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September 18, 2001

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: Gateway Pipeline Company
Case No. GM-2001-585

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of) Gateway Pipeline Company, Inc.,) Missouri Gas Company and Missouri) Pipeline Company and the Acquisition by) Gateway Pipeline Company of the) Outstanding Shares of UtiliCorp Pipeline) Systems, Inc.)	Case No GM-2001-585

BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

M. Ruth O'Neill (#49456)
Assistant Legal Counsel

September 18, 2001

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INTRODUCTION

The primary issue in this case is whether the Missouri Public Service Commission should approve the sale of two Missouri regulated intrastate pipelines from a Missouri-regulated utility UtiliCorp United, to an unregulated, newly created entity Gateway Pipeline Company, with no ties to Missouri? The Office of the Public Counsel submits that this transaction would be detrimental to the public interest, and should not be approved.

This brief will discuss the issues which should concern the Commission regarding the detriment to the public interest which will result from approving this transaction. Of the Applicants, especially Gateway Pipeline Company, have failed to prove that this transaction will not be detrimental to the public interest. Additionally, the brief will address the legitimate concerns raised by Public Counsel and other parties which clearly show that this transaction will result in public detriment. The public detriment which will result includes the strong possibility that this Commission could lose jurisdiction over the intrastate pipelines to the Federal Energy Regulatory Commission (the FERC).

A second issue also surfaced as this matter proceeded toward a hearing. That issue concerns whether the restriction contained in the certificate of convenience and necessity of one of the two intrastate pipelines, which precludes that pipeline from being connected to an interstate section of pipeline which would also be transferred by the proposed sale. The Commission should conclude that the restriction (a) is still in full force and effect, and (b) should not be waived in the event that the Commission decides to approve the transaction described in the application. Public Counsel will demonstrate that the restriction has never been lifted, and should still be considered to be in full force and effect. Public Counsel strongly opposes the waiver of any conditions which currently apply to the regulated utilities at issue in this proceeding, for both substantive and procedural reasons.

FACTS AND PROCEDURAL HISTORY

While the ultimate issues in this case are straightforward, the history of these intrastate pipelines is more complicated. Missouri Pipeline Company (MPC) and Missouri Gas Company (MGC) are two intrastate pipelines which transport natural gas in the State of Missouri. In 1989, MPC originally requested a certificate of convenience and necessity to provide intrastate natural gas transportation services. In Re Missouri Pipeline Co, Case No. GA-89-126, 30 Mo. PSC (N.S.) 10 (1989), the Commission granted the certificate following hearing. However, the Commission imposed a number of conditions when it granted of the certificate. Those conditions include, in relevant part:

> "1. that the certificate only permit Applicant to install facilities necessary to interconnect with pipeline companies and local distribution companies, and not directly with end users…
> …7. the physical separation of the intrastate pipeline from the portion of the Applicant's segment crossing the state boundary into Illinois." In re Missouri Pipeline Co., 30 Mo. PSC (N.S.) 10, 15 (1989).

At the time this order was issued, MPC did not own any pipe that crossed state boundaries, also known as an "interstate" pipe. However, at the time of the initial order, MPC's parent company owned a small segment of pipe inactive pipe, filled with nitrogen to preserve it, which ran under the Mississippi River and which is discussed below. [Tr. at p. 168-172.]

In 1990, Missouri Gas Company obtained a certificate of convenience and necessity to provide intrastate natural gas transportation services in In the matter of the application of Intercon Gas, et al, 30 Mo. PSC (N.S.) 554 (1991). At the time of MGC's application, it was owned by the same corporate parent as MPC. This same corporate parent also owned an unused portion of pipeline which runs under the Mississippi River between Missouri and Illinois, and which is physically separated from the easternmost point of MPC by a distance of approximately 18 inches to three feet. [Tr. at p. 151.]

The current ultimate owner of the MPC and MGC pipelines is UtiliCorp United, which holds both pipelines through a wholly-owned subsidiary, UtiliCorp Pipelines Systems (UPL). UtiliCorp United acquired all "rights, properties, and assets [of] Missouri Pipeline Company and Missouri Gas Company" pursuant to a transaction which came before the Commission in Case No. GM-94-252, In re Missouri Gas et al., 3 Mo PSC 3d 216, 228 (1994). In that matter, the Commission authorized UtiliCorp "to purchase and acquire the assets and rights as set out in the...application and agreement, and to own, operate, control, manage and maintain those assets ***in accordance with the Commission's original certification as set out in Case No. GA-90-280 and this Report and Order.***"3 Mo. PSC 3d, at 228. (emphasis added.) The transaction was completed in early 1995. [Tr. at 188.] When the Commission approved the sale of the pipelines to UtiliCorp, it approved and directed the parties to comply with agreements settled between the parties prior to the hearing. Among those settled issues was UtiliCorp's agreement that:

> "B. As to the physical separation of MPC's intrastate pipeline from A portion of a pipeline which crosses the Mississippi River, all parties agree that the prohibition against connecting the intrastate system to the interstate system is a condition which was imposed at the time the

> certificate was issued to MPC in Case No. GA-89-126, **and that it will remain a condition of the certificate if transferred**" 3 Mo. PSC 3d, at 225. (emphasis added.)

In the 1994 proceeding, UtiliCorp acquired MPC, MGC, and the segment of inactive pipeline, known as the Trans-Mississippi Pipeline (the TMP), which crosses the border of Missouri into Illinois under the river. Between the date of that acquisition and the evidentiary hearing in this case, UtiliCorp has not filed any application, nor argued in any proceeding before the Commission, that this restriction should be waived that the restriction has expired or otherwise no longer exists.

MPC, MGC and UtiliCorp are all regulated by the Missouri Public Service Commission, although UPL is not regulated by the Commission. UPL consists of the two regulated pipelines and the small, inactive pipeline, the (TMP), which runs under the Mississippi River between Missouri and Illinois. This matter arose because UtiliCorp wishes to sell its ownership interest which it holds as the parent of UPL and the regulated pipelines it holds.

UtiliCorp is a public utility as defined by §386.020(42) RSMo (2000). UtiliCorp provides electric and gas utility service in the State of Missouri, through its divisions which do business as (d/b/a) Missouri Public Service Co. and St. Joseph Light & Power Co. UtiliCorp also provides regulated utility service in Missouri through its second tier subsidiary companies, (MGC) and (MPC). Both MGC and MPC are public utilities as defined by § 386.020(42). The Commission regulates the utility operations of UtiliCorp, MGC and MPC in the state of Missouri. The TMP is not currently not used or useful, and is not currently regulated. However, if placed in service, the TMP would have to be regulated by some governmental entity at the state or federal level. The most likely entity to regulate the TMP if it is placed in service is the Federal Energy Regulatory Commission (FERC).

Gateway Pipeline Company, Inc., is a Delaware Corporation which is registered in Missouri. Currently, the corporation has no assets. Gateway is wholly owned by Mogas Energy, LLC, a limited liability company formed under the laws of the state of Delaware. Currently, Mogas has no holdings other than Gateway. Mogas is wholly owned by Dennis Langley, David Ries and a corporation known as TCW. Although numerous attempts were made to obtain complete information regarding the financial stability of Mogas, as Gateway's sole owner, inquiries regarding the financial viability of these corporations by Public Counsel and the Commission Staff were rebuffed on several occasions. The parties currently have little information regarding the financial workings of the corporations.

Gateway and Mogas currently have no Missouri operations of any kind. Neither Gateway nor Mogas is a regulated utility as defined by § 386.020(42).

