

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
June 7, 2001**

**CASE NO: EO-2001-477**

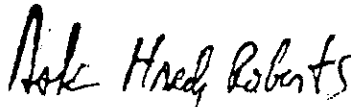
**Office of the Public Counsel**  
P.O. Box 7800  
Jefferson City, MO 65102

**General Counsel**  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

**Dean L. Cooper**  
Brydon, Swearngen & England, P.C.  
312 East Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102

**Enclosed find certified copy of an ORDER in the above-numbered case(s).**

**Sincerely,**



**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service  
Commission held at its office in  
Jefferson City on the 7th day of  
June, 2001.

In the Matter of the Application of UtiliCorp United Inc.     )  
under §32(k) of the Public Utilities Holding Company Act     )  
of 1935 Concerning Service Agreement No. 2 Between     ) **Case No. EO-2001-477**  
MEP Pleasant Hill, L.L.C. and UtiliCorp United Inc.     )  
d/b/a Missouri Public Service.     )

**ORDER GRANTING VARIANCE**

This order grants the motion filed on May 18, 2001, by UtiliCorp United, Inc., d/b/a Missouri Public Service, with the Missouri Public Service Commission for variance concerning Service Agreement No. 2 (SA2).

**UtiliCorp's Original Application**

UtiliCorp filed an application on March 8, 2001, for an order concerning SA2 between UtiliCorp and MEP Pleasant Hill, L.L.C. (Pleasant Hill). UtiliCorp stated that it filed the application under Subsection 32(k) of the Public Utility Holding Company Act of 1935 (the PUHCA), and Commission Rules 4 CSR 240-2.060(1) and 4 CSR 240-2.080.

UtiliCorp stated that it is a Delaware corporation, in good standing, with its principal office in Kansas City, Missouri, authorized to conduct business in Missouri through its Missouri Public Service operating division. UtiliCorp provides electric and natural gas in its service areas subject to the jurisdiction of the Commission. A certified copy of UtiliCorp's Certificate of Corporate Good Standing-Foreign Corporation and fictitious name registration issued by the Missouri Secretary of State was filed in case number EM-2000-292 and was

incorporated by UtiliCorp's reference to it under Commission Rule 4 CSR 240-2.060(1)(G). UtiliCorp stated that it has no pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or rates. UtiliCorp also stated that it has no annual report or assessment fees that are overdue.

Briefly restated, UtiliCorp's application further pointed out:

- Pleasant Hill is a special purpose limited liability company organized under the laws of the State of Delaware, and is in good standing. Pleasant Hill is owned equally by Aquila Energy Corporation--a wholly-owned subsidiary of UtiliCorp--and Calpine Corporation. Pleasant Hill is constructing an approximately 600 MW gas-fired, combined-cycle power project in Cass County, Missouri (the Aries Project).
- UtiliCorp has entered into contracts under which it purchases wholesale electric power. On May 22, 1998, UtiliCorp entered into a competitive bidding process under which it issued a Request for Proposal (RFP), for both annual and seasonal purchased power capacity.
- Pleasant Hill submitted the lowest bid. Accordingly, UtiliCorp negotiated a Power Sales Agreement (PSA) with Pleasant Hill.
- Subsection 32(k) of the PUHCA prohibits an electric utility, such as UtiliCorp, from entering into a purchase power agreement with an affiliated exempt wholesale generator (EWG), unless every state commission having jurisdiction over the retail rates of the electric utility

makes determinations with respect to the agreement; namely, the Commission has sufficient regulatory authority, resources, and access to books and records of UtiliCorp and any relevant affiliate or subsidiary to determine that the proposed PSA (1) will benefit consumers; (2) does not violate any applicable state law; (3) would not provide Pleasant Hill any unfair competitive advantage by virtue of its affiliation with UtiliCorp; and (4) is in the public interest.

- The Commission reviewed the PSA between UtiliCorp and Pleasant Hill in Commission case number EM-99-369 and made the necessary findings to satisfy the PUHCA.
- Thereafter, Pleasant Hill filed with the Federal Energy Regulatory Commission (FERC) a request for certification as an EWG and a request for approval of the PSA under applicable provisions of the PUHCA and the Federal Power Act. After obtaining the FERC approvals, Pleasant Hill began constructing a combined-cycle combustion turbine generation plant in Cass County, Missouri, near the town of Pleasant Hill.
- Pleasant Hill is now ready to test the Aries Project. Delivery obligations under the PSA commence on the initial Commercial Operation Date (COD) of the Aries Project in simple-cycle mode and the PSA does not provide for sales of test energy from the project prior to the COD. In order to account for test energy, Pleasant Hill and UtiliCorp have agreed to SA2 (attached to the application as

Appendix 1). SA2 also provides for sales of test energy prior to the subsequent COD of the Aries Project in combined-cycle mode. SA2 provides for the sale by Pleasant Hill to UtiliCorp of test energy from the Aries Project at UtiliCorp's avoided cost of supply. To remove any possibility of affiliate abuse, the rate is capped at a daily index price plus transmission charges.

