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February 21, 2002

Mr. Dale Hardy Roberts, Secretary
Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102-0360

FILED³
FEB 21 2002

Missouri Public
Service Commission

**Re: MCFC v. Missouri Public Service
Case No. EC-2002-277**

Dear Mr. Roberts:

On behalf of UtiliCorp United Inc., enclosed for filing in the above-referenced case please find a Motion to Dismiss, or, in the Alternative, Motion for More Definite Statement and Suggestions. A copy has been hand-delivered to the Office of the Public Counsel. I have also enclosed a "receipt" copy, which I request that you file stamp and return to the messenger delivering same.

Thank you for your assistance in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:



Paul A. Boudreau

PAB/aw

Enclosures

cc: PSC General Counsel's Office
Mr. John Coffman, OPC
Mr. Terry C. Allen

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

FEB 21 2002

Missouri Coalition for Fair Competition,

Complainant,

Missouri Public Service, a Division
of UtiliCorp United Inc.,

Respondent.

Missouri Public
Service Commission

Case No. EC-2002-277

**MOTION TO DISMISS, OR, IN THE ALTERNATIVE,
MOTION FOR MORE DEFINITE STATEMENT AND SUGGESTIONS**

COMES NOW the Respondent, UtiliCorp United Inc., d/b/a/ Missouri Public Service (hereinafter "MPS"), and moves the Missouri Public Service Commission ("Commission") for an order dismissing the Complaint filed herein by Missouri Coalition for Fair Competition (the "MCFC"), or, in the alternative, for an order compelling the MCFC to state more definitely and particularly the allegations in its Complaint. In support of its Motion, MPS respectfully states unto the Commission as follows:

I. Failure to State a Claim

The MCFC's Complaint filed herein fails to state a claim upon which relief may be granted, in that the allegations of the MCFC do not fall within the parameters of the HVAC Services Act, §§386.754 through 386.764 RSMo. 2000 (hereinafter, the "Act"). Essentially, the Act contains three general restrictions governing a utility's involvement in the heating, ventilating and air conditioning ("HVAC") business. First, a utility, except through an affiliate¹, may not engage in HVAC services².

¹ An affiliate is defined as "any entity not regulated by the public service commission which is owned, controlled by or under common control with a utility and is engaged in HVAC services." §386.754(1) RSMo. 2000.

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§386.756(1) RSMo. 2000. There are certain permitted exceptions to this business limitation. A utility may provide HVAC services in an emergency situation, if it is required to do so by law or tariff, or if it was engaged in providing such services prior to August 28, 1993. §386.756(7), (8) RSMo. 2000. The applicability of these exceptions will not be discussed in this Motion, because the activities of MPS, even as alleged by the MCFC in its Complaint, do not fall within the confines of any of the three prohibited activities.

The second prohibition of the Act requires a utility to refrain from using or allowing any affiliate or utility contractor³ to use the name of such utility to engage in HVAC services, unless an appropriate disclaimer is made in all advertisements and solicitations stating that the services being provided are not regulated by the Commission. §386.756(3) RSMo. 2000.

The third general prohibition under the Act prevents a utility from engaging in or assisting any affiliate or utility contractor from engaging in HVAC services in a manner which subsidizes the activities of such utility, affiliate or utility contractor to the extent that there is a change in the rates or charges for the utility's regulated services above or below the rates or charges that would be in effect in the absence of such activities. §386.756(4) RSMo. 2000.

The MCFC states generally that its Complaint involves a violation of the Act. It alleges that MPS has committed two specific violations of the Act. The MCFC alleges that MPS offers HVAC

² HVAC services are specifically defined as the "warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning equipment." §386.754(2) RSMo. 2000.

³ A utility contractor is defined as "a person, including an individual, corporation, firm, incorporated association or other business or legal entity, that contracts, whether in writing or not in writing, with a utility to engage in or assist any entity in engaging in HVAC service, but does not include employees of a utility." §386.724(4) RSMo 2000.

services to its customers through affiliates without providing proper disclosures. The MCFC further alleges that MPS is directly engaged in providing HVAC services. The MCFC offers these two conclusory allegations; however, the only purported factual support for its allegations is the exhibit referenced in the Complaint. Upon inspection, this exhibit is devoid of any factual support for the MCFC's assertion that MPS is either providing HVAC services directly or through an affiliate.

