BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Aquila, Inc. d/b/a	)	
Aquila Networks - L&P and Aquila	)	Case No. GR-2004-0072
Networks - MPS to Implement a	)	
General Rate Increase in Natural Gas Rates	)	

AQUILA'S SUGGESTIONS IN OPPOSITION
TO PUBLIC COUNSEL'S MOTION TO DISMISS

Comes now Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P ("Aquila" or "Company") and, in response to the Office of the Public Counsel's ("Public Counsel") Motion to Dismiss and Reject Aquila Networks' Unauthorized Filing of Proposed Natural Gas Tariffs and for the Appointment of a Conservator for the Benefit of the Shareholders of St. Joseph Light & Power Co. and Request for Oral Argument ("Motion to Dismiss"), states as follows to the Missouri Public Service Commission ("Commission"):

A. The Merger is not void because it was undertaken in accordance with a lawful and operative order of the Commission authorizing same.

Public Counsel argues in its Motion to Dismiss that the merger of St. Joseph Light & Power Company ("SJLP") with and into UtiliCorp United Inc. ("UtiliCorp") (hereinafter, the "Merger") is void and Aquila does not lawfully provide service because the Missouri Public Service Commission ("Commission") Report and Order in its Case No. EM-2000-292[1] was not a "final order." (Mtn., p. 2, ¶ 3, ¶ 4) Public Counsel argues that because at the time the Merger was closed applications for rehearing (which were ultimately denied) were pending, the order of the Commission approving

[1] *In the Matter of the Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Company for Authority to Merge St. Joseph Light & Power Company with and into UtiliCorp United Inc., and, in Connection Therewith, Certain Other Related Transactions.*

the Merger was "absolutely and completely void." Public Counsel's claim is premised on a recent opinion of the Missouri Supreme Court in its Case No. SC85352 wherein the Commission's Report and Order in Case No. EM-2000-292 authorizing the Merger (hereinafter, the "Merger Order") was reversed and ordered remanded for the Commission to make further findings concerning the recovery in rates of the merger premium paid by UtiliCorp (now, Aquila) to acquire all of the shares of SJLP.

However, Public Counsel's argument conflicts with the plain language of §386.490, RSMo[2] which specifically provides that an order of the Commission can be acted upon as of the effective date established by the Commission. It states that:

> Every order or decision of the commission **shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission** unless such order be unauthorized by law or be in violation of a provision of the constitution of the state or of the United States. (Emphasis added.)

The effective date of the Merger Order was December 24, 2000, and it took legal effect and became operative on that date. The Merger was consummated several days thereafter on December 31, 2000.[3] Public Counsel's use of the term "final order" in this context is not pertinent to the issue at hand. The Merger Order was valid and operative for purposes of closing the Merger even though it may not have been considered final for purposes of judicial review. The statutes governing appeals of Commission orders confirm this fact.

That the Commission's Merger Order was at all relevant times lawful and valid can easily

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[2] All statutory references are to the year 2000 edition of the Revised Statutes of Missouri.

[3] Attached for all purposes is a "Certificate of Fact" issued by the Secretary of State of the State of Missouri showing that Articles of Merger were filed January 3, 2001, and evidencing that the Merger took place on December 31, 2000.

be determined by review of §386.500, RSMo, the statute governing rehearing before the Commission. It addresses the very fact situation about which Public Counsel now complains. Section 3 of §386.500, RSMo states that:

> **An application for a rehearing shall not** excuse any corporation or person or public utility from complying with or obeying any order or decision or any requirement of any order or decision of the commission or **operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct**. (Emphasis supplied.)

Thus, simply because applications for rehearing were pending at the time the Merger was completed, the operation of the order approving the Merger was not stayed nor was the effectiveness of the Merger Order postponed. The Commission's Merger Order was a valid and operative order that became effective on and after December 24, 2000, the date specified by the Commission.

Further, Section 4 of the same statute states, in part, as follows:

> An order made after any such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision **but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision**. (Emphasis supplied.)

Thus, any order made by the Commission on rehearing would have only operated prospectively, and even if the Commission *had* granted rehearing and made some change to the original order, the modified order would not have made the completion of the Merger unlawful. In any event, the Commission ultimately denied the applications for rehearing at which time its decision became final for purposes of appeal.