On April 19, 2001, Gateway, MPC and MGC filed an application with the Commission seeking to induce the Commission to decline jurisdiction over the proposed transaction, on the grounds that this matter constituted a mere "stock transfer" between two unregulated entities. UtiliCorp was not a party to the Application. The Commission accepted jurisdiction to decide this matter on June 3, 2001. The Commission ordered UtiliCorp to enter its appearance as a party in this case, in its order dated June 3, 2001. UtiliCorp subsequently entered its appearance as a party, but has not filed an application on its own behalf with the Commission to approve this transfer of ownership. Despite the insistence that this is merely a "stock transfer" it is clear that this transaction would transfer all of UtiliCorp's ownership interest to Gateway.

In April 2001, UtiliCorp sent a letter to its customers, addressed to "Dear Community Leaders" in the MPC and MGC service territories. In that letter, UtiliCorp stated:

> "UtiliCorp United has agreed to sell our pipeline subsidiaries, Missouri Pipeline Company and Missouri Gas Company, to Gateway Pipeline Company, Inc. These subsidiaries own and operate a 250-mile long intrastate gas transmission pipeline, a portion of which serves your community." [Ex. 15, at p. 3, and Schedule 1.]

Gateway agreed to acquire UPL for an amount which exceeds the book value of MPC and MGC by approximately ** __________ ** This additional cost is identified as the price to be paid for that portion of UPL which is outside the MPC and MGC assets. The only other asset which UPL owns is the currently unused the TMP. The "book value" of the TMP is significantly inflated because the purchase price reflects an acquisition premium paid by UtiliCorp at the time it acquired these three pipelines in 1995. [Tr. p. 188.] Uncertainty regarding whether Gateway will attempt to recover this premium is but one reason that Public Counsel opposes this transaction.

Gateway and Mogas attempt to paint a bright picture of this proposed acquisition in broad strokes, but the picture blurs when one attempts to examine the details of the transaction. Public Counsel has attempted to uncover the facts which Gateway and Mogas would prefer to keep hidden in the shadows, but many questions remain unanswered. The lack a of strategic business plan, or at least the lack of a plan that Gateway was willing to share with the parties prior to the hearing, also factored into Public Counsel's position.

Gateway submitted pro forma financial statements forecasting a robust future for the pipelines, but failed to submit any information which would support its projections. Gateway provided some in-camera testimony regarding its plans for all of UPL's holdings for the first time during the evidentiary hearing in this case. However, even this additional information lacks specificity as a business plan which the Commission can use to determine whether the transaction will be detrimental to the public interest.

These and other concerns have led Public Counsel to oppose this transaction.

ARGUMENT

I. THE COMMISSION SHOULD DENY THE REQUEST OF THE JOINT APPLICANTS FOR GATEWAY TO ACQUIRE ALL OF THE STOCK OF UPL, AND CONSEQUENTLY, ACQUIRE OWNERSHIP OF THE MISSOURI REGULATED INTRASTATE PIPELINES, MPC AND MGC, BECAUSE APPROVING THIS APPLICATION WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST.

As this Commission stated in The Matter of the Joint Application of Missouri-American Water Company and United Water Missouri, Inc., WM-2000-222 (2000),

> "Pursuant to Commission Rule 4 CSR240-2.060(9)(C), the Applicants must show why the proposed acquisition is not detrimental to the public interest. In considering this application, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). "The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility." State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently. See In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-252 (Report and Order, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220."

A. The Commission correctly asserted jurisdiction in this matter because UtiliCorp, Missouri Pipeline Company and Missouri Gas Company are all public utilities regulated by the Commission.

The Commission has jurisdiction over the proposed transaction pursuant to §§386.250 and 393.190 RSMo (2000). The Commission's authority to regulate the sale, transfer, or disposition of a utility's system or assets is broad. State ex rel. Marigney Creek v. PSC, 537 S.W.2d 388 (Mo. banc 1988).

Section 386.250 RSMo provides the Commission with jurisdiction and supervision over "all public utility corporations and persons whatsoever subject to the provisions of this chapter." §386.250(5). Section 386.250(1) RSMo grants the Commission jurisdiction over the:

> "manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat or power, within the state, and to persons or corporations owning, leasing, operating or controlling the same..."

The Commission has jurisdiction over the Missouri operations of UtiliCorp, MGC and MPC, on the basis of §386.250(1) and (5). Subsection (5) of §386.250 RSMo clearly recognizes the Commission's jurisdiction over the ownership, operation and control of utility plant and sale of utility service.

Section 393.190.1 RSMo provides that:

> "No gas corporation, electrical corporation...shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, without having first secured from the Commission an order authorizing it so to do."

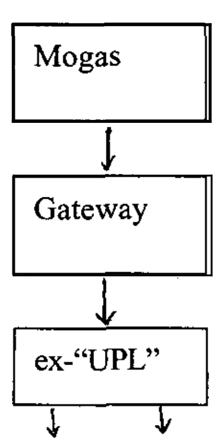
All regulated utility companies in Missouri are required by law to seek Commission approval of a sale or other transfer of assets such as the transfer of assets proposed in this application. This application is not analogous to a situation where a retired widow seeks to sell 100 shares of UtiliCorp stock. The sale of UPL "stock" by UtiliCorp to Gateway, is in reality a transfer of UtiliCorp's entire ownership interest in these two regulated utilities to an untried, unregulated entity. This transfer of assets which are used to provided electric and natural gas transmission service to UtiliCorp's Missouri customers, is correctly the subject of the Commission's jurisdiction.

In State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo App. E.D. 1980), the court of appeals stated that:

> "Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain the approval of the Commission....The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility." 596 S.W.2d, at 468.

Only after the Commission is convinced that the purchasing party will continue to provide safe and adequate service to the public, does the Commission's role in this procedure become constrained. Once the applicants to demonstrate that they can continue the public utility service without detriment to the public interest, "The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest." Id.

If this transaction were approved, the corporate structure would be:



If this transaction is approved, the Commission could arguably decline jurisdictional oversight of future "stock transactions" and asset transfers involving various parent companies of MPC and MGC. Mogas, Gateway and UPL are all unregulated companies. One of the primary reasons that the Commission accepted jurisdiction in this case was that UtiliCorp, the current ultimate parent of MPC and MGC, is a public utility which is regulated by the Commission. If this transaction is approved, it is Gateway's position that it would not need Commission approval to transfer the stock in "UPL."

Further complicating the ability of the Commission to track the ownership of these regulated intrastate pipelines is the provision in the purchase agreement which requires Gateway to rename UPL and remove any suggestion in the Company's name that it is legally connected to ** ____

__________________________ **

The Applicants believe that this Commission might not accept jurisdiction to review a proposed sale of MPC and MGC, if the corporate entity being sold is the stock of Mogas, Gateway or the renamed UPL. Given that the regulated assets are the only things that Mogas, Gateway or the ex-UPL will own to give value to its corporate stock the question of continuing jurisdiction should be considered by the Commission in making its decision in this case.

B. The Joint Applicants have failed to make a prima facie showing that this proposed transaction will not be detrimental to the public interest, and therefore the Commission should deny the application.

In Missouri, the standard for whether to approve a proposed sale of regulated utility assets from one party to another is found in a number of cases. In general, if the applicants can establish that the level of service the utility will provide to its customers will not be diminished, the Commission should approve such a sale if it finds that the transaction would not be detrimental to the public interest. . State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. 1980). The burden of establishing that no detriment to the public interest will result is on the applicants. Application of KCPL, EM-2001-464, (Commissioner Gaw, dissenting, at p.3.) In his opening statement, counsel for MPC, MGC and UtiliCorp, failed to recognize that his clients, as joint applicants, share in meeting that burden of proof with along with Gateway.

