

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

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

POST-HEARING BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD

COMES NOW, The Citizens' Utility Ratepayer Board (CURB) and respectfully submits its *Post-Hearing Brief* pertaining to the Joint Application (“Application”) by Great Plains Energy Incorporated (GPE), Kansas City Power and Light Company (KCP&L), and Westar Energy, Inc. and Kansas Gas and Electric Company (Westar), (collectively referred to as “Joint Applicants”) seeking approval for Great Plains Energy’s acquisition of Westar. As set forth below, CURB recommends that the Commission deny the Application.

I. Introduction

A. Background

1. On June 17, 2015, Joint Applicants filed their Application with the State Corporation Commission of the State of Kansas (“Commission”) seeking approval for GPE to acquire 100% of the stock of Westar for \$8.6 billion dollars, and assume \$3.6 billion dollars of existing Westar debt, in a transaction valued at approximately \$12.2 billion dollars.¹ More specifically, Westar’s shareholders will receive \$60.00 per share of total consideration for each share of Westar common stock, which consists of \$51.00 in cash and \$9.00 in GPE’s common stock, subject to a 7.5 percent collar based upon the GPE common stock price at the time of the

¹ Joint Application, ¶ 8 (June 17, 2015).

closing of the transaction.² Upon closing, Kansas' two largest jurisdictional utilities will be owned by Great Plains Energy, with Westar becoming a wholly-owned subsidiary of Great Plains Energy.³

2. The acquisition premium ("AP" or "Goodwill"), which is the amount that GPE has agreed to pay for Westar over book value, is approximately \$4.9 billion.⁴ The AP and the related purchasing adjustments will be recorded at the consolidated GPE level.⁵ Joint Applicants are not requesting the AP to be put into rates if they are allowed to use the subsidiary capital structures of Westar and KCP&L for ratemaking purposes; however, if the Commission decides to use GPE's consolidated capital structure in determining Westar and KCP&L's rate of return, for future ratemaking purposes, then GPE reserves the right to ask for the recovery of the AP in "excess of book value and transaction costs associated with the Transaction through inclusion in revenue requirement and retail rates in order to match the recovery of the use of funds with such a request to utilize the source of funds in setting retail rates."⁶

3. GPE secured approximately \$8.0 billion of committed debt financing, or bridge financing facility, from Goldman Sachs for the full cash portion of the transaction consideration, although GPE has stated that it does not expect to draw materially from that acquisition facility.⁷ Permanent financing of the \$8.6 billion paid in consideration for Westar's common stock by GPE includes: a \$750 million purchase of GPE's Mandatory Convertible Preferred Stock from

² *Id.*

³ *Id.* at ¶ 6.

⁴ Direct Testimony of Steve Busser on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company, p. 12 (Busser Direct) (June 28, 2016).

⁵ *Id.* at pp. 11-12.

⁶ Supplemental Direct Testimony of Darrin Ives on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company, p. 12 (Ives Supplemental) (November 2, 2016).

⁷ Direct Testimony of Kevin Bryant on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company, p. 9 (Bryant Direct) (June 28, 2016).

the OCM CREDIT PORTFOLIO LP (“OMERS”), at the close of the transaction;⁸ an agreement by Westar to accept \$1.3 billion of GPE common stock “as partial consideration for the acquisition of Westar’s common stock;”⁹ \$2.35 billion of equity comprised of GPE common and mandatory convertible preferred stock; and \$4.4 billion of new GPE market issued debt.¹⁰

4. On August 9, 2016, the Commission issued its Order on Merger Standards reaffirming the mergers standards¹¹ as modified in the 97-WSRE-676-MER Docket (97-676 Docket).¹² The Commission’s Order set out the standards to be used in determining whether a proposed merger will promote the public interest,¹³ those standards are as follows:

- (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.

⁸ *Id.*

⁹ *Id.* at p. 8.

¹⁰ *Id.* at p. 9.

¹¹ The Commission reaffirmed the merger standards as stated in the November 14, 1991 Order approving the Kansas Power & Light and Kansas Gas & Electric merger in consolidated dockets 172,745-U and 174,155-U.

¹² Order on Merger Standards, ¶¶ 4-5 (August 9, 2016).

¹³ *Id.* at ¶ 5.

- (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.
- (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.¹⁴

The Commission recognized that 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 Joint Applicants to clearly identify any deviation from the Commission's Merger Standards in its application and justify those deviations in supporting testimony.¹⁵

B. Evidentiary Record

5. On June 28, 2016, Joint Applicants filed direct testimony of their witnesses¹⁶ in

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 7.

¹⁶ Direct Testimony of Terry Bassham on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Basham Direct) (June 28, 2016); Direct Testimony of Mark Ruelle on Behalf of Westar Energy (Ruelle Direct); Bryant Direct; Direct Testimony of Charles Caisley on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Caisley Direct) (June 28, 2016); Direct Testimony of Scott Heidtbrink on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Heidtbrink Direct) (June 28, 2016); Direct Testimony of Darrin Ives on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Ives Direct) (June 28, 2016); Direct Testimony of William Kemp on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Kemp Direct) (June 28, 2016); Busser Direct.

support of its Application.¹⁷ In their testimony, Joint Applicant witnesses explained the purported benefits of GPE acquiring Westar.¹⁸ Joint Applicant witnesses also addressed regulatory policy issues related to the merger standards issued by the Commission in its Order on Merger Standards.¹⁹ CURB and Commission Staff (“Staff”) raised concerns over whether those merger standards were fully addressed.

6. On December 5, 2016, the Commission held a Public Hearing in Tecumseh, Kansas to provide ratepayers an opportunity to ask questions and provide comments about the proposed acquisition of Westar by GPE.

7. On December 16, 2016, CURB, Staff and Intervenors filed direct testimony opposing the acquisition of Westar by GPE, arguing that the acquisition does not promote the public interest.²⁰

¹⁷ See Application.

¹⁸ See Ives Direct, p. 2.

¹⁹ See *id.* at p. 3.

²⁰ Direct Testimony and Exhibits of Mark F. Doljac, Kansas Electric Power Cooperative, Inc. (Doljac Direct) (December 16, 2016); Direct Testimony of Dr. Laurence D. Kirsch on Behalf of Kansas Electric Power Cooperative, Inc. (Kirsch Direct) (December 16, 2016); Direct Testimony of David E. Dismukes, PH.D. on Behalf of Kansas Electric Power Cooperative, Inc. (Dismukes Direct) (December 16, 2016); Direct Testimony of Andrea Crane on Behalf of CURB (Crane Direct) (December 16, 2016); Direct Testimony of Stacey Harden on Behalf of CURB (Harden Direct) (December 16, 2016); Direct Testimony and Exhibits of Larry W. Holloway on Behalf of the Kansas Power Pool (Holloway Direct) (December 16, 2016); Direct Testimony of Scott Hempling filed on behalf of the Staff of the Kansas Corporation Commission (Hempling Direct) (December 16, 2016); Direct Testimony of Casey M. Gile filed on behalf of the Staff of the Kansas Corporation Commission (Gile Direct) (December 16, 2016); Direct Testimony of Adam Gatewood filed on behalf of the Staff of the Kansas Corporation Commission (Gatewood Direct) (December 16, 2016); Direct Testimony of Justin Grady filed on behalf of the Staff of the Kansas Corporation Commission (Grady Direct) (December 16, 2016); Direct Testimony of Walter P. Drabinski filed on behalf of Staff of the Kansas Corporation Commission (Drabinski Direct) (December 16, 2016); Direct Testimony of Jeff McClanahan Filed on Behalf of the Staff of the Kansas Corporation Commission (December 16, 2016); Direct Testimony of Robert Glass filed on behalf of the Staff of the Kansas Corporation Commission (December 16, 2016); Direct Testimony of Ann Diggs Filed on Behalf of the Staff of the Kansas Corporation Commission (December 16, 2016); Direct Testimony and Exhibits of Michael P. Gorman Kansas Industrial Consumers Group, Inc., Cargill, Incorporated, CCPS Transportation, LLC, Coffeyville Resources Refining & Marketing, LLC, The Goodyear Tire & Rubber Company, HollyFrontier El Dorado Refining L.L.C., Occidental Chemical Corporation, Spirit AeroSystems, Inc. (Gorman Direct) (December 16, 2016); Direct Testimony of Steve Chriss on Behalf of Wal-Mart Stores, Inc. (December 16, 2016); Direct Testimony and Exhibits of Joseph A. Herz on Behalf of Kansas Municipal Energy Agency, Kansas Municipal Utilities, and the City of Independence, Missouri (December 16, 2016); Direct Testimony and Exhibits of John A. Krajewski on Behalf of the KCBPU (Krajewski Direct) (December 16, 2016); Direct Testimony of James Brungardt on behalf of Sunflower and Mid-Kansas (December 16, 2016); Direct Testimony of Boris Steffen on Behalf of KCBPU (December 16, 2016); Direct Testimony of Jonathan Lesser

8. On January 1, 2017, Joint Applicants filed their Rebuttal testimony, arguing that the acquisition of Westar by GPE is reasonable and does promote the public interest.²¹

9. From January 30, 2017, through February, 7 2017, the Commission held an evidentiary hearing (“Hearing”) on this matter.

II. Standard of Review

10. The Commission has a broad grant of authority under K.S.A. 66-101.²² In accordance with that broad grant of authority, the Commission has jurisdiction over proposed utility mergers pursuant to K.S.A. 66-101, K.S.A. 66-127, and K.S.A. 66-101e.²³ The Commission has noted that “Kansas statutes do not contain a specific standard for mergers.”²⁴ In approving a merger, the Commission has stated that the applicant must demonstrate that the

on Behalf of KCBPU (Lesser Direct) (December 16, 2016); Direct Testimony of Raymond Rogers on Behalf of IBEW 225 (December 16, 2016); Direct Testimony of John Garretson on Behalf of IBEW 304 (December 16, 2016); Direct Testimony of Duane Nordick on Behalf of IBEW 1523 (December 16, 2016); Direct Testimony Maximilian Chang On Behalf of Sierra Club (December 16, 2016).

²¹ Rebuttal Testimony of Terry Bassham on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Bassham Rebuttal) (January 9, 2016); Rebuttal Testimony of Kevin Bryant on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Bryant Rebuttal) (January 9, 2016); Rebuttal Testimony of John Reed on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Reed Rebuttal) (January 9, 2016); Rebuttal Testimony of Robert Hevert on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Hevert Rebuttal) (January 9, 2016); Rebuttal Testimony of Mark Ruelle on Behalf of Westar Energy (Ruelle Rebuttal) (January 9, 2016); Rebuttal Testimony of James Proctor on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Proctor Rebuttal) (January 9, 2016); Rebuttal Testimony of Kevin Noblet on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Noblet Rebuttal) (January 9, 2016); Rebuttal Testimony of Charles Caisley on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Caisley Rebuttal) (January 9, 2016); Rebuttal Testimony of Arthur P. Hall, Ph. D on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Hall Rebuttal) (January 9, 2016); Rebuttal Testimony of Steven P. Busser on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light (Busser Rebuttal) (January 9, 2016); Rebuttal Testimony of William Kemp on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Kemp Rebuttal) (January 9, 2016); Rebuttal Testimony of Thomas Flaherty on Behalf of Great Plains Energy Incorporated and Kansas & Light Company (Flaherty Rebuttal) (January 9, 2016); Rebuttal Testimony of Melissa Hardesty on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Hardesty Rebuttal) (January 9, 2016); Rebuttal Testimony of Darrin R. Ives on Behalf of Great Plains Energy Incorporated and Kansas City Power & Company (Ives Rebuttal) (January 10, 2016).