The traditional remedy for Public Counsel under the statute to protect its interests and delay the Merger Order from becoming effective is to request and obtain from the Commission a stay of the order pursuant to §386.500.3, RSMo or to obtain a temporary injunction from a court of

competent jurisdiction pursuant to Civil Rule 92. No such relief was requested. Because the parties failed to avail themselves of these customary remedies and thereby secure a stay of the Merger Order before its effective date or a TRO to protect its interests, the Merger Order became operative in accordance with its terms on the effective date stated therein and was as of that date a lawful and valid order. Thus, the Merger was in all respects lawful, valid and operative on the date it took place; December 31, 2000. There is no legitimate basis now to claim that it is void.

Moreover, the Commission's Merger Order ultimately became the final order of the Commission for purposes of judicial review on January 9, 2001, when the applications for rehearing were denied. This is proven by the very facts alleged by Public Counsel in its Motion to Dismiss. Public Counsel states that "[j]udicial review of the Commission's decision is now complete". (Mtn. p. 3, ¶ 8) As the Commission is aware, this culminated in appeals to, and separate opinions handed down by, the Missouri Court of Appeals for the Western District of Missouri (Case No. WD60631) *and* the Missouri Supreme Court. This circumstance conclusively establishes that the Merger Order became a final order because only a final order of the Commission can be appealed.

The right to judicial review exists by reason of the Missouri Constitution, and that right is limited to final administrative decisions.[4] *State of Missouri ex rel. Riverside Pipeline Company, L.P. v. Public Service Commission,* 26 S.W.3d 396, 400, (Mo. App. W.D. 2000) citing *Lederer v. State, Department of Social Services, Division of Aging,* 825 S.W. 2d 858, 861 (Mo. App. W.D. 1992).[5]

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[4] "**All final decisions, findings, rules and orders of any administrative officer or body** existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law." *Mo. Const.* art. V, §18 (emphasis added).

[5] *See also, City of Park Hills v. Public Service Commission*, 26 S.W.3d 401, 404 (Mo. App. W.D. 2000) ["The Missouri Constitution creates a right to judicial review of 'final'

Also, Public Counsel never raised the issue of the finality of the Merger Order throughout the entire three-year period during which the appeal was pursued. Although several issues were cited, the issue of whether the Merger Order was a "final" order was never raised in the Application for Rehearing it filed with the Commission or in any subsequent stages of the appeal before the circuit or appellate courts.

The Merger was carried out in accordance with the terms of a lawful and operative order of the Commission which thereafter became final for purposes of appeal. It has not been invalidated by the opinion of the Missouri Supreme Court remanding the case to the Commission for further findings, and the Merger Order remains operative and in full force and effect in accordance with its express terms.

B. <u>The Motion is an improper collateral attack on the Merger Order.</u>

In this case (Case No. GR-2004-0072), Public Counsel argues that the Merger Order in another case (Case No. EM-2000-292) is invalid. For this proposition, Public Counsel cites the language of §393.190.1, RSMo, stating that a merger made other than in accordance with the order of the Commission authorizing the merger is void. (Mtn. p. 2, ¶ 4) This argument constitutes an impermissible collateral attack on the Merger Order.

Section 386.550, RSMo, specifically prohibits this type of legal challenge. It states that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." As demonstrated above, the Merger Order is a final, effective order. It therefore is conclusive as to Public Counsel and all other parties to this case. Public Counsel cannot now in this new proceeding attack the validity of an order that has become final and conclusive.

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administrative decisions"].

C. **Aquila's tariff filings on behalf of its Aquila Networks - L&P division are lawful because the Merger closed lawfully.**

The rates and charges now in effect for Aquila Networks - L&P, a division of Aquila, are lawful and reasonable in all respects. The Commission specifically approved the tariff sheets filed by UtiliCorp on December 22, 2000, adopting the rate schedules SJLP then had on file. In its December 28, 2000, Order Approving Tariffs in Case No. EM-2000-292 (copy attached), the Commission determined that "the tariff sheets should be approved and become effective on December 30, 2000". Those rates, charges and conditions of service of Aquila which are on file with and approved by the Commission enjoy a statutory presumption of lawfulness and reasonableness. Section 386.270, RSMo, provides that:

> **All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful**, and all regulations practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable **until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter**. (Emphasis added)

Moreover, the monies collected pursuant to the tariffs which are now in effect for the Aquila Networks - L&P division are the lawful property of Aquila which cannot be taken or diverted from it without due process of law. *Straube v. Bowling Green Gas Company*, 227 S.W.2d 666, 671 (Mo. 1950).

A party seeking to challenge filed and approved tariffs has the burden of demonstrating that the rates and charges in effect are unlawful or unreasonable. The place to make that showing is in the context of a complaint proceeding after a full evidentiary hearing. *See*, §386.390, RSMo. Public Counsel is not entitled to any summary relief here.

