BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In re the Joint Application of UtiliCorp United, Inc. and St. Joseph Light & Power Company for authority to merge St. Joseph Light & Power Company with and into UtiliCorp United Inc. and, in connection therewith, certain other related transactions.	)	Case No. EM-2000-292

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Service Commission

INITIAL POST-HEARING BRIEF OF INTERVENOR AG PROCESSING INC

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COMES NOW Intervenor Ag Processing Inc. a Cooperative (AGP) and submits its Initial Brief in this proceeding. AGP took positions on a limited number of issues in this proceeding and this brief will address only those issues on which AGP took independent positions. On other issues, AGP would defer to Commission Staff, Public Counsel or Intervenor Springfield and would respectfully commend the Initial Briefs of those respective parties to the Commission.

I. AGP'S GENERAL POSITION.

AGP is an industrial customer of the St. Joseph Light & Power (SJLP) utility. If not SJLP's largest electrical customer, AGP is among the largest. AGP also is SJLP's largest steam customer.

AGP is a private company that operates food and grain processing facilities throughout the Midwest. AGP is the largest cooperative soybean processing company in the world, the third-largest supplier of refined vegetable oil in the United States and the third-largest commercial feed manufacturer in North America. AGP's facility in St. Joseph is of substantial size and processes primarily soy beans producing soy oil, meal and other products that are either directly sold to other producers as inputs to food or animal food products, or represent finished products themselves.

As a private company, AGP would not ordinarily interfere or have concerns regarding mergers by other private companies. However, as a major ratepayer of SJLP, AGP shares the concerns that have been voiced by numerous other parties in this proceeding regarding the implications of this merger. Recognizing that the standard to be applied is that the transaction must be shown to be not detrimental to the ratepayers of SJLP, AGP respectfully suggests that standard has not been met by the proposal before the Commission.

In large measure, the proposed merger represents an attempt by both companies, but principally UtiliCorp United (UCU), to improve competitive positions in unregulated aspects of the combined business operations. The endemic flaw, however, is that the applicants appear to expect the ratepayers of the regulated entities to fund that attempt, to the tune of nearly $100 million. Thus viewed, the proposed merger represents nothing more unique than prior "promotional practices" cases, or even the far simpler cases, disposed of years ago by this Commission, involving subsidized sales or repairs of gas or electric appliances by regulated gas or electric utilities.

In the specific case of SJLP, some years ago the utility operated a bus line within the City of St. Joseph. Rides throughout the City were, at various times, as inexpensive as 15 cents. Though not a competitive service in the classic sense, this so-called "transit subsidy" was ultimately eliminated by the Commission that found it simply inappropriate to have the electric, gas and steam ratepayers subsidizing public transportation.

This proposed merger highlights the clash that the Commission is likely to see in the future between rather different paradigms. On one hand are the public utility monopolies, whose exclusive service territories, jealously guarded regulatory entitlements,[1] and "opportunity guarantees" supposedly exist to support these companies' provision of needed services to the public. On the other hand are these same companies, but in new garb, that are jockeying to position themselves for what to them is a new and challenging landscape of customer choice, but still want their embedded and unchallengeable monopoly services and captive customers to pay the cost of that positioning. In short, that is exactly what we have in this case: UCU wants both to have its cake and eat it. UCU wants to improve its competitive position and has constructed a regulatory plan that would assure that the movement to its newly enhanced competitive position

[1] In other contexts, the utilities are fond of calling these entitlements the "regulatory compact."

gained by acquisition of SJLP's generating assets is financed by the ratepayers of SJLP.[2] For the same reasons that the "transit subsidy" and home appliance sales plans of long ago were rejected, this plan should also be rejected.

The proposed transaction, most particularly the "regulatory plan" and its handling of the acquisition premium generated by the proposed transaction, has been shown to be clearly detrimental to the ratepayers of SJLP. For that matter, it has been shown as clearly detrimental to the ratepayers of Missouri Public Service. Since the applicants have given no indication that they were willing to go forward with the transaction without the regulatory plan being guaranteed, and the economics of the deal appear to depend on the approval of the regulatory plan, the merger proposal should be rejected.

