

NEWMAN, COMLEY & RUTH

PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW

MONROE BLUFF EXECUTIVE CENTER

601 MONROE STREET, SUITE 301

P. O. BOX 537

JEFFERSON CITY, MISSOURI 65102-0537

TELEPHONE: (573) 634-2266

FACSIMILE: (573) 636-3306

ROBERT K. ANGSTEAD
MARK W. COMLEY
CATHLEEN A. MARTIN
STEPHEN G. NEWMAN
JOHN A. RUTH
D. GREGORY STONEBARGER
ALICIA EMBLEY TURNER

October 4, 2000

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. EM-2000-292

Dear Judge Roberts:

Enclosed for filing in the above referenced matter, please find the original and eight copies of St. Joseph Light & Power Company's Response and Suggestions in Opposition to Staff's Motion for a Commission Order Directing an on the Record Conference.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
comleym@ncrpc.com

MWC:ab

Enclosure

cc: Office of Public Counsel
General Counsel's Office
Gary L. Myers
James C. Swearengen
Stuart W. Conrad
Karl Zobrist
Shelley A. Woods
William J. Niehoff
Jeffrey A. Keevil

FILED²
OCT 4 2000
Missouri Public
Service Commission

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

OCT 4 2000

Missouri Public
Service Commission

In the matter of the Joint Application)
of UtiliCorp United Inc. and St. Joseph Light)
& Power Company for authority to merge)
St. Joseph Light & Power Company)
with and into UtiliCorp United Inc. and,)
in connection therewith, certain other)
related transactions.)

Case No. EM-2000-292

**ST. JOSEPH LIGHT & POWER COMPANY'S RESPONSE
AND SUGGESTIONS IN OPPOSITION TO
STAFF'S MOTION FOR A COMMISSION ORDER DIRECTING
AN ON THE RECORD CONFERENCE**

Staff has requested that the Commission schedule an on the record conference in this matter for Thursday, October 12, 2000 for purposes of requiring the joint applicants in this case to 1) explain the present status of their proposed merger and 2) why the Commission should not put its deliberations on hold until "after closure has occurred between the joint applicants regarding an incident at SJLP's Lake Road Plant." Staff has attached copies of recent correspondence between the joint applicants in which the seriousness of the June 7, 2000 fire and consequent outage at SJLP's Lake Road plant is debated. In its letter to SJLP, UtiliCorp has raised the issue whether the incident constitutes a material adverse affect on SJLP as defined in the Merger Agreement which is under review by this Commission. In SJLP's response, it advised UtiliCorp that the impact and projected costs of the Lake Road plant were not material for purposes of the Merger Agreement, and that SJLP remained in compliance with the Merger Agreement. Staff's motion should be overruled.

A. Relevance

This case was heard by the Commission from July 10 to July 14, 2000. The transcript was timely prepared and the initial and reply briefs have been filed. The case is now under submission to the Commission, and the parties have recited to a point of redundancy the limited standard of

129

review under which it should be decided: The Commission is to determine whether the proposed merger between the applicants is detrimental to the public interest. At page 2 of its motion, Staff asserts that the correspondence between UtiliCorp and SJLP about the Lake Road plant is relevant to this case, but makes no effort to tie the subject matter of the correspondence to any issue under consideration by the Commission. That task would be difficult, for in truth there is no connection between the ultimate issue in this case, (is the merger detrimental to the public interest) and the parties' differences about the effect of the fire at the Lake Road plant (is the fire and outage a material adverse effect under the agreement.) Proof of one fact does not bear on the other. The legal arguments advanced by the parties about the Lake Road incident are divorced entirely from the question of whether the merger is not detrimental to the public interest. Quite simply, the questions which Staff wants to publicly air are not relevant to the case.

B. Commission Authority and Jurisdiction

The correspondence attached to Staff's motion concerns the differing legal interpretations placed upon the Merger Agreement by the parties. The Staff's motion refers to data requests the Staff served on SJLP and UtiliCorp on September 22, 2000 and those data requests are strictly confined to an inquiry about how the parties apply the contract language to the circumstances of the Lake Road plant turbine fire. Staff's data request 317 asked SJLP the following:

1. Please provide the workpapers/documents relied upon by Saint Joseph Light & Power in determining "that the impact and projected costs of the Lake Road plant fire are not 'material' for purposes of the Merger Agreement.
2. Please identify all reasons why St. Joseph Light & Power believes the June 7, 2000 fire at Lake Road plant is not material to the merger

between UtiliCorp and St. Joseph.¹

A nearly identical data request was served on UtiliCorp. If these data requests are, as SJLP believes, strong clues as to Staff's intentions at the on the record conference it requests, then Staff expects to argue about the meaning of the words used in the Merger Agreement and how SJLP or UtiliCorp, or the lawyers of the parties, have interpreted them. Leaving aside for the moment the still very important question of relevance, which was addressed above, another equally important question is whether an on the record conference regarding legal interpretation of the Merger Agreement would fall within the zone of Commission power and jurisdiction. A long line of case authority and opinion in this state has ruled on the question decisively in the negative.

