Martha S. Hogerty
Public Counsel

State of Missouri

Roger B. Wilson
Governor

Office of the Public Counsel
Governor's Office Building
200 Madison, Suite 650
P.O. Box 7800
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: http://www.mo-opc.org
Relay Missouri
1-800-735-2966 TDD
1-800-735-2466 Voice

November 21, 2000

FILED[3]
NOV 21 2000
Missouri Public Service Commission

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

RE: UtiliCorp United Inc. and Empire District Electric Company
Case No. EM-2000-369

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Reply Brief of the Office of the Public Counsel.** Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

John B. Coffman
Deputy Public Counsel

JBC:jb

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[3]
NOV 21 2000
Missouri Public
Service Commission

In the Matter of the Joint Application of	)	
UtiliCorp United, Inc. and the Empire	)	
District Electric Company for Authority to	)	
Merge the Empire District Electric	)	**Case No. EM-2000-369**
Company with and into UtiliCorp United	)	
Inc. and, in Connection Therewith, Certain	)	
Other Related Transactions, Filed	)	

REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

John B. Coffman (#36591)
Deputy Public Counsel

Douglas E. Micheel (#38371)
Senior Public Counsel

November 21, 2000

118

I. INTRODUCTION

In this reply brief, the Office of the Public Counsel (Public Counsel) responds to arguments and mischaracterizations of the law and of the record that are contained in the initial briefs of the merger applicants, Utilicorp United, Inc. ("UCU" or "Utilicorp") and Empire District Electric Company (Empire)(collectively, "Joint Applicants"). An attempt has been made to avoid duplication of arguments made in the Initial Brief of the Office of the Public Counsel, which adequately covered the most important issues of this case. Any failure of this reply brief to address an argument made in any initial brief in this case should not be construed as agreement or acquiescence.

As the Commission reviews the all of the arguments made in this matter, there is one overriding fact that should be kept in mind—this is a merger case and nothing more. There is no dispute among the parties regarding the fact that the Commission should be making a decision in this case completely within the confines of Section 393.190.1 RSMo. 1994. The Commission's legal authority is thereby limited. The Joint Applicants' so-called Regulatory Plan is not contained within the four corners of the May 10, 1999 "Agreement and Plan of Merger." (Joint Application, Appendix 4). The Commission must judge the proposed merger itself (without the Regulatory Plan) on its own merits. Attempts to lure the Commission into making (or prejudging) rate case issues in this merger case by adopting the Regulatory Plan should be rejected as unlawful, unprecedented, and unwise--as well as detrimental to the public interest.

II. BURDEN OF PROOF

The parties apparently all agree regarding the standard that the Missouri Commission must apply to merger applications--the well-established "not detrimental to the public" standard first annunciated by the Missouri Supreme Court in 1934 and consistently applied ever since. In other words, if the Commission believes that there would be a detriment to the public resulting from the proposed merger, approval must not be granted.

However, the Joint Applicants' Initial Brief seriously misstates the law with regard to who bears the burden of proof to show that this standard has been met in a merger application case:

> The Commission must approve the proposed merger between UtiliCorp and Empire unless it can be shown by competent and substantial record evidence in the record that the merger would be detrimental to the public interest.
>
> Joint Applicants' Initial Brief, p. 3.

This statement is quite simply wrong. It incorrectly suggests that the Joint Applicants do not bear the burden of proof in a merger case. No court case supports this position. It has always been understood that applicants petitioning the Commission for merger approval bear the burden of proof. If fact, as a general rule, all applicants initiating a case before the Commission (whether it is a request to increase or decrease rates, a request to approve a transaction, or a request for relief in a complaint case) bear the burden of proof. The Commission's own rules recognize this, as they require a merger application to be accompanied with the reasons that a proposed merger is not detrimental to the public. 4 CSR 240-2.060(7)(D).

The consequences of the fact that the Joint Applicants bear the burden of proof are such that, if the Commission is unsure about whether a merger would be "not detrimental" to the

public based upon the record, then it must rule against the merger. In other words, if the weight of the evidence is equally balanced, the applicants lose.

Parties opposed to a merger proposal have never been required to bear the burden of persuading the Commission that a detriment would result. That would actually be contrary to the holding in State ex rel. St. Louis v. Public Service Commission, 73 S.W.2d 393 (Mo. 1934), which is cited by the Joint Applicants. In fact, the reason that the standard has been so awkwardly worded as a negative as a result of that case ("not detrimental") is that the Missouri Supreme Court recognized that merger applicants must actually prove a negative in order to prevail. The Joint Applicants must prove a negative in this case in that they must show that no detriment would accrue to the ratepaying public as a result of the proposed merger.