II. THE PROPOSED MERGER AND REGULATORY PLAN HAVE BEEN DEMONSTRATED TO HAVE DETRIMENTAL EFFECTS ON THE RATEPAYERS AND, AS SUCH, THEY CANNOT, AND SHOULD NOT, BE APPROVED.

A. Detriment - The Legal Standard.

The legal standard that has been used by this Commission is stated in terms of a required showing that the proposed transaction is not detrimental. The requirement is drawn from Section 393.190.2 and 4 CSR 240-2.060(9) and has been consistent-

[2] AGP is a customer of SJLP and its concerns are focused on that relationship. Through the evidence in this proceeding, appreciation was gained that the customers of **Missouri Public Service Company** (MoPub) also are being disadvantaged by this transaction.

ly enforced by the Commission. *See, e.g., In re American Long Lines, Inc. and Teligent, Inc.*, Case No. TM-2000-770, 2000 Mo. PSC LEXIS 958 (June 28, 2000); *In re Southern Union Company*, Case No. GF-2000-504, 2000 Mo. PSC LEXIS 530 (March 28, 2000); *In re Missouri-American Water Company and United Water Missouri, Inc.*, Case No. WM-2000-222, 2000 Mo. PSC LEXIS 304 (March 16, 2000). Missouri courts have generally confirmed this standard. *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. en banc 1934). In past merger cases, the Commission has occasionally addressed its concerns about public and ratepayer detriment by imposing conditions on the merger partners that assured that ratepayers were insulated from detrimental effects. It is our belief, obviously shared by others in this proceeding, that this proposed merger has been constructed in a way that is so basically flawed that it cannot be saved by such conditions.

B. Failure to Provide Rate Decreases Tracking Claimed Merger Operating Cost Savings Creates a Detriment to Ratepayers.

The general parameters of the proposed Regulatory Plan provide for a "rate freeze" during which the combined companies would not propose to change rates up or down during the initial five-year period. Given that the magnitude of claimed savings net of costs to achieve is in the range of $68 million, during this same period, it is literally unconscionable that the applicants propose to maintain rates at what will become unjust and unreasonable levels.

Neither of the applicants appeared willing to recognize that as savings from combined operations reduce costs, the failure to pass along those cost decreases to the ratepayers results in a detriment. Witness Steinbecker could not grasp how a rate freeze could result in a detriment, and struggled to avoid the obvious result of the examples that were put to him. Tr. 153-155. Finally he acknowledged that, if a utility's rates stayed the same, but its costs declined, that the earnings would increase.

> Q. Even though they're receiving service at the same rate? Where is the difference going, Mr. Steinbecker?
>
> A. Well, if the revenue stays the same, the costs are reduced, the earnings increase.

Tr. 154, ll. 16-19.[3/] Obviously, if the earnings increase, than the shareholders are benefitted in the form of an increased dividend or an incremental increase in the net worth of their company in the form of retained earnings.[4/]

Mr. Brubaker does not agree with this and recognizes that **unless rates reasonably track declining costs**, the ratepayers are detrimentally impacted.

[3/]We have little doubt that Mr. Steinbecker would see the detriment to the stockholders if the hypothetical posed included an increase in costs of operations coupled with no change in rates. In fact, that is the essential argument in a rate increase case.

[4/]More likely, in this day and age, what might become increases in earnings for the shareholders are, instead, transferred to the managers of the business in the form of bonuses, stock options, or other performance incentives. In theory, these have been approved by the shareholders through their elected representatives.

> A. I would define detriment as the ratepayer paying -- **paying rates that were higher than otherwise would have been paid** but for the merger or other events that we're talking about, assuming that the quality of service and the adequacy of service remains constant.