The Aquila Networks - L&P tariffs remain in effect and Aquila is free to take any and all

actions it considers necessary with respect to such operations, such as filing for a revenue increase, pursuant to the Commission's various orders in Case No. EM-2000-292. The normal rate making procedures associated with the file-and-suspend method provided by statute cannot be circumvented by Public Counsel's Motion to Dismiss.

D. The Missouri Supreme Court's decision remanding the case to the Commission does not render the Commission's Merger Order ineffective. The Merger Order remains effective until such time as the Commission issues a new order after remand.

Public Counsel states in its Motion to Dismiss that the Missouri Supreme Court found the transaction not to be reasonable in that it is not supported by competent and substantial evidence on the whole record. Public Counsel further states that Aquila closed the Merger without a valid order from the Commission and the Merger is "void." (Mtn. p. 2, ¶ 4) Public Counsel further states that Aquila thus "has no authority to file tariffs proposing to increase rates and charges for natural gas service to customers in the St. Joseph Light & Power Co. service territory, nor does Aquila, Inc. own the property that still belongs to the shareholders of St. Joseph Light & Power Co." (Mtn. p. 3, ¶ 9) These are inaccurate statements which are not properly before the Commission for decision in this case in any event.

The Missouri Supreme Court's October 28, 2003, opinion speaks for itself. Public Counsel's claim that there is no lawful order of the Commission approving the Merger is contradicted by the express language in the Supreme Court's opinion. At page 4 of its slip opinion, the Missouri Supreme Court stated the following:

> There is no dispute that the applicants are regulated utilities under Chapter 393. Section 393.190.1, requiring the issuance of a merger approval order from the PSC, provides the lawful authority for the PSC's decision. **Having found the PSC's**

> **decision to be lawful, the court must examine its reasonableness.** (Footnotes omitted. Emphasis added.)

For the reasons set forth in the Court's opinion, the case was remanded to the Commission "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." (Slip op. at 7-8) In the Supreme Court's words, the Merger Order was found to be lawful, but the case has been remanded to the Commission for further findings concerning the *reasonableness* of the acquisition premium and whether, and in what manner, it may be recovered in rates; nothing more.

In circumstances such as these, the validity of the Commission's Merger Order is not in question. As noted in the discussion in subsection A., *supra*, §386.490, RSMo, is explicit in this regard. That statute provides that "**every order or decision of the commission shall of its own force take effect and become operative**" on the date specified by the Commission; December 24, 2000 in the case of the Merger Order. It further provides that the Merger Order "**shall continue in force . . . until changed or abrogated by the commission**" unless found to be unauthorized by law or unconstitutional. (Emphasis added.)

The Missouri Supreme Court specifically has determined the Merger Order was authorized by law. Consequently, the Merger Order is valid, operative and in force according to its terms until changed by the Commission and then only to the extent of the change, if any. Further, any change can only operate prospectively. *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 353 (Mo. 1951). A prospective change in the Merger Order could only take effect following a decision in Case No. EM-2000-292 *after* it has been remanded to the Commission. The Merger was completed in accordance with a lawful and operative order of the Commission which can only be changed by

further order of the Commission in the context of Case No. EM-2000-292.

Unless an order of the Commission is stayed, it remains in force and is *prima facie* lawful until found otherwise by the ultimate ruling of a court at the conclusion of the appeal process. §386.270, RSMo; *State ex rel. GTE North, Inc. v. Missouri Public Service Commission,* 835 S.W.2d 356, 367 (Mo. App. W.D. 1992); *Osage Water Co. v. City of Osage Beach,* 58 S.W.3d 35, 43 (Mo. App. S.D. 2001). The Court of Appeals in *GTE North* stated that "an adverse ruling on the Commission's order by the circuit court does not invalidate the order of the Commission while the appeal continues." *GTE North*, 835 S.W.2d at 368. By analogy, an adverse ruling by the Supreme Court does not invalidate the Commission order until the Commission issues a new order.

This is a principle with which the Commission is familiar. The best illustration of this concept is found in the remand of the *GTE North* case cited above. *In the Matter of GTE North Incorporated,* 3 Mo. P.S.C. 3d 144 (1994). The Commission's original order in the *GTE North* rate case was issued on February 9, 1990. The Circuit Court issued its order remanding the cause to the Commission for further proceedings consistent with the mandate and opinion of the Court of Appeals on September 10, 1993. During the pendency of the appeal, GTE North had merged with Contel and become GTE Midwest Incorporated. After remand, the Commission convened a prehearing conference, and the parties requested time to work on a settlement. On August 29, 1994, the Commission issued a Report and Order in which it approved the parties' Stipulation and Agreement and directed GTE to file tariffs consistent with the stipulation. The Order and the tariffs were effective September 15, 1994. Thus, the Commission's original order remained effective for over four years until such time as a new order was issued.