Even if the "burden of production" (also known as "the burden of going forward with the evidence") is shifted to adverse parties at some point in the analysis, the "burden of persuasion" still rests with the merger applicants. Missouri courts have stated that plaintiffs in litigation generally have the responsibility to prove negative averments unless evidence relevant to the issue at hand is peculiarly within the knowledge and control of one party. Kenton v. Massman Const. Co. (Kenton) 164 S.W.2d 349 (Mo. 1942). In utility cases before the Commission, most documents and records relevant to the issues are uniquely within the utility's control and so it would not be appropriate to shift the burden of persuasion in this case. Kenton; See also Kennedy v. Fournie, 898 S.W.2d 672 (Mo. App. E.D. 1995). (Transfer denied, June 20, 1995). Public Counsel concurs with the thorough analysis of the burden of proof in merger cases contained in the Initial Brief of the Staff. Ibid., pp. 12-15.

III. DETRIMENTS OF THE MERGER ITSELF

The Joint Applicants generally acknowledge that the word "public" in the "not detrimental to the public" standard refers to the utility consumers (ratepayers). (Joint Applicants' Initial Brief, p. 3. With this standard in mind, it is important to understand that any benefits to ratepayers that have been incorporated by the Joint Applicants' into their proposed merger will be merely incidental. It is the Joint Applicants' goal and duty to attempt to maximize shareholder value through this proposed transaction. The Commission, on the other hand, has a duty of its own in this matter – to protect the public from any detriment that would occur from such a proposal. The Commission's principal interest is to serve and protect ratepayers. State ex rel. Capital City Water v. PSC, 850 S.W.2d 903, 911 (Mo.App. W.D. 1993).

Surprisingly, the Joint Applicants never critique or rebut in any direct way the evidence put forth by Public Counsel regarding the substantial detriments of the merger itself. The Joint Applicants virtually ignored the testimony of Public Counsel witnesses during the pendency of this case, choosing not to cross-examine them on the witness stand, and in briefs, acknowledging none of the evidence of merger detriments contained in the record, apart from addressing the cost/benefit analysis performed by the Staff of the Commission (Staff). But there are several other detriments that are found in the record.

The Joint Applicants misstate Public Counsel's position regarding merger detriments when it attempts to lump Public Counsel's arguments regarding merger detriments together with the Staff's arguments that merger costs will exceed merger benefits and then suggest that the positions of Staff and Public Counsel essentially make the same contentions. (UCU Initial Brief, pp. 4-5). The testimony of Public Counsel witnesses Mark Burdette and Ryan Kind, which

contain evidence of distinct detriments that are separate and apart from the substantial evidence of detriments placed into the record by the Staff. This Public Counsel evidence has essentially been unrebutted and is irrefutable. The Commission should look past the Joint Applicants' attempt in their initial brief to lump together the detriments identified by the various parties and address each of Public Counsel's unique contentions regarding merger detriments on their own merits.

Generally, the Joint Applicants attempt to confuse matters and dismiss all evidence of merger detriments by referring to provisions of the "Regulatory Plan" – the proposed five-year moratorium and the "promise" to adjust the cost of service by $1.6 million in the future. In response, it should be pointed out that these two provisions are not a part of the underlying merger itself and should not be confused with the issue of whether the merger itself is not detrimental to the public interest. Moreover, these provisions represent shareholder relief that would be unlawful for the Commission to grant in the merger case and which would actually aggravate the potential harm and detriment to the public, as discussed in Public Counsel's Initial Brief on pages 5 through 21 and 38 through 45.

A. Increased Financial Risks

The increased financial risks, which would increase the cost of debt charged to Empire customers is a detriment that would certainly result from the proposed merger (separate and distinct from the contention that merger costs will exceed merger benefits). As Public Counsel witness Mark Burdette explains, Empire has been placed on "Rating Watch-Down" by Duff &

Phelps Credit Rating Company. (Ex. 200, pp. 11-12). This change in the cost of debt would be a direct result of the merger, and unlike other identified merger detriments, cannot be mitigated by any merger conditions. (See Public Counsel's Initial Brief, pp. 22-24). The Joint Applicants have yet to even mention, much less rebut, this identified merger detriment.

B. Market Power

The Joint Applicants fail miserably to meet their burden of proof regarding the market power detriments of the proposed merger. To the extent that Joint Applicants address market power concerns at all, they essentially make two unsupportable claims: 1) evidence of increased market power as a result of the merger has not been presented in this case, and 2) if market power concerns are a serious concern, the Federal Energy Regulatory Commission (FERC) will take care of it. (UCU Initial Brief, pp. 52-53).

