & Light Co*., Consol. Dockets 174,155-U and 174,155-U, Nov. 15, 1991 ("1991 Merger Order"), p. 35 ("Utility mergers and acquisition are complex transactions that affect both ratepayers and shareholders for many years to come and have significant implications for the utility service to be provided"). In particular, the Commission's Merger Standards require that the Commission evaluate the "effect of the transaction on consumers," which certainly includes KEPCo and its member-owners and the Kansas retail consumers they serve. Order on Merger Standards at ¶ 5. Joint Applicants' suggestion that concerns of KEPCo and other wholesale energy and transmission customers are beyond the scope of proceedings—*e.g.* , Ives Rebuttal at 68:6-20; *id.* at 69:18-19 (impacts of a ratings downgrade on rates paid by wholesale customers "is not properly before this Commission")—misconstrues KEPCo's participation in these proceedings and unreasonably limits the Commission's fact-finding authority.[3]

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[3] In stark contrast to Mr. Ives' suggestion, other witnesses for the Joint Applicants believe that the Commission's authority to review a proposed merger is much broader under the public interest standard. *See* Proctor Rebuttal at 28:9-14:

> Q: Doesn't the fact that ITC is not within the Commission's ratemaking authority make the ITC case distinguishable?
>
> A: No. Even though the Commission does not set ITC's rates, the Commission was obligated to determine the public interest when it approved the transfer of ITC's certificate of convenience and necessity to Fortis. Presumably, that is why the Commission reviewed the merger and issued an order.

III. BACKGROUND AND RELEVANT FACTS

For a detailed summary of GPE's interest in a Westar acquisition and how it produced the purchase price and acquisition premium here before the Commission, see Appendix A to this brief.

A. Valuation, Consideration Paid, and Financing Plan for Westar.

The transaction values Westar at approximately $12.2 billion, with GPE paying $8.6 billion in consideration for Westar's common stock and assuming $3.6 billion of Westar's net debt. Bryant Direct at 6:4-9. The mix of consideration for the acquisition of Westar's common stock is "85 percent cash and 15 percent GPE common stock." Bryant Direct at 6:20. At closing, each share of Westar's common stock "will convert into the right to receive $60.00 per share of total consideration, consisting of (i) a cash payment of $51.00 and (ii) $9.00 in GPE common stock, subject to a 7.5 percent collar." *Id.* at 6:14-16.

GPE expects to permanently finance the consideration paid for Westar's common stock with a mix of "approximately 50% equity and 50% debt." *Id.* at 9:17; *see generally id.* at 9:16-23. The financing plan's debt issuance includes "$4.4 billion of new GPE market issued debt." *Id.* at 9:23. The financing plan's private and public equity issuances include (1) a private equity placement with OCM Credit Portfolio LP ("OMERS"), an affiliated company of the Ontario Municipal Employees Retirement System, for $750 million of GPE's Mandatory Convertible Preferred Stock to execute at transaction closing (*id.* at 8:18-19), and (2) a registered public offering of $2.35 billion of equity and $4.4 billion of debt (*id.* at 9:21-22).[4]

[4] During the September 2016 offering GPE issued "$1.6 billion of common stock" and "$863 million of mandatory convertible preferred stock." Bryant Rebuttal at 9:17-18. On March 6, 2017, GPE announced the pricing on its previously announced underwritten public offering of senior notes.

B. Wall Street Analysts' Response to the Proposed Transaction Stress Its Inherent Risks.

Financial analysists stressed the multitude of financial risks in their analyses of GPE's proposed acquisition of its larger neighbor, Westar. Ex. JAL-47 at 5 ("It's rare to see a small company buy a larger one"); Ex. JAL-10 at 3 ("[GPE] is sacrificing its strong financial profile to acquire its neighbor"). These perceived risks derived from the financing plan that substantially leverages the holding company. Ex. JAL-47 at 4 ("we see substantial issues with the leverage in the deal"); Ex. JAL-48 at 1 ("Fitch's primary concern is the level of [GPE] consolidated leverage following the acquisition . . . . Thus, elevated leverage at [GPE] would negatively weigh on Westar's and KGE's ratings and could result in a one or two notch downgrade"); Ex. JAL-48 at 1 ("The sheer size of the acquisition compared to GXP's current balance sheet will weigh on GXP's financial profile"); Ex. JAL-47 at 5 ("We have a lot of issues with the [Westar] deal, as it introduces a multitude of risks"); Ex. JAL-50 at 1 ("Together, we see the additional leverage and new capital structure complexity reducing financial flexibility across the entire corporate family"); Ex. JAL-50 at 2 ("Management's aggressive financial policies leave no flexibility for unforeseen challenges, at an investment grade level"); Ex. JAL-50 at 4 ("ACQUISITION DEBT OUTWEIGHS SIZE AND DIVERSIFICATION BENEFIT"). Some analysts expect that the significant cash flow requirements of transaction-issued securities would drain the regulated utilities of capital. Ex. Staff-6 at 1 ("At transaction close, GPE's ratio of parent holding company debt to consolidated debt will rise to 35%, from roughly 2% as of March 31, 2016, which could place greater pressure on upstream dividends from subsidiaries in order to service the corporate dividend and parent interest payments").

Wall Street's concern that the combined companies would be weighed down by substantial holding company debt and risk has continued to persist. *E.g.*, Ex. KEPCo-15 at 1

("We see a long road to hit the ambitious promises"). More recently, analysts have highlighted that Joint Applicants will be operating in a changed capital market environment shaped by priorities of the Trump Administration. Analysists have elevated deleveraging to a "key theme" for 2017, which they explain is a "new issue for regulated utilities given the push for a lower corporate tax rate by the incoming Donald Trump administration and House Republicans." Ex. BPU-15 at 1 ("[r]educing leverage is the most important driver across all sectors from fully regulated [utilities] to fully deregulated (IPPs)" (internal quotations omitted)). *See* Ex. BPU-16 at 1 ("Some on Wall Street, however, believe that the [electric utility] sector's strong financial run is grinding to a halt").

Further, if short term interest rates rise, as forecast, Joint Applicants may be challenged to fulfill substantial debt service obligations and to competitively position themselves among utility peers in a higher interest rate environment. *Compare* Ex. BPU-19 at 1. ("Under normal market conditions the [Moody's] downgrade should have no impact on GPE and its subsidiaries' ability to attract capital") *with* Ex. BPU-16 at 1 ("Perhaps the biggest obstacle facing investor-owned utilities . . . is the potential for further hikes in short-term interest rates by the Federal Reserve"); Ex. KEPCo-15 at 24 ("rising interest rates and robust valuations are a challenged to the [regulated utility] sector, particularly as earnings growth stalls once EPA-mandated growth capex slows mid-decade. . . . ***We believe utilities with high parent leverage will disproportionately suffer, as they are unable to recoup from rising interest rates,*** " emphasis supplied).

The two credit rating agencies, Standard and Poor's and Moody's Investors Service, which had access to GPE's non-public plans to finance the transaction, validate financial analysts' concerns. Confidentially, Moody's warned that "the financial policies of [GPE] management and board of directors have become decidedly more tolerant of risk – a credit negative and a deviation from what we have incorporated into our ratings, historically" and that financing scenarios presented would be viewed as "highly aggressive and evidence of financial engineering." Ex. BPU-5 at 4, 6; *see also* Ex. BPU-4. Moody's also informed GPE that "[t]his debt will be increasingly difficult to service in a rising interest rate environment and could pressure utility subsidiaries for additional upstream dividends in the future." Ex. BPU-5 at 6.

C. Moody's Announces the Downgrade of GPE's Long-Term Ratings and Issues a Baa3 Rating on GPE's Senior Unsecured Notes Financing the Westar Acquisition.

On March 6, 2017, Moody's downgraded GPE's long-term credit ratings, concluding their rating review initiated on May 31, 2016. Moody's also assigned the Baa3 senior unsecured rating to Great Plains new $4.3 billion senior unsecured notes that GPE intends to finance the acquisition of Westar. Moody's ratings rationale states that "[a] rating upgrade is unlikely in the near-term given higher leverage incurred to finance the Westar acquisition. * * * A rating downgrade could be considered if there is a further deterioration in the company's financial performance . . . ." Moody's Ratings Downgrade (Appendix A).

IV. PUBLIC INTEREST—THE STANDARD OF REVIEW

A. The Standard of Review Applicable to This Case.

The Commission regulates public utilities for the "benefit of the public interest" pursuant to broad grants of authority under Kansas law. 1991 Merger Order at 34. When investigating a proposed merger or acquisition of a public utility, the Commission generally considers "whether the public interest is served by approving the merger as determined by the specific facts and circumstances of each case." Order on Merger Application, *In re Western Resources, Inc.*, Docket No. 97-WSRE-676-MER. Sept. 28, 1999 ("1999 Merger Order"), ¶ 18.

In these proceedings, the Commission applied long-standing standards developed in the 1991 Merger Order, as modified by the 1999 Merger Order, to assess whether GPE's acquisition of Westar will promote the public interest.[5] The Commission will consider the following factors:

(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; and

(v) the effect of the proposed transaction on the existing competition.

(b) The effect of the transaction on the environment.

(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. Whether the proposed transaction will likely create labor dislocations that may be particularly harmful to local communities, or the state generally, and whether measures can be taken to mitigate the harm.

(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.

(e) The effect of the transaction on affected public utility shareholders.

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[5] The intent of the standards, which have held up as Kansas utility merger law for 25 years, is to "allow the Commission to uniformly review mergers and acquisitions that may be presented to the Commission in the future while maintaining some flexibility to deal with the particular circumstances of each transaction." 1991 Merger Order at 36. The merger standards were affirmed in a 1999 decision, with clarification that they may be supplemented by other considerations relevant to facts and circumstances specific to the transaction. *See* 1999 Merger Order at ¶ 18. The 1999 Merger Order affirms the Commission's recognition that its review of each transaction is fact-specific, and that the Commission will take into account the wide range of issues that a transaction could raise.

(f) Whether the transaction maximizes the use of Kansas energy resources.

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

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

Order on Merger Standards at ¶ 5. The Order on Merger Standards states unequivocally that the Commission "will evaluate the application under [these] criteria." *Id.* at ¶ 5. Accordingly, the Commission will apply each of the standards to the proposed transaction, and may find that the proposed transaction promotes the public interest only if *each* of these standards is met.

Joint Applicants bear the burden of proof. Joint Applicants must demonstrate that the proposed transaction complies with each of the merger standards and promotes the public interest. 1999 Merger Order at ¶ 18 ("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"); 1991 Merger Order at 35 (merger or acquisition of a regulated utility "should be approved where the applicant can demonstrate that the merger or acquisition will promote the public interest").

The Commission must base its findings of fact on "substantial competent evidence" to survive judicial review. *Jones v. Kan. Gas & Elec. Co.*, 222 Kan. 390, 397 (1977). "Substantial competent evidence is evidence which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved." *Id.* (citing *Graves Truck Line, Inc. v. State Corp. Comm'n*, 215 Kan. 565 (1974); *Morra v. State Bd. of Exam'rs of Psychologists*, 212 Kan. 103 (1973); *Kan. State Bd. of Healing Arts v. Foote*, 200 Kan. 447 (1968)).

As described in Sections V–VII below, Joint Applicants have not shown that the effect of the transaction on consumers, enumerated in in paragraph 5(a) of the Order on Merger Standards and particularly subparts (i), (ii), and (iv), will promote the public interest.

B. The Commission Should Reject Joint Applicants' Attempt to Rewrite the Merger Standards.

The Joint Applicants contend that Merger Standards (a)(ii) and (a)(iv) are irrelevant and that the Commission should ignore the size of the purchase price ($12.2 billion) and the acquisition premium ($4.9 billion over the book value) when evaluating whether the proposed transaction is in the public interest because ostensibly they have committed not to seek to recover the acquisition premium. JA Br. at 18; *see* Ives Rebuttal at 20:2-4; Tr. Vol. 2, 385:11-22 (Ives). Joint Applicants argue that the "[t]ransaction passes the Commission's Merger Standards *as they have been applied in past cases*" (JA Br. at 15 (emphasis supplied)) and that the Commission "has never required any merger applicant to 'check all the boxes'" (*id.* at 17). In support of their position, Joint Applicants rely on the testimony of Mr. James Proctor, a former Commission employee from 1984 through 1990, who claims: (1) to have insight into the "original intent and subsequent application of the Merger Standards" (Proctor Rebuttal at 4:6; *see* Tr. Vol. 2, 307:17-309:1 (Proctor)), and (2) that the "standards were not designed to determine whether the purchase price or acquisition premium is reasonable for the purpose of granting, or denying, a merger transaction" (Proctor Rebuttal at 6:20-22). The best evidence of the Commission's intent, however, are the words of its orders. Joint Applicants' interpretation is contrary to the plain language of the Commission's Merger Standards and would lead to the absurd result that, in determining whether a proposed merger is in the public interest, this Commission could not look at the implications of the overall purchase price and acquisition premium. The purchase price, acquisition premium, and demonstrated savings of a merger or acquisition are each key indicators of potential future financial stress on the surviving utility from the merger or acquisition. The financial well-being of the survivor has direct impact on that utility's ability post-transaction to reliably and economically serve its customers, which in turn is of critical importance to the Commission's public interest determination. Accordingly, the Commission must consider the purchase price and the acquisition premium in order to determine whether the transaction is in the public interest. The Commission should give no weight to Mr. Proctor's testimony and reject Joint Applicants' belated attempt to rewrite the Commission's Merger Standards on the basis of that testimony.

1. Mr. Proctor's Testimony Is Inconsistent with the Plain Language of the Merger Standards and the Commission's Orders in This Case.

The Commission's Merger Standards unequivocally call for Commission scrutiny of the purchase price, any acquisition premium, and demonstrated savings. Merger Standard (a)(ii) requires the Commission to evaluate 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 in a reasonable range." Order on Merger Standards at ¶ 5. Merger Standard (a)(iv) requires the Commission to assess whether "there are operational synergies that justify payment of a premium in excess of book value." *Id.* These standards are not conditional or qualified.

Joint Applicants and Mr. Proctor would re-write these standards to include conditions that the actual language does not contain. Ex. KEPCo-5 illustrates this clearly. The following are Merger Standards (a)(ii) and (a)(iv) with the actual language of the merger standards in black and the language needed for Mr. Proctor's interpretation in red.[6]

> The effect of the transaction on consumers, including:
>
> (a)(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 **<u>(when the applicants are seeking specific ratemaking recognition of an</u>**

[6] On cross-examination, Mr. Proctor confirmed that the language in red accurately reflects his understanding of what each condition means. Tr. Vol. 2, 311:9-313:20 (Proctor) (Merger Standard (a)(ii)), 314:1-316:13 (Proctor) (Merger Standard (a)(iv)).

> **acquisition premium based on merger savings in its post-transaction utility rates)** and whether the purchase price is within a reasonable range;
>
> (a)(iv) whether there are operational synergies that justify payment of a premium in excess of book value **when the purchaser seeks to recover through inclusion in customer rates some or all of the acquisition premium based on the merger's cost savings;**

Had the Commission intended the conditional clauses that Mr. Proctor and Joint Applicants read into the Commission's standards, the Merger Standards would so state.

Mr. Proctor purports to glean his interpretation from Commission utility merger and acquisition orders over the past 26 years (*see* Section IV.B.3, *infra*), but he ignores what the Commission has said ***in this case***. This case involves a massive acquisition premium over book value and assertion that Joint Applicants will not to seek to recover that premium from customers. This case, therefore, presents precisely the fact pattern that Mr. Proctor suggests would lead the Commission to apply the conditions that he reads into the Merger Standards. Yet, the Commission ***in this case*** confirmed the applicability of Merger Standards (a)(ii) and (a)(iv) in the Order On Merger Standards without any qualification or condition on their applicability.

Moreover, the Commission offered Joint Applicants an opportunity to comment on, and to propose changes to, the standards that would be used to assess the proposed transaction. Joint Applicants "accept[ed] the standards" (Ex. DRI-2 at 3) and "reiterate[d]" their "accept[ance]" of these merger standards in Mr. Ives' supplemental testimony (at 2:5-9) filed on November 2, 2016.[7] *See also* Tr. Vol. 2, 316:22-317:4 (Proctor) (same). Joint Applicants claim that the Commission provides "flexibility" in prior merger orders (JA Br. at 17), but that view is irrelevant in this case. In these proceedings, the Commission has been clear that any such

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[7] The Commission's Order on Merger Standards permitted parties to propose modifications to the merger standards. *See* Order on Merger Standards at Ordering ¶¶ A-C. Joint Applicants did not seek modifications, and, as demonstrated in this section, the Commission should not accept suggestions that certain merger standards are not relevant to this transaction.

deviation would have to be "*clearly identified in the application and justified in supporting testimony*" filed within 21 days of the order. Order on Merger Standards at P 7 & Ordering ¶ B (emphasis supplied); *see* Order Addressing Joint Applicants' Verified Responses on the Commission's Merger Standards, Oct. 18, 2016 ("Order Addressing JA Verified Responses"), ¶ 2 ("While the Order on Merger Standards recognized the 97-676 Docket allows for some flexibility in the merger standards, including modifying those standards or even adding additional standards or considerations, the Commission directed the Joint Applicants to clearly identify any deviation from the restated merger standards and justify the deviations in supporting testimony"). Joint Applicants' belated attempt to change the rules at this point in the proceeding through Mr. Proctor's Rebuttal Testimony and on brief defies clear instructions in the Order on Merger Standards. Joint Applicants are procedurally barred from altering these standards or arguing these standards are irrelevant or inapplicable to this transaction. *See* Order Addressing JA Verified Responses at ¶¶ 5, 10-12.

2. There is No Evidence that Mr. Proctor Has Any Unique Insight into the Commission's Intent With Respect to Merger Standards (a)(ii) and (a)(iv).

The hearing in this proceeding made it apparent that Mr. Proctor has no direct or special insight into the intentions of the Commission that issued the 1991 Merger Order. Mr. Proctor admitted that he resigned from the Commission before KGE and KPL filed their merger application on November 21, 1990. Tr. Vol. 2, 328:3-17 (Proctor). He also conceded that, in the thirteen months between the time he left the Commission and the issuance of the 1991 Merger Order, there was a new governor, and at least one new commissioner; Mr. Proctor was neither aware of the turnover on the Commission's staff nor was he in regular contact with the remaining staff following his departure from the Commission. *Id.* at 328:25-329:21 (Proctor). There is, therefore, no factual basis for the Commission to find that Mr. Proctor has relevant insight into the Commission's decision making process in 1991 Merger Order.

The Supreme Court has cautioned against giving any weight to the interpretations of an individual when attempting to discern the intent of a deliberative body. *See e.g., Barber v. Thomas*, 560 U.S. 474, 486 (2011) (emphasis in original) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law. *See., e.g.*, *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995)"). Similarly, the Kansas Supreme Court has advised that the intent of a deliberative body should be derived from the words it chooses.[8] Here, it would be entirely unreasonable for the Commission to effectively modify the plain language of its Merger Standards based an ex-employee's alleged insight into a prior Commission order issued over 25 years ago and the Commission should reject Joint Applicants' plea for it to do so.

3. Mr. Proctor's Interpretation of Prior Commission Decisions Is Irrelevant and Incorrect.

Joint Applicants rely on Mr. Proctor's reading of prior merger orders as evidence that the purchase price and acquisition premium are not relevant in this proceeding. JA Br. at 70, 96. Mr. Proctor's interpretation of prior Commission orders, however, is tantamount to legal arguments on brief and is entitled to no evidentiary weight. Moreover, none of the cases cited by Mr. Proctor stand for the proposition that the Commission can ignore the purchase price and the acquisition premium if the applicants are not proposing to recover the premium from ratepayers. They are, at best, examples of cases in which the purchase price and acquisition premium were

[8] *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378 (2001) (citing *In re Marriage of Killman*, 264 Kan. 33, 42-43 (1998) ("When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in it.").

not principal concerns. For example, Mr. Proctor claims that in the 1991 Merger Order the "Commission made no judgment about the reasonableness of the purchase price or the [acquisition premium]" (Proctor Rebuttal at 10:13-14), but he acknowledged that in that proceeding the $388 million acquisition premium was greatly exceeded by projected savings of $705 million (Tr. Vol. 2, 320:3-11 (Proctor)). *See also* 1991 Merger Order at 36, 52.

Similarly, in the 1999 Merger Order, the Commission found that the proposed inclusion in rate base of a $300 million acquisition premium was not reasonable. 1999 Merger Order at ¶¶ 21-22. While Joint Applicants rely (JA Br. at 70) on Mr. Proctor's claim that "*the Commission did not even mention the amount of the [acquisition premium] or purchase price being offered by WRI for KCP&L's common equity*," (Proctor Rebuttal at 13:20-21 (emphasis in original)), the 1999 Merger Order is clear that "[a] contentious and vexing issue in this proceeding has been the acquisition premium . . . ." 1999 Merger Order at ¶ 25. Accordingly, there is no basis to extrapolate from the 1999 Merger Order (or any other case Mr. Proctor cites) that the Commission would not have been even more keenly focused on the acquisition premium if that transaction mirrored the instant proceeding—a $4.9 billion acquisition premium over book value that exceeds the entire market capitalization of the acquiring entity. Ex. BPU-13 at 14.

Mr. Proctor testified that in approving Black Hills/Kansas Gas Utility Company, LLC ("Black Hills") acquisition of Aquila, Inc.'s natural gas business in Kansas (referred to as the "1063 Docket") and GPE's acquisition of Aquila's Missouri electric and steam operations and merchant services operations (referred to as the "1064 Docket") in a 2008 order,[9] the Commission did not mention the amount of the acquisition premium, transition costs or costs paid in the transactions. Proctor Rebuttal at 23:19-20, 25:12-13. The Order Granting Joint

[9] Order Granting Joint Motions to Adopt Stipulation and Agreement and Approving Agreements, *In re of Aquila, Inc., d/b/a Aquila Networks*, *et al*., Consolidated Docket 07-BHCG-1063-ACQ and 07-KCPE-1064-ACQ, May 15, 2008 ("Order Granting Joint Motions").

Motions, however, involved the Commission's review of two unanimous settlement agreements (Order Granting Joint Motions at ¶ 7) that the Commission accepted "in light of the evidence, and particularly the evidence submitted by parties recommending adoption of this settlement" (*id.* at ¶ 49), the effect of 3-year rate moratoriums in each of the proceedings (*id.* at ¶¶ 18. 20) and CURB testimony supporting the settlements as in the public interest (*id.* at ¶¶ 21, 31). The Commission also expressly found that the settlement agreements would "insure that financially stable utilities will provide service in Kansas and ratepayers will benefit from being served by investment-grade companies." *Id.* at ¶ 49. In contrast, the evidence in this proceeding demonstrates that purchase price and acquisition premium will have a deleterious effect on the financial stability of the resulting utility.

The total acquisition price in the PostRock MidContinent Production, LLC ("PostRock") proceeding was $53 million,[10] which may explain why the Commission did not focus its attention on the purchase price. Even in the PostRock Order, however, the Commission relied on Staff's determination that "the financial condition of [the acquiring entity] is sufficient to continue operating the Facilities efficiently." *Id.* at ¶ 17.

The ITC Great Plains Order[11] is plainly distinguishable because of the finding that "the Commission's limited role in regulating ITC Great Plains warrants a more limited application of the merger standards than a transaction involving utilities fully regulated by the Commission." *Id.* at ¶ 21. And, even under that limited merger review, the Commission relied on the fact that Staff believed that the transaction in that proceeding would not "jeopardize the financial condition of the [merging entities]"—a fact not present in this proceeding (Tr. Vol. 2, 323:17-

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[10] Order Approving Acquisition By MVP Logistics, LLC, *In re PostRock MidContinent Production, LLC and MVP Logistics, LLC*, Docket No. 14-EMEG-101-ACQ, Jan. 14, 2014 ("PostRock Order"), ¶ 10.

[11] Order Approving The Transaction With Conditions, *In re ITC Great Plains, LLC*, Docket No. 16- ITCE-512-ACQ, Oct. 11, 2016 ("ITC Great Plains Order").

324:5 (Proctor))—and further relied on evidence that the transaction would help the regulated entities have access to capital on favorable terms (ITC Great Plains Order at ¶ 22)—a fact that is clearly in dispute in the instant proceeding.

