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November 21, 2000

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

NOV 21 2000

Missouri Public  
Service Commission

Missouri Public Service Commission  
Attn: Secretary of the Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, Mo. 65102-0360

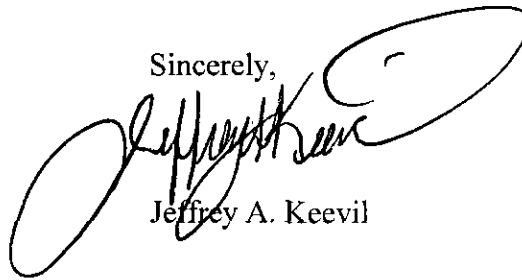
RE: Case No. EM-2000-369  
UtiliCorp United Inc./The Empire District Electric Company

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case are an original and the appropriate number of copies of the REPLY BRIEF of the City of Springfield, Missouri, through the Board of Public Utilities.

Copies of this filing have on this date been mailed or hand-delivered to counsel of record. Thank you for your attention to this matter.

Sincerely,



Jeffrey A. Keevil

JAK/er  
Enclosures  
cc: counsel of record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>  
NOV 21 2000

Missouri Public  
Service Commission

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

REPLY BRIEF OF THE CITY OF SPRINGFIELD, MISSOURI,  
THROUGH THE BOARD OF PUBLIC UTILITIES

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November 2000

120

## TABLE OF CONTENTS

<b>MARKET POWER.....</b>	<b>2</b>
(34) Will a post-merger UtiliCorp possess more horizontal, vertical, or retail market power?.....	2
(35) Will the merger allow the Companies to take valuable, limited transmission capacity necessary for other Missouri utilities to maintain deliveries under their purchased power contracts?.....	3
<b>TRANSMISSION ACCESS AND RELIABILITY.....</b>	<b>4</b>
(36) Have the Companies conducted and provided adequate studies of the impact of the proposed merger upon transmission facilities within, and interconnecting with, the State of Missouri, and upon all providers of electric service in the State, to prove that the proposed merger is not detrimental to the public interest?.....	4
(37) Will the proposed merger provide the Companies the ability to gain unduly preferential priority of access to limited transmission facilities and/or exercise their post-merger transmission access anti-competitively, to the detriment of other customers in the State and therefore to the detriment of the public?.....	8
(38) Could a post-merger UCU refunctionalize its transmission facilities in anti-competitive ways to the detriment of the public?.....	9
(39) Do the companies being merged adhere to a single, consistent set of standards for designing and operating their transmission facilities and, if not, would not adhering to a single, consistent set of standards for designing and operating their transmission facilities be detrimental if the merger is approved?.....	10
<b>MARKET POWER CONDITIONS.....</b>	<b>10</b>
<b>TRANSMISSION ACCESS AND RELIABILITY CONDITIONS.....</b>	<b>10</b>
<b>CONCLUSION.....</b>	<b>13</b>

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OF THE STATE OF MISSOURI**

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Certain Other Related Transactions.     )

Case No. EM-2000-369

**REPLY BRIEF OF THE CITY OF SPRINGFIELD,  
MISSOURI, THROUGH THE BOARD OF PUBLIC UTILITIES**

COMES NOW the City of Springfield, Missouri, through the Board of Public Utilities ("Springfield"), and, pursuant to the briefing schedule established for this case, submits this Reply Brief. This Reply Brief will focus on those portions of the joint initial brief of UtiliCorp United Inc ("UCU") and The Empire District Electric Company ("EDE" or "Empire") of most direct concern to Springfield. Since these issues were addressed in detail in Springfield's initial brief filed herein, attempt will be made to avoid, to the extent possible, repeating facts and arguments presented in Springfield's initial brief; however, Springfield would direct the Commission to the discussion of the issues of Transmission Access and Reliability (and conditions associated therewith) and Market Power (and associated conditions) set forth in its initial brief for a full explication of the issues addressed herein. Furthermore, failure of this Reply Brief to address any matters set forth in the initial brief of UCU/EDE or any other party should not be deemed

as agreement therewith unless specifically so stated. For convenience purposes, this brief will use the same section headings and numbers used by UCU/EDE in their initial brief.

