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

RESPONSE OF AQUILA, INC., TO APPLICATIONS FOR REHEARING

COMES NOW Aquila, Inc. (the "Company"), and, in response to the Applications for Rehearing filed herein by Ag Processing Inc. (AGP) and the Office of the Public Counsel (OPC), respectfully states to the Commission as follows:

1. AGP and OPC raise essentially the same arguments in their Applications for Rehearing: (1) That the Commission did not comply with the mandate of the Missouri Supreme Court and the Circuit Court of Cole County; and (2) that the Commission violated the parties' due process rights by not providing the opportunity for AGP and OPC to offer new arguments or evidence. The crux of their arguments is that the Commission, on remand, was required to conduct a hearing or otherwise accept new evidence. This position, however, is not supported by Missouri statutory law or case law. As such, the Applications for Rehearing should be denied, and the Commission's Second Report and Order should stand.

2. AGP and OPC contend that their due process rights were violated by the Commission not accepting new arguments and evidence regarding changes in circumstances and intervening events that have occurred since the original Report and

Order was entered. In fact, AGP goes so far as to contend that denial of a hearing following remand is the "most basic denial of due process rights imaginable." AGP attempts to support that argument with the conclusion that the case is a "contested case as defined by law."

3. This case began with a review of a proposed merger under §393.190 RSMo. 2000[1], which statute requires Commission approval for a merger but does not require a hearing before that approval may be given. A "contested case," as defined by §536.010 RSMo., is a proceeding before an agency in which legal rights are **required by law** to be determined after hearing. The initial review of the merger was not a contested case. The fact that the Commission held a hearing does not convert a non-contested case to a contested case.[2] The Missouri Supreme Court's remand of the case to the Commission also does not convert this non-contested case to a contested case. The Commission was not required to hold a hearing prior to approving the merger, and the Commission was not required to hold a hearing following the Supreme Court's remand.

4. The contested/non-contested case distinction recently was considered in *State ex rel. Coffman v. Public Service Commission*, 121 S.W.3d 534 (Mo. App. W.D. 2003). As the Court of Appeals stated, whether a case is deemed contested or non-contested "hinges upon the answer to a single question: Was the agency required by law to hold a hearing?" *Id.* at 539. Here, the statute in question, §393.190 RSMo., does

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[1] Unless otherwise indicated, all statutory references are to the Revised Statutes of Missouri 2000.

[2] *Re Missouri Public Service*, 1 Mo. P.S.C. 3d 200 (1991), *aff'd*, *State ex rel. Office of the Public Counsel v. Public Service Commission*, 858 S.W.2d 806 (Mo.App. W.D. 1993); *Herron v. Kempker*, 2003 Mo.App. Lexis 1744 (Mo.App. W.D. 2003); *Golden Rule Insurance Company v. Crist*, 766 S.W.2d 637 (Mo. banc 1989).

not contain an express requirement that the Commission grant a hearing in response to a request for approval of a merger. The statute regarding review of a Commission decision by the circuit court, §386.510 RSMo., also does not contain an express requirement that the Commission conduct a hearing following remand.

5. The classification of a case as contested or non-contested is not left to the Commission's discretion but is determined as a matter of law. *Cade v. Missouri Department of Social Services*, 990 S.W.2d 32, 36 (Mo. App. W.D. 1999). The existence of disputing parties or contested issues does not create a contested case. *Id.* Further, the fact that the Commission held a hearing prior to first approving the merger does not convert this case from a non-contested case into a contested case. *See Golden Rule Insurance Company v. Crist*, 766 S.W.2d 637 (Mo. banc 1989) (agency director's decision to hear evidence to aid him in exercising his discretion did not create a contested case); *See also Herron v. Kempker*, 2003 Mo. App. Lexis 1744 (Mo. App. W.D. 2003) (the question is not whether a hearing was held, but whether the administrative agency was required to hold a hearing).

6. If a hearing is not required by statutory law, as is the case here, a hearing will be required under due process principles only when the agency decision concerns a protected property interest. *Coffman v. Public Service Commission*, 121 S.W.3d at 539. With regard to AGP and OPC, there is not a protected property interest at stake, and AGP and OPC have not asserted one. The Missouri Supreme Court has held that there is no protected property interest in a particular utility rate. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975). Likewise, the Missouri Supreme Court has concluded that customers are not entitled to a guarantee

of the *status quo* and have no protected interest in the identity of the company from which they receive utility service. *Love 1979 Partners v. Public Service Commission*, 715 S.W.2d 482, 490 (Mo. banc 1986). If the public does not have a protected property interest in any particular rate, nor in the identity of the company which provides service, surely AGP and OPC cannot argue that they have a protected property interest in whether or not the Company is granted approval for a merger.