Mr. Proctor's reliance (Proctor Rebuttal at 29:1-31:19) on the Empire Merger Order[12] is misplaced. Although Staff in that case could not conclude that synergy savings exceeded the acquisition premium, the parties "agreed this factor was appropriately addressed through the [settlement agreement] terms addressing the quantified net benefits obtained for Empire's Kansas ratepayers through the rate moratorium and tariff provisions discussed above and the Joint Applicants' agreement not to seek recovery of the [acquisition premium] and transaction costs in rates." *Id.* at ¶ 38. In other words, in *Empire District Electric Co.*, customers got their benefits effectively guaranteed up front, unlike this case, in which KCP&L and Westar customers must wait for estimated savings to materialize in the face of this enormously-leveraged acquisition.

Finally, Mr. Proctor conceded during cross examination that the Joint Applicants' express reservation of the right to seek to recover the acquisition premium under certain circumstances makes Merger Standards (a)(ii) and (a)(iv) relevant to the proposed transaction. Tr. Vol. 2, 331:14-22 (Proctor). Accordingly, the reasonableness of both the purchase price and the acquisition premium are clearly relevant to the Commission's assessment of the proposed transaction in this proceeding and should be thoroughly vetted by the Commission.

The 1991 Merger Order and the 1999 Merger Order (and the subsequent orders relied on by Joint Applicants and cited by Mr. Proctor) were decided based on the facts presented in those proceedings. That is precisely what the Commission must do in this proceeding; it cannot ignore the $12.2 billion purchase price or the $4.9 billion acquisition premium over book value when

[12] Order Granting Joint Motion to Approve the Unanimous Settlement Agreement And Approval of the Joint Application, *In re The Empire District Electric Company, Liberty Sub Corp. and Liberty Utilities (Central)*, Docket No. 16-EPDE-410-ACQ, Dec. 22, 2016 ("Empire Merger Order").

assessing the reasonableness of the proposed transaction. When the Commission issued the Order on Merger Standards in this proceeding it was aware that the Joint Applicants were not proposing to recover the acquisition premium from consumers, but it nevertheless found that it must review both the purchase price and the acquisition premium in order to assess the reasonableness of the Joint Applicants' proposed transaction. There is nothing in the record that should cause the Commission to alter that determination.

V. SAVINGS AND INTEGRATION—JOINT APPLICANTS HAVE NOT SHOWN OPERATIONAL SYNERGIES TO EXIST THAT JUSTIFY THE PAYMENT OF A PREMIUM IN EXCESS OF BOOK VALUE.

A. Joint Applicants' Estimated Synergy Savings Are Materially Overstated, Based upon Fundamental Errors, Inherently Unreliable, and Fall Far Short of the Demonstrations Required to Meet the Applicable Commission Merger Standards.

Joint Applicants will pay an acquisition premium of $4.9 billion above book value and estimate that the transaction will produce $4.3 billion in synergy savings on a net present value basis; they are wrong. As explained in this section, Dr. Kirsch demonstrated in unrebutted testimony that, because of Joint Applicants' errors, they will at best realize a net present value of $2.9 billion to $3.2 billion in merger savings.

There are few elements of Joint Applicants' case more critical to the viability and success of this transaction than the estimated merger synergy savings. If GPE does not deleverage the enormous debt incurred to acquire Westar (which will be harder to do in a period of rising interest rates (Ex. BPU-5 at 6)), GPE will be downgraded by the rating agencies (Tr. Vol. 3, 650:16-651:2 (Bryant)), with an almost inevitable pressure to downgrade KCP&L and Westar as core subsidiaries of the GPE group. Ex. JAL-49 at 2; Ex. KEPCo-7 at 3; Ex. JAL-48 at 1. In such a case, costs to Kansas retail and wholesale consumers will go up (Doljac Direct at 22:7-26:4). The principal means by which GPE can deleverage post-merger is with the merger savings: indeed, they are the only savings Joint Applicants have quantified. Tr. Vol. 5, 1315:8-22 (Flaherty).

Despite these facts and Commission merger standards (a)(ii) and (iv), which unequivocally require evidence of demonstrated merger savings compared to the purchase price and acquisition premium, respectively, Joint Applicants had not even conducted an analysis of whether the merger savings would exceed the acquisition premium when direct testimony was prepared. Tr. Vol. 3, 624:23-625:2 (Bryant). The first such analysis was provided in Mr. Bryant's supplemental direct testimony, which purported to show, on a net present value basis, that the Joint Applicants expected $4.3 billion in estimated savings compared to the $4.9 billion acquisition premium. Bryant Supplemental Direct at 8:5-9. Joint Applicants appear unconcerned about the $600 million shortfall, as they did not mention how they intend to make up that difference or attempt to quantify any other savings. Kirsch Direct at 4:10-14.

The problem is that, in addition to the $600 million shortfall, the estimated savings that Joint Applicants have provided are grossly overstated—by between $1.030 billion and $1.407 billion on a net present value basis, or between 24% and 33% of Joint Applicants' $4.3 billion net present value of savings calculated by Mr. Bryant. Of this $1.030 billion overstatement, $686 million is due to mathematical errors in Mr. Bryant's calculation and $344 million is due to Mr. Bryant's clearly incorrect assumption that the benefits of the Transaction will last forever. The additional $377 million of overstatement in the $1.407 billion is due to Mr. Bryant's unexplained misuse of Mr. Kemp's annual operational savings figures for the years 2021 and beyond. Dr. Kirsch describes these errors in his direct testimony. Kirsch Direct at 23:9-26:7. When Joint Applicants' errors are corrected and combined with Joint Applicants' admitted $600 million shortfall, Joint Applicants' estimated merger savings are between $1.7 billion and $2.0 billion (34% to 42%) less than the $4.9 billion acquisition premium.[13]

Joint Applicants chose not to respond in their rebuttal testimony to Dr. Kirsch's demonstration of those errors and the quantification of impact of those errors, nor did they choose to cross-examine Dr. Kirsch on that or any other aspect of his direct testimony. In fact, Mr. Bryant did not even spend five minutes of his time—or his staff's time—reviewing the spreadsheet in which Dr. Kirsch proves that Mr. Bryant made a $686 million mathematical error in calculating his net present value. Tr. Vol. 3, 630:17-19 (Bryant). Neither Mr. Bryant nor any other witness on behalf of Joint Applicants has rebutted, or even attempted to rebut, Dr. Kirsch's analysis and quantification to correct Joint Applicants' merger savings errors.

Joint Applicants' brief is replete with representations about the savings to be reaped from the acquisition,[14] but in no place do they assert that merger savings will, on a net present value basis, equal, exceed, or even come close to the $4.9 billion above book value acquisition premium that drives the purchase price and amount of leveraging required for GPE to consummate this acquisition. They make no such representation because they cannot. Joint Applicants' estimated merger savings fall between $1.7 billion and $2.0 billion short of the acquisition premium. GPE's calculation of the net present value of its own merger savings estimates is fatally flawed.

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[13] The $1.7 billion equals $4.9 billion minus the $3.3 billion figure. *Id.* at 26:6. The $2.0 billion equals $4.9 billion minus the $2.5 billion figure at Kirsch Direct at 26:6 minus the $364 million figure. *Id.* at 23:6.

[14] *E.g.,* JA Br. at 2 ("the Transaction will undoubtedly produce substantial savings that will accrue to customers"), 6 (emphasis in original) ("[t]he merger will generate significant savings for customers . . . ." and "*The proposed Transaction makes good sense and will clearly generate significant savings to the benefit of customers that are available through no other course.*), 18 ("a merger of these companies will provide significant savings for customers."), 38 ("This new company will create billions of dollars of cost savings…" (quoting Bryant Rebuttal at 6)), 82 (emphasis in original) ("*[t]he Transaction will result in millions of dollars of savings flowing to Westar and KCP&L customers. . . .*"]).

Joint Applicants maintain that "the Transaction debt being taken on by GPE and its shareholders is a measured risk that is reasonable in light of the benefits created by the Transaction" and "the Transaction debt will have only a modest and near-term impact on GPE's credit rating that, on balance, is well justified by the Transaction's many benefits," but never mention that those "benefits" are roughly two billion dollars less than they have claimed. *Id.* at 37.

Joint Applicants' erroneous calculation of the net present value of savings is a major, but far from only, problem with their savings estimates. The evidence of record shows that, even under the best of circumstances, the estimation of utility merger savings is an exercise in which uncertainty is inherent. Joint Applicants' merger savings estimates are based upon flawed analyses and data, which illustrates some of the reasons why merger savings estimates can be so highly unreliable. Indeed, GPE witness Flaherty's testimony impugns the credibility and reliability of the very analysis that GPE witness Kemp ostensibly used to assess the reasonableness of the GPE savings estimates (*see* Section V.A.2.b, *infra*.).

In summary, Joint Applicants' faulty evidentiary presentation on merger savings leaves them between $1.7 billion and $2.0 billion short of covering the acquisition premium; and the $2.9 billion to $3.2 billion of saving estimates that remain are based upon analyses that are fraught with uncertainty. In a transaction that is admittedly a financial "stretch" for GPE (Tr. Vol. 1, 192:7-14 (Ruelle); Ex. BPU-13 at 14), the failure of these merger savings to materialize could have profound repercussions. The Joint Applicants are asking this Commission to trust them that the savings will be there, but their presentation is long on feel-good rhetoric and demonstrably short on empirical support.

* * *

The following discussion is applicable to Merger Standards (a)(ii) and (a)(iv) because much of the evidence and arguments are relevant to both.[15]

1. Joint Applicants' Merger Savings Analysis Contains Errors and Flawed Assumptions that Overstate the Net Present Value of Joint Applicants' Merger Savings Estimate by Between $1.0 Billion and $1.4 Billion.

Dr. Kirsch demonstrated, *inter alia*, that Joint Applicants' merger savings estimates were fundamentally flawed and unreliable. The principal flaws in Joint Applicants analysis are (1) a fundamental mistake in Mr. Bryant's calculation of the net present value of Joint Applicants' estimated savings that materially overstates those savings (*see* section 1.a, *infra.*), (2) the inflation of merger savings by assuming that merger savings would continue in perpetuity (*see* section 1.b, *infra.*), and (3) and the use by Mr. Bryant of an assumption of annual merger savings in 2021 and beyond of $204 million (plus inflation), which is $28 million per year higher than his own expert, Mr. Kemp, would support for 2021 (*see* section 1.c, *infra.*). Joint Applicants appear to agree with this third point at page 83 of their Initial Brief, where they describe their estimated savings as including "ongoing savings beyond 2020 estimated at $176 million per year, net of transition costs." The correction of numbers (1) and (2) reduces the merger savings estimates by approximately $686 million (Kirsch Direct at 21:12-15), and the correction of all

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[15] Merger Standard (a)—The effect of the transaction on consumers, including:

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

Joint Applicants address some of the subjects and issues addressed below in this section in the context of Merger Standard (a)(iii): "(a) The effect of the transaction on consumers, including: (iii) Whether ratepayer benefits resulting from the transaction can be quantified."

three errors reduces the net present value of the estimated merger savings to $2.9 billion (equals $364 million for years 2017–2020 as per Kirsch Direct at 23:6, plus $2.5 billion for years 2021–2067 as per *id.* at 26:1-7). Joint Applicants did not rebut any aspect of Dr. Kirsch's analysis or conclusions in this regard.

a. Joint Applicants' net present value savings calculation claims to discount to the year 2017; but the operating savings for years 2021 and beyond are erroneously discounted back to 2020. This has the effects of: i) erroneously adding another $199 million more per year (plus inflation adjustments) to the operating savings in each of the years 2018, 2019, and 2020; and ii) erroneously increasing the operating savings for years 2021 and beyond by an extra three years of inflation.

The inputs to GPE's calculation of the net present value of its estimated merger savings were provided by Mr. Kemp in his direct testimony, at Exhibit WJK-3, which shows the net savings due to the transaction, for the five years 2017 through 2021, will be $16 million, $63 million, $149 million, $199 million, and $176 million, respectively. Kirsch Direct at 20:12-15. Mr. Kemp's footnote three in Exhibit WJK-3 indicates that the $176 million savings figure for each year 2021 and after is an assumed value:

> Annual savings after 2020 were not projected for GPE's bid, but minimal additional costs to achieve would be expected, and gross annual NFOM [non-fuel operation and maintenance ("O&M")] savings would be expected to increase at roughly the rate of inflation. Capital-related savings would decline after 2020 and have not been quantified.

Ex. WJK-3; *see* Tr. Vol. 5, 1260:6 - 1261:2 (Kemp).

As summarized by Dr. Kirsch (and not contested by Joint Applicants), Mr. Bryant calculated the net present value of operational savings in 2017 dollars as follows:

> Mr. Bryant discounts the future stream of Mr. Kemp's forecast annual savings back to year 2017 using a 7.50% discount rate. Instead of using Mr. Kemp's $176 million figure for 2021 as the basis for annual savings in the out years of 2021 and beyond, Mr. Bryant uses Mr. Kemp's $199 million figure for 2020 as the basis for the out-year (2021+) figures, which he inflates at 2.40% per year. Mr. Bryant then finds the net present value of operational savings to be $4,266 million, which

> consists of $364 million of savings in the year of and the first three years after completion of the Transaction (2017-2020), plus $3,902 million of savings over an infinite number of years starting in 2021.[39]
>
> ______________________________________
>
> [39] Bryant Supplemental Direct Testimony, p. 6. In Table 1, the $4,266 million appears in line 9, the $364 million figure appears in line 6, and the $3,902 million figure appears in line 8.

Mr. Bryant made a significant mathematical error in the equation he presented on page 6 of his Supplemental Direct Testimony at line 8 of Table 1, the effect of which is to overstate the net present value of estimated merger savings by $686 million.[16] The principal error is that the equation used by Mr. Bryant treats the operating savings for 2021 and each year thereafter as if those savings began in 2018. Dr. Kirsch explains:

> Mr. Bryant has in effect added $199 million per year (plus inflation adjustments) to the operating savings for each of the years 2018, 2019, and 2020; and he has also implicitly increased the forecast benefits for all years after 2020 by an extra three years of inflation. Correcting this error reduces the net present value of operational savings by 19.5%.

Id. at 22:5-9.

Joint Applicants did not respond to this analysis in their rebuttal testimony (it was not even mentioned in their rebuttal testimony) or in response to cross-examination questions from KEPCo counsel. When asked on cross-examination about Dr. Kirsch's criticism, Mr. Bryant acknowledged each step of Dr. Kirsch's analysis and did not object or question any part of that analysis. Tr. Vol. 3, 627:17-631:6 (Bryant). Mr. Bryant agreed that Dr. Kirsch had confirmed the net present value calculation in Dr. Kirsch's direct testimony by a detailed calculation by year which summed the annual values and arrived at the same number as his net present value calculation (*Id.*, 630:20-631:6 (Bryant)), and that Dr. Kirsch's calculation produced a net present

[16] As explained by Dr. Kirsch, "[i]n Bryant Supplemental Direct Testimony, p. 6, Table 1, line 8, the equation for on-going savings in the out years is presented as (Line 4 / (Line 5 - Line 7)). The correct equation is {Line 4 * [1/(1-(1+Line 7)/(1+Line 5))-1]/(1+Line 5)^3}." *Id.* at 21 n.40.

value of estimated savings of $3.2 billion for years 2021 and beyond, approximately $686 million less than Mr. Bryant's own calculation (*Id.*, 629:20-630:5 (Bryant)).

Mr. Bryant's sole explanation for the differences between his calculation and Dr. Kirsch's calculation was "I generally know he used a different approach than I do." *Id.*, 627:23-24 (Bryant). In point of fact, Mr. Bryant purported to present "a net present value of operational savings" (Bryant Supplemental Direct at 6:10), but he did not do so correctly. The only valid net present value calculation of merger savings presented in this record is the calculation provided by Dr. Kirsch. Mr. Bryant tacitly acknowledges the flaws in his own analysis:

> Q. And so that is a net present value calculation?
> A. That is intended to be a net present value.

Tr. Vol. 3, 627:6-8 (Bryant). Regardless GPE's "intent," the calculation presented at 6 of Mr. Bryant's supplemental direct testimony is plainly flawed and vastly overstates Joint Applicants' estimated merger savings.

b. Joint Applicants' net present value savings analysis erroneously assumes savings will continue in perpetuity.

Mr. Bryant implausibly assumes that the operational savings due to the transaction will continue forever. In so doing, Mr. Bryant claims $344 million of savings that will occur more than 50 years after closing of the transaction. Kirsch Direct at 24:6-25:2. Dr. Kirsch explains why this assumption of savings in perpetuity is unreasonable and that, for reasons pertaining to technological change, institutional change, electric industry practice, and GPE's own financial practices, it is more reasonable to assume that merger savings continue for no more than 50 years after transaction closure. *Id.* at 24:6-25:2.[17] Because $344 million of the net present value of

[17] At those pages, Dr. Kirsch testified that one can reasonably expect that the current stock of power industry capital will almost fully turn over during the next 50 years, technological and institutional conditions of the industry will change radically over the next 50 years, and that it is therefore implausible that $199 million in annual operational savings due to a transaction that closes in the year 2017 will persist, with inflation adjustment, beyond the year 2067; and it is far more likely that those operational savings will be swept away by events—meaning that they will

operational savings occurs more than 50 years after transaction closure, recognizing the limited life of operational savings has the effect of reducing the net present value by $344 million.

c. Joint Applicants' merger savings analysis erroneously and without explanation assumes there will be $204 million (plus inflation) of savings per year for each year 2021 and beyond, when GPE's merger savings expert Mr. Kemp assumed only $176 million per year for 2021.

The third error in Mr. Bryant's net present value calculation of merger savings is that he assumes that for each year 2021 and beyond there will be $199 million in savings (with his 2.4% annual inflation adjustment—$204 million in 2021, $209 million in 2022, etc.). Kirsch Direct at 25:13-14. Mr. Kemp, Joint Applicants' merger savings expert, provided the estimated savings used in Mr. Bryant's flawed net present value calculation. Tr. Vol. 3, 626:17-25 (Bryant). Although Mr. Kemp estimated merger savings of $199 million for 2020, he recommended that merger savings in 2021 and beyond be assumed to be $176 million per year (Ex. WJK-3) and cautioned that "Capital-related savings would decline after 2020 and have not been quantified." Ex. WJK-3, n.3. Mr. Bryant provided no explanation why he disregarded the recommendations of his own expert and, including his annual inflation adjustment of 2.4%, increased the assumed savings by $28 million, but the impact of this unexplained increase is to further inflate the ostensible net present value of Joint Applicants' estimated merger savings. As Dr. Kirsch testified:

> Suppose instead [of Mr. Bryant's $204 million] that savings in 2021 are $176 million as forecast (with qualifications) by Mr. Kemp, that they escalate with inflation thereafter, and that they persist through the year 2067. Under these suppositions, the net present value [in 2017] of operational savings would be only $2,495 million [for years 2021 and beyond]. Therefore, based upon the numbers presented by Mr. Kemp and Mr. Bryant, the net present value of operational savings through year 2067 will be somewhere in the range of $2,495 million to

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be substantially reduced or nullified—well before 2067. In support of this assumption he testified that GPE's present debt all matures by 2043, its regulatory assets are all amortized by 2058, and its lease commitments end by 2048, and that, as a practical matter, neither GPE nor its lenders assume that its present assets will last forever.

> $3,236 million, which is substantially below the $4,266 million figure presented by Mr. Bryant.

Kirsch Direct at 26:1-7.[18]

As previously noted, GPE appears in its brief to abandon Mr. Bryant's $199 million per year assumed savings for 2021 and beyond when describing those post-2020 estimated savings, without mentioning Mr. Bryant's testimony, as:

> estimated at $176 million per year, net of transition costs. Kemp Direct, WJK-3, as updated in Kemp Rebuttal, WJK-3R. These efficiency estimates were developed by GPE management in collaboration with a team of industry experts led by Mr. Kemp of Enovation Partners, LLC ("Enovation").

JA Br. 83 (citing Tr. Vol. 5, 1297 (Kemp)). Joint Applicants earlier quoted Mr. Kemp's Direct Testimony that "GPE estimated . . . [o]ngoing savings beyond 2020 would be close to $200 million per year," but that estimate was not Mr. Kemp's estimate. *Id.* at 2. As noted in the preceding paragraph and cited by the Joint Applicants on page 83 of their brief, Mr. Kemp recommended an assumption of only $176 million per year.

2. Joint Applicants' Savings Estimates Are Based upon Flawed Analyses and Are Inherently Unreliable.

Even if Joint Applicants' merger savings estimates were accurate, those savings would add up to far less than the $4.3 billion of merger savings on a net present value basis calculated by Joint Applicants. Bryant Supplemental Direct at 8:5-7. There are, however, substantial reasons to question the reliability of the estimates themselves. Indeed, the data and analyses provided by Joint Applicants' own witnesses calls into serious question the accuracy and reliability of Joint Applicants' savings estimates.

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[18] The $2.495 billion figure does not include $364 million net present value of savings for 2017-2020, which would bring the total net present value savings to $2.859 billion (=2,495+364).

a. GPE's estimates of merger savings are unreliable.

GPE's defense of its savings estimates rests almost exclusively on the process by which the estimates were developed and by emphasizing the robust participation of Mr. Kemp. JA Br. at 84-90. In point of fact, Mr. Kemp's participation was not nearly as wide-ranging as described. In March 2016, his company, Enovation, was asked to update its industry database and to provide GPE a range of industry experiences and cost changes from mergers, but at that time Mr. Kemp was not aware that there was a possible transaction with Westar in the works. Tr. Vol. 5, 1256:18-22 (Kemp). Enovation was called back by GPE in late April and given minimum target savings by GPE of $50 million, $100 million, and $150 million for 2018, 2019, and 2020, respectively. *Id.*, 1257:3-12 (Kemp). Mr. Kemp was not involved in the development of those numbers and is not aware if they were supported by any empirical analysis by GPE management. *Id.*, 1258:6-11 (Kemp). He did a spot check on the estimates for quality control purposes, but he did not check every calculation. *Id.*, 1256:1-4 (Kemp). In the end, the savings estimates presented by GPE were GPE's estimates. *Id.*, 1260:3-5 (Kemp).

In addition, a basic problem with the GPE savings estimates is that GPE's estimates are inherently subjective. The process GPE employed relied heavily upon the estimates and judgments of its managers and not upon an approach that is reasonably capable of reproduction. Kirsch Direct at 26:14-15. Essentially, GPE established subjective merger savings estimates and Mr. Kemp compared them to industry experience, but he did not dig under the "expected savings" numbers themselves. The Commission, therefore, is being asked to accept GPE's merger savings estimates with virtually no empirical evidence to support them.

Mr. Kemp testified that the O&M and capex savings in the Generation function primarily reflect the effects of combining the generation fleets of GPE and Westar, "with the related reduction in required planning reserves for generation capacity." Kemp Direct at 22:19-23:1.

One would expect that the megawatts of reduction post-merger in required planning reserves would be readily ascertainable, but these claimed savings are also suspect. As Dr. Kirsch testified, through 2020, the GPE acquisition of Westar will produce no reduction in required planning reserves, and "[a]fter 2020, the reduction in required planning reserves is unlikely to be more than negligible." Kirsch Direct at 27:20-28:2. This is because GPE quantified the joint planning reserve requirements of post-merger KCP&L and Westar and the sum of their separate stand-alone planning reserve requirements. As Dr. Kirsch testified, when asked to specify the number of MWs by which the Transaction would reduce the utilities' planning reserve requirements, KCP&L responded "[c]ombining KCP&L's and Westar's annual reserve margin requirements would provide merged-company reserve margin requirements," *i.e.*, KCP&L forecasts that the merged company's reserve margin requirement will be the simple sum of the separate reserve margin requirements of the merging utility companies. Kirsch Direct at 29:15-21 (citing KCP&L's Response to BPU Data Request No. 2-24).

GPE witness Ives responded to Dr. Kirsch's testimony in this regard, but his testimony barely grazes a capillary. Dr. Kirsch testified there would be no savings in terms of a reduction in the planning reserve requirement of post-merger KCP&L and Westar. Mr. Ives agreed that "for an indefinite period of time after the Transaction is completed, there will be no change to the SPP reserve margin requirements for Westar or KCP&L unless and until they obtain network transmission service for their combined load." Ives Rebuttal at 66:19-22. If and when Westar and KCP&L sought network transmission service on a combined basis, the best Mr. Ives could say is that "there may be a slight reduction in the combined reserve margin requirement depending on the diversity in the Companies' system loads. This diversity impact has not been quantified." *Id.* at 66:22-67:3. In other words, Mr. Ives and Dr. Kirsch are in agreement that the planning reserve benefits to be obtained from the Transaction are negligible at best.