Incredibly, UCU states that "There has been no evidence presented which demonstrates that UtiliCorp will possess significantly more market power than it possesses today, prior to the merger." Id. at 52. To agree with this conclusion, the Commission would have to discount all of the competent and substantial evidence in the record on this issue by Public Counsel witness Ryan Kind, Staff witness Michael Procter, and City of Springfield witness Whitfield A. Russell. (Ex. 201HC, Ex. 713, Ex. 300). Public Counsel alone placed into the record, without objection, numerous pages of unrebutted evidence showing how UCU will definitely possess more horizontal, vertical, and retail market power as a result of the proposed merger. (Ex. 201HC, pp. 35-76).

The Joint Applicants' general denial regarding any market power implications from the proposed merger is all the more incredible in light of the acknowledgment that it is being driven by a desire to increase the market size of the merged entity in order to address the industry trend towards electric retail competition. (Joint Applicants' Initial Brief, p. 2). UCU witness Green acknowledges that UCU's strategy in the proposed merger is "simply a reflection of what will most likely be realized in any event as the industry transitions into a restructured, competitive environment." (Ex. 15, p. 4).

In an attempt to alleviate concerns about market power problems, the Joint Applicants note that the FERC is requiring that the Joint Applicants submit a revised competitive analysis six months prior to the commencement of its integrated operations, and then suggest that the FERC will have "the authority and the opportunity to deal appropriately with any concerns at that time." (Joint Applicants' Initial Brief, p. 53). However, FERC is only able to deal with wholesale market power issues, and does not typically address retail market power issues; instead, it leaves those important issues to be addressed by local public utility commissions. It would be a shame for a diffusion of regulatory responsibility to leave consumers vulnerable. When it comes to the detriments of retail market power, this Commission cannot expect the FERC to intervene in order to protect consumers. The Commission must act in this case.

With regard to Public Counsel's proposed condition regarding horizontal market power as adopted by the Commission in Case No. EM-97-515, the Joint Applicants simply state that the Commission has determined that "now is not the time" for a market power study to be performed. (UCU Initial Brief, p. 63). The Commission has not prejudged this matter and this statement confuses the issue of what the Commission should order in this case. The issue is not about when a study should be performed and Public Counsel's proposed condition does not ask

that UCU perform a study at this time. Rather, Public Counsel's proposed condition would merely require UCU to perform a market power study at the time any electric retail choice is adopted in Missouri. (Ex. 201NP, Attachment 1, Section a.1.).

With regard to Public Counsel's proposed condition that UCU be subjected to the same retail market provisions that were adopted by the Commission in Case No. EM-97-515, the Joint Applicants merely state: "No, for the reasons previously stated." (Joint Applicants' Initial Brief, p. 63). However, the Joint Applicants' Initial Brief contains no absolutely discussion of retail market power whatsoever. The only "reasons" stated in that brief with regard to market power conditions refer specifically to horizontal or vertical market power conditions. There is no discussion of retail market power impacts or retail market power conditions anywhere in UCU's Initial Brief, and so it is unclear what "reasons previously stated" could possibly be referenced.

C. Merger Costs Exceed Merger Benefits

Both the Joint Applicants and the Commission Staff performed analyses of the projected costs of the proposed merger and compared them to the projected benefits of the proposed merger, coming to very different conclusions. If the Commission is to give any weight to these analyses, it should recognize that the Staff analysis is by far the most thorough analysis. (Ex. 703, 713, 715, 716, 719). It is again important to recognize that it is the Joint Applicants alone that bear the burden of proving no detriment will impact the public as a result of the proposed merger. If the Commission finds these analyses to be equally persuasive, then the Joint Applicants have failed to meet their burden and the merger should be denied.

The Joint Applicants argue that the claims of other parties that rates will be lower absent the proposed merger involve speculation. (Joint Applicants' Initial Brief, pp. 6, 26). Of course, the cost/benefit analysis of the Joint Applicants is at least as speculative as Staff's analysis as it is based upon a variety of unreasonable and unsupportable assumptions and estimates. (See Public Counsel's Initial Brief, pp. 31-33).

The speculative nature of such cost/benefit analyzes is the reason that Public Counsel firmly believes that inaccurate tracking of merger-related savings is impossible. The success rate of such tracking in Missouri is terrible. The Commission at various times in the recent past has discussed such a tracking process; however, there has never been a successful implementation of such a tracking system. (Ex. 202NP, pp. 78-87).