7. In addition to their due process argument, AGP and OPC assert that the Commission failed to comply with the Supreme Court mandate by not considering the totality of all of the necessary evidence in the context of the acquisition premium. Contrary to the contentions of AGP and OPC, the Supreme Court **did not require** the Commission to consider the totality of the evidence regarding the reasonableness of the merger decision. Although the Supreme Court did state that the Commission would have that opportunity, the Supreme Court opinion simply required the Commission to consider and decide the issue of the recoupment of the acquisition premium. This task was accomplished by the Commission prior to and with the issuance of the Second Report and Order.

8. A reviewing court is limited by §386.510 RSMo., and may only remand a Commission decision "for further action." A reviewing court may not attempt to tell the Commission what action should be taken upon remand. *See, State ex rel. GTE North v. Missouri Public Service Commission*, 835 S.W.2d 356, 360-61 (Mo. App. W.D. 1992); *State ex rel. Fee Fee Trunk Sewer v. Public Service Commission*, 522 S.W.2d 67 (Mo. App. W.D. 1975); *State ex rel. Anderson Motor Service Company v. Public Service Commission*, 134 S.W.2d 1069 (Mo. App. 1939). In the instant case, the Supreme

Court found the Commission's order to be unreasonable because the Commission had failed to consider and decide the issue of recoupment of the acquisition premium. Following remand, the Commission considered and addressed this issue and entered its Second Report and Order.

9. Contrary to the contention of AGP and OPC, the Court did not require the Commission to make a "current determination of the public benefit or detriment" of the merger transaction in addition to considering and deciding the issue of recoupment of the acquisition premium. In support of this contention, AGP cites §393.190.1 RSMo., and *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo. banc 1934). Earlier in its Application for Rehearing, AGP cited *State ex rel. Intercon Gas v. Public Service Commission*, 848 S.W.2d 593 (Mo. App. W.D. 1993), and *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979), for the contention that the Commission was required to consider all relevant circumstances, including those that have occurred since the issuance of the original order approving the merger. None of the cited cases or the cited statutes, however, **require** the Commission to do more than it did upon remand in this case.

10. The merger statute deals with review by the Commission **prior** to a merger. Although the *St. Louis* decision, dealing with review of a Commission order authorizing a stock sale, established the "not detrimental" standard, the decision does not require the Commission to make a current determination following remand. The *Intercon* decision also does not support the moving parties' argument. Although the opinion refers to the Commission's authority to consider any relevant circumstances

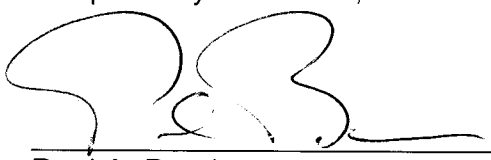
with regard to the public interest, the *Intercon* court imposed no such requirement on the Commission. In fact, with regard to the original proceeding, the *Intercon* court acknowledged the Commission's broad discretion in deciding whether to permit the filing of additional evidence. The *UCCM* case, to which AGP and OPC point, is clearly distinguishable from the case at hand, as it deals with the Commission's authority to set rates – not to authorize a merger. The "all relevant circumstances" principle of that decision is not applicable here. Again, contrary to the assertion of AGP, the *UCCM* decision does not stand for the proposition that the Commission must perform a new review of the merger upon remand.

11. The Supreme Court directed the Commission to consider the merger in light of the acquisition premium issue, and the Commission did just that. The Circuit Court issued a remand for further action by the Commission regarding the acquisition premium. The Court could not, and did not, attempt to tell the Commission precisely what action should be taken upon remand, nor did the Court attempt to direct the Commission on the procedures to be taken in issuing its Second Report and Order. Pursuant to the remand directive, the Commission considered the issue of recoupment of the acquisition premium in conjunction with the other issues raised regarding whether the merger is detrimental to the public. This assessment did not require additional arguments or evidence from AGP or OPC. The Commission concluded the acquisition premium was reasonable, that Aquila will not be permitted to recover any acquisition premium from its ratepayers, and that the existence of the acquisition premium did not alter the Commission's evaluation of whether the merger would be detrimental to the

public. Thus, in its Second Report and Order, the Commission reaffirmed the determination in its initial Report and Order, and this decision should stand.

WHEREFORE, for the good cause shown above, and because the Commission's Second Report and Order is supported by adequate Findings of Fact and Conclusions of Law, the Company respectfully requests that the Applications for Rehearing filed herein by AGP and OPC be denied, and requests such other and further relief as the Commission deems proper under the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 26th day of March 2004 to the following:

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