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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 St. Joseph Light & Power Company
Case No. EM-2000-292

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

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**

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OCT 3 2000
Missouri Public Service Commission

REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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October 3, 2000

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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) and St. Joseph Light & Power Company (SJLP). 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 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 March 4, 1999 "Agreement and Plan of Merger." (Joint Application, Appendix 4). The Commission must judge the proposed merger itself on its own merits, without the Regulatory Plan. 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, UCU's 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:

> As indicated, the Commission must approve the proposed transaction unless it can be shown by competent and substantial evidence in the record that the merger would be detrimental to the public interest. *See, State ex rel. St. Louis v. Public Service Commission,* supra.
>
> Ibid., pp.3-4.

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. 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.

Parties opposed to a proposed merger 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). In fact, the reason that the standard seems to have been so awkwardly worded in that case is that the Missouri Supreme Court recognized that merger applicants must prove a negative in order to prevail. The Joint Applicants must prove in this case a negative 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" (or "the burden of going forward with the evidence") is shifted to adverse parties, the "burden of persuasion" still rests with the merger applicants. Missouri courts have stated that plaintiffs 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. 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 "public" in the "not detrimental to the public" standard refers to the utility consumers (ratepayers). (UCU Initial Brief, p. 3; SJLP Initial Brief, p. 13). SJLP even states that the effect of the proposed merger on these consumers is the "central inquiry" of this case. (SJLP Initial Brief, p. 13). Given this fact, it is refreshing that SJLP's Initial Brief explains to the Commission with candor that, in negotiating the proposed merger, SJLP's board of directors were attempting only to maximize shareholder value. Ibid., pp. 7-9. Any benefits to ratepayers incorporated into the proposed merger were merely incidental to the goals of the Joint Applicants. SJLP has accurately described the fiduciary duty that it owes to its shareholders. 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 the 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 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 the cost/benefit analysis performed by the Staff of the Commission (Staff). UCU misstates Public Counsel's position regarding merger detriments when it attempts to lump Public Counsel's position regarding merger detriments into the Staff's position that merger costs will exceed merger benefits. (UCU Initial Brief, p. 5). The testimony of Public Counsel witnesses Mark Burdette and Ryan Kind contain evidence of distinct detriments that are separate and apart from the substantial evidence of detriments placed into the record by the Staff. Public Counsel's evidence is essentially unrebutted and irrefutable. The Commission should look past UCU's lumping together of detriments in its initial brief and address each of Public Counsel's contentions regarding merger detriments on its own merits.

Generally, the Joint Applicants attempt to confuse the issue 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. First of all, 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 aggravate the potential harm and detriment to the public, as discussed in Public Counsel's Initial Brief on pages 4 through 16 and 33 through 38.

A. Increased Financial Risks

The increased financial risks which would increase the cost of debt charged to SJLP 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, SJLP has been placed on "CreditWatch" by Standard & Poor's with "negative implications." (Ex. 200, p. 10). 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.18-20). 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, p. 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. To reach 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, AGP witness Maurice Brubaker, and City of Springfield witness Whitfield A. Russell. (Ex. 201HC, Ex. 714, Ex. 500, Ex. 300). Public Counsel alone placed into the record, without objection, fourteen 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. 30-54).

The Joint Applicants' general denial regarding any market power implications is all the more incredible in light of the acknowledgments that the proposed merger is being driven by a desire to increase the market size of the merged entity in order to address the national trend towards electric retail competition. (SJLP Initial Brief, pp. 5-7; UCU Initial Brief, p. 3). SJLP forthrightly quotes Mr. Terry Steinbecker as saying the electric industry is heading towards customer choice and "a totally deregulated industry." (Tr. 125, 129; SJLP Initial Brief, pp. 5, 13).

In an attempt to alleviate concerns about market power problems, UCU notes 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." (UCU 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.

With regard to Public Counsel's proposed condition regarding horizontal market power as adopted by the Commission in Case No. EM-97-515, UCU simply states that "now is not the time" for a market power study to be performed. (UCU Initial Brief, pp. 61-62). The truth is that Public Counsel's proposed condition does not ask that UCU perform a study at this time. Rather, Public Counsel's proposed condition would require UCU to perform a market power study at the time 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, UCU's only response is merely, "No, for the reasons previously stated." (UCU Initial Brief, p. 62). However, UCU's Initial Brief contains no 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" are being 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. UCU argues that claims that rates would be lower absent the proposed merger involves speculation. (UCU Initial Brief, p. 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 assumptions and estimates. 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. 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 inclusive, then the Joint Applicants have failed to meet their burden and the merger should be denied.

