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ORIGINAL

January 4, 2001

FILED[2]
JAN 4 2001
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 an Application for Rehearing, Motion for Reconsideration and Request for Stay on behalf of the City of Springfield, Missouri, through the Board of Public Utilities. I realize that UtiliCorp has announced that it is terminating this proposed merger; however, out of an abundance of caution I feel compelled to make this filing at this time since to my knowledge neither UtiliCorp nor Empire has made any formal filings in this case to recognize the termination of the merger.

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[2]
JAN 4 2001
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

APPLICATION FOR REHEARING, MOTION FOR RECONSIDERATION AND REQUEST FOR STAY

COMES NOW the City of Springfield, Missouri, through the Board of Public Utilities ("City Utilities")[1], pursuant to Section 386.500 RSMo 1994 and 4 CSR 240-2.160, by and through the undersigned counsel, and for its Application for Rehearing, Motion for Reconsideration and Request for Stay in the above-captioned case respectfully states as follows:

1. On December 28, 2000, the Commission issued a Report and Order (the "Order") in this case. The Order contained an effective date of January 7, 2001.

2. The Order is unjust, unreasonable, unlawful, arbitrary and capricious, an abuse of discretion, and deprives City Utilities of its rights to due process and equal protection as guaranteed by the Missouri and United States Constitutions for the reasons set out below.

[1] As stated in City Utilities' Application to Intervene in this case, the City of Springfield, Missouri, is a constitutional charter city existing and operating pursuant to Article VI, Sections 19 and 19(a) of the Constitution of the State of Missouri. Utility services, including electric and natural gas service, are provided to the public through its Board of Public Utilities pursuant to Article XVI of the City Charter of the City of Springfield, Missouri. To the extent required, copies of relevant provisions of the City Charter have been previously filed with the Commission in Case No. TA-97-313 and are incorporated herein by this reference.

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3. The Commission erred in finding that "the merger between UtiliCorp [UtiliCorp United Inc.] and Empire [The Empire District Electric Company] will not be detrimental to the public and should be approved;" such finding is not supported by competent and substantial evidence on the record, and in fact is contrary to the overwhelming weight of the evidence. In order for the Commission's Order to be supported by "competent and substantial evidence," the Commission's findings must be supported by credible testimony. *See, Deaconess Manor Association v. Public Service Commission,* 994 S.W.2d 602 at 611 (Mo. App. 1999). In this case they are not.

4. The Commission erred in failing to make any findings, or made inadequate findings, concerning certain issues set forth in the List of Issues which required a finding by the Commission; more specifically, the Commission erred by failing to make findings, or made inadequate findings, on the following issues:

(a) whether the merger will allow the Companies (UtiliCorp and Empire) to take valuable, limited transmission capacity necessary for other Missouri utilities to maintain deliveries under their purchased power contracts;

(b) whether the Companies have 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;

(c) whether the proposed merger will 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;

(d) whether a post-merger UtiliCorp could refunctionalize its transmission facilities in anti-competitive ways to the detriment of the public;

(e) whether the companies being merged adhere to a single, consistent set of standards for designing and operating their transmission facilities and, if not, whether not adhering to a single, consistent set of standards for designing and operating their transmission facilities would be detrimental if the merger is approved.

Furthermore, to the extent that the Commission made any findings in the Order regarding the issues set forth above, such findings are not supported by competent and substantial evidence on the record and in fact are contrary to the overwhelming weight of the evidence. In order for the Commission's Order to be supported by "competent and substantial evidence," the Commission's findings must be supported by credible testimony. *See, Deaconess Manor Association v. Public Service Commission,* 994 S.W.2d 602 at 611 (Mo. App. 1999).

5. In the Order, the Commission erred in failing to impose the following conditions upon the merger between UtiliCorp and Empire:

(a) That the Applicants (*i.e.,* UtiliCorp and Empire), prior to approval of the merger, conduct production cost, load flow and stability studies of the effects of combining their systems and control areas upon other utilities. Although the FERC has ordered Applicants to conduct a similar study, the studies need to be done prior to approval of the merger rather than after, as FERC has ordered, and should be expedited to prevent detriment to the Missouri public. The Applicants should be ordered to provide these studies in hard copy and electronic form to the other parties, and the Commission should keep this case open until such time as the studies have been completed and all

parties have been allowed sufficient time (*i.e.*, 30 days) to review/analyze and file comments in this case on such studies. If, after the comments are filed, the Commission determines that additional hearings are warranted, hearings could be continued at that time. Such studies should include, but not necessarily be limited to, the following: (i) Production cost simulations that indicate the hourly amount of power flows that can be expected to occur between each of the separate pockets of load and generation in connection with the merged company's internal dispatch. This should include hourly determinations of net exports and imports for each of those pockets. The output of this analysis should also include hourly indications of (A) the amount of generating capacity probabilistically determined to be available from each generating resource owned and purchased by the merged company, (B) the amount of that capacity dedicated to native load, (C) the amount dedicated to firm off-system sales, and (D) the amount available for additional off-system sales; (ii) Load flow and stability analyses of necessary additions of equipment (and employment of must-run generation) to support transmission voltages within a +/- 5% range of nominal voltage under base case conditions, heavy transfer conditions and under all single contingency outage conditions. The starting conditions should reflect alterations of internal dispatch that Applicants expect to occur in the post-merger scenarios. (iii) Analyses of transmission facility additions necessary to integrate operations of Applicants' control areas without impairing City Utilities' ability to carry out a planned purchase of a firm unit entitlement from KCPL's Montrose unit. The reliability criteria should include a requirement that Applicants comply with regional reliability standards. Furthermore, Applicants (or UtiliCorp as the surviving company) should be ordered to construct, at their expense, any transmission lines which the studies