Moreover, for all of Joint Applicants' verbal assurances of the reliability of their estimated savings, the empirical evidence of industry experience with such estimates shows otherwise. Merger savings are difficult to estimate with any reasonable degree of accuracy. As Dr. Kirsch testified, the history of recent mergers:

> shows the forecasts are about as good as a coin toss. This can be seen even in data provided by Mr. Kemp. Table 3, which is based entirely on data supplied by Mr. Kemp, compares forecast and actual non-fuel O&M cost changes three years after transaction close for twenty-five mergers from 1997 to 2007. The table shows that the twenty-five mergers had average *forecast* NFOM savings of 9.0% – coincidentally almost the same savings that Mr. Kemp forecasts for the present Transaction – and yet they achieved average *actual* savings of 0.0%. Of the twenty-five mergers, fifteen failed to achieve their announced goals and twelve failed to achieve any savings at all. In the most extreme cases, utilities did 46.1% worse than announced and 22.0% better than announced; and, in one case, a utility that forecast NFOM cost savings instead experienced a 31.9% *increase* in these costs.

Kirsch Direct at 30:9-19 (emphasis in original). Note that, in the foregoing excerpt, the statistics cited by Dr. Kirsch are derived entirely from the data prepared by Joint Applicants' witness Mr. Kemp.

Finally, as demonstrated in the following section, GPE's reliance on Mr. Kemp's validation of GPE's estimated merger savings is undercut by GPE's witness Flaherty's attack on the data that Mr. Kemp employed.

b. GPE Witness Flaherty's attack on the data and analyses presented by GPE Witness Kemp, if valid, undercut the reliability of GPE's estimated merger savings.

In a tactical gambit of some note, GPE witness Flaherty directly attacked the validity of the data and analyses provided by GPE witness Kemp and, derivatively, KEPCo witness Dr.

Kirsch's use of them.[19] Preliminarily, it must be remembered that Mr. Kemp helped develop GPE's merger savings estimates (Kemp Direct at 14:9-10; Tr. Vol. 5, 1259:7-13 (Kemp)) and he used the very same data from his industry merger database that Mr. Flaherty testifies are unreliable to validate the reasonableness of those savings estimates.[20]

Mr. Flaherty repeatedly criticizes Mr. Kemp's use of FERC Form No. 1 data to evaluate merger savings in a manner similar to the following:

> But if you are working at a FERC level much like Mr. Kemp did when we talked about it earlier, the same problems that you have in terms of trying to distinguish merger impacts from gross costing acts would still be present. That is why I don't use FERC accounts to try to make this kind of determination.

Tr. Vol. 5, 1325:9-15 (Flaherty); *see also id.*, 1310:4-21, 1312:18-25 (Flaherty).

In contrast, Mr. Kemp testified that:

> Data on realized efficiencies or savings are most reliably and consistently obtained from utilities' annual filings to Federal Energy Regulatory Commission ("FERC") on their actual costs of utility operations (FERC Forms 1 and 2).

Kemp Direct at 28:21-29:1. Indeed, FERC filed data and accounts are the very basis for Mr. Kemp's comparison of GPE estimated savings to other utility mergers.

> Q: What steps did you take to prepare GPE's estimated Transaction savings for comparison to other utility transactions?
>
> A: The base 2015 NFOM costs for both GPE (i.e., KCP&L) and Westar were obtained directly from their 2015 FERC Form 1 reports. These base costs were inflated to 2016 dollars using the CPI-U.
>
> Since the savings estimates were prepared by major operational function, and not necessarily by FERC account grouping, I have classified the estimated Transaction savings into the functional groups of accounts in FERC's Uniform

[19] "So it's going to happen when you look at macro comparisons on a FERC account basis, you don't see the actual savings identified by category to be realized get lost in the noise of the escalations driving all the other costs that comprise individual categories. That's what happens in Mr. Kemp's analysis when he goes out of A&G. It happens in Mr. Kirsch -- or Dr. Kirsch's analysis when he picks up the same data base and tries to look at it in the manner that he did." Tr. Vol. 5, 1311:12-20 (Flaherty).

[20] "I compared GPE's estimates with the range of utility industry experience, and considered the deal-specific circumstances." Kemp Direct at 28:12-13.

> System of Accounts: Generation, Transmission, Distribution, Customer Service and A&G. The Sales function was not analyzed because it is an immaterial cost item (less than $0.5 million per year) at both GPE and Westar. I assigned each line item in GPE's savings estimates to the appropriate FERC function, based on GPE team leaders' descriptions of the type of costs in the line item.

Id. at 30:3-15.

If Mr. Flaherty's criticisms are correct, Joint Applicants' direct case in support of the reasonableness of their estimated merger savings evaporates.

Mr. Flaherty's criticisms, however, are themselves implausible. The premise of his testimony in this regard is that a more granular analysis of savings than Mr. Kemp performed will show merger savings that otherwise get lost in other higher post-merger utility costs (Tr. Vol. 5, 1312:23-1313:25 (Flaherty)), *i.e.*, that "other costs over a broader database will just overwhelm the merger savings"(*id.*, 1311:24-1312:1 (Flaherty)). Mr. Flaherty's criticism is belied by Mr. Kemp's data, as summarized in Dr. Kirsch's Table 3 on page 31 of his direct testimony. For Mr. Flaherty's criticism to be valid, one must accept that the 60% of the 25 mergers shown on Table 3 that failed to meet their cost savings targets by large margins had "other costs over a broader database" systematically higher than forecast even though those costs have nothing to do with the mergers. Mr. Flaherty specifically identifies cost increases due to "regulatory mandates" or "changes in the external environment." (*Id.*, 1313:3-6 (Flaherty); but this would imply that merging utilities have a habit of systematically underestimating these two types of costs. In other words, for Mr. Flaherty's criticism to be plausible, each of the 15 acquiring utilities materially underestimated the "other costs" unaffected by the merger because each of their 15 mergers experienced changed regulatory mandates or other external factors in the first three years after consummation of the transaction that caused non-merger related costs to rise to a level that dwarfed merger savings. The far more plausible explanation is that merging utilities systematically underestimate post-merger costs and overestimate merger cost savings, and that Dr. Kirsch's analysis of Mr. Kemp's data shows exactly what it purports to show—that of the 25 mergers evaluated in his Table 3 "fifteen failed to achieve their announced goals and twelve failed to achieve any savings at all." Kirsch Direct at 30:16-17.

c. GPE Witness Flaherty's criticisms of the Boston Consulting Group study presented in Dr. Kirsch's testimony to show the unreliability of merger savings estimates misreads and mischaracterizes that study, the results of which are verified by Dr. Kirsch's analysis of GPE Witness Kemp's industry-wide merger savings data.

Dr. Kirsch also presented the results of a study of utility mergers between 1997 and 2005 performed by the Boston Consulting Group ("BCG")[21] which shows that, compared to mergers in all U.S. industries, which created an average total shareholder return ("TSR") of two to three percent relative to the market index two years after closing, utility mergers typically underperformed the utility index by about two to three percent three years after the transaction announcement, and T&D mergers underperformed the index by about four percent. Kirsch Direct at 32:5-11. According to BCG, utility mergers underperformed the TSR index because:

> [h]istorically… acquirers have found it difficult to derive value from merged utilities. With the exception of some vertically integrated deals, most M&A deals have been value-neutral or value-diluting. This track record can be explained by a combination of factors: steep acquisition premiums, harsh regulatory givebacks, anemic cost reduction targets and (in more than half of the deals) a failure to achieve targets quickly enough to make a difference. In fact, over an eight-year period, *less than half the utility mergers actually met or exceeded the announced cost reduction levels resulting from the synergies of the merged utilities.*

Id. at 32:17-25 (emphasis in original). Figure 1 of Dr. Kirsch's Direct Testimony, excerpted from the BCG Study, graphically depicts this failure to achieve projected cost savings. *Id.* at 33:1-5.

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[21] P. Seshadri, R. Peters, J. Gell, G. Morsches, and M. Finger, Utility M&A: Beating the Odds, The Boston Consulting Group, (Mar. 1, 2007) (cited in Kirsch Direct at 32:5-33:5), *available at* https://www.bcgperspectives.com/content/articles/energy_environment_mergers_aquisitions_utility_m_and_a/#chapter1.

GPE witness Flaherty levels two baseless criticisms at Dr. Kirsch's use of the BCG study: (1) the BCG study is conducted at a macro-level and does not take into account savings at the category level; and (2) Dr. Kirsch cherry picked language from the BCG study. Flaherty Rebuttal at 56:6-10. On cross-examination, Mr. Flaherty muddled the matter further by acknowledging that Figure 1 measures changes in cost (Tr. Vol. 5, 1320:24-1321:14 (Flaherty)), but testified it does not represent cost changes "as we have been describing cost changes this afternoon" (*id.*, 1321:14-16 (Flaherty)). But, when asked on cross-examination whether the costs measured by the vertical axis of Figure 1 measured merger synergy savings and what he thought the term "actual savings" meant on the vertical axis, he twice dissembled and did not answer the questions. *Id.*, 1323:21-1325:15 (Flaherty).

In point of fact, as demonstrated above and as carefully explained in Dr. Kirsch's testimony, the BCG study measured TSR underperformance, but it clearly identified as a significant cause of that TSR underperformance the fact that, over an 8-year study period "*less than half the utility mergers actually met or exceeded the announced cost reduction levels resulting from the synergies of the merged utilities.*" Kirsch Direct at 32:23-25 (emphasis in original). It is that failure to meet or exceed announced merger savings that is measured by Figure 1, and it is that failure that this Commission must bear in mind when evaluating Joint Applicants' assurances of robust merger savings. Mr. Flaherty's criticisms of the BCG study have nothing to do with the validity of the data presented in Dr. Kirsch's testimony and in particular Figure 1. Flaherty Rebuttal at 56:11-58:16.

Indeed, the BCG findings and Dr. Kirsch's testimony are validated by the data and analyses presented by GPE witness Kemp. Table 3 on page 31 of Dr. Kirsch's direct testimony, which is based entirely on data developed by Mr. Kemp, shows essentially the same woeful achievement of estimated merger savings as reported by the BCG study.

In addition, Mr. Kemp's own Exhibit WJK-5 graphically illustrates the sharp contrast between forecasted and actual achieved merger savings, and thereby highlights the unreliability of merger savings forecasts. As Dr. Kirsch testified:

> Figure 2, which is a copy of Mr. Kemp's Schedule WJK-5, shows that every functional category has a plus-and-minus range of at least 50%, and for two functions over 100%. For all categories, there were instances in which costs after merger went down by at least 20%. For all categories, there were instances in which costs after merger went up by at least 20%.

Kirsch Direct at 33:11-34:3. On cross-examination, Mr. Kemp readily acknowledged that his Exhibit WJK-5 showed actual achieved non-fuel operations and maintenance ("O&M") savings ranging from 33% savings to 32% cost increases, meaning that, of the mergers he studied, some achieved non-fuel O&M savings of up to 33% while others experienced non-fuel O&M cost increases of up to 32%. Tr. Vol. 5, 1261:19-1262:2 (Kemp).

The uncertainty of estimated merger savings is well-established. As reported in a whitepaper prepared by Mr. Kemp in 2011 and reproduced by Dr. Kirsch as Figure 3 on page 35 of his direct testimony, Mr. Kemp compared the sum of the separate utility costs one year prior to the merger closing to the combined utility costs four years after closing. Mr. Kemp found that, with a single exception, every functional category has a plus-and-minus range of well over 100%. For all categories, there were instances in which costs went down by at least 23% and went up by at least 49%. Kirsch Direct at 34:9-35:9. Interestingly, for the 32 mergers reflected in Figure 3, the median changes for all categories, with the exception of Sales, is close to zero. But, as Dr. Kirsch noted: "the key point is that there is significant uncertainty as to the savings outcomes in each of the categories that Mr. Kemp has analyzed for Joint Applicants' Transaction." *Id.* at 36:3-5.

d. GPE Witness Kemp's attempt to buttress GPE's estimated merger savings with generalized observations that merging utilities enjoy a cost advantage over non-merging utilities does not bear scrutiny.

Mr. Kemp's attempt to buttress Joint Applicants' estimates of merger savings with the generalized observation that merging utilities enjoy a statistically significant cost advantage over non-merging utilities, with the merger group "consistently enjoying bigger cost decreases or lower cost increases," does not bear scrutiny. *Id.* at 35:14-36:3. As Dr. Kirsch explained, the regression model Mr. Kemp used to support his claim fails to account for the myriad factors that can influence both controllable costs and non-controllable costs for both merging and non-merging firms. *Id.* at 37:5-13. His model is therefore inadequate for capturing secular industry trends in costs or for controlling for trends in merged and non-merged utilities' costs over time, especially for the pre-merger period. His model also fails to capture utility-specific and industry cost trends that would require longer-term data series than he uses. Table 4 on page 39 of Dr. Kirsch's direct testimony summarizes, for each of the seven cost categories, elements of Mr. Kemp's regression results that Dr. Kirsch examines. The table shows clearly that even Mr. Kemp's flawed analysis fails to find statistically significant differences between merged and non-merged utilities in their total NFOM costs and in three of the six cost categories. In fact, Mr. Kemp's analysis implies that the cost trends for merging utilities might even be worse than those of non-merging utilities for total NFOM costs and three of the six cost categories. *Id.* at 38:5-39:5. Mr. Kemp had the opportunity to respond to Dr. Kirsch's criticism of Mr. Kemp's analysis in his rebuttal testimony, but he did not do so.

Dr. Kirsch cited a peer-reviewed study published in the *International Journal of Industrial Organization* that questions whether mergers improve efficiency.[22] The study presented statistically significant regression results to support its conclusions that: (1) efficiency of buyers in a merger is not significantly different statistically from non-merged firms before or after the merger, but (2) the efficiency of sellers is significantly higher than non-merged firms before the merger but declines to the average for non-merged utilities after the merger. Kirsch Direct at 42:16-20.

3. The Commission Should Ignore GPE Witness Busser's Suggestion that GPE's Integration Project Has Confirmed Mr. Kemp's Savings Estimates; It Has Not.

On cross-examination, GPE witness Busser testified that Joint Applicants were comfortable moving ahead with the acquisition application using Mr. Kemp's savings estimates because Joint Applicants would have eight months to confirm them (Tr. Vol. 5, 1216:17-1217:8 (Busser)), but he then went further and stated that "We were able to confirm those numbers. We have a, a very high level of confidence that they will be achieved." *Id.*, 1217:6-8 (Busser). He testified that the updated savings estimate data were provided in a recent data response so it would be ready for the parties to brief based upon those updated numbers. *Id.*, 1221:24-1222:4 (Busser).

The suggestion that Joint Applicants have new, more refined savings estimates is devoid of support on the record except for Mr. Busser's unsupported testimony. Joint Applicants could have provided some or all of that supposedly updated analysis in their rebuttal testimony, when intervenors would have at least had two days to conduct discovery, but Joint Applicants apparently made a strategic decision to withhold this information and not include it in their

[22] J. Kwoka and M. Pollitt, "Do mergers improve efficiency? Evidence from restructuring the US electric power sector," *International Journal of Industrial Organization*, 2010, 28: 645-656 (cited in Kirsch Direct at 40:4-43:11).

rebuttal testimony. Mr. Busser testified that the information was probably in multiple documents provided in discovery "[b]ut there is – it probably is the document with the most succinct level of detail in terms of the efficiencies, which is I think what you're driving at that, that would be a December 20, 2016, Steering Committee report that I gave." *Id.*, 1222:12-19 (Busser). In other words, Joint Applicants had the data and analysis to which Mr. Busser refers at least 21 days before the filing of their rebuttal testimony, but chose not to provide that information in that rebuttal testimony in time for intervenors and Staff to be prepared to address it, or to permit the Commission to ask questions about it. Instead, the Commission, parties and Staff are left with platitudes such as "we have a high degree of confidence" with no way to evaluate whether such confidence is warranted.

Subsequent examination by BPU counsel revealed somewhat less confidence by Mr. Busser, as the savings estimates that he testified GPE was able to "confirm" proved instead to be non-final. He testified that the plans as to how the efficiencies will be achieved "exist in draft form at the integration team level" (*id.*, 1219:20-21(Busser)), but none have been approved through the integration governance process (*id.*, 1219:21-22 (Busser)); that the determination of the costs to achieve is being performed as part of the determination of efficiencies, and "[a]s such, these amounts have not been finalized" (*id.*, 1221:3-6 (Busser)); and these details will likely be finalized by the end of March (*id.*, 1221:10-12 (Busser)).

Testimony that purports to "confirm" estimates that are subsequently admitted to not yet be final, and analyses that Joint Applicants could have placed before this Commission in testimony, but which they instead chose to slip into data responses when intervenors and staff had two days in which to conduct discovery, should be accorded no weight.

B. Joint Applicants Have Not Demonstrated that Operational Synergies Exist to Justify the Payment of a Premium of $4.9 Billion above Book Value.

Joint Applicants have not come close to carrying their burden under Merger Standard (a)(iv) to demonstrate that the acquisition of Westar will produce operational synergies that justify the payment of a premium in excess of book value. When Joint Applicants prepared direct testimony in this case, they had not even conducted an analysis of whether the merger savings would exceed the acquisition premium. Tr. Vol. 3, 624:23-625:2 (Bryant). The best synergy savings number that Joint Applicants have—the erroneously calculated $4.3 billion net present value figure—is still $0.6 billion short of the $4.9 billion acquisition premium.[23] With the corrections identified by Dr. Kirsch, the net present value of synergy savings is between $2.9 billion to $3.2 billion, which is $1.7 billion to $2.0 billion short of the acquisition premium. Mr. Bryant testifies, contrary to the evidence, that "[t]he net present value of Transaction-related savings is consistent with the acquisition premium in excess of book value," but he provides no merger savings numbers, beyond his incorrectly calculated net present value of operational savings, to justify the acquisition premium. Bryant Supplemental Direct at 4:13-14.

When asked to "identify in detail all of the reasons for paying the premium, even though the premium (above market and above book) exceeds the savings," KCP&L's full response was "[t]he purchase price [GPE] agreed to pay (which necessarily includes the acquisition premium, however calculated) was necessary to win the competitive bidding process and is justified for the reasons explained in Mr. Bryant's direct testimony." Kirsch Direct at 44:16-21 & n.72. As summarized by Dr. Kirsch:

[23] As demonstrated in detail in Section V.A, above, when all of the errors in GPE's flawed net present value calculation are corrected, the merger synergy savings are at least $1.7 billion less than the $4.9 billion acquisition premium. Kirsch Direct at 43:16-19: "The acquisition premium of $4.9 billion exceeds by $0.6 billion GPE's own number for the net present value of operational savings, and exceeds by $1.7 billion my corrected version of GPE's number."

> It appears that $4.9 billion acquisition premium was determined by GPE's decision "to win the competitive bidding process," and that GPE is unable to quantify the benefits that would justify the $4.9 billion premium.
>
> Joint Applicants' submission simply lacks numbers that support the $4.9 billion acquisition premium. GPE's witnesses repeatedly refer to the detailed work performed by Mr. Kemp and the reasonableness of Mr. Kemp's approach and findings; but the major problems are not due to Mr. Kemp's work but are instead due to GPE's erroneous translation of Mr. Kemp's findings into net present values and GPE's failure to quantify any benefits other than those quantified by Mr. Kemp.

Id. at 45:1-12.

On redirect, GPE witness Bryant sought to minimize the vast gulf created by the $1.7 to $2.0 billion shortfall in merger savings by noting that even under the merger savings Dr. Kirsch calculates (modified somewhat by Mr. Bryant's testimony), $3.6 billion in merger savings is "greater" than the $2.3 billion acquisition premium. Tr. Vol. 3, 771:19-21 (Bryant). The $2.3 billion figure is the measure of the acquisition premium against Westar's "undisturbed" stock price, whereas the $4.9 billion figure is the measure of the premium above book value. Bryant Supplemental Direct at 8:7-8. The correct measure of the acquisition premium should be against book value. As Dr. Kirsch testified:

> The relevant yardstick is the book value, because the book value is put into rate base and is the basis for setting future customer charges. As Staff rightly notes,
>
> > …a regulated utility's book value has unique meaning and importance in the context of utility regulation; this is the value that a utility's shareholders are legally entitled an opportunity to earn a 'return on' and a 'return of' for purposes of ratemaking. In other words, there is very little difference between Westar's rate base and its book value of assets.
>
> Even GPE acknowledges that "after the closing of the Transaction, rates will continue to be set on the basis of net book value of assets used and useful in providing electric service to customers just as they have been for many years in the state of Kansas." [Ives Supplemental Direct Testimony at 4:19-21.]
>
> . . . .

> Mr. Bryant's claim notwithstanding, the market value of Westar's stock is irrelevant to the determination of the acquisition premium in the context of regulated utilities because it is the book value, not the market value of the stock, that is put into rate base after a merger.

Kirsch Direct at 45:15-46:12. It would seem reasonable to surmise that GPE switched to comparing its $4.3 billion estimated savings to the value of the acquisition premium based upon Westar's stock price because it has no answer to the evidence that demonstrates it falls woefully short of the real measure of the acquisition premium—the $4.9 billion above book value.

In the absence of any ability to close the gap between estimated savings and the acquisition premium, GPE instead argues that the acquisition premium is within industry norms. Mr. Bryant testified that, as a measure of premium above stock price, the acquisition premium ranged from 14% to 42% above stock price one day prior to announcement in eleven utility transactions over the past two years, whereas GPE's acquisition premium above stock price is 36%. Bryant Direct at 11:11-14, 11:7. As Dr. Kirsch points out, those facts hardly evidence the wisdom of a 36% acquisition premium, as it places GPE third highest out of a collection of 13 recent utility transactions. Kirsch Direct at 47:1-11.

Nor is it at all clear that GPE's acquisition premium above stock price is "only" 36%. Dr. Kirsch testified that:

> It is not clear whether Mr. Bryant is correct because there is an open question as to the date that Westar's stock price was disturbed by news of a potential merger. In response to a data request, GPE has indicated that both November 3, 2015 and March 9, 2016 are plausible dates for measuring the undisturbed Westar stock price. With respect to the former date, GPE has stated,
>
>> November 3, 2015 is the date that in the early stages of the process best represented 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.

> The Westar stock price closed at $39.51 on November 3, 2015 and at $44.08 on March 9, 2016. The $60 acquisition price is a 51.9% premium over the November 3, 2015 market price and a 36.1% premium over the March 9, 2016 market price. Thus, the purchase price might have a substantially larger premium over the undisturbed Westar stock price than is indicated by Mr. Bryant; and that premium of 51.9% is higher than any of the recent premiums shown in Table 5. This raises yet another red flag against the wisdom of the purchase price and acquisition premium that GPE is paying in this Transaction. [footnotes omitted]

Id. at 48:1-19.

Moreover, the reasonableness of the amount paid is not merely a function of what others may pay, but also a function of the ability of the entity in question to pay that amount. GPE is not a large player in the utility sector, and the evidence is clear that GPE strained to win the bid for Westar. Tr. Vol. 1, 192:7-13 (Ruelle); Ex. BPU-13 at 14. To put the $4.9 billion acquisition premium in context, it exceeds by $100 million the entire market capitalization of GPE. Ex. BPU-13 at 14 ($4.8 billion market cap). While the $4.9 billion premium is a measure of premium above book value, it illustrates the extreme nature of GPE's proposed acquisition premium. KEPCo witness Dr. Dismukes testified that, even measured as $2.3 billion above stock price, GPE's acquisition premium "is one of the largest reported over the past 2 years." Dismukes Direct at 47:9-11; *see* Ex. DED-10.

VI. FINANCIAL ISSUES—JOINT APPLICANTS HAVE NOT SHOWN 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.

Pursuant to Merger Standard (a)(ii), the Commission evaluates whether the proposed transaction promotes the public interest by closely examining "the reasonableness of the purchase price" to assess "the effect of the transaction on consumers." Order on Merger Standards at ¶ 5. The examination is a fact-specific inquiry of two key factors—(1) whether the purchase price is reasonable in light of the savings that can be demonstrated from the merger and

(2) whether the purchase price is within a reasonable range. *Id.* Joint Applicants' brief does not discuss the first factor, and their presentation on the second factor focuses narrowly on concerns raised by Staff.[24] JA Br. at 71-78.