Public Counsel has documented the numerous ways in which the Joint Applicants' proposal for tracking purported savings in this case is inadequate and unreliable. (Ex. 202NP, pp. 88-94). Overstatement of merger-related savings is likely to occur if a tracking system is implemented because Company has not even adjusted the 1999 budgeted amounts it uses for UCU and Empire in order to remove expenses and other items that have never been allowed for regulatory purposes. (Ex. 202NP, p. 88). If consumers are not required to reimburse Company for these costs, it is irrelevant whether they might increase or decrease over time. The inability of such a tracking system to identify and track savings that are specific solely to a merger leaves the Commission without competent and substantial evidence to back claims of merger savings. Further indication of why Public Counsel believes that any system of tracking "merger-related savings" is not feasible can be found in claims of the Joint Applicants which are contradicted by the evidence in this very case.

The Joint Applicants Initial Brief contains the following statement, which is contradicted by the evidence in the case, "MPS's activity, both in terms of volumes and margins, has reached a plateau, in part due to transmission limitations." (Joint Applicants' Initial Brief, p. 36). The evidence in this case actually shows a significant upward trend (Ex. 208HC, p. 18). This contradiction is further evidence of how unreliable the proposed tracking system would be if adopted.

Despite the fact that the Regulatory Plan is not contained within the Merger Agreement, the Joint Applicants repeatedly refer to a provision in that plan which they claim would "guarantee" a $3 million reduction in the cost of service for the Empire area in sixth year after completion of the pre-moratorium rate case. The Joint Applicants misleadingly suggest that this provision alone would assure that ratepayers receive a benefit. (UCU Initial Brief, pp. 4, 22-23, 43). It is important for the Commission to realize that the Joint Applicants are not promising to reduce rates. This fact was made perfectly clear during Chair Sheila Lumpe's cross-examination of witness Robert Green. (Tr. 394).

In fact, if costs exceed benefits by more than $3 million (as most reasonable estimates indicate), consumers will definitely be worse off under the Joint Applicants' regulatory scheme. The so-called $3 million "guarantee" is simply an invitation for the Commission to prejudge one element of UCU's future cost of service in isolation and then engage in classic single-issue ratemaking. Offsetting merger costs would then most likely overwhelm the $3 million reduction, and then rates would actually be increased for consumers!

With regard to the additional benefits from the proposed merger that are not reflected in the Joint Applicants' ten-year merger synergy calculations (Ex. 201HC, pp. 35-61), the Joint Applicants completely fail to respond to this evidence. On page 56 of the Joint Applicants'

Initial Brief, the question is posed about whether such additional benefits are reflected in its 10-year merger synergy calculations, but the question is never answered. Because it is obvious that the synergies which Public Counsel identifies are not included in the calculations, and the Joint Applicants are not able to deny the existence of these additional benefits; they only argue that it is their intent to "maximize savings". This simply begs the question.

Also, without the citation to any supporting evidence, the initial brief of the Joint Applicants states, "Empire's nonregulated businesses are self-contained entities which will not realize any significant benefit from the synergies resulting from the merger." Ibid., p. 50. This statement completely flies in the face of the evidence on the record in this case of millions of dollars in non-regulated synergies that would be generated for UCU as a result of the proposed merger. (Ex. 201NP, pp. 47-59).

The Joint Applicants have again failed to meet their burden of proof to show on the record that the public would not be impacted detrimentally as a result of the proposed transaction, because merger costs would more than likely exceed merger benefits, and any claim to the contrary is pure speculation.

IV. PROPOSED REGULATORY PLAN

A. Pre-Moratorium Rate Case

Public Counsel's Initial Brief explained how the Joint Applicants Request for Pre-Determination of RateMaking Issues in the Pre-Moratorium Rate Case would be unlawful. Ibid. at 7-8. Even if the Commission approves the ill-advised merger proposal in this case, the

Commission should reject the Joint Applicants invitation to pre-determine a variety of ratemaking components in a manner that would favor Empire. As Empire witness Fancher acknowledged at the hearing in this case (Tr. 930-931), this matter is essentially mute. On November 3, 2000, Empire filed a general rate case, Case No. ER-2001-299, accompanied by prepared direct testimony addressing the ratemaking components that the Joint Applicants want pre-determined in this merger case. Assuming the proposed merger is approved, this rate case would be the Joint Applicants "Pre-Moratorium Rate Case." On November 17, 2000, the Commission issued its Suspension Order and Notice, requesting filings to address the proper test year for use in the rate case and recommendations concerning true-up. Clearly, ratemaking issues, under the law and as a matter of sound regulatory policy, should remain in rate cases.