The burden of proof in this matter is on the Applicants. That burden never shifts throughout the proceeding, even though the burden of going forward with evidence may shift after a *prima facie* case is made. Anchor Centre Partners v. Mercantile Bank, N.A., 803 S.W.2d 23 (Mo. App. E.D. 1991) The applicants do not meet their burden "if the evidence on any of the essential elements would leave a fact finder 'in the nebulous twilight of speculation, conjecture and surmise.'" Rossman v. G.F.C. Corporation of Missouri, 596 S.W.2d 469, 472 (Mo. App. E.D. 1980). (citations within case omitted.)

1. Gateway has no ties to Missouri, and has not established that the layers of its unregulated corporate structure will not be detrimental to the public interest.

The Commission should not approve the sale of the Missouri regulated pipelines, MPC and MGC, from the regulated UtiliCorp to Gateway Pipeline Company, an unregulated entity with no substantial ties to Missouri and no other business interests likely to come before this Commission. Gateway has failed to establish that this acquisition will not be detrimental to the public interest.

There is Commission precedent for looking at the owners of a corporation to evaluate the public interest in a proposed transaction. At the time that MGC obtained its certificate in the Intercon Gas case, the Commission made the following statement regarding the owners of Intercon:

> "Intercon, although a corporation, is wholly owned by two gentlemen from Texas [names omitted]. Neither [of the owners] was willing to divulge anything to this Commission regarding their net worth.... At hearing, the Commission heard of their hostile takeover attempts of [several companies.]...The Commission is of the opinion that Intercon's application(s) have more of the character of a speculation than a well-reasoned business undertaking." 30 Mo. P.S.C. (N.S.), at 580.

At the time that UtiliCorp acquired MPC, MGC and TMP, there were concerns about whether the transaction would be financially viable. There were also questions raised about affiliate transactions between UtiliCorp's Missouri Public Service Division, which operates a natural gas local distribution company (LDC) in the service territory covered by the pipelines. See, In re Missouri Gas, 3 Mo. PSC 3d 216 (1994).

Public Counsel believes, that one of the reasons that this Commission should not allow the transfer in this matter UtiliCorp's substantial ties to this State. Regardless of the relationship between its LDC and its intrastate pipelines, UtiliCorp is regulated by this Commission. Therefore, this Commission has some assurance that UtiliCorp will act in a manner consistent with the Missouri Commission's policies and orders pertaining to these pipelines. While UtiliCorp's interests are not identical to the Commission's interests or the public interest, its history in Missouri and nexus to this state is a relevant consideration for this Commission as a predictor of its further actions regarding the pipelines while they are under UtiliCorp's control.

Gateway on the other hand, has no ties to this Commission or to this State. Gateway has no track record whatsoever. The only "track record" which the Commission has before it which would assist in predicting how Gateway will act toward the public in Missouri, is the experience of David Ries, as an employee of a number of interstate and out of state energy companies, and the history of the pipelines which Dennis Langley controlled in Kansas, Oklahoma and western Missouri. A more detailed discussion of Mr. Langley's companies, including Kansas Pipeline Company and the Kansas Pipeline Partnership appears in Section **II** of this brief. However, this Commission should be aware that the Kansas Court of Appeals, and later, upon rehearing, the Kansas Corporation Commission, found that Kansas Pipeline Partnership and other companies controlled by Mr. Langley improperly included non-existent "market entry costs" in rate base for those companies, and obtained, in nearly ex parte proceedings, a number of "accounting orders" which caused customer rates to increase significantly. See, Williams Natural Gas Company v. Kansas Corporation Commission, 916 P.2d 52 (App. 1996); appeal after remand affirming KCC's disallowance of improper costs, at Kansas Pipeline Partnership v. Kansas Corporation Commission, 24 Kan. App. 2d 42 (1997).

In the Williams Natural Gas case, cited above, the Kansas Court of Appeals discussed whether the Kansas Corporation Commission (KCC) "had the authority to permit the Joint Applicants (companies owned by Mr. Langley) to recover certain 'market entry costs.' These costs were incurred by other entities at a time when the Joint

Applicants did not exist" but which the KCC had allowed to be recovered in a rate case. 916 P.2d, at 19. The Court of Appeals found that:

> "the KCC has no power to permit an applicant to recover market entry costs when the applicant did not incur or otherwise acquire the costs in question. To do this would be equivalent to allowing a loan applicant to add the value of his or her best friend's home to the applicant's property statement because the applicant had purchased his or her best friend's automobile." 916 P.2d, at 20.

On remand, the KCC declined to reorder the market entry costs, and Kansas Pipeline Partnership appealed. In the Kansas Pipeline Partnership case, above, the Kansas Court of Appeals upheld the KCC's decision to disallow market entry costs in rates, and also upheld the KCC's decision to order the company to refund the rate which was found to be unlawful.

No substantial information is available about the other named investor, TCW. TWC is an asset management company, and manages assets for its clients. It claims to have at $80 billion of assets under management. It should be noted for the record that counsel for Gateway misstated TCW's worth to the commission when he asked witness Oligschlaeger ** ____

____

____ ** In fact, TCW has claimed that this is the value of the assets is manages for others.

The lack of regulatory oversight of Gateway or Mogas and the track record of or its primary principle should cause the Commission to review this application with a wary eye. The Applicants have done nothing in this case to demonstrate that they will not act in contradiction to the public interest if allowed to operate in Missouri.

2. Gateway has failed to establish that the operational reliability of the pipelines will not diminish.

Gateway has failed to establish that it can guarantee the continued operational reliability of the pipeline system. Gateway has failed to establish that it will be financially viable after the transaction is completed. Gateway has failed to establish that this transaction will be transparent to customers regarding levels of service and rates. To allow Gateway to assume ownership and control over Missouri regulated intrastate pipelines without proving to the Commission that it has the ability to do these things would be detrimental to the public interest in Missouri.

Gateway's "evidence" in support of the application consists of unsupported financial allegations, and assertions that they will operate these pipelines in an adequate manner. It's projections are fueled by assumptions which are not borne out by the past history of these companies, and Gateway has not been forthcoming regarding the true costs of implementing changes which could increase revenues. Like the applicants in the Intercon Gas case, the record in this case shows that Gateway has made unreasonable assumptions about these pipelines. As the Commission said in that earlier case, "by indulging in these faulty assumptions, (the Company) has made its project look considerably better than it is in fact." 30 Mo. P.S.C. (N.S.), at p. 574.

Public Counsel, recognizes and respects the general right of a property owner to do with its property as it sees fit. However, this right has certain limitations. In the context of this case, it is important to remember that the property which is the ultimate subject of this transaction is property dedicated to the public use. When private property is dedicated to a public use, the Commission has the obligation to ensure that the use will not operate to the public detriment.

3. Gateway has failed to establish the financial viability of this transaction.

In this case, Gateway failed to provide any detailed information regarding how it proposes to make this transaction financially viable in its pre-filed testimony. Both Staff and Public Counsel requested additional information on this issue during the discovery process. It was only during the evidentiary hearing in this case, in response to questions from the Commission, that Gateway began to reveal some of its plans for making this transaction financially viable.

Even in response to questions from the bench, however, Gateway failed to provide substantial and credible information which supported the proposition that its plans to ** ________________________________ ** would not result in a detriment to the public interest. Despite Gateway's allegations that ** ________________________________

____

________________________ ** Gateway provided no hard data to support its underlying assumption that ** ________________

______ ** would result in a ** ________________________

____

________________________________ **

Gateway has provided no information to this Commission that it can avoid detriment to the public interest ** ________________________

_____ **

In pre-filed testimony, Public Counsel witness Burdette explained that the Company had failed to provide sufficient information to enable the parties to perform a complete financial analysis of the proposed transaction. [Ex. 10, p. 2.] He expressed concerns about whether there was a risk that, in a rate proceeding, "ratepayers would be paying higher rates with no increase in the level of service...due only to the new owner's increased cost of capital." [Ex. 10, p.3.]