²² “The commission is given full power, authority and jurisdiction to supervise and control the electric public utilities, as defined in K.S.A. 66-101a, doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.” K.S.A. 66-101.

²³ Docket No. 174, 155-U, Re Kansas Power & Light Co., 127 P.U.R.4th 201 (November 15, 1991).

²⁴ *Id.*

merger “will promote the public interest.”²⁵ As stated above, the Commission issued its Order on Merger Standards reaffirming the merger standards as modified in the 97-WSRE-676-MER Docket (97-676 Docket), and determines whether a proposed merger will promote the public interest under those reaffirmed merger standards.²⁶

III. Issues Before the Commission

11. In this docket, the Commission has asked the parties to analyze whether the acquisition of Westar by GPE will promote the public interest.²⁷ More specifically, whether the acquisition of Westar by GPE will promote the public interest according to the Commission’s Merger Standards.²⁸ CURB analyzed the Joint Application and supporting evidence accordingly.

IV. Arguments and Authorities

12. CURB recommends that the Commission deny the Joint Applicants request for Great Plains Energy to acquire Westar because it is not in the public interest. More specifically, CURB recommends that the Commission reject the acquisition of Westar by Great Plains because it does not comply with the Commission’s Merger Standards.

A. The Acquisition of Westar by GPE is not in the Public’s Interest and Should be Denied.

13. On the surface, the acquisition of Westar by GPE makes sense. GPE, through its subsidiary KCP&L, has a service territory in Kansas, as does Westar. KCP&L and Westar are both regulated by the Commission, so they are both familiar with regulation in Kansas. Both share ownership of generating facilities and are members of the Southwest Power Pool (SPP). The issue in this case is not whether this transaction superficially makes “sense”, it is whether

²⁵ Order on Merger Standards, ¶ 3, (citing Order, Consolidated Dockets 172,745-U and 174,155-U, p. 34, November 15, 1991).

²⁶ Order on Merger Standards, ¶¶ 4-5 (August 9, 2016).

²⁷ *Id.*

²⁸ *Id.* at ¶ 5.

this transaction is in the public interest, and clearly it is not.²⁹ Simply put, the purchase price is too high, relative to the projected level of savings.³⁰ Furthermore, the proposed financing of this transaction, largely through debt, jeopardizes the credit ratings of the Joint Applicants and as a result would likely lead to higher rates and deteriorating service for Kansas customers.³¹ As analyzed below, Westar pushed KCP&L to the brink financially, in a desire to reward Westar shareholders handsomely.³² GPE, on the other hand, hoped to find a new source of earnings for its shareholders at any cost necessary.³³ This transaction was not done to provide benefits for ratepayers; to the contrary, this transaction was done primarily for shareholder benefit, at the expense of Kansas ratepayers.

1. The acquisition of Westar by GPE fails merger standard (a)(i): (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.

14. To begin, CURB has serious concerns about the way in which GPE has planned to finance its acquisition of Westar. This transaction was born out of a competitive bidding process that for all intents and purposes was used to elicit the highest bid for Westar shareholders.³⁴ The overall transaction value is \$12.2 billion, which includes the assumption of \$3.6 billion of Westar debt, and \$4.4 billion of new debt to finance the cash payment to Westar shareholders.³⁵ The AP or goodwill, which is the amount that GPE has agreed to pay for Westar over book value, is approximately \$4.9 billion.³⁶ GPE has agreed to pay Westar shareholders

²⁹ Order on Merger Standards, ¶ 5.

³⁰ Notice of Re-Filing CURB's Pre-Filed Direct Testimony Without Redactions - Direct Testimony of Andrea Crane on Behalf of CURB, pp. 6-7 (Re-filed Crane Direct) (January 27, 2017).

³¹ *Id.*

³² *See id.* at p. 7.

³³ *Id.*

³⁴ *See id.* at p. 16.

³⁵ *Id.* at p. 24.

³⁶ Busser Direct, p. 12.

approximately \$2.30 for every \$1.00 of assets acquired in this transaction, which is staggering.³⁷

15. Joint Applicants allege that the acquisition is funded with 50% debt and 50% equity; however this ignores the fact that the additional \$3.6 billion in Westar debt is going to be assumed by GPE as a result of this proposed transaction. The actual total purchase price is financed with closer to approximately two thirds debt.

a) The proposed transaction will result in Credit Rating problems.

16. The amount of leverage that GPE plans to take on to finance this transaction is troubling for many reasons; first, the rating agencies have concerns that this transaction would put GPE right on the edge of its ability to maintain its investment grade rating.³⁸ Ms. Crane addresses this problem in her direct testimony:

Mr. Bryant indicates at page 21 of his testimony that the credit ratings of all of the Joint Applicants, GPE, KCP&L and Westar, are rated BBB+ by Standard and Poor's ("S&P"). That rating is two notches above a non-investment grade rating. S&P affirmed its BBB+ rating but gave each of the Joint Applicants a negative outlook after the agreement was announced. Moody's Investor Services ("Moody's") rates KCP&L and Westar Baa1, also two notches above a non-investment grade rating, but rates GPE's Senior Unsecured debt as Baa2, still investment grade but lower than the utilities' ratings. After the announcement of the agreement, Moody's affirmed the utility ratings with a stable outlook, but put GPE on review for a downgrade to Baa3, the lowest investment grade rating.³⁹

17. It is clear from the evidence that if the proposed transaction is approved GPE will likely see a one notch downgrade and will be rated at Baa3, which is the lowest of the investment grade ratings. GPE will be hampered with credit rating problems from the very beginning, which hardly points to a financially stable entity from the outset. Unfortunately, the problems with this transaction do not end there. Moody's Rating Assessment Service ("RAS") makes clear that GPE

³⁷ Re-filed Crane Direct, p. 11.

³⁸ *Id.* at p. 24.

³⁹ *Id.* at p. 30.

has “no cushion to absorb a negative credit event.”⁴⁰ In other words, GPE will be in such a weak financial position post transaction that any negative event could lead to further credit downgrades; Moody’s states:

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 124% leave little room for error within the Great Plains forecast assumptions, including regulatory outcomes and economic factors (including interest rate levels) that are outside management control. The combination of these factors would expose Great Plains to a lower tolerance threshold for negative credit events, and a higher likelihood for downgrade in the face of adverse circumstance.**⁴¹

18. Not only will the new entity be financially weaker day one, post transaction, but it will be in such a weak state that any negative event outside managements control could lead to further credit downgrades. This would result in GPE being downgraded below investment grade. The resulting downgrade will be harmful to consumers, as supported later.

19. The potential credit rating problems are not confined to just GPE. There is a great possibility that the utilities themselves could be downgraded as a result of the proposed transaction. In an effort to alleviate concerns with Regulators and other Intervenors, Joint Applicant’s allege that the \$4.4 billion of debt will be issued at the holding company level; therefore, there will not be any recourse to any utility subsidiary.⁴² This assertion is in stark contrast to what the evidence actually shows. Moody’s Rating Assessment states:

Lastly, it is possible that the credit ratings for Westar, KCPL and GMO could be constrained or negatively impacted going forward. While no change to utility ratings would likely occur at close of 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. Scenario 4 and 5 leverage would weaken the positioning of Westar, KCPL and GMO within their respective ratings

⁴⁰ BPU Exhibit #5, p. 4.

⁴¹ *Id.* at p. 5.

⁴² Bryant Direct, p. 10.

categories.⁴³

20. Moody's also notes that "[s]hould the upstream dividend demands for Westar become excessive or substantial customer benefits (e.g. bill credits or rate freezes) result in a multi-year reduction of Westar's retained cash flow, **there would likely be negative ratings pressure at the utility.**"⁴⁴ Ms. Crane points out in her direct testimony that "the Scenario 4 and 5 referred to by Moody's address new long-term debt issuances of \$4.3-\$4.6 billion respectively, which is the range for the debt proposed in this transaction of \$4.4 billion."⁴⁵

21. Fitch Ratings Inc. (Fitch) and Standard & Poor's (S&P), the other two major ratings agencies, also raise similar concerns.⁴⁶ S&P stated, "[t]he negative outlook reflects the potential for lower ratings on Westar, after the merger closes, if the combined entity's financial performance weakens such that funds from operations to total debt is consistently less than 13% after 2018." Fitch had a much stronger negative opinion regarding this transaction:

Future developments that may, individually or collectively, lead to a negative rating action: Fitch believes that the completion of the acquisition, based on the proposed financing structure as disclosed, **would result in a one or two notch downgrade of Westar's ratings.** Fitch would consider a one-notch downgrade if GXP presents a firm and credible path to deleveraging to a capital structure consistent with a 'BBB-' rating and/or if regulatory approval of the acquisition results in effective ring-fencing of Westar. On the other hand, Fitch would consider a two-notch downgrade if GXP relies heavily on hybrid issuance to finance the acquisition, follows an aggressive financial policy, and/or there is limited regulatory ring-fencing of Westar post-merger.⁴⁷

22. It is eye-opening that the Joint Applicants contend that the "[c]redit rating agencies have examined this risk and concluded that it **will have no negative effect** on the credit

⁴³ BPU Exhibit #5, p. 4.

⁴⁴ See Re-filed Gatewood Direct, p. 10.

⁴⁵ Re-filed Crane Direct, p. 31.

⁴⁶ See Re-filed Gatewood Direct, pp. 11-13.

⁴⁷ *Id.* at p. 13.

ratings of either Westar or KCP&L. . . ,”⁴⁸ then in the very next sentence admit, “[e]ven though **there is but a slim chance that Transaction debt held by GPE would negatively impact the credit ratings of KCP&L and Westar.** . . .” This type of inconsistency is concerning to CURB. It is clear from the evidence that this transaction could have a negative impact on the credit ratings of the utilities. The Joint Applicants themselves concede this fact, but continue to argue inconsistently that it will not.

23. A reduction in the credit ratings of the utilities could be potentially devastating for ratepayers because the cost of debt will increase as credit ratings decrease.⁴⁹ As a result, “[a]n increase in the cost of debt will be reflected in a higher cost of capital applied to rate base, thereby increasing the revenue requirement and driving up rates to consumers.”⁵⁰ Joint Applicants criticize Staff and Intervenors for their “single-minded focus on the credit rating and debt levels of GPE. . . .”⁵¹ CURB believes, given the evidence, that this “single-minded focus” is clearly warranted. It is those paramount issues that could potentially cause ratepayers to pay higher rates and would likely result in two utilities that are far weaker.⁵² Of course Joint Applicants do not want CURB, Staff, and Intervenors to concentrate on those issues. It is those key issues, coupled with others, that point to the fact that this transaction is not in the public interest. In actuality, it was the “single-minded focus” of the Joint Applicants to reward shareholders that has led to the problems related to this transaction, rather than any misapplied

⁴⁸ Joint Applicants’ Initial Post-Hearing Brief, p. 37 (February 28, 2017).

⁴⁹ Re-filed Crane Direct, pp. 31-32.

⁵⁰ *Id.*

⁵¹ Joint Applicants’ Initial Post-Hearing Brief, p. 38.

⁵² Re-filed Crane Direct, pp. 31-32; “It is clear from prior Commission Orders on mergers that the Commission, as it should, takes this issue very seriously when evaluating a potential merger of public utilities. It is indisputable that the financial condition of a utility has an effect on the cost of providing service to consumers. Utilities with relatively poorer financial health pay relatively higher capital costs and utilities pass those higher costs on to consumers. There is also added risk that the utilities with poorer financial health will likely focus less on providing high quality, reliable service, and more on rectifying the state of their poor financial health. In addition, utilities in financial distress consume considerably more of this agency’s time and resources and the associated costs are ultimately passed on to customers.” Re-filed Gatewood Direct, p. 4.

focus of CURB, Staff, and Intervenors.