The GPE purchase price for Westar is extreme and unreasonable by several metrics. The stretch GPE is making to acquire Westar is perhaps best illustrated by the fact that the $12.2 billion dollar purchase price dwarfs GPE's current market capitalization of $4.8 billion. Ex. BPU-13 at 14. As Dr. Dismukes and Dr. Kirsch testified:

> As shown in the exhibit [DED-4], the proposed transaction has the highest purchase price of all mergers in the last year. After the Iberdrola and UIL merger at a $17.9 billion purchase price, the only merger coming relatively close to the proposed transaction's purchase price is the merger of Southern Company and AGL Resources, which was valued at $12 billion. However, when compared on a per customer basis the proposed transaction far exceeds that of the Southern Company and AGL Resources transaction as well as those of its peers, with a price of $17,379 per customer, which is nearly 260 percent greater than the average price per customer of $4,819 for similar mergers that have occurred within the last two years.

Dismukes Direct at 27:19-28:8.

> In this Transaction, GPE will pay a $4.9 billion acquisition premium to create an organization that will provide no more than $200 million per year in quantified benefits (i.e., operational savings) in 2020 and beyond. That is only a 4% return on investment in years 2020 and beyond. The return is even lower before 2020, only 1% in 2018 and 3% in 2019.
>
> The mystery is deepened by the fact that, according to the Joint Application, the benefits from operational savings will go largely to customers, as GPE shareholders retain only the portion of operational savings that are not allocated to customers until the next general rate case. Thus, GPE will supposedly get little return on or of goodwill, which means that it will have on its books a $4.9 billion asset that is making little money for shareholders. It is difficult to see how such an asset can have much value for shareholders.

[24] Joint Applicants' substantive response, however, does not set out an affirmative case supporting the reasonableness of the purchase price. They argue as a threshold matter that the Commission should not apply merger standard (a)(ii) because "this standard has really been used to determine how much of the acquisition premium could be amortized annually and recovered in rates." JA Br. at 70. The Commission should reject this argument, as explained in Section IV.

Kirsch Direct at 50:10-21. The deal is great for Westar shareholders,[25] but it is hard to discern what value GPE's shareholders and customers get from this purchase price.

A. Joint Applicants Have Not Shown the Purchase Price to be Reasonable in Light of Anticipated Merger Efficiencies.

There is no dispute that the savings from merger efficiencies are critical to the transaction. GPE witnesses testified that GPE was able to offer the highest price because the projected merger efficiencies freed up cash flows that could be directed to financing the transaction. Mr. Bryant explained that "[a]s the winning bidder, GPE's bid was the highest of all submitted . . . . [I]t is reasonable for GPE to be at the high end of this range of values given the numerous efficiency opportunities resulting from the geographic proximity of the two companies and their shared ownership of assets." Bryant Rebuttal at 35:5-10; *see* Bryant Direct at 7:12-14 ("the savings to be realized from the Transaction, which are described and quantified in the Direct Testimony of William Kemp, justify the level of consideration being paid by GPE in connection with the Transaction"). These savings and efficiencies are supposed to free up cash that Joint Applicants will need to service holding company debt, and pay dividends on convertible preferred and common stock.[26] *See* JA Br. at 7.

The degree of confidence around Joint Applicants' ability to achieve projected operational savings and efficiencies in the timeframe projected and in amounts projected is of utmost importance. Joint Applicants have not shown the transaction meets the Merger Standard

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[25] As Mr. Ruelle explained, the auction process and hiring Guggenheim as the company's advisor throughout that process to ascertain the best value of the company fulfilled his fiduciary duties to Westar shareholders. Tr. Vol. 1, 213:19-215:12 (Ruelle); Tr. Vol. 3, 547:3-7 (Reed) ("The duty of any director of a publicly traded company….is to act as a fiduciary in the best interest of . . . the stockholders that own that company"); Ex. BJS-60 at 77 (Westar Board approval based on determination that the GPE offer is "in the best interests of Westar and its shareholders").

[26] GPE's obligations would not have been as foreboding if it had structured the offer without such a high cash payment to Westar shareholders. The deal provides Westar shareholders with 85% of consideration to be paid in cash—$51 per share. Accordingly, the Commission's assessment of the soundness of the estimated merger savings is also material in determining the reasonableness of the share of cash consideration to be paid to shareholders.

(a)(ii)'s first factor for two reasons. First, for the reasons explained in Section V.A *supra*, Joint Applicants' merger savings projections are not reliable and the net present value of the savings that could be realized does not come close to justifying the purchase price. [redacted] Dr. Dismukes' analyses, presented in Section VII.B.5, shows the deleterious impact on GPE's financial metrics if efficiency savings and rate case revenues fall short of projections. At bottom, the evidence of record does not support a finding that the purchase price is reasonable in light of demonstrated savings.

B. Joint Applicants Have Not Shown the Purchase Price to be Within a Reasonable Range of Prices Paid in Comparable Utility Transactions.

GPE's acquisition of Westar is "the second highest valued transaction in the distribution energy market in the U.S. in the last two years." Dismukes Direct at 27:12-13. When compared against premia over stock price paid in recent utility transactions, the acquisition premium for this transaction is the second highest in absolute dollars and, at $3,227 per customer, is substantially greater than any other per customer premium paid in recent utility transactions. Ex. DED-10 (average per customer acquisition premium is $997). The second highest per customer premium over stock price—at $1,543 per customer—is the Macquarie Infrastructure and Cleco deal, but that transaction's $438 million acquisition premium is among the lowest of all recent transactions and is about one-fifth of the acquisition premium in this case. Ex. DED-10 (recent acquisition premia measured against stock price). Dr. Dismukes testified that the transaction's very high purchase price—and excessive acquisition premium—would likely lead to a financially weakened Westar and KCP&L. He explains:

> [F]inancial weakness is largely the result of the transaction's purchase price, which is (1) very high in absolute terms; (2) is very high relative to the size of the respective utilities; (3) very high relative to recent utility merger transactions; and, most importantly, (4) is very high relative to the synergy savings likely to arise from this transaction.

Dismukes Direct at 5:10-14.

Joint Applicants' brief makes no mention of the factors Joint Applicants initially presented in support of their claim that the total consideration to be paid for Westar is within a reasonable range. *Compare* JA Br. at 71-78 *with e.g.,* Ex. DRI-1 at 1 (citing, as comprehensive evidentiary support for 5(a)(ii), Bryant Direct at 6:1-9:2, 11:5-12:7; Bryant Supplemental Direct at 2:22-7:10; Ives Direct at 18:11-21:21; Ives Supplemental Direct at 4:1-10:5). As KEPCo explains below, however, none of Joint Applicants' putative reasons show the purchase price to be within a reasonable range.

1. Westar's Auction Process Is Neither Necessary Nor Sufficient to Show the Purchase Price to Be in the Range of Reasonableness.

Joint Applicants contend that the purchase price is reasonable because Westar decided to solicit offers to acquire the company and then accepted the offer of the highest bidder. Bryant Direct at 7:9-11 (consideration . . . was determined through a competitive market auction process" and is therefore reasonable). Merger Standard (a)(ii), however, is directed to examining the effect of the transaction on customers. How the deal was reached tells us little about whether the resulting price is within a reasonable range from a customer perspective. In this case, the process appears to have pushed up the purchase price to the benefit of Westar shareholders, but not GPE or Westar customers. Ex. JAL-47 at 8 (emphasis added) ("Just when we thought the M&A trend was getting long in the tooth and the deals with big premiums were coming to an end, the metrics of the [Westar] acquisition were *even better for the seller* than some of the prior deals").

The amount of consideration that GPE has agreed to pay to Westar shareholders, and the proportion of consideration to be paid in cash, suggest that GPE acted with much haste and without adequate consideration of the risks. *See generally* Appendix B (describing GPE's participation in the Westar auction). GPE's $60-per-share offer is more than $2 billion greater in consideration than the $45 to $47-per-share offer in October 2015.[27] The cash portion of its offer increased from about $13 to $14 per share to $51 per share—an increase of about 360% percent. The acquisition premium over stock price nearly tripled when compared against the acquisition premium offered in October 2015, at Westar's October 6, 2015 closing price.[28] All of this for a company—GPE—that was by far the smallest of the final bidders in terms of market capitalization. Ex. BPU-13 at 14.

The amount of consideration that GPE has agreed to pay to Westar shareholders, and the proportion of consideration to be paid in cash, were not just enough to win, they dwarfed the last best offers of its competitors. GPE's $60 per share offer exceeded the offer of the next highest bidder ("Bidder D") by more than $550 million and by $26 cash consideration per share.[29] It is difficult to look at a bid that exceeds the competition by more than one-half billion dollars and conclude that auction produced a reasonable purchase price (or acquisition premium) from the

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[27] The transaction price, at $60 per share, is $15 per share greater than the October 2015 offer of $45-$47 per share, increasing the consideration offered by about $2.1 billion (*i.e.*, multiplying $15.00 per share with GPE's estimate of the number of Westar shares outstanding). BPU-1 at 19/25 (141 million "Sky Shares Outstanding").

[28] The transaction price, at $60 per share, is $21.83 per share greater than the October 6, 2015 price, producing an acquisition premium of over $3 billion when measured against the October 6, 2015 price (*i.e.*, multiplying $21.83 per share with GPE's estimate of the number of Westar shares outstanding). *Id.* at 19/25 (141 million "Sky Shares Outstanding"). The acquisition premium included in GPE's October 2015 offer was about $1.3 billion. *Id.* at 19/25 (multiplying premium of $9.47 per share times 141 million "Sky Shares Outstanding").

[29] Westar's documents show that GPE's offer, at $60 per share, is $4-$6 per share greater than the $54-$56 per share of the next highest offer of "Company 2." Ex. BPU-13 at 9. The difference in value between GPE's offer and Company 2's offer is determined by multiplying $4 (or $6) per share and the 142.685 million shares outstanding of Westar stock as of May 31, 2016. *Id.* at 11 (n.1). This calculation shows GPE's offer to be $570 million to $856 million higher than Company 2's next highest offer. Company 2 and Company 3 also offered substantially lower percentages of cash consideration than GPE. *Id.* at 9. Company 2 offered 45% cash consideration, about $25 per share; Company 3 offered 20% cash consideration, about $10.20 per share. *Id.* at 9. *See also* Tr. Vol. 1, 188:1-189:7, 190:6-191:12, 194:12-195:4 (Ruelle).

perspective of customers. What is clear, however is that the auction produced a very high price and a substantial cash payout for the principle beneficiaries—shareholders of Westar.

2. Claims that the Acquisition Premium Is In-Line with Recent Transactions Miss the Mark.

Joint Applicants claim that the purchase price "is comparable with recent market transactions of this nature" (Bryant Direct at 8:18-19) because the "premiums paid [in 11 recent corporate utility transactions] . . . . have ranged from 15% to 50% for regulated utility transactions in the past two years, with the average being 30%." *Id.* at 11:11-29. Joint Applicants conclude that "[o]ur purchase price is consistent with those ranges." *Id*. at 11:19-20.

Dr. Kirsch cautions, however, that Mr. Bryant's comparisons to other utilities' acquisition premiums is not responsive to the Merger Standards:

> [T]he market value of Westar's stock is irrelevant to the determination of the acquisition premium in the context of regulated utilities because it is the book value, not the market value of the stock, that is put into rate base after a merger.

Kirsch Direct at 46:9-12. Joint Applicants have not produced any expert analyses that compare acquisition premium over book value for utility transactions.

As described in Section V.B, even GPE's misguided argument that the premium over stock price is in line with recent transaction is not persuasive. Dr. Kirsch pointed out that the premium GPE paid at the high end of comparable recent deals. *Id.* at 47:7-8. Moreover, measured from the November 3, 2016 Westar stock, the "$60 acquisition price is a 51.9% premium over the November 3, 2015 market price and a 36.1% premium over the March 9, 2016 market price." *Id.* at 48:13-14.[30]

[30] The acquisition premium over the October 6, 2015 stock price corresponding to GPE's October 2015 offer would produce a substantially higher premium to market price than the November 3, 2015 market price. Tr. Vol. 1, 168:25-169:17 (Ruelle) ("And that's the price[] referred to here in the range of 20 to 25 percent of the then current price of Westar. And it goes on to say that the then current price of Westar was $38.17").

3. Joint Applicants' Expectation to Maintain Investment Grade Ratings Is Not Sufficient to Demonstrate the Reasonableness of the Purchase Price.

Joint Applicants assert that the purchase price is reasonable because they believe they can retain "the investment grade credit quality of each utility after the transaction . . . and expected investment grade rating at the GPE holding company." Bryant Direct at 8:10-12; *see* JA Br. at 12. Joint Applicants' testimony is based on GPE's understanding that two of the three largest credit rating agencies will not downgrade the companies' credit ratings to below investment grade as a result of the transaction's closing.

The Commission should give little weight to Joint Applicants' statements about credit ratings offered as evidence that the purchase price is within a reasonable range. JA Br. at 12, 28. Joint Applicants' statements are based on communications with Moody's and Standard & Poor's when GPE "engaged the formal rating evaluation services" of these companies during the auction process in April and May 2016.[31] Moody's rating assessment states plainly that these services "are not equivalent to and do not represent traditional Moody's Credit Ratings." Ex. BPU-4 at 1. The assessments are "based solely [on] information and assumptions provided by the Applicant," are "assigned on a 'point-in-time' basis," and "will not be monitored going forward." *Id.* at 11. Moreover, "[e]xisting assigned credit ratings are subject to revision or withdrawal by Moody's at any time." *Id.*

[31] Ex. BPU-3 at 8. To better understand the credit agencies' tipping point for a downgrade, GPE "solicit[ed] feedback on pro forma credit and to determine the outer bounds of [GPE's] financing capabilities." *Id.* at 8. GPE intended the financing scenarios "to solve for an investment grade outcome for the combined company" and to "locat[e] the outer boundaries," *i.e.*, "identify the line between different rating outcomes." *Id.* at 8-9. GPE submitted three scenarios for evaluation and, later, requested the ratings agencies to consider two more scenarios. *See, e.g.*, Ex. BPU-4 (reporting on scenarios one through three), Ex. BPU-5 (reporting on scenarios four and five). Joint Applicants have not offered any evidence showing that the financing plan actually deployed was reviewed by Moody's or Standard and Poor's.

The credit ratings agencies' cautionary assessments of GPE's proposed financing structures are more instructive as to the precariousness of Joint Applicants' credit ratings if the transaction is consummated. Moody's, for instance, cautioned that the financing structure produced extremely weak financial metrics:

> These financial metrics result in a weakly positioned Baa3 holding company that has average consolidated regulatory support and unique exposure to a single-unit nuclear facility. Average cash flow to debt metrics around 14% leave little room for error within the [GPE] forecast assumptions, including regulatory outcomes and economic factors (including interest rate levels) that are outside of management control. The combination of these factors would expose [GPE] to a lower tolerance threshold for negative credit events, and a higher likelihood for downgrade in the face of an adverse circumstance.

Ex. BPU-5 at 5; *see* Ex. BPU-4 at 8 ("The combination of' material size and average consolidated regulatory oversight places a higher emphasis on the financial impacts of the [GPE] transaction"), 9 (noting that GPE would be weakened financially for several years"). Joint Applicants did not consult with Fitch, the third major credit rating agency. Fitch stated:

> GXP's long-term financial policy, the amount of hybrids[[32]] used to finance the acquisition, GXP's deleveraging plan as well as the level of integration and/or ring-fencing going-forward will become key criteria in assessing Westar's and KGE's credit profiles after the acquisition is completed.

Ex. JAK-14 at 1. GPE has blindly ignored the many cautions from the ratings agencies and other members of the financial community as to the risks posed by this transaction. Contrary to Joint Applicants' claims, the credit assessments of GPE, Westar, and KCP&L do not prove that the purchase price is reasonable.

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[32] A hybrid security is a security that is neither plain senior debt or common equity; it includes convertible preferred equity. *See* Section VII.B.3 *infra.* Unlike S&P and Moody's, Fitch typically assigns 50% to 100% debt value to hybrid securities in the utility sector. *Compare* Ex. JAK-14 at 1 *with* Ex. BPU-4 at 12 ("Hybrid instruments achieve base E treatment (100% equity) under Moody's hybrid's methodology").

4. Joint Applicants Offer No Support for Their Claims that Due Diligence by OMERS and Westar Demonstrate the Reasonableness of Price.

Joint Applicants also claim that the consideration to be paid by GPE is reasonable because OMERS and Westar each conducted "substantial financial due diligence" before taking on a substantial equity stake in GPE in connection with this transaction. Bryant Direct at 8:18-9:2. This testimony does not describe the due diligence performed by OMERS or Westar, but discovery shows that Joint Applicants overstated what they knew about the due diligence conducted by OMERS.

> We are aware that OMERS performed due diligence on GPE before vesting but we have no visibility into their analysis or the work they performed during their due diligence period.

Ex. KEPCo-14 (emphasis added); *see* Tr. Vol. 3, 649:3-17 (Bryant). Likewise, no Westar witness has offered testimony explaining the scope of due diligence allegedly performed for its shareholders, or explaining why that due diligence supports the reasonableness of the purchase price. Most of Westar shareholders' equity investment will be cashed out, with only a small percentage of their equity investment swapped for GPE stock. Joint Applicants' due diligence assertions ring hollow and do not support their claims that the purchase price is reasonable.

VII. RINGFENCING

The ringfencing conditions Joint Applicants propose will not protect Westar and KCP&L, and therefore will not protect their customers, if post-acquisition GPE is unable to timely deleverage the holding company within the timeframes that financial investors, analysts, and the ratings agencies expect because the merger synergy savings do not materialize as estimated, interest rates continue to rise, or other adverse events occur. If the Commission decides to approve the proposed transaction, approval should be conditioned on Joint Applicants' acceptance of ringfencing protections that provide more effective protections for customers. Only with appropriate financial ringfencing protections in place could the Commission find that the proposed transaction will promote the public interest and, particularly, that the effect of the proposed transaction on the financial condition of post-transaction KCP&L and Westar is comparable to the financial condition of the companies if the transaction had not occurred. Order on Merger Standards at ¶ 5(a)(i).

This section analyzes the record evidence establishing the risks particular to this transaction alongside the Joint Applicants' ringfencing conditions. *See generally* JA Br. at 57-68. Joint Applicants' ringfencing conditions will not adequately insulate customers from the particular and immediate financial risks derivative of this transaction, *e.g.,* its particular financing structure. *Id.* at 11 ("The risks associated with the Transaction are largely the financial risks associated with increased leverage at GPE and the recording of the acquisition premium at GPE"), 34 ("the first three and one-half years after closing . . . is typically the most critical time for any significant transaction because . . . there has not yet been sufficient time for debt levels to be paid down").

Contrary to Joint Applicants' claims (*id.* at 15), the proposed ringfencing protections Joint Applicants propose do not meet the public interest standard or the merger standards set forth in the Order on Merger Standards. The Commission should modify the ringfencing provisions, as proposed in Appendix C, to adequately protect customers from the risks of this transaction and thereby to satisfy the merger standards and the public interest standard, and then Joint Applicants may decide whether the deal can be consummated.

A. Ringfencing's Purpose in Utility Combinations.

Ringfencing "protect[s] customers from facing adverse consequences from financial pressures on a utility's parent or affiliates" (Reed Rebuttal at 54:14-15) and "ensure[s] that the risks being taken on by GPE's investors do not adversely affect the rates, financial strength, or service quality of the utilities' customers" (*id.* at 79:5-6). In this case, ringfencing is necessary to protect the customers of Westar and KCP&L from the risks of this transaction, in particular the risk that GPE is unable to meet Wall Street's expectations to timely deleverage at the holding company level.

"Ring-fencing is a process by which the operations of one company within a larger corporation or holding company can be financially insulated, or protected, from the actions of the parent or other affiliates." Dismukes Direct at 17:13-15. Ringfencing "can be comprised of a number of different individual financial measures and commitments" (*id.* at 17:15-16) and fashioned to the meet the specific characteristics of a proposed transaction to comply with the regulatory requirements of the applicable jurisdiction. Dr. Dismukes explains,

> These financial measures, collectively, are thought to place a financially-protective "ring" around the acquired utility (or utilities) for as long as the measures are in place, which can span several years, and usually cannot be removed or modified without some regulatory approval.

Id. at 18:4-7. "In general, these ring-fencing measures, if appropriately designed, should lead to a considerable degree of financial separation and independence." *Id.* at 17:16-18.

Corporate commitments embodied in ringfencing commitments set prudent and reasonable limitations on the decisions of the Board of Directors and the day-to-day decision-making by management. After the transaction is consummated, members of the GPE Board will also sit on the boards of KCP&L and Westar (Tr. Vol. 5, 1096:4-8 (Reed)), and the regulated utilities will be "owned and controlled" by "one shareholder." JA Br. at 27. As Mr. Reed explained,

> There will be a Board of Directors for each of its subsidiaries. All three utilities will have their own board. What you have heard is currently the plans for GPE are that the members of the parent company Board, the public Board, will be the same members that exist on the other three boards, but because they are separate

> corporations and because the directors of each corporation have duties partially to that corporation and to the parent means that they do have slightly different duties when they are on the Board of Westar or Kansas City Power & Light or GMO.

Tr. Vol. 5, 1096:2-13 (Reed). There is an obvious and inherent tension, if not conflict, between the responsibilities of a GPE Board member and that same person's responsibilities as a KCP&L or Westar Board member. Properly constructed ringfencing conditions ordered by the Commission benefit customers by placing pre-defined limits on board decision-making, such as a decision on dividend payments, when acting on behalf of one of the regulated utilities, as compared with that board member's duties when acting on behalf of the publicly traded company.

B. Joint Applicants' Ringfencing Conditions Are Not Directed to the Particular Risks of This Transaction, Will Not Protect Customers, and Cannot Support a Determination by the Commission that the Transaction Promotes the Public Interest.

Careful scrutiny of the proposed ringfencing conditions set forth in Exhibit DRI-3 shows they are neither definite in language nor in the degree of intended customer protection. Contrary to claims of Joint Applicants, these proposed conditions are not sufficient to "accomplish the goal of insulating customers from the Transaction-related debt at GPE." JA Br. at 68. In the fact-specific context of *this* transaction, Joint Applicants' ringfencing proposals will not provide sufficient protections to permit the Commission to find the transaction promotes the public interest and meets the merger standards.

1. Joint Applicants' Synergy Savings Are Overstated and Unreliable.

Joint Applicants claim that one of the "several major advantages" of the proposed transaction "from the perspective of customers" is that it will achieve operational synergies resulting from combining contiguous utilities in the same state. *Id.* at 14. Mr. Bassham testified that "this transaction will enable efficiencies and savings that cannot be obtained by either GPE or Westar on a stand-alone basis, and these efficiencies and savings will keep rates lower in the future than they would have been absent this Transaction . . . ." Bassham Direct at 10:8-11; *see id.* at 10:21-11:4.

Joint Applicants estimated (incorrectly) that the proposed transaction creates $4.3 billion in synergy savings, in net present value terms; in fact, the correct net present value of savings is on $2.9 billion to $3.2 billion, which is between $1.0 billion to $1.4 billion less than claimed by Joint Applicants. *See supra* Section V.A.1. Mr. Bryant testified that the expected savings from operational efficiencies, retained by the regulated utilities between rate cases, "will allow us to service and repay debt and fund the incremental dividends," *i.e.*, to deleverage the holding company. Bryant Direct at 17:2-3.

The estimated projections of operational synergies prepared by Mr. Kemp and Joint Applicants are unreliable. *See* Section V.A, *supra*. Joint Applicants have not offered a merger condition designed specifically to protect customers from the myriad adverse financial consequences of failing to achieve these expectations. Joint Applicants will not even commit "that Westar and KCP&L will maintain an equity share of no less than 40 percent and no more than 53 percent," Ex. DED-2 at 1 (Financial Integrity Commitment No. 10), even though Joint Applicants' promise that through the realization of operational synergies "the Transaction will have little, if any, impact on the capital structure of the operating companies." Bryant Direct at 17:19-20. A promise is not enforceable; an order of this Commission is.

The Commission should take into account the significant uncertainty of achieving the expected operational synergies, and the financial and consequential rate impact if Joint Applicants fail to achieve synergies on the scale and within the immediate timeframe expected. *See* JA Br. at 34 ("the first three and one-half years after closing . . . is typically the most critical time for any significant transaction because . . . there has not yet been sufficient time for debt levels to be paid down"). For the reasons explained below, customers are not protected.