identify as being necessary, as well as the 161 kV line between Nevada and Asbury. During the course of this case, UtiliCorp finally committed to construct the Nevada to Asbury line, and the Commission erred in failing to order UtiliCorp to do so in the Order.

(b) That the Applicants commit that with respect to any and all generating resources associated with any one of their existing 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 (8th 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 local generating resources for off-system sales.

(c) That the Applicants not be allowed to combine any or all of their existing control areas without first submitting their plans for such combinations to peer group review and approval by the SPP ISO/RTO and the affected regional reliability councils.

(d) That the merged companies 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 geographically isolated pockets of load and generation in separate control areas of the merging companies; implement real-time monitoring of intra-company flows associated with internal dispatch; report continuously the amount of such flows on its OASIS; make all reasonable efforts to limit internal dispatch to levels at

or below the transmission capacity reserved for purposes of carrying out internal dispatch.

(e) That, if the burdens on City Utilities attributable to internal dispatch of the Applicants turn out to be substantial (*i.e.*, curtailments of City Utilities' firm schedules from Montrose), UtiliCorp reimburse City Utilities for the incremental costs to City Utilities of re-dispatching City Utilities' generating resources that are attributable to the post-merger integrated operations of what are now the Applicants' separate systems.

(f) That UtiliCorp be required to (i) not 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.

(g) That the merged company be required to put all of its transmission facilities under the control of the SPP ISO/RTO in a single zone under the SPP transmission tariff and to join - and maintain membership in - the SPP ISO/RTO and also be required to file an integrated open access transmission tariff ("OATT") and an integrated transmission rate for what are now separate control areas. The Commission should be aware that, subsequent to the hearing in this case, and also subsequent to the date required by FERC to make its RTO/ISO filing, UtiliCorp has put its membership plans to join the Midwest ISO on hold, due to the request of several of its members to pull out. Therefore, when the Commission states on page 19 of the Order that "UtiliCorp replied that it would meet the FERC deadline for joining [October 15, 2000] a regional transmission entity" (*see also*, Order at p. 22) the Order is based on a representation by UtiliCorp which UtiliCorp did not fulfill.

(h) That UtiliCorp be required to not seek refunctionalization of any currently categorized transmission lines of the merging companies that operate at or above 69 kV.

(i) That the Applicants be required to establish and implement a single standard for transmission system design and operation for the entirety of the merged company and, be required to at least comply with the Southwest Power Pool Criteria.

Furthermore, the Commission erred in the Order in failing to make any findings, or made inadequate findings, concerning the foregoing conditions, and to the extent that the Commission made any findings in the Order regarding the conditions set forth above, such findings are not supported by competent and substantial evidence on the record and in fact are contrary to the overwhelming weight of the evidence.

6. The seven factor test adopted by FERC in Order 888, to which the Commission refers on pages 42-43 of the Order, was designed and is intended to be used to categorize electrical facilities as either transmission or distribution facilities, not to be used to determine whether issues are subject to state or exclusive federal jurisdiction as the Commission used the seven factor test in the Order, and as such the Order is unlawful.

7. The Commission's decision on page 43 of the Order that "The Commission will not attempt to determine the validity of Springfield's concerns and will instead defer to the jurisdiction of the FERC" was unlawful, unjust, unreasonable, arbitrary and capricious, an abuse of discretion, and deprived City Utilities of its rights to due process and equal protection. In its discussion in the Order of the five-year rate moratorium, the Commission recognized that its has certain "statutory obligations" and "legislatively imposed duties;" one such statutory obligation and legislatively imposed

duty is to ensure that mergers such as that at issue in this case are not detrimental to the public of Missouri. The Commission cannot abdicate this responsibility and simply defer to the FERC, and to do so was clearly unlawful, unjust, unreasonable, arbitrary and capricious, an abuse of discretion, and deprived City Utilities of its rights to due process and equal protection. The Commission is undoubtedly aware of the serious issues concerning the availability and price of electricity currently confronting the residents of the State of California, and must take action to prevent a repeat of California's problems in Missouri, rather than defer to the FERC and rely upon FERC to protect the Missouri public.