Two principle concerns which Mr. Burdette had attempted to analyze this transaction were ** ______________________________

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By the time of the filing of his supplemental rebuttal testimony, Mr. Burdette's concerns had not been allayed by any information provided by the Company. Mr. Burdette stated that he could not recommend approval of this transaction because the applicants had not "provided sufficient evidence or support to establish that this transaction is financially sound and will not be detrimental to the public interest." [Ex. 11, p.2.]

In analyzing a response to a data request which sought detailed information on ** ______________________________ ** Mr. Burdette expressed the following additional concerns which indicated a likelihood of public detriment:

"Unfortunately, ** ______________________________
** is not sufficient ** ______________________ ** to alleviate fears of detriment. ** ____________________________________

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____________________________________ ** [Ex. 11, pp2-3.]

Staff witnesses McKiddy and Oligschlager also expressed concerns about the dearth of financial information provided by Gateway in this proceeding. Further, Ms. McKiddy noted that Gateway "paints MPC and MGC's financial future in an overly optimistic light." [Ex. 19, p. 12.] She notes that in its pro forma statements, "Gateway projects the operations of MPC and MGC will generate approximately ** ___ ** million and ** ___ ** million in revenues, respectively, for the period ending December 31, 2002. This is an approximate increase in revenues of ** ___ ** million over those realized by UtiliCorp for the period ending December 31, 2000." [Ex. 19. pp.10-11.] However, despite Staff requests for a copy of a business plan or strategic plan, Gateway failed to provide any such plans. [Ex. 19, p. 10.] Ms. McKiddy also testified that Gateway did not provide any form of "market analysis" with its Joint Application. [Id.] Ms. McKiddy went on to explain that, without definitive plans and supporting documentation for those plans, "the pro forma financial statements provided by Gateway are nothing short of speculative." [Ex. 19, p.15.]

Staff Witness Oligschlager also expressed deep concerns about the financial viability of this transaction. He stated that:

** ** (emphasis added.)

In testimony before the Commission, it was clearly established that, although the size of a company is a factor to be considered in evaluating risk, it is not the only factor that Mr. Oligschlager considered in this, or any case. Rather, Mr. Oligschlager testified that he would look at a company's total risk profile. While size may be a factor, companies of similar size may have different risk profiles. [Tr. pp. 712-713.]

Mr. Oligschlager also expanded on concerns related to the possibility that the TMP would be opened up. He further testified that, even on the third day of the evidentiary hearing, he did not have enough real information to know whether opening the TMP was an economic option. [Tr. p 714.]

The lack of information is not the only cause for concern regarding the financial viability of this transaction. The capital structure in this case, to the extent it has been outlined, both prior to, and especially at the hearing, raise serious concerns of the detrimental impact of this transaction.

The terms of the financing for Gateway and its proposed acquisition raise several concerns, some of which were not know until during the hearing itself, because of Gateway's reluctance to provide information in this case. Witness Burdette described a number of concerns with the debt financing which was to be provided by BankOne in his supplemental rebuttal testimony, filed after the information became available. In discussing ** ____

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________________ ** Mr. Burdette stated that:

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These concerns were compounded by revelations during the evidentiary hearing in this case due to first, ** ____

________________ **

Although some vague, general numbers were submitted pre-hearing regarding the level and percentage of equity investments of David Ries, TCW and Dennis Langley [Ex. 11, p. 4.] at the evidentiary hearing, David Ries revealed, for the first time, that Gateway's plans to employ a very troubling method for calculating a return on equity.

In response to questions from the Commission and other parties, Mr. Ries revealed the percentage of each owner's contribution was ** [redacted]

** Ries also revealed that although these were the initial contributions,

> ** [redacted]

[redacted] ** This financing scheme should be of substantial concern to the Commission in deciding this case, especially since the three "equity" investors expect to earn a return of ** [redacted] **

The second concern that becomes apparent from Ries' hearing testiomony is **

**

Faced with questions from Commissioner Gaw regarding the financial viability of Gateway, Mr. Ries suggested that **

**

This stated intent for an unorthodox use of depreciation expense should deeply concern this Commission. While private sector businesses have great leeway regarding how to use any cash generated from their business enterprises, MPC and MGC, which are the sole source of cash to be generated for Gateway and Mogas, are regulated utilities. As such, they have a continuing duty to serve the public interest.

Depreciation is "the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy and obsolescence." Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151, 167 (1934). Depreciation expense refers to internally generated funds which the Company accrues in order to have cash available for capital investment, including replacing depreciated plant. This Commission recently confronted the problems of a water company regarding whether depreciation expense would generate sufficient revenues to fund needed replacement of infrastructure. In the Application of St.

Louis County Water Company, WR-2000-844 (Decided April, 2001.) This Commission has recent experience, therefore, with the concerns which arise when a Company fails to maintain sufficient cash flow to replace depreciated infrastructure.

Staff witness Oligschlaeger testified, during the evidentiary hearing, that "Depreciation expense is an element of a utility's or any company's income statement which represents the rational and systematic allocation to expense of the company's capital investment." [Tr. at p. 637.]

Mr. Oligschlager further testified that funds generated as depreciation expense are "normally presumed to be available for reinvestment within the business to meet whatever ongoing capital needs they may have." [Tr. at p. 638.] However, he further testified that "Depreciation expense is not a component of return on equity and it is not a substitute for return on equity.... in effect (that) would mean that the company was taking capital out of the business." [Id.]

Mr. Oligschlager provided his opinion, in response to a hypothetical, that paying a return to equity investors out of the funds which are counted toward depreciation expense would be detrimental to the public interest. In support of that conclusion, he stated two reasons:

(1) that if depreciation funds were used to by a return on equity, "those funds are not available to be invested in the business. Most utilities...have ongoing capital needs. And those moneys would not be available to meet those needs" if paid out as a return on equity. [Tr. at 639.]

(2) in situations where "a company is paying dividends in excess of its net income, I think that would raise concerns about whether the company itself was a going concern and would be in operation for the long-term." [Id.]

Mr. Oligschlager also confirmed that, as regulated utilities, MPC and MGC have an obligation to serve the public interest over the long-term as a going concern. [Id.] Clearly, a company which intends to pay a return of or a return on an equity investment from funds which are designated as depreciation expense operate in contradiction to the public interest.

In evaluating this transaction, Public Counsel expects that Gateway and/or the other Joint Applicants may attempt to suggest to this Commission, as they did at the hearing, that the mere fact that a bank is willing to loan a portion of the purchase price, and "equity" investors are willing to provide additional funding, that this should be taken as some sort of evidence that Gateway can operate these pipelines in a financially viable manner. This Commission should resist the urge to consider this as "evidence" for two reasons. First, the reasons behind the decisions of the bank and the investors to provide funds to finance this transaction have not been revealed to this Commission and are not in the record. It is improper for a party, and especially improper for counsel for a party, to urge or draw inferences from matters not in evidence. Reese v. Illinois Railroad Company, 273 S.W.2d 217, 225 (Mo banc 1954).

Second, whatever their reasons for investing, the interests of the bank and the investors are just not the same as the interests of the public. This Commission is obliged to determine whether the transaction will be detrimental to the public interest. Even if the transaction were proven in this case to be "not detrimental" to the bank or the investors, that does not mean that it is "not detrimental" to the customers of MPC and MGC.