2. Joint Applicants' Mere Promises of No Credit Ratings Downgrades for Westar and KCP&L Are Not Credible.

Joint Applicants have not committed to "maintain the financial integrity and independence of Westar and KCP&L" and "exercise management prudence in matters relating to dividends, capital investments and other financial actions in order to maintain an investment grade credit rating" consistent with its pre-merger operations. Ex. DED-2 at 1 (Financial Integrity Commitment No. 1). Credit ratings assigned by the ratings agencies to GPE, Westar and KCP&L are important because, all other things held constant, a lower credit rating increases the cost of capital. *See, e.g.*, Ex. BPU-19 (average difference between BBB and BBB- rating is about 63 basis points on a Corporate ten-year bond); Tr. Vol. 4, 982:9-14 (Ives) (similar). Increases in the cost of capital for the regulated utilities are passed through to customers in cost-of-service rates for electric service. *See* Doljac Direct at 5:15-6:4, 8:7-11, 22:5-27:16. On March 6, 2017, Moody's downgraded GPE to Baa3 from Baa2. *See* Appendix A.

a. Credit ratings of affiliated companies are linked, and GPE's credit rating will affect the ratings of affiliates Westar and KCP&L.

Joint Applicants contend that "the risk [of "increased leverage due to Transaction debt held by GPE"] is isolated at the GPE level both in the near-term and over the long-term." JA Br. at 12. According to Joint Applicants, the risk has been "isolated" because ratings agencies S&P and Moody's "have confirmed the credit ratings for both KCP&L and Westar." *Id.* This claim is an inaccurate representation of the record because, as explained in Section VI.B.3, *supra*, the ratings agencies' do not provide rating confirmations as part of the review services. *See also* Ex. Staff-3 at 13 n.1 (clarifying that "*confirmed*" means that "[w]e *expect* to maintain our investment grade ratings" (emphasis added)). Joint Applicants also insist that the regulated utilities capital costs will not increase "*as a result of the transaction*" because the "[t]he use of Utility specific capital structures and cost of capital for setting rates will hold customers harmless from a downgrade of GPE's Senior Unsecured Debt." Ex. BPU-19; *see* JA Br. at 37 (claiming "there is but a slim chance" that GPE debt will negatively impact regulated utilities' credit ratings), 38 (impact of GPE's debt is "highly speculative"). Joint Applicants' views are wrong, inconsistent with credit ratings agency opinions, and contradicted by the testimony of Joint Applicants' own witnesses: a credit rating downgrade at the holding company level because Joint Applicants are unable to deleverage would likely trigger a ratings downgrade for Westar and KCP&L.

Mr. Reed explains that each credit rating agency applies its own criteria to determine the degree of credit ratings linkages between affiliated companies. Tr. Vol. 3, 589:11-590:14 (Reed); *see* Tr. Vol. 3, 621:10-15 (Bryant) (similar). For instance, S&P's June 2016 report on KCP&L explains that "[t]here are no meaningful insulation measures in place that protect KCP&L from its parent and, therefore, KCP&L's issuer credit rating is in line with GPE's group credit profile of BBB+." Ex. KEPCo-7 (Q. 17 Responses) at 1.

Three scenarios illustrate the linkages between affiliated companies. First, the credit ratings of Westar and KCP&L will be negatively affected by a financially distressed holding company if expected targets are not achieved. *See* Ex. JAL-49 at 2, 4 ("When the merger closes, we expect to view Westar and KGE as core subsidiaries of the GPE group and that their issuer credit ratings will be aligned with those of the group"); Ex. KEPCo-7 (S&P KCP&L Research Summary) at 3 ("We could lower ratings on GPE and its subsidiaries if GPE's financial risk profile remains weak after the merger such that FFO to total debt is consistently below 13%.

This could occur if the company funds the transaction disproportionately with debt or if capital spending increases materially while investment recovery lags").

Second, the regulated utilities' credit ratings could also be adjusted downward if these companies' Boards make decisions that "place greater pressure on upstream dividends from subsidiaries in order to service the corporate dividend and parent interest payments." Ex. Staff-6 at 1-2; *see id.* at 2 ("an aggressive upstream dividend policy for Westar" identified as a "Factor[s] that Could Lead to a Downgrade").

Third and conversely, there will be no opportunity for Westar or KCP&L to improve ratings as Moody's has determined that the "proposed acquisition financing constrains Westar's ratings." Ex. Staff-6 at 4 ("limited parent financial flexibility at GPE, weak consolidated financial metrics and demand for increased utility dividends will constrain the rating of Westar at Baa1, despite prospects for improvement after conclusion of its wind expansion"); Ex. BPU-5 at 4 ("While no change to utility ratings would likely occur at close of the transaction, the high amount of family leverage would begin to weigh on upward ratings mobility of the subsidiaries, due to the contagion risk at the parent level and increased need for upstream dividend support").

If the Commission approves the transaction, definitive ringfencing protections around Westar and KCP&L can help to weaken linkages and protect these utilities from adverse effects that would have not occurred but for the transaction.

b. Joint Applicants do not have written plans to recover GPE's one-notch rating downgrade by Moody's.

Credit ratings agencies prefer a "firm and credible commitment to deleveraging." Ex. JAL-48 at 1. Joint Applicants do not have one, even though the financing structure necessary for the $7.3 billion cash payout to Westar shareholders fully leverages the company. *See, e.g.*, Ex. BPU-2 at 17/48 ("Likely fully leverages improving standalone credit capacity" in "Transaction Assessment–Risks").

Joint Applicants expected that Moody's Investors Service would downgrade the GPE holding company issue ratings for its senior unsecured shelf debt, subordinate debt, subordinate shelf debt, and preferred stock.[33] Ex. BPU-4 at 3; Ex. BPU-5 at 3. Utilities prefer to avoid credit downgrades to below investment-grade. Tr. Vol. 4, 981:21-982:14 (Ives). On March 6, 2017, Moody's downgraded the long-term ratings of GPE, including its senior unsecured rating, to Baa3 from Baa2, which leaves GPE's senior unsecured debt just above investment grade.[34] Tr. Vol. 3, 750:15-17 (Bryant) ("Moody's expects, as I mentioned, a one notch downgrade from Baa2 to Baa3, which is the level right above investment grade"). Moody's earlier had warned:

> This weakened financial position persists for several years, as there is immaterial deleveraging of consolidated debt through 2020. Furthermore, at no point of the forecast period do consolidated financial metrics return to the level that [GPE] is currently producing (e.g, 17% CFO pre-WC to debt), let alone approach what was expected prior to the transaction (e.g., 24% CFO pre-WC to debt).

Ex. BPU-4 at 9 (commenting on the first three (of five) hypothetical financial structures).

As noted, Joint Applicants have no written plan in place to achieve pre-transaction-level credit ratings, or specifically to pay down debt, and do not believe that a written plan is necessary. *See* JA Br. at 36-37; Ex. BPU-18; Tr. Vol. 3, 772:23-773:3 (Bryant). Instead, Joint Applicants represent to the Commission that the credit rating downgrade is not "permanent" (JA Br. at 12), that recovery to regain pre-transaction-level issue ratings will take three to five years

[33] GPE does not maintain a Moody's issuer rating, but KCP&L and Westar each maintain issuer ratings. Ex. BPU-4 at 3.

[34] Joint Applicants' "expect[ation]" that these regulated utilities "will . . . have credit ratings comparable to other electric utilities of similar risk" is a tautology and does not confront the risk that Westar and KCP&L may not be able to maintain their pre-transaction credit ratings. JA Br. at 12 (citations omitted).

of solid performance (Ex. BPU-17; *see* Tr. Vol. 3, 750:23-751:1 (Bryant)[35]), and assure the Commission that if "future cash flows are insufficient," there are "options available to improve its cash position, including issuance of additional equity or reducing dividends paid to shareholders" (JA Br. at 34 (references omitted)). None of these "assurances" are what the ratings agencies want. Moreover, in the absence of any firm and credible commitments to deleveraging, the Commission should give no weight to counsels' claims. Rather, the Commission should focus on the fact that either Joint Applicants did not provide these same explanations to Moody's, or they did and Moody's was not impressed.

If the Commission conditionally approves the transaction, it should direct Joint Applicants to make a compliance filing within 30 days of consummation of the transaction that sets out a clear plan to deleverage the holding company. This merger condition is presented in Appendix C.

3. Joint Applicants' Need for Westar and KCP&L Dividends Risk Depleting Westar and KCP&L of Equity.

Joint Applicants will not commit that "Westar and KCP&L will not make any dividend payments to the parent company to the extent that the payment would result in a drop of either utilities' equity level below 40 percent of its total capitalization." Ex. DED-2 at 1 (Financial Integrity Commitment No. 9). *Compare* Ex. DRI-3 at 3 (Commitment 10, providing for equity levels as low as 35%). The equity floor protections are necessary because Joint Applicants' financing plan calls for substantial new preferred convertible and common equity and debt issuances with incrementally higher dividend and interest costs, and greater cash flow pressures,

[35] Joint Applicants' optimistic views of recovery are undercut by Staff's deconstruction of GPE's forecasts of net free cash flows. Bryant Rebuttal at 22 (Table 1). As Staff showed at hearing, Joint Applicants' net free cash flows over five years [redacted].

in the immediate future. Bryant Direct at 15:19-17:6. These issuances increase upward dividend pressure on Westar and KCP&L to ensure that GPE meets its coupon obligations generally and to OMERS particularly.

The $1.6 billion of mandatory convertible preferred stock issuance to raise cash for the payout to Westar shareholders has been a critical component of the transaction's financing plan.[36] About one half of that issuance was privately placed with OMERS, and OMERS has secured governance protections for its substantial equity investment that protect against perceived financial risks.[37]

This section focuses on Joint Applicants' issuance of convertible preferred equity to finance the transaction and the unique risks that it poses. Joint Applicants' merger commitments do not adequately insulate customers from future adverse impacts arising from this financing element of the transaction.

a. The $1.6 billion public and private placement issuances of mandatory convertible preferred securities to finance the transaction increases financial pressures on Westar and KCP&L.

Convertible preferred equity is a hybrid security that has characteristics of both debt and equity. Like debt, convertible preferred equity pays a "preferred dividend" or coupon on a regular basis. The obligation to pay the dividend is fixed and firm, unlike common equity. At the end of a specified term the security converts to common stock. Tr. Vol. 3, 644:16-21 (Bryant).

[36] The $1.61 billion is the sum of the $750 million private placement to OMERS (Bryant Direct at 12:22-23) and the $863 million issuance to the public market (Bryant Rebuttal at 9:17-18).

[37] Joint Applicants will also pay a $30 million fee—about four percent of the value of the issuance. Ex. KEPCo-13 at 1; *see* Tr. Vol. 3, 646:6-13 (Bryant) ("15 at announcement of the transaction and 15 at closing").

Convertible preferred equity receives "100% equity credit from S&P and Moody's" (Ex. BPU-8 at 67/234 (Updated Equity Partner Discussions), but not all credit ratings agencies treat these securities the same way. For instance, "Fitch typically assigns 50% to 100% debt value to hybrid structures prevalent in the utility sector." Ex. JAK-14 at 1. Mr. Bryant agreed that it is highly preferable that convertible preferred equity is treated as equity (rather than debt) "given the financing size of this transaction." Tr. Vol. 3, 645:7-11 (Bryant). The value of the rating agencies' metrics, FFO/debt and CFO/debt, would change if convertible preferred equity was not given 100% equity credit. *Id.*, 645:12-16 (Bryant).

The private placement of convertible preferred equity to OMERS helped to eliminate "market risk from the required equity financing of the Transaction" (Bryant Direct at 12:22-23:1), yet that aspect of the financing plan simply swapped an immediate issuance risk (that has now passed)[38] with future myriad cash flow risks.

The required coupon payments for mandatory preferred stock create greater cash flow pressures than discretionary dividends for common equity. The OMERS issuance pays an above-market 7.25% dividend that is fixed for three years before converting to common equity. Tr. Vol. 3, 646:7-10, 18-24 (Bryant); Ex. KEPCo-13 at 1. Prior to conversion of the $1.5 billion issuance of convertible preferred in three years' time, Joint Applicants must pay out about $115 million in dividend payments annually—about $50 million more per year than after conversion to common stock. Bryant Direct at 16:8-19. Accordingly, management's decision to finance the transaction with convertible preferred equity creates cash flow challenges for Joint Applicants that are not fully reflected in the ratings methodologies of the rating agencies GPE solicited

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[38] *Id.* at 8:16-20; 9:8-11 (OMERS' commitment permitted GPE to commit to Westar that there was no financing contingency in its offer). GPE's investment banker likewise advised the Board that the private placement with OMERS would "significantly de-risk market equity issuances" because, among other reasons, it would be perceived as an "[a]nchor investment [that] reduces execution risk on remaining public market issuances." Ex. BPU-8 at 67/234.

during the bid process. The Commission should take these future risks into account when considering modification of Joint Applicants' ringfencing commitments.

b. OMERS is able to protect its substantial equity investment because GPE gave OMERS a contractual right to seats on the GPE Board if the Company is financially distressed, which could be counter to the interests of customers.

The difference between the risks of this transaction to investors and the risks to customers are, in part, delineated by the ability of the former to protect themselves when customers cannot. Joint Applicants' contract with OMERS provides the fund with two strong corporate governance provisions to protect its substantial equity investment if GPE becomes financially distressed. First, if the issue rating on GPE's senior unsecured long term debt falls below investment grade, OMERS may designate a representative to attend all Board meetings in a non-voting observer capacity. Ex. KEPCo-13 (Section 9 of Investor Rights Agreement, Ex. B to Stock Purchase Agreement).

Second, the contract with OMERS provides that if dividends owed to OMERS accumulate to at least two dividend payments, the GPE Board must then adopt resolutions that increase the number of Board members by two persons and then appoint the two persons selected by OMERS to fill the newly created vacancies. Ex. KEPCo-13 (Section 8 of Investor Rights Agreement, Ex. B to Stock Purchase Agreement); Tr. Vol. 3, 647:3-648:10 (Bryant). Customers have no such protections.

If GPE becomes financially distressed, OMERS could advocate for actions that squeeze cash dividends from the utilities to pay GPE's dividend obligations. Joint Applicants' prefiled testimony did not discuss these important provisions positioning OMERS to protect its investment with direct access to the Board or even appointments to the GPE Board. *Id.*, 648:7-

10 (Bryant). The ringfencing measures will assist to protect regulated utilities, and therefore customers, from adverse interests of the GPE board should GPE become financially stressed.

4. GPE's Recent Financial Forecasts Indicate [redacted].

Joint Applicants testified in June 2016 that the "[t]ransaction will be neutral to [GPE's] forecasted earnings per share on a stand-alone basis in the first full calendar year after the Transaction closes increasing to approximately ten percent accretive, or an incremental earnings per share increase, as compared to its forecasted stand-alone plan by 2020."[39] Bryant Direct at 8:4-6. The record evidence shows that projections prepared by Mr. Bryant [redacted]. Joint Applicants nevertheless continued to rely on the [redacted] projections that Mr. Bryant presented, but never updated, as of the close of the record. *E.g.*, Ives Rebuttal at 32:18-20. The earnings projections in Joint Applicants' testimony are identical to the earnings projections in a financial report that Mr. Bryant presented to the GPE Board on May 29, 2016. Ex. KEPCo-10 at 2 ("Final Bid" data). Mr. Bryant testified that this information is reported to the Board because investors and financial analysts are sensitive to publicly traded companies' earnings per share. Tr. Vol. 3, 633:24-634:8 (Bryant). For this reason, EPS was a key metric in the "Bidding Considerations" for Westar, with a requirement that EPS is "accretive by second full year" and "accretive by at least 7% by third for year" excluding transaction and/or transition costs." Ex. BPU-8 at 13/234 (May 18, 2016 GPE Board Presentation); *see* Ex. BPU-1 at 11/25 ("Prairie's view of strategic opportunities across the energy landscape prioritizes the following

[39] Mr. Bryant explained that "accretion represents . . . the earnings from the pro forma plan, or the plan given the combination with Westar as compared to [GPE's] stand-alone plan with accretion being an increase in earnings per share and dilution being a decrease." Tr. Vol. 3, 634:11-16 (Bryant).

criteria when assessing a strategic transaction: . . . Clear improvement of TSR or financial/earnings profile (e.g. earnings accretion/dilution)").

Joint Applicants presented the May 2016 EPS accretion forecasts as evidence supporting the reasonableness of the purchase price in this case. Mr. Bryant routinely provides these EPS ratios—projected each year for the 2018 – 2020 period—in his financial presentations to the Board. Tr. Vol. 3, 633:24-634:8, 639:16-20 (Bryant) (confirming that since the May 29th, 2016 meeting, Mr. Bryant "regularly provided updates on these key EPS sensitivities" in each of his financial presentations to the GPE Board).

Mr. Bryant's financial reports to the Board [redacted]. The table below summarizes data pulled from the Board presentations in Exhibit KEPCo-10.

Board Meeting Documents— EPS Accretion/Dilution Projections		**Forecast Earnings by Year**		
Document Date	**Record Citation**	**2018**	**2019**	**2020**
May 29, 2016	Bryant Direct at 8:4-6; Ex. KEPCo-10 at 2	[redacted]	[redacted]	[redacted]
Aug. 26, 2016	Ex. KEPCo-10 at 7	[redacted]	[redacted]	[redacted]
Sept. 20, 2016	Ex. KEPCo-10 at 12	[redacted]	[redacted]	[redacted]
Sept. 26, 2016	Ex. KEPCo-10 at 17	[redacted]	[redacted]	[redacted]
Oct. 31, 2016	Ex. KEPCo-10 at 20	[redacted]	[redacted]	[redacted]

The table shows that GPE's EPS projections [redacted]

Mr. Bryant testified that GPE has not prepared any financial updates for the Board of Directors since the October 2016 projections.

> Q. And then you prepared one for October 31st?
> A. Correct.
> Q. Have you prepared any since then?

A. We have not.

Tr. Vol. 3, 644:7-10 (Bryant); *see* Ex. KEPCo-12.

Mr. Bryant's Board presentations also show that Joint Applicants' operational synergies [redacted] Along with EPS accretion/dilution projections, Mr. Bryant's Board presentations contain a financial sensitivity analysis showing how EPS is impacted by changes in the realization of NFOM efficiencies during the 2018–2020 period. Ex. KEPCo-10 at 3, 5, 8, 18, 21 (Key EPS Sensitivities).

Mr. Bryant did not recall the value of the NFOM efficiencies to be achieved each year, nor did he recall how the sensitivity analysis was constructed. Tr. Vol. 3, 636:3-14; 638:5-11 (Bryant).[40] Notably, Mr. Bryant did not recall how the $100 million plus or minus variances of the NFOM efficiency savings in his Board presentations were allocated over the three years of projections. Tr. Vol. 3, 638:5-19 (Bryant).

The sensitivity analysis specifically measures the possible low-to-high range of EPS accretion or dilution resulting from subtracting or adding $33 million to Mr. Kemp's projected yearly NFOM savings.[41] Ex. KEPCo-11; Tr. Vol. 3, 637:25-638:24 (Bryant). The most recent projections available [redacted] Joint Applicants have not updated the EPS projections they rely upon

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[40] *Compare* Tr. Vol. 5, 1257:3-1258:15 (Kemp) (confirming GPE provided initial savings targets to Mr. Kemp, that he was not provided any analysis underlying those targets, and that he was not involved in the development of those numbers but "I think Mr. Bryant or Mr. Busser would perhaps know"); *id.* at 1259:7-1260:16 (confirming that Enovation and GPE collaboratively developed the savings estimates by functional areas but that "GPE and its management team ... made the final decisions on the estimates").

[41] The +/- $33 million deviation values do not appear to have been informed by Mr. Kemp's merger database. *Cf.* Tr. Vol. 5, 1240:16-25 (Kemp).

in these proceedings (Tr. Vol. 3, 642:6-15 (Bryant)), and the Commission should give no credit to Joint Applicants' stale projections.

5. Dr. Dismukes' Sensitivity Analyses on GPE Financials Show that Reasonably Foreseeable Exogenous Shocks Cause Substantial Deterioration to Key Credit Metrics.

Dr. Dismukes testimony underscores the importance of conducting financial sensitivity analyses of the proposed transaction that "examine the robustness of the estimated key credit metric[s]." Dismukes Direct at 34:13-15. Dr. Dismukes explained that this transaction particularly, "should be examined under different scenarios particularly those that change the Joint Applicants' ability to reduce the leverage associated with this merger." *Id.* at 34:20-22. Joint Applicants did not present sensitivity analyses in their application to the Commission.

Dr. Dismukes has performed a rigorous analysis of Joint Applicants' pre- and post-merger financial metrics. He uses credible and conservative assumptions about the realization of synergy savings and the level of assumed rate increases from rate cases before the Commission. *Id.* at 35:4-36:20. The results are produced in Confidential Ex. DED-6. Confidential Ex. DED-6 reports on two financial sensitivity analyses, and the impacts of these sensitivity analyses on the same "Key Metrics" that Mr. Bryant includes in financial reports to the Board. *Compare* Ex. DED-6 at 2 *with* Ex. KEPCo-10 at 2, 7, 12, 17, 20.

The sensitivity analyses' changed assumptions tested by Dr. Dismukes are supported fully by the evidentiary record compiled in these proceedings. With respect to savings realization, Dr. Kirsch's careful examination of Mr. Kemp's data shows that realization of only one-half of projected merger savings is not atypical. Kirsch Direct at 30:7-35:10. With respect to rate increases, historically GPE and Westar have recovered only a fraction of their requested rate increases. Ex. KEPCo-15 at 38 (Fig. 30). Joint Applicants did not challenge the assumptions Dr. Dismukes used, nor did Joint Applicants dispute the results of these sensitivity analyses.

In Scenario 1, Dr. Dismukes assumes that Joint Applicants will successfully realize one-half of projected NFOM savings and receive three-quarters of their requested rate increases. Ex. DED-6 at 2. Under this scenario, [redacted] *See, e.g.*, Ex. KEPCo-15 at 16 (Moody's could downgrade to [high yield] if FFO/debt stays between 10% and 13% for a sustainable period"); Ex. JAL-50 at 2 ("Given the significantly weakened financial position at close (e.g., 13% CFO pre-WC to debt), the rating could be downgraded to speculative grade if anticipated financial improvements are jeopardized"); Ex. JAK-12 at 1-2 ("We expect that after the acquisition closes, the combined entity's financial profile will strengthen mainly due to ongoing regulatory recovery of costs such that funds from operations (FFO) to total debt is consistently above 13%. * * * The negative outlook on GPE and its subsidiaries reflects the potential for lower ratings if GPE's financial risk profile, which will deteriorate due to the financing used in the acquisition, does not improve after the transaction closes such that FFO to total debt is well over 13% after 2018").

Scenario 2 assumes that Joint Applicants would successfully realize one-half of projected NFOM savings and receive one-half of requested rate increases. Again, [redacted]

These sensitivity analyses show that, in both cases, the reduction of synergy savings and rate case revenue substantially curtails Joint Applicants' ability to deleverage the transaction. Both scenarios show that the company is unable to have any impact on [redacted], and show that no progress is made to [redacted]. *Id.* at 2-3; *see* Dismukes Direct at 36:14-20.

Dr. Dismukes also warns that Joint Applicants' baseline in their financial models "assume a relatively favorable operating environment over the next several years." Dismukes Direct at 37:1-5. He cautions that "[e]ven with these projections, the Joint Applicants' financial situation is strained and could very likely lead to outcomes where its credit could be downgraded." *Id.* at 37:1-5.

> Even the baseline outcomes, which are based upon a generally rosy operating outlook, are not very "robust." As I showed earlier, more realistic synergy savings assumptions, or realistic assumptions about future rate increases, could lead to even more challenging financial outcomes. However, my analysis only looks at changing a few key assumptions and does not include the introduction of shocks that could arise from exogenous events, such as a dramatic change in wholesale power markets, environmental compliance cost challenges, or other operating challenges that could increase costs or reduce revenues. A financially-vulnerable GPE would have a difficult time responding to these exogenous challenges and to the extent any that any unfortunate events were to arise, it could lead to considerably difficult financial outcomes for GPE, KCP&L and Westar.

Id. at 37:5-16; *see id.* at 37:17-39:12 (providing examples of events that could further impair Joint Applicants' financial condition). Dr. Dismukes' sensitivities illustrate the fact that this Transaction will leave post-acquisition GPE with very little margin for error in its synergy savings projects, rate increase assumptions, and other critical assumptions, and little ability to react to future changed circumstances.