Tr. 416, ll. 2-6 (emphasis added). This is, of course, the key. If the utility's costs decline, within a reasonable period of time it should either file to reduce its rates, or be brought in through a complaint to have its rates reduced to just and reasonable levels.

SJLP has been in a declining cost situation for several years. In fact, each of its last several rate cases has begun as a rate reduction initiated by Staff. The rate filings by the utility appeared to have been defensive measures to attempt to seize the initiative from the Staff.

The applicants appear certain that there would be cost savings resulting from the merger. Witness Green characterizes it as assurance that they will recover a return on their investment. "The key," he testified, "is that we have to be able to justify a reasonable return for the investment made. It's that simple." Tr. 198, ll. 19-21. As a private concern, AGP has little doubt that Mr. Green's statement is not far from wrong. The problem, of course, is with where Mr. Green seeks to obtain his reasonable return. He would have captive ratepayers contribute their capital to fund his enterprise; AGP and others would say to Mr. Green that if the competitive unregulated environment will not support his investment, then the investment should not be made. It is "that simple," Mr. Green.

Certainty is part of this concern. Mr. Green testified that the regulatory plan "gives us a certainty to understand what kind of return we're going to earn on this investment." Tr. 208, ll. 8-10. The amount of this return on investment must also be known, since Mr. Green rejoined one questioner: "would you invest $92 million not knowing what return you were going to earn on your investment?" Tr. 220, ll. 9-11.

Exhibit 502[5] appears to partially quantify that return. This schedule, prepared by Mr. Siemek (and grudgingly confirmed by Mr. McKinney (Tr. 341-42)), shows the averages for the initial five year period and can be used to derive the total numbers for the corresponding items for the entire five-year period. During the first five years, when rates to captive customers are proposed to be "frozen," UCU estimates that it would reap over $81 million of operating cost reductions from the SJLP operations which would be retained for the benefit of the stockholders. The same Exhibit estimates the costs to achieve at $13 million producing total "synergies net of costs to achieve" of roughly $68 million. In all that, the ratepayers of SJLP would receive not one dime of rate reduction. And that only addresses the first five years.

During the second five years, the same Exhibit estimates total O & M savings of $103 million and costs to achieve of $12 million resulting in net "synergies" of $91 million for a

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[5]Exhibit 502 was also attached to Mr. Brubaker's Prepared Rebuttal testimony.

grand total of $159 million net "synergies" over the proposed ten-year period. While SJLP ratepayers might gain some cost reductions during the second five-year period, they would have to exceed the 50 percent recovery of the unamortized acquisition premium reserved to that period. Lest we be accused of overlooking the paltry annual benefit of $1.6 million, we need to note that amount is not a guarantee of a rate reduction, but rather a reduction in cost of service which could be more than offset by other cost increases during the second five years thereby denying SJLP ratepayers even this picayune guarantee.

As Mr. Brubaker testified, this scheme results in retained benefits for the stockholders of roughly $149 million or almost 15 times the committed benefit for the ratepayers. It is no wonder that the Commission Staff has taken the unprecedented step of opposing the merger outright.

C. UCU Cannot Deny Unwilling Customers or Their Representatives the Right to Complain or to Have Access to the Commission.

As another aspect of this somewhat appalling proposal, UCU would deny Public Counsel and customers of access to the Commission's processes for filing a complaint to reduce SJLP's rates during the period of the "freeze." This perception is unlawful. UCU cannot deny customers or customer representatives access to the Commission any more than UCU can deny them access to the courts. Section 386.390(1) provides the authority for these parties, including the Public Counsel, to complain of unreasonable rates. This right has been given by the general assembly and cannot be taken from unwilling customers.

Utilicorp should well know this, for in another setting it claimed benefit of the very principle that the Commission cannot even bind itself, or certainly future Commissions. In *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. en banc 1975) the question of whether the Commission could bind itself to a particular rate level was presented.