24. It is clear from the evidence, that the new entity will be much weaker financially than the current utilities on a stand-alone basis. It is also clear that ratepayers will be left paying higher rates as a result of this poorly financed transaction. On a stand-alone basis, Westar and KCP&L, are strong public utilities.⁵³ Mark Ruelle, CEO of Westar, confirmed this at hearing:

Q. Thank you. Would you consider Westar to be financially sound today?

A. Yes.

Q. Do you anticipate if this merger, this acquisition, is not approved by the Commission that the financial condition of Westar will degrade?

A. If it's not approved?

Q. If it's not approved.

A. I would hope not.

Q. If the transaction is not approved, will Westar continue to provide reliable and safe electric service in the service territory?

A. Yes.⁵⁴

25. What is truly remarkable is that the opposition to the Joint Applicants request for GPE to purchase Westar is not limited to CURB, in fact, Staff and Intervenors are also opposed to this transaction. It is very seldom that Staff, CURB and all Intervenors come together, sharing one voice, in opposition to an application. This shows just how obvious it is that the proposed transaction will result in harm to all ratepayers. Staff and CURB agree that the way in which GPE has planned to finance its acquisition of Westar presents real risks, that would likely lead to a credit downgrade, and as a result would lead to higher rates for customers.⁵⁵ Staff witness, Mr.

⁵³ See Re-filed Gatewood Direct, p. 8.

⁵⁴ Transcript of Evidentiary Hearing, Vol. 1, p. 241 (Tr.).

⁵⁵ See Notice of Re-Filing Staff's Pre-Filed Direct Testimony Partially Redactions - Direct Testimony of Justin Grady on Behalf of Kansas Corporation Commission, p. 53-54 (Re-filed Grady Direct) (January 20, 2017).

Gatewood summed up why credit ratings matter to ratepayers:

The views of credit rating agencies are important because they are an indicator of how much risk is associated with a particular utility, which – in turn – translates into the return required by investors to be enticed to purchase the bonds issued by that utility. Consumers pay the interest expense of a utility's bonds; thus, a change in a utility's credit rating has a direct effect on ratepayers.⁵⁶

Mr. Gatewood analyzed the credit rating agency opinions and concluded that:

There is no doubt that the financial weakness expected and forecasted by rating agencies and by the Joint Applicants is solely attributable to this Transaction. The Transaction proposed by the Joint Applicants results in a financially weaker utility, and, for that reason, it fails to meet the public interest test espoused in the Commission's Merger Standard a) i).⁵⁷

26. Intervenor also agree that this transaction could result in a downgrade for GPE and as a result will likely lead to a credit downgrade for GPE and impact the utilities, as well as, the ratepayers negatively.⁵⁸ Dr. Dismukes, expert witness for KEPCo, testifies, "[t]he Joint Applicants' assurances of maintaining their current credit ratings stand in juxtaposition to other rating agency statements challenging this potential outcome. . . ."⁵⁹ In addition Dr. Dismukes states:

This is exactly the problem I discussed earlier in my testimony when I noted that a financially-weakened GPE would create financial challenges for Westar and KCP&L. GPE owns no assets in and of itself, and relies on Westar, KCP&L and other affiliates for its income. If its debt increases substantially on a post-merger basis, as this key credit metric suggests, GPE will face increasing pressure to obtain cash from its affiliates, likely through increased dividends, to help service its high level of debt. . . .[A]s I have shown earlier in my testimony, this premium serves as part of the basis for the financial weakness arising from the transaction, and this weakness will likely lead to a cost of service increase for Kansas

⁵⁶ Re-filed Gatewood Direct, p. 9.

⁵⁷ *Id.* at p. 8.

⁵⁸ See Notice of Re-Filing Direct Testimony Partially Redactions - Direct Testimony of Jonathan Lesser on Behalf of Kansas City, Kansas Board of Public Utilities, pp. 88, 93-104 (Re-filed Lesser Direct) (January 30, 2017); See Notice of Re-Filing of Direct Testimony Without Redactions - Direct Testimony of John A. Krajewski on Behalf of Kansas City, Kansas Board of Public Utilities, pp. 14-15 (Re-filed Krajewski Direct) (January 30, 2017); See Notice of Re-Filing for Pre-Filed Direct Testimony Without Redactions - Direct Testimony of David E. Dismukes, Ph.D. on Behalf of Kansas Electric Power Cooperative, Inc., pp. 5, 24-42 (Re-Filed Dismukes Direct) (January 30, 2017); See Gorman Direct, p. 18-19.

⁵⁹ Re-filed Dismukes, p. 26.

customers, not only for retail Kansas customers, but those under cost-based contractual rates like KEPCo. The Commission, therefore, should not be dissuaded by the Joint Applicants' arguments on this matter.⁶⁰

If this transaction is approved the new entity will be far weaker than it would have been had this transaction not occurred.

b) Consolidated Capital Structure is the appropriate capital structure; however, as structured by the Joint Applicants the ratepayer will be burdened by the transaction related debt under either scenario.

27. The proposed transaction is further troubled due to the Joint Applicants insistence that the Commission use the individual utility capital structures to set future rates, despite the fundamental change of the consolidated entity.⁶¹ CURB is concerned with this issue because it is pertinent to the financing of this transaction. CURB believes that the consolidated capital structure should be used in setting future rates should the proposed transaction be approved by the Commission.⁶² The problem is that using the appropriate capital structure (consolidated) to set rates will likely cause a credit downgrade for GPE.⁶³ Joint Applicants have made clear that the completion of this transaction is largely dependent on the use of the utility capital structures for setting future rates as opposed to the consolidated capital structure (GPE's capital structure).⁶⁴ If the proposed transaction is approved, GPE will move from 50% equity to only 41% equity and GPE's long term debt will increase from 50.4% to 59%, as a result of the \$4.4 billion in new debt.⁶⁵ KCP&L and Westar will have a targeted range of equity of 49%-54%.⁶⁶

28. Joint Applicants argue that, "[t]he ratemaking capital structure should be based on

⁶⁰ *Id.* at pp. 25, 50-51.

⁶¹ Re-filed Crane Direct, p. 25.

⁶² *Id.* at p. 61.

⁶³ Re-filed Gatewood Direct, p. 33.

⁶⁴ *Id.* at p. 32.

⁶⁵ See Re-filed Crane Direct, p. 25.

⁶⁶ *Id.*

the capital used to fund assets enabling the provision of utility service.”⁶⁷ This notion actually supports the use of a consolidated capital structure in this case. The reason it is more appropriate to use GPE’s consolidated capital structure for setting future rates is because “that is the capital structure that is actually financing utility operations.”⁶⁸ Ms. Crane elaborates on this point in direct testimony:

The individual utility capital structures that the Joint Applicants propose to utilize for ratemaking purposes reflect an artificially high level of equity that, in turn, is being financed with holding company debt. In addition, the Joint Applicants have minimal non-regulated operations. This is not a situation where a holding company is financing a broad mix of various business enterprises, both regulated and non-regulated. In that case, the consolidated capital structure may not be appropriate to use for ratemaking purposes. However, in this case, the GPE consolidated capital structure is the capital structure that is financing the utilities. As pointed out by Moody’s in its Rating Assessment, it is only “financial engineering” that creates the significant dichotomy between the utility capital structures and the consolidated capital structure.⁶⁹

29. Staff also believes that using the consolidated capital structure to set future rates is appropriate in this case:

For the purpose of determining the weighted average cost of capital or allowed rate of return, we will rely on the capitalization that results in the lowest weighted average cost of capital. Thus, if the parent company exhibits a higher debt ratio than the subsidiary, we will use the parent company’s capital ratios to calculate the revenue requirement. Staff believes this approach is reasonable because it recognizes the reality of the parent company’s absolute control over the operations of the subsidiary. Credit rating agencies also recognize the control and interrelated nature in that they will only allow a couple of notches difference between a parent and subsidiary. They recognize that a weakness in either will drag on the credit worthiness of the other. There will be very little separation between GPE and its subsidiaries, as GPE and each of its subsidiaries will have the same board of directors, who in turn set the dividend and capitalization policies of the parent and the subsidiaries. Staff has made its position clear through testimony filed in past rate cases, and this Commission has through orders it issued, that the consolidated capitalization is reviewed and could be used

⁶⁷ Notice of Re-Filing Rebuttal Testimony Without Redactions - Rebuttal Testimony of Robert Hevert on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company, p. 4 (Re-filed Hevert) (January 30, 2017).

⁶⁸ Re-filed Crane Direct, p. 62.

⁶⁹ *Id.*

to set rates. In Staff's view, this is a reasonable means to reduce or eliminate incentives to manipulate subsidiary capital structure solely for the benefit of stockholders. Staff's policy recommendation on capital costs simply seeks to treat capital costs like all other parent-subsidiary transactions and applies an asymmetrical approach. Just as with the parent providing labor or office space to the subsidiary, the parent should not profit from providing capital to the subsidiary at a higher cost than it incurred to obtain the capital. In some sense, recognizing the consolidated capital structure is a form of ring-fencing.⁷⁰

30. Joint Applicants argue that the "[l]ong-standing practice among utility Commissions is to establish rates based on the operating company capital structures, not consolidated capital structures."⁷¹ This is simply not the case. It is troubling that the Joint Applicants assumed the Commission would set rates based on the subsidiary capital structures, despite the fact that "it is contrary to the manner in which the Kansas Commission, the Missouri Public Service Commission, and the Federal Energy Regulatory Commission currently set rates for Westar and GPE's subsidiaries."⁷² Joint Applicants admit that KCP&L's current rates are set using GPE's consolidated capital structure.⁷³ However, the Joint Applicants argue that the reason the Commission has adopted GPE's capital structure in KCP&L's most recent rate cases is "because it reflected the capital used in funding KCP&L's utility operations and was nearly identical to KCP&L's actual capital structure of approximately 50% equity and 50% debt."⁷⁴ Joint Applicants argument is unconvincing.

31. First, as discussed above, it is GPE's consolidated capital structure that is actually financing the utilities if the proposed transaction is approved.⁷⁵ Because the consolidated capital structure would be the actual capital structure that is financing the utilities, GPE's consolidated

⁷⁰ Re-filed Gatewood Direct, p. 41.

⁷¹ Re-filed Hevert, p. 4.

⁷² Re-filed Gatewood Direct, p. 29.

⁷³ Joint Applicants' Initial Post-Hearing Brief, p. 39.

⁷⁴ *Id.*

⁷⁵ Re-filed Crane Direct, p. 62.

capital structure is the more appropriate capital structure to use for future ratemaking purposes.⁷⁶ Second, the Commission has wide discretion to determine what capital structure to use for purposes of future ratemaking.⁷⁷ In Docket No. 03-HVDT-664-RTS, Haviland Telephone Company, Inc. (Haviland) filed an Application for additional supplemental Kansas Universal Service Fund (KUSF) funding.⁷⁸ Staff recommended using Haviland's actual capital structure of 87.90% debt and 12.10% equity for determining rate of return.⁷⁹ Haviland recommended "a hypothetical, forward looking market value based capital structure of 50% debt and 50% equity."⁸⁰

32. Staff recommended the use of the actual capital structure because the "[r]eturn on equity is significantly higher than return on debt."⁸¹ Staff argued that, "[u]sing a hypothetical capital structure with a high-debt utility would provide a return on a higher level of equity than exists in the company, and would allow recovery of an amount in excess of Haviland's legitimate regulatory needs."⁸² Staff described this as a windfall to Haviland's shareholders.⁸³ The Commission agreed with Staff in this docket and concluded that Haviland's actual capital structure should be used when determining its revenue requirement because "[t]he higher equity return would provide a return that substantially exceeded what was justified by Haviland's financial requirements."⁸⁴

33. Similarly, in Docket No. 03-WHST-503-AUD, the Commission audited Wheat State Telephone Company, Inc. (Wheat State) to make sure the amount of KUSF support

⁷⁶ *Id.*

⁷⁷ *Midwest Gas Users Ass'n v. State Corp. Comm'n*, 5 Kan. App. 2d 653, 658-660 (1981).