Until the Commission regains jurisdiction and considers the case in accordance with the

Supreme Court's directive, there can be no new Commission order. In the meantime, the original Merger Order continues in effect as a valid and operative order,

E. The Commission does not have statutory authority to seek appointment of a conservator to protect the interests of the former SJLP shareholders as suggested by Public Counsel.

As has been explained above, Public Counsel's premise that the Merger is void and that Aquila does not have the right to occupy and manage the franchise and properties of the former SJLP is entirely without merit. The Merger was a valid merger consummated pursuant to a valid and lawful Commission order. Likewise, Public Counsel's subsidiary request that the Commission join with it in a request that the Circuit Court appoint a conservatorship to protect the interests of the SJLP shareholders is completely without legal basis.

The Commission is an agency of limited jurisdiction and has only such powers as are conferred by statute. *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co.*, 889 S.W.2d 875 (Mo. App. W.D. 1994). The Commission does not have statutory authority to seek a conservatorship for the former shareholders of SJLP. The Commission has no inherent authority to seek the appointment of a conservator. Chapter 393 of the Missouri Revised Statutes does authorize the Commission to petition the circuit court for an order attaching the assets of a sewer or water corporation having one thousand or fewer customers that is unable or unwilling to provide safe and adequate service. §393.145, RSMo. This, however, is the *only* instance where a special power of this nature has been conferred upon the Commission.

The rule of statutory construction that the express mention of one thing implies the exclusion of another weighs against the Commission being able to petition the court for a conservatorship in

this situation. Where special powers are expressly conferred or special methods are expressly prescribed for the exercise of power, other powers and procedures are excluded. *Brown v. Morris,* 290 S.W.2d 160, 167 (Mo. banc 1956).

Also, there are no SJLP shareholders because SJLP was merged out of existence effective December 31, 2000.[6] The only shareholders whose interests are affected by Public Counsel's Motion to Dismiss are the shareholders of Aquila, formerly UtiliCorp, and their interests are fully and adequately represented in this case.

It must be kept in mind that the former shareholders of SJLP overwhelmingly approved the terms of the Merger at a special meeting of shareholders on June 16, 1999. Of the total common shares of SJLP entitled to vote, 68.3 percent voted for the merger.[7] Of the shares actually voted, 5,601,456, or **93.6 percent**, were in favor of the Merger while only 172,012, or 2.1 percent, voted against. At the conclusion of the Merger, each SJLP shareholder received a premium of over $6 for each share of SJLP stock held by them.[8] The former shareholders of SJLP were no longer the owners of the SJLP property after January 1, 2001. At that time, the shareholders of UtiliCorp (now, Aquila) became the lawful owners of the properties of the former SJLP which are operated by Aquila.[9] As

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[6] *See*, ftnt. #3, *infra*.

[7] Direct Testimony of Terry Steinbecker, Chief Executive Officer of SJLP, Exh. 1, Case No. EM-2000-292. See also, SJLP 1999 Annual Report, pp. 3 and 19.

[8] On March 4, 1999, the day before the Merger was announced, one share of SJLP stock traded at $16.88. Under the terms of the merger agreement, each share of SJLP stock was converted into the right to receive $23 of UtiliCorp stock.

[9] A more detailed factual background relating to the Merger is found in Schedule 2 to the rebuttal testimony of Staff witness Cary G. Featherstone in Commission Case No. ER-2004-0034 (a copy of which is attached hereto).

such, there is no need or basis for Aquila to account for revenues for the benefit of the former SJLP shareholders or to restore revenues to those individuals as requested by Public Counsel. (Mtn. p. 4, ¶ 13) The former SJLP shareholders have received the benefit of their bargain and they are entitled to nothing additional under the terms of the Merger agreement.

F. The Cole County Circuit Court's Order and Mandate Remanding Case which purports to retain jurisdiction over the remand of Case No. EM-2002-292 creates uncertainty as to whether the Commission has regained jurisdiction to reconsider the Merger as directed by the Supreme Court.

In the alternative, the Commission may deem the Motion to Dismiss deniable because of the procedural manner in which the matter has come before it. The present posture of the topic is problematic.