Despite the fact that the Regulatory Plan is not contained within the Merger Agreement, UCU repeatedly refers to a provision in that plan which UCU claims would "guarantee" a $1.6 million reduction in the cost of service for the SJLP area in sixth year after the merger. UCU misleadingly suggests that this provision alone would assure that ratepayers receive a benefit. (UCU Initial Brief, pp. 4-5, 22-23, 44-45). It is important for the Commission to realize that UCU is not promising to reduce rates. In fact, if costs exceed benefits by more than $1.6 million (as most reasonable estimates indicate), consumers will definitely be worse off under the Joint Applicants' regulatory scheme. The so-called $1.6 million "guarantee" is simply an invitation for the Commission to prejudge one element of UCU's future cost of service in isolation and engage in classic single-issue ratemaking. The $1.6 million reduction would then be most likely overwhelmed by offsetting merger costs, 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. 201, pp. 25-40), the Joint Applicants completely fail to respond to this evidence. On page 56 of UCU's Initial Brief, UCU poses the question about whether such additional benefits are reflected in its calculations, but UCU never directly answers the question.

Also without the citation to any supporting evidence, UCU's brief states, "SJLP's non-regulated businesses are self-contained entities which will not realize any significant benefit from the synergies resulting from the merger." Ibid., p. 51. This statement completely flies in the face of the evidence of approximately $8 million per year in non-regulated synergies that would be generated as a result of the proposed merger. (Ex. 201NP, pp. 33-39, Attachments 5-7).

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, because merger costs would most likely exceed merger benefits.

IV. PROPOSED REGULATORY PLAN

A. Five-Year Rate Moratorium

UCU in its 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) (Initial Brief, p. 13). UCU's assertion is incorrect. Pursuant to its proposed five-year moratorium UCU seeks to prevent the Commission, on its own motion, from initiating a complaint case against the proposed SJLP division of UCU. Sections 386.391.1 and 393.270(3) clearly contemplate that the Commission, on its own motion, can investigate the reasonableness of any rates SJLP as a division of UCU charges to customers.

UCU's proposed moratorium would prevent the Commission, a proper party, from directing its Staff to review SJLP's rate levels for five years. UCU witness McKinney admitted in response to questions from Chair Lumpe that the Commission could not on its own motion direct its Staff to review SJLP's rates:

> Q. The questions about the prohibition on the Commission. Yes, indeed if Public Counsel were to bring the case or one of these entities that we just read, but as I understood you to say, it would prohibit the Commission from asking the Staff. And you still stand by that?
>
> A. Yes.
>
> Q. We would not be able to ask Staff?
>
> A. That's what we're asking. <u>That you not go out on your own motion and do it.</u> (Emphasis added).

(Tr. p. 481, l. 24-25; p. 482, l. 1-7). In fact, UCU would deny the Commission its statutory authority to review SJLP's rates on its own motion.

The statutory scheme set-up by the legislature contemplates that the Commission when carrying out its statutory duty to review rate levels act via its staff. Section 386.240 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 UCU's requested five-year moratorium would prevent the Commission from properly utilizing its Staff to review SJLP's rate levels for a period of five years. Such a moratorium on the ability of this Commission to exercise its regulatory authority over SJLP's rates is contrary to this Commission's statutory authority.

From a regulatory perspective, agreeing to prevent the Staff from participating in any complaint case procedures for a term of five years would be poor regulatory 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. This Commission should not hamper its ability to determine just and reasonable rates for the proposed SJLP division of UCU by agreeing to instruct its own Staff not to participate in or support a complaint case for a five-year period.

Moreover, UCU's attempt to prevent the Commission Staff from filing a complaint with respect to rates for the SJLP'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.

The rules of the Commission, which have been duly promulgated pursuant to proper delegated authority, have the force and effect of law. State ex rel. Springfield v. Public Service Commission, 812 S.W.2d 827 (Mo. App. 1987) overruled on other grounds by Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. banc 1996). The Commission duly promulgated 4 CSR 240-2.070(1), specifically granting its Staff authority through the general counsel to file a complaint. A valid rule or regulation promulgated by a public administrative agency is binding on the agency. 73 C.J.S. Section 93 Pub. Ad. Law and Pro., p. 621. Acceptance of UCU's five-year moratorium would unlawfully nullify the Staff's ability to independently file a complaint pursuant to 4 CSR 240-2.070(1).

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. That is not the case in this merger proceeding. UCU seeks to unilaterally impose the 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 UCU's invitation.

Finally, UCU's proposed moratorium contains numerous one-sided escape clauses that would allow the proposed SJLP division of UCU to seek a rate increase when some undefined events occur. However, UCU would require the Commission to abide by all of the facets of its ten-year regulatory plan for the ten-year period. (Tr. p. 208, l. 11-25; p. 209, l. 1-16). 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.

B. The Acquisition Adjustment

UCU requests this Commission "reaffirm its existing policy on premium recovery," and requests this Commission "go one step further to state that if UtiliCorp meets its burden of proof 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. 14). UCU is not requesting this Commission "reaffirm" its policy of allowing UCU a reasonable opportunity to recover the acquisition premium within the context of a base rate case proceeding. UCU is requesting this Commission completely change its long-held policy of not making ratemaking decisions within the confines of a merger proceeding and on a prospective basis approve specific ratemaking treatment for the acquisition adjustment in the context of this merger proceeding.