8. Although the Order is unclear, to the extent that the Commission found that the issues set forth in paragraph 4 above and/or the conditions set forth in paragraph 5 above are not subject to the Commission's jurisdiction, the Commission erred. These issues clearly relate to whether the merger will be detrimental to the Missouri public, *i.e.*, harm the retail ratepayers of other Missouri utilities which may be disadvantaged by the merger, are subject to this Commission's jurisdiction, and in fact must be decided by the Commission prior to approving the merger.

9. The Commission erred on pages 32-33 of the Order in failing to make findings of fact and/or conclusions of law regarding the answers to the questions posed by the Commission itself – what does it mean for the Commission to find that the proposed merger is "not detrimental to the public" and who is "the public" that is to be protected from detriment? City Utilities cannot tell from the Order if the Commission determined "the public" to only be ratepayers of UtiliCorp and Empire, but if the Commission so determined, it was in error. The Commission has a statutory obligation to

see that a merger such as the instant merger is not detrimental to any of the Missouri public, including the retail ratepayers of other Missouri utilities which may be disadvantaged by the merger for the reasons described in the issues set forth in paragraph 4 above.

10. The Commission erred in its reliance on the case of *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) since applications for certiorari to the U.S. Supreme Court have been filed in this case and have not yet been denied; the precise issue for which the Commission cites the case will likely be determined by the Supreme Court if certiorari is granted, and may be determined contrary to the manner in which the Commission used the case in the Order. Therefore, reliance in the Order upon the case is clearly unlawful, unjust, unreasonable, arbitrary and capricious, an abuse of discretion, and deprives City Utilities of its rights to due process and equal protection by having the Commission's decision in this case rest upon a court case which is not yet final and may ultimately be determined by the U.S. Supreme Court to support City Utilities' position in this case.

11. The Order fails to set forth adequate findings of fact and conclusions of law as required by Missouri law. Accordingly, the Order is unlawful and unreasonable as a matter of law.

12. The Order fails to set forth adequate findings of fact and conclusions of law as required by Missouri law and accordingly City Utilities is unable to discern the actual basis of the Commission's decision in general in a manner sufficient to more specifically frame issues for judicial review. Accordingly, the Order is unlawful and unreasonable as a matter of law.

13. In all other respects, the Order is unlawful, unjust, unreasonable, and is not supported by competent and substantial evidence upon the whole record in violation of Missouri law.

14. The Commission erred in not ordering the Applicants to perform market power studies regarding the merger.

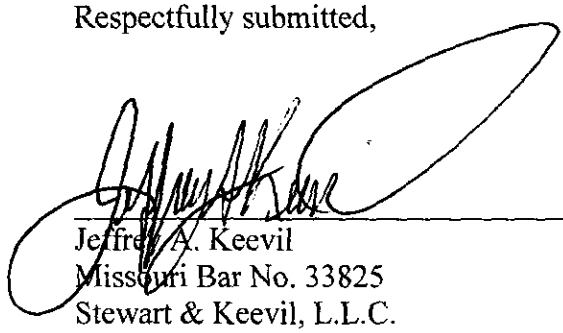
15. The Commission concluded on page 26 of the Order that it "is not obligated to follow federal precedent;" however, on page 42 of the Order, the Commission concluded that whether it has certain jurisdiction "is answered through a review of applicable federal law;" these statements are clearly inconsistent and therefore both statements cannot possibly be correct. The Commission must therefore grant rehearing and properly find and indicate in its Order whether it believes it is or is not bound by federal law and whether, why and to what extent it found federal law to be controlling in this case.

16. **STAY REQUEST** - Pursuant to Section 386.500 RSMo. 1994 the Commission may stay its Order. For all of the reasons set forth above, the Commission should stay its Order in this case, at least until all applications for rehearing are decided and the parties are given a chance to seek similar relief in the circuit court. Furthermore, given that on pages 42-43 of the Order the Commission appears to have relied upon the case of *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), and since applications for certiorari to the U.S. Supreme Court have been filed in that case and have not yet been denied, the Commission should stay the effectiveness of its Order until that case becomes truly final and non-appealable, whether by denial of

certiorari, decision of the U.S. Supreme Court, or final, non-appealable decision on remand.

WHEREFORE, City Utilities respectfully requests that the Commission issue an order staying the effectiveness of the Report and Order issued herein on December 28, 2000, and granting rehearing/reconsideration of the Report and Order issued herein on December 28, 2000, for the reasons stated above.

Respectfully submitted,



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VERIFICATION

STATE OF MISSOURI)
) ss
COUNTY OF BOONE)

I, Jeffrey A. Keevil, being first duly sworn verify that I: am an attorney for the City of Springfield, Missouri, through the Board of Public Utilities ("City Utilities"), licensed to practice law in the State of Missouri; have been authorized to file the foregoing on behalf of City Utilities; and that the foregoing is correct to the best of my knowledge, information and belief.

Jeffrey A. Keevil

Subscribed and sworn to before me this 4th day of January, 2001 .

Shawna M. Adams
Notary Public - Notary Seal
STATE OF MISSOURI
Boone County
My Commission Expires: Jan. 13, 2004

Notary Public

My Commission expires: _____

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 4th day of January, 2001.