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May 1, 2001

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

FILED<sup>3</sup>

MAY 01 2001

Missouri Public  
Service Commission

**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 **Response in Opposition to Joint Application for Finding of Lack of Jurisdiction or, Alternatively, for Authority for Gateway Pipeline Company, Inc. to Acquire the Outstanding Shares of UtiliCorp Pipeline Systems, Inc., and Motion for Expedited Treatment.** 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**

**FILED<sup>3</sup>**

MAY 01 2001

Missouri Public  
Service Commission

In the Matter of the Joint Application of       )  
Gateway Pipeline Company, Inc.,                )  
Missouri Gas Company and Missouri            )  
Pipeline Company.                                )

Case No. GM-2001-585

**RESPONSE IN OPPOSITION TO JOINT APPLICATION FOR FINDING OF  
LACK OF JURISDICTION OR, ALTERNATIVELY, FOR AUTHORITY FOR  
GATEWAY PIPELINE COMPANY, INC. TO ACQUIRE THE OUTSTANDING  
SHARES OF UTILICORP PIPELINE SYSTEMS, INC., AND MOTION FOR  
EXPEDITED TREATMENT**

COMES NOW, the Office of the Public Counsel (Public Counsel), and respectfully responds to the Motion for Finding of Lack of Jurisdiction, or Alternatively, for Authority to Acquire UtiliCorp Pipeline Systems, Inc., jointly filed by Gateway Pipeline Company, Inc., Missouri Gas Company and Missouri Pipeline Company (the Companies). Public Counsel hereby informs the Missouri Public Service Commission (Commission) that it opposes the Companies' claim that this Commission lacks jurisdiction over the proposed transaction. Public Counsel respectfully asks the Commission to set a hearing in this matter in order to ascertain whether the proposed acquisition is in the public interest. Public Counsel believes that the Commission can and should accept jurisdiction over the proposed transaction pursuant to §§386.250 and 393.190 RSMo (2000) because Gateway Pipeline is seeking to purchase UtiliCorp Pipeline Systems, Inc. from a Missouri regulated utility company, UtiliCorp United, Inc.

**Suggestions in Support of the Motion**

1. Public Counsel acknowledges that Gateway Pipeline (Gateway) and UtiliCorp Pipeline Systems, Inc. (UPL) are companies which are not regulated by the Commission.

However, Gateway is **not** planning a simple merger/acquisition transaction with the unregulated UPL. Rather, Gateway is seeking to buy UPL **from UtiliCorp United, Inc.** (UtiliCorp), a regulated utility company. UPL is a wholly owned subsidiary of UtiliCorp.

2. 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, Missouri Gas Company (MGC) and Missouri Pipeline Company (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.

3. 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, because it carves out an exception, specifically allows the Commission to **decline** jurisdiction and supervision:

"over the sale and distribution of electricity and the owning, operating, and controlling of related plant if such sale and distribution is by a person authorized to provide such services in an adjoining state with fewer than twenty residential customers in Missouri, all of whom are located within two miles of the border...and if such customers are unable to receive utility services from an investor-owned utility or rural electric cooperative due to a natural barrier."

UtiliCorp, MGC and MPC do not fall within this exception.

4. 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. The sale of UPL by UtiliCorp to Gateway is a transfer of assets which are useful in directly or indirectly providing electric and gas utility service to UtiliCorp's Missouri customers. In addition to the Missouri customers served by the divisions of UtiliCorp discussed above, MGC and MPC supply gas to Missouri customers in the Owensville, Ft. Leonard Wood and Rolla areas.

5. The Companies have framed the issue in their joint application in a misleading fashion. They seek to direct the Commission only to § 393.190.2, RSMo, (joint application at p. 5, paragraph 9) which addresses when the Commission has jurisdiction over a company which seeks to "acquire" stock, etc. of another company. While this subsection is important to the question of jurisdiction, it is not the only statutory

provision which the Commission must consider. The failure of the Companies to address the requirements of §§ 386.250 and 393.190.1 RSMo, results in a flawed analysis of Commission's jurisdiction over the proposed transaction.

6. Clearly, if UtiliCorp was seeking to acquire a subsidiary of Gateway, the Commission would have jurisdiction over the transaction, pursuant to §393.190.2 RSMo. The Commission has previously determined that, when it has jurisdiction over a utility company, it must determine whether to approve the acquisition of another corporation "engaged in the same or similar business." In the matter of the application of Kansas City Power and Light Company for authority to acquire certain share of stock of Wolf Creek Nuclear Operating Company, 29 Mo. P.S.C. (N.S.) 29 (1986).