Gateway provided little information prior to the evidentiary hearing in this case regarding its ability to continue to provide safe and adequate service at just and reasonable rates for MPC and MGC. Although somewhat more forthcoming at the hearing itself, Gateway left the parties with no opportunity to test the reasonableness of its claims for how it will make this transaction financially viable without a rate increase or subjecting MPC and MGC to a substantial risk of FERC jurisdiction. Gateway has made sunny projections about income without providing even rough estimates of the costs it will have to incur to meet those projections. All in all, the Commission is left in the murky twilight of speculation, conjecture and surmise. Gateway has managed an extremely rare accomplishment: it has failed to make a prima facie showing that this proposed transaction will cause no detriment to the public interest. The Commission need look no further in order to deny the application.

C. Even if this Commission finds that the Joint Applicants made a prima facie showing that the transaction will not be detrimental to the public interest, the Commission should deny this application because the record in this case establishes that the transaction would be detrimental to the public interest.

Public Counsel acknowledges the fact that, if the Commission finds that Applicants in this matter have made a *prima facie* case that this transaction would not be detrimental to the public interest, Public Counsel and the other parties opposing this transaction would have the burden of going forward with evidence to rebut the Applicant's claim that no detriment to the public interest would result. Public Counsel submits that the opposing parties in this matter have complied with this burden of proof.

In candor, Public Counsel recognizes that these pipelines have not achieved the optimistic projections made by UtiliCorp at the time it acquired MPC, MGC and the TMP. In re Missouri Gas, 3 Mo. P.S.C.3d 217, (1994). Public Counsel does not suggest to this Commission that it should require Gateway to prove that it can run MPC and MGC "better" than UtiliCorp has done. The legal standard that the Commission must consider is "not detrimental." Therefore, Gateway was obligated to establish that it would not run MPC and MGC "worse" than UtiliCorp has done. However, as set forth in the points above, Gateway has failed to meet its burden.

Gateway is a new corporation. It conducts no operations subject to the jurisdiction or regulation of this Commission. [Ex. 4, at p. 5.] The history the Commission has before it is primarily the history of Dennis Langley and his corporate interests in other jurisdictions. The testimony of Laclede witness Pflaum aptly describes some of the reasons why this Commission should be concerned about allowing a new Langley-owned utility venture to exist in Missouri.

As discussed in the previous sections of this brief, if Gateway assumes ownership of the regulated pipelines several elements come into play, all of which are detrimental to the public interest. The additional information regarding Gateway's plans for the three UPL assets and its plans regarding financing do nothing to assuage the concerns raised in their pre-hearing testimony and failure to provide requested information pre-hearing. Rather, the new components of the "plan" provide additional causes for alarm. Even in this eleventh hour testimony, Gateway failed to explain how it would finance any of the improvements to the system which would be necessary to implement its plan to ** ____

________________ ** While Public Counsel could speculate about how such financing would be achieved, none of these scenarios alleviate the detriment to the public interest which are presented in the known portions of the plan.

Public Counsel would refer the Commission to the previously cited testimony of Mark Burdette, Roberta McKiddy and Mark Oligschlager, and the testimony of Carmen Morrissey and John Kottwitz, cited below, for evidence of public detriment. This transaction should not be allowed to go forward.

II. THERE IS A STRONG POSSIBILITY THAT THE MISSOURI COMMISSION COULD LOSE JURISDICTION OVER MPC AND MGC AS A RESULT OF THIS TRANSACTION, AND IF THE COMMISSION LOST JURISDICTION, ANY CONDITIONS IMPOSED ON THIS TRANSACTION TO MITIGATE THE DETRIMENT TO THE PUBLIC INTEREST WOULD BE SUBJECT TO CHALLENGE.

If Gateway is allowed to acquire UPL and its regulated assets, along with its unregulated asset, the currently unused interstate "TMP" pipeline, there is a significant possibility that Gateway will attempt to link TMP with MPC and MGC. The TMP, ** ________________

________________ ** [Tr. at 347].

When Gateway begins using these pipelines in interstate commerce, it is likely to expect that FERC will consider pre-empting Missouri state jurisdiction and assume jurisdiction over the entire pipeline system. ** ________________

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______________________________ ** If the FERC assumes jurisdiction over these pipelines as a result of the approval of this transaction, conditions imposed by the Missouri Commission may lose their effect.

A. The Commission may lose jurisdiction over MPC and MGC as a result of this transaction because Gateway is likely to attempt to connect TMP and MPC and, if so, FERC may assert jurisdiction over all three pipelines.

The Commission could lose jurisdiction over MPC and MGC, especially if the Commission waives the condition in MPC's current certificate which prohibits MPC from connecting to TMP. The Commission could also lose jurisdiction if Gateway acquired another pipeline which crossed state lines and connected MPC and/or MGC to that pipeline, or if Gateway connected MPC and TMP without Commission approval. The Commission should not rely on statements by Gateway that it will not **seek** to become FERC jurisdictional even if it is allowed to connect MPC and TMP. The FERC has previously exercised jurisdiction over chains of interconnected intrastate affiliates that collectively functioned as interstate pipelines. See, KansOk Partnership v. Williams Natural Gas Co.,73 F.E.R.C. ¶ 61,160 (1995); and Louisiana Gas System Inc. v. Panhandle Eastern Corp. 73 F.E.R.C. ¶ 61,161 (1995).

This removal from state to FERC jurisdiction will detrimentally affect the public interest for a number of reasons. The FERC's approach to rate increase determinations differs significantly from that of the Missouri Public Service Commission. There is no operation of law date by which a final order must be issued. Soon after a rate case is filed, a rate increase is allowed to take effect, subject to refund, for the months, and even years it takes for a final determination of the rate increase request on the merits. The

FERC has a duty to decide cases in the public interest, but the FERC's perspective and priorities are different than those of the Missouri Commission, because its constituency is different. The interests of Missouri customers will be not be considered a priority at FERC the way they are before the state Commission.

B. If the Commission lost jurisdiction over these pipelines, the loss of jurisdiction would constitute a detriment to the public interest.

The loss of this Commission's jurisdiction to the FERC would cause a number of adverse effects to the interests of the ultimate customers of these pipelines in Missouri. These adverse effects constitute a detriment to the public interest. Several of the adverse effects which would occur are discussed in the testimony of staff witnesses Carmen Morrissey, who addresses rate making and other policy issues, and John Kottwitz who discusses gas safety issues. Other detriments to the public interest which are likely to result due to FERC jurisdiction are addressed by Laclede witness Christopher Pflaum who discusses, among other topics, the mechanism by which FERC could approve the bypass of local natural gas distributors by large industrial users of natural gas.

In her testimony, Staff witness Morrissey sets forth a number of areas of detriment to the public interest if this Commission loses jurisdiction to the FERC. Those detrimental effects include:

1) rate cases at the FERC do not have operation-of-law dates, so the FERC allows companies to raise rates on an "interim basis" while the case is pending. While these rates are theoretically "subject to refund," the pipeline's customers are "obligated to pay those high, subject-to-refund rates until a final FERC order is delivered," a process that typically takes "3-5 years." [Ex. 18, at p. 6.]

2) FERC's use of "tolling orders" allows a decision of FERC to be stayed indefinitely while FERC "reconsiders" a previous order. "This maneuver allows FERC in unlimited time for issuing is substantive order on rehearing; all the while customers endure high rates or rate uncertainty." [Ex. 18, at p.6.]

3) FERC's agenda for setting policy for natural gas pipelines is dictated by a national base of companies, customers and political influences. For this reason, the concerns of "Missouri consumers are usually not a high priority for FERC and are not reviewed as closely/thoroughly as they would be if their requests were being presented to this (Missouri) Commission." [Ex. 18, at p. 6.]