B. Five-Year Rate Moratorium

The Joint Applicants' Initial Brief asserts that the five-year proposed moratorium would not "prohibit Public Counsel or any other proper party from initiating a complaint with the Commission with respect to rates or any other subject." (Emphasis added) (Joint Applicants' Initial Brief, p. 11). This assertion is incorrect. Pursuant to the proposed five-year moratorium the Joint Applicants seek to prevent the Commission, on its own motion, from initiating a complaint case against the proposed Empire division of UCU. Sections 386.391.1 and 393.270(3) RSMo. 1994 clearly contemplate that the Commission, on its own motion, can investigate the reasonableness of any rates Empire, as a division of UCU would charge to its customers.

The Joint Applicants' proposed moratorium would prevent the Commission, a proper party, from directing its Staff to review Empire's rate levels for five years. UCU witness John McKinney admitted under cross-examination that the Commission could not on its own motion direct its Staff to review Empire's rates:

> Q. . . ., All you're seeking to bind is the Commission and the Commission Staff, is that correct?
>
> A. That is correct.
>
> Q. So in other words, if the Commission felt that – or the Commission Staff came to the Commission and said, Empire was overearning, can we file a complaint case, the Commission would be required to say no; is that correct?
>
> A. That's correct.
>
> Q. Or if the Commission felt perhaps that Empire was overearning and said – it could not direct its Staff to investigate the rates of Empire; is that correct?
>
> A. That's correct. . .
>
> (Tr., pp. 454-455).

It could not be more clear that the Joint Applicants would actually deny the Commission its statutory authority to review Empire's rates on its own motion.

As pointed out in Public Counsel's Initial Brief, the statutory scheme set-up by the legislature contemplates that the Commission when carrying out its statutory duty to review rate levels may act via its staff. Section 386.240 RSMo. 1994 provides:

> **Powers of the commission, how exercised.** – The commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission.

Approval of the Joint Applicants' requested five-year moratorium would prevent the Commission from properly utilizing its Staff to review Empire's rate levels for a period of five years. Such a moratorium on the ability of this Commission to exercise its regulatory authority over Empire's rates is directly contrary to this Commission's statutory authority.

Furthermore, from a regulatory perspective, agreeing to prevent the Staff from participating in any complaint case procedures for a term of five years would be extremely poor policy. The Staff brings a unique and different prospective to all proceedings and is an integral part of the regulatory scheme established by the legislature, and this perspective would be lost if Staff were told it could not participate in nor support any complaint case for a five-year period. This Commission should not hamper its ability to determine just and reasonable rates for the proposed Empire division of UCU by agreeing to instruct its own Staff to sit on the sidelines.

Moreover, as Public Counsel has previously pointed out, the Joint Applicants' attempt to prevent the Commission Staff from filing a complaint with respect to rates for the Empire's division of UCU is contrary to the requirements of 4 CSR 240-2.070(1), which states:

> (1) The commission on its own motion, the commission staff through the general counsel, the office of the public counsel, or any person or public utility who feels aggrieved by a violation of any statute, rule order or decision within the commission's jurisdiction may file a complaint. The aggrieved party, or complainant, has the option to file either an informal or a formal complaint. (Emphasis added).

This rule clearly gives the Staff of the Commission, through the General Counsel, the authority to file complaints. A valid rule or regulation promulgated by a public administrative agency is binding on that agency, and thus preventing the Staff from participating in a rate compliant case would violate the Commission's own rule. (See Public Counsel's Initial Brief, pp. 12-13).

Joint Applicants have failed to point to any statutory authority that supports their position that this Commission has authority in a contested merger case to approve a five-year moratorium. Joint Applicants fail to point to any statutory authority because no such authority exists. Public Counsel is aware of merger proceedings where the parties have presented unanimous stipulations where the parties to the unanimous stipulations agree to some sort of rate case moratorium. Certainly specific parties can agree to bind themselves to certain rate moratoriums, but that is not the case in this merger proceeding since no agreement could be reached. The Joint Applicants seek to unilaterally impose a five-year moratorium upon the Staff and invites this Commission to specifically disavow its statutory authority to file complaints upon the Commission's own motion. The Commission should decline this invitation.

Finally, the Joint Applicants' proposed moratorium contains numerous one-sided escape clauses ("kick-out clauses") that would allow the proposed Empire division of UCU to seek a rate increase when certain undefined events occur. However, the Joint Applicants would nonetheless still require the Commission to abide by all of the facets of its ten-year regulatory plan for the ten-year period. (Tr. 453-454). It would be poor regulatory policy for this Commission to approve a one-sided five-year moratorium that allows UCU to seek a rate increase under certain undefined "significant and unusual events" while at the same time not allowing its Staff to file to reduce rates if some undefined "significant and unusual event" benefits the Joint Applicants.

