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April 27, 2001

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Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
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FILED²
APR 27 2001
Missouri Public
Service Commission

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

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of a **STAFF RECOMMENDATION REGARDING PROVISION OF PUBLIC UTILITY HOLDING COMPANY ACT SECTION 32(k) DETERMINATIONS TO UTILICORP FOR ITS TEST POWER CONTRACT WITH MEPPH.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Steven Dottheim
Chief Deputy General Counsel
(573) 751-7489
(573) 751-9285 (Fax)

Enclosure
cc: Counsel of Record

FILED²

APR 27 2001

Missouri Public
Service Commission

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the matter of the Application of UtiliCorp United Inc.)
under Section 32(k) of the Public Utilities Holding)
Company Act of 1935 concerning Service Agreement No.)
2 between MEP Pleasant Hill, L.L.C. and UtiliCorp)
United Inc. d/b/a Missouri Public Service)

Case No. EO-2001-477

**STAFF RECOMMENDATION REGARDING PROVISION OF PUBLIC UTILITY
HOLDING COMPANY ACT SECTION 32(k) DETERMINATIONS TO UTILICORP
FOR ITS TEST POWER CONTRACT WITH MEPPH**

Comes now the Staff of the Missouri Public Service Commission (Staff) regarding the matter of the Missouri Public Service Commission (Commission) providing to UtiliCorp United Inc. (UtiliCorp), d/b/a Missouri Public Service (MPS) the Public Utility Holding Company Act of 1935 (PUHCA) Section 32(k) determinations sought by UtiliCorp respecting its Service Agreement No. 2 (SA2) with MEP Pleasant Hill, L.L.C. (MEPPH). In respect thereto, the Staff states as follows:

1. The "Contract Price" provided for in SA2 is not in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting "Affiliate Transactions."¹ Thus, the transaction, in not being in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1), would violate state law; would not benefit consumers; and would not be in the public interest. The Staff has discussed this matter with UtiliCorp. Since the costs associated with SA2 are not considered by the Staff to be material, the Staff would recommend to the Commission that the Commission

¹ Several gas corporations have sought judicial review of the Commission's gas affiliate transaction rule and have obtained a stay of the same as said rule applies to them. One electrical corporation (Union Electric Company, d/b/a AmerenUE) has sought judicial review of the Commission's electric affiliate transaction rule and has obtained a stay of the same as said rule applies to it. UtiliCorp has not sought judicial review or a stay of the Commission's electric affiliate transaction rule or the Commission's gas affiliate transaction rule.

provide the PUHCA Section 32(k) determinations sought by UtiliCorp in the instant proceeding, if UtiliCorp (a) files for a variance from Commission Rule 4 CSR 240-20.015(2)(A)(1), pursuant to 4 CSR 240-20.015(10) respecting "Variances," and (b) agrees that (i) Case No. EO-2001-477, i.e., SA2, shall 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 Section 32(k) determinations shall not be cited as precedent for any matter, and (iii) UtiliCorp shall provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.

Case No. EM-99-369

2. On March 1, 1999, UtiliCorp filed with the Commission an Application for an Order making certain determinations pursuant to Section 32(k) of PUHCA with respect to a Power Sales Agreement (PSA) between UtiliCorp and MEPPH. The Commission docketed the Application as Case No. EM-99-369.

3. In said Application filed on March 1, 1999, UtiliCorp related that (a) MEPPH is a limited liability corporation organized under and by virtue of the laws of the State of Delaware, with its principal office and place of business in Raytown, Missouri; (b) MEPPH is a subsidiary of UtiliCorp; (c) on May 22, 1998 UtiliCorp entered into a competitive bidding process pursuant to which it issued a Request For Proposal (RFP) for both annual and seasonal purchased power capacity; (d) UtiliCorp determined that the lowest cost, and therefore the successful proposal, was the bid submitted by MEPPH; (e) UtiliCorp negotiated with MEPPH a PSA which would provide for 320 to 500 megawatts (MW) of capacity over a four year term commencing June 1, 2001; (f) MEPPH would supply capacity from a 500 MW gas fired combined-cycle combustion turbine generation plant, which MEPPH would construct in Cass County, Missouri, near the

town of Pleasant Hill; (g) MEPPH will not be an "electrical corporation" as that term is defined in Section 386.020(15) in that it will sell electric power exclusively at wholesale and, thus, will not be engaged in the sale of electric power at retail to the general public²; (h) MEPPH will be regulated by the Federal Energy Regulatory Commission (FERC) with respect to wholesale energy rates; (i) in order to protect against abusive affiliate transactions, PUHCA Section 32(k) requires that the Commission make certain determinations respecting the PSA before MEPPH may apply to the FERC for approval of the PSA; (j) once the Commission makes the PUHCA Section 32(k) determinations MEPPH will file with the FERC a request for certification as an exempt wholesale generator (EWG) and a request for approval of the PSA under applicable provisions of PUHCA and the Federal Power Act (FPA); and (k) shortly after obtaining these FERC approvals MEPPH would commence with the construction of the 500 MW combined cycle combustion turbine generation plant.³

² *State ex rel. M.O. Danciger v. Public Serv. Commn*, 205 S.W. 36 (Mo. 1918).

