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**

INTERVENOR AG PROCESSING INC
APPLICATION FOR REHEARING

COMES NOW Intervenor Ag Processing Inc. a Cooperative (AGP) and pursuant to Section 386.500 RSMo. seeks rehearing of the February 26, 2004 Second Report and Order herein on the grounds that such Report and Order is unconstitutional, unlawful, unjust, unreasonable, arbitrary and capricious for the reasons set forth herein:

1. The Commission has failed to comply with the mandate of the Missouri Supreme Court and the Circuit Court in that it has failed to consider the totality of all of the necessary evidence in the context of the acquisition premium. In *Ag Processing v. Public Service Commission*, 120 S.W.3d 732 (Mo. *en banc* 2003) the Missouri Supreme Court stated:

> The judgment is reversed, and the case is remanded. The circuit court shall remand the case to the PSC to consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public. ***Upon remand the Commission will have the opportunity to reconsider the totality of***

> ***all of the necessary evidence to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and SJLP***.

Id., at 737. The Commission also failed to reconsider the totality of all of the necessary evidence to evaluate the reasonableness of a decision to approve the merger because it failed to provide the parties to the case with even a minimal opportunity to provide such evidence. In this failure it denied the parties with due process as guaranteed to them by the United States and Missouri Constitution.

2. The Commission appears to have opened the record for a hurriedly-filed position statement by one of the Applicant utilities. A series of statements were filed by Aquila at roughly 5:00 p.m. on February 25, 2004. By 9:00 a.m. the following morning the Commission already had an order prepared referencing the prior evening's filing and referring to it as an event that had occurred since and following the entry of the original reversed order. It is patently unfair and not in accordance with a fair procedure that the record should be opened for one party to provide unsolicited position statements which the Commission then hurriedly considers in an order issued less than 24 hours later while at the same time denying other parties to the proceeding an opportunity to respond to the filing or even to receive it by service or to provide additional evidence of other events that have intervened in the period since the original reversed order was entered. The Commission's process in this case has employed an unfair and one-sided procedure that denies

other parties due process rights that are guaranteed to them by the United States and Missouri Constitutions and denies them an opportunity to even present evidence of changes in circumstances and intervening events that have occurred since the original reversed order was entered.

3. While the reviewing courts were bound to review the basis of the Commission's now reversed order under Section 386.510 RSMo. the Commission on remand was not. It is obligated pursuant to the mandate and remand to consider all necessary evidence including the positions and contentions of the other parties to the proceeding. In adopting its short-cut procedure and denying these parties a hearing or other opportunity to show changes in circumstances, the Commission has predetermined the result of its decision before it adopted a procedure to accomplish that result. This procedure is basically unfair and inconsistent with the Commission's obligations to base its orders upon all necessary evidence and to consider all relevant factors in its decisions. Denying opposing parties an opportunity for a hearing is the most basic denial of due process rights imaginable, when the identity, location and interest of those parties in this proceeding was well known to the Commission.

4. Under the holding in *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 596 (Mo.App. W.D. 1993), the Commission should consider events that have occurred following the issuance of the original reversed order.

> [I]f the PSC order authorizing the certificate to MoGas is determined to be invalid, it

> can be ordered to be set aside and the cause remanded to the PSC. If upon remand MoGas was not successful in obtaining authority to operate its pipeline, the PSC would have authority to seek to enjoin its operation. *Public Serv. Comm'n v. Kansas City Power & Light Co., 325 Mo. 1217, 31 S.W.2d 67 (Mo. banc 1930).* ***However, this is not to say that the completion of the project, under authority of the PSC that is later set aside on appeal, cannot be taken into consideration in determining the public interest in the event of remand. Orders of the PSC are made on the basis of the public interest. [Citing Consumers]. The PSC would be entitled to consider any relevant evidence.***