4) Not only are Missouri consumers' concerns given less weight at FERC than before this Commission, the policies important to this Commission do not control FERC decisions. While the Commission may intervene as a party in FERC matters, its role is much more limited. While the FERC is free to consider the concerns put forward by the Missouri Commission, the state Commission's voice is merely one of many which the FERC considers in making its decisions affecting Missouri customers. [Ex. 18, at p. 7.] . The Commission's role at the FERC could be compared to that of Public Counsel's role in state proceedings.

5) Missouri's interests often differ from the federal agenda and "the broader, public interest perspective of FERC." [Ex. 18, at p. 7.] Therefore, Missouri interests may not be considered as having a high priority at the federal level. For this and the previously mentioned reasons, "Missouri consumers have less opportunity for input and are likely to suffer higher rates and more delays and uncertainty (under FERC) than if the MoPSC is the decisional authority." [Ex. 18, at p. 7.]

6) Although Staff witness Morrissey initially characterized some items as "positive effects" in her pre-filed testimony, she clarified under cross-examination that those "positive effects" –the Commission's ability to choose which issues to participate in rather than addressing all relevant factors, and the Commission's lack of direct responsibility or accountability for detrimental regulatory action taken by the FERC—are not benefits which inure to the public. Rather, a decision by the FERC could have an adverse effect on Missouri customers, but although "they could come here and complain, ..it would not be the fault or based on a decision that this Commission issued." [Tr. at p. 767.]

In his testimony, staff witness Kottwitz addresses issues related to gas safety which are handled differently by the Missouri and federal commissions. Because of the more stringent requirements of the Missouri Commission, if FERC assumes jurisdiction over MPC and MGC, there will be a detriment to the public interest, unless the Commission imposes enforceable conditions on Gateway at the time, if any, that this transaction may be approved. [See, Ex. 14, at p. 4.]

Witness Kottwitz stated that:

> "The Commission has adopted pipeline safety regulations that are more stringent than the minimum federal safety standards enforced by OPS. Some of these more stringent regulations apply to transmission lines, and the most significant differences involve odorization and leak surveying. The PSC Staff conducts annual compliance inspections of intrastate pipeline companies (including MPC and MGC), while OPS inspections are on a less frequent basis." [Ex. 14, at p. 4.]

Witness Kottwitz's testimony therefore lists several additional detriments to the public interest which will occur if FERC assumes jurisdiction of this pipeline system. They are:

> 1) "The Commission's regulations require natural gas in a transmission line to be odorized, but the OPS regulations exempt most transmission lines (including most of the MPC and MGC lines) from the odorization requirement. The Staff believes that the odorization of natural gas in transmission provides a pipeline safety benefit....If MPC and MGC became subject to OPS jurisdiction and they were permitted to discontinue odorizing the natural gas they transport, then any natural gas leakage that might occur would not include odorant to facilitate detection by the public and reporting by MPC and MGC." [Ex. 14, at p. 5.]
>
> 2) If odorizing was discontinued, "each utility and distribution system served by MPC and MGC would be required to install equipment to facilitate odorization at each of their delivery points." [Id.]
>
> 3) "The Commission requires all transmission line leakage surveys to be conducted with a leak detection instrument. The OPS regulations also require leakage surveys to be conducted, but only require the use of leak detector equipment when the natural gas is not odorized in certain areas with higher population densities along the transmission line. A leak detection instrument would not be required by the OPS regulations during leakage surveys over **any** transmission lines operated by MPC and MGC if they were odorized, of **most** of the transmission lines if they were not odorized. the Staff believes that using a leak detection instrument to conduct leakage surveys provides a pipeline safety benefit." [Ex. 14, at pp. 4-5.] (emphasis added.)
>
> 4) While the Commission "conducts annual compliance inspections of intrastate pipeline companies (including MPC and MGC),..OPS inspections are on a less frequent basis." [Ex. 14, at p. 4.]

Public Counsel acknowledges that, in the event this transaction is approved, Gateway has agreed three gas safety conditions set out in witness Kottwitz's pre-filed testimony at pages 3-4. If the Commission does decide to approve this transaction, Public Counsel agrees that these conditions provide some degree of protection to the public from a gas safety perspective, and would join other parties in asking that the conditions be explicitly set out in any order which approves the proposed transactions. However, the agreement by Gateway to these three conditions does not alleviate Public Counsel's actual and substantial concerns about this area of detriment to the public interest if this Commission loses jurisdiction to the FERC.

The conditions put forward by Mr. Kottwitz fail to address the public detriment which would occur if the FERC assumed jurisdiction over MPC and MGC. Since the enforceability of any Missouri Commission order comes into question if the FERC assumes jurisdiction, the Commission should consider the less stringent gas safety standards of FERC as detrimental to the public interest.

In his testimony, Laclede witness Pflaum also raised issues related to how the public interest will be harmed if FERC assumes jurisdiction over MPC and MGC. Specifically, the witness points to a very real possibility that, under rates set by FERC, Missouri customers could be saddled with paying substantially higher rates due to a higher cost of providing service. Witness Pflaum explains that:

> "FERC jurisdiction would virtually guarantee approval of any effort by Gateway to bypass Laclede or other LDC's – result that would burden smaller customers with additional fixed cost responsibility as the revenues currently contributed by larger customers would be lost to Gateway." {Ex. 9, at p. 10.]

This detrimental effect could occur as a result of actions taken by large industrial gas users who could themselves be instrumental in causing FERC to assert jurisdiction in the first place. As Witness Pflaum stated at the evidentiary hearing, in response to Commissioner Gaw's query about the likelihood that FERC would actually assert jurisdiction over MPC:

> "A group of industrial consumers, for example, could petition the FERC that they want direct connections and that this is, in fact, an

interstate pipeline and, therefore, they could ask for it to be declared as one." [Tr. at p. 556.]

If that petition was successful and FERC took jurisdiction over MPC and MGC, the industrial users would be able to by-pass the local LDC's as natural gas service providers. Currently, the Missouri certificates of convenience and necessity for MPC and MGC prohibit by-pass of the pipelines' LDC and municipal customers. The LDCs and municipalities will be left with the obligation of spreading their fixed transportation costs over a smaller customer base, weighted more heavily with residential and small business customers than is currently the case.

C. Even if Gateway claims that a pipeline which consists of TMP, MPC and MGC should be eligible for the *Hinshaw* exemption from FERC jurisdiction, the Commission should not rely on this claim, nor should the Commission rely on a claim by Gateway that FERC will not assume jurisdiction if TMP and MPC are held under different corporate identities. Because FERC has held that it can lawfully disregard the separate corporate entities where the system had been designed to frustrate the statutory purpose of the Natural Gas Act.

The most likely scenario under which the Commission could lose jurisdiction over MPC and MGC is that in which the Commission waives the condition in MPC's current certificate which prohibits MPC from connecting to TMP. The Commission could also lose jurisdiction if Gateway acquired another pipeline which crossed state lines and connected MPC and MGC to that pipeline, or if Gateway connected MPC and TMP without Commission approval.

Gateway alleges that FERC will not assume jurisdiction over these pipelines because, even if they become eligible for FERC jurisdiction, they fall into the *Hinshaw* exception to FERC jurisdiction. The Commission should not allow itself to be lulled into a sense of security by this allegation.

