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May 18, 2001

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

**MAY 18 2001**

**Missouri Public  
Service Commission**

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


**Re: Case No. EO-2001-477**

Dear Mr. Roberts:

Enclosed for filing on behalf of UtiliCorp United Inc. d/b/a Missouri Public Service, please find an original and eight (8) copies of a Motion for Variance Concerning Service Agreement No. 2 in above-referenced matter.

Please see that this filing is brought to the attention of the appropriate Commission personnel. A copy of the enclosed document is being provided to parties of record. I thank you in advance for your cooperation in this matter.

Sincerely,



Dean L. Cooper

DLC/da  
Enclosure

cc: Mr. John Coffman  
Mr. Steven Dottheim  
Mr. Gary Clemens

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>  
MAY 18 2001

In the Matter of the Application of )  
UtiliCorp United Inc. under §32(k) of )  
the Public Utilities Holding Company )  
Act of 1935 Concerning Service )  
Agreement No. 2 Between )  
MEP Pleasant Hill, L.L.C. and )  
UtiliCorp United Inc. d/b/a Missouri )  
Public Service. )

Case No. EO-2001-477

Missouri Public  
Service Commission

**MOTION FOR VARIANCE**  
**CONCERNING SERVICE AGREEMENT NO. 2**

Comes now UtiliCorp United Inc. ("UtiliCorp") d/b/a Missouri Public Service ("MPS"), and, in accordance with 4 CSR 240-20.015(10) and 4 CSR 240-2.060(14), states to the Missouri Public Service Commission ("Commission") as follows:

**GENERAL BACKGROUND**

1. On March 8, 2001, UtiliCorp filed its Application in this case requesting that as to its Service Agreement No. 2 ("SA2") with MEP Pleasant Hill, L.L.C. ("MEPPH") the Commission determine that UtiliCorp has sufficient regulatory authority, resources and access to books and records of UtiliCorp and MEPPH to exercise its duties under subsection 32(k) of the Public Utility Holding Company Act ("PUHCA")<sup>1</sup> to ensure that SA2: (i) benefits consumers; (ii) does not violate any state law; (iii) does not provide MEPPH with any unfair competitive advantage by virtue of its affiliation with UtiliCorp; and, (iv) is in the public interest.

2. MEPPH owns and is in the process of constructing an approximately 600 MW gas fired combined cycle power project in Cass County, Missouri (the "Aries Project"). It is owned 50%

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<sup>1</sup>See, 15 U.S.C. §79z-5a(k).

by Aquila Energy Corporation - a wholly owned subsidiary of UtiliCorp – and 50% by Calpine Corporation.

### **PAST COMMISSION ACTION**

3. In its Order Regarding Power Sales Agreement issued April 22, 1999, in Commission Case No. EM-99-369, the Commission reviewed the base Power Service Agreement (“PSA”) between UtiliCorp and MEPPH and made the necessary findings to satisfy the PUHCA. The Commission’s broad statutory authority over the determination of retail rates by electrical corporations, including UtiliCorp, pursuant to Chapters 386 and 393, RSMo has not changed since the Commission’s decision in Case No. EM-99-369. Thus, the Commission continues to have the ability to make the determinations required by the PUHCA.

### **TRANSACTION**

4. MEPPH is now in a position to test the Aries Project. However, delivery obligations under the PSA commence on the initial Commercial Operation Date of the Aries Project in simple-cycle mode and the PSA does not provide for sales of test energy from the project prior to such Commercial Operation Date. In order to account for test energy, MEPPH and UtiliCorp have agreed to SA2. SA2 also provides for sales of test energy prior to the subsequent Commercial Operation date of the Aries Project in combined-cycle mode. SA2 provides for the sale by MEPPH to UtiliCorp of test energy from the Aries Project at UtiliCorp’s avoided cost of supply, as capped by a market proxy.

### **STAFF RECOMMENDATION**

5. On April 27, 2001, the Staff Recommendation Regarding Provision of Public Utility Holding Company Act Section 32(k) Determinations to UtiliCorp for Its Test Power Contract with MEPPH (“Staff Recommendation”) was filed in this case. The Staff stated in relevant part that the

“‘Contract price’ provided for in SA2 is not in compliance with the Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting ‘Affiliate Transactions.’”

6. The Staff went on to recommend that the Commission provide the subsection 32(k) of PUHCA determinations sought by UtiliCorp, “if UtiliCorp (a) files for a variance from Commission Rule 4 CSR 240-20.015(2)(A)(1), pursuant to 4 CSR 240-20.015(10) respecting “Variances,” and (b) agrees that (i) Case No. EO-2001-477, i.e., SA2, shall not be utilized by UtiliCorp for ratemaking purposes, (ii) the Staff’s recommendation respecting this matter and the Commission’s Order making the requested PUHCA Section 32(k) determinations shall not be cited as precedent for any matter, and (iii) UtiliCorp shall provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.”