In the facts of *Jackson County*, Missouri Public Service Company (MoPub) had previously received a rate increase, but the Commission Report and Order granting that earlier rate increase had also fixed the maximum rates to be charged by MoPub **"for a period of at least two years from the effective date of this Order . . . ."** Exceptions were granted for sliding scale rates and other automatic adjustments "heretofore or hereafter approved by this Commission pursuant to § 393.270, ¶ 3, R.S.Mo.1969." Subsequently, and in less than two years, MoPub filed a new rate case and, upon the Commission granting further rate relief, the opposing parties appealed. The Supreme Court held that the statutes did not permit the Commission to close its doors to the utility nor to the other parties. Quoting from an Illinois case, the Court stated:

> "The construction contended for seems to be in conflict with the spirit of the act. One of its primary purposes was to set up machinery for continuous regulation as changes in conditions require. It appears to be inherent in the act itself."

Id. at 29 (quoting from *Illinois Bell Tel. Co. v. Illinois Commerce Commission*, 414 Ill. 275, 111 N.E.2d 329 (1953)). The Supreme Court also noted its own language in *State ex rel. Chicago, R.I. & P.RR Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. 1958) that the

> Commission's supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.

"To rule otherwise," said the Court, "would make § 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company **or unreasonable to the consumers**." *Id.* at 29-30 (emphasis added).

The very "freeze" advocated in this case by Joint Applicants would violate this principle. During the five-year period in which roughly $68 million of reduced costs would otherwise flow to ratepayers of SJLP, Joint Applicants would deny this Commission, its Staff, the Public Counsel, or members of the public access to the Commission.

The Joint Applicants appeared to contend that the Commission could instruct its own Staff not to participate in or support such a complaint. The Commission can imagine the public, not to mention the legislative outcry, if it were to become known that the Public Counsel or customers had filed a complaint alleging that rate levels were unjustly and unreasonably high and the Commission had directed its own Staff to refuse to assist either party.

Even if it was willing to do so, the Commission cannot bind non-acquiescing customers such as AGP to such conditions nor can it bind the Public Counsel who is independently granted authority to make complaints. While we are aware of several instances in which the Commission has approved **unanimous stipulations** in which such conditions were included, and no one contests that the parties to the case could certainly **agree** to bind themselves to certain conditions for considerations they thought appropriate, we are, in fact, aware of **no instances** in which the Commission has even sought to impose a rate moratorium or freeze upon unwilling customers.

We are aware of no instance in which the Commission has even attempted to bind itself over the determined opposition of its own Staff, the Office of the Public Counsel, and concerned customer representatives such as AGP. What these parties, or others like them in other cases, might **agree** to waive, does not provide support for compelling such concessions. To be clear, AGP does **not** agree to waive its rights in this proceeding or over the next five or ten years. While we would not attempt to speak for Public Counsel, our sense is that the independent agency will not agree either. The parties may agree not to use their keys to the courthouse, but those keys cannot be wrested from their unwilling hands by either Joint Applicants or the Commission.

D. Detriments Are Explicitly Shown for the Steam and Gas Customers of SJLP.

UCU Witness McKinney felt that Exhibit 503 was "irrelevant," apparently because he concluded it had been "updated." However, the update was never produced by Mr. McKinney and Exhibit 503 stands. Exhibit 503 shows a detriment of $34,000 annually for the steam system and a detriment of $35,000 to SJLP gas customers after costs are allocated from other UCU divisions. When allocated premium costs are considered, steam customers face a detriment of $166,000 annually with gas customers' detriment even larger ($202,000).

Moreover, although Mr. McKinney sought to argue that Exhibit 503 was only an initial allocation or displayed a methodology, the **total of the dollars to be allocated remains negative and thus is shown to be a detriment.**

These numbers are undisputed. Exhibit 503 was provided by UCU, one of the Joint Applicants. Detriment is, accordingly, proven from the month of the joint applicants.