Since "[o]rders of the PSC are made on the basis of the public interest," the Commission should not be insouciant to the changes in Aquila's financial picture that have occurred in the past four years. However, the Commission's precipitous action has done this selectively by picking and choosing only those items of evidence and subsequent occurrence that would support a finding that the combination continued to be in the public interest without providing even the most basic notice and opportunity to be heard, much less a reasonable opportunity for opposing parties to provide evidence regarding other events.[1/] The Commission erred in establishing a procedure that prevented other parties from presenting this important evidence for the Commission's consideration and it failed to consider and address

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[1/] It deserves only brief note that the Commission's own Staff, now so apparently purposed on saving the merger, testified uniformly in the original EM-2000-292 hearings that the merger was a bad deal for the ratepayers, a bad deal for the shareholders, a bad deal for the public generally and quite likely a bad deal for Aquila ***completely independent of the issue of the acquisition premium proposed by Aquila.***

all relevant circumstances including those that have occurred since the entry of the original reversed order. *State el rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. *en banc* 1979) ("UCCM").

5. Under *UCCM*, the Commission should have provided the parties with a reasonable opportunity to bring forward and produce any relevant evidence of public detriment and the impact on the public interest that has surfaced in the past four years including significant changes in Aquila's financial condition.

6. At page 8 of the February 26, 2004 Second Report and Order, the Commission states:

> With the Commission having decided that UtiliCorp will not be allowed to recover an acquisition premium from its ratepayers, the existence of an acquisition premium cannot alter the Commission's evaluation of whether the merger would be detrimental to the public.

This statement makes clear that the Commission completely failed to comply with the Supreme Court's mandate that it should ***"reconsider the totality of all of the necessary evidence to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and SJLP."*** *Ag Processing, supra,* at 737. Instead the Commission has simply looked at the question of the acquisition premium which completely ignores the Court's directive.

7. The Commission's arbitrary and precipitous procedure has denied opposing parties a reasonable opportunity to produce evidence that in the interim might well indicate that the proposed transaction now has a far stronger tendency to injure

the public welfare without regard to the inclusion or exclusion of the acquisition premium and, indeed, ignores intervening events that establish that damage and detriment has already occured from the transaction. The Commission has recently held that "[t]he Commission should look at the reasonableness of the risk of the increases" and should give due consideration to the law that "[n]o one can lawfully do that which has a ***tendency*** to be injurious to the public welfare."[2/]

8. Having been provided by the Supreme Court with an opportunity to "reconsider all the necessary evidence"[3/] whether in the present circumstances the reasonableness of a decision to allow these two utilities to merge is still reasonable and is not detrimental to the public interest, failing to provide a full and fair consideration of these intervening facts violates the due process rights of all the parties. *State ex rel. Fischer v. PSC*,

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[2/] *In re Application of Aquila*, Case No. EF-2003-0465 (February 24, 2004), slip opinion at 7, *quoting from State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo. *en banc* 1934) (emphasis in original).

[3/] *Ag Processing, supra,* at 737.

645 S.W.2d 39 (Mo. App. 1982).[4/] These facts would include without limitation:

- Changes in the financial condition of Aquila, Inc. wrought by its unregulated activities that would argue against the public interest being served by merging a healthy Missouri public utility with one that is below investment grade and financially imperiled.

- Changes in the financial ratings of Aquila, Inc. due to its financial condition that could create a tendency to cause a detrimental impact upon the ratepayers in the St. Joseph Light & Power service territory.

- Any changes in the financial condition of Aquila that has occurred since the reversed order was originally entered that would detrimentally affect the ability of Aquila as a surviving corporation to make

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[4/] In *Fischer*, the reviewing court said:

> ***This court has authority to examine acts of the Public Service Commission for due process violations.*** *State ex rel. Chicago Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791, 796[2] (Mo. banc 1958).
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> Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. *Tonkin v. Jackson County Merit System Commission*, 599 S.W.2d 25, 32-33[7] (Mo.App.1980) and *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37, 39-40[2]] (Mo.App.1962). ***One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.*** *Mercy heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J.Super. 412, 330 A.2d 370, 373-374[7](1974) (Bolded italics added).

good its obligations to the retirees and pensioners of the utility that is proposed to be acquired.