⁷⁸ Docket N. 03-HVDT-664-RTS, Order Modifying the Amount of KUSF Support Received by Haviland Telephone Co., p. 1 (Docket 03-664) (November 7, 2003).

⁷⁹ *Id.* at p. 5.

⁸⁰ *Id.*

⁸¹ *Id.* at p. 6.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at pp. 6-7.

received by the company equaled the level justified by its cost to provide local service.⁸⁵ Staff recommended using the actual capital structure of Golden Wheat, Wheat State's parent company, of 87.77% debt and 12.23% equity for determining Wheat State's rate of return.⁸⁶ Staff asserted that using anything other than the consolidated capital structure would provide a windfall to shareholders.⁸⁷ Staff also argued that "[a] hypothetical capital structure does not guarantee that there are actual dollars behind the capital structure percentages. As the corporate management determines the blend of debt and equity that is used to finance operations, allowing an equity return on debt would provide an incentive for management to increase debt levels and leverage capital structures."⁸⁸ The Commission agreed with Staff that the hypothetical capital structure would result in a return in excess of its legitimate regulatory needs because "the return on equity is significantly higher than the return on debt. . . ."⁸⁹

34. Likewise, in Docket 04-AQULE-1065-RTS, the Commission, in its Order on Reconsideration, had to determine whether or not it was reasonable to use Aquila's consolidated capital structure to determine the rate of return for Aquila, Inc. d/b/a Aquila Networks – WPK (WPK).⁹⁰ The Commission found:

Because WPK is not a stand-alone entity, it was affected along with Aquila. Staff firmly maintained, and the Commission has agreed, that WPK's allocated capital structure is inequitable to ratepayers because the allocated equity ratio is greater than the Aquila's actual equity ratio (citation omitted) WPK's allocated capital structure allows for an equity return on what is actually debt capital. If Aquila's rates are based on a higher equity ratio than actually exists, its shareholders will benefit at the expense of the ratepayers.⁹¹

35. The proposed financing of this transaction, by the Joint Applicants, is very similar

⁸⁵ Docket No. 03-WHST-503-AUD, Order Reducing Wheat State's KUSF Support Effective October 1, 2003, p. 1 (Docket 03-503) (September 9, 2003).

⁸⁶ *Id.* at p. 11.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at p. 12.

⁹⁰ Docket No. 04-AQULE-1065-RTS, Order on Reconsideration, p. 7 (Docket 04-1065).

⁹¹ *Id.* at p. 6.

to the dockets discussed above, in that the individual utility capital structures are being financed with a significant amount of low cost holding company debt.⁹² Said differently, it is GPE's capital structure that is actually financing utility operations, as was the case in these prior dockets. Another similarity between this transaction and the dockets above is that the Joint Applicants do not plan to recognize the low cost financing at the holding company level for ratemaking purposes, which will result in ratepayers paying rates of return in excess of what is actually required.⁹³ To prevent this inequity, CURB recommends that the Commission use the consolidated capital structure of GPE for ratemaking purposes, as it has clearly done in the past.

36. The Joint Applicants erroneously argue that “the low-cost debt being incurred by GPE will be used entirely to fund its purchase of the shares of Westar from individual Westar shareholders, that Westar itself will never take possession of any such funds, and thus it cannot be used to fund the utilities’ assets or operations, and that neither Westar’s nor KCP&L’s capital structure will change as a result of the debt issuance by GPE.”⁹⁴ This argument ignores the fact that the leveraged financing is being used to buy Westar utility assets.⁹⁵ It is the purchase of Westar’s utility assets that is the driving change in GPE’s capital structure.⁹⁶

37. Additionally, there are not any unregulated activities that are being acquired in this transaction, so to ask ratepayers to pay rates that do not reflect this double leverage is inappropriate.⁹⁷ The Joint Applicants also state that the KCC is not concerned about how each current Westar shareholder finances the purchase of the Westar stock, so the KCC should not be concerned about how GPE would finance the purchase of Westar stock.⁹⁸ However, in the case

⁹² Re-filed Crane Direct, p. 62.

⁹³ *Id.* at pp. 31-32.

⁹⁴ Joint Applicants’ Initial Post-Hearing Brief, p. 44.

⁹⁵ Re-filed Crane Direct, p. 11.

⁹⁶ *Id.* at pp. 10-11, 62.

⁹⁷ *Id.* at p. 62.

⁹⁸ Joint Applicants’ Initial Post-Hearing Brief, pp. 27-28.

of current shareholders, each individual shareholder has little or no control over the Westar capital structure, while if the transaction is approved, GPE will have absolute discretion to determine the capital structure assigned to Westar.⁹⁹

38. Aside from the consolidated capital structure being the appropriate capital structure, there are several other problems with allowing the Joint Applicants to set future rates using the individual utility capital structures. Although the Joint Applicants do not explicitly seek to recover the AP, it will still result in the ratepayers subsidizing the AP, and at \$4.9 billion that could be devastating to ratepayers.¹⁰⁰ The reason that ratepayers will still be implicitly paying for the AP, if a consolidated capital structure is not used for ratemaking, is due to the fact that “[r]atepayers would be implicitly paying for the acquisition premium through rates that reflect a capital structure that is not representative of how actual utility operations are being financed.”¹⁰¹ In other words, the Joint Applicants want the Commission to ignore the highly leveraged capital structure for rate setting purposes, which as discussed above, will result in ratepayers paying much higher rates than they otherwise would be, so that the GPE can service the transaction related debt. Ms. Andrea Crane illustrates this in her direct testimony:

For illustrative purposes, assume that the Westar and KCP&L have a combined Kansas-jurisdictional rate base of \$7 billion. Assuming debt costs of 5.5% and equity costs of 9.0%, the difference between a capital structure of 50% long-term debt and a capital structure of 59% long-term debt is almost \$60 million annually in higher rates that would be paid by Kansas jurisdictional ratepayers. Moreover, this differential will increase over time, as the rate base of each company grows. This differential will also increase if capital costs increase in the future. Thus, while the Joint Applicants contend that ratepayers would not finance the acquisition premium being paid in this case, in fact ratepayers would be indirectly paying these costs.¹⁰²

39. It is very troubling that the Joint Applicants did not find it prudent to run a

⁹⁹ Re-filed Crane Direct, pp. 47-48, 62.

¹⁰⁰ *Id.* at p. 19.

¹⁰¹ *Id.* at p. 47.

¹⁰² *Id.* at pp. 25-26.

financial model that took into account the possibility of regulators using a consolidated capital structure to set rates.¹⁰³ In fact, “all of the financial modeling performed by the Joint Applicants and communications with credit agencies relied solely on the use of the less-leveraged, operating-utility capital structures for setting future revenue requirements.”¹⁰⁴ Clearly, Joint Applicants realized that if they modeled a scenario where the Commission used GPE’s consolidated capital structure for setting future rates that the credit rating opinions would be far worse. Regardless, the credit rating opinions are still not favorable given even the best case scenarios.

40. Joint Applicants testify that they are not requesting that ratepayers pay for any of the AP or transaction related costs associated with the acquisition of Westar by GPE.¹⁰⁵ This is also not entirely true. Joint Applicants will not request the AP or transaction related costs to be included in rates, only if they are allowed to set future rates based on the individual utility capital structures.

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 in order to match the recovery of the use of funds with such a request to utilize the source of funds in setting retail rates.¹⁰⁶

41. Joint Applicants understand that the only way they can service the holding company debt is to utilize the utility capital structures for ratemaking purposes. The Joint Applicants have made this clear by stating, “if the consolidated capital structure of the parent holding company is used for utility ratemaking purposes, GPE could not move forward with the

¹⁰³ Re-filed Gatewood Direct, p. 28-29.

¹⁰⁴ *Id.* at p. 29.

¹⁰⁵ Bryant Supplemental, p. 4.

¹⁰⁶ Ives Supplemental, p. 12.

Transaction. . . .”¹⁰⁷ This statement proves how little room there is for any deviation outside of what the Joint Applicants are requesting, even if those deviations are necessary to protect ratepayers or are necessary to ensure that this transaction is in the public interest.

42. The fact that the Joint Applicants have included a provision that allows a recovery of the AP in the event the Commission decides to use GPE’s consolidated capital structure clearly indicates that there is little room for deviation outside of what the Joint Applicants are requesting. The Joint Applicants have engineered this transaction in such a way that regardless of which capital structure the Commission picks, the ratepayers will be footing the bill. It is financial engineering that makes this transaction possible, and the Joint Applicants readily admit it.¹⁰⁸ It is the ratepayers that will ultimately be responsible for ensuring that Westar shareholders are handsomely paid, regardless of what capital structure is used for future ratemaking purposes, not GPE shareholders.

c) Joint Applicants do not have a sufficient plan to pay back GPE’s transaction debt.

43. Despite the rating agencies clearly stating that there could be an impact on the credit ratings of the subsidiaries going forward, the Joint Applicants state that they have a plan to pay down transaction debt that the Joint Applicants allege will “protect them from potential harm due to the financing structure or relationship of Westar and KCP&L with GPE or its affiliates.”¹⁰⁹ In reality, the Joint Applicants have not provided a comprehensive plan to pay back the massive transaction related debt incurred to finance the acquisition premium.¹¹⁰

44. Mr. Bryant provides that Joint Applicants expect “approximately \$65 - \$200

¹⁰⁷ Notice of Re-Filing Rebuttal Testimony Without Redactions - Rebuttal Testimony of Kevin Bryant on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company, p. 26 (Re-filed Bryant Rebuttal) (January 30, 2017).

¹⁰⁸ *Id.* at p. 5.

¹⁰⁹ Ives Rebuttal, p. 1; Re-filed Bryant Rebuttal p. 7.

¹¹⁰ Re-filed Crane Direct, p. 35.

million from operations related savings from the Transaction in addition to the substantial free cash flow from each of our three utility operating companies.”¹¹¹ Mr. Bryant also provides that GPE has “approximately \$400 million in non- regulated net operating loss carry-forwards. . . .”¹¹² Additionally, Mr. Bryant provides a brief and speculative figure in his rebuttal testimony of \$500 million in transaction-related net free cash flows in the first five years following the transaction which would enable GPE to reduce debt by an estimated 11%.¹¹³ The problem here is that Mr. Bryant does not provide an explicit timeline for paying back the transaction related debt. In fact, he does not provide a written plan at all.¹¹⁴ The only support he provides is savings estimates that may or may not be accurate and an informal guarantee that he will pay back the debt.¹¹⁵

45. The Joint Applicants argue that, “GPE has a long history of managing its financing needs efficiently and effectively in light of conditions prevailing when decisions need to be made, and GPE expects to make decisions regarding the pay down of Transaction debt in the future consistent with its past practice.”¹¹⁶ This informal guarantee is not reliable. Company executives could be replaced, which could result in the elimination of those informal guarantees. Additionally, negative events could happen that could prevent the Joint Applicants from servicing its debt. Without a formal written plan or set requirements to pay down the debt, GPE could suspend those guarantees.¹¹⁷

46. The only guarantee that Mr. Bryant provides is an insufficient plan, with no timeline, that largely relies on dividends from the utilities and speculative transaction related

¹¹¹ Bryant Direct, pp.16-17.