*Market Power*

34. *Will a post-merger UtiliCorp possess more horizontal, vertical, or retail market power?*

On page 53 of their brief the Applicants quote a small portion of the FERC's *Order Conditionally Authorizing Mergers*, FERC Dockets EC00-27-000 et al. (July 26, 2000) for the proposition that "FERC ruled that the merger 'will not create or enhance the ability of the merged company to raise prices or decrease output in downstream electricity markets.'" However, Applicants have taken this one, limited statement out of context. The *Order Conditionally Authorizing Mergers* actually states as follows:

The [FERC] agrees with Applicants that combining the merged company's delivered gas and generation interests will not create or enhance the ability of the merged company to raise prices or decrease output in downstream electricity markets. **However, we find that Applicants have not shown that their proposed mergers will not adversely affect competition** as a result of consolidating generation (i.e., horizontal effects) or consolidating generation and transmission (i.e., vertical effects). (emphasis added)

*Order Conditionally Authorizing Mergers*, FERC Dockets EC00-27-000 et al., p. 9 (July 26, 2000) (Ex. 5, Schedule JWM-1). The *Order Conditionally Authorizing Mergers* then goes on to state:

In the Merger Policy Statement, ... [t]he Commission [*i.e.*, FERC] explained that transmission line loadings are likely to change as a result of merger applicants' combined operations and that such changes are likely to result in transmission availability different from historical experience [footnote omitted]. Transmission availability is a critical parameter in defining relevant markets, particularly in the transmission-constrained areas affected by the proposed merger, as Springfield points out. Therefore, failure to fully reflect the effects of joint dispatch may result in inaccurate identification and definition of relevant markets and, in turn, an

inaccurate assessment of the effect of the proposed mergers in those markets.

....

Applicants' [*i.e.*, UCU, St. Joseph Light & Power Company and The Empire District Electric Company] analysis also shows that in many cases, the effect of post-merger system integration is to increase the combined companies' market share beyond the simple combination of their pre-merger market shares, further increasing concentration in relevant markets. [footnote omitted]. Our concern regarding Applicants' treatment of system integration is also relevant to an analysis of whether combining Applicants' generation and transmission creates or enhances the merged company's ability and/or incentive to adversely affect electricity prices or output. **Applicants have not performed such an analysis.** (emphasis added)

*Order Conditionally Authorizing Mergers*, FERC Dockets EC00-27-000 et al., pp. 10-11 (July 26, 2000) (Ex. 5, Schedule JWM-1). As shown above, when read in context, the FERC order cited by Applicants fails to support their position, and actually supports a finding directly opposite of Applicants' position, *i.e.*, that a post-merger UCU will possess more market power in relevant markets. The FERC order also supports Springfield's position (as discussed under the heading of Transmission Access and Reliability in Springfield's Initial Brief) that the Applicants have not performed adequate studies of the impact of their proposed merger.

*35. Will the merger allow the Companies to take valuable, limited transmission capacity necessary for other Missouri utilities to maintain deliveries under their purchased power contracts?*

In their brief, UCU/EDE rely upon the testimony of UCU witness Dennis Florom for the proposition that there will be no reduction in available transmission capacity (ATC) post-merger. First, it must be recognized that Mr. Florom's testimony on this matter amounted to pure speculation, as shown at the hearing. Under cross-examination

Mr. Florom admitted that he had not conducted any studies of the impact of the Nevada to Asbury line on ATC post-merger, nor to his knowledge had anyone else at UCU conducted any such study. (Tr. 1133-1134).

Second, it should be noted that UCU's position is in contradiction to the position it took in its comments to FERC in Docket No. RM99-2-000, which are attached to Mr. Kreul's direct testimony (Ex. 24) as Schedule RCK-11. On pages 16-17 of Schedule RCK-11 to Exhibit 24, UCU commented to FERC as follows:

Specifically, UtiliCorp is one of those which the NOPR identifies as having alleged "*that transmission providers who also compete in power markets against their competitors have both the incentive and ability to post unreliable ATC numbers.*" We [UCU] submit that the same thing is true in the case of Capacity Benefit Margin ("CBM") calculations. This issue is at the core of the discriminatory behavior UtiliCorp and other power marketers have experienced at the hands of certain large transmission-owning utilities, *which have appeared to use ATC and CBM calculations in attempts to shield their high-cost generation from effective competition.* (emphasis added)

UCU's criticism of others as set forth above is equally applicable to UCU.