- The Commission's statutory authority over retail rates of electrical corporations has not changed since case number EM-99-369. Thus, the Commission continues to have the ability to make the determinations required by the PUHCA.
- SA2 will allow the energy produced during the test of the Aries Project to be beneficially used and enable the Aries Project to produce a steady, affordable, and reliable source of electric power.
- SA2 does not violate any applicable state law.
- SA2 will not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp.
- UtiliCorp further specifically agrees to the following conditions which are a part of the Commission's Order in case number EM-99-369:
  - a) That UtiliCorp will make available to the Commission, the Commission's Staff, and the Office of the Public Counsel, at reasonable times and reasonable places, all books, records, employees, and officers of Pleasant Hill and any affiliate or subsidiary of UtiliCorp engaged in any activity with Pleasant Hill;

- b) Pleasant Hill will employ accounting and other procedures and controls related to cost allocations and transfer pricing to ensure and facilitate full review by the Commission and its Staff and to protect against cross-subsidization of non-UtiliCorp business by UtiliCorp's customers; and,
  - c) This order is not binding on the Commission or any party regarding a future rate or earnings complaint case to contest the ratemaking treatment to be afforded SA2. UtiliCorp will not seek to overturn, reverse, set aside, change or enjoin, whether through appeal or the initiation or maintenance of any action in any forum, a decision or order of the Commission which pertains to recovery, disallowance, deferral, or ratemaking treatment of any expense, charge, cost, or allocation incurred or accrued by Pleasant Hill or UtiliCorp as a result of SA2 on the basis that the expense, charge, cost, or allocation has itself been filed with or approved by the FERC, or was incurred under SA2.
- The terms of SA2 are in the public interest.

#### **Staff's Recommendation**

On April 27, 2001, the Staff filed its recommendation. Briefly restated, Staff's position is:

- Under SA2, the rate to UtiliCorp for the sale of test energy is set at UtiliCorp's avoided cost of supply (the cost to produce or that otherwise would be incurred for electric power that is displaced because the increment

of power is provided by the SA2) and the rate is capped at a market proxy plus applicable transmission charges.

- SA2 defines the terms "Contract Price" and "Buyer's Avoided Cost of Supply":

**Contract Price:** Buyer's Avoided Cost of Supply (defined below); provided, however, that the Contract Price will in no event exceed the "Into Cinergy" daily index price as quoted by Power Markets Weekly, plus the applicable transmission charges required to deliver the Product to the [UtiliCorp] Control Area.

**Buyer's Avoided Cost of Supply:** The cost that Buyer would otherwise incur to obtain the similar Energy for delivery to its native load. In situations in which the Buyer's native load offtake is less than the Buyer's available and reducible generation capacity, the avoided cost would be equal to the Buyer's marginal cost of generation. In situations in which the Buyer's native load offtake exceeds Buyer's available generation capacity, the avoided cost would be Buyer's cost to purchase substitute Energy on the open market. In situations where Energy being purchased on the open market can not [sic] be reduced and Buyer's generating units cannot be reduced, the avoided cost will be equal to the proceeds obtained by the Buyer from reselling the Seller's Energy into the existing market and the price received for such energy. The avoided costs will be calculated by the Buyer, and subject to audit and verification by the Seller.

- Commission Rule 4 CSR 240-20.015(2)(A)(1) Affiliate Transactions provides:

A regulated electrical corporation must not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation will be deemed to provide a financial advantage to an affiliated entity if[...]It compensates an affiliated entity for goods or services above the lesser of [...]the fair market price; or [t]he fully distributed cost to the regulated electrical corporation to provide the goods or services for itself....

- The "Contract Price" of the SA2 is not in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1). Missouri courts have held that duly promulgated rules of a state administrative agency have the force and effect of law.

Therefore, in Staff's opinion, this transaction: does not comply with Commission Rule 4 CSR 240-20.015(2)(A)(1); violates state law; will not benefit consumers; and will not be in the public interest. Staff recommends providing UtiliCorp with the PUHCA Subsection 32(k) determinations if UtiliCorp (a) files for a variance from Commission Rule 4 CSR 240-20.015(2)(A)(1), under 4 CSR 240-20.015(10) respecting "Variances," and (b) agrees that (i) this case will not be utilized by UtiliCorp for ratemaking purposes, (ii) the Staff's recommendation respecting this matter and the Commission's Order making the requested PUHCA Subsection 32(k) determinations will not be cited as precedent for any matter, and (iii) UtiliCorp will provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.

