BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In re the Joint Application of UtiliCorp United, Inc. and Empire District Electric Company for authority to merge Empire District Electric Company with and into UtiliCorp United Inc. and, in connection therewith, certain other related transactions.	)))))))	Case No. EM-2000-369

INITIAL POST-HEARING BRIEF OF INTERVENOR PRAXAIR INC.

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad Mo. Bar #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR PRAXAIR INC.

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COMES NOW Intervenor Praxair Inc. (Praxair) and submits its Initial Brief in this proceeding. Praxair took positions on a limited number of issues in this proceeding and this brief will address only those issues on which Praxair took independent positions. On other issues, Praxair 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. PRAXAIR'S GENERAL POSITION.

Praxair is an industrial customer of the Empire District Electric Company (Empire) utility. If not Empire's largest electrical customer, Praxair is among the largest.

Praxair is a publicly traded company that manufactures industrial gasses at processing facilities throughout the United States and the world.

As a publicly-held company, Praxair would not ordinarily interfere regarding mergers by other shareholder-owned enterprises. However, as a major ratepayer of Empire, Praxair 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 Empire's ratepayers, Empire respectfully suggests that standard has not been met by the proposal before the Commission, particularly the proposed "Regulatory Plan" that has been proposed by the joint applicants.

Praxair's position is that the proposed "Regulatory Plan" is particularly offensive and should be rejected. The Regulatory Plan is clearly proposed as a financing vehicle for the proposed merger. Tr. 243, ll. 1-6; Tr. 372, ll. 1-6. The Regulatory Plan represents an attempt by both companies, but principally UtiliCorp United (UCU), to better its competitive positions in unregulated aspects of the combined business operations. Tr. 164, ll. 6-8, 16-21. Praxair's major concern is that the function of the Regulatory Plan is to cause Empire's ratepayers (and, for that matter, Missouri Public Services' ratepayers) to fund that attempt, by over $270 million. In Praxair's vision, 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, involv-

ing subsidized sales or repairs of gas or electric appliances by regulated gas or electric utilities.

This package highlights the clash that the Commission is likely to see in the future between drastically differing 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, garbed in "competitor" clothing, and jockeying to gain competitive advantage in a landscape of customer choice, but attempting to force their embedded and unchallengeable monopoly services and captive customers to pay the cost of that jockeying.

As demonstrated in this case, UCU both wants 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 gained by acquisition of Empire's generating assets is financed by the captive ratepayers of Empire.[2/] Obviously this Regulatory Plan should be rejected.

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

[2/]Praxair is a customer of Empire 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.

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 Empire. For that matter, it has been shown as clearly detrimental to the ratepayers of Missouri Public Service. Although applicants' intentions about going forward with the merger without the Regulatory Plan have been "fuzzy," the economics of the deal appear to depend on the approval of the Regulatory Plan as a financing vehicle. Praxair believes the Regulatory Plan should be rejected. If that causes the merger to fail, then the merger will have been revealed to have been poorly structured and uneconomic from the beginning.

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 consistently 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. Many other parties have made a convincing case that the proposed merger has been constructed in a way that is so basically flawed that it cannot be saved by conditions. Praxair does not contest such a conclusion, but its principal focus has been the offensive Regulatory Plan.

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 $31 million, during this same period,[3/] it is literally unconscionable that the applicants propose to maintain rates at what will become unjust and unreasonable levels.

Mr. Myron McKinney appeared to recognize that decreases in cost of operation, without an accompanying rate reduction, was

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[3/]Exhibit 27.

a detriment to the ratepayers. Tr. 128. Just as shareholders might be detrimentally affected by regulatory lag in a milieu of rising costs unless rates are increased, ratepayers are detrimentally affected by decreasing costs unless those decreasing costs are translated into reduced rates. As Mr. Meade of Praxair stated:

> [W]e believe a utility's obligation is to operate in the most economical manner possible consistent with safety and good practice. If a business combination results in savings, those savings should be manifest in reduced costs of operations. Those reduced costs should be returned to the ratepayers in lower rates on as current a basis as possible.

Meade Rebuttal, Ex. 500, p. 20. Mr. Meade also suggested a means to achieving this objective:

> The Commission could use a "show cause" proceeding. In this proceeding the utility would be required after a comparatively short period of time to come before the Commission and show cause why its rates should not be reduced by an amount corresponding to the claimed savings that were asserted in the merger proceeding. This would assure the ratepayers that actual cost savings that had been obtained would be passed through to them and the utility's claims regarding savings could be tested.

Meade Rebuttal, Ex. 500, p. 20. He also suggested a series of automatic rate decreases. Id., at 21.

A rate "freeze" is particularly inappropriate in a case in which the utility is experiencing continued growth and increased profitability in its operations. Mr. McKinney stated that the growth in Branson, Missouri had slowed, but was continuing and that growth "is becoming more profitable with time." Tr.