Finally, UCU/EDE cite the case of *Transmission Access Policy Study Group, et al. v. FERC*. The Commission should be aware that NARUC and several state commissions have filed a petition for certiorari (October 12, 2000)(No. 00-568) of this case to the Supreme Court, so any reliance on it by this Commission at this point would be risky at best.

#### *Transmission Access and Reliability*

36. *Have the Companies conducted and provided adequate studies of the impact of the proposed merger upon transmission facilities within, and interconnecting with, the State of Missouri, and upon all providers of electric service in the State, to prove that the proposed merger is not detrimental to the public interest?*

Since the record in this case fails to support the position of UCU/EDE on this issue, their brief merely states that this is a matter for FERC, not the state commission, and refers to the FERC's *Order Conditionally Authorizing Mergers* (the Commission should be aware that the *Order Conditionally Approving Mergers* is currently pending rehearing and could be changed). However, even the FERC *Order Conditionally Authorizing Mergers*, upon which Applicants rely, noted that Applicants have not accounted for the effects of their joint dispatch on transmission availability. Beginning on page 10 of the *Order Conditionally Authorizing Mergers* FERC stated:

In the Merger Policy Statement, ... [t]he Commission [*i.e.*, FERC] explained that transmission line loadings are likely to change as a result of merger applicants' combined operations and that such changes are likely to result in transmission availability different from historical experience [footnote omitted]. Transmission availability is a critical parameter in defining relevant markets, particularly in the transmission-constrained areas affected by the proposed merger, as Springfield points out. Therefore, failure to fully reflect the effects of joint dispatch may result in inaccurate identification and definition of relevant markets and, in turn, an inaccurate assessment of the effect of the proposed mergers in those markets.

....

Applicants' [*i.e.*, UCU, St. Joseph Light & Power Company and The Empire District Electric Company] analysis also shows that in many cases, the effect of post-merger system integration is to increase the combined companies' market share beyond the simple combination of their pre-merger market shares, further increasing concentration in relevant markets. [footnote omitted]. Our concern regarding Applicants' treatment of system integration is also relevant to an analysis of whether combining Applicants' generation and transmission creates or enhances the merged company's ability and/or incentive to adversely affect electricity prices or output. **Applicants have not performed such an analysis.** (Emphasis added)

*Order Conditionally Authorizing Mergers*, FERC Dockets EC00-27-000 et al., pp. 10-11 (July 26, 2000) (Ex. 5, Schedule JWM-1).



As stated in Springfield's initial brief, the Companies (*i.e.*, UCU) have not analyzed the impact of their combined uses of the region's transmission system upon transmissions customers such as, but not limited to, Springfield (with the resulting impact upon such transmission customers' retail customers). (Ex. 300, p. 23). Staff witness Proctor agrees (Ex. 714, pp. 7-8), and even states that he recommends "that the Commission support region-wide optimization of the transmission system." (Ex. 714, p. 7). Even though it now opposes a region-wide study by the Southwest Power Pool such as that recommended by Mr. Russell and Dr. Proctor, in its comments to FERC in Docket No. RM99-2-000, which are attached to Mr. Kreul's direct testimony (Ex. 24) as Schedule RCK-11, UCU stated that "regional approaches are necessary." (Ex. 24, Schedule RCK-11, p. 1).