E. The Proposed Merger and Regulatory Plan Are Out of Balance Against the Interest of Ratepayers.

Against this backdrop of massive diversions of cost saving benefits away from ratepayers, it is useful to compare the significant benefits that the regulatory plan will distribute to the stockholders.

First, the resulting combined entity will be advantaged from a competitive standpoint; a more competitive overall enterprise will be created. This is acknowledged by applicants at pages 6-7 of the Merger Application where they state:

> The Merger will strengthen the competitive position of UtiliCorp, including its MPS and SJLP operations, not only in Missouri but also in the surrounding region in the mid-west.

Merger Application, Paragraph 12. One might reasonably ask, as AGP counsel did in his opening statement, why a utility that has an exclusive service territory and is the "only game in town" within that service was be concerned about becoming more "competitive." The answer, of course, is the impending deregulation of the generation side of the business. It is not that UCU wants to become a more efficient operator, nor save its ratepayers money by reducing costs, it is, rather, that it wants to become more competitive. It is only in the deregulated side of the business where this enhanced competitive position may be employed.

One might also reasonably inquire whether this enhanced competitive position would somehow redound to the benefit of ratepayers. The answer, again, is that it would not. In fact, the benefit of the competitive enhancement will redound to UCU stockholders. It is with the lost-cost generation from the SJLP units that UCU will become more "competitive." That same low-cost generation that SJLP customers now enjoy.

Additionally, one might also reasonably inquire whether the enhancement of competition by becoming bigger will enure to the benefit of the ratepayers. Experience teaches otherwise. Indeed, is it not interesting that, while the electric utilities throughout the country are seeking to become "larger and more competitive," the two lowest cost investor owned utilities in the entire State of Missouri are SJLP and Empire District? Bigger is not always better. Bigger, and managed for the sole benefit of the stockholders, is the worst of all possible ratepayer worlds.

Second, Applicants have stated that another benefit flowing to the stockholders from this transaction in the ability to provide enhanced returns to stockholders. Steinbecker, Exhibit 1, p. 7; Brubaker, Exhibit 500, p. 9.

Third, the transaction will enhance diversity in the generation mix for the combined utility. Not only will the load become more diverse geographically across Missouri, but the units that are available to be dispatched to respond to that load will become more diverse. A larger utility will be better able to handle the loss of a generation unit without serious financial impact as it can redispatch units to cover the shortfall.

The proof of this benefit is already before the Commission, In early June, SJLP suffered the temporary loss of one of its Lake Road units and immediately threw itself on the mercy of the Commission through an accounting authority order application.[6/] SJLP claimed that the cost of purchased power would represent half of the company's projected revenue and extraordinary relief must be obtained. At the same time, and in the very same application, SJLP asserted that **if the merger with UCU were**

[6/]EO-2000-845.

permitted, the amount sought under the AAO would simply be written off.

Of course, as evidence in **this** case revealed, it would be SJLP that would take the write-off and the effect of that write-off would simply be to reduce SJLP's book value thereby increasing the acquisition premium. Tr. 145, ll. 14-23. Thus, SJLP/UCU's "grand" gesture to make the AAO issue go away may not have been so "grand" as it originally appeared. In fact, it was unmasked as little more than a ploy to shift the burden back to SJLP ratepayers, but in the form of an acquisition premium recovery rather than a direct charge from the AAO. Id.

The point is this: Missouri does not have a fuel adjustment provision. Increases to purchased power costs that are above estimated levels are the responsibility of the stockholders -- risk for which they are compensated by the rate of return. Thus, increases in diversity flow to the benefit of stockholders because they reduce this risk exposure. Brubaker, Exhibit 500, p. 9-10.

Fourth, the larger combined enterprise becomes more diverse and better able to deal with cash flow problems that result from operations of the business. In this case, by stretching a service area from Northern Missouri into South Central Missouri, the combined entity will see different weather patterns that will assist in this diversity. Brubaker, Exhibit 500, p. 10.