In that case, Kansas City Power and Light (KCPL) claimed that its proposed acquisition of stock in the Wolf Creek Nuclear Operating Company (WCNOC) did not require Commission approval. KCPL based its argument, in part on the fact that WCNOC was not a regulated utility and would not be engaged in selling electricity, but would, in fact, merely assume operating responsibility for the Wolf Creek Nuclear Power Plant. However, the Commission disagreed. The Commission recognized and exercised its jurisdiction in that case, even though the entity the regulated utility was purchasing was not regulated by the Missouri Commission, **and** even though the entity being purchased was not **directly** functioning as a public utility. The Commission found that, by operating the Wolf Creek plant, WCNOC was "engaged in the same or similar business" as KCPL. 29 Mo. P.S.C., at 33.

7. The converse is also true. The mere fact that Gateway will not be regulated by the Commission, because it will not be functioning **directly** as a public utility, does not

take this transaction outside the bounds of Commission jurisdiction and oversight. The Commission should exercise jurisdiction over the transfer of UPL, and its regulated subsidiaries, MGC and MPC, from the regulated UtiliCorp to the unregulated Gateway. Gateway will continue to supply gas to areas in Missouri following the proposed merger, through MGC and MPC. (The Companies, in their application, state, at p. 5, that "There will be no change in the operations of MGC and MPC." The application further states, at p.6, "the transaction will be entirely transparent to [MGC and MPC customers.]") Gateway is engaged in the same or similar business as UtiliCorp. Therefore, the Commission should assume jurisdiction in this case and oversee the proposed merger.

8. The Company's reliance on the Commission's decision to decline jurisdiction in WM-2000-318 (In the Matter of the Merger of American Water Works Company with National Enterprises, Inc. and the Indirect Acquisition by American Water Works Company of the Total Capital Stock of St. Louis County Water Company), and WM-99-224 (the Application of United Water Missouri, Inc. for Authority for Lyonaise American Holding Company Inc. to Acquire the Common Stock of United Water Resources Inc/ and in Connection therewith to Enter into Certain Other Related Transactions) is misplaced. In those cases, both the seller and the purchaser were unregulated companies. These cases presented the Commission with a completely different type of proposed transaction. In this case, unlike the two water merger cases relied on by the Companies in their application, a regulated company is proposing to sell an unregulated entity, which in turn operates two regulated companies, to an unregulated company. Because the underlying factual scenario differs significantly from the facts in the Merger of American Water Works and United Water situations, this application requires a different analysis.

9. The structure of the transaction at issue in this application is as follows. A regulated utility wishes to sell off an unregulated subsidiary, which in turn owns two regulated utilities, to an unregulated buyer. The structure of this proposed transaction differs significantly from the transaction at issue in the above-cited water company merger cases. It also differs from the situation in The Matter of SBC Communications and Ameritech Corporation, Case No. TM-99-76 (Decided October 8, 1998). In that case, the Commission declined jurisdiction because "there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies." The Commission said nothing about its jurisdiction over a transfer of assets from a regulated company which owned an unregulated company to another unregulated company. Therefore, the Commission's decision declining jurisdiction over the proposed merger of two unregulated telecommunications parent corporations, neither of which was regulated by the Commission, does not control the outcome of the instant case

10. The argument made by the Companies in this case must fail because Gateway is not seeking to merely acquire UPL stock from UPL. Rather, in order to acquire UPL, Gateway must buy that asset, and the stock in that asset, from UtiliCorp. This fact removes the transaction from the class of mergers over which this Commission has declined jurisdiction in the past few years, and places the proposed transaction firmly within the Commission's jurisdiction and oversight.

11. The Companies in this case are fully aware that the plain language of §393.190.1 RSMo requires the Commission to assert its jurisdiction in any transfer of assets from UtiliCorp to another corporate entity. As the Wolf Creek case makes clear,

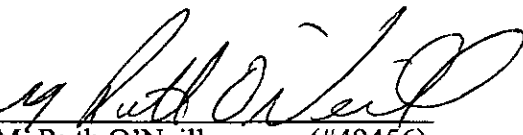
where one of the parties to a stock transfer transaction is regulated by the Missouri Commission, the Commission has jurisdiction over the sale or acquisition of stock, pursuant to §393.190(2), even if the other party is not regulated.

12. In order to give the Commission the opportunity to adequately exercise its lawful power and duty to determine whether the proposed transaction is "not detrimental" to the public interest, Public Counsel respectfully requests that a procedural schedule be established and this matter be set for hearing. Public Counsel further requests that such procedural schedule provide sufficient time for all parties to investigate whether or not the proposed transaction will be detrimental to the public interest, including the interests of UtiliCorp's Missouri customers.

WHEREFORE, Public Counsel respectfully moves that the Commission accept jurisdiction in this matter. Further, Public Counsel requests that the Commission direct that a procedural schedule be established and the matter be set for evidentiary hearing.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By:   
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Assistant Public Counsel

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## **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 1<sup>st</sup> day of May 2001:

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