In regard to UCU/EDE's contention that the State should not concern itself with transmission since transmission, according to Applicants, is under the jurisdiction of FERC (a recurring theme throughout UCU/EDE's brief on these issues), several matters should be mentioned. First, in his rebuttal testimony, Mr. Russell addressed at length why a state commission such as the Missouri Commission should be concerned about, and take an active role regarding, transmission. (Ex. 300, pp. 4-11). His testimony is unrefuted by competent, credible evidence on the record. Second, UCU's comments to FERC in Docket No. RM99-2-000 recognize that "state regulatory authorities effectively determine the rate of return on equity on all but a relatively small percentage of [transmission-owning utilities'] transmission assets." (Ex. 24, Schedule RCK-11, p. 19). Third, it was recognized in FERC's Order No. 2000 that state commissions possess authority over siting, planning and reliability of the transmission system. (*See*, Order No.

2000, pp. 629, 633, 635). Fourth, at the hearing in this matter, Mr. Green of UCU stated that various state commission take an active role in transmission reliability issues; approve utilities' plans for transmission systems; and that state jurisdiction over transmission varies from state to state (Tr. 332-334) - which could not be true if the states were preempted at the federal level. Fifth, this Commission has enacted certain rules relating to transmission issues. *See*, 4 CSR 240-20.080(3)(E); 4 CSR 240-22.040(1), (3), (5), (6), (7).

Although the FERC order referenced by UCU/EDE may require additional studies, that fact should not eliminate the concerns of this Commission with respect to harm to Missouri ratepayers and detriments to the public interest of Missouri. The FERC order contains numerous statements indicating that the merger is detrimental to the public interest. FERC's order is actually contrary to the position of UCU/EDE and supportive of Springfield's recommendations in the instant case. Also, any studies ordered by this Commission and done in collaboration with the Missouri PSC Staff and Springfield will be more rigorous and targeted to local problems and almost certainly will satisfy FERC's requirements. Thus, the studies recommended by Springfield and Staff in Missouri should be done to safeguard Missouri concerns and will incidentally add nothing to Applicants' burden to file at FERC, Applicants' statements to the contrary notwithstanding. The harm occasioned by the merger will occur as soon as the merger takes effect and transactions between the Applicants (which are now separate companies and separate control areas) begin. The harm will only worsen as integration proceeds. Therefore, the studies are needed now, before the merger is approved, not later, as required by the FERC order.

Finally, as stated in Springfield's initial brief, the Commission should bear in mind the standard applicable to this case – whether the proposed merger has been proven to be not detrimental to the public interest. This analysis should look to the effect of the merger on the Missouri public at large (*In the Matter of the Application of Carol June Tyndall*, 3 Mo. P.S.C. 3d 28 at 48 (1994)) given the regional implications and impact of the proposed merger. It is this Commission's duty to ensure that all citizens – whether customers of Kansas City Power & Light Company, Springfield, or the Applicants - are not detrimentally affected by this proposed merger, and the Commission should not abdicate that duty to the FERC.

*37. Will the proposed merger provide the Companies the ability to gain unduly preferential priority of access to limited transmission facilities and/or exercise their post-merger transmission access anti-competitively, to the detriment of other customers in the State and therefore to the detriment of the public?*

Applicants' initial brief fails to explain the contradiction between their stated position in this case and certain evidence which UCU itself presented in this case, namely the UCU comments to FERC in Docket No. RM99-2-000 (Ex. 24, Schedule RCK-11). In Exhibit 24, Schedule RCK-11, UCU told FERC that FERC should strengthen and enforce "its policies and precedent prohibiting utility discrimination against wholesale users of transmission in favor of their own uses of transmission for native load" (Ex. 24, Schedule RCK-11, p. 5, footnote 4) and that UCU believes "in the importance of the RTO's ability to thwart market power, especially in the context of *eliminating participating utilities' capabilities and incentives to obtain undue preferences for transmission used to serve*

*native load.*” (emphasis added)(Ex. 24, Schedule RCK-11, p. 10, footnote 8).<sup>1</sup> Clearly, in its comments to FERC, UCU recognized Springfield’s point – that UCU will gain an undue preference for its transmission over an expanded territory if the merger is approved. Rather than address this issue directly – which they could not do, given UCU’s stated position to FERC – in their brief UCU/EDE once again simply tell the state commission that this is a FERC matter. Therefore, Springfield would refer the Commission to the discussion under Point 36 above regarding Applicants’ contention that the State should not concern itself with transmission since transmission, according to Applicants, is under the jurisdiction of FERC.

