

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

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

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

DEAN COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
BRIAN K. BOGARD
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

March 14, 2002

FILED
MAR 14 2002
Missouri Public
Service Commission

Secretary of the Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102-0360

**Re: MCFC v. Missouri Public Service
Case No. EC-2002-277**

Dear Mr. Roberts:

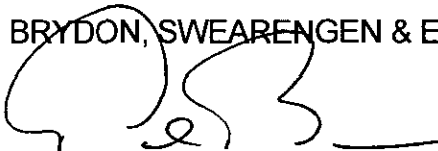
On behalf of UtiliCorp United Inc., enclosed for filing in the above-referenced case please find an original and eight (8) copies of a Response of UtiliCorp United Inc. to Reply of Complainant. Copies have been hand-delivered to the Office of the Public Counsel and mailed to all counsel of record. I have also enclosed a "receipt" copy, which I request that you file stamp and return to the messenger delivering same.

Thank you for your assistance in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:



Paul A. Boudreau

PAB/aw

Enclosures

cc: PSC General Counsel's Office
Mr. John Coffman, OPC
Mr. Terry C. Allen

SION

FILED

MAR 14 2002

Missouri Public
Service Commission

2-277

Respondent.)

Case No. EC-2002-277

COMES NOW UtiliCorp United Inc. d/b/a Missouri Public Service (“MPS”), by and through counsel, and provides the following response to the March 7, 2002, reply of the Missouri Coalition for Fair Competition (the “MCFC”) to MPS’s Motion to Dismiss (hereinafter, the “Reply”):

1. At the outset, MPS notes that MCFC's Reply was not timely filed. The Commission's rules of practice and procedure provide that parties are not allowed more than ten (10) days from the date of filing in which to respond to any pleading unless authorized by the Commission. *See*, 4 CSR 240-2.080(16). The Reply was not filed within ten (10) days of the filing of MPS's Motion to Dismiss, which was filed on February, 21, 2002. Consequently, it should not be considered by the Commission absent a showing of good cause for doing so.

2. Should the Commission in any event decide to accept and entertain the Reply of the MCFC, a number of observations are appropriate. First, the MCFC admits non-compliance with the Commission's rule requiring that a Complaint include a statement as whether the complainant has directly contacted the public utility about the grounds upon which complaint is

being made. *See*, 4 CSR 240-2.070 (*Reply* at ¶ 8). Rather, the MCFC appears to be contemptuous of the requirement.

3. Second, MCFC contends that fact pleading is not required by the Commission's rules. *Reply*, ¶ 10. To the contrary, the Commission's rule requires a "clear and concise" statement of the nature of the complaint. *See*, 4 CSR 240-2.070(5)(C). Moreover, a party may file a motion to dismiss based on a complainant's "failure to state a claim on which relief may be granted." *See*, 4 CSR 240-2.070(6). This would be a meaningless opportunity if a complainant were not required to state the basic facts upon which a complaint is based. The Commission's complaint procedures are not in place to provide an opportunity for the MCFC to engage in a fishing expedition under the guise of "discovery".

4. Finally, the MCFC has attempted to insert a new issue in its Reply. In ¶ 7 of its Reply, the MCFC makes reference to the Commission's promotional practices rule, suggesting that MPS may have violated some of the provisions thereof. Several important observations need to be made about this allegation. The Complaint does not allege a violation by MPS of the Commission's promotional practices rule. The MCFC may not, in the context of its Reply, inject a wholly new issue in an effort to avoid summary dismissal of the Complaint. In any event, the Commission's promotional practices rule is not applicable to any of the matters addressed by the PowerTechSM program. To the contrary, advertising and publicity by a public utility under its own name is specifically *excluded* from the definition of the term "promotional practices" in the Commission's rules. *See*, 4 CSR 240.14.010(6)(L)(10).

5. In an effort to avoid dismissal of its Complaint, the MCFC urges the Commission to consider its Staff's Report for guidance on whether the PowerTechSM dealers are under the control of MPS. *See, Reply*, ¶ 7. The Staff has since filed its Report in which it has

indicated that the PowerTechSM Dealer Letter of Understanding does not give direct or implied control or partial control of the PowerTechSM dealers to MPS.

WHEREFORE, MPS contends that the Reply of the MCFC is untimely and, in any event, without merit, and therefore MPS renews its request that the Complaint be dismissed.

Respectfully submitted,



Paul A. Boudreau #33155
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Telephone: (573) 635-7166
Facsimile: (573) 635-0427
E-Mail: PaulB@brydonlaw.com

Attorneys for UtiliCorp United Inc. d/b/a Missouri
Public Service

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 14th day of March 2002, to:

Mr. Terry C. Allen
Allen & Holden Law Office, L.L.C.
102 E. High Street, Suite 200
P.O. Box 1702
Jefferson City, MO 65102

Missouri Public Service Commission
General Counsel's Office
Governor Office Building
200 Madison Street, P.O. Box 360
Jefferson City, MO 65102

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



Paul A. Boudreau