The referenced exhibit involves an advertisement by MPS describing the cost and comfort advantages of installing an electric heat pump. It contains a comparison of features as between heat pumps and gas/LP furnaces. Finally, it points out that MPS will finance heat pump purchases through authorized PowerTechSM Dealers and that heat pump performance and satisfaction is guaranteed.

This exhibit does not establish that MPS is offering HVAC service. It does not contain statements showing that MPS is engaged in the warranty, selling, leasing, renting, installing, constructing, modernizing, retrofitting, maintaining or repairing of HVAC equipment. Significantly, the Complaint does not contain a statement of basic facts which, if true, would show that MPS is engaged in the business of providing HVAC services. Nowhere in the ad does it state that MPS is offering to sell heat pumps. To the contrary, the ad specifically states that heat pumps are available through sources *other than* MPS. The conclusory allegations of the Complaint are insufficient to state a claim under the Act.

Also, the heat pump advertisement does not demonstrate that MPS is engaged in providing HVAC service through affiliates. Again, the Complaint does not even contain the allegation that any particular business entity is affiliated with MPS. Significantly, the MCFC's Complaint does not contend authorized PowerTechSM Dealers are owned, controlled by or under common control with

MPS. To the contrary, these dealers are independent businessmen. Likewise, the advertisement does not establish that MPS is permitting utility contractors to use its name in ads or solicitations. Again, the MCFC's Complaint does not allege facts which, if true, would amount to a violation of the Act.

The MCFC's Complaint contains no additional factual assertions which purport to demonstrate a violation of the Act by MPS. The Act does not prohibit MPS from advertising the availability and advantages of heat pumps. The allegations in the Complaint are wholly conclusory. There are no specific factual allegations in the Complaint which, if true, would demonstrate a violation of the Act by MPS, and therefore, MCFC's Complaint fails to state a claim upon which relief may be granted by the Commission.

II. Failure to Comply with 4 CSR 240-2.070

In addition to failing to state a claim under the HVAC Services Act, the content of the MCFC's Complaint does not comply with the procedural requirements of the Commission rule governing the filing of a formal complaint. The Complaint fails to contain a statement as to whether the MCFC directly contacted MPS with regard to the subject matter of the Complaint, as required by Commission Rule 4 CSR 240-2.070(5)(E).

In paragraph 4 of its Complaint, the MCFC alleges that it was not required to discuss the allegations with MPS prior to filing its Complaint with the Commission, but MCFC does not state whether or not such contact took place. Upon information and belief, a representative of MCFC did not, prior to filing the Complaint, contact MPS about the subject matter of the Complaint.

The MCFC's compliance with this requirement is not one that it should be allowed to disregard without good cause. The purpose of the rule is to encourage parties to resolve differences,

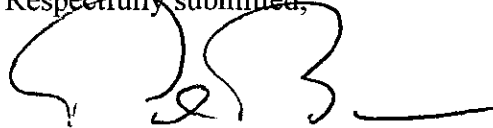
if possible, *before* resorting to the filing of a formal complaint. MCFC has provided no explanation for its disregard of the Commission's rules of procedure.

III. Lack of Subject Matter Jurisdiction

Lastly, the Commission lacks subject matter jurisdiction over this case. In paragraph 4 of its Complaint, the MCFC alleges that the Commission has jurisdiction of this matter pursuant to §§386.754 through 386.764 RSMo. 2000. Although the Commission certainly has statutory authority to administer and ensure compliance with the Act, the allegations made by the MCFC do not state facts cognizable under the Act, as more fully explained in Point I ("Failure to State a Claim") above. Therefore, the Commission is without subject matter jurisdiction over the matters to which reference is made in the Complaint.

WHEREFORE, for the reasons hereinabove stated, the Respondent, UtiliCorp United Inc., d/b/a/ Missouri Public Service, hereby requests that the MCFC's Complaint be dismissed pursuant to 4 CSR 240-2.070(6), or, in the alternative, the Respondent requests an order of this Commission compelling the MCFC to state more definitely and particularly the facts stating a claim under the Act, and for such other disposition or relief as the Commission deems appropriate under the circumstances.

Respectfully submitted,



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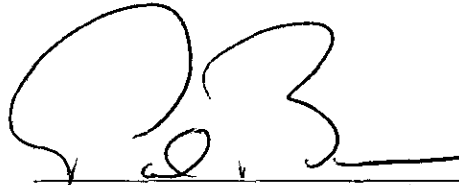
Certificate of Service

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 21st day of February, 2002, to:

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Missouri Public Service Commission
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Jefferson City, MO 65102

Mr. John Coffman, Acting Public Counsel
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