*38. Could a post-merger UtiliCorp re-functionalize its transmission facilities in anti-competitive ways to the detriment of the public?*

Under this point of their brief, Applicants refer to the “seven factor test;” Springfield also addressed the seven factor test in its initial brief. As stated in Springfield’s initial brief, FERC Order No. 888 permits utilities to refunctionalize their transmission facilities pursuant to the “seven-factors test” in Order 888; however, FERC gave states the right to establish the dividing line between transmission and distribution pursuant to this “seven-factors test.” (Ex. 300, pp. 10, 47). In their brief, UCU/EDE once again simply tells the state commission that this is a FERC matter. Therefore, Springfield would refer the Commission to the discussion under Point 36 above regarding UCU/EDE’s contention that the State should not concern itself with transmission since transmission, according to UCU/EDE, is under the jurisdiction of FERC.

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<sup>1</sup> Springfield would also refer the Commission to the discussion under Point 35 above regarding ATC and CBM, and UCU’s comments to FERC regarding ATC and CBM.

39. *Do the Companies being merged adhere to a single, consistent set of standards for designing and operating their transmission facilities and, if not, would not adhering to a single, consistent set of standards for designing and operating their transmission facilities be detrimental if the merger is approved?*

Under this point of its brief, Applicants refer to the *Order Conditionally Authorizing Mergers* which was issued by FERC – however, rehearing of that order is pending and the order may be changed. Also, UCU/EDE once again tell the state commission that this is a FERC matter. Therefore, Springfield would refer the Commission to the discussion under Point 36 above regarding UCU/EDE's contention that the State should not concern itself with transmission.

*Market Power Conditions*

66. *Respecting transmission capacity, should Springfield's proposed conditions regarding Transmission Access and Reliability (which are set forth in detail herein under the heading "Transmission Access and Reliability Conditions") be adopted?*

As discussed in detail in Springfield's initial brief, the answer to this question is "yes." See further discussion below.

*Transmission Access and Reliability Conditions*

67. *(a) Should the Commission order the Joint Applicants to conduct production cost, load flow and stability studies of the impact of the proposed merger upon transmission facilities within, and interconnecting with, the State of Missouri, and upon all providers of electric service in the State, prior to approval of the merger and if so, what should such studies contain? (b) Should the Joint Applicants be ordered to provide these studies in hard copy and electronic form to the other parties, and should the*

*Commission keep this case open until such time as the studies have been completed and all parties have been allowed sufficient time to review/analyze and file comments in this case on such studies? (c) Should the Joint Applicants be required to construct and/or upgrade, at their expense, transmission facilities necessary to insure that their integrated operation will not adversely impact others? (d) If the answer to (c) is yes, what transmission facilities?*

Yes. UCU/EDE once again tell the Commission that this is a FERC matter and that the Commission cannot get involved, and refer once again to the case of *Transmission Access Policy Study Group, et al. v. FERC*. Therefore, Springfield would refer the Commission to the discussion under Point 35 above regarding the case of *Transmission Access Policy Study Group, et al. v. FERC* and Point 36 above regarding UCU/EDE's contention that the State should not concern itself with transmission.

68. *Should the Commission impose conditions on the merger such that:*

- *The Joint Applicants be required by the Commission to commit that with respect to any and all generating resources associated with any one of their existing four control areas (including purchased generating resources) serving load in any other control area of the merging companies, the merging companies should waive or not assert (i) native load priority on scheduling and curtailing non-firm network transmission service; (ii) the native load preference arguably accorded to bundled retail loads over wholesale loads under the decision in Northern States Power Co. v. FERC, 176 F.3d 1090 (8<sup>th</sup> Cir. 1999); and (iii) use of any native load priority that will enable any one of the merging companies to import power through constrained interfaces so as to free up its local generating resources for off-system sales?*

Yes. Same response as under Point 35 and Point 36.

- *The Joint Applicants not be allowed to combine any or all of their existing control areas without first submitting their plans for such combination to peer group review and approval by the SPP ISO/RTO and the affected regional reliability councils?*

Yes. See the discussion under Point 35 and Point 36.