At paragraph 7 of the Motion to Dismiss, Public Counsel cites the remand of the Merger case as proof that Aquila closed the Merger without a valid order from the Commission. Because the Cole County Circuit Court purports to have retained jurisdiction over the subject-matter of the case, however, the Commission may not yet have lawful authority to take any action, direct or indirect, with respect to the Merger Order. As such, the opinion of the Missouri Supreme Court cannot be used as support for Public Counsel's argument that the Merger was closed without a valid order of the Commission.

Missouri law requires that upon remand, a trial court or administrative agency is bound to enter judgment in compliance with the superior court's mandate. *See, Breckle v. Hawk's Nest, Inc.*, 42 S.W.3d 789, 792 (Mo. App. E.D. 2001). In other words, the Cole County Circuit Court was

required to follow the Supreme Court's mandate, as the Commission will be required to follow the Circuit Court's mandate, to consider and decide the issue of recoupment of the acquisition premium and related issues. However, the Circuit Court's mandate did more than what the Supreme Court ordered. It went on to order the Commission to report back to it on the status of the matter, within sixty (60) days of the mandate, and to effectuate this the Circuit Court stated specifically that, "[t]his Court **retains jurisdiction** of this matter for the purpose of monitoring commission compliance with this remand Order and Mandate." *See,* Order and Mandate Remanding Case (emphasis added). The Commission and the Circuit Court of Cole County cannot have concurrent jurisdiction of this matter.[10]

Also, the Supreme Court's mandate issued to the Circuit Court in this case contained no provision directing the Circuit Court to retain jurisdiction or "monitor" the Commission's compliance. The Circuit Court was charged only with what should have been a ministerial act; simply remanding the case to the Commission for the purposes set forth in paragraph (1) of Judge Kinder's Order. The Cole County Circuit Court, however, improperly assumed the additional authority to retain jurisdiction when the Supreme Court did not direct it and when there was no independent basis for it to do so, since the mandate, by its very terms, directed that jurisdiction be put back in the hands of the Commission.[11]

Thus, the issue raised by Public Counsel's Motion to Dismiss is not simply whether

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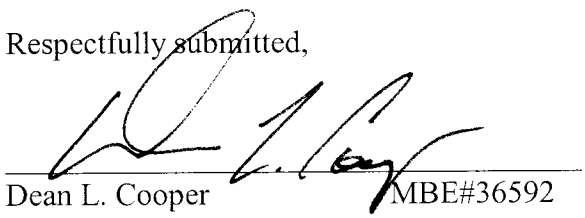
[10] Missouri Courts have held that "[e]fficient administration of justice requires that two courts not have jurisdiction over the same issue in the same case at the same time." *Blechle v. Goodyear Tire & Rubber Co.,* 28 S.W.3d 484, 487 (Mo. App. E.D. 2000).

[11] Original authority for the revesting of jurisdiction following remand appears to be *Durwood v. Dubinsky,* 361 S.W.2d 779, 783 (Mo. 1962).

jurisdiction can exist in both the Circuit Court of Cole County and the Commission; it is also a question of the Circuit Court's *authority* to retain jurisdiction for monitoring the Commission's actions on remand. In summary, it is far from clear whether the Missouri Supreme Court's remand of Case No. EM-2000-292 is properly before the Commission at this time because exclusive jurisdiction may yet reside in the Circuit Court of Cole County, the superior tribunal, and the Commission may lack jurisdiction to reconsider the Merger Order for any purpose.

WHEREFORE, for all the reasons stated above, Aquila respectfully requests that the Commission deny the Public Counsel's Motion to Dismiss and grant any other relief on behalf of Aquila as may be appropriate in the circumstances.

Respectfully submitted,



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AQUILA NETWORKS - MPS AND
AQUILA NETWORKS - L&P

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered or provided by electronic mail on February 5, 2004, to the following:

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F00300558

STATE OF MISSOURI

Matt Blunt
Secretary of State

I, MATT BLUNT, Secretary of State of the State of Missouri, do hereby certify that the records in my office and in my care and custody as Secretary of State show that Articles of Merger were filed as of the 3rd day of January, 2001, effective December 31, 2000, merging

ST. JOSEPH LIGHT & POWER COMPANY

Into

UTILICORP UNITED INC.

of which UTILICORP UNITED INC. is the surviving entity.

I further certify that UTILICORP UNITED INC. changed its name to AQUILA, INC. D/B/A AQUILA FOREIGN QUALIFICATIONS CORPORATION on March 19, 2002, and is in good standing as of the date of this certificate.

In testimony whereof, I have set my hand and imprinted the Great Seal of the State of Missouri, on this, the 13th day of January, 2004.

