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December 13, 1999

FILED³

DEC 13 1999

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

Missouri Public
Service Commission

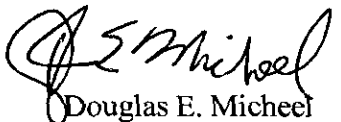
RE: UtiliCorp United, Inc. and St. Joseph Light & Power Company
Case No. EM-2000-292

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and fourteen copies of **Public Counsel's Reply To December 3, 1999 Response of UtiliCorp United and St. Joseph Light & Power**. Please "file" stamp the extra enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,


Douglas E. Mischeel
Senior Public Counsel

DEM:mm

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

DEC 13 1999

In The Matter Of 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 Transaction.)

Missouri Public
Service Commission

Case No. EM-2000-292

**Public Counsel's Reply To December 3, 1999 Response of
UtiliCorp United, Inc. and St. Joseph Light & Power Company**

Comes now the Office of the Public Counsel ("Public Counsel") in reply to the December 3, 1999 Response of UtiliCorp United Inc. ("UtiliCorp") and St. Joseph Light and Power Company ("SJLP") states as follows:

1. In the Response of UtiliCorp and SJLP filed on December 3, 1999, the Joint Applicants state on page 2 that "retail market power is an important issue which should be reviewed by the Commission when retail competition becomes a reality in Missouri." This approach would be appropriate if utilities in Missouri were waiting for retail competition to become a reality in Missouri before taking actions such as proposing mergers in order to enhance their competitive position in future deregulated retail electric markets. However, as evidenced by the merger activity that has already taken place in Missouri (the Union Electric/CIPSCO merger, the proposed Kansas City Power & Light /Western Resources, Inc. merger, and now the proposed mergers of UtiliCorp with both St. Joseph Light and Power and Empire District Electric), Missouri utilities are obviously not waiting for retail competition to become a reality in this State before taking actions

such as proposing mergers in order to enhance their competitive position in future deregulated retail electric markets.

2. The position of UtiliCorp and SJLP is essentially that the Commission should ignore, for the time being, any detrimental impacts that current electric merger activity may be having on the robustness of future deregulated electricity markets in Missouri, and then do what it can to assess the damage once retail competition has become a reality in Missouri. Unfortunately, if the Commission proceeds as the Joint Applicants propose, it may be able to do little more than assess the damage that has occurred as utilities merge. This is because, by the time retail competition becomes a reality, the Commission would have long since given its blessing to the proposed merger and may no longer have any authority to impose remedies for any of the merger's market power detriments. For example, after a merged entity has acquired a portfolio of generation assets that concentrates too many regional generation assets in the hands of a single competitor, the Commission may be powerless to remedy this detriment if it waits until retail competition has already arrived and the merger has been approved. While deferring retail market power issues would be favorable to the stockholders and management of the merged entity, Missouri consumers could face higher prices and fewer choices if these issues are deferred to a future date when no effective remedies for market power detriments are available.

3. Also on page two of the Response of UtiliCorp and SJLP, the Joint Applicants state that "because retail competition does not now exist in Missouri, no meaningful retail market power study can be accomplished at this time." No reasonable basis for such a conclusion can exist prior to examining in detail the retail market power

studies that have been performed by the various parties. Since UtiliCorp has apparently not even attempted to perform such a study and other parties will not have studies completed and filed until the date for filing rebuttal testimony in this case, retail market power studies specific to the proposed UtiliCorp mergers do not yet exist. In the Kansas City Power & Light /Western Resources, Inc. (KCPL/WRI) merger case, retail market power studies were performed by the merger applicants, the Staff, and OPC. If the Joint Applicants in this case do not believe any of those studies were meaningful, they should provide detailed analysis and reasoning that supports their conclusion. Since no such analysis and reasoning has been presented to the Commission, OPC believes that this case should proceed in a manner similar to previous merger cases where the Commission has had the opportunity to consider evidence regarding retail market power studies performed by various parties, including the merger applicants.

4. In the same bullet point on page two of their Response where the Joint Applicants made the statement discussed in the preceding paragraph, they stated that "UtiliCorp will perform such a [retail market power] study when the Commission deems it appropriate." It is also interesting to note that the testimony of John McKinney in this case stated on page 31 that "in the proposed settlement of the Western Resources/Kansas City Power & Light merger, the parties agreed to the same basic concept of deferring the retail market power study" and that " UtiliCorp and SJLP are asking for similar treatment from the Commission in this proceeding." While Public Counsel does not know precisely what Mr. McKinney was referring to when he stated that "similar treatment" would be acceptable, the Staff has already offered a compromise at the bottom of page 2 in the Staff Response to Commission Notice Regarding Motion to Establish Procedural

Schedule filed November 24, 1999. (Staff Response). In this Response, the Staff stated that "if the Joint Applicants agree to the same market power conditions as are contained in the Stipulation and Agreement in Case No. EM-97-515, then the Staff would agree that there is no further need for the Joint Applicants to file a retail market power study in the instant case." OPC would agree to the same compromise offer contained in the Staff Response for the purpose of settling: (1) the current dispute over whether a market power study needs to be filed by the Joint Applicants and (2) all market power issues in this case. OPC has indicated to the Joint Applicants its willingness to discuss such a settlement and made itself available to the Joint Applicants, but no such discussions have occurred.