¹¹² Bryant Direct, p. 17.

¹¹³ Re-filed Bryant Rebuttal, p. 21.

¹¹⁴ Tr. Vol. 3, pp.772-773.

¹¹⁵ Re-filed Bryant Rebuttal, p. 21-22.

¹¹⁶ Joint Applicants’ Post-Hearing Initial Brief, p. 36.

¹¹⁷ Tr. Vol. 3, pp.772-773.

efficiencies that likely will not be able to service GPE's debt even if they are accurate.¹¹⁸ Put another way, Mr. Bryant is counting on ratepayers to pay higher rates of return than necessary, coupled with unsubstantiated operational savings in an effort to assure parties that the Joint Applicants at some unknown point in time will be able to service GPE's debt.¹¹⁹ Ms. Crane addresses why this is a problem in her direct testimony:

[I]f the Company does not have a plan to pay off this debt, the debt would presumably need to be refinanced in future years, which could result in higher interest payments as well as additional fees and issuance costs. The KCC should be very concerned that GPE is proposing to take on \$4.4 billion of new debt, for which it has provided no repayment plan. This is especially troubling, given the very thin margin of error on which GPE has justified the preservation of its credit ratings.¹²⁰

47. In hopes to ease the concerns of CURB, Staff, and Intervenors, Mr. Bryant includes other ways in which the Joint Applicants plan to mitigate the risks associated with the financing of this transaction. This includes; issuing additional equity, a reduction in the level of GPE dividends, and/or withstanding a lower earned rate of return on Westar's common equity than assumed.¹²¹ These mitigating factors, as proposed by Mr. Bryant, are the very protections that could jeopardize the investment grade ratings of GPE and its subsidiaries.

d) Joint Applicants proposed ring-fencing is insufficient to protect ratepayers from the risks associated with the financing of this transaction.

48. The ring-fencing proposed by the Joint Applicants is insufficient to protect ratepayers if this transaction is approved. The ring-fencing that the Joint Applicants propose in Mr. Ives Rebuttal Testimony, Schedule DRI-3, clearly uses qualifying language that could allow the Joint Applicants the ability to change or modify those commitments or conditions at some

¹¹⁸ Re-filed Bryant Rebuttal, pp. 21-22.

¹¹⁹ See Re-filed Crane Direct, pp 28-29.

¹²⁰ *Id.* at p. 29.

¹²¹ Re-filed Bryant Rebuttal, p. 20.

future time.¹²² In essence, the Joint Applicants have structured their ring-fencing so open-ended that they are not really commitments at all. This seems to be a common theme with this transaction. Dr. Dismukes, KEPCo's witness, addressed this problem at hearing:

COMMISSIONER FEIST ALBRECHT: I am going to make sure that I understand KEPCo's position. Generally, their position is in opposition to the Application that is before us. Is that correct?

MR. DISMUKES: Yes. I would say that as filed the Application is deficient and without further ring fencing measures like the ones that I have talked about you are going to have a merger or an acquisition that would lead to potentially adverse impacts for ratepayers including KEPCo.

COMMISSIONER FEIST ALBRECHT: So do you believe if the Commission were inclined to approve this transaction that -- that the proposed ring fencing measures and other commitments contained in Joint Applicants DRI Exhibit 3 are sufficient?

MR. DISMUKES: No. I would recommend -- I mean, we've come I think a long way in terms of reconciling potential ring fencing measures that would make this acquisition much less -- expose ratepayers to much less risk, but I would recommend using the language and the measures that I have offered in my exhibit. I think yesterday we had some discussions about some conditioning that had been included in the Company's proposal, excuse me, the Joint Applicants' proposal as well as some other modifications they had made, but I think while they don't appear -- if you look at them closely, there are pretty substantial differences and I would argue to use the more stringent, concise language that I've offered. In many of those instances, for instance, that we heard yesterday there were qualifying clauses in there that would say, well, subject to the Commission's approval. I think that opens the Commission up to and this whole proceeding to a particular challenge because what you are essentially offering up when you include something like that in a ring fencing measure is to challenge this Merger Order. You are extending the invitation to change that order rather than making that standard a little bit higher, and I am not a lawyer. It's not that the Joint Applicants or the merged company in this aftermath can't come to the Commission and take that position, but you don't want to invite that opportunity, and, again, I was a little concerned yesterday with Mr. Ives' testimony in the sense that if you -- if you create these opportunities for reassessment on individual items and they have been the individual items that the Joint Applicants have identified, not any of the other Intervenor's, it opens up all the issues. It makes you wonder why have we been here for the last week? I mean, if there are no commitments and conditions and they all can be changed again later, what's the purpose of all this? That's not my experience in having worked in a number of different mergers

¹²² See Ives Rebuttal, Schedule DRI-3.

and looked at ring fencing measures and other types of merger-related commitments that you would leave that kind of open-ended nature to a Merger Order open like that.¹²³

49. The Joint Applicants inappropriately blame other parties for their failure to provide reasonable and comprehensive ring-fencing provisions.¹²⁴ The Joint Applicants are obviously attempting to smear CURB, Staff, and other parties in an effort to gain favor in the eyes of the Commission. The Joint Applicants go as far as stating, “Joint Applicants’ overtures were summarily rejected without-suggestions or further discussion of potential conditions or ring-fencing measures.” This statement is grossly inaccurate. Joint Applicants were aware of the concerns that parties had, through direct testimony, yet chose to ignore those concerns in favor of less stringent requirements.¹²⁵ The real reason that the Joint Applicants won’t agree to more stringent requirements is because they simply can’t,¹²⁶ the rating agencies have made that clear:

Should the upstream dividend demands for Westar become excessive or substantial customer benefits (e.g. bill credits or rate freezes) result in a multi-year reduction of Westar’s retained cash flow, there would likely be negative ratings pressure at the utility.¹²⁷

The Joint Applicants themselves admit that they are not agreeable to additional ring-fencing provisions beyond those contained in Schedule DRI-3:

The Joint Applicants caution that if the KCC imposes additional conditions on Joint Applicants beyond those contained in Schedule DRI-3, there is the possibility that one or some of those additional conditions could result in making the Transaction infeasible. . . . [t]he acceptability of any additional condition would hinge on its impact on financial flexibility and credit quality as viewed by the rating agencies.¹²⁸

50. It is not the fault of CURB, Staff, or other parties that the price GPE is willing to

¹²³ Tr. Vol. 5, pp. 1101-1102.

¹²⁴ Joint Applicants’ Initial Post-Hearing Brief, pp. 64-67.

¹²⁵ See Ives Rebuttal, Schedule DRI-3.

¹²⁶ See Re-filed Gatewood Direct, p. 10.

¹²⁷ *Id.*

¹²⁸ Joint Applicants’ Initial Post-Hearing Brief, p. 66.

pay for Westar is so far in excess that it results in this transaction being poorly financed. This leaves little to no room for Joint Applicants to agree to reasonable and appropriate ring-fencing. The fact that there is dispute over the strength of the ring-fencing at all is bothersome. The Joint Applicants could not even agree to the more stringent requirements provided by Dr. Dismukes.¹²⁹ They did not agree to the full breadth of those requirements, because this transaction can't handle reasonable ring-fencing conditions, as stated above. It should be noted that CURB does not believe that any type of ring-fencing provisions can eliminate the risks associated with this transaction.¹³⁰

2. The acquisition of Westar by GPE fails Commission Merger Standard (a)(ii): (a) The effect of the transaction on consumers, including: (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.

51. Simply put, the purchase price paid by GPE for Westar is too high for an acquirer the size of GPE.¹³¹ As, discussed above, there is “a considerable amount of downside risk to the estimated savings and cash flows, and any underperformance, as discussed in the Moody’s Rating Assessment, could negatively impact both the holding company and its subsidiaries.”¹³² Furthermore, “[a] credit downgrade of utility subsidiaries will increase the cost of capital and thereby increase costs borne by the ratepayers.”¹³³

52. Joint Applicants argue that the purchase price is reasonable based on four arguments listed in Mr. Bryant’s Direct testimony: “1) the price was a result of a competitive bidding process, 2) savings from the merger will be substantial, ranging from \$65 million in the first year following the merger and growing to \$200 million per year, 3) the price and premium

¹²⁹ See Dismukes Direct, Exhibit DED-2.

¹³⁰ Refiled Crane Direct, p. 8.

¹³¹ *Id.* at pp. 45-46.

¹³² *Id.* at p. 45.

¹³³ *Id.* at pp. 45-46.

paid for Westar is comparable to similar market transactions and 4) the credit ratings are expected to remain at investment grade for GPE following the transaction.”¹³⁴

53. CURB witness, Ms. Crane, addressed in her direct testimony why Mr. Bryant’s four arguments do not demonstrate that the purchase price is reasonable in light of the savings that can be demonstrated from the merger.¹³⁵ To summarize: 1) Irrespective of whether a competitive bidding process was used, the price paid as a result of the competitive bidding process is too high and leaves little room for error on the part of GPE.¹³⁶ 2) Mr. Bryant’s “analysis is flawed in comparing the acquisition premium based on stock market values to savings, that will flow through the ratemaking equation based on actual costs.”¹³⁷ If the Commission “compares the purchase price instead to the acquisition premium based on goodwill of \$4.8 billion, even fifty years of savings is not sufficient to offset the acquisition premium.”¹³⁸ 3) A larger utility may be able to absorb the AP, or at the very least finance it in a more reasonable way.¹³⁹ “The problem in this transaction is not only the purchase price, but the fact that this purchase will result in such a large increase to GPE’s long-term debt.”¹⁴⁰ 4) The problems associated with GPE and its subsidiaries ability to maintain investment grade ratings has been discussed at length above.

54. CURB does not specifically challenge the purchase price as compared to other market-based transactions. CURB simply believes that the purchase price is too high for a company the size of GPE, and the Joint Applicants have not provided evidence to the contrary. Although CURB does not specifically challenge the purchase price as compared to other market-

¹³⁴ Re-filed Crane Direct, p. 42; *See* Bryant Direct pp. 7-8.

¹³⁵ *See* Re-filed Crane Direct, pp. 42-45.

¹³⁶ Re-filed Crane Direct, pp. 43-44.

¹³⁷ *Id.* at pp. 44.

¹³⁸ *Id.* at pp. 44-45.

¹³⁹ *Id.* at p. 45.

¹⁴⁰ *Id.*

based transactions, CURB recognizes the validity of those arguments raised by Staff and Intervenor.

55. Joint Applicants argue erroneously, through the rebuttal testimony of Mr. Proctor, that because the Commission has “never ruled on the reasonableness of the purchase price in past cases” that it should be precluded from doing so in this case.¹⁴¹ That argument ignores the plain language of the Commission’s Merger Standards.¹⁴² Furthermore, Mr. Proctor’s arguments are not sustainable. First, Mr. Proctor’s testimony should be disregarded in that it is riddled with a number of problems. Mr. Proctor, admittedly applies his interpretation¹⁴³ of Commission Merger Standards (a)(iii) and (a)(iv), as opposed to analyzing those merger standards based on how they are actually written in the Commission’s Order on Merger Standards.¹⁴⁴ This is clearly a modification of the Commission’s merger standards and as a result Mr. Proctor’s analysis of this transaction relating to Merger Standard (a)(ii) and (a)(iv) should not be given any weight.