C. If the Commission Does Not Reject the Application, It Should Condition Approval on Joint Applicants' Adoption of Effective Ringfencing Protections that Promote the Public Interest.

If the Commission does not reject the application, it should modify Joint Applicants' merger commitments set out in Exhibit DRI-3 of Mr. Ives' rebuttal testimony. Dr. Dismukes has provided a comprehensive set of conditions that are "measured and proportional to this particular transaction." Tr. Vol. 5, 1112:10-11 (Dismukes); *see id.*, 1112:19 (Dismukes) ("They are very exact"). These commitments are set out in Exhibit DED-2. Dr. Dismukes testified that he had a "high level of confidence" that the financial integrity conditions in Exhibit DED-2 will insulate Westar and KCP&L.

The commitments that the Commission adopts should be "very stringent and very clear and unequivocal." *See* Tr. Vol. 5, 1112:23-24 (Dismukes). Appendix C to this brief sets forth the changes to Joint Applicants' proffered commitments that are necessary for the Commission to find that Westar and KCP&L customers are adequately protected. These recommended changes are consistent with the concise financial integrity commitments that Dr. Dismukes' presented in prefiled testimony and discussed further during the hearing. *See id.*, 1101:5-1113:2 (Dismukes). The following sections summarize some of the key changes to Joint Applicants' commitments consistent with Dr. Dismukes' recommendations.

1. Joint Applicants' Merger Conditions Do Not Provide Stable, Long-term Commitments and Must Be Substantially Tightened.

The commitments that Joint Applicants propose are not "firm" in any meaningful way. Ex. DRI-3 states that the proffered conditions "will remain in force and effect for the time period specified in the condition or if no time period is specified in perpetuity and in all other cases unless otherwise approved by the KCC." Ex. DRI-3 at 1. This reservation provides that the Commission may at any time and for any reason modify the merger conditions upon petition of

Joint Applicants. Likewise, Joint Applicants drafted several conditions to state that a portion of the condition is effective only "unless otherwise authorized by the Commission." Joint Applicants inserted this language into portions of the Financing and Ring-Fencing Conditions—Condition Nos. 10, 11, 12—without explication. These merger condition out-clauses are unduly favorable to Joint Applicants and highly prejudicial to customers. They empower Joint Applicants to seek substantial changes without revisiting the merger standards, without the burden of proof applied in this proceeding, and without confronting the evidentiary record supporting the Commission's decision. For example, they literally afford post-acquisition GPE the opportunity, in any proceeding concerning KCP&L or Westar, to seek to change a condition imposed by this Commission to protect customers and to make the transaction in the public interest. Without those "out" clauses, KCP&L or Westar would have to bear the burden to convince the Commission to modify its merger approval order to alter or eliminate a condition to the approval of the transaction—a much higher burden. The Commission should strike this one-sided protection benefitting only Joint Applicants.

2. Joint Applicants Must Explicitly Commit to Protect the Financial Integrity of Westar and KCP&L for the Purpose of Maintaining Investment-Grade Ratings.

Joint Applicants eschew commitments that would require the company to take actions to maintain the pre-transaction, investment-grade credit ratings of Westar and KCP&L. Appendix C modifies Exhibit DRI-3 to include Dr. Dismukes' financial integrity commitment no. 1 in full:

> The Joint Applicants shall maintain the financial integrity and independence of Westar and KCP&L in all respects and will exercise management prudence in matters relating to dividends, capital investments and other financial actions in order to maintain an investment grade credit rating consistent with its pre-merger operations.

Sections V and VI, *supra,* support the Commission's decision to require that Joint Applicants adopt this commitment as a condition of transaction approval. Exhibit DRI-3 is also modified to require Joint Applicants to file a written, five-year plan describing their plan to deleverage the holding company. *See supra* Section VII.B.2.b.

3. Joint Applicants' Conditional Commitment Not to Seek Recovery of the Acquisition Premium Unreasonably Exposes Customers to the Potential Recovery of the Premium in Rates.

Much of Joint Applicants' strategy in this case revolves around their ostensible commitment not to request "authorization to recover goodwill associated with the Transaction by inclusion in revenue requirement used to set electric service rates." Busser Direct at 12:19-21.[42] This commitment is the basis for Joint Applicants' claim, albeit erroneous, that this Commission's Merger Standards (a)(ii) and (a)(iv) are not applicable to this proceeding. *See* Section IV.B, *supra.* But, Joint Applicants' commitment is not nearly as absolute as the unequivocal language of Mr. Busser's and Mr. Ives' testimony. Joint Applicants have added two conditions to that commitment that create the very real possibility that Joint Applicants' Kansas customers will be required to pay for the acquisition premium in the rates they pay to post-acquisition KCP&L and Westar.[43] Accordingly, Appendix C modifies Exhibit DRI-3 to remove language that would enable Joint Applicants to seek recovery of the acquisition premium in rates.

[42] Joint Applicants' witness Mr. Ives asked that the Commission "[c]onfirm GPE's commitment to not request recovery of acquisition premium or transaction costs related to the Transaction." Ives Direct at 4:17-18.

[43] If post-acquisition GPE is in extreme financial distress, this Commission may face the Hobson's choice of permitting GPE to fail or permitting the recovery of the acquisition premium through KCP&L and Westar rates. Only rigorous and unequivocal ring-fencing provisions such as those proposed by Dr. Dismukes can ameliorate this concern.

a. Joint Applicants reserve the right to seek to recover the acquisition premium in rates if they deem that a Commission order has caused impairment of the acquisition premium.

Joint Applicants' original application in this matter represented that "Joint Applicants do not request authorization to recover any acquisition premium . . . through inclusion of such costs in electric service rates." Application at P 25. As this case has proceeded, however, this clear and succinct statement has become qualified and conditional. GPE indicated for the first time in a data response that it reserved the right to ask for a recovery of goodwill "to the extent that there are capital cost increases that occur from an impairment that results from a KCC order." Kirsch Direct at 49:11-13 & n.84. Dr. Dismukes noted the same qualification in GPE's commitment. Dismukes Direct at 46:5-25. GPE provided no explanation of what kind of action by a Commission order could trigger this provision. The Joint Applicants first addressed this new condition to their "commitment" not to seek recovery of the acquisition premium in rates in their rebuttal testimony.[44] For example, Mr. Ives testifies in his Rebuttal (at 45:1-4) that:

> the commitments confirm that goodwill (AP) from the Transaction will stay on the books of GPE and will not negatively affect KCP&L's or Westar's cost of

[44] Prior to rebuttal testimony, Joint Applicants' testimony not only made no mention of this "KCC order" condition, but instead emphasized that the only one exception to the acquisition premium commitment was if a party sought use of a consolidated capital structure for ratemaking purposes. For example, GPE witness Busser testified that after consummation of the acquisition, GPE would not seek to amortize any of the $4.9 billion of goodwill into expense and that, if impairment occurred, "a write-down would be required" (Busser Direct at 12:3-15), but he did not testify that the $4.9 billion would be subject to inclusion in rates if the goodwill were impaired by a KCC order. Instead, he emphasized the original pledge of no rate recovery: "the Joint Applicants are not requesting authorization to recover goodwill associated with the Transaction by inclusion in revenue requirement used to set electric service rates." *Id.* at 12:19-21. Mr. Bryant emphasized that because of Joint Applicants' commitment not to recover "Transaction-related costs (*i.e.*, the acquisition premium being paid in excess of book value or transaction costs), even savings of only $1 flowed to the benefit of customers would exceed the $0 in Transaction-related costs to be included in customer rates." Bryant Supplemental Direct at 5:22-6:3. Mr. Ives emphasized that there was only one exception to GPE's commitment not to seek recovery of the acquisition premium:

> Therefore, if—and only if—any party to a KCP&L or Westar general rate case proposes to impute the cost or proportion of debt used by GPE to finance the Transaction for purposes of determining a fair and reasonable return, then Westar and KCP&L reserve the right to seek, in any such rate case, recovery of the acquisition premium in excess of book value and transaction costs associated with the Transaction through inclusion in revenue requirement and retail rates . . . .

Ives Supplemental Direct at 12:17-23.

> capital. Should impairment of the goodwill occur potentially impacting the utilities, rates will be adjusted as needed to remove the impact of the impairment.[65]
>
> ---
>
> [65] Unless caused by KCC Order.

Mr. Busser took up this theme in his rebuttal testimony, where he testifies that, because the acquisition premium will be recorded on GPE's books and not the books of KCP&L or Westar, "any impairment charge . . . would not be on the Westar books, and as such, it would not be requested as part of a Westar rate proceeding and recovered from customers *unless the impairment resulted from a Commission order*." Busser Rebuttal at 25:2-8 (emphasis added).

Joint Applicants provide no clarification as to what kind of future action by Commission order would trigger a request for recovery of some or all of the acquisition premium. If this condition means that GPE could seek recovery of the acquisition premium if, in response to the request of a party, the Commission authorizes the use of the GPE capital structure for KCP&L and/or Westar ratemaking, the condition would be appear unnecessary, because GPE already is insisting on a separate condition that, if any party even seeks such a consolidated capital structure, GPE's subsidiaries would have the right to seek to recover the acquisition premium in rates. If the condition is intended to prevent the Commission, *sua sponte*, from requiring the use of a consolidated capital structure for ratemaking purposes, Joint Applicants should say so directly and let the Commission decide if it is prudent for it agree to such a restriction on its authority in the future. But, the Commission should not accept an open-ended condition that could result in the Commission being faced with creative impairment arguments in future rate cases. For example, if the Commission decides in the future to reduce KCP&L's or Westar's authorized rates of return on equity at the same time that the acquisition premium on GPE's books is impaired, will the Commission be faced with an argument that the lawful exercise of its ratemaking authority contributed to the impairment of the acquisition premium that triggers recovery of the premium in rates?

The concern that Commission action may coincide with but not be the cause of impairment is not hypothetical, because the potential for impairment of the acquisition premium is real. When asked if the goodwill will eventually become impaired, Dr. Kirsch testified:

> The lion's share of it, yes. The fundamental problem is that technological and institutional evolution will erode the value of the goodwill over the course of years: eventually, its value will be impaired, down to near zero, with only some exceptional assets (like land, perhaps) retaining any goodwill portions of their values. Thus, regardless of whether goodwill is amortized or impaired, somebody is going to pay for the eventual decline in its value; and it is a reasonable expectation that GPE's managers, exercising their fiduciary responsibility on behalf of shareholders, will seek substantial recovery from customers.

Kirsch Direct at 49:18-50:8. If the Commission does not choose to reject this new condition on Joint Applicants' commitment not to seek recovery of the acquisition premium, it should spell out in its order precisely what it understands to be the limits of this condition.

b. Joint Applicants have reserved the right to seek rate recovery of the acquisition premium if a party in a future rate case seeks to incorporate the debt used to finance the Westar acquisition into general rate case cost of capital for utility subsidiaries.

Mr. Ives testified in his Supplemental Direct that, if any party sought in post-closing general rate cases to use debt used by GPE to finance the Transaction to determine a reasonable rate of return for setting customer rates, "Westar and KCP&L reserve the right to seek, in any such rate case, recovery of the acquisition premium in excess of book value and transaction costs associated with the Transaction through inclusion in revenue requirement and retail rates. . . ." Ives Supplemental Direct at 12:6-16,12:19-22. As summarized by Dr. Dismukes:

> The Joint Applicants now appear to be conditioning their commitment to a situation where no party to a future KCP&L or Westar general rate case proposes to incorporate the debt used to finance the acquisition into cost of capital calculations. As the Joint Applicants note, if and only if this new condition is met will they stand behind their original merger commitment.

Dismukes Direct at 45:15-20.

It is important to note that, *read literally*, the mere act of filing by any one party in a future rate case of a pleading arguing for the GPE capital structure for ratemaking purposes for a GPE operating subsidiary could trigger an attempt to recovery the acquisition premium, even if that one party's efforts are rebuffed by the Commission. Notwithstanding repeated arguments that the Commission's Merger Standards (a)(ii) and (a)(iv) are irrelevant because Joint Applicants have committed not to seek recovery of the acquisition premium in rates, Joint Applicants have left themselves two means by which they can, in the future and after the acquisition has been approved, seek to recover the acquisition premium from customers.

VIII. CONCLUSION

For the reasons stated herein, Joint Applicants have not demonstrated that the transaction promotes the public interest or complies with the Merger Standards. To the contrary, the financing structure of this transaction creates unwanted, substantial risks for KCP&L and Westar customers. The Commission should therefore reject the Joint Applicants' application. If the Commission finds that the imposition of ringfencing measures as conditions can remedy the deficiencies in the application, KEPCo recommends that the Commission approve the transaction on a conditional basis and require Joint Applicants to accept modified merger conditions, as described in Section VII. Joint Applicants may then decide whether to consummate the transaction under the terms the Commission requires.

Respectfully submitted,

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TABLE OF TESTIMONY AND EXHIBITS CITED

Short Citation	Full Citation and Reference to the Record
Bassham Direct	Direct Testimony of Terry Bassham on behalf of GPE and KCP&L (June 28, 2016)
Bryant Direct	Direct Testimony of Kevin E. Bryant on behalf of GPE and KCP&L (June 28, 2016)
Bryant Rebuttal	Rebuttal Testimony Kevin E. Bryant on behalf of GPE and KCP&L (refiled Jan. 30, 2017)
Bryant Supplemental Direct	Supplemental Direct Testimony of Kevin E. Bryant on behalf of GPE and KCP&L (Nov. 2, 2016)
Busser Direct	Direct Testimony of Steven P. Busser on behalf of GPE and KCP&L (June 28, 2016)
Busser Rebuttal	Rebuttal Testimony of Steven P. Busser on behalf of GPE and KCP&L (Jan. 9, 2017)
Dismukes Direct	Direct Testimony of David E. Dismukes, Ph.D. on behalf of KEPCo (refiled Jan. 27, 2017, errata on Jan. 30, 2017)
Doljac Direct	Direct Testimony and Exhibits of Mark F. Doljac on behalf of KEPCo (Dec. 16, 2016)
Ex. BJS-60	Joint Proxy Statement (Aug. 25, 2016) (attached to Steffen Direct)
Ex. BPU-1	Agenda and Presentation concerning Project Horizon to the Board of Directors (Oct. 2, 2015) (Tr. Vol. 1, 129:10-13 (Bassham)) (References to this exhibit use page no. /25 at the bottom center of page)
Ex. BPU-2	Overview of M&A in the Industry Presentation at Board of Directors Meeting (Mar. 29, 2016) (Tr. Vol. 1, 129:10-13 (Bassham))(References to this exhibit use page no. /48 at the bottom center of page)
Ex. BPU-3	Project Wizard Update Presentation at Board of Directors Meeting (May 2, 2016) (Tr. Vol. 1, 129:10-13 (Bassham))
Ex. BPU-4	Letter from Ryan Wobbrock, Vice President-Senior Analyst, Moody's Investors Service, to Lori Wright, GPE, (May 12, 2016) (responsive to Staff Data Request 24) (Tr. Vol. 1, 129:10-13 (Bassham))
Ex. BPU-5	KCP&L Response to Staff Data Request 24 (Aug. 18, 2016) (Tr. Vol. 1, 129:10-13 (Bassham))
Ex. BPU-8	GPE Board of Directors Meeting Materials (May 18, 2016) (Tr. Vol. 1, 129:10-13 (Bassham)) (References to this exhibit use page no. /234 at the bottom center of page)
Ex. BPU-9	Guggenheim Board Meeting Discussion Materials (Nov. 19, 2015) (Tr. Vol. 1, 198:6-10 (Ruelle))
Ex. BPU-10	Guggenheim Board Meeting Discussion Materials (Dec. 9, 2015) (Tr. Vol. 1, 198:6-10 (Ruelle))
Ex. BPU-11	Guggenheim Board Meeting Discussion Materials (Feb. 23, 2016) (Tr. Vol. 1, 198:6-10 (Ruelle))
Ex. BPU-12	Guggenheim Board Meeting Discussion Materials (Apr. 11, 2016) (Tr. Vol. 1, 198:6-10 (Ruelle))
Ex. BPU-13	Guggenheim Board Meeting Discussion Materials (May 25, 2016) (Tr. Vol. 1, 198:6-10 (Ruelle))
Ex. BPU-15	SNL: MARKET WEEK, *Wall Street continues pull-back on regulated utilities* (Jan. 13, 2017) (Tr. Vol. 3, 617:2-7 (Bryant))
Ex. BPU-16	SNL: MARKET WEEK, *Electric industry trends to continue in 2017, with cautious eye on interest rate* (Dec. 23, 2016) (Tr. Vol. 3, 617:2-7 (Bryant))
Ex. BPU-17	KCP&L Response to BPU Data Request 7-3 (Jan. 20, 2017) (Tr. Vol. 3, 617:2-7 (Bryant))

Short Citation	Full Citation and Reference to the Record
Ex. BPU-18	KCP&L Response to KEPCo Data Request 11-21 (Jan. 25, 2017) (Tr. Vol. 3, 617:2-7 (Bryant))
Ex. BPU-19	KCP&L Response to KEPCo Data Request 3-45 (Dec. 2, 2016) (Tr. Vol. 3, 617:2-7 (Bryant))
Ex. DED-2	Proposed Financial Integrity Commitments (attached to Dismukes Direct)
Ex. DED-6	Key Credit Metrics Under Alternative Assumptions (attached to Dismukes Direct)
Ex. DED-10	Comparison of Acquisition Premiums of Recent Utility Mergers (attached to Dismukes Direct)
Ex. DED-11	Cited Responses to Information Requests (attached to Dismukes Direct)
Ex. DRI-1	Summary of Direct and Supplemental Direct Testimony Supporting Merger Standards (attached to Ives Supplemental Direct)
Ex. DRI-2	Joint Applicants' Verified Response to Commission's Order on Merger Standards (Aug. 30, 2016) (attached to Ives Supplemental Direct)
Ex. DRI-3	Joint Applicants' Proferred Merger Commitments and Conditions (attached to Ives Rebuttal)
Ex. JAK-12	S&P GLOBAL RATINGS, *GPE Ratings Affirmed, Outlook Revised to Negative on Proposed Acquisition of Westar Energy* (May 31, 2016) (attached to Krajewski Direct)
Ex. JAK-13	MOODY'S INVESTORS SERVICE, *Rating Action* (May 31, 2016) (attached to Krajewski Direct)
Ex. JAK-14	FITCH RATINGS, "Fitch Places Westar on Negative Watch Following Acquisition Announcement." June 1, 2016 (attached to Krajewski Direct)
Ex. JAL-47	KCP&L Response to BPU Data Request 3-39 (Nov. 18, 2016) (attached to Krajewski Direct)
Ex. JAL-48	BUSINESS WIRE, *Fitch Places Westar on Negative Watch Following Acquisition Announcement* (Jun. 1, 2016) (attached to Lesser Direct)
Ex. JAL-49	S&P GLOBAL RATINGS, *Research Update: Westar Energy Inc. And Sub Rtgs Affirmed And Outlook Revised To Negative On Proposed Acquisition By Great Plains Energy* (May 31, 2016) (attached to Lesser Direct)
Ex. JAL-50	MOODY'S INVESTORS SERVICE, *Credit Opinion* (Jun. 1, 2016) (attached to Lesser Direct)
Ex. KEPCo-1	Memorandum to GPE Board of Directors from Terry Bassham re Strategic Opportunity – Horizon (Mar. 2, 2016) (Tr. Vol. 1, 220:25-221:3 (Bassham))
Ex. KEPCo-3	Westar Website Page – Historical Price Lookup (accessed Jan. 18, 2017) (Tr. Vol. 1, 220:25-221:3 (Ruelle))
Ex. KEPCo-5	Merger Standards slides presented by William Riggins, counsel for KEPCo, at Evidentiary Hearing (Jan. 31, 2017) (Tr. Vol. 2, 332:6-9 (Proctor))
Ex. KEPCo-7	KCP&L Response to KIC Data Request 17 (Nov. 4, 2016) (Tr. Vol. 3, 651:21-23 (Bryant))
Ex. KEPCo-10	Excerpts of KCP&L Board of Directors materials in KCP&L Response to Staff Data Request 23 (Tr. Vol. 3, 651:21-23 (Bryant))
Ex. KEPCo-11	Excerpt from Bryant Dashboard workbook in KCP&L Response to KEPCo Data Request 10-8 (Jan. 5, 2017) (Tr. Vol. 3, 651:21-23 (Bryant))
Ex. KEPCo-12	KCP&L Response to KEPCo Data Request 11-4 (Jan. 25, 2017) (Tr. Vol. 3, 651:21-23 (Bryant))
Ex. KEPCo-13	Stock Purchase Agreement by and between OCM Credit Portfolio LP and GPE (May 29, 2016) (Tr. Vol. 3, 651:21-23 (Bryant))
Ex. KEPCo-14	KCP&L Response to BPU Data Request 2-43 (Nov. 4, 2016) (Tr. Vol. 3, 651:21-23 (Bryant))

Short Citation	Full Citation and Reference to the Record
Ex. KEPCo-15	UBS, *Great Plains Energy Inc: How Great Can It Get? Initiating Neutral* (Jan. 5, 2017) (Tr. Vol. 3, 651:21-23 (Bryant))
Ex. Staff-3	Great Plains Energy Investor Presentation (Sept. 2016) (Tr. Vol. 3, 714:24 (Bryant))
Ex. Staff-5	KCP&L Response to Staff Data Request 446 (Jan. 19, 2017) (Tr. Vol. 3, Tr. 723:22-25 (Bryant))
Ex. Staff-6	MOODY'S INVESTORS SERVICE, *Credit Opinion* (Jun. 2, 2016) (Tr. Vol. 3, 725:19-21 (Bryant))
Ex. Staff-7	Dashboard-1 Tab, KCP&L Response to Staff Data Request 446 (Jan. 19, 2017) (Tr. Vol. 3,728:14-16 (Bryant))
Ex. Staff-8	Tab DR-446 model, KCP&L Response to Staff Data Request 446 (Jan. 19, 2017) (Tr. Vol. 3, 733:12-17 (Bryant))
Ex. Staff-9	Tab DR-446 output, KCP&L Response to Staff Data Request (Jan. 19, 2017) (Tr. Vol. 3, 735:9-11 (Bryant))
Ex. Staff-10	DR 446 model supporting Bryant Rebuttal at 22 with changes (Feb. 1, 2017) (Tr. Vol. 3, 73:20-22 (Bryant))
Ex. WJK-3	Estimated Transaction Savings (attached to Kemp Direct)
Ex. WJK-5	Industry Experience on Merger Savings (attached to Kemp Direct)
Flaherty Rebuttal	Rebuttal Testimony of Thomas J. Flaherty on behalf of GPE and KCP&L (filed Jan. 9, 2017)
Ives Direct	Direct Testimony of Darrin R. Ives on behalf of GPE and KCP&L (filed Jun. 28, 2016)
Ives Rebuttal	Rebuttal Testimony of Darrin R. Ives on behalf of GPE and KCP&L (filed Jan. 10, 2017)
Ives Supplemental Direct	Supplemental Direct Testimony of Darrin R. Ives on behalf of GPE and KCP&L (Nov. 2, 2016)
JA Br.	Joint Applicants' Initial Post-Hearing Brief (Feb. 28, 2017)
Kemp Direct	Direct Testimony of William J. Kemp on behalf of GPE and KCP&L (filed Jun. 28, 2016)
Kirsch Direct	Direct Testimony and Exhibits for Dr. Laurence D. Kirsch on behalf of KEPCo (refiled Jan. 27, 2017)
Krajewski Direct	Direct Testimony of John A. Krajewski, P.E., JK Energy Consulting, LLC on behalf of BPU (refiled Jan. 30, 2016)
Lesser Direct	Direct Testimony and Exhibits of Jonathan A. Lesser, Ph.D. on behalf of BPU (refiled Jan. 30, 2017)
Proctor Rebuttal	Rebuttal Testimony of James Proctor on behalf of GPE and KCP&L (filed Jan. 9, 2017)
Reed Rebuttal	Rebuttal Testimony of John J. Reed on behalf of GPE and KCP&L (filed Jan. 9, 2017, corrected Jan. 10, 2017)
Steffen Direct	Direct Testimony of Boris J. Steffen, CPA, ASA, ABV, CDBV, CGMA on behalf of BPU (refiled Jan. 30, 2017)

APPENDIX A

MOODY'S
INVESTORS SERVICE

Rating Action: Moody's downgrades Great Plains Energy to Baa3 from Baa2 and assigns Baa3 to new senior unsecured notes; outlook stable

Global Credit Research - 06 Mar 2017

Approximately $1 billion of debt downgraded and $4.3 billion of new debt rated

New York, March 06, 2017 -- Moody's Investors Service, ("Moody's") downgraded the long-term ratings of Great Plains Energy (Great Plains), including its senior unsecured rating, to Baa3 from Baa2. The rating outlook is stable. This rating action concludes the rating review initiated on 31 May 2016. In addition, Moody's assigned a Baa3 senior unsecured rating to Great Plains' new $4.3 billion senior unsecured notes. The proceeds from this issuance will be used to finance the acquisition of Westar Energy, Inc., which is expected to close in the second quarter of 2017.