³ The Calpine Corporation website provides, among other information, the following at "Energy Centers – Energy Assets – Under Construction – Aries" (www.calpine.com/energy_assets_4/calpine_4_2_3.asp?plant=61):

In January 2000, Calpine acquired a 50% interest in the Aries Power Plant, natural gas-fired plant currently under construction near Pleasant Hill, Missouri, from a subsidiary of Aquila Energy Corporation. Construction started in 1999. Commercial operation of the first 330 megawatts is scheduled to begin December 2001 with the balance of the plant starting in January 2002. The majority of the facility's output will be sold to Missouri Public Service through May 2005. Thereafter, power will be sold into the Southwest Power Pool.

(It is the Staff's understanding that the first 320 megawatts is scheduled to begin June 1, 2001.).

The UtiliCorp United Inc. website at "www.utilicorp.com" provides, among other information, the following at "News & Events – News Releases – 2000 Archived News Releases – 14-Jan-2000 Aquila Energy Teams With Calpine Corp. On Missouri Power Plant Ownership":

Aquila Energy, a wholly-owned subsidiary of UtiliCorp United (NYSE: UCU), has sold to San Jose-based Calpine Corporation (NYSE:CPN) a 50 percent interest in its 600-megawatt, natural gas-fired, combined-cycle Aries power plant now under construction in Pleasant Hill, Missouri.

Under the agreement Merchant Energy Partners, an Aquila subsidiary, will manage the fuel supply for the plant as well as all the power produced by the plant. Calpine will oversee construction of and operate and maintain the plant.

4. Thus, pursuant to PUHCA Section 32(k), UtiliCorp in its March 1, 1999 Application requested that the Commission issue an Order specifically determining that the Commission has sufficient regulatory authority, resources and access to books and records of UtiliCorp and MEPPH to exercise its duties under PUHCA Section 32(k) to ensure that the PSA benefits consumers, does not violate state law, does not provide MEPPH with any unfair competitive advantage by virtue of its affiliation with UtiliCorp and is in the public interest. UtiliCorp stated that it understood that an Order containing the findings required by PUHCA with respect to the PSA in no way would be binding on the Commission or any party to a future rate case to contest the ratemaking treatment to be afforded the PSA.

5. On April 5, 1999, the Staff filed its Recommendations that the Commission make the PUHCA determinations requested by UtiliCorp only upon certain conditions set out in the Staff's Recommendations.

6. Also on April 5, 1999, the Office of the Public Counsel (Public Counsel) filed a Recommendation that the Commission make the PUHCA determinations requested by UtiliCorp only upon certain conditions set out in Public Counsel's Recommendation.

7. On April 22, 1999, the Commission issued Order Regarding Power Sales Agreement approving the Application filed by UtiliCorp subject to the conditions recommended by the Staff and Public Counsel. (Attachment 1 hereto). The Commission directed that the Order shall become effective on May 4, 1999 and that the case be closed on May 5, 1999. UtiliCorp did not file an Application For Rehearing or anything further in Case No. EM-99-369.

UtiliCorp's March 8, 2001 Application states, in part, as follows:

... MEPPH is owned 50% by Aquila Energy Corporation – a wholly owned subsidiary of UtiliCorp – and 50% by Calpine Corporation. MEPPH owns and is in the process of constructing an approximately 600 MW gas fired combined cycle power project in Cass, County Missouri (the "Aries Project").

8. Subsequently, MEEPH was certified as an EWG by the FERC (FERC Docket No. ER99-2833-000) and the PSA was approved by the FERC under applicable provisions of PUHCA and FPA (FERC Docket No. ER-99-2858-000).

Case No. EO-2001-477

9. On March 8, 2001, UtiliCorp filed an Application with the Missouri Public Service Commission seeking that the Commission make the PUHCA Section 32(k) determinations respecting Service Agreement No. 2 (SA2) between UtiliCorp and MEPPH. UtiliCorp explained in its Application that the PSA, which the Commission addressed in Case No. EM-99-369, applies to delivery obligations of MEPPH that commence on the Commercial Operation Date (in-service date) ⁴ of the Aries Project in simple-cycle mode, but not to sales of test energy from the unit prior to such Commercial Operation Date. SA2 also provides for sales of test energy prior to the subsequent Commercial Operation Date of the Aries Project in combined-cycle mode.⁵

10. UtiliCorp states in its March 8, 2001 Application that the Commission continues to have the ability to make the PUHCA Section 32 determinations and that UtiliCorp agrees to certain conditions which are a part of the Commission's Order in Case No. EM-99-369.