56. In addition, the Joint Applicants did not ask for a modification of Commission Merger Standard (a)(iii) and (a)(iv), so the analysis that Mr. Proctor provides is based on language and a standard that has not been approved by the Commission in this docket. Next, there is some controversy over the timeline provided by Mr. Proctor as to his tenure at the Commission and what cases he was actually involved with.¹⁴⁵ Mr. Proctor has not provided any concrete evidence that the Commission, in fact, used his interpretation in applying Merger Standards (a)(ii) and (a)(iv) in prior dockets. As a result, his interpretation and analysis of

¹⁴¹ Joint Applicants’ Initial Post-Hearing Brief, p. 69; *See* Proctor Rebuttal.

¹⁴² Order on Merger Standards, ¶ 5.

¹⁴³ Mr. Proctor’s modifications of Commission Merger Standards (a)(ii) and (a)(iv) are as follows: “(a)(ii) addressing “whether the purchase price was reasonable in light of the savings that can be demonstrated from the merger” is only applicable when the acquiring utility in a merger seeks recovery of the AP, based on merger savings, through post-Transaction rates.” Merger Standard (a)(iv): “that comparison and measure was originally established and meant to be relevant for merger transactions where the purchaser seeks to recover through inclusion in customer rates some or all of the AP based on the merger’s cost savings.” *See* Proctor Direct, pp. 17-18.

¹⁴⁴ *See* Tr. 2, pp. 305-318, 331.

¹⁴⁵ *See id.* at pp. 301-310.

Merger Standards (a)(ii) and (a)(iv) should be disregarded.

3. The acquisition of Westar by GPE fails merger standard (a)(iii): (a) The effect of the transaction on consumers, including: (iii) whether ratepayer benefits resulting from the transaction can be quantified.

57. CURB does not believe that ratepayers will benefit from this transaction. Joint Applicants have guaranteed that all savings “go back to customers over the course of the ratemaking process.”¹⁴⁶ Meaning that GPE intends on retaining savings between rate cases “to service and repay debt and fund the incremental dividends.”¹⁴⁷ CURB is concerned that GPE will use its ability to control the timing of rate cases, to benefit the company and its shareholders in such a way that ratepayers may or may not see any savings at all. If the utilities stay out for a long period of time, those savings will go directly to the benefit of the shareholders.

58. CURB analyzed the “methodology used by GPE to estimate merger savings, to review the assumptions used to develop merger savings, and to trace how those savings were included in the financial planning models provided in response to CURB-42 and updated in KCC-169.”¹⁴⁸ Joint Applicants state that, “CURB witness Crane stated that she was persuaded that the Joint Applicants’ testimony and financial modeling of savings are reasonably quantified.”¹⁴⁹ The Joint Applicants mischaracterize CURB’s argument. While CURB does not challenge the financial model of savings estimates, CURB still has major concerns over the speculative nature of the cost savings.¹⁵⁰ It is CURB’s position that even if the savings estimates are accurate, CURB does not believe that those savings estimates are sufficient to justify the AP paid in this transaction.¹⁵¹ In addition, CURB is concerned that the “timing of the savings may

¹⁴⁶ Tr. Vol. 2, p. 411.

¹⁴⁷ Bryant Direct, p. 17.

¹⁴⁸ Re-filed Crane Direct, p. 46.

¹⁴⁹ Joint Applicants’ Post-Hearing Brief, p. 2.

¹⁵⁰ Re-filed Crane Direct, p. 46.

¹⁵¹ *Id.* at p. 47.

prove overly ambitious” and “that complications could arise that would tend to increase, rather than decrease, costs in the period immediately following the closing.”¹⁵² While CURB did not find it necessary to specifically challenge the financial model of savings estimates in view of the vast amount of problems which are caused by other aspects of the Joint Application, CURB recognizes the validity of arguments raised by Staff and Intervenors.

59. Joint Applicants have not provided any rate freezes, rate moratoriums, rate decreases, or bill credits for ratepayers. Doing so would put this transaction in jeopardy. In fact, the Joint Applicants intend on filing a rate case in the near future that will still raise rates.¹⁵³ There are no clear benefits that ratepayers will see as a result of this transaction. What is likely is that ratepayers will be shouldered with higher rates and a decline in service quality because of enormous purchase price and the manner in which this transaction was financed. For these reasons, the Joint Applicants have failed to satisfy Commission Merger Standard (a)(iii).

**4. The acquisition of Westar by GPE fails Commission Merger Standard (a)(iv):
(a)The effect of the transaction on consumers, including: (iv) whether there are
operational synergies that justify payment of a premium in excess of book value.**

60. As addressed above, the AP related to this transaction is approximately \$4.9 billion.¹⁵⁴ That is \$4.9 billion more than Westar’s book value.¹⁵⁵ CURB does not believe that there are “operational synergies that justify the level of the premium proposed to be paid by GPE for Westar in this case.”¹⁵⁶ CURB believes that the savings estimates are speculative and costs will likely increase, rather than decrease, which may jeopardize those savings.¹⁵⁷ Furthermore, “the purchase price and associated financing requirements provide insufficient cushion with

¹⁵² *Id.* at p. 46.

¹⁵³ Tr. Vol. 6, p. 1541.

¹⁵⁴ Re-filed Grady Direct, p. 68.

¹⁵⁵ *Id.*

¹⁵⁶ Re-filed Crane Direct p. 47.

¹⁵⁷ *Id.* at p. 46.

regard to credit ratings.”¹⁵⁸ The Joint Applicants seem to ignore the fact that the high AP “could still jeopardize the credit ratings and financial integrity of the consolidated entity, especially if it is being financed with significant amounts of new long-term debt that will become a permanent part of the consolidated capital structure.”¹⁵⁹ Joint Applicants argue that GPE is not asking to recover the AP from ratepayers, unless a party recommends the use of GPE’s consolidated capital structure, therefore, any type of savings justifies the AP.¹⁶⁰ The problem, as addressed above, is that ratepayers will still be paying for the AP implicitly as a result of a capital structure that is “not representative of how actual utility operations are being financed.”¹⁶¹

61. Additionally, as addressed above, Joint Applicants have not provided a reasonably comprehensive plan as to how they are going to pay down the principal of the new long-term debt.¹⁶² The pressure to service the long-term debt, or deliver earnings to shareholders may also lead to cuts to service quality.¹⁶³ It is odd that GPE or any company would pay such a significant amount over book value to acquire a regulated utility. The reason that GPE is able to pay \$4.9 billion over book value is because GPE knows that Westar’s cost of equity is much lower than its Commission authorized return on equity.¹⁶⁴ In other words, GPE expects that Westar’s authorized returns in the future to be much greater than its actual cost of equity.¹⁶⁵ Ms. Crane explains in her direct why it is necessary to assess the AP in light of the utilities net book values:

Since Westar and KCP&L are utilities that are regulated on a cost-of-service basis, and since net book value is the standard by which rate base is calculated, then theoretically purchasers of utility companies should not be willing to pay significantly more than book value for the assets they acquire. That is especially true when the entity being acquired does not have substantial non-regulated

¹⁵⁸ *Id.* at p. 47.

¹⁵⁹ *Id.*

¹⁶⁰ Ives Supplemental, p. 12.

¹⁶¹ Re-filed Crane Direct, p. 47.

¹⁶² Re-filed Crane Direct, p. 35.

¹⁶³ *Id.* at p. 48.

¹⁶⁴ *See* Re-filed Grady Direct, pp. 67-77.

¹⁶⁵ *Id.*

operations. Given the fact that the overwhelming majority of the consolidated entity's operations will be regulated and the fact that the utilities will provide the majority of revenue supporting the consolidated entity, it is not only reasonable but also necessary to assess the magnitude of the acquisition premium in light of the utilities' net book values.¹⁶⁶

62. CURB analyzed Mr. Bryant's net present value of savings and does not agree with Mr. Bryant's "use of an infinite time horizon to assess the value of a utility company's savings."¹⁶⁷ Using an infinite time horizon overstates its value to any living person.¹⁶⁸ Additionally, "the accuracy of any savings diminishes the further one goes in the future, and certainly an estimate based on perpetuity has a significant margin of error."¹⁶⁹ Finally, even if the company were able to produce the synergies that they propose, which CURB and all other parties doubt, it still would not be enough to cover the \$4.9 billion AP.

5. The acquisition of Westar by GPE is neutral as to Commission Merger Standard (a)(v): (a) The effect of the transaction on consumers, including: (v) the effect of the proposed transaction on the existing competition.

63. If the Commission approves this transaction, Westar will cease to exist as an independently operated utility. GPE will own both KCP&L and Westar as a result of this proposed transaction. Joint Applicants argue that parties to this docket did not challenge the conclusion that this transaction will not affect existing competition in Kansas.¹⁷⁰ CURB acknowledges that there is currently no competition for regulated electric service in Kansas pursuant to K.S.A. 66-1,170; however, CURB does have concerns over the elimination of Westar as an independent utility. These concerns are addressed by Ms. Andrea Crane in her direct testimony:

In spite of the fact that there is currently no competition for regulated electric

¹⁶⁶ Re-filed Crane Direct at p. 48.

¹⁶⁷ *Id.* at p. 49.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Joint Applicants' Initial Post-Hearing Brief, p. 108.

service, the proposed transaction will still eliminate one significant entity in the electric industry. This is a significant period for the electric industry, as new technologies evolve, resulting in new sources of renewable power, increased distributed generation, and other technological changes. Therefore, while I tend to agree with Mr. Ives that there will be virtually no short-term impact on competition, the elimination of one large player in the field could impact the progress of future technological development and implementation of new power sources. More importantly, the merger will eliminate one independent entity from the industry, an entity that has the potential to examine issues with a different perspective from GPE.¹⁷¹

Although K.S.A. 66-1,170 precludes competition for regulated electric service in Kansas, the elimination of Westar's individual perspective from the industry in Kansas and the Midwest may prove to be harmful.

6. The acquisition of Westar by GPE is neutral as to Commission Merger Standard (b).

64. Commission Standard (b) addresses, “[t]he effect of the transaction on the environment.”¹⁷² The Joint Applicants maintain that this transaction will have a positive impact on the environment.¹⁷³ CURB acknowledges that there could be a slightly positive impact on the environment as a result of this transaction.¹⁷⁴ The slight positive impact is due to the possibility of early retirement of coal generation that the Joint Applicants have assumed if this transaction is approved.¹⁷⁵ However, CURB has concerns over the early retirement of those coal generation plants if the Joint Applicants request recovery of stranded costs.¹⁷⁶ This would result in ratepayers paying for generation facilities that are no longer providing a utility service, which would become a financial burden to the ratepayers.¹⁷⁷ Joint Applicants acknowledge CURB's concerns related to potential stranded costs and argue that this issue is addressed by the

¹⁷¹ Re-filed Crane Direct, pp. 50-51.

¹⁷² Commission Order on Merger Standards, ¶ 5.

¹⁷³ See Joint Applicants' Initial Post-Hearing Brief, pp. 111-112.

¹⁷⁴ Re-filed Crane Direct, p. 51.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

integrated resource planning (“IRP”) analysis because an IRP takes into account “stranded costs in determining the long-term least cost revenue requirement.”¹⁷⁸

65. The IRP process may take stranded costs into account; however, the problem here is that Joint Applicants have included specific plant retirements in their analysis of cost savings without a completed IRP.¹⁷⁹ The Joint Applicants allege that they will take stranded costs into account at some later date, but there have been no actual guarantees made by the Joint Applicants that ratepayers will not shoulder those costs at that time. CURB believes that the Joint Applicants have not alleviated concerns related to stranded plant costs and finds it troubling that the Joint Applicants have included plant retirements in their savings analysis prior to having an IRP completed.