132, ll. 19-20. Indeed, as he stated, "It's those facilities that we built are filling in that [it's] becoming more profitable." Tr. 132, ll. 21-22.

Empire has been benefitted by a portion of its service area that has been experiencing significant growth over the past few years. While Mr. McKinney indicated that the growth was slowing, he did not indicate that the trend was reversing. Thus, all other things being equal, growth in revenue coupled with the effect of depreciation, would result in a reduction in rates were it not for the merger. Since all things cannot be held equal, and Empire believes that it will need a rate case in the near term, it would be detrimental to the ratepayers to impose (even if such could be legally done) a rate "freeze" in a time that revenues would be increasing.

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.

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. This is precisely what Mr. Meade of Praxair has requested.

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 invest-

ment. "[I]t would be very difficult to imagine," he testified, "moving forward not understanding whether you were going to earn a return on $270 million of investment . . . ." Tr. 372, ll. 2-6. As a private concern, Praxair 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; Praxair 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.

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 Empire's rates during the period of the "freeze." "In a practical sense," testified Mr. Green, it seeks to bind the Commission and the Commission's Staff. Tr. 356, ll. 21-23.

This objective 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 millions of dollars of reduced costs would otherwise flow to ratepayers of Empire, Joint Applicants would deny this Commission, its Staff, the Public Counsel, or members of the public access to the Commission to bring rates down.

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 Praxair 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 Praxair. 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, Praxair 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. 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. Tr. 372. So be it.

As has been seen in the testimony and amply demonstrated in this record, UCU is simply trying to get Empire ratepayers to fund its acquisition premium. Indeed, it is mildly surprising that UCU is as forthright about its intentions. Virtually all the original $270 million would be recovered from the Empire ratepayers.

Mr. Green characterizes this as wanting a "return on his investment." Tr. 372. Mr. Green is free to do what he will with his money or that of his company. Praxair believes it has better uses for its shareholders' funds than to fund UCU's purchase of an adjacent utility. We have better uses for **our** shareholders' 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 Empire ratepayers had been questioned whether they wanted to pay nearly $270 million in rates that are higher than they should be so that UCU can expand its already far-flung utility empire. With respect, Praxair declines the offer.

Mr. Meade stated Praxair's position:

> [W]hen one utility pays a premium above book for the assets or stock of another utility, the difference in broad terms represents an "acquisition premium." Here the Applicants have sought through a series of mechanisms to charge the cost of that acquisition premium to the ratepayers, including Praxair, and we oppose that proposal.

Meade Rebuttal, Ex. 500, p. 18. Praxair's objection went to the very foundation of the regulatory structure, Meade stated:

> [T]he service obligation of a public utility includes the responsibility to provide its services to the public at the lowest reasonable cost. As investor-owned utilities, decisions regarding business structure and business ownership, including mergers, are stockholder decisions. However, those decisions are also the **responsibility** of the shareholders who should be fully informed and accept the costs associated with those decisions. Since the business structure of a public utility should be that which will result in the lowest reasonable cost to its ratepayers, mergers should not be at the cost of the ratepayers but at the cost of the shareholders.

Meade Rebuttal, Ex. 500, p. 18. This does not mean that UCU cannot merge or grow its business by acquisition, but, said Mr. Meade:

> [w]hen industries in competitive markets merge, they typically do so to reduce costs, gain access to additional lines of business, or to additional markets. They recognize that such combinations must result in true benefits since their customers have alternatives and will simply take business to remaining competitors. I believe a similar view is important for utility mergers as we move slowly but definitely into an era of customer choice.

Meade Rebuttal, Ex. 500, p. 19. He requested that all such direct and indirect attempts to recover a premium on the transac-

tion, however "camouflaged or characterized," should be rejected. Meade Rebuttal, Ex. 500, p. 19.

Praxair is entitled to safe and adequate electric service from Empire 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.

E. The "Stealth" Rate Increase Should Also Be Rejected.

The Joint Applicants sought what Mr. Meade characterized as a "stealth" rate increase. Like the B2 Stealth Bomber that seeks to avoid detection by flying "under the radar," the Joint Applicants sought predetermination of a number of issues that are part and parcel of a rate increase case. Mr. Meade testified:

> A merger between these two companies should stand on its own economics at the time the companies performed their due diligence and signed their merger agreement. The economics of the merger either make sense for the entities as of that time or they do not. Subsequent speculation about a rate increase, while perhaps a consideration for the surviving entity's management, do not appear to me to be appropriate considerations in connection with the consideration of the merger and its impact on ratepayers. The merger should have been evaluated by the respective corporations without regard to a speculative future increase and as a result, that portion of the proposal should be disregarded.
>
> Further, Missouri provides a comprehensive procedure for the submission by a utility of a proposed rate hike. In that procedure, there is ample opportunity for Commission Staff, Office of the Public Counsel, and

> other interested intervenors to thoroughly investigate and test the utility's claims for additional revenue entitlement. In this case, attention properly turns to the impact of the merger on ratepayers and typical rate case issues are properly not before the Commission. Seeking to obtain predetermination of numerous important aspects of a rate case decision as these applicants have done while in the context of a merger case is contrary to this procedure and should be rejected.