Matt Blunt
Secretary of State

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Company for Authority to Merge St. Joseph Light & Power Company with and into UtiliCorp United Inc., and, in Connection Therewith, Certain Other Related Transactions.	)))))))	**Case No. EM-2000-292** Tariff Nos. 200100686 200100687 200100688

ORDER APPROVING TARIFFS

On December 14, 2000, the Commission issued a Report and Order approving a proposed merger between UtiliCorp United Inc. (UtiliCorp) and St. Joseph Light & Power Company (SJLP). On December 22, St. Joseph Light & Power, a division of UtiliCorp United Inc., filed tariff sheets adopting the existing tariff sheets of SJLP. The submitted tariff sheets show an effective date of January 21, 2001. However, along with the tariffs, UtiliCorp filed a Motion for Expedited Treatment asking that the tariffs be approved on an expedited basis and be allowed to become effective on December 30, 2000.

The Staff of the Commission (Staff) reviewed the tariff sheets and filed a Recommendation and Memorandum on December 27. Staff indicated that there is good cause for acting on the submitted tariffs in an expedited manner and recommends that the Commission approve the submitted tariff sheets, effective on December 30, 2000.

The Commission has reviewed the tariff sheets, the Motion for Expedited Treatment and Staff's recommendation and finds that the tariff sheets should be approved to become effective on December 30, 2000.

IT IS THEREFORE ORDERED:

1. That the tariffs filed by St. Joseph Light & Power, a division of UtiliCorp United Inc., on December 22, 2000, and assigned tariff numbers 200100686, 200100687 and 200100688, are approved to become effective on December 30, 2000. The tariffs approved are:

P.S.C. Mo. No. 6 (electric)
Original Sheet No. 0.1

P.S.C. Mo. No. 4 (gas)
Original Sheet No. 0.1

P.S.C. Mo. No. 3 (steam)
Original Sheet No. 0.1

2. That this order shall become effective on December 30, 2000.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Morris L. Woodruff, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri, on this 28th day of December, 2000.

BACKGROUND OF THE ST. JOSEPH LIGHT & POWER COMPANY MERGER WITH AQUILA, INC.

Q. What was the history of St. Joseph prior to its merger with Aquila?

A. According to St. Joseph's 1998 Annual Report to Shareholders, St. Joseph "has been in the public utility business since 1883. It became an independent, investor-owned business in 1950." It was incorporated in the state of Missouri in 1895.

St. Joseph's corporate headquarters were located in St. Joseph, Missouri. It was an independent investor-owned electric utility that was engaged in the generation, purchase, transmission, distribution and sale of electricity to over 62,000 electric customers in 74 cities, towns and villages, and in a large rural area encompassing 3,200 square miles in northwest Missouri. In 1999 electric revenues represented about 70% of its total revenues. St. Joseph also supplied natural gas service to approximately 6,400 customers in Maryville and 14 other communities, and provided industrial steam service to six customers in St. Joseph, Missouri.

Q. When did Aquila and St. Joseph file their application to merge?

A. On October 19, 1999, Aquila filed an application with the Commission requesting approval of a merger between Aquila and St. Joseph pursuant to the "Agreement and Plan of Merger" (Merger Agreement) dated March 4, 1999. Under terms of this Merger Agreement, St. Joseph merged with and into Aquila, then called UtiliCorp. The merger was publicly announced on March 5, 1999.

Q. Did this Commission approve the merger between Aquila and St. Joseph?

A. Yes. On December 14, 2000, the Commission approved the merger in Case No. EM-2000-292. All other regulatory approvals were received by Aquila and St. Joseph, and the merger was completed by December 31, 2000.

Q. How did Aquila approach St. Joseph to bring about this merger proposal?

A. Aquila submitted a proposal to merge with St. Joseph in a bidding process to acquire all the common stock of SJLP. This bidding process was initiated by St. Joseph through its financial advisor, Morgan Stanley Dean Witter (Morgan Stanley) in late 1998.

Q. What was the purchase price offered by Aquila for St. Joseph?

A. Under the terms of the merger agreement, Aquila proposed to pay St. Joseph shareholders a fixed value of $23.00 of its common stock for each share of St. Joseph's common stock. According to the direct testimony (page 6) filed in Case No. EM-2000-292 by Aquila witness Robert K. Green, President and Chief Operating Officer, the total value of the merger transaction was to be $270 million, of which $190 million relates to the purchase of approximately 8.2 million shares of St. Joseph's common stock and the assumption of an expected $80 million in liabilities. That estimate represented a $92 million or approximately 36 percent merger premium to the book value of St. Joseph. The Aquila common stock was to be based on the average trading price for Aquila's common stock during the 20 trading days ending on the fifth trading day prior to the closing date (Proxy Statement, page 31).

