

LAW OFFICES  
**BRYDON, SWEARENGEN & ENGLAND**

PROFESSIONAL CORPORATION

312 EAST CAPITOL AVENUE

P.O. BOX 456

JEFFERSON CITY, MISSOURI 65102-0456

TELEPHONE (573) 635-7166

FACSIMILE (573) 635-0427

EMAIL: PAULB@BRYDONLAW.COM

DAVID V.G. BRYDON  
JAMES C. SWEARENGEN  
WILLIAM R. ENGLAND, III  
JOHNNY K. RICHARDSON  
GARY W. DUFFY  
PAUL A. BOUDREAU  
SONDRA B. MORGAN  
CHARLES E. SMARR

DEAN COOPER  
MARK G. ANDERSON  
TIMOTHY T. STEWART  
GREGORY C. MITCHELL  
BRIAN T. MCCARTNEY  
DALE T. SMITH  
BRIAN K. BOGARD

OF COUNSEL  
RICHARD T. CIOTONE

March 21, 2001

**FILED<sup>3</sup>**

MAR 21 2001

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, MO 65102

**Re: In the Matter of an Investigation respecting the sale of UtiliCorp United Inc.'s  
Utility Network Construction, Operation and Maintenance Organization  
Case No. EO-2001-472**

Dear Mr. Roberts:

On behalf of UtiliCorp United Inc., I deliver herewith an original and eight (8) copies of Suggestions of UtiliCorp United Inc. in Opposition to Conditional Application to Intervene of AG Processing Inc. to be filed with the Commission in the referenced case. A copy is also being hand-delivered to The Office of the Public Counsel this date.

I have also enclosed an extra copy of the Suggestions of UtiliCorp United Inc. in Opposition to Conditional Application to Intervene of AG Processing Inc. which I request that you stamp "Filed" and return to the person delivering same to you.

Thank you for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Paul A. Boudreau

PAB:aw

Enclosures

cc: Office of the Public Counsel

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>

MAR 21 2001

Missouri Public  
Service Commission

In the Matter of an Investigation )  
respecting the sale of UtiliCorp United )  
Inc.'s Utility Network Construction, ) Case No. EO-2001-472  
Operation and Maintenance Organization. )

**SUGGESTIONS OF UTILICORP UNITED INC. IN OPPOSITION TO  
CONDITIONAL APPLICATION TO INTERVENE OF AG PROCESSING INC.**

COMES NOW UtiliCorp United Inc. ("UtiliCorp") and offers the following suggestions in opposition to the Conditional Application to Intervene of AG Processing Inc., a cooperative ("AGP"):

1. The Application of AGP to intervene in the referenced case is admittedly premature, as evidenced by the fact that said Application is a conditional one. The Motion of the Staff to open a formal investigatory docket in this matter has not been granted by the Commission. Accordingly, any ruling on AGP's Conditional Application at this time is inappropriate.

2. With respect to the merits of AGP's Conditional Application to Intervene, UtiliCorp contends that AGP has not stated any basis for intervention which meets with the requirements of Commission Rule 4 CSR 240-2.075. Specifically, AGP has not stated an interest which is different than that of the general public. The only interest stated by AGP is that it is an electric and steam customer of UtiliCorp<sup>1</sup>, a status which does not distinguish it from any other member of the general public which is served by UtiliCorp. AGP alleges no contractual interest which conceivably could be adversely affected by the sale of the construction, operation and maintenance ("CO&M") Business by UtiliCorp. Likewise, AGP has made no showing that granting its Application to Intervene would serve the public interest. AGP would bring no special expertise to bear on the topic

---

<sup>1</sup> Application, ¶ 6.

and it has not even alleged that it is in a position to do so.

3. At paragraph 8 of its Application, AGP states that it is concerned that electrical and steam service be based on cost of service principles. This is an issue that can only be addressed in a rate case or complaint proceeding. It has no place in matters pertaining to the sale of a business.

4. The Conditional Application to Intervene filed by AGP simply validates an issue articulated by UtiliCorp in paragraph 7 of its Response to Staff's Motion which UtiliCorp filed on March 15, 2001. UtiliCorp then expressed the concern that opening a formal investigatory docket at this time would simply invite the participation of intervenors who have no legitimate interest in the exercise of UtiliCorp's management discretion through the negotiated bid process that is underway. AGP's filing is an eloquent illustration of this point. It is completely inappropriate to open a formal docket into the manner in which UtiliCorp is going about making a business decision, a subject matter reserved exclusively to UtiliCorp's managerial prerogatives. See, *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8 (Mo. banc 1930); *State ex rel. Harlan v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960); *State ex rel. Southwestern Bell Telephone Company v. Missouri Public Service Commission*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981 (1923); *Laclede Gas Company v. Public Service Commission*, 600 S.W.2d 222 (Mo. App. 1980).