66. Joint Applicants argue that the reason they have included plant retirements in their analysis is because, “KCP&L has a long history of conducting IRP studies that evaluate the appropriate long-term resource plan for retail customers. The retirements assumed as part of the savings analysis are based in part on this extensive experience.”¹⁸⁰ CURB is not aware of any standard that relies on “extensive experience” to determine savings related to plant retirements. Furthermore, that analysis is presumably not quantifiable. Given that an IRP was not completed it is fair to assume that all of the savings analysis was based on KCP&L’s “extensive experience”.¹⁸¹

67. CURB disagrees with Joint Applicants that this transaction is guaranteed to have a positive impact on the environment.¹⁸² CURB believes that there is a possibility that this

¹⁷⁸ Joint Applicants’ Initial Post-Hearing Brief, p. 113.

¹⁷⁹ Ives Rebuttal, p. 58.

¹⁸⁰ *Id.* at p. 59.

¹⁸¹ *Id.*

¹⁸² Re-filed Crane Direct, p. 52.

transaction could negatively impact the environment.¹⁸³ This transaction would have a negative impact on the environment if rate structures were implemented that promoted increased energy consumption.¹⁸⁴ CURB respectfully recommends that the Commission consider the different rate structures of the Joint Applicants and cautions that potential rate consolidation could lead to less efficient rate structures.¹⁸⁵ Ms. Andrea Crane summarizes the differences between current Westar and KCP&L residential general use rate structures in her direct testimony:

Westar's residential general (or standard) use rate schedule contains a customer charge, a declining-block winter energy charge, and an inclining-block summer energy charge. In the winter, the energy charge is lower for all usage in excess of 900 kWh per month. In the summer, the energy charge is higher for all usage in excess of 900 kWh per month. KCP&L's current residential general use (or RES-A) rate schedule contains a customer charge and a flat rate energy charge, which is seasonally differentiated (*i.e.*, higher in the summer than in the winter). Therefore, Westar's inclining-block energy charge provides a strong price signal to all residential customers to conserve electricity in the summer months, which is Westar's peak season. By conserving electricity, residential customers exercise greater control over their electric bills, and benefit directly from the resulting reduction in their utility bills. At the same time, however, greater conservation can contribute towards a delay in the need to build expensive new generating plant, which benefits *all* ratepayers. Obviously, the conservation oriented price signal inherent in Westar's inclining block rate design is absent from KCP&L's residential rate structure. I understand that CURB has supported Westar's existing inclining-block rate structure in past Westar rate proceedings. It is also my understanding that KCP&L has consistently opposed the adoption of an inclining-block rate structure for residential customers.¹⁸⁶

68. The Joint Applicants have not addressed whether they are committed to retaining Westar's inclining-block rate structure in the record. KCP&L has opposed the implementation of an inclining-block rate design for its residential customers in the past, which CURB concludes is a sign that KCP&L will seek to eliminate that inclining-block rate design in a future rate

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at pp. 52-53.

proceeding.¹⁸⁷ CURB is concerned that the “[e]limination of Westar’s inclining block structure could have a detrimental impact on the environment if it results in increased consumption per customer and increases generation requirements.”¹⁸⁸ CURB believes that this issue is important and relevant to protecting ratepayers from increasing costs as a result of generation requirements.

7. It is unknown at the present time whether the proposed transaction meets Commission Merger Standard (c).

69. Commission Merger Standard (c) addresses, “[w]hether 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 Kansas. 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.”¹⁸⁹ CURB addressed in direct testimony that there may be some benefits to state and local economies if the proposed transaction produces lower utility rates.¹⁹⁰ This is because customers would in theory have more disposable income to spend in the community.¹⁹¹ Additionally, lower rates could result in new businesses relocating to Kansas.¹⁹²

70. In contrast, there could be a negative economic impact if those benefits are offset by job losses.¹⁹³ Moreover, “the proposed transaction could result in deterioration of service, as GPE strives to meet earnings objectives while financing the debt service resulting from the proposed acquisition.”¹⁹⁴ It is also possible that this service degradation could result in

¹⁸⁷ *Id.* at p. 53.

¹⁸⁸ *Id.*

¹⁸⁹ Order on Merger Standards, ¶ 5.

¹⁹⁰ Re-filed Crane Direct, p. 54.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

businesses not relocating to the Joint Applicants service territory.¹⁹⁵ Joint Applicants argue that the transaction will result in “energy costs that are less expensive for customers than they would be absent the merger and lower energy costs will have a positive economic impact for Kansas.”¹⁹⁶ CURB does not necessarily agree. As discussed above, the Joint Applicants plan on filing a rate case that will increase rates for customers in 2019. The Joint Applicants have not agreed to any rate freezes, moratoriums, or rate decreases for customers.

71. The Joint Applicants can point only to synergies/savings which they allege will reduce rates; however, Staff, CURB, and Intervenors have deemed these savings speculative at best, with a real possibility that they may not materialize at all. There is no way to guarantee that energy costs will be less expensive than they would be absent the merger, or at all for that matter. What we do know for certain is that the Joint Applicants expect a loss of 638 full-time equivalent employees if the proposed transaction is approved.¹⁹⁷ The Joint Applicants have stated that they will eliminate those positions through attrition rather than employee layoffs.¹⁹⁸ Regardless of whether it is done through attrition or layoffs those reductions will result in an overall loss to the state and local economies.¹⁹⁹ The question still remains as to whether the labor cost savings justify the detrimental impact of job losses, for this reason CURB believes that it is unknown at this time whether the proposed transaction meets Commission Merger Standard (c).²⁰⁰

a) Ratepayers were not privy to all of the evidence related to this transaction during the Joint Applicants tour of the State.

72. Mr. Caisley touts in his rebuttal testimony that the Joint Applicants “met with more than 600 community leaders and customers. In not one meeting did anyone express the

¹⁹⁵ *Id.*

¹⁹⁶ Joint Applicants’ Initial Post-Hearing Brief, p. 115.

¹⁹⁷ Re-filed Crane Direct, p. 55.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

opinion that this Transaction should not occur.”²⁰¹ Additionally, Mr. Caisley states, “[n]ever did anyone express the opinion that this Transaction should not occur.”²⁰² First, Mr. Caisley has provided no substantial evidence in the record that those 600 community leaders and customers did not “express the opinion that the Transaction should not occur.”²⁰³ What the record does show is that 93 public comments were filed in this docket on January 26, 2017. Out of those 93 public comments only about 26 actually supported the acquisition.²⁰⁴ Additionally, Mr. Caisley admitted at hearing that he was not even present for all of those community meetings.²⁰⁵

73. Second, at the time of the Joint Applicants tour most of the evidence in this docket was still “confidential”. The Joint Applicants tour was sometime around June 1, 2016.²⁰⁶ It was not until January 26, 2017, that the Commission ordered the majority of classified information in this docket to be made public.²⁰⁷ This is important because the customers and leaders that the Joint Applicants approached at the time of their tour on June 1, 2016, were not privy to all of the details/issues regarding this transaction. Instead, customers and leaders could only rely on the information and promises that the Joint Applicants made to them at that time.²⁰⁸ This did not include a conversation about the credit rating problems associated with this transaction and certainly did not include pertinent issues, identified in confidential information, related to the financing problems associated with this transaction.²⁰⁹

74. Finally, the Commission is the trier of fact. The legislature has vested the

²⁰¹ Caisley Rebuttal, p. 5.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Tr. Vol. 6, p. 1499.

²⁰⁵ *Id.* at p. 1502.

²⁰⁶ *Id.* at 1503.

²⁰⁷ See Order on Prehearing Motions (January 26, 2017).

²⁰⁸ Caisley Direct, p. 5.

²⁰⁹ See Tr. Vol 6, pp.1512-1513.

Commission with wide discretion to determine issues that fall within its authority.²¹⁰ CURB has every confidence that the Commission will weigh the evidence in this matter and make a reasonable determination.

8. The proposed acquisition of Westar by GPE meets Commission Merger Standard (d) and will preserve the jurisdiction of the KCC and the capacity of the KCC to effectively regulate and audit public utility operations in the state.

75. GPE's proposed acquisition of Westar will preserve the jurisdiction of the KCC to effectively regulate and audit public utility operation in the state of Kansas.²¹¹ However, if the Commission were to approve the proposed transaction, CURB recommends that it be contingent upon "GPE's assurance that the KCC will retain its right to regulate all affiliate transactions, including those that may be subject to other regulatory bodies as well."²¹² Ms. Crane describes why this contingency is important in her direct testimony:

For example, the KCC should not be bound by allocation factors or methodologies authorized by other regulatory jurisdictions, even if differences among allocation methodologies result in the Joint Applicants' failure to recover all of its costs. Similarly, the Joint Applicants should be precluded from arguing that federal regulatory authorities take precedence over state regulation with regard to cost allocations from affiliates.²¹³

CURB believes that these assurances are reasonable; however, CURB reiterates its overall position, which is that this transaction should not be approved.

9. The Acquisition of Westar by GPE is very beneficial to Westar Shareholders, but unclear as to GPE Shareholders.

76. Commission Merger Standard (e) addresses, "[t]he effect of the transaction on affected public utility shareholders."²¹⁴ It is undisputed that Westar Shareholders stand to materially benefit if the Commission approves this transaction. Westar shareholders will receive

²¹⁰ See *Midwest Gas Users Ass'n*, 5 Kan. App. at 657.

²¹¹ Re-filed Crane Direct, p. 56.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Order on Merger Standards, ¶ 5.

a significant premium for their stock, as well as, a “significant premium over the net book value of the assets being transferred.”²¹⁵ Westar executives also stand to materially benefit from the approval of this transaction, as discussed by Ms. Andrea Crane in her direct testimony:

It should also be noted that Westar executives, as significant shareholders in Westar, also stand to materially benefit from the transaction. As noted earlier, the proposed transaction will result in the settlement of approximately \$46 million of Westar equity awards to current Westar employees, much of which will accrue to the benefit of its officers, executives, and directors. As stated on page 109 of the Proxy Statement, there are five directors that have deferred equity compensation agreements that could result in payments ranging from \$1.64 million to \$5.48 million. Page 113 of the Proxy Statement indicates that Mr. Ruelle is expected to receive a payment of \$10.75 million if the proposed transaction is completed. Thus, the Westar individuals that negotiated and authorized the sale will benefit handsomely from the transaction.²¹⁶

77. The high level of executive compensation that will result from the approval of this transaction supports the premise that this transaction was done with only one goal in mind and that was to materially benefit the shareholders and those associated with this transaction.²¹⁷ Ratepayers are absolutely a means to those ends and that is apparent given the level of reward that has been structured into this deal. Again, it is important to note that no rate freezes, bill credits, discounted rates or rate moratoriums have been proposed to benefit ratepayers as a result of this transaction. In fact, no specific benefits have been structured into this deal. Yet, executives and shareholders will explicitly be rewarded if the Commission approves this acquisition.

78. It is clear that Westar shareholders and executives will be rewarded handsomely as a result of this transaction.²¹⁸ However, it is less certain as to how beneficial this transaction will be for GPE shareholders moving forward:

²¹⁵ Re-filed Crane Direct, p. 57.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Re-filed Crane Direct, pp. 57-58.