11. 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

⁴ The "in-service" date is defined by Section 393.135 RSMo 2000 as the date that the unit is "fully operational and used for service."

⁵ The Staff related in the Recommendation submitted by Dr. Michael S. Proctor in Case No. EM-99-369 that in 2001 UtiliCorp will receive 320 MW of combustion turbine capacity from the Aries Project and in 2002 UtiliCorp will receive 500 MW of capacity out of the Aries Project as MEPPH adds 180 MW of combined-cycle capacity to the 320 MW of combustion turbines.

A combined cycle unit is an electric generating unit that consists of one or more combustion turbines and one or more boilers with a portion of the required energy input to the boiler(s) provided by the waste, exhaust gas of the combustion turbine(s).

power that is displaced because the increment of power is provided by the SA2) and “the rate is capped at a market proxy – the ‘Into Cinergy’ daily index price as quoted by Power Markets Weekly, plus applicable transmission charges necessary to deliver the quantity of energy from Cinergy to the MPS control area. [Footnote omitted.]” SA2 defines the terms “Contract Price” and “Buyer’s Avoided Cost of Supply” specifically as follows:

Contract Price:

Buyer’s Avoided Cost of Supply (defined below); provided, however, that the Contract Price shall 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 Missouri Public Service 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.

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

4 CSR 240-20.015 Affiliate Transactions

(2) Standards

(A) A regulated electrical corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation shall be deemed to provide a financial advantage to an affiliated entity if –

1. It compensates an affiliated entity for goods or services above the lesser of –

A. The fair market price; or

B. The 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 4 CSR 240-20.015(2)(A)(1). Missouri courts have held that "[d]uly promulgated rules of a state administrative agency have the force and effect of law. *Missouri National Education Association v. Missouri State Board of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985)." *State ex rel. City of Springfield v. Public Serv. Commn.*, 812 S.W.2d 827, 831 (Mo. App. 1991); *overruled on other grounds, Missouri Municipal League v. State of Missouri*, 932 S.W. 2d 400, 402 (Mo.banc 1996). Therefore, in that the instant transaction will not be in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1), the transaction will violate state law; will not benefit consumers; and will not be in the public interest. As noted in the opening paragraph of this pleading, the Staff has discussed this matter with UtiliCorp as to what assurances UtiliCorp will need to provide, in order for the Staff to recommend to the Commission that the Commission provide the PUHCA Section 32(k) determinations sought by UtiliCorp.

Wherefore the Staff of the Missouri Public Service Commission recommends to the Missouri Public Service Commission providing to UtiliCorp United Inc., d/b/a Missouri Public Service, the Public Utility Holding Company Act of 1935 Section 32(k) determinations sought by UtiliCorp United Inc., d/b/a Missouri Public Service respecting Service Agreement No. 2, if UtiliCorp (a) files for a variance from Commission Rule 4 CSR 240-20.015(2)(A)(1), pursuant to 4 CSR 240-20.015(10) respecting "Variances," and (b) agrees that (i) Case No. EO-2001-477, i.e., SA2, shall 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 Section 32(k) determinations shall not be cited as precedent for any matter, and (iii)

UtiliCorp shall provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.

Respectfully submitted,

DANA K. JOYCE
General Counsel




Steven Dottheim
Chief Deputy General Counsel
Missouri Bar No. 29149

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 27th day of April 2001.



Service List for
Case No. EO-2001-477
Verified: April 19, 2001 (RR)

Office of the Public Counsel
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312 East Capitol Avenue
P.O. Box 456
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**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 22nd
day of April, 1999.

In the Matter of the Application of)
UtiliCorp United Inc. Under Section)
32(k) of the Public Utilities Holding)
Company Act of 1935 Concerning a)
Proposed Power Sales Agreement Between)
MEP Pleasant Hill, L.L.C. and UtiliCorp)
United Inc. d/b/a Missouri Public)
Service.)

Case No. EM-99-369

ORDER REGARDING POWER SALES AGREEMENT

On March 1, 1999, UtiliCorp United Inc. (UtiliCorp) d/b/a Missouri Public Service filed an Application with the Commission seeking an order of the Commission regarding a Power Sales Agreement (PSA) between UtiliCorp and MEP Pleasant Hill, L.L.C. (MEPPH). UtiliCorp proposes to enter into a PSA agreement with MEPPH whereby UtiliCorp would purchase electric power generated by MEPPH beginning on June 1, 2001. MEPPH is an exempt wholesale generator of electric power and is an affiliate of UtiliCorp.

