

11/2000

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 10th
day of February, 2000.

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 Company)
with and into UtiliCorp United Inc., and,)
in Connection Therewith, Certain Other)
Related Transactions.)

Case No. EM-2000-369

**ORDER DENYING MOTION TO CONSOLIDATE AND
ESTABLISHING PROCEDURAL SCHEDULE**

On December 15, 1999, UtiliCorp United, Inc. (UtiliCorp) and The Empire District Electric Company (Empire) filed a joint application to merge Empire with and into UtiliCorp. That merger application was assigned case number EM-2000-369. Previously, on October 19, UtiliCorp and St. Joseph Light & Power Company (SJLP) filed a joint application to merge SJLP with and into UtiliCorp. That merger application was assigned case number EM-2000-292. Along with their application, UtiliCorp and Empire, on December 15, filed a Motion to Establish Procedural Schedule. On December 17, the Office of the Public Counsel (Public Counsel) filed a motion asking that the Commission consolidate and review the two merger applications in a single case.

On December 17, the Commission issued a Notice Regarding Motion to Establish Procedural Schedule that notified the parties that they could file their responses to the Motion to Establish Procedural Schedule

no later than January 21, 2000. On December 22, the Commission issued a Notice Regarding Motion to Consolidate that notified the parties that they could file their responses to Public Counsel's Motion to Consolidate no later than January 21, 2000.

On January 21, ICI Explosives USA, Inc. (ICI) and Praxair, Inc. (Praxair) filed a joint response to the Motion to Consolidate and the Motion to Establish Procedural Schedule. ICI and Praxair support the consolidation of the two cases and suggest that a hearing on the consolidated cases be scheduled for September 2000. The City of Springfield, Missouri, through the Board of Public Utilities (City Utilities), filed a response indicating its support for consolidation and suggesting a September hearing on the consolidated cases. On January 21, Public Counsel filed a response to the Motion to Establish Procedural Schedule, suggesting that a hearing on the application be held in late November 2000. Public Counsel however indicated that it is willing to agree to a September hearing if the merger cases are consolidated. On January 20, the Missouri Department of Natural Resources (MDNR) filed its own Motion to Consolidate, indicating that it joined in Public Counsel's motion to consolidate and urging the Commission to extend the procedural schedule sufficiently to allow the parties to conduct a thorough review of the proposed mergers. On January 24, the Staff of the Commission (Staff) filed a response to the Motion to Consolidate and Motion to Establish Procedural Schedule along with a motion asking leave to late file its response. Staff supports the consolidation of the two merger cases. Staff also submitted proposed procedural schedules for this case

as well as for a consolidated case. UtiliCorp and SJLP filed a response indicating their opposition to the motion to consolidate on January 21. Staff filed a reply to the response of UtiliCorp and SJLP on January 31.

Public Counsel's Motion to Consolidate suggests that the merger cases should be consolidated because they share many common issues and much of the testimony that will be presented in the two cases will overlap. The motion suggests that a tremendous and unnecessary waste of resources can be avoided if the two cases are consolidated for purposes of Commission review and hearing. UtiliCorp and SJLP oppose the consolidation of the merger cases because they believe that consolidation would only serve to confuse and complicate the consideration of the separate merger applications. They suggest that the two merger applications are separate and distinct transactions. Each should be decided on its own merits in a separate and distinct Commission decision based on record evidence pertaining to that transaction. To consolidate the two applications would deny the applicants their due process rights. Furthermore, UtiliCorp and SJLP suggest that consolidation would result in increased confusion at the hearing because of the need for the witnesses and the Commission to constantly shift back and forth between the cases.

The Commission has considered the Motion to Consolidate as well as the suggestions put forth by the other parties in support of, and in opposition to, the Motion to Consolidate. While these cases do share many common issues of fact and law, they are not so identical as to require that they be consolidated into a single case. Maintaining the

distinction between the cases will allow the Commission the flexibility to deal with the separate issues that will arise with regard to the separate merger transactions.

The Commission is concerned about the need to economize on the use of the regulatory resources of the Commission and the Public Counsel, as well as the resources of the applicants and intervenors. The parties are encouraged to take advantage of any opportunities that may arise to utilize discovery and testimony that are common to both cases. If the parties do file any identical testimony in the two cases, the Commission requests that they inform the Commission by noting that fact on the front cover of the testimony.

Having decided that the Motions to Consolidate should be denied, the Commission must now address the establishment of a procedural schedule for the UtiliCorp and Empire merger. The Motion to Establish Procedural Schedule filed by UtiliCorp and Empire suggests that this case be heard in June 2000. The Commission has already established a July 2000 hearing date for the UtiliCorp and SJLP merger application that was filed two months before this merger. Therefore, a June hearing date for this application would clearly not be appropriate. In its response, Staff suggests that if the two merger cases are not consolidated, a procedural schedule be established that would result in a hearing of this matter on December 4 through 8, 2000. However, Staff suggests that if these cases are consolidated, the consolidated case can be heard in September. Public Counsel and the intervenors echo Staff's position. In their response, UtiliCorp and Empire request that the application be

processed on a schedule that will permit a closing of the transaction by December 31, 2000, the Termination Date of the Agreement and Plan of Merger between Empire and UtiliCorp.