A *Hinshaw* pipeline is a pipeline which may be exempted from FERC jurisdiction pursuant to the *Hinshaw* Amendment to the Natural Gas Act. (15 U.S.C §717.) In light of Supreme Court holdings regarding pipelines engaged in interstate commerce, the Hinshaw amendment to the NGA was passed in 1954. It is found at Section 1(c). It states:

> "The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation interstate commerce or the sale in interstate commerce for resale, or natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters of primarily local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

In order to help implement the statutory provisions regarding Hinshaw pipelines, FERC promulgated Part 152 in response to the enactment of the Hinshaw amendment. Originally, Part 152 required entities which qualify for exemption under Section 1(c) of the NGA must file an application with the Commission to receive a formal declaration of exemption. A pipeline could qualify for and receive Hinshaw status if it met this two-part test:

(1) all of the gas received by the pipeline within or at the boundary of a state must be consumed within that same state; and

(2) the pipelines rates, services and facilities must be regulated by a state commission.

In 1982, FERC decided that companies did not need to apply for a formal declaration from FERC that they meet the Hinshaw requirements if they are currently being regulated by the Commission, as long as they met the 2-part test.

The Commission should not be swayed by any assurances which Gateway may offer that it will not *seek* to become FERC jurisdictional even if it is allowed to connect MPC and TMP or another Gateway owned pipeline which is held under a different company name. FERC has previously exercised jurisdiction over chains of interconnected intrastate affiliates that collectively functioned as interstate pipelines. *See, KansOk* Partnership v. Williams Natural Gas Co., 73 F.E.R.C. ¶ 61,160 (1995), order granting stay in part, 73 F.E.R.C. ¶ 61,293 (1995); Louisiana Gas System Inc. v. Panhandle Eastern Corp. 73 F.E.R.C. ¶ 61,161 (1995).

In KansasOk Partnership, *supra,* is a case involving one of the principle owners of Gateway Pipeline, Dennis Langley. In that case, FERC held that it could lawfully disregard the separate corporate entities where the system had been designed to frustrate the statutory purpose of the NGA. FERC determined that, in essence, the affiliated group of corporations was transporting gas from Oklahoma through Kansas to Missouri without subjecting itself to FERC jurisdiction.

The Commission should be concerned that, ** ______________________________ ______________ ** the pipelines probably will not qualify for Hinshaw status. While MPC and MGC would still meet the Hinshaw requirements, the TMP would not. As previously noted, because the TMP is an interstate pipeline, if placed in service, it would have to be regulated by FERC. [Tr. at 347.] TMP would fail the second requirement for Hinshaw pipeline status. TMP can not be a Hinshaw pipeline. Therefore if FERC were to consider TMP, MPC and MGC to be a single entity for regulatory purposes, it is extremely likely to assert jurisdiction. If Gateway ** ____________________

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______________________________ ** Given the situation in the Kans-Ok Partnership case, this Commission should be very concerned about the detriment to the public interest which would result with FERC regulating MPC and MGC.

This removal from state to FERC jurisdiction would detrimentally affect the public interest for a number of reasons, as set out above, in section **II.B.** Gateway's claim that the FERC is unlikely to assume jurisdiction ignores precedent involving one of the principle, if not the principle, underwriters of this proposed transaction. Gateway also ignores that valid reasons why, even if Gateway or its affiliates do not actively seek FERC jurisdiction, such a change in regulatory oversight is likely to occur.

D. The Commission should be concerned about the detriment which will result from this transaction because, regardless of whether FERC assumes jurisdiction over these pipelines, Gateway has failed to show that this transaction will be financially viable because ** ____
______________________________ **

The Commission should consider the likelihood of FERC asserting jurisdiction to be an actual present detriment, not merely speculation, because this transaction's financial viability ** ______________________________________

_____ **

Although by ** ______________________________________

______________________________ ** Gateway may be able to overcome the detriment to the public interest which would otherwise occur, due to the negative financial impact of the transaction, as discussed in section **I.C.3.** above.

III. THE CONDITION THAT THE COMMISSION PLACED ON UTILICORP WHEN IT ACQUIRED THESE PROPERTIES (MPC AND MGC), THAT UTILICORP WOULD NOT CONNECT THE INTRASTATE PIPELINES TO THE INTERSTATE TRANS MISSISSIPPI PIPELINE, SHOULD CONTINUE TO APPLY TO GATEWAY SHOULD IF THE COMMISSION APPROVES THIS TRANSACTION, UNLESS THE COMMISSION WAIVES THE RESTRICTION AFTER AN APPLICATION HAS BEEN FILED REQUESTING THAT THE RESTRICTION BE REMOVED.

A. MPC's certificate of convenience and necessity contains a restriction on interconnecting to TMP when both pipelines are held by the same owner, and this restriction has never been rescinded by the Commission.

Public Counsel, the Commission Staff, and all non-applicant intervenors in this case correctly take the position that MPC's certificate of convenience and necessity contains a restriction prohibiting it from connecting to an interstate pipeline owned by the same corporate entity. Until after the beginning of the evidentiary hearing, only Gateway took a different position.

This restriction is contained in MPC's certificate of convenience and necessity. In re Missouri Pipeline Company, 30 Mo. PSC (N.S.) 10, 15 (1989). MPC never sought to have the restriction removed from its certificate prior to its acquisition by UtiliCorp.

In its application to purchase MPC, MGC and TMP, UtiliCorp asked the Commission to transfer to it all "of the certificates of convenience and necessity issued to MPC and MGC **without alteration.**" In the Matter of the Joint Application of Missouri Gas Pipeline, et al., 3 Mo. PSC 3d 216, 218 (1994). (emphasis added.)

By both agreement and design, UtiliCorp did not seek to have this restriction removed at the time it purchased the pipeline. In re Missouri Gas Pipeline, 3 Mo. PSC 3d, at 225 & 228. Hence, UtiliCorp does not currently own the right to connect MPC to the Trans Mississippi Pipeline (TMP). UtiliCorp witness Kreul acknowledged that UtiliCorp had agreed to maintain this restriction in MPC's certificate at the time that UtiliCorp purchased MPC, MGC and TMP in his pre-filed testimony. [Ex. 3, p. 6.] Mr. Kreul acknowledged that UtiliCorp did not "dispute that condition when it thereafter acquired the assets of that company pursuant to Commission's order, Case No. GM-94-252." [Tr. p. 123.] Mr. Kreul also acknowledged that it acquired the three pipeline companies, MPC, MGC and TMP, from the same parent company as part of the transaction at issue in GM-94-252, with full knowledge and agreement that the restriction existed. [Tr. p. 189.] Kreul also admitted that, since it assumed ownership of the three pipeline companies, UtiliCorp has not taken any affirmative steps to remove the restriction from the certificate up through the date of the hearing. [Tr. p. 190.]

Additionally, in the "Position Statement of UtiliCorp United Inc. and Joint Applicants Missouri Pipeline Company and Missouri Gas Company" filed in this case on August 28, 2001, the UtiliCorp controlled applicants in this case state, at page 2, that "Condition No. 7 contained in the Findings of Fact section of the Report and Order in Case No. GA-89-126 will remain in effect in the event the Commission approves of the proposed transaction unless it modifies, eliminates or waives that provision." Although UtiliCorp suggested in its position statement that this restriction was open to interpretation, it did not state, in pre-filed testimony or its position statement, that the condition had expired, been eliminated, or waived.

The Commission specifically continued the restriction in MPC's certificate at the time it approved the application of UtiliCorp to purchase these three pipeline companies from their former parent. The Commission would have no reason to order that the condition continue unless the condition had some force and effect.