5. The Commission, in two recent cases, has recently evidenced its extreme reluctance to get involved in managerial decisions of utilities. As recently as July of last year, the Commission rejected a recommendation of its Staff that the Commission assume the role of evaluating competing merger proposals which might be considered by The Empire District Electric Company ("Empire"). Empire had filed an Application for authority to renew its shareholder rights plan. Staff recommended that the Application be approved, subject to conditions which would have permitted the Commission to thereafter choose a merger proposal for Empire which the Commission believed

would provide a greater benefit to the public. The Commission rejected Staff's recommended conditions. In doing so, it stated that:

"The Commission does not wish to attempt to impose itself into determinations appropriately made by Empire's Board of Directors. The Commission's proper role is to examine any proposed merger to determine whether or not it is detrimental to the public. The Commission takes that role seriously and is currently fulfilling that role in its examination of the proposed merger of Empire with and into UtiliCorp United Inc. The Commission does not have, and does not desire, the authority to sift through various possible bids for Empire to try to substitute its judgment for that of Empire's Board of Directors."

The Commission approved Empire's application without any of the conditions recommended by Staff. See, *Order Granting Application*, July 13, 2000, Case No. EF-2000-764.

6. More recently, in October of last year, the Commission again rejected the recommendation of its Staff that the Commission become involved in managerial decisions. Specifically, on September 29, 2000, in Commission Case No. EM-2000-292, Staff filed a Motion asking that the Commission schedule an on-the-record conference for the purpose of requiring UtiliCorp and St. Joseph Light & Power Company ("SJLP") to explain the status of their proposed merger in light of correspondence exchanged between UtiliCorp and SJLP regarding a June 7, 2000, fire at SJLP's Lake Road power plant. The Commission soundly rejected this motion. In doing so, it stated that:

"Whether or not UtiliCorp and SJLP decide to proceed with the merger is a business decision that management of the two companies must make. Forcing the companies to appear before the Commission to publicly explain newly-formed positions may have an unintended impact on the negotiations."


The Commission denied Staff's motion to become involved in those business discussions.

7. Staff's Motion to Open an Investigatory Docket with respect to the possible sale by

UtiliCorp of the CO&M Business should be resolved in the same manner as the Commission ruled on the Staff's effort to involve the Commission in the business decisions of Empire with respect to its shareholder's rights plan and UtiliCorp and SJLP with respect to their merger. All of the matters are clearly in the realm of business decisions reserved by law to the managerial discretion of the utility. Opening an investigatory docket into UtiliCorp's ongoing negotiated bid process would be a direct interference in that process prior to the time any regulatory implications have arisen.

WHEREFORE, UtiliCorp opposes the Conditional Application to Intervene of AG Processing Inc. for the reasons aforesaid.

Respectfully submitted,



James C. Swearengen #21510

Paul A. Boudreau #33155

Brydon, Swearengen & England P.C.

P.O. Box 456

Jefferson City, MO 65102

Telephone (573) 635-7166

Facsimile (573) 635-0427

E-Mail: [PaulB@brydonlaw.com](mailto:PaulB@brydonlaw.com)

Attorneys for UtiliCorp United Inc.

**Certificate of Service**

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 21<sup>st</sup> day of March, 2001, to:


Mr. Steven Dottheim  
Missouri Public Service Commission  
Governor Office Building  
200 Madison Street  
P.O. Box 360  
Jefferson City, MO 65102

Mr. Stuart W. Conrad  
Finnegan, Conrad & Peterson, L.C.  
1209 Penntower Office Center  
3100 Broadway  
Kansas City, MO 64111

Mr. John B. Coffman  
Office of the Public Counsel  
Governor Office Building  
200 Madison Street  
P.O. Box 7800  
Jefferson City, MO 65102

Mr. James R. Waers  
Blake & Uhlig, P.A.  
475 New Brotherhood Bldg.  
753 State Avenue  
Kansas City, KS 66101

Mr. William A. Jolley  
Jolley, Walsh, Hurley & Raisher, P.C.  
204 West Linwood Blvd.  
Kansas City, MO 64111



Paul A. Boudreau