5. One last item in the Response of UtiliCorp and SJLP merits further discussion. At the bottom of page 2 of this Response, the Joint Applicants state that after the applicant's proposed 5 year regulatory plan has expired, rates will continue to be regulated by the Commission and as a consequence, "UtiliCorp will not be able to exert retail market power." This statement would only be true if the Missouri Legislature has not chosen to begin retail competition by the time the proposed five-year regulatory plan ends or any time thereafter. Once the Missouri legislature decides to deregulate retail electric generation markets, the Commission will likely have little, if any, power to set rates for generation service. Furthermore, any such power would likely end once a brief transition period has ended. Retail markets for competitive generation service are, of course, those markets where consumers are most likely to be harmed by the exercise of market power. If the Joint Applicants truly believe that "it will not be able to exert market power" because "rates will continue to be regulated by the Commission" then

one must wonder why they would even acknowledge in their pleading that "retail market power is an important issue which should be reviewed by the Commission when retail competition becomes a reality in Missouri."

6. Retail market power must be addressed in this case for the Commission to be able to determine whether the proposed merger is detrimental to the public interest and to determine if certain conditions should be put in place to remedy any detriments associated with market power. In the Union Electric (UE) merger case, the Commission mandated certain conditions to address market power detriments. In the KCPL/WRI merger case, the Commission approved a Stipulation & Agreement containing conditions intended to address a wide range of market power detriments.

7. The Joint Applicants' proposed merger in this case is part of a recent wave of energy utility mergers that has arisen, in large part, due to the desire of utilities to better position themselves to compete successfully in deregulated energy markets. The motivation for this merger is consistent with the motivation behind the overall trend of energy mergers. UtiliCorp acknowledged this motivation in its March 5, 1999 press release announcing the UtiliCorp/SJLP merger agreement where it stated that "the merger strengthens our competitive position in our home state and in the Midwest" and in its joint merger application at the Federal Energy Regulatory Commission where it stated that "the transactions that are the subject of this Joint Application...represent two essential pieces of a coordinated strategy to create a new financially and operationally stronger electric utility entity based in the State of Missouri, which will be a more effective competitor in the larger regional market in which the existing companies are located."

8. When utilities strengthen their competitive position by becoming larger and swallowing up neighboring utilities that are potential future competitors, regulators must always be vigilant in examining whether the enhanced competitive position (especially for incumbents) may allow the merged entity to dominate the market in a way that diminishes or eliminates the benefits that consumers can achieve from deregulated retail energy markets. Deregulated retail energy markets need to have a sufficient number of competitors, widely dispersed ownership of generation assets and separate ownership or control of vertically integrated assets (e.g. ISOs/RTOs for transmission assets) or these new markets will not produce outcomes that are beneficial for consumers.

9. Public Counsel believes that the need to examine the market power implications of this merger is at least as great, if not greater, than the need to examine market power in the KCPL/WRI and UE/CIPSCO mergers. First of all, the likely implementation date for retail competition in Missouri is probably a little closer than it was when the other two recent electric mergers were considered and the likelihood of legislative action to deregulate Missouri electric markets remains high. Second, significant changes have been taking place in the regional electric market that includes Missouri and surrounding states. The recent electric mergers in Missouri have caused our two largest electric utilities to become even larger and additional merger activity is continuing to occur in surrounding states. The pending merger of UtiliCorp with SJLP and Empire will decrease the number of Missouri investor utilities from five to three and the remaining three will all be significantly larger than they were just a few years ago. Increased size translates into increased concentration of regional generation assets and an

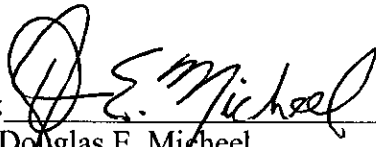
increased ability to leverage distribution and transmission functions to gain an unfair advantage and generate excess profits in deregulated retail generation markets.

10. Public Counsel concurs and wholly supports the Staff's recommendations to the Commission contained in its Joint Reply To December 3, 1999 Response Of UtiliCorp and SJLP.

WHEREFORE Public Counsel respectfully requests the Commission require the Applicants to file additional direct testimony including a market power study that defines the relevant market for the proposed merged entity, provides quantitative analysis of the horizontal and vertical market power that the applicants would have in wholesale markets and price deregulated retail markets, and proposes measures that would mitigate any such market power.

Respectfully submitted,

OFFICE OF THE 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 13th day of December, 1999:

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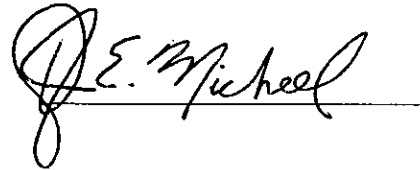
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A handwritten signature in cursive script, appearing to read "D.E. Michael", is written over a horizontal line.