- Changes in impact on Aquila's MPS ratepayers since Aquila's liquidity and its availability of funds to provide safe and adequate service is certainly affected by the amount of the acquisition premium that ***was*** paid, whether or not it is currently sought to be recovered.

- Any other changes in the conditions surrounding Aquila, changes in its cash positions, changes in its business plan and related other matters that would negatively affect the reasonableness of a decision to approve a merger between Aquila and St. Joseph Light & Power Co. as viewed from the perspective of the entire public interest including that of the SJLP shareholders.

9. The mandate of the Supreme Court was quoted above.

In addition the Court stated:

> While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger.

Ag Processing, supra at 736 (emphasis added; footnotes omitted). The Commission has refused to consider the positions and other evidence that could have been offered by opposing parties through its precipitous procedure as surely as it refused to consider the acquisition premium that caused the Supreme Court to reverse the

original order. The Commission seems intent on approving this merger without regard to the public interest and without the consideration thereof.

10. Despite its remand to the Commission, this matter was still a contested case as defined by law. The parties to the case were and are entitled to due process and reasonable notice of proceedings in the case. Without regard to these rights the Commission, apparently on its own motion, chose to reopen the record to receive a position statement of one of the parties, yet failed and refused to even offer the other parties an opportunity to submit their position statements for the record before precipitously issuing its February 26, 2004 Second Report and Order. These statements were unsworn and are inadmissible save as pleadings yet the Commission failed and refused to permit other parties even the minimum time necessary under its own rules to receive responses before precipitously adopting its order. This process clearly is arbitrary and capricious and violates the other parties' due process rights.

11. In its February 26, 2004 Second Report and Order, the Commission states:

> The Commission adopts all the Findings of Fact from its initial Report and Order except as modified in this Second Report and Order.

Second Report and Order, p. 3. In doing so the Commission seriously errs in that it has purported to incorporate Findings of Fact that were based upon a record in which a regulatory plan including recovery of an acquisition premium was not only pro-

posed by the Applicants but was addressed and related to the testimony of many of the parties and certainly the Commission Staff. Whether or not Aquila has the right in this proceeding without a motion to reopen the record to simply interpose position statements at will, Aquila cannot by so doing correct the numerous claimed-to-be findings of fact that the Commission made in its earlier now reversed order, nor can it modify the testimony that other parties had submitted to the Commission and upon which cross-examination had been conducted. Nor can the Commission modify those parties' testimony, positions, briefs or other materials that were all submitted in the context of a then-pending application for merger and recovery of an acquisition premium. To simply allow one party to unilaterally abandon its position without permitting other parties to react and then continuing to base its decision on the evidence and record that was developed in an entirely different factual circumstance all without permitting them the opportunity to resubmit their respective positions and testimonies violates the most basic principles of fairness and fundamental due process considerations.

12. In its February 26, 2004 Second Report and Order, the Commission states:

> The Commission adopts all the Findings of Fact from its initial Report and Order except as modified in this Second Report and Order.

Second Report and Order, p. 3. Those findings of fact from the earlier now reversed order include findings of fact as to the credit standing of UtiliCorp as compared to SJLP. These findings

of fact are expressly unchanged and are readopted by the Commission in its precipitous Second Order. However, less than two days prior the Commission adopted a Report and Order in Case No. EF-2003-0465 recognizing the precarious credit standing of Aquila and recognizing explicitly that it was a below-investment-grade-utility. These actions stand in sharp contrast to each other and make clear that for ***part*** of its Second Report and Order the Commission was attempting to address the original record while in other parts of the same Second Report and Order the Commission takes into account current activities and filings of Aquila, namely its abandonment of its claim for an acquisition premium.