Fifth, there are some unique attributes of the SJLP/UCU combination that will be additional value to shareholders, noted in the HIGHLY CONFIDENTIAL portion of Mr. Brubaker's testimony, Exhibit 500, at pages 10-11.

Given these benefits, one might think that some consideration to ratepayers beyond a willingness to "freeze" current rate levels while costs decline roughly $60 million and, at the end of that "freeze" guarantee a $1.6 million reduction in cost of service (which reduction might not even have a effect on rate levels) might have been suggested, but one would be wrong in this case. Indeed, UCU and SJLP simply ask that, at the end of the five-year rate freeze, that the SJLP shareholders have the duty and privilege of continuing to contribute to the UCU's corporate coffers by the continued recovery of such of the acquisition premium as might then remain unrecovered.

F. Recovery of the Acquisition Premium in Any Form should Be Rejected.

UCU through Mr. Green suggests that if the acquisition premium could not be recovered through the proposed regulatory plan, the deal would be in serious trouble. So be it.

As has been seen in the testimony and amply demonstrated in this record, UCU is simply trying to get SJLP ratepayers to fund its acquisition premium. Indeed, it is mildly surprising that UCU is as forthright about its intentions. Virtually all the original $93 million (plus the $7.5 million from the AAO) would be recovered from the SJLP ratepayers.

Mr. Green characterizes this as wanting a "return on his investment." Tr. 197, l. 23. Mr. Green is free to do what he will with his money. We believe that we have better uses for ours than to fund UCU's purchase of an adjacent utility. We have better uses for our money than to fund UCU's enhancement of its competitive position. If UCU wishes to take such steps, it is free to do so as long as it does not expect its ratepayers to pick up the tab. UCU shareholders willingly purchased or acquired and have retained their UCU stock. Ratepayers have not been offered that choice. We did not see in the record where the SJLP ratepayers had been questioned whether they wanted to pay nearly $100 million in rates that are higher than they should be so that UCU can expand its already far-flung utility empire. With respect, AGP declines the offer.

Instead, we are entitled to safe and adequate steam and electric service from this utility at cost based rates that do not in the aggregate exceed the utility's legitimate cost of service. We have no desire to expand UCU's empire, nor fund its competitive enhancement projects.

G. Any Conditioning Should Include Market Power Conditions.

AGP does not believe that conditions will remedy the problems with this proposed merger and Regulatory Plan. Nevertheless, the Commission should recognize that the proposal is also deficient in failing to include the necessary market power conditions the necessity for which was revealed both by the prior

Western Resources merger (EM-97-515) and the conditions that were requested by Intervenor City Utilities of Springfield. Obviously, based on the record in the hearing, UCU's positions on restructuring legislation are of concern to several of the Commissioners. Indeed, the implications of restructuring and the spinoff of generation in a manner that would foreclose the Commission's ability to conform this arrangement to a new reality and protect ratepayer interests could result in serious damage to the ratepayers' interests. Such conditions should be imposed in the unlikely event that, in some later or resurrected form, this transaction should surface again.

III. CONCLUSION.

This merger and its regulatory plan are demonstrably detrimental to and for SJLP ratepayers, and particularly for steam and natural gas customers. Costs exceed benefits for steam customers by nearly $200,000 annually. Detriments exceed benefits for the entire arrangement at roughly $2.5 million. Exhibit 503. UCU and SJLP have concocted a scheme to transfer wealth to the stockholders of SJLP through a substantial acquisition premium of over $100 million, then have the SJLP ratepayers fund the transfer and acquisition through several devices including "freezing" rates while costs significantly decline and a fiction of a subsequent "sharing" mechanism. This entire scheme should be rejected. If that results in the scuttling of this merger, then that is a proper result for a deal that was uneconomic but for subsidization by the ratepayers.

WHEREFORE Intervenor AGP prays that the Commission reject the proposed merger as detrimental to the ratepayers of both SJLP and MoPub and contrary to the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by U.S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission and shown on the sheet following.

Stuart W. Conrad

Dated: September 5, 2000

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