UCU admits this fact at page 26 of its Initial Brief when UCU states "[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 "one step further" that UCU requests. That one step is one step beyond this Commission's statutory authority. According to UCU the only factor relating to the acquisition premium the Commission could consider in the post-moratorium rate case are the alleged synergy savings. (Tr. p. 675, l. 3-16; Ex. 5, p. 11, l. 20-22; p. 12, l. 1-2). Such preapproval and one factor focus would be contrary to the requirement of Section 393.270(4) that requires the Commission to consider all relevant factors in setting rates.

UCU appears to agree with Public Counsel's view when it states at page 26 of its Initial Brief ". . . the requested ratemaking treatment for the Assigned Premium should be viewed in the same light as other costs." Other costs do not get preapproved ratemaking treatment outside the rate case setting, they are considered in a ratemaking proceeding with all relevant factors. The law requires this.

UCU cites three Missouri jurisdictional merger proceedings at page 30 of its 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, the Union Electric Company case EM-96-149 and the Western Resources Inc. case 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." Moreover, in EM-97-515 rates were frozen only after ratepayers received a rate reduction.

In this proceeding, the Commission should 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 will have a reasonable opportunity to persuade this Commission that UCU should be allowed to recover some or all of the acquisition premium from SJLP's ratepayers. Within the context of a future rate case proceeding all relevant factors can be considered.

C. Frozen Capital Structure

UCU asserts that it is appropriate to freeze SJLP's capital structure for a ten-year period because "absent the merger, Staff would continue to use a comparable company approach in setting SJLP's capital structure as it did in previous rate cases." (UCU Initial Brief, p. 15). The fact that SJLP as an independent entity with its own common equity and debt will cease to exist if the merger is closed is exactly the reason UCU's proposal to "freeze" SJLP'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 SJLP division of UCU would be based.

This Commission should reject UCU's proposal to "freeze" SJLP's capital structure for a ten-year period. No one can know what SJLP'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 in 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 regardless of the actual financing used to support the proposed SJLP division of UCU.

D. Frozen Corporate Allocation

At page 32 of its Initial Brief UCU states that if "the UtiliCorp/SJLP 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 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." (UCU Initial Brief, p. 48). UCU's 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 $3.5 million annually. (Ex. 721, p. 10, l. 9-11).

This proposal to "freeze" the corporate allocation factor is nothing more than UCU's attempt to force MoPub's 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. 718, pp. 9-10). 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.

E. 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). (UCU Initial Brief, p. 16).

Unlike the present proceeding, the case that UCU cites to support its claim 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. 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 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 approve 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 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 UtiliCorp seeks to saddle the customers of SJLP with paying for the $92 million acquisition premium. However, SJLP failed to seek the customers' views regarding the proposed merger. (Tr. p. 117, l. 15-18). In fact, SJLP's President and CEO Terry F. Steinbecker stated it would not have been "appropriate to seek customers' opinions regarding the proposed merger." (Tr. p. 117, l. 25; p. 118, l. 1-3). No vote was taken by the SJLP ratepayers to determine their views regarding the proposed merger or their willingness to be required to foot the bill for the $92 million merger premium UCU agreed to pay the shareholders of SJLP. 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 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 16 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 and beyond the Commission's statutory authority.

V. AFFILIATE TRANSACTIONS

The Joint Applicants were only able to muster a one-word discussion of the affiliates transactions issue. The UCU Initial Brief states merely "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 denial but no evidence and no reasoning to suggest that the public will face no detriment from this reality. 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.

VI. LAKE ROAD PLANT INCIDENT

In its attempt to prove that SJLP customers would be better off after the proposed merger, SJLP claims that, absent the merger, it will seek a rate increase as a result of costs incurred as a result of the Lake Road Plant explosion. (SJLP Initial Brief, p. 16). First of all, it should be understood that nothing is stopping SJLP from filing a rate case at the present time. The pending merger case does not preclude SJLP from seeking a general rate increase now that utilizes a test year in which these costs were incurred. Moreover, Public Counsel doubts that, in any rate case and under any scenario, the costs associated with the Lake Road Plant incident will ultimately be found to be appropriate for recovery in rates. The testimony on file in SJLP's pending application for an accounting authority order (Case No. EO-2000-845) raises serious questions regarding the causes of and the culpability for the explosion that occurred on June 7, 2000.

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). UCU states in its 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 UCU's Initial Brief contains an entire section entitled "ISSUES WHICH MUST BE DECIDED," in which UCU states that it is "essential" that the Commission make various decisions related to the "Assigned Premium." Ibid. at 17.

At one point, UCU's 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 12. It is entirely inappropriate for UCU to invite the Commission at this late stage of the proceeding to devise a wholly new regulatory plan. When UCU was preparing to file its merger application, it considered other alternatives to the Regulatory Plan, but rejected them. (Tr. p. 195, l. 11-20). The Joint Applicants also 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 would suggest that "Public Counsel's regulatory condition" (Ex. 203, p. 5; Ex. 201NP, p. 21), 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 to the ratepaying public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copies of the foregoing have been mailed or hand-delivered to the counsel of record on the attached list on this 3rd day of October, 2000.

____

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