C. The Acquisition Adjustment

The Joint Applicants request that this Commission "reaffirm its existing policy on premium recovery," and requests that this Commission "go one step further to state that if UtiliCorp meets its burden of proof of demonstrating merger savings in the future rate case, UtiliCorp will be granted the requested rate treatment of the Assigned Premium and related amortization." (UCU Initial Brief, p. 12, emphasis belongs to the Joint Applicants).

However, the Joint Applicants are not requesting this Commission to "reaffirm" its policy of allowing UCU a reasonable opportunity to recover the acquisition premium within the context of a general rate case proceeding. The Joint Applicants are actually requesting this Commission to completely change its long-held policy of not making ratemaking decisions within the confines of a merger proceeding and, on a prospective basis, to pre-approve specific ratemaking treatment for the acquisition adjustment in the context of this merger proceeding.

The Joint Applicants admit this fact at page 25 of their Initial Brief, stating "[i]n determining whether it should grant UtiliCorp's request for this prospective acquisition adjustment ratemaking treatment, the Commission should evaluate the reasonableness of the proposal in terms of the merger benefits which are anticipated to be generated through synergies from merging the companies." (Emphasis added). This Commission should not take the unprecedented "one step further" that is requested. First of all, that one step is one step beyond this Commission's statutory authority. According to the Joint Applicants, the only factor relating to the acquisition premium the Commission could consider in the post-moratorium rate case are the alleged synergy savings. (Ex. 4, p. 9-10). Such pre-approval and one-factor focus

would be contrary to the requirement of Section 393.270(4) RSMo. 1994, which requires the Commission to consider all relevant factors in setting rates.

The Joint Applicants actually appear to agree with Public Counsel's view at page 25 of their Initial Brief, where it states: ". . . the requested ratemaking treatment for the Assigned Premium should be viewed in the same light as other costs." This is right because the law requires that no cost be singled out for pre-approved ratemaking treatment outside of the rate case setting. However, this requirement prohibits the pre-approval relief being requested.

The Joint Applicants cite three Missouri jurisdictional merger proceedings at page 29 of their Initial Brief, (Re Kansas Power & Light Company, Case No. EM-91-213; Re Union Electric Company, Case No. EM-96-149; and Re Western Resources, Inc., Case No. EM-97-515) apparently in an attempt to assert that these merger cases support this Commission's prospective preapproval for recovery of the acquisition premium in this merger proceeding. These cases do not support UCU's proposal.

First, in Re Kansas Power & Light Company, the Commission did not explicitly approve any ratemaking treatment within the context of the contested merger proceeding. 1 Mo.P.S.C.3d 150, 161 (1991) Ordered ¶11. Second, Re Union Electric Company, Case No. EM-96-149 and Re Western Resources Inc., Case No. EM-97-515 were settled cases. UCU asserts that a rate freeze was established in EM-97-515 to allow for "a full or partial recovery of the acquisition adjustment." (UCU Initial Brief, p. 30). A review of the Commission's Report and Order in EM-97-515 does not indicate this supposed "fact" anywhere within it. Moreover, in EM-97-515, it was agreed upon that rates would be frozen only after ratepayers received a significant rate reduction.

If the Commission should approve the ill-advised merger proposal in this proceeding, the Commission should at least continue its long-held policy of deferring any decision on the recovery of the acquisition premium until a rate case proceeding. In that rate case proceeding, UCU would have a reasonable opportunity to persuade this Commission that it should be allowed to recover some or all of the acquisition premium from Empire's ratepayers. Within the context of a future rate case proceeding, all relevant factors can be considered.

D. Frozen Capital Structure

The Joint Applicants assert that it is appropriate to freeze Empire's capital structure for a ten-year period because, absent the merger, Empire's capital structure would not change appreciably. (Joint Applicants' Initial Brief, p. 46). This statement does not, in any way, justify pre-approved freezing of the current stand-alone structure in future rate cases years from now in complete indifference to future reality. The fact that Empire, as an independent entity with its own common equity and debt, will cease to exist if the merger is closed is exactly the reason the Joint Applicants are proposing to "freeze" Empire's capital structure for a ten-year period should be rejected. Simply stated, the "frozen" capital structure would establish a future rate of return based upon conditions that existed in the past and would wholly ignore current capital conditions regarding the capital structure of UCU, the corporate entity upon which the Empire division of UCU would be based.