Section 32(k) of the Public Utility Holding Company Act of 1935 (PUHCA), codified at 15 U.S.C. 79z-5a(k), provides that "an electric utility company may not enter into a contract to purchase electric energy at wholesale from an exempt wholesale generator if the exempt wholesale generator is an affiliate or associate company of the electric utility company." The federal statute then goes on to indicate that an electric

utility company may enter into such a contract with an affiliate if every state commission having jurisdiction over the retail rates of such electric utility company makes certain specific determinations in advance of the electric utility company entering into such contract. UtiliCorp's Application asks that the Commission enter an order making the required specific determinations. Because of the need to begin construction of a combustion turbine generation plant by the end of July of 1999, UtiliCorp asked that the Commission issue its order regarding this Application no later than May 1, 1999.

On March 5, the Commission issued a Notice Establishing Time for Filing of Recommendation that directed the Staff of the Public Service Commission (Staff) to file its recommendation regarding approval or rejection of UtiliCorp's Application no later than April 5. The Office of the Public Counsel (Public Counsel) was also allowed until April 5 to file its recommendation.

On April 5, Staff filed two memorandums, one submitted by Michael S. Proctor, Chief Regulatory Economist for the Commission, and the other submitted by Mark L. Oligschlaeger, Regulatory Auditor V, and Steven Dottheim, Chief Deputy General Counsel. Both memorandums evaluate the PSA and recommend that the Commission approve UtiliCorp's application. Staff did, however, recommend that the Commission's approval be subject to several conditions. Public Counsel also filed its recommendation on April 5. Public Counsel recommended approval but only upon certain conditions. 4 CSR 240-2.080(12) provides that parties are allowed ten days from the date of filing in which to respond to any motion or

pleading. No timely response was filed to the recommendations of either Staff or Public Counsel.

The Commission has reviewed and considered the Application filed by UtiliCorp and the recommendations of Staff and Public Counsel. The Commission finds that the Application of UtiliCorp should be granted subject to the conditions recommended by Staff and Public Counsel.

IT IS THEREFORE ORDERED:

1. That, in compliance with Section 32(k) of the Public Utility Holding Company Act of 1935, the Commission determines that:

- a) the Commission has sufficient regulatory authority, resources and access to books and records of UtiliCorp United Inc., MEP Pleasant Hill, L.L.C. and any relevant associate, affiliate or subsidiary company to exercise its duties under subparagraph (k) of Section 32 of the Public Utility Holding Company Act of 1935;
- b) the transaction will benefit consumers;
- c) the transaction does not violate any Missouri law;
- d) the transaction would not provide MEP Pleasant Hill, L.L.C. with any unfair competitive advantage by virtue of its affiliation or association with UtiliCorp United Inc.; and
- e) the transaction is in the public interest.

2. That the Commission's approval of UtiliCorp United Inc. d/b/a Missouri Public Service's Application is specifically conditioned upon the following conditions:

- a) That UtiliCorp United Inc. shall make available to the Commission, its Staff and the Office of the Public Counsel, at reasonable times and reasonable places, all books and records and employees and officers of MEP Pleasant Hill, L.L.C. and any affiliate or subsidiary of UtiliCorp engaged in any activity with MEP Pleasant Hill, L.L.C.
- b) MEP Pleasant Hill, L.L.C. shall 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-Missouri Public Service business by Missouri Public Service's customers.
- c) This order is in no way binding on the Commission or any party regarding a future rate or earnings complaint case to contest the ratemaking treatment to be afforded the Power Sales Agreement. UtiliCorp United Inc. shall 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 MEP Pleasant Hill, L.L.C. or UtiliCorp United Inc. d/b/a Missouri Public Service in or as a result of the Power Sales

Agreement on the basis that such expense, charge, cost or allocation has itself been filed with or approved by the Federal Energy Regulatory Commission, or was incurred pursuant to the Power Sales Agreement.

3. That the Commission's approval of the instant Power Sales Agreement does not imply or assure approval of any future contracts to purchase electric energy at wholesale from an exempt wholesale generator that is an affiliate or associate company of an electrical corporation within the Commission's jurisdiction.

4. That UtiliCorp United Inc. is authorized to enter into, execute and perform in accordance with the terms and conditions of the proposed Power Sales Agreement by and between MEP Pleasant Hill, L.L.C. and UtiliCorp United Inc. d/b/a Missouri Public Service.

5. That UtiliCorp United Inc. is authorized to enter into, execute and perform in accordance with the terms of all documents reasonably necessary and incidental to the performance of the transactions that are the subject of the Application.

6. That this order shall become effective on May 4, 1999.

7. That this case may be closed on May 5, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer
and Drainer, CC., concur
Crumpton, C., absent

Woodruff, Regulatory Law Judge