13. In failing to provide a fair opportunity to consider all relevant factors on a current basis and providing a fair opportunity to all parties to submit evidence of the current status of these companies, the Commission has completely failed to make a current determination of the public benefit or detriment that it is required to make under Section 393.190.1 and as it is commanded to do by the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo. *en banc* 1934).

14. Moreover, by failing to provide an opportunity to consider all current relevant factors while selectively considering some current factors, the Commission fails to properly apprehend and comply with the Missouri Supreme Court's decision in the very case that directed this remand, namely *Ag Processing,*

supra. The Commission wholly fails to apprehend that there was nothing particularly unique about the $92 million acquisition premium such that failure to consider it required reversal of the earlier order. Instead, the Supreme Court ruled:

> The PSC erred when determining whether to approve the merger ***because it failed to consider and decide all the necessary and essential issues***, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.

Id., at 736 (emphasis added). Here the Commission is committing the same error, this time not with the acquisition premium, but with the failure to consider -- indeed the complete failure to even consider ***whether*** to consider -- events that have occurred in the nearly four years since the merger application was originally filed. One of the reasons for the original now reversed decision included:

> . . . strengthening of the competitive position and financial condition of the combined entity would support an investment grade bond rating; (3) expanded asset base, increased revenues and improved cash flows would increase access to capital markets on more reasonable terms; and (4) the merger would result in significant synergies from generation, economies of scale, and efficiencies realized from the elimination of duplicate corporate and administrative services, ultimately resulting in lower operational costs translating into lower rates for utility service.

Id., at 736. Certainly no one could argue that the competitive positions of the two utilities have been strengthened and an investment-grade rating for Aquila is only a distant memory. Improved cash flows have not occurred; indeed Aquila's cash flow

situation is under severe stress and its access to capital markets is certainly restricted, having to prepay as it now does, for many of the items that it needs to conduct its business including natural gas electric generating fuel and transportation of natural gas. Finally, Aquila has, even with its most recent unsolicited filings in this case, completely abandoned its earlier contentions that "significant synergies" would result from the combination. In fact, the above quotation makes clear that the very underpinnings of the original reversed decision have drastically changed in the four years since the original merger was sought. Commission decisions operate prospectively only. *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 353 (Mo. 1951). Since Commission decisions operate prospectively, the public interest is ill-served and, indeed, disserved, by basing a decision upon facts that are four years old and ignoring current realities -- even when those realities form the basis of a Commission decision issued on the same company not 48 hours earlier.

15. It is amply clear that, if the merger application were brought before the Commission as a new matter today, given Aquila's financial condition, the merger would quickly be rejected as contrary to the public interest including the public interest of the ratepayers and shareholder of SJLP. Recognizing these current events (that they are well known to the Commission cannot be denied given its February 26, 2004 order in EF-2003-0465), the Commission determined that it would "support earlier

Commissions" by ratifying this unfortunate decision even though facts and circumstances have radically changed. To do so not only does not protect the public interest, it affirmatively damages the interest that the Commission is charged with protecting by Section 393.190.1 and governing law.

16. That in all other respects the Report and Order is not supported by competent and substantial evidence upon the whole record and is contrary to the competent and substantial evidence of record. It therefore is unlawful and unreasonable an in violation of Missouri law.

WHEREFORE Intervenor AGP prays that rehearing of the Second Report and Order be granted and that, upon such reconsideration or rehearing, that the Second Report and Order be set aside and that proper procedures relating to a remand of this matter to the Commission in compliance with the mandate of the Missouri Supreme Court be implemented.

Respectfully submitted,

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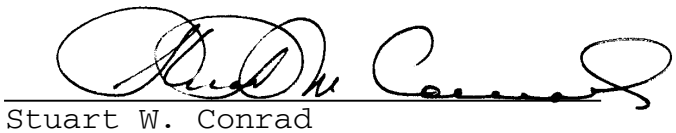
ATTORNEYS FOR AG PROCESSING INC. A COOPERATIVE

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: March 5, 2004