#### **UtiliCorp's Response**

On May 7, 2001, UtiliCorp filed its response to Staff's recommendation. Briefly restated, UtiliCorp's response noted:

- The approach by the Staff is generally acceptable to UtiliCorp, with certain reservations.
- UtiliCorp agrees that: this case will not be utilized by UtiliCorp for ratemaking purposes; the Staff's recommendation respecting this matter and the Commission's Order making the PUHCA Subsection 32(k) determinations will not be cited as precedent for any matter, except for those specific matters for which the application has been filed; and UtiliCorp will provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.



- UtiliCorp also agrees to file a motion for the identified variance within this case. UtiliCorp's actions in doing so, however, should not be interpreted as a concession on the part of UtiliCorp that the "contract price" provided for in SA2 is necessarily not in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting affiliate transactions or that the price contained in SA2 is necessarily within the jurisdiction of a state commission, rather than the FERC.
- Staff correctly cites Commission Rule 4 CSR 240.20.015. Contrary to Staff's assertions, there likewise is no requirement that contractual terms such as the COD be defined consistent with terms contained in the Missouri Revised Statutes (i.e., "in-service" date). This Rule does not impose a requirement to use specific contract language. It merely imposes a test for the resulting compensation paid to the affiliate. Staff's allegation that the contract will not be in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1) is merely speculation. Compliance, or noncompliance, will ultimately be measured by comparing the actual amount paid, on the one hand, to the lower of fair market price and fully distributed cost, as defined by the Rule, on the other hand.
- SA2 provides for a contract price that will be the lower of UtiliCorp's "avoided cost," as defined by the contract, and a market price. UtiliCorp believes that the "avoided cost" identified by the contract will in fact be lower than the Commission's "fully distributed cost" and therefore complies with Commission Rule 2 CSR 240-20.015(2)(A)(1). UtiliCorp committed in its

application that "Pleasant Hill will employ accounting and other procedures and controls related to cost allocations and transfer pricing to ensure and facilitate full review by the Commission and its Staff and to protect against cross-subsidization of [non-UtiliCorp] business by [UtiliCorp's] customers."

- To the extent it may be in error, UtiliCorp will ask for a variance as suggested by the Staff. The Staff has stated that "the costs associated with SA2 are not considered by the Staff to be material." UtiliCorp agrees with this statement and believes that the added benefit of fully testing the Aries Project so that this power can be added to UtiliCorp's portfolio to the benefit of UtiliCorp's customers and the State of Missouri weighs in favor of the variance suggested by the Staff. SA2 will allow the energy produced during the test of the Aries Project to be used in a beneficial manner and enable the Aries Project to move toward the production of a steady, affordable, and reliable source of electric power for distribution by UtiliCorp to its electric utility customers.

Thus, UtiliCorp stated its intention to file a variance as suggested by the Staff Recommendation, with the reservations identified above.

#### **UtiliCorp's Motion for Variance**

On May 18, 2001, UtiliCorp filed its motion for variance concerning SA2. Briefly restated, the motion noted:

- SA2 provides for a contract price that will be the lower of UtiliCorp's "avoided cost," as defined by the contract, and a market price. UtiliCorp believes that the "avoided cost" identified by the contract will in fact be lower

than the Commission's "fully distributed cost" and therefore within the parameters of Commission Rule 2 CSR 240-20.015(2)(A)(1).

- UtiliCorp, however, recognizes the Staff's concerns and, therefore, to the extent that it is in error and the eventual contract price is not in accordance with Commission Rule 2 CSR 240-20.015(2)(A)(1), seeks by its motion a variance from the identified pricing provision for the sole purpose of performing in accordance with SA2.

- The Staff has stated that "the costs associated with SA2 are not considered by the Staff to be material." UtiliCorp agrees with this statement and believes that the added benefit of fully testing the Aries Project so that this power can be added to UtiliCorp's portfolio to the benefit of UtiliCorp's customers and the State of Missouri weighs in favor of the variance suggested by the Staff. SA2 will allow the energy produced during the test of the Aries Project to be used in a beneficial manner and enable the Aries Project to move toward the production of a steady, affordable, and reliable source of electric power for distribution by UtiliCorp to its electric utility customers. Therefore, good cause exists for the grant of the requested variance.