#### **UTILICORP RESPONSE**

7. On May 7, 2001, UtiliCorp filed its response to the Staff Recommendation. Therein, UtiliCorp confirmed its agreement with Staff conditions b(i), b(ii) and b(iii). It also agreed to file this motion for variance, with some reservations concerning its position.<sup>2</sup>

#### **VARIANCE**

8. The Staff Recommendation focused on Commission Rule 4 CSR 240-20.015(2)(A)(1), which states as follows:

A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to

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<sup>2</sup> UtiliCorp stated that its actions should not be interpreted as a concession on the part of UtiliCorp that the “contract price” provided for in SA2 necessarily fails to comply with Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting Affiliate Transactions or that the price contained in SA2 is necessarily within the jurisdiction of a state commission, rather than the FERC, as the FERC generally has exclusive jurisdiction over wholesale power prices. *See In the Matter of the Joint Application of UtiliCorp United Inc. and The Empire District Electric Company*, Case No. EM-2000-369 (December 28, 2000).

provide a financial advantage to an affiliated entity if –

1. It compensates an affiliated entity for information, assets, goods or services above the lesser of —

- A. The fair market price; or
- B. The fully distributed cost of the regulated gas corporation to provide the information, assets, goods or services for itself; or

9. Commission Rule 4 CSR 240-20.015(10)(A) states in relevant part as follows:

A variance from the standards in this rule may be obtained by compliance with paragraphs (10)(A)1 or (10)(A)2.

\* \* \* \* \*

- 1. The regulated electrical corporation shall request a variance upon written application in accordance with commission procedures set out in 4 CSR 240-2.060(11); [now (14)]

10. As explained in its Response to the Staff Recommendation, UtiliCorp believes that the contract price will be in compliance with Commission Rule 2 CSR 240-20.015(2)(A)(1). Compliance, or noncompliance, will ultimately be measured by comparing the actual amount paid, on the one hand, to the lower of fair market price and fully distributed cost, as defined by the Rule, on the other hand.

11. SA2 provides for a contract price that will be the lower of UtiliCorp's "avoided cost," as defined by the contract, and a market price. UtiliCorp believes that the "avoided cost" identified by the contract will in fact be lower than the Commission's "fully distributed cost" and therefore within the parameters of Commission Rule 2 CSR 240-20.015(2)(A)(1).

12. However, UtiliCorp recognizes the Staff's concerns and, therefore, to the extent that it is in error and the eventual contract price is not in accordance with Commission Rule 2 CSR 240-20.015(2)(A)(1), seeks by this motion a variance from the identified pricing provision for the sole purpose of performing in accordance with SA2.

#### **GOOD CAUSE**

13. The Staff has stated that "the costs associated with SA2 are not considered by the

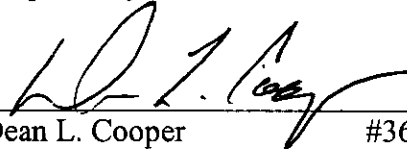
Staff to be material.” UtiliCorp agrees with this statement and believes that the added benefit of fully testing the Aeries Project so that this power can be added to UtiliCorp’s portfolio to the benefit of UtiliCorp’s customers and the State of Missouri weighs in favor of the variance suggested by the Staff. SA2 will allow the energy produced during the test of the Aries Project to be used in a beneficial manner and enable the Aries Project to move toward the production of a steady, affordable and reliable source of electric power for distribution by MPS to its electric utility customers. Therefore, good cause exists for the grant of the requested variance.

WHEREFORE, UtiliCorp respectfully requests a Commission order:

- (a) granting a variance for good cause from Commission Rule 4 CSR 240-20.015(2)(A)(1) for the sole purpose of performing in accordance with SA2;
- (b) specifically determining that the Commission has sufficient regulatory authority, resources and access to books and records of UtiliCorp and MEPPH to exercise its duties under subsection 32(k) of PUHCA to ensure that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide MEPPH with any unfair competitive advantage by virtue of its affiliation with UtiliCorp and (iv) is in the public interest;
- (c) authorizing UtiliCorp to perform in accordance with the terms and conditions of the Service Agreement No. 2 by and between MEPPH and UtiliCorp;
- (d) authorizing UtiliCorp to enter into, execute and perform in accordance with the terms of all documents reasonably necessary and incidental to the performance of the transactions which are the subject of SA2; and,
- (e) granting such further relief as may be necessary which is consistent with the relief

requested herein.

Respectfully submitted,

  
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Dean L. Cooper #36592  
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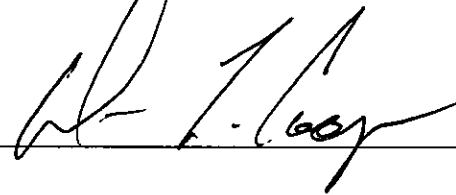
Attorneys for UtiliCorp United Inc.

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 18<sup>th</sup> day of May, 2001, to:

Mr. Steven Dottheim  
Missouri Public Service Commission  
Governor State Office Building  
P.O. Box 360  
Jefferson City, MO 65102-0360

Mr. John Coffman  
The Office of the Public Counsel  
6<sup>th</sup> Floor, Governor State Office Building  
P.O. Box 7800  
Jefferson City, MO 65102-7800

  
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