- *The merged Companies be required to schedule all power flows and/or reserve transmission capacity on the relevant OASIS for purposes of carrying out any internal dispatch between what are now four geographically isolated pockets of load and generation in four separate control areas of the merging companies, to implement real-time monitoring of intra-company flows associated with internal dispatch, to report continuously the amount of such flows on its OASIS and to make all reasonable efforts to limit internal dispatch to levels at or below the transmission capacity reserved for purposes of carrying it out?*

Yes. See the discussion under Point 35 and Point 36.

- *If the burdens on Springfield attributable to internal dispatch of the Joint Applicants turn out to be substantial (i.e., a substantial increase in curtailments of Springfield's firm schedules from Montrose), the merged company be required to reimburse Springfield for the incremental costs to Springfield of re-dispatching Springfield's generating resources that are attributable to the post-merger integrated operations of the Joint Applicants' separate systems?*

Yes. See the discussion under Point 35 and Point 36.

- *The merged company be required to put all of its transmission facilities in Missouri and Kansas under the control of the SPP ISO/RTO in a single zone under the SPP transmission tariff and that the merged company join - and maintain membership in - the SPP ISO/RTO and be required to file an integrated open access transmission tariff ("OATT") and an integrated transmission rate for their four control areas in Missouri and Kansas?*

Yes. Applicants' initial brief on this point refers to a prior point of their brief, apparently for the proposition that they have several choices of which RTO to join; this simply misses the point. True, they may have choices, and this is why they should be ordered to join the SPP ISO/RTO. As Mr. Russell testified, "[t]his Commission should be concerned about the manner in which Missouri utilities carve up the state into multiple RTOs that may enhance individual utilities' marketing advantages, rather than supporting a vigorously competitive regional market" . . . "KCPL, Springfield, and Empire are in the SPP ISO" and UCU applied for network service from the SPP ISO, which "demonstrates

the suitability of SPP participation by the merged company.” (Ex. 300, p. 22).

Applicants fail to address, let alone rebut, this in their initial brief.

- *UtiliCorp be required to (i) set aside transmission capacity for Capacity Benefit Margins (CBM) and Transmission Reserve Margins (TRM) and (ii) to waive any future claims for CBM and TRM?*

Yes. See the discussion under Point 35 and Point 36.

*69. Should UtiliCorp be required to not seek refunctionalization of any currently categorized transmission lines of the merging companies that operate at or above 69kV?*

Yes. See the discussion under Point 35, Point 36, and Point 38.

*70. Should the Joint Applicants be required (i) to establish and implement a single standard for transmission system design and operation for the entirety of the merged company and (ii) to comply with the Southwest Power Pool Criteria?*

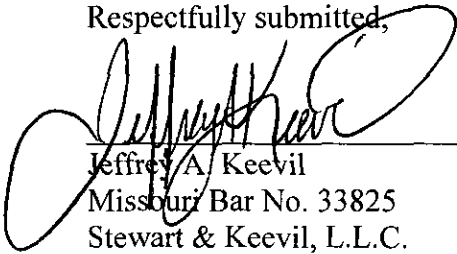
Yes. Applicants again simply claim this to be an exclusive FERC matter. See the discussion under Point 35 and Point 36 for Springfield’s response to this repeated claim.

## **CONCLUSION**

Competent and substantial evidence on the record as a whole shows the proposed merger to be detrimental to the public interest for the reasons discussed in Springfield’s initial brief; no competent and substantial evidence on the record refutes this, nor does the initial brief of UCU/EDE, for the reasons set forth above. The Commission must therefore either (i) deny the proposed merger or (ii) authorize the merger only upon the imposition of the conditions set forth in Springfield’s initial brief.



Respectfully submitted,



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ATTORNEY FOR THE CITY OF  
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THE BOARD OF PUBLIC UTILITIES

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was delivered by first-class mail, or hand-delivery, to counsel for parties of record; the Office of the Public Counsel; and the General Counsel's Office of the Missouri Public Service Commission on this 21st day of November, 2000.