Thus, UtiliCorp requested a Commission order:

(a) granting a variance for good cause from Commission Rule 4 CSR 240-20.015(2)(A)(1) for the sole purpose of performing in accordance with SA2;

(b) specifically determining that the Commission has sufficient regulatory authority, resources, and access to books and records of UtiliCorp and Pleasant Hill to

exercise its duties under Subsection 32(k) of the PUHCA to ensure that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp, and (iv) is in the public interest;

(c) authorizing UtiliCorp to perform in accordance with the terms and conditions of SA2 between Pleasant Hill and UtiliCorp; and

(d) authorizing UtiliCorp to enter into, execute, and perform in accordance with the terms of all documents reasonably necessary and incidental to the performance of the transactions which are the subject of SA2.

No party filed a response to UtiliCorp's motion. The Commission will grant the motion.

#### **Findings of Fact**

Commission Rule 4 CSR 240-2.060(14) states, in part:

[A]pplications for variances or waivers from...tariff provisions...shall contain information as follows: (A) Specific indication of the...tariff from which the variance or waiver is sought; (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and (C) The name of any public utility affected by the variance or waiver.

The Commission finds that UtiliCorp has substantially complied with that part of Commission Rule 4 CSR 240-2.060(14) cited above and will grant the variance.

#### **Good Cause Finding**

The Commission further finds that the good cause for granting the variance is that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp, and (iv) is in the public interest.

### **Findings Required Under the PUHCA**

The Commission also specifically finds that it has sufficient regulatory authority, resources and access to books and records of UtiliCorp and Pleasant Hill to exercise its duties under Subsection 32(k) of the PUHCA to ensure that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp and (iv) is in the public interest.

#### **IT IS THEREFORE ORDERED:**

1. That, in compliance with Subsection 32(k) of the Public Utility Holding Company Act of 1935, the Missouri Public Service Commission determines that: it has sufficient regulatory authority, resources, and access to books and records of UtiliCorp United, Inc., d/b/a Missouri Public Service, and MEP Pleasant Hill, L.L.C., to exercise its duties to ensure that the proposed Service Agreement No. 2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide MEP Pleasant Hill, L.L.C., with any unfair competitive advantage by virtue of its affiliation with UtiliCorp United, Inc., d/b/a Missouri Public Service, and (iv) is in the public interest.

2. The Missouri Public Service Commission grants to UtiliCorp United, Inc., d/b/a Missouri Public Service, a variance for good cause from the affiliate transactions rule as set forth in Commission Rule 4 CSR 240-20.015(2)(A)(1) for the purpose of performing in accordance with the Service Agreement No. 2 between MEP Pleasant Hill, L.L.C., and UtiliCorp United, Inc., d/b/a Missouri Public Service.

3. That UtiliCorp United, Inc., d/b/a Missouri Public Service, is authorized to perform in accordance with the terms and conditions of the Service Agreement No. 2

between MEP Pleasant Hill, L.L.C., and UtiliCorp United, Inc., d/b/a Missouri Public Service.

4. That UtiliCorp United, Inc., d/b/a Missouri Public Service, is authorized to enter into, execute, and perform in accordance with the terms of all documents reasonably necessary to the performance of the Service Agreement No. 2 between MEP Pleasant Hill, L.L.C., and UtiliCorp United, Inc., d/b/a Missouri Public Service.

5. That the Commission approves the agreement of the parties expressed in their pleadings that (i) this case will not be utilized by UtiliCorp United, Inc., d/b/a Missouri Public Service, for ratemaking purposes, (ii) no part of this case will be cited as precedent for any matter, and (iii) UtiliCorp United, Inc., d/b/a Missouri Public Service, will provide to the Staff of the Missouri Public Service Commission access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of Service Agreement No. 2.

6. That nothing in this order may be considered a finding by the Missouri Public Service Commission of the value for ratemaking purposes of the properties, transactions, or expenditures herein involved.

7. That the Missouri Public Service Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions, or expenditures herein involved in a later proceeding.

8. That this order shall become effective on June 17, 2001.

**BY THE COMMISSION**

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

( S E A L )

Lumpe, Ch., Murray, Simmons,  
and Gaw, CC., concur.

Ruth, Regulatory Law Judge

ALJ/Secretary: Hopkins/Robt, bpe  
6-1  
Date Circulated 30-2001-477  
CASE NO.  
Lumpke, Chair JS  
~~Deane, Vice Chair~~  
Am. & J. J.  
Murray, Commissioner  
KS  
Simmons, Commissioner  
7/6  
Gaw, Commissioner  
6-7  
Agenda Date  
Action taken: 4-095  
Must Vote Not Later Than

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and  
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 7<sup>th</sup> day of June 2001.

Dale Hardy Roberts

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