Upon the completion of the merger on December 31, 2000, all the operations of St. Joseph were merged with and into the operations of, Aquila, and St. Joseph is now being operated as a division of Aquila. Aquila maintained the St. Joseph Light & Power Company name as a trade name within the existing service territory of St. Joseph. The service once provided by St. Joseph is now being provided by Aquila Networks-L&P, a division of Aquila.

Q. Did St. Joseph seek a buyer for its utility property?

A. Yes. The Proxy Statement (pages 14 through 16) identified in detail the process that the Board of Directors of St. Joseph engaged in to conduct a series of analyses relating to its

future operations. Also, in the direct testimony of Mr. Terry F. Steinbecker, Chairman of the Board, President and Chief Executive Officer of St. Joseph, (Case No. EM-2000-292 direct, pages 2 through 6) there is similar detail about the merger process that St. Joseph used to determine its future corporate structure. Some of the more important events that occurred during the period of 1995 to the March 4, 1999, the date the merger agreement was executed, are as follows:

- Prior to 1995, St. Joseph's Board of Directors (Board) studied various strategies for maximizing shareholder value.

- In 1995, St. Joseph retained a consulting firm, Planmetrics, Inc., which presented to the Board an analysis in January 1996 relating to Strategic Planning of St. Joseph. This presentation was used by the Board to make decisions on St. Joseph's diversification program.

- The diversification program resulted in the acquisition of several companies by St. Joseph, including Percy Kent, who is a manufacturer of small paper bags for food, agricultural, chemical, pet food and other consumer packaging companies.

- In 1998, St. Joseph retained another consulting firm, Scott, Madden & Associates, Inc. (Scott, Madden), which issued a confidential report to the Board of Directors on Strategic Planning. Scott, Madden recommended that St. Joseph should sell the Company.

- On July 15, 1998, the Board approved the retention of Morgan Stanley as financial advisor to St. Joseph. Morgan Stanley was instructed to develop potential strategic alternatives for maximizing shareholder value, including a potential merger or strategic alliance.

- On October 14, 1998, Morgan Stanley outlined the strategic challenges facing St. Joseph and recommended that St. Joseph explore a potential business combination with a larger utility company as the best means of maximizing long-term value for St. Joseph's shareholders.

- At the October 14 meeting, the Board instructed Morgan Stanley to contact seven companies for the purpose of obtaining expressions of interest in a potential business combination.

- Between November 27 and December 2, 1998, two of the seven potential bidders informed Morgan Stanley of their interest in receiving information about St. Joseph. During a December 4 meeting with the Board, Morgan Stanley informed the Board that a third party had indicated an expression of interest.

- Between December 16 and 18, 1998, Morgan Stanley received a preliminary expression of interest from each of three potential bidders. On December 21, Morgan Stanley discussed financial and non-financial aspects of the non-binding bids that contained preliminary proposed valuations of between $19.70 and $22.25 per share of SJLP common stock.

- Between January 12 and 21, 1999, the three parties that submitted non-binding bids performed due diligence reviews of St. Joseph.

- Between January 7 and February 17, 1999, St. Joseph's management conducted a due diligence review of the three interested parties.

- On February 16, 1999, St. Joseph received final binding proposals from two of the three interested parties. Aquila's proposal was a fixed value of $22.50 per share of St. Joseph common stock. The second proposal was an all stock transaction at a value of $21.28 per share of St. Joseph common stock, with a downward price adjustment in the event of a reduction in the bidder's share price. The third interested party had informed Morgan Stanley it did not intend to submit a final binding proposal.

- On February 19, 1999 the Board met to review and compare the two binding bids. Because Aquila had the higher and a fixed bid, the Board requested Morgan Stanley to see if Aquila would increase its offer. Morgan Stanley contacted Aquila and encouraged it to increase its bid. Aquila raised its bid to $23.00 per share of St. Joseph common stock.

- Based upon the increase in price to $23.00 per share and the more favorable structure of Aquila's bid, on February 22, 1999 the Board of Directors authorized management and St. Joseph's legal advisors to negotiate a definitive merger agreement with Aquila. This occurred over the next ten days.

- Sometime after February 22, 1999 and prior to March 4, Morgan Stanley contacted the financial advisor of the other bidder, which did not augment its proposal as a result of that conversation.