This Commission should reject the proposal to pre-approve the so-called "normalized capital structure" for purposes of the pre-moratorium rate case as well as reject the proposal to "freeze" Empire's capital structure for a ten-year period through the moratorium and pre-

approval of this matter for purposes of the post-moratorium rate case. If the ill-advised merger is approved, no one will be able to determine what Empire's capital structure would have been had it remained an independent company. Nor can anyone predict what UCU's capital structure will be one, five or ten years into the future. This Commission should not lock in rates based upon a capital structure that will not be updated for potentially ten years or more and in manner that would be blind to the actual financing used to support the proposed Empire division of UCU.

E. Frozen Corporate Allocation

At page 30 of the Joint Applicants' Initial Brief, it is stated that if "the UtiliCorp/Empire merger does not take place, benefits which could accrue to the customers of both companies will not be realized." This statement is puzzling. UCU has not offered even the promise of benefits to its MoPub customers. In fact, UCU claims "[n]one of the saving and costs should be reflected in the rates for the MPS division after the closing of the merger." (Joint Applicants' Initial Brief, p. 47). The Joint Applicants' proposal to freeze corporate allocation will result in UCU's MoPub customers being detrimentally impacted. This proposal to deviate from cost-based ratemaking results in a higher cost of service imposed upon UCU's MoPub division, causing a detriment to MoPub's ratepayers an average of $6.33 million annually. (Ex. 716, Schedule SMT-3).

This proposal to "freeze" the corporate allocation factor is nothing more than UCU's attempt to force its MoPub customers to subsidize the net loss from the merger which results because projected merger savings are insufficient to cover all merger costs and the acquisition premium! (Ex. 716, p. 12). This Commission should reject UCU's proposal to "freeze" the

allocation factor of corporate and intra-business costs to MoPub during the ten years covered by the proposed Regulatory Plan.

F. The Rolla Certificate Case GA-94-325

Joint Applicants have failed to point to any contested merger proceedings wherein the Commission has determined the ratemaking treatment to be applied in subsequent rate case proceedings. To lend support to their unprecedented request, Joint Applicants point to Re UtiliCorp United, Inc., (hereinafter "Rolla certificate case") Case No. GA-94-325 (1994). (Joint Applicants' Initial Brief, p. 14).

Unlike the present proceeding, the case to which the Joint Applicants cite for support was a certificate case pursuant to § 393.170 RSMo. and not a merger proceeding pursuant to § 393.190. These are two separate and distinct statutory sections granting different degrees of discretion to the Commission. Nowhere in §393.190 does the legislature give this Commission authority to set rates in the context of a merger proceeding. The Commission's statutory duty is simply to determine if the proposed merger is "not detrimental to the public interest." The Commission's obligations in a merger proceeding are much different than the Commission's requirements in a proceeding in which rates or rate components are being determined.

In the Rolla certificate case, the citizens of Rolla had voted to allow UtiliCorp to provide natural gas service. The Report and Order in GA-94-325 states that "[i]t is the official position taken apparently after popular vote, that the City of Rolla is fully supportive of the application of UtiliCorp." (Report and Order , Case No. GA-94-325, p. 3). The citizens of Rolla apparently were willing to pay the $300.00 customer conversion costs in rates. In this proceeding, the Joint

Applicants seek to saddle the customers of Empire with paying for the $275 million acquisition premium. However, Empire failed to seek the customers' views regarding the proposed merger. No vote was taken by the Empire ratepayers to determine their views regarding the proposed merger or their willingness to be required to foot the bill for the $275 million merger premium UCU agreed to pay the shareholders of Empire. These facts are in stark contrast to what occurred in the Rolla certificate case.

Instead of lending support to UtiliCorp's request regarding approval of its proposed Regulatory Plan, the Rolla certificate case clearly demonstrates that, by contrast, the Joint Applicants are requesting that this Commission make rate case issue determinations within the context of a merger proceeding. In fact, UCU admits as much in its brief at page 15 when it states "UtiliCorp is asking that the Commission do nothing more than it has done in this prior case when it made a 'rate' decision in a non-rate case proceeding." Making such a rate decision within the context of this merger proceeding would be ill advised as well as beyond the Commission's statutory authority.