Clearly, UtiliCorp was aware that the restriction applied at the time it purchased the three pipeline companies. Clearly, UtiliCorp, either itself of through any subsidiary, has never sought to have the restriction removed. Currently, UtiliCorp and its subsidiaries do not have the authority to connect MPC and TMP without first obtaining from the Commission a waiver of the restriction in MPC's certificate. UtiliCorp cannot transfer rights it does not own as part of this transaction. Only the Commission can grant MPC and its owner's permission to connect to an interstate pipeline.

B. The Commission should not waive this provision because it is the only current condition which mitigates the detriment to the public interest which will result if this transaction is approved.

The only current condition which mitigates the detriment to the public interest which will result from this transaction is the restriction prohibiting the connection of MPC with TMP.

As demonstrated above, at part II of this brief, the connection of MPC and TMP while both pipelines are under the same ownership would be detrimental to the public interest, because it is likely that this would result in the loss of jurisdiction by the Commission to the FERC.

It may be appropriate, however, to note that the restriction in MPC's certificate only prohibits the connection of MPC to an interstate pipeline owned by the same party as MPC. Were the TMP owned by a separate corporate entity, which was not an affiliate of MPC, it is likely that, even if FERC became interested in MPC, it would find that, at best, MPC should be considered a <u>Hinshaw</u> pipeline, in which case FERC jurisdiction would not be a reasonably likely possibility.

If the Commission decides to approve the sale of these pipelines, and if it thought that it could place enforceable restrictions on MPC and MGC, the Commission could continue the restriction in MPC's certificate of convenience and necessity against interconnecting with an interstate pipeline affiliate, until such time as MPC files a successful application, supported by evidence, alleging that waiving or removing this restriction would not be detrimental to the public interest.

<u>C. The Commission should not waive the restriction in MPC's certificate of convenience and necessity which precludes it from being connected to an interstate pipeline owned by the same entity, because the application in this case does not contain a request that the Commission waive this provision, and Gateway has not produced evidence which would establish that a waiver of this provision is not contrary to the public interest.</u>

The Commission is a creature of statute. It is empowered by the legislature to regulate the operations of public utilities, including intrastate natural gas pipelines. An application by a company for relief must comply with the filing provisions of 4 SCR 240-2.060. The purpose of this rule is stated as follows: "Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule."

Gateway, MPC and MGC filed this matter addressing only the issues related to the proposed acquisition. In the pre-filed testimony of witness Kreul, MPC, MGC and UtiliCorp did not request that any changes be made to any current franchises, permits, operating rights or certificates of convenience and necessity of either MPC or MGC. [Ex.

1, at p.7.] Witness Kreul also asserted that this transaction "should be entirely transparent to" MPC and MGC customers. [Ex. 1, at p.9.]

Nowhere in the prefiled testimony of witnesses Ries and Makholm, does Gateway ask the Commission to make any changes in the certificates, tariffs or rules governing MPC and MGC. Not only does Gateway fail to provide evidence in support of a change in MPC's certificate, witness Ries testified that:

> "there will be no change in the operations of MGC or MPC. MGC and MPC will continue to provide services to their customers pursuant to the rates, rules, regulations and other tariff provisions of MGC and MPC on file with and approved by the Commission until such time as they may be modified according to law." [Ex. 4, at p. 5.]

Applications for variances or waivers from commission rules, tariff provisions or statutory provisions which may be waived must comply with 4 CSR 240-2.060(14). Certificates of convenience and necessity are the basic although no provision of the rule specifically addresses waivers of terms in certificates, it is likely that these provisions must be met in such a petition.

4 CSR 240-2.060(14) requires that an applicant provide, in addition to the information required by 4 CSR 240-2.060(1), the following information:

> (A) Specific indication of the statute, rule or tariff from which the variance or waiver is sought;
> (B) the reasons for the proposed variance or waiver and a complete justification setting out good cause for granting the variance or waiver, and
> (C) The name of any public utility affected by the variance or waiver.

The Commission is required by law to "supervise, regulate and control the public utilities within its jurisdiction." State ex rel. UCCM v. PSC, 585 S.W.2d 41, 48 (Mo. banc 1979). However, it can only reach a decision based upon the facts it finds from the evidence presented to it.

No application has been made by MPC or an owner of MPC to remove the restriction against connecting to the interstate portion of pipeline owned by UPL. The ownership history of MPC, MGC and the TMP, above, clearly demonstrate that MPC's certificate of convenience and necessity contains a restriction against connecting to the TMP without Commission approval, at least as long as both pipelines are owned by the same corporate entity. Public Counsel believes that this restriction should apply to any corporate entity which is an ultimate corporate owner over MPC and the TMP. In a scenario in which the Commission approves this transaction, that would arguably include, ownership of the TMP by UPL, Gateway, or Mogas. However, at a bare minimum, Public Counsel submits that the ownership structure of MPC and the TMP at the time of the original certificate (both pipelines owned by the same corporate parent) would prohibit MPC from connecting MPC to the TMP while owned by the same parent such as UPL. Without an application to remove or waive this provision in the certificate before the Commission, and given the intent expressed by the applicants at the time the application was filed and in their pre-hearing testimony that no changes to the pipelines themselves would result from this transaction, the Commission should not alter or eliminate the restriction in this proceeding. If MPC or an owner of MPC wishes to file an application to remove or waive the restriction in the future, the parties can argue the merits of that application on the basis of the evidence presented by MPC and other parties in that proceeding.

CONCLUSION

The Commission should deny the application and refuse to allow Gateway Pipeline Company to acquire UPL and its regulated subsidiaries, MPC and MGC. This proposed transaction is detrimental to the public interest in real and measurable ways. The Applicants resisted supplying information about their plans for the system, finally providing some information about their plans at the evidentiary hearing, when it was too late for the other parties to properly analyze their claims. The Applicants resisted providing financial details about the transaction and the service of capital which would be required after the transaction was completed. Given the expected returns of "equity" investors and the requirements of the Bank One loan, the manner proposed for servicing the company's capital will be detrimental to the public interest.

Should the transaction occur, and if the Company were to successfully implement a plan for opening the TMP to provide access to additional gas sources to its customers, the FERC is likely to strongly consider, and may assume, jurisdiction over the entire pipeline system. The transfer of these pipelines to FERC jurisdiction would result in real and substantial detriment to the public interest. Moreover, the proposed transaction places MPC and MGC at the bottom of a chain of unregulated corporate entities, most of which have no ties to Missouri and no track record for conducting public utility service operations in the State of Missouri. For all of the reasons above, Public Counsel urges this Commission to deny the Application in this case.

In the event that the Commission does decide to approve the application, and to the extent the Commission believes that it can impose enforceable conditions on

Gateway, Public Counsel respectfully requests that those conditions contain, at least, the following:

1) adoption of all gas safety recommendations in the testimony of John Kottwitz;

2) maintain and, if necessary, clarify the restriction in MPC's certificate prohibiting it from connecting to the TMP while both are under the same ownership umbrella;

3) maintain the restriction in the pipeline certificates regarding by-pass of LDCs and specifically require the pipelines to apply to the Commission for approval of a waiver if a situation should arise where the pipeline seeks to directly serve a customer;

4) specifically prohibit Gateway from using depreciation expense to provide a return on or of equity to its capital investors.

WHEREFORE, Public Counsel respectfully requests that this Commission deny the application in its entirety. In the event that the Commission does not find that the detriments addressed arise to the level of actual, present detriment to the public interest, and overrules Public Counsel's request to deny the application Public Counsel urges the Commission to impose reasonable restrictions on the transaction. Reasonable restrictions could include the four (4) restrictions set forth in this Conclusion, and such other reasonable restrictions as this Commission believes will alleviate the detriment or potential detriment of this transaction.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

BY: [signature]

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been faxed and mailed or hand-delivered to the following this 18th day of September 2001:

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