Downgrades:

..Issuer: Great Plains Energy Incorporated

....Subordinate Shelf, Downgraded to (P)Ba1 from (P)Baa3

....Senior Unsecured Shelf, Downgraded to (P)Baa3 from (P)Baa2

....Subordinate Regular Bond/Debenture, Downgraded to Ba1 from Baa3

....Senior Unsecured Regular Bond/Debenture, Downgraded to Baa3 from Baa2

Assignments:

..Issuer: Great Plains Energy Incorporated

....Senior Unsecured Regular Bond/Debenture, Assigned Baa3

Outlook Actions:

..Issuer: Great Plains Energy Incorporated

....Outlook, Changed To Stable From Rating Under Review

RATINGS RATIONALE

"The downgrade reflects our expectation that the Great Plains and Westar merger transaction will close, although we believe there's a possibility of some delay," stated Jairo Chung, Moody's Analyst. "The significant amount of additional parent debt, leaving very little financial flexibility, and our view that Great Plains' management has a higher tolerance for financial risk were the key rationales for the downgrade," added Chung. In addition, although there is a sound strategic reason for the acquisition, the combined company's credit metrics will be significantly weaker, another reason for the downgrade.

With the additional $4.3 billion of debt, Great Plains' parent holding company debt as a percentage of consolidated debt is expected to be over 35%. As a combined company, Great Plains' ratio of cash flow from operations before changes in working capital (CFO pre-WC) to debt will be in the 13% range, lower than Great Plains' pre-acquisition stand-alone level of around 17% in 2016.

We believe that Great Plains' management and board of directors have adopted a higher risk tolerance for leverage than had been exhibited prior to this transaction, a long-term credit negative. Great Plains will have limited financial flexibility for some time following the merger and could potentially be under greater pressure if regulatory support in Kansas and Missouri wanes or if there is a softening of regional macro-economic fundamentals.

As a combined company, Great Plains will increase the scale and size of its operations, with a higher Federal

Electric Regulatory Commission (FERC) regulated transmission rate base and an increased its presence in Kansas. We view FERC as one of the most supportive regulatory jurisdiction in the U.S. and the regulatory environment in Kansas for electric utilities to be relatively challenging.

Rating Outlook

The stable outlook incorporates our expectation that the pending transaction and the integration of Great Plains and Westar will be completed as described by the company. The stable outlook reflects our view that the credit quality of its utilities will be maintained and that Great Plains will not undertake any other financings that put further pressure on its balance sheet.

Factors That Could Lead to an Upgrade

A rating upgrade is unlikely in the near-term given higher leverage incurred to finance the Westar acquisition. However, a rating upgrade could be considered if there is a significant reduction in parent debt or the company's financial performance improves meaningfully such that its CFO pre-WC to debt increases to high teens on a sustained basis. Also, if there is a material improvement in the company's regulatory environments, resulting in credit supportive developments, a rating upgrade could be considered.

Factors That Could lead to a Downgrade

A rating downgrade could be considered if there is a further deterioration in the company's financial performance, such that its CFO pre-WC to debt falls below 13% on a sustained basis. Also, if more debt is added at the parent level, Great Plains' rating could be downgraded. A rating downgrade is also possible if the regulatory environments become less credit supportive.

Headquartered in Kansas City, Missouri, Great Plains is a utility holding company with operations in Kansas and Missouri through Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company. Great Plains also owns 13.5% of Transource Energy LLC (A2 stable), a joint venture transmission company. It is in the process of acquiring Westar Energy, Inc.

The principal methodology used in these ratings was Regulated Electric and Gas Utilities published in December 2013. Please see the Rating Methodologies page on www.moodys.com for a copy of this methodology.

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APPENDIX B

APPENDIX B—BACKGROUND OF TRANSACTION

Discussions around a possible combination of GPE and Westar began "[i]n early 2015" when Terry Bassham, GPE's CEO, contacted Mark Ruelle, Westar's CEO. Ex. BJS-60 at 64. Mr. Bassham indicated that the GPE Board had "potential interest in discussing the merits of a business combination with Westar." *Id.* at 64. Mr. Ruelle informed Mr. Bassham that Westar was not for sale. Later that summer, Mr. Bassham again reiterated GPE's "potential interest in combining with Westar" to Mr. Ruelle, and was again told that Westar was not for sale. *Id.* at 65.

GPE's effort to acquire Westar intensified late in 2015. In September, Mr. Bassham and Mr. Ruelle again spoke of a possible combination. Mr. Ruelle told Mr. Bassham that Westar was not for sale, but added that "he was willing to hear what [GPE] wished to share with the Westar Board in terms of its potential interest." *Id.* at 66. Mr. Bassham indicated that GPE "still remained very interested" in a potential combination, although the company's valuation of Westar would not be in the range of recently announced utility transactions. *Id.*.

When the two spoke again later that month, Mr. Ruelle stated his view that "based on the anticipated benefits to Westar shareholders," Westar "did not view a business combination transaction structured as a merger of equals favorably." *Id.*. Mr. Ruelle also advised Mr. Bassham 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 to Westar's consideration of any proposal made by [GPE]." *Id.*

On October 2, 2015, GPE's Board held a special meeting "to provide an update on the preliminary discussions between Mr. Bassham and Mr. Ruelle regarding a potential business combination transaction." *Id.* GPE management believed that the transaction was "achievable" and indicated that the "objective is to enter into bilateral discussions with [Westar] and, within an approximately 6 week timeframe, perform due diligence, finalize the offer, and negotiate a definitive agreement." Ex. BPU-1 at 6/25.[45] GPE management cautioned that a key consideration for the proposed combination was that GPE's "relative size and slight P/E trading discount potentially limits its ability to compete with larger suitors." *Id.* at 13/25. GPE "may have less financial flexibility than [] other suitors" and the Company was at a competitive disadvantage, relative to other potential acquirers of Westar, due to its "size" and "valuation (P/E) and balance sheet strength." *Id.* at 24/25.

GPE's Board authorized Mr. Bassham to discuss a proposal with Mr. Ruelle that "would be based on an acquisition of Westar by GPE at a premium of 20%-25% over the current market price of Westar's shares of common stock, with consideration payable 70% in GPE common stock and 30% in cash." Ex. BJS-60 at 66. With Westar's common stock trading in the $37 to $38 range (Ex. BPU-1 at 15/25 ($37.88 at close on Sept. 29, 2015), Ex. BJS-60 at 68-69 ($38.17 at close on October 6, 2015)—GPE's proposal thus contemplated acquiring all outstanding Westar shares at a valuation range of $45.50 to $47.50 per share (Ex. BPU-1 at 6/25). *See id.* at 19/25 ("acquisition price" of $47.35 per share); Tr. Vol. 1, 207:3-20 (Ruelle) (acquisition price about $45-$47 per common share, in total). Based on this valuation, GPE's October proposal put the acquisition premium for the transaction at approximately $1.3 billion, with GPE offering Westar shareholders about $13-14 per share in cash. Ex. BPU-1 at 19 (multiplying dollar value of the acquisition premium offered with "Sky Shares Outstanding"). Mr. Bassham conveyed GPE's proposal to Mr. Ruelle on October 7, 2015. Ex. BJS-60 at 66-67. Mr. Ruelle testified during the hearing that "[w]e were not even for sale at that price and that was abundantly clear."

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[45] The GPE Board discussed other courses of action available to the Company, including: (1) maintaining the "status quo" by "executing on organic utility growth opportunities"; (2) a "merger with [a] strategic peer"; and "[acquisition of a] smaller strategic peer." *Id.* at 10/25. Two benefits of pursuing the "status quo" course of action recognized by GPE's management were GPE's "strong balance sheet that can finance existing organic growth opportunities" and "no additional regulatory risk." *Id.*

Tr. Vol. 1, 209:2-3 (Ruelle); *see* Tr. Vol. 1, 208:21-209:9 (Ruelle) (disagreeing that the October 2015 offer included a $1.09 to $1.36 billion acquisition premium because "we were not for sale at that price"), 209:4-9 (Westar was "not for sale at that price"), 210:6-8 (similar).

In addition to interest from GPE, three other companies contacted Westar about a potential business combination during 2015. Ex. BJS-60 at 65, 67 (Bidders A, B, and C). On November 11, 2015, Westar retained Guggenheim Securities ("Guggenheim") as a financial advisor to advise the Company "concerning merger and acquisition matters, including the potential sale of Westar." *Id.* at 67. At the meeting on November 19, 2015, the Westar Board received a presentation from Guggenheim noting that "utilities are currently trading above long-term average levels and recent precedent transaction premia are robust." Ex. BPU-9 at 13 (emphasis in original); *see* Tr. Vol. 1, 172:8-14 (Ruelle) (agreeing the presentation "was consistent with some of our thoughts [about a possible transaction]").

In December 2015, Guggenheim provided the Westar Board with a list of ten "Potential Strategic Counterparties." Ex. BPU-10 at 14. GPE was not on that list. Mr. Ruelle testified that at this stage of Westar's process, GPE was not thought capable of meeting Westar's expectations. Tr. Vol. 1, 192:7-15 (Ruelle) ("they were small. . . . And it was, it was why they weren't in the original document"), 192:11-12 ("we sort of characterized them [GPE] as the little that thinks it can"). After evaluating its options, the Westar Board decided to approach a "single long-term bidder" and authorized Mr. Ruelle to approach Bidder A—not [GPE][46]—about "a potential acquisition of Westar." *Id.* When asked during the hearing why Westar's Board selected Bidder

[46] The Board selected Bidder A over GPE and the other two bidders based on several considerations: (1) the "price to be received by Westar's shareholders"; (2) the "type of consideration and certainty of value"; (3) the "ability of the counter-party in any such transaction to demonstrate that the transaction would be in the public interest and be able to obtain the necessary regulatory approvals"; (4) the "ability to obtain any necessary financing for the transaction"; and (5) "any commitments that the counterparty would be willing to make with respect to Westar's customers and employees, as well as the communities served by Westar." Ex. BJS-60 at 68.

A, and not GPE, Mr. Ruelle stated that Bidder A had "the desired characteristics" and that "the Board had an assessment that . . . there would be no question about its ability to finance a company of our size." Tr. Vol. 1, 179:21-180:1 (Ruelle). Mr. Ruelle continued: "[GPE] was a little bit smaller than us at this time . . . that's why they weren't on the [list of potential strategic counterparties], right? We weren't sure that [GPE] would be able to finance a transaction like this." *Id.*, 180:1-6 (Ruelle). Mr. Ruelle went on to explain that at this point in the process there was a "more of a concern" whether the transaction would be "too big for [GPE]." *Id.*, 180:14-15 (Ruelle).

Bidder A informed Westar in January 2016 that it was no longer interested in a potential transaction "given other internal investment opportunities for its available capital." Ex. BJS-60 at 69. On February 11, 2016, Mr. Ruelle contacted Mr. Bassham about GPE's October 2015 proposal and asked Mr. Bassham for his "current view on the price [GPE] would be willing to pay in a potential acquisition" and whether the Company "would be willing to provide additional certainty with respect to the value of the consideration payable in the potential acquisition, by increasing the cash portion of the consideration." *Id.* Mr. Ruelle added that Westar preferred cash consideration. *Id.*.

The GPE Board met on February 18, 2016, and authorized Mr. Bassham to convey an updated proposal to Mr. Ruelle. *Id.* at 70. The terms included "an acquisition of Westar by [GPE] priced at a premium of 20% over the current market price, with a consideration mix of 50% [GPE] common stock and 50% cash." *Id.*; *see* Ex. KEPCo-3 (Westar stock closed at $45.15 on Feb. 17, 2016). Like the October proposal, GPE's February proposal offered about a $1.3 billion acquisition premium over the Westar stock price. Tr. Vol. 1, 211:17-20 (Ruelle). GPE's offer on the cash component of the February proposal, however, increased from 30% to 50% of the consideration offered. *Id.*, 212:25-213:7 (Ruelle).

At a meeting on February 22, 2016, the Westar Board decided to "solicit indications of interest from several potential counter-parties in order to gauge their level of interest in a potential strategic transaction." Ex. BJS-60 at 70. This approach would permit the Board "to ascertain maximum potential value" of the company. *Id.* Unlike Guggenheim's presentation to the Westar Board on December 9, 2015, this presentation to the Westar Board at the February 2016 meeting now included GPE as a "potential strategic counterpart[y]." Ex. BPU-11 at 7.

Mr. Ruelle called Mr. Bassham on February 29, 2016, and, based on that conversation, Mr. Bassham informed the GPE Board that Westar had decided "to start a process to sell the company" and had "engaged Guggenheim Partners as their banker." Ex. KEPCo-1 (memo) at 1. Guggenheim subsequently contacted GPE and 15 other companies regarding a potential transaction. Ex. BJS-60 at 70. Guggenheim explained to GPE that the process would consist of two rounds, with initial bids due in early April, and final bids, for those companies Westar invited to the second round, due in early May. Ex. KEPCo-1 at 1. The first-round bids would be "non-binding proposals" (Ex. BPU-12 at 9), whereas the second-round bids would be "binding" (Ex. BPU-13 at 9; *see* Tr. Vol. 1, 213:8-18 (Ruelle) (similar)).

At the outset of the auction process, GPE expressed doubts about its ability to close the transaction. At a March 2016 Board Meeting, GPE's management noted that, "[w]hile we represent the most logical strategic partner for [Westar], we expect a handful of very credible strategic bidders to aggressively participate in this process." Ex. BPU-2 at 7/48. "[G]iven [Westar's] relatively larger market capitalization and what we expect to be a competitive process, there are real limitations in our ability to participate and consummate a successful transaction."

Id. at 2/48. Moreover, by this time, the market price of Westar's common stock had appreciated 26.7% since GPE's October proposal and was trading around its 52-week high. *Id.* at 20/48, 28/48 ($31.67 share price at 99.3% of 52-week high).

On April 5, 2016, GPE and four other companies submitted their first-round bids. Based on the considerations discussed at the March 2016 Board Meeting, GPE indicated "that it might be willing to acquire Westar for a price of $54.50 per share of Westar common stock, with the consideration being 65% cash and 35% [GPE] common stock." Ex. BJS-60 at 71. The offer "represented a 24% premium to [Westar's] undisturbed share price of $44.08 as of March 9" (Ex. BPU-3 at 1)—about a $1.5 billion acquisition premium over the stock price.[47]

The Westar Board met on April 11, 2016, to consider the first-round bids and decided to invite all five companies into the second round of the sale process. Ex. BJS-60 at 71; Tr. Vol. 1, 185:21-25 (Ruelle); Ex. BPU-12 at 9 (Guggenheim first round bid overview).

The GPE Board met on May 2, 2016, and again discussed the competitive landscape surrounding the proposed transaction. GPE management advised the Board that it had received feedback from Westar's advisors that its "bid was not the highest" and that "more cash [was] preferred" given that "100% cash bids were received in the first round." Ex. BPU-3 at 3. (GPE had been outbid by Bidder D, which had "proposed a price range of up to $55.11 per share in cash on a fully-diluted basis." Ex. BJS-60 at 71.) GPE's management noted that it "has been reported that a number of credible parties are also evaluating [Westar], including Ameren and various Canadian pension and infrastructure funds; other unnamed parties are likely still active in the process." Ex. BPU-3 at 4. GPE's management continued: "Given this competitive and

[47] GPE's nonbinding offer of $54.50 per share is a $10.42 per share premium over Westar's March 9, 2016 closing price (BPU-3 at 1), and produces an acquisition premium of about $1.5 billion when measured against the March 9 price (i.e., multiplying $10.42 per share with 142.685 million shares outstanding of Westar stock at of May 31, 2016. Ex. BPU-13 at 11.

dynamic process, we are evaluating various financing alternatives to increase the cash component of our bid including discussions with potential financial partners." *Id.*.

The GPE Board held a special meeting on May 18, 2016, to discuss the Company's binding bid and GPE's competition in the auction. GPE management again noted that "Ameren is likely involved and aggressively pursuing a potential acquisition of Sky." Ex. BPU-8 at 17. Mr. Bryant's presentation explained several reasons why an Ameren-Westar transaction would be competitive: (1)"[Westar] represents a logical 'fit' with efficiencies and an attractive 'equity story' "; (2) Ameren's "relative size / balance sheet advantage versus [GPE]"; and (3) Ameren's "similar regulatory positioning." *Id.* at 17. Noting that "[Westar] may receive multiple final bids," Mr. Bryant suggests a possible path forward to increase GPE's competitiveness: "If any buyer is truly distinguished, Sky may seek to sprint to the finish line with that buyer." *Id.*.

On May 23, 2016, GPE and two other companies submitted final bids to acquire Westar. Ex. BJS-60 at 73; Tr. Vol. 1, 188:1-5 (Ruelle). GPE's bid to acquire Westar was "for a price of $58.25 per share, with 85% of the consideration being in cash and 15% in [GPE] common stock." Ex. BJS-60 at 73; Tr. Vol. 1, 188: 6-10 (Ruelle). At this point in the process, GPE was the high bidder. Tr. Vol. 1, 188:11-189:7 (Ruelle). GPE was also the smallest company left in the process: the two other remaining bidders had market capitalizations that were more than two-times and more than eleven-times larger than the market capitalization of GPE. Ex. BPU-13 at 14 ("Bidder Current Market Cap" of GPE ("Genius"), Bidder D, and Bidder E are $4.8 billion, $12.8 billion, and $54.4 billion, respectively); Tr. Vol. 1, 191:13-192:15 (Ruelle).

On May 26, 2016, Westar and Guggenheim held conversations with each bidder. GPE confirmed to Guggenheim that it was willing to accept the negotiated terms of the merger agreement. Ex. BJS-60 at 74-75. During that conversation, GPE learned from Guggenheim that the purchase prices of the final two participants in the process were "close," and that it should convey its "best and final proposal" to Guggenheim. *Id.* at 75. Following this discussion, GPE revised its bid letter to increase its purchase price to $60.00 per share. *Id.*

On May 29, 2016, the Westar Board "unanimously determined that the merger was in the best interests of Westar and its shareholders" and approved an acquisition by GPE. *Id.* at 77; *see id.* at 63 ("Ruelle's decision [to recommend GPE] . . . was based on his judgment that it was unlikely that Westar would be able to obtain as high or a higher price from any of the other bidders within the next few days"); Tr. Vol. 1, 192:13-14 (Ruelle) ("[GPE] put together a bid that knocked it out of the park"). The terms of the deal provided that Westar's shareholders would receive about $7.3 billion in cash.[48] *See* Tr. Vol. 1, 121:11-122:13 (Bassham) (acknowledging that the "estimated cash portion [of the transaction] is 7.2 billion"). GPE would provide Westar shareholders with $60 per share of Westar common stock, at an acquisition premium of approximately $2.3 billion as measured from the March 9, 2016 "undisturbed" stock price of $44.08. Bryant Direct at 11:7-9. The cash component of the consideration would be $51 per share of Westar common stock, with the remainder swapped for GPE common stock. These terms stand in marked contrast to GPE's October 2015 proposal that offered an acquisition premium of approximately $1.3 billion over a much lower "undisturbed" $38 price per share, and $13 to $14 per share in cash.

When Mr. Ruelle was asked during the hearing whether the goal is to "go as far as you can in purchase price" so long as the public interest is served, he responded, "Yeah, consistent with fiduciary duties. My legal duties are to take care of shareholders." Tr. Vol. 1, 241:3-8 (Ruelle)

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[48] The total cash consideration of the transaction was computed by multiplying the cash portion of purchase price, at $51 per share, (BPU-14 at 2) by the 142.6 million Westar shares outstanding (*id.* at 4) for a total of $7.27 billion in cash.

APPENDIX C

APPENDIX C

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
Changes to Commitments Presented in Ex. DRI-3		**Citations to Record**
Applicability of Commitments and Conditions		
~~These conditions' are presented as a package. Changes to any individual condition may require changes to other conditions. The conditions will remain in force and effect for the time period specified in the condition or if no time period is specified in perpetuity and in all cases unless otherwise approved by the KCC.~~		Tr. Vol. 4, 1001:3-1003:17 (Ives)
General Conditions **Financing and Ring-Fencing Conditions**		
NEW	**The Joint Applicants shall maintain the financial integrity and independence of Westar and KCP&L in all respects and will exercise management prudence in matters relating to dividends, capital investments and other financial actions in order to maintain an investment grade credit rating consistent with its pre-merger operations.**	Ex. DED-2, Financial Integrity Commitment #1. Tr. Vol. 4, 1008:10-20 (Ives) (agreeing that the purpose of FIC#1 is to maintain an investment grade rating; listing "some actions in order to maintain an investment grade credit rating consistent with premerger operations"); 1008:21-1011:25 (comparing Joint Applicants' understanding of their "plan to use reasonable and prudent investment grade capital structures" in Commitment No. 10 and "inten[t] to utilize" in Commitment No. 13 with proposed FIC 1 commitment); Tr. Vol. 5, 1119:21-1121:13 (Dismukes) (cross examination on FIC#1).
10	*Separate capital structures*: GPE, KCP&L and Westar shall maintain separate capital structures to finance the **respective** activities and operations of each entity~~ **unless otherwise authorized by the Commission.**~~	Ex. DED-2, Financial Integrity Commitment #1.b.
	~~**Unless the Commission authorizes otherwise,**~~ GPE, KCP&L and Westar shall maintain separate **issuer (i.e.,** Corporate Credit Ratings**) and issue ratings.**~~, and~~	Ex. DED-2, Financial Integrity Commitment #1.a.

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	GPE, KCP&L and Westar shall maintain separate debt so that neither GPE, KCP&L nor Westar will be responsible for the debts of each other or their other affiliated companies. GPE, KCP&L and Westar shall also maintain**, for the exclusive benefit of KCP&L and Westar,** adequate capacity under revolving credit facilities and commercial paper, if any, which capacity may be administered on a combined basis provided that pricing is separated by entity and there are neither cross-default provisions nor provisions under which KCP&L or Westar guarantee the debt obligations of **GPE or** any GPE affiliate.	Ex. DED-2, Financial Integrity Commitment #1.a. Tr. Vol. 4, 1012:1-1014:1 (Ives) (discussion relating to shared access to revolving credit facilities and commercial paper "under a master" with credit default provisions and providing for ringfencing).
	GPE, KCP&L and Westar shall also maintain separate preferred stock, if any.	
	KCP&L and Westar ~~plan to~~ **shall** use reasonable and prudent investment grade capital structures. KCP&L and Westar will be provided with appropriate amounts of equity from GPE to maintain such capital structures.	
	GPE shall maintain consolidated debt of no more than 70 percent of total consolidated capitalization.	
	GPE commits that Westar and KCP&L will maintain an equity share of no less than 40 percent and a debt share of no more than 53 percent. ~~**KCP&L's debt shall be maintained at no more than 65 percent. GPE commits that Westar's debt shall also be maintained at no more than 65 percent.**~~	Ex. DED-2, Financial Integrity Commitment # 10. Tr. Vol. 4, 1003:22-1005:25 (Ives) (explaining that Joint Applicants' proposal of a 35% equity floor "reflect[s] that we already have that commitment for our operating utility, KCP&L, as a result of a prior decision by the Commission"); 1007:14-1008:6 (Ives) (proposed debt ceiling rate in JA Commitment No. 10 also intended to align with 2001 decision on GPE reorganization); 1072:14-1072:25 (Ives) (explaining 35% equity floor derives from 2001 decision on GPE reorganization); Tr. Vol. 5, 1109:12-1110:3 (Dismukes) (bases for recommendations on capitalization percentages). Tr. Vol. 4, 1005:21-25 (Ives) (JA Commitment No. 10 provides that regulated utilities' debt shall be "maintained at no more than

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
Changes to Commitments Presented in Ex. DRI-3		Citations to Record
		65 percent"); *id.*, 1005:5-1007:10 (Ives) (FIC#10 does not apply exclusively for ratemaking purposes, and addresses same issue in JA Commitment No. 10).
	GPE commits that Westar and KCP&L will not make any dividend payments to the parent company to the extent that the payment would result in an increase in either utility's debt level above ~~**65**~~ **60** percent of its total capitalization, unless the Commission authorizes otherwise.	Ex. DED-2, Financial Integrity Commitment #9.
NEW	**The Joint Applicants will not sell, lease, rent or other convey, outside routine business practices, Westar and KCP&L assets without Commission approval.**	Ex. DED-2, Financial Integrity Commitment #8. Tr. Vol. 4, 1023:4-11 (Ives) ("I don't think [FIC 8] is specifically addressed. I think in Condition 43, which is the IRP, you might get an indication in that IRP if there were going to be a sale or a closure of an asset of those entities, and I think otherwise Kansas generally reviews those in the context of general rate cases and that authority would still reside with the Commission post close"). Tr. Vol. 5, 1106:20-1107:14 (Dismukes) (discussing difference between FIC 8 and JA Commitment No. 43).
11	*Separation of assets*: GPE commits that KCP&L and Westar will not comingle their assets with the assets of any other person or entity~~**, except as allowed under the Commission's Affiliate Transaction statutes or other Commission order**~~.	Ex. DED-2, Financial Integrity Commitment #7.
	GPE commits that KCP&L and Westar will conduct business as separate legal entities and shall hold all of their assets in their own legal entity name~~ **unless otherwise authorized by Commission order**~~.	Ex. DED-2, Financial Integrity Commitment #2.