V. AFFILIATE TRANSACTIONS

The Joint Applicants' Initial Brief states "no" in response to the question: Will UtiliCorp's affiliate transactions, as a result of the proposed merger increase in size and scope and thus become more complex and difficult to monitor, while at the same time it will become more important to monitor such transactions to ensure compliance with standards? In response to the substantial evidence of increasingly complex affiliate transactions and increasing non-regulated synergies, the Joint Applicants offer a denial--but no evidence to suggest that the public will face no detriment from this reality. (Joint Applicants' Initial Brief, p. 56). Even if

the Commission feels that it must approve what Public Counsel believes to be detrimental merger, it should at least adopt Public Counsel's affiliate transaction condition and closely scrutinize the increase in affiliate transactions that will no doubt follow.

VII. TAKE IT OR LEAVE IT?

Throughout this merger case, it has been difficult to determine exactly what the Joint Applicants were requesting in addition to approval of the Merger Agreement itself. The initial briefs of Public Counsel and Staff document the varying statements of utility witnesses regarding the potential impact of the proposed Regulatory Plan, including discrepancies regarding what entities would be affected by the proposed moratorium on rates. It still remains difficult to understand whether or not the Joint Applicants are suggesting that they will not carry through with the merger without the assurances involving the Regulatory Plan (which Public Counsel has explained would be beyond the Commission's statutory authority in this case, as well as ill-advised and a detriment to the public). The Joint Applicants state in their Initial Brief:

> In other words, this plan is not a 'take it or leave it' proposition from UtiliCorp's standpoint. This was made clear by UtiliCorp witness Robert K. Green in his direct testimony.
>
> Ibid at 10.

A few pages later the Joint Applicants' Initial Brief contains an entire section entitled "ISSUES WHICH MUST BE DECIDED," in which it is stated that it is "essential" that the Commission make various decisions related to the "Assigned Premium." Ibid. at 16.

At one point, the Joint Applicants' Initial Brief states that the "proposed regulatory plan is not necessarily the only acceptable approach," and suggests that "some other comparable model" would be acceptable if it offers shareholders a reasonable opportunity to obtain a return

on their investment. Ibid. at 10. It is entirely inappropriate for the Joint Applicants to invite the Commission at this late stage of the proceeding to devise a wholly new regulatory plan. The Joint Applicants had opportunities to negotiate an alternative to its Regulatory Plan proposal with the other parties, but chose not to do so. If the Commission devises an alternative regulatory model that is not described in testimony, it will be unlawful as well as unfair. The parties would be denied the notice and opportunity to comment that due process requires.

Public Counsel suggests that "Public Counsel's regulatory condition" (Ex. 203, p. 5; Ex. 201NP, pp. 28-29), which would simply ensure that the merged entity's rates would be based upon traditional ratemaking, is an alternative regulatory model, fully detailed in the record, that would allow shareholders a reasonable opportunity to obtain a return on their investment. Moreover, this regulatory condition would achieve this stated goal within a clearly legal, tried-and-true framework that treats both shareholders and consumers fairly.

VIII. CONCLUSION

The Joint Applicants have not met their burden to prove that the proposed merger itself is not detrimental to consumers. They have utterly failed to rebut a variety of serious detriments identified in the testimony of Public Counsel and other parties, leaving the Commission no choice but to reject the Application.

The proposed Regulatory Plan is legally flawed, ill advised, and would only serve to aggravate the detriments already inherent to the proposed merger. If the Commission feels compelled to approve the merger despite the overwhelming evidence of public detriment, it

should at least reject the Regulatory Plan and impose conditions that would mitigate the detriments that will surely fall upon the ratepaying public.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

BY: _____

John B. Coffman (Bar No. 36591)
Deputy Public Counsel
Douglas E. Micheel (Bar No. 38371)
Senior Public Counsel

P. O. Box 7800
200 Madison Street, Suite 650
Jefferson City, MO 65102-0250
Telephone: (573) 751-5565
Facsimile: (573) 751-5562

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 21st day of November 2000:

James Swearengen
Brydon, Swearengen & England
P.O. Box 456
Jefferson City, MO 65102

Steven Dottheim/Dana K. Joyce
Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

James J. Cook
Union Electric Company
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166

Jeffery A. Keevil
Stewart & Keevil
1001 Cherry St., Suite 302
Columbia, MO 65201

Stuart W. Conrad
Finnegan, Conrad & Peterson
1209 Penntower Office Bldg.
3100 Broadway
Kansas City, MO 64111

William A. Jolley
Jolley, Walsh, Hurley & Raisher
204 W. Linwood Blvd.
Kansas City, MO 64111

Shelley A. Woods
Assistant Attorney General
P.O. Box 176
Jefferson City, MO 65102

James B. Deutsch
Blitz, Bardgett, & Deutsch, L.C.
308 East High Street, Suite 301
Jefferson City, MO 65101