The Commission is not willing to accept the proposition that the decision to not consolidate the UtiliCorp and SJLP merger with the UtiliCorp and Empire merger must result in a lengthy delay in the hearing of the UtiliCorp and Empire merger. It is suggested that such a delay is necessary because the professionals who will be examining the evidence and testifying in the first merger case will also be examining the evidence and testifying in the second merger case. This argument is based on the idea that these persons cannot work on the two cases at the same time. However, the argument for delay is undercut by the arguments put forth in favor of consolidation of the merger cases. If, in fact, many of the issues and the evidence are common to the two cases, then it follows that much of the evidence and testimony can be repeated in the second case. So, at least some of the evidence will be prepared only once, even though it may be presented to the Commission twice.

The Commission finds that a procedural schedule should be adopted that will bring this case to hearing in September. That will allow for the establishment of a procedural schedule comparable to that established in the UtiliCorp and SJLP merger, while allowing the Commission to consider the proposed merger in a timely fashion. Staff has proposed such a schedule, although it suggests its use in a consolidated case. The Commission will establish a procedural schedule based on that proposed by Staff.

The Commission will apply the conditions set out below to the procedural schedule in this case.

(A) The Commission will require the prefiling of testimony as defined in 4 CSR 240-2.130. All parties shall comply with this rule, including the requirement that testimony be filed on line-numbered pages. The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing.

(B) Pursuant to 4 CSR 240-2.130(15), testimony and schedules shall not be filed under seal and treated as proprietary or highly confidential unless the Commission has first established a protective order. Any testimony or schedule filed without a protective order first being established shall be considered public information.

(C) The parties shall agree upon and the Staff shall file a list of the issues to be heard, the witnesses to appear on each day of the hearing and the order in which they shall be called, and the order of cross-examination for each witness. The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution.

(D) Each party shall file a statement of its position on each disputed issue. Such statement shall be simple and concise, and shall not contain argument about why the party believes its position to be the correct one.

(E) The Commission's general policy provides for the filing of the transcript within two weeks after the hearing. If any party seeks to expedite the filing of the transcript, such request shall be tendered in writing to the regulatory law judge at least five days prior to the date of the hearing.

(F) All pleadings, briefs and amendments shall be filed in accordance with 4 CSR 240-2.080. Briefs shall follow the same list of issues as filed in the case and shall set forth and cite the proper portions of the record concerning the remaining unresolved issues that are to be decided by the Commission.

(G) All parties are required to bring an adequate number of copies of exhibits that they intend to offer into evidence at the hearing. If an exhibit has been prefiled, only three copies of the exhibit are necessary for the court reporter. If an exhibit has not been prefiled, the party offering it should bring, in addition to the three copies for the court reporter, copies for the five Commissioners, the regulatory law judge, and all counsel.

IT IS THEREFORE ORDERED:

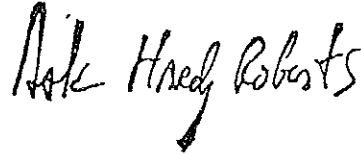
1. That the Motion to Consolidate filed by the Office of the Public Counsel on December 17, 1999 is denied.
2. That the Motion to Consolidate filed by the Missouri Department of Natural Resources on January 20, 2000 is denied.
3. That the following procedural schedule is adopted for this case, subject to the conditions discussed above:

<u>Date</u>	<u>Event</u>
December 15, 1999	Direct Testimony filed by UtiliCorp and Empire
June 7, 2000, 3:00 p.m.	Rebuttal Testimony by all other parties
July 24, 2000, 10:00 a.m.	Prehearing Conference
July 31, 2000, 3:00 p.m.	List of Issues to be filed by Staff
August 9, 2000, 3:00 p.m.	Surrebuttal Testimony to be filed by all parties
August 23, 2000, 3:00 p.m.	Statements of Positions to be filed by all parties.
September 11-15, 2000, 8:30 a.m.	Hearing

4. That the prehearing conference and the evidentiary hearing will be held in the Commission's office, currently located on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri. The parties are advised that the Commission expects to move to its new office located at the Governor Office Building at some time during the summer of 2000. Anyone who is uncertain about where the prehearing conference and evidentiary hearing will be held should contact the Commission. Anyone wishing to attend who has special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days before the prehearing conference at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

5. That this order shall become effective on February 23, 2000.

BY THE COMMISSION

A handwritten signature in dark ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, somewhat stylized script.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Schemenauer,
and Drainer, CC., concur
Murray, C., dissents

Woodruff, Regulatory Law Judge