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
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	GPE, KCP&L and Westar affirm that the present legal entity structure that separates their regulated business operations from their unregulated business operations shall be maintained unless express Commission approval is sought to alter any such structure. GPE, KCP&L and Westar further commit that proper accounting procedures will be employed to protect against cross-subsidization of GPE's, KCP&L's and Westar's non-regulated businesses, or GPE's other regulated businesses in Kansas or its regulated businesses in other jurisdictions by Westar's Kansas customers.	
12	*Other Separation:* **The Joint Applicants commit that Westar and KCP&L will not grant or permit to exist any such encumbrance, claim, security interest, pledge, or other right in favor of any entity or person, its assets other than immaterial liens or encumbrances in the ordinary course of business.**	Ex. DED-2, Financial Integrity Commitment #5.
	Neither KCP&L nor Westar shall guarantee the debt of the other, or of GPE, or of any of GPE's other affiliates, or otherwise enter into make-well or similar agreements, unless otherwise authorized by the Commission.	Ex. DED-2, Financial Integrity Commitment #3.
	Neither KCP&L nor Westar shall include, in any debt or credit instrument of Westar and KCP&L, any cross default provisions between said utilities' respective securities and the securities of GPE or any other affiliate.	Ex. DED-2, Financial Integrity Commitment #3.a
	Neither KCP&L nor Westar will include, in any debt or credit instrument of Westar ~~and~~ **or** KCP&L, any financial covenants or default triggers related to GPE or any of its affiliates.	Ex. DED-2, Financial Integrity Commitment #3.b.
	Neither KCP&L nor Westar shall pledge their respective stock or assets as collateral for obligations of any other entity~~, unless otherwise authorized by the Commission~~.	Ex. DED-2, Financial Integrity Commitment #4.

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13	*Use of utility-specific capital structure*: KCP&L and Westar intend to utilize their respective utility-specific capital structure in general rate case filings subsequent to the close of the Transaction. **The Joint Applicants shall commit that its future cost of service and rates will not be adversely impacted as a result of this merger and that its future cost of service and rates will be set commensurate with the financial and business risks attendant to their individual regulated utility operations.** In such filings, KCP&L or Westar (as applicable) shall have **the burden of proof to** ~~provide (a) evidence~~ demonstrat**e**~~ing~~ **(a)** that the Transaction has not resulted in a downgrade to that utility's Corporate Credit Rating **or senior unsecured debt issue rating** that exists at the time the general rate case is filed compared to the Corporate Credit Rating **or senior unsecured debt issue rating** of that utility that existed as of May 27, 2016, or (b) if such a Corporate Credit Rating **or senior unsecured debt issue rating** downgrade resulting from the Transaction exists at the time a general rate case is filed, ~~evidence demonstrating that~~ Kansas customers **shall be** ~~are~~ held harmless from any cost increases resulting from such a downgrade~~,~~**;** and (c) ~~evidence supporting~~ the reasonableness of using the utility-specific capital structure of KCP&L or Westar in determining a fair and reasonable rate of return for the applicable utility. **A presumption shall apply that the ratings downgrade is caused by, results from, and is derivative of the Transaction.**	Ex. DED-2, Financial Integrity Commitment #12.
14	*Credit rating downgrade*: ~~In the event KCP&L or Westar should have its respective~~ **If** Standard & Poor's ("S&P") or Moody's **downgrade the** Corporate Credit Rating **or senior unsecured debt issue rating of KCP&L or Westar (the "Impacted Utility")** ~~downgraded~~ to below **investment grade (i.e.,** BBB- or Baa3 **or below)**, ~~respectively, as a result of the Transaction,~~ ~~KCP&L and/or Westar (~~the **"**Impacted Utility**"**~~)~~ commits to file:	Ex. DED-2, Financial Integrity Commitment #1.c. Tr. Vol. 4, 1014:21-1016:4 (Ives) (clarifying "intent" of JA Condition No. 14 is to trigger with "a decline in credit rating below investment grade for either Westar or KCP&L, probably issue or issuer"); 1016:5-1017:6 (Ives) (condition would "probably" apply if the ratings agencies downgrade Westar a

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
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	i. Notice with the Commission within five (5) business days of such downgrade **that includes specification of the affected credit rating(s), the pre-and post-downgrade credit ratings of each affected credit rating, and a full explanation of why the credit rating agenc(ies) downgraded each of the affected credit ratings;** ii. A pleading with the Commission within sixty (60) days which shall include the following: • Actions the Impacted Utility may take to raise its S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating to BBB- or Baa3, respectively, including the costs and benefits of such actions and any plan the Impacted Utility may have to undertake such actions. If the costs of returning Westar and/or KCP&L to investment grade are above the benefits of such actions, Westar and/or KCP&L shall be required to show and explain why it is not necessary, or cost-effective, to take such actions and how the utility(s) can continue to provide efficient and sufficient service in Kansas under such circumstances; • The change~~, if any,~~ on the capital costs of the Impacted Utility due to its S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating being below BBB- or Baa3, respectively; and • Documentation detailing how the Impacted Utility will not request from its Kansas customers, directly or indirectly, any higher capital costs incurred due to a downgrade of its S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating below BBB- or Baa3, respectively; iii. File with the Commission, every forty-five (45) days thereafter until the Impacted Utility has regained its S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating of BBB- or Baa3, respectively or above, an updated status report with respect to the items required in paragraph 4(c)(ii) above. iv. If the Commission determines that the decline of the Impacted Utility's S&P or	"result of leverage or issues at the holding company stemming from the transaction"); 1017:7-1018:3 (Ives) (clarifying that FIC#1 does not limit the reporting requirement to a downgrade of a corporate credit (issuer) rating).

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	Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating to a level below BBB- or Baa3, respectively, has caused its quality of service to decline, then the Impacted Utility shall be required to file a plan with the Commission detailing the steps that will be taken to restore service quality levels that existed prior to the ratings decline. v. **Credit rating linkages.** In the event KCP&L's or Westar's affiliation **(ownership or otherwise)** with GPE or any of GPE's affiliates is **a contributing factor** ~~the reason~~ for KCP&L's or Westar's ~~respective~~ S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating to be downgraded to below BBB- or Baa3, respectively, KCP&L and/or Westar shall ~~pursue~~ **promptly undertake** additional legal and structural separation~~, if necessary,~~ from the affiliate(s) causing the downgrade**.**~~, and~~ **Nothwithstanding Commitment No. 10's limitation on payment of dividends,** the Impacted Utility shall not pay a common dividend without Commission approval or until the Impacted Utility's S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating has been restored to BBB- or Baa3, respectively~~, or above~~. vi. If KCP&L's or Westar's respective S&P or Moody's ~~Corporate~~ ~~C~~credit ~~R~~rating declines below BBB- or Baa3, respectively, ~~as a result of the Transaction,~~ the Impacted Utility shall file with the Commission **within 15 days** a comprehensive risk management plan ~~that~~ setting forth committed actions assur~~es~~**ing that** the Impacted Utility's access to and cost of capital will not be further impaired. ~~The plan shall include a non-consolidation opinion if required by S&P or Moody's.~~	
15	*Cost of capital*: Neither KCP&L nor Westar shall seek an increase to their cost of capital as a result of **(i.e., arising from, or related to)** the Transaction or KCP&L's and Westar's ongoing affiliation with GPE and its affiliates after the Transaction. **The burden of proof that the increase to the cost of capital is not in any way a result of, arising from, or related to the transaction shall be born by KCP&L or Westar.** Any net increase in the cost of capital that KCP&L or Westar seek shall be supported by documentation that: (a) the increases are a result of factors not associated with the	

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	Transaction or the post-Transaction operations of GPE or its non-KCP&L and non-Westar affiliates; (b) the increases are not a result of changes in business, market, economic or other conditions caused by the Transaction or the post-Transaction operations of GPE or its non-KCP&L and non-Westar affiliates; and (c) the increases are not a result of changes in the risk profile of KCP&L or Westar caused by the Transaction or the post-Transaction operations of GPE or its non-KCP&L and non-Westar affiliates. The provisions of this section are intended to recognize the Commission's authority to consider, in appropriate proceedings, whether this Transaction or the post-Transaction operations of GPE or its non-KCP&L and non-Westar affiliates have resulted in capital cost increases for KCP&L or Westar. Nothing in this condition shall restrict the Commission from disallowing such capital cost increases from recovery in KCP&L or Westar's rates.	
16	*Goodwill* ***impairment***: **Customers shall be held harmless from the risk or realization of goodwill impairment.** The goodwill arising from the Transaction **shall** ~~will~~ be maintained on the books of GPE**. Joint Applicants do** ~~and is therefore~~ not expect~~ed~~, **and shall take prudent actions to avoid, goodwill** to negatively affect KCP&L's or Westar's cost of capital~~; however, I~~ **I**f such goodwill becomes impaired ~~other than as a result of a Commission order~~ and such impairment negatively affects KCP&L's or Westar's cost of capital **or credit ratings**, all ~~net~~ costs associated with the decline in the Impacted Utility's credit quality specifically attributed to the goodwill impairment, considering all other capital cost effects of the Transaction and the impairment, shall be excluded from the determination of the Impacted Utility's rates. For the first **full** five (5) **calendar** years after closing of the Transaction, GPE shall provide Staff and CURB its annual goodwill impairment analysis in a format that includes spreadsheets in their original format with formulas and links to other	

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Changes to Commitments Presented in Ex. DRI-3		**Citations to Record**
	spreadsheets intact and any printed materials within thirty (30) days after the filing of GPE's Form 10 Q for the period in which the analysis is performed, as well as all supporting documentation. Thereafter, this analysis will be made available to Staff and CURB upon request.	
NEW	**Joint Applicants shall file within 30 days after an order of the Commission conditionally approving the transaction, a written plan to deleverage the holding company. The written plan shall state the mitigating actions available to avoid a downgrade of the Corporate Credit Rating or senior unsecured debt of Westar and/or KCP&L, and may include for example, issuance of non-consolidation opinion.**	KEPCo Br. at Section VII.2.b..
Ratemaking, Accounting and Related Conditions		
NEW	**The Joint Applicants shall commit to uphold the principle that its future cost of service and rates will be set commensurate with the financial and business risks attendant to its affiliates' regulated utility operations and shall not challenge this principle before the KCC nor on any legal appeal.**	Ex. DED-2, Financial Integrity Commitment #1.c.
18	For ratemaking purposes, Westar and KCP&L **shall** agree to ~~**the**~~ use ~~of~~ an ~~**actual**~~ utility-specific capital structure with an equity share of no less than ~~**45**~~ **40** 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 and the Commission may grant such relief, to the extent it chooses to do so, based on a finding of good cause**~~. **For purposes of estimating a post-merger cost of capital, Westar and KCP&L will cap its weighted average cost of debt to the level included in their most recent base rate case filing prior to the merger and this debt cost rate cap will be allowed to increase by no more than the percentage increase in the U.S. ten year treasury bond**	Ex. DED-2, Financial Integrity Commitment #10. Tr. Vol. 4, 1018:16-1020:19 (Ives) (unlike FIC#10, ratemaking provisions in commitment no. 18 do not contain a cap; providing example of a "good cause" circumstance that Joint Applicants would petition Commission for relief from JA Commitment No. 18), 1071:14-1072:4 (Ives) (responding to Commissioner question about the FIC 10 to cap the weighted cost of debt). *See generally id.*, 1072:5-1072:25 (Ives). Tr. Vol. 5 at 1109:12-1111:10 (Dismukes) (recommendations for capitalization percentages based on his review of trends;

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	rate as measured from the rate that is reported at the time of the merger closing to the time period under which rates are being set. This cap will remain in place for five full calendar years following the close of the transaction.	discussion of recommendation for ratemaking purposes); Tr. Vol. 5, 1115:5-1118:7 (Dismukes) (cross examination on same).
19	**The Joint Applicants will never include in its cost of service, nor shall it seek to recover in rates, any transition costs that are in excess of the benefits that these transition costs are intended to attain.** Transition costs are those costs incurred to integrate Westar under the ownership of GPE and include integration planning and execution, and "costs to achieve." Transition costs include capital and non-capital costs. Non-capital transition costs can be ongoing costs or one-time costs. KCP&L's and Westar's non-capital transition costs~~, which shall include but not be limited to severance payments made to employees other than those required to be made under change of control agreements,~~ can be deferred on the books of either KCP&L or Westar to be considered for recovery in KCP&L and Westar future rate cases. If subsequent rate recovery is sought, KCP&L and Westar will have the burden of proof to clearly identify where all transaction costs are recorded and of proving that the recoveries of any transition costs are just and reasonable as their incurrence facilitated the ability to provide benefits to its Kansas customers. **KCP&L and Westar shall be required to attest in all future rate proceedings before the Commission that no transition costs in excess of their corresponding benefits are included in its cost of service and rates, and to provide a complete explanation of the procedures used to ensure that the transition costs, in excess of their corresponding benefits, are not included in the cost of service or rates. This commitment shall be required until all transition costs are fully amortized.** **The Joint Applicants shall bear the burden of proving, and fully documenting, any merger-related synergy savings that are used as offsets to any merger-related transition costs. These benefits must be provided on a detailed, itemized basis**	Ex. DED-2, Financial Integrity Commitment #14, 14.a, 14.b, 11 (severance costs). Tr. Vol. 5, 1107:15-1107:24 (Dismukes) (with respect to FIC#11, disagreeing that severance costs should be included in the transaction cost category); Tr. Vol. 5, 1113:22-1115:4 (Dismukes) (cross examination on same).

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	Changes to Commitments Presented in Ex. DRI-3	**Citations to Record**
	which directly corresponds to their associated transition costs. Such benefits may be the result of avoiding or shifting costs and activities.	
20	Goodwill associated with the premium over book value of the assets paid for the shares of Westar stock (referred to herein as "Acquisition Premium") will be maintained on the books of GPE. The amount of any Acquisition Premium paid for Westar shall not be included in the revenue requirement of KCP&L or Westar in future Kansas rate cases~~, **unless otherwise ordered by the Commission**~~. Neither KCP&L nor Westar will seek direct or indirect recovery or recognition in retail rates of any Acquisition Premium through revenue requirement in future rate cases~~**; provided, however, that if any party to any KCP&L or Westar general rate case proposes to impute the cost or proportion of the debt GPE is using to finance the Transaction to either KCP&L or Westar for purposes of determining a fair and reasonable return for either utility, then KCP&L and Westar reserve the right to seek, in any such rate case, recovery and recognition in retail rates of the Acquisition Premium**~~.	Ex. DED-2, Financial Integrity Commitment #10 (acquisition premium), 11. Tr. Vol. 4, 1020:21-1022:2 (Ives) (no GPE affiliate could trigger exception clause, permitting utility to seek recovery of acquisition premium discussed in exception clause of JA Commitment No. 20), 1076:6-1077:4 (Ives) (opposing recommendation that Joint Applicants be precluded from recovering severance costs).
21	**Neither Westar nor KCP&L shall never seek to recover, and shall be barred from recovering, and customers will never pay, either directly or indirectly, any acquisition premium, transaction costs, severance costs, or termination fees incurred or associated with this transaction.** Transaction costs include, but are not limited to, those costs relating to obtaining regulatory approvals, development of transaction documents, investment banking costs, costs related to raising equity incurred prior to the close of the Transaction~~**, severance payments required to be made by change of control agreements**~~, **internal labor and third party consultant costs incurred in performing any types of analysis or preparation (financial, tax, investment, accounting, legal, market, regulatory, etc.) to evaluate the potential sale or transfer of ownership, prepare for bid solicitation, analyze bids, conduct due diligence, compliance with existing contracts including change in control provisions and compliance with any regulatory conditions,**	Ex. DED-2, Financial Integrity Commitment #11, 11.a, 11.b. Tr. Vol. 4, 1076:6-1077:4 (Ives) (opposing recommendation that Joint Applicants be precluded from recovering severance costs); Tr. Vol. 5, 1107:15-1107:24 (Dismukes) (disagreeing that severance costs should be included in the transaction cost category); Tr. Vol. 5, 1113:22-1115:4 (Dismukes) (cross examination on same).

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
	Changes to Commitments Presented in Ex. DRI-3	**Citations to Record**
	closing, and communication costs regarding the ownership change with customers and employees. **Westar and KCP&L commit that they shall have the burden of proof to clearly identify where all transactions costs are recorded and shall be required to attest in all future rate proceedings before the Commission that none of these cost are included in its cost of service and rates, and to provide a complete explanation of the procedures used to ensure that these transactions cost are not included in the cost of service or rates.** Transaction costs shall be recorded on GPE's books. Neither KCP&L nor Westar will seek either direct or indirect recovery or recognition in retail rates of any Transaction costs through its revenue requirement in future rate cases~~;~~ ~~**provided, however, that if any party to any KCP&L or Westar general rate case proposes to impute the cost or proportion of the debt GPE is using to finance the Transaction to either KCP&L or Westar for purposes of determining a fair and reasonable return for either utility, then KCP&L and Westar reserve the right to seek, in any such rate case, recovery and recognition in retail rates of transaction costs**~~.	
25	~~**Provided the actual utility-specific capital structure is used to set rates for KCP&L and Westar,**~~ GPE, KCP&L and Westar commit to uphold the principle that their future costs of service and rates will be set commensurate with the financial and business risks attendant to each affiliate's regulated utility operations and that they will not oppose, in either a regulatory proceeding or by judicial appeal of a Commission decision, the application of this principle.	Ex. DED-2, Financial Integrity Commitment #13.

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
	Changes to Commitments Presented in Ex. DRI-3	Citations to Record
	Affiliate Transactions and Cost Allocations Manual (CAM) Conditions	
27	KCP&L and Westar commit that they will file with the Commission (1) within sixty (60) days of closing of the Transaction **<u>and (2) with first post merger rate case,</u>** an executed copy of all additional relevant Affiliate Service Agreements related to the Transaction, pursuant to K.S.A. 66-1402**<u> and that includes the service agreement(s) between any service company or affiliate allocating costs to a regulated utility affiliate</u>**.	Ex. DED-2, Financial Integrity Commitment #16.h. Tr. Vol. 4, 1024:9-20 (Ives) (stating belief that JA Commitment No. 27 would "cover the same agreements" as commitment no. 16(h)); Tr. Vol. 5, 1108:19-1109:11 (Dismukes) (clarification as to concerns with (h)).
31	GPE and its subsidiaries **~~shall~~** **<u>may</u>** seek recovery of intercompany charges to **~~their~~** regulated utility affiliates in their first base rate proceedings following the closing of the ~~T~~transaction at levels equal to the lesser of actual costs or the costs allowed related to such functions in the cost of service of their most recent rate case prior to the closing of the Transaction, as adjusted for inflation measured by the Gross Domestic Product Price Index. Billings for common-use assets shall be permitted consistent with GPE's current practices. **<u>GPE and its subsidiaries shall have the burden of proof to demonstrate billings are prudent, in the usual course of business, and consistent with past practice.</u>**	Ex. DED-2, Financial Integrity Commitment #15.
32	Joint Applicants shall maintain separate books and records, system of accounts, financial statements and bank accounts for Westar and KCP&L. The records and books of Westar and KCP&L will be maintained under the FERC Uniform System of Accounts ("USOA") applicable to investor-owned jurisdictional electric utilities, as adopted by the Commission.	Ex. DED-2, Financial Integrity Commitment #16.a, 16.b.
<u>NEW</u>	**<u>The Joint Applicants commit that any merger-related financial and accounting changes must be reported to the Commission and such changes must be shown to not harm Kansas customers.</u>**	Ex. DED-2, Financial Integrity Commitment #6. Tr. Vol. 4, 1014:5-20 (Ives) (JA Commitment No. 13 is different than FIC#6's requirement to report financial and accounting changes to the Commission).

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
Changes to Commitments Presented in Ex. DRI-3		Citations to Record
34	KCP&L and Westar agree to meet with Staff and CURB no later than sixty (60) days after the closing of the Transaction to provide a description of its expected impact on the allocation of costs among GPE's utility and non-utility subsidiaries as well as a description of its expected impact on the cost allocation manuals ("CAMs") of KCP&L and Westar.	
	No later than six (6) months after the closing of the Transaction but no less than two (2) months before the filing of a general rate case for either KCP&L or Westar, whichever occurs first, KCP&L and Westar agree to file updates to their existing CAMs reflecting process and recordkeeping changes necessitated by the Transaction.	Ex. DED-2, Financial Integrity Commitment #16.g. Tr. Vol. 5, 1107:25-1108:18 (Dismukes) (clarification as to concerns with (g)).
Access to Records		
NEW	**The financial books and records of the Joint Applicants' regulated utility affiliates will be made available to the Commission and its Staff and in its Topeka offices.**	Ex. DED-2, Financial Integrity Commitment #16.c.
	The records and books of any affiliate for which any direct or indirect charge is made to Westar and KCP&L, and included in said utilities' cost of service and rates on either a direct or indirect basis, will be made available, upon request, to the Commission and its Staff.	Ex. DED-2, Financial Integrity Commitment #16.d.

PROPOSED MERGER COMMITMENTS AND CONDITIONS		
Changes to Commitments Presented in Ex. DRI-3		Citations to Record
NEW	**Joint Applicants shall provide Commission and its Staff with timely access to any relevant external auditor workpapers and/or reports.**	Ex. DED-2, Financial Integrity Commitment #16.d. Tr. Vol. 4, 1023:13-1024:1 (Ives) ("16 e is not addressed. I don't have the authority to give timely access to external auditor work papers. They are the proprietary work papers of the external auditor. I can certainly facilitate access to that. Usually I believe Staff ends up entering some sort of written agreement with our external auditors to review those work papers and get access to those, so that's why I did not provide it"; "If it's related to external auditor reports, depending on what you mean. If they are proprietary reports, I can't provide them. If they are reports like giving their, their unqualified opinion, those are publicly available already"). Tr. Vol. 5, 1109:4-11 (Dismukes) ("in developing a relationship with your external auditor why you couldn't tie in a provision to make sure that those work paper could be provided under seal or confidentiality with the auditors that this is needed for compliance with the KCC").
40	KCP&L and Westar will maintain records supporting its affiliated transactions for at least five (5) years. Within six months of the close of the merger, Joint Applicants will provide to the Commission Staff detailed journal entries recorded to reflect the transaction and the provisions of this Agreement. The Joint Applicants shall also provide the final detailed journal entries to be filed with the Commission no later than 13 months after the date of the closing. These entries must show, and shall include but not be limited to, the entries made to record or remove from all utility accounts any acquisition premium costs or transaction costs.	Ex. DED-2, Financial Integrity Commitment #16.f.

CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of March, 2017, I electronically filed via the Kansas Corporation Commission's Electronic Filing System, a true and correct copy of the above and foregoing with a copy emailed to all parties of record.

William Riggins