Meade Rebuttal, Ex. 500, pp. 14-15. As a large interruptible customer of Empire, Praxair believes that these issues should be reserved to a rate case where they may be thoroughly examined in the public view.

Empire's witness Robert Fancher took exception to Mr. Meade's characterization of the "stealth" aspects of the "rate case within a merger." Tr. 921, l. 3. However, through cross-examination he acknowledged that: (a) Empire had not filed a rate increase or complaint case (Tr. 921); (b) had not provided notice of any type to its customers in its service area of the implications of the rate case decisions that Empire was asking the Commission to make (Tr. 921, ll. 12-18); (c) had not set out any "bill stuffers" advising customers that rates might increase as a result of certain decisions made in the "pre-moratorium" rate case (Tr. 912, ll. 19-25); (d) that there had been no formal mailing or notice to affected customers about the proposed cost of the State Line Combined Cycle plant (SLCC) for which authorization had been sought (Tr. 922, ll. 1-8); (e) that they had no notice of the depreciation rates and the various other "pre-moratorium" rate case decisions that Joint Applicants were

seeking the Commission to make. Tr. 922, ll. 9-22. The absence of these notifications is why the "pre-moratorium" rate case determinations that were sought were properly characterized by Mr. Meade as a "stealth" rate case.

Mr. Fancher appeared to argue that all the Joint Applicants were seeking was how the plant investment might be treated. As regards that determination, he needed merely to look to the public service commission law. "We want the Commission to determine that that [SLCC] will be included in the pre-moratorium rate case when that is concluded," (Tr. 923, ll. 19-21) testified Mr. Fancher. Of course, Empire put forward no evidence of operation, no evidence of cost, no evidence of prudence or planning, and no evidence of justification for the expenditure. Empire just wanted the Commission "to determine that [SLCC] will be included . . . ." Tr. 923, ll. 19-21. "At what value, sir," Mr. Fancher was asked. Tr. 923, l. 22. He responded "[a]t whatever the value is at that time." Tr. 923, l. 23. He even disclaimed knowledge of the current investment in the plant at the time of hearing. Tr. 923, l. 25.

It would be difficult to develop a more clear attempt to entice the Commission into some statement in its order that could then later be seized upon by the utility to claim pre-approval of the plant "[a]t whatever the value is at that time." This is not a "blank check" proceeding, nor should the Commission fall into the trap of making such determinations well ahead of the need for them to be made. There will be questions aplenty

when the rate case finally arrives. There is no need to anticipate problems nor aggressively seek them out. This attempt should be rejected.

Mr. Fancher acknowledged that an Empire ratepayer would have no way in the context of this case to know what those amounts would be. He acknowledged that "they would not know." Tr. 924, l. 7. Nor would it be possible for a ratepayer to find out those amounts in the context of this case. Tr. 924, l. 11. For that matter, ***there is no way in this case that the Commission could know or determine what it was being asked to pre-approve.***

That is Praxair's complaint about this process. It is misplaced in this merger proceeding. As Mr. Meade stated, Praxair's rates may be increased:

> [B]ut that would only be as a result of a deliberate and full proceeding under the applicable laws and Commission procedures complete with adequate opportunity to investigate, obtain evidence and submit alternative considerations and appropriate information about our operations for the Commission's consideration. We understand the Applicants' proposal to essentially seek "preapproval" of such rate changes and we oppose that proposal as inappropriate in the context of a merger proceeding.

Meade Rebuttal, Ex. 500, p. 17. This "stealth rate increase" should be rejected.

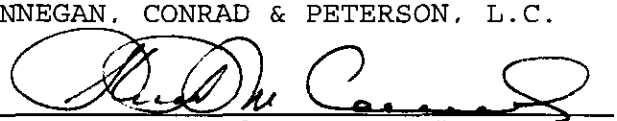
III. CONCLUSION.

This merger and its Regulatory Plan are demonstrably detrimental to and for Empire ratepayers. UCU and Empire have concocted a scheme to transfer wealth to the stockholders of Empire through a substantial acquisition premium of over $270 million, then have the Empire (and possibly the MoPub) 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 Regulatory Plan scheme should be rejected. If rejection of the Regulatory Plan 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 Praxair prays that the Commission reject the proposed Regulatory Plan as detrimental to the ratepayers of both Empire and MoPub and contrary to the public interest.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



Stuart W. Conrad Mo. Bar #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR PRAXAIR INC.

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.

Stuart W. Conrad

Dated: October 31, 2000