In its proxy statement GPE stated that the proposed transaction would be accretive to earnings, resulting in an increase in earnings per share of approximately 10% by 2020. This estimate has since been reduced, given the actual financings that have occurred to date and the updated financial projections. Currently GPE estimates that the proposed transaction will only provide a modest accretion to earnings by 2020. In return for this modest increase in earnings, shareholders would then own a much larger company, but one that is significantly more leveraged and more risky. The question is whether the potential increase in earnings projected by GPE justifies the significant increase in financial risk resulting from financing of the proposed transaction with new long-term debt that will become a permanent part of GPE's capital structure.²¹⁹

10. It is unknown as to whether the acquisition of Westar by GPE maximizes the use of Kansas energy resources.

79. Commission Merger Standard (f) addresses, “Whether the transaction maximizes the use of Kansas energy resources.”²²⁰ Joint Applicants argue that this transaction will “help maximize the use of Kansas energy resources.”²²¹ As addressed above, GPE plans on retiring generation plants as a result of this transaction. This could result in “more efficient use of such resources if the proposed transaction has a favorable impact on reserve margins.”²²² In contrast, “the proposed transaction could have a detrimental impact on Kansas energy resources due to employee layoffs, including labor reductions at generating facilities. Kansas energy resources could also be negatively impacted if there are unreasonable reductions in capital expenditures and/or unreasonable reductions in maintenance spending.”²²³ The uncertainties surrounding the financing of this transaction may certainly cause the negative impacts discussed above.²²⁴ Additionally, the Joint Applicants have not completed an IRP, so it is still speculative as to what plants may or may not be retired if the Commission approves this transaction.²²⁵ For these reasons, CURB believes that it is unknown at this time whether the transaction maximizes the

²¹⁹ *Id.*

²²⁰ Order on Merger Standards, ¶ 5.

²²¹ Joint Applicants’ Initial Post-Hearing Brief, p. 126.

²²² Re-filed Crane Direct, p. 58.

²²³ *Id.*

²²⁴ *Id.* at pp. 58-59.

²²⁵ Ives Rebuttal, p. 58.

use of Kansas energy resources.

11. The acquisition of Westar by GPE will not reduce the possibility of economic waste and thus fails Commission Merger Standard (g).

80. The proposed acquisition of Westar by GPE does not meet Commission Merger Standard (g) because the estimated \$4.9 billion in goodwill that GPE has proposed to pay will drastically increase economic waste.²²⁶ Joint Applicants argue that the proposed transaction will result in more efficient use of resources and “that efficiencies are the primary driver of the [t]ransaction”; however, “paying Westar’s shareholders \$60 per share for their stock increases economic waste, especially considering that the projected synergy saving do not justify the additional financial risk that will result from the proposed transaction.”²²⁷ Furthermore, efficiencies are not the primary driver of the transaction. As discussed above, the primary driver of this transaction is financial engineering, which is the financing of this transaction with lower cost debt at the parent company, with the hope that the Commission uses the subsidiary capital structures that will result in higher rates of return than what is actually required.

81. CURB is also concerned with the issue of stranded costs from the projected early retirement of generation plants if the proposed transaction is approved. This concern is addressed in greater detail above, but is pertinent to this issue as well. Joint Applicants promise on one hand that there will be early retirements of generation plants, which will be beneficial and amount to savings/synergies and positive environmental impacts. Yet on the other hand, the Joint Applicants make statements that are in complete contradiction to that prior promise, stating, “Staff’s concern about ‘premature’ closing of a power plant as a potential inefficiency also seems to disregard the fact that, as discussed above, GPE has committed to complete an IRP by July 2017 for all of its operating utilities and has indicated no final decisions regarding plant closures

²²⁶ Re-filed Crane Direct, p. 59.

²²⁷ Joint Applicants Initial Post-Hearing Brief, p. 129; Re-filed Crane Direct, p. 59.

will be made until after the IRP is completed.”²²⁸

82. The Joint Applicants did not complete an IRP prior to seeking approval of this transaction.²²⁹ This has allowed the Joint Applicants to make speculative statements or promises as to what they might be able to do because there is no clear answer as to what they actually can do at this point. This conveniently has allowed the Joint Applicants to take two different positions on the same issue, as detailed above. For these reasons, this transaction will not reduce economic waste.

12. The acquisition of Westar by GPE may negatively impact public safety.

83. The proposed acquisition of Westar by GPE may negatively impact public safety, thus failing Commission Merger Standard (h) which addresses, “[w]hat impact, if any, the transaction has on the public safety.” CURB is concerned that the Joint Applicants will “need to cut additional costs in order to finance its debt service requirements and/or its commitments to shareholders.”²³⁰ Cost cutting would result in service reliability issues, which is a public safety concern.²³¹ “While the KCC would retain jurisdiction to mandate safe electric service in Kansas, the impact of such cost cutting measures on public safety may not be immediately apparent. For example, utilities may be able to reduce spending for some period without a corresponding reduction in safety and reliability parameters. However, at some point, safety and reliability will be negatively impacted unless adequate capital expenditures are made and adequate maintenance programs are implemented.”²³² The proposed financing of this transaction will put significant pressure on GPE to meet its debt service which will result in a deterioration of electric service

²²⁸ Joint Applicants’ Initial Post-Hearing Brief, p. 130.

²²⁹ Ives Rebuttal, p. 58.

²³⁰ Re-filed Crane Direct, p. 60.

²³¹ *Id.*

²³² *Id.*

and reliability.²³³ If that deterioration occurs it will negatively impact public safety.

a) Acquisition of Westar by GPE could negatively impact customer service and reliability.

84. CURB witness Ms. Harden analyzed the impacts that this transaction could have on reliability and customer service and believes that it is relevant to several merger standards.²³⁴ CURB finds that it is best addressed under Merger Standard (h). As addressed above, CURB is concerned that GPE will be “under considerable pressure to contain costs in order to pay down the debt incurred as a result of this transaction.”²³⁵ As a result of trying to contain costs, GPE could potentially “reduce operating costs including costs associated with customer service to such a degree that reliability and customer service are negatively impacted.”²³⁶

85. CURB recommended, in direct testimony, that the Commission approve quality of service standards and penalty provisions, such as those that were presented in the Unanimous Settlement Agreement in Docket No. 16-EPDE-410-ACQ.” These quality of service standards include annual reliability performance reports, and if reliability parameters fall to between 5% and 10% of the normalized baseline then a penalty would apply.²³⁷ “The potential penalty ranges from \$35,000 for a reliability parameter deviation of 5%-10%, \$70,000 for a deviation of 10%-15%, and \$105,000 for a deviation greater than 15%.”²³⁸ CURB also recommended in direct testimony:

[T]he Commission review the reliability parameters identified by Westar and KCP&L for years 2012-2015, as well as the call center statistics. Based on the reported performance results, I would recommend the Commission establish the highest performing reliability statistics as the baseline for the new company. Establishing the baseline based upon a three-year average of the best performance

²³³ *Id.* at p. 61.

²³⁴ Harden Direct, pp. 3-4.

²³⁵ *Id.* at p. 8.

²³⁶ *Id.*

²³⁷ *See id.* at pp. 8-9.

²³⁸ *Id.* at p. 9.

indices will ensure that the new company will provide, at minimum, the same level of service to its customers, while improving reliability and customer service for others.²³⁹

86. Joint Applicants do not oppose quality of service standards; however, Joint Applicants propose standards that CURB believes may not be sufficient in duration to protect ratepayers from a decline in quality of service. Specifically, CURB is most concerned that the Joint Applicants proposed standards allow for the termination of penalty exposure “upon the utility’s attainment of three consecutive years of penalty-free performance for that measure.”²⁴⁰ Joint Applicants have structured their proposed service quality standards in such a way that is most beneficial to their interests, as opposed to ratepayer’s interests. This seems to be a common theme with this transaction and is similar to how the Joint Applicants have structured their proposed ring-fencing provisions.

87. CURB believes that three consecutive years is not long enough to ensure that service quality is not affected as a result of this transaction. CURB recommends a 10 year time-frame with set penalty provisions because it may take longer than three years to see a substantial decline in service related to this transaction. Moreover, CURB believes that the three consecutive year loophole allows the Joint Applicants a way to escape from the penalty provisions associated with a decline in service quality, which in turn removes a substantial incentive to maintain reasonable service quality. Joint Applicants argue that the service standards they have proposed are comprehensive and “attend to their customers’ service needs during 2018-2020”.²⁴¹ CURB disagrees. If the Joint Applicants were truly concerned with maintaining quality of service or were confident in the ability to do so they would have no problem agreeing to the standards proposed by CURB and Staff. The truth of the matter is that the Joint Applicants aren’t confident

²³⁹ *Id.* at pp. 9-10.

²⁴⁰ Joint Applicants’ Initial Post-Hearing Brief, p. 101.

²⁴¹ *See id.* at pp. 101-105.

in their ability to maintain service quality past three consecutive years, as demonstrated by their need to include a way to terminate penalty exposure as a part of their proposed standards.

IV. Conclusion

88. CURB analyzed the Joint Applicants Application and evidence pursuant to the Commission's Merger Standards and believes that, taken in totality, this transaction does not meet the Commission's Merger Standards and therefore is not in the public's interest. As set forth above, it is clear from the evidence that the newly created entity will be far weaker than the stand alone utilities. This transaction will result in GPE becoming highly leveraged, in order to pay for the enormous AP, due to Westar's bidding process. As a result, it is likely that GPE will see a credit rating downgrade, which in turn will "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."²⁴² This could eventually lead to credit downgrades to the utilities.²⁴³ The outcome of those downgrades would lead to deteriorating service and higher rates for customers as financing costs become higher.²⁴⁴

89. This is not an "old fashioned merger," as argued by the Joint Applicants.²⁴⁵ The only reason this transaction is even remotely possible is through financial engineering. Meaning, GPE can only service the transaction related debt by collecting higher returns than what is actually required.²⁴⁶ This is done through the use of the individual utility capital structures for setting rates, rather than GPE's consolidated capital structure, that is actually financing this transaction. CURB believes that the consolidated capital structure is the more appropriate capital structure for setting future rates, as opposed to the individual utility capital structures, although,

²⁴² BPU Exhibit #5, p. 4.

²⁴³ Re-filed Gatewood Direct, p. 13.

²⁴⁴ Re-filed Crane Direct, p. 48.

²⁴⁵ Joint Applicants' Initial Post-Hearing Brief, p. 2.

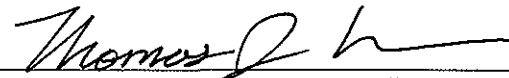
²⁴⁶ Re-filed Grady Direct, p. 73.

ratepayers will be paying for the AP either way. The financing of this transaction is so risky that everything has to go the Joint Applicants way, otherwise it does not work, resulting in ratepayers being negatively impacted.

90. The ring-fencing that the Joint Applicants have proposed is not sufficient to protect ratepayers from the financing of this transaction and GPE has not provided a timeline or a reasonable plan for paying back its transaction related debt. CURB does not specifically challenge the purchase price as compared to other market-based transactions; CURB simply believes that the purchase price is too high for a company the size of GPE, given the proposed method of financing. CURB does not believe that ratepayers will benefit from this transaction because GPE plans on retaining the majority of savings and has not provided any explicit ratepayer benefits as part of the transaction. The Joint Applicants have provided promises that may never materialize. All told this transaction was done for the benefit of Westar and GPE shareholders, with little thought as to how it would affect the ratepayers. This transaction is not in the public's interest and should be denied.

WHEREFORE CURB respectfully submits its *Post-Hearing Brief* and recommends that the Commission deny the Joint Applicants Application because it is not in the public's interest.

Respectfully submitted,



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VERIFICATION

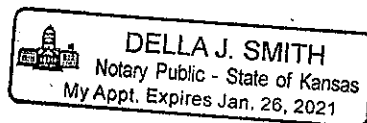
STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

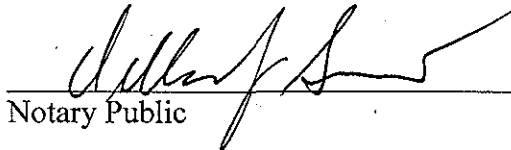
I, Thomas J. Connors, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.



Thomas J. Connors

SUBSCRIBED AND SWORN to before me this 13th day of March, 2017.





Notary Public

My Commission expires: 01-26-2021.

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

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