- On March 4, 1999 Morgan Stanley presented an opinion to St. Joseph's Board that the merger consideration was fair.

- On March 4, 1999 St. Joseph executed the merger agreement with Aquila based on unanimous approval of the Board.

- On March 5, 1999 the merger was publicly announced.

The St. Joseph Board unanimously approved the merger with Aquila, and Morgan Stanley presented its fairness opinion in accordance with the investment banking firm's responsibilities to the shareholders of St. Joseph.

Q. Did the shareholders approve the merger?

A. Yes. At a special meeting held on June 16, 1999, St. Joseph's shareholders approved the merger by greater than the necessary two-thirds approval with 68.6 percentage participation. This note comprised a 96.3 percent approval of those shares that voted.

Q. What reasons did the Board state for recommending shareholder approval of the merger?

A. The Proxy Statement (pages 16 and 17) identified reasons the Board approved the merger. The overwhelming majority of reasons the Board approved and recommended shareholder approval dealt with St. Joseph's ownership issues. Very little mention is given to St. Joseph's customers or employees.

The reasons the Board believed the shareholders should approve the merger with Aquila are identified in the Proxy Statement as follows:

- the merger **consideration offers St. Joseph's shareholders an attractive premium** over the recent historical trading prices of St. Joseph's common stock;

- the merger **offers St. Joseph's shareholders a more liquid market** for their shares;

- as a result of the merger, **St. Joseph's shareholders will most likely benefit from UtiliCorp's dividend rate,** which then was, and in recent years had been, higher than St. Joseph's dividend rate;

- **St. Joseph's shareholders will benefit by participating in the combined economic growth of the service territories** of UtiliCorp and St. Joseph, and from the inherent increase in scale, the market diversification and the resulting increased financial stability and strength of the combined entity;

- the merger **will result in cost savings from decreased electric production and gas supply costs, a reduction in operating and maintenance expenses** and other factors;

- the combined enterprise **can more effectively participate in the increasingly competitive market** for the generation of power;

- UtiliCorp has significant non-utility operations and, as a larger and stronger financial entity following the merger, should be able to **manage and pursue further non-utility diversification activities** more efficiently and effectively than St. Joseph as a stand-alone entity; and

- the merger and various provisions of the merger agreement **offer St. Joseph's shareholders, customers and employees** and the St. Joseph community a unique **opportunity to realize the benefits** created by combining the two companies.

[emphasis added]

The reasons cited by the Board in its communication to the shareholders regarding the merger clearly illustrates that the merger was about increasing the overall wealth of St. Joseph's shareholders. The Proxy Statement and Mr. Steinbecker's direct testimony in Case No. EM-2000-292 (pages 2 through 4), indicate that the Board made the decision to merge with Aquila based solely on "maximizing shareholder value." The payment of the merger premium to St. Joseph's shareholders and the increased dividends on an ongoing basis to former St. Joseph shareholders taking UlitiCorp stock relate directly to "maximizing shareholder value." To that end, the merger process engaged in by St. Joseph was a success. St. Joseph ensured that the interest of

its shareholders was first and foremost in the merger analyses. The customers' interests were secondary in all respects.

Q. Was the basis for the SJLP merger with Aquila increasing the overall wealth of shareholders?

A. Yes. It is necessary for a proposed merger to provide opportunities to shareholders in order for management to be able to pursue the merger. If the merger cannot be presented as advantageous to shareholders, they will not vote for approval. The Proxy Statement identifies several benefits to St. Joseph's shareholders to ensure that they believe that they are being rewarded for giving up control of the company. Maximizing shareholder value is extremely important in the merger process. The board of directors has a special and unique responsibility to the shareholders and other investors of the entity to ensure that the owners of the entity are fully compensated for relinquishing their ownership interest. The payment of the merger premium to St. Joseph's shareholders is the primary benefit to them, along with any opportunity to receive an increase in dividends. Also, typically the opportunity for a smaller company like St. Joseph to access more potential shareholders by trading stock in a larger pool of investors, such as was and is the case for Aquila's stock, is considered a benefit. This allowed former St. Joseph stockholders to trade their stock in a more liquid market than was previously available to them. Other potential shareholder benefits resulting from mergers, include the opportunity to be an owner of a larger combined company with greater potential for economic growth, the opportunity as a shareholder to "keep" the preponderance of the purported merger savings, the opportunity to participate in the increasingly competitive market for power, the opportunity to engage in non-regulated and non-utility diversification and the opportunity to

realize the benefits of a larger combined company in the procurement of capital, goods and services, etc. These all relate directly to enhancing shareholder value.