'The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund.' *State ex rel. Laundry, Inc. v. Public Service Commission, supra*, 34 S.W.2d 37, 46; *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666, 668, 18 A.L.R.2d 1335. 'The commission 'has no power to declare or enforce any principle of law or equity' * * * and as a result it cannot determine damages or award pecuniary relief.' *American Petroleum Exchange v. Public Service Commission*, Mo.Sup., 172 S.W.2d 952, 954, 955; *Board of Public Works of Rolla v. Sho-Me Power Corp.*, 362 Mo. 730, 244 S.W.2d 55, 59; *Consumers Public Service Co. v. Public Service Comm.*, 352 Mo. 905, 180 S.W.2d 40; *State ex rel. Missouri Pacific R. Co. v. Public Service Commission*, 303 Mo. 212, 259 S.W. 445. **Since the commission is not a court, it 'has neither the power to construe contracts, nor to enforce them'.** *State ex rel. Washington University v. Public Service Commission*, 308 Mo. 328, 272 S.W. 971, 972. See also, *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 49; *Kansas City Light & Power Co. v. Midland Realty Co.*, *supra*, 93 S.W.2d 954, 959; *State ex rel. Gehrs v. Public Service Commission*, *supra*, 114 S.W.2d 161, 165. It 'has no authority to adjudicate and determine individual or personal rights * * * because under the Constitution the Legislature has no power or authority to invest such Commission with judicial powers'. *State ex rel. Rutledge v. Public Service Commission*, 316 Mo. 233, 289 S.W. 785, 787; *State ex rel. Consumers Public Service Co. v. Public Service Commission, supra*, 180 S.W.2d

¹SJLP has served Staff with objections to these data requests asserting a variety of grounds, among which are: they are irrelevant, and since the hearing has concluded they cannot be designed to lead to the discovery of admissible evidence. Even more importantly, the data requests seek responses that are rife with legal conclusions which can only be the product of the impressions and advice of the parties' attorneys and their work product.

40, 44. [emphasis added]

Katz Drug Co. v. Kansas City Power & Light Co., 303 S.W.2d 672, 679 (K.C.Ct.App. 1957).

If SJLP and UtiliCorp were summoned to an on the record conference with the Commission to explain the present status of the merger, SJLP believes that much of the commentary will come from the legal staff of each party who will present for the Commission their client's separate interpretation of the Merger Agreement. The discussions before the Commission will entail complex legal issues which the Commission has no power to adjudicate. From the Commission's perspective, the conference would be futile. It would serve only as a first round sounding board for the arguments which the parties might eventually present to a judge or jury, if they were not able to resolve the issue which has surfaced in their recent letters. Such an early public display of their legal differences could prove to be an unfair and unnecessary impediment to the course of their negotiations toward resolution, or might telegraph ambiguous signals to an already nervous stock market that persistently and keenly observes the progress of this transaction. If the on the record conference convenes, the Commission has nothing to gain from the exercise, but the Joint Applicants, their customers and employees, have so much to lose. No conference should be scheduled.

C. The On the Record Conference Procedure

On the record conferences before the Commission have historically been reserved for situations in which parties are prepared to submit matters to the Commission by stipulation and the Commission wishes to pose questions to the parties about the effects of the agreements. Generally, there is no testimony by witnesses; statements may or may not be made under oath; and there has been no cross examination.

SJLP reasserts that the Commission lacks jurisdiction over the issues raised in the

correspondence attached to Staff's motion. A conference or hearing about those issues would be in excess of that jurisdiction. Even though the Commission lacks jurisdiction over them, the issues the parties have raised in their recent letters are quite serious, and, absent a resolution, will place at stake millions of dollars. The procedures generally followed for an on the record conference fall short of the process due to protect SJLP under the circumstances. If the Commission nonetheless schedules the conference and the hearing procedures do not include the procedures normally allowed for contested cases, SJLP contends that its due process rights protected by the 14th Amendment to the Constitution of the United States and other amendments thereto which have been incorporated by the 14th Amendment, will be violated.

D. The Conference is Unnecessary

Staff requests the on the record conference for purposes of requiring the joint applicants to 1) explain the present status of their proposed merger and 2) why the Commission should not put its deliberations on hold until the parties resolve their differences about the incident at the Lake Road Plant. These questions are answered already without the need for a further hearing.

Respecting the present status of the merger, the parties are waiting for the Commission to approve the merger as proposed. The evidence has been admitted, and the issues have been fully briefed. The matter is now consigned to the Commission for its decision. Other regulatory bodies with jurisdiction over the parties have already approved the transaction. The Commission's approval of the merger is a step in the process of closing. It is not the only step, but it is an important one.

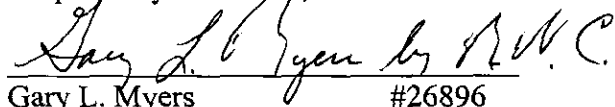
The Commission should proceed to a decision in this matter in the ordinary course. There is no justification for delay. Not a single term or condition of the Merger Agreement has been affected by the correspondence between SJLP and UtiliCorp. The Merger Agreement and the regulatory plan are the same as they were at the time the Commission heard the evidence in this case

in July. The Joint Applicants have not changed. They have not asked that the application be amended. They have not asked that their application be withdrawn. For SJLP and UtiliCorp, this case is as viable and valid as the day the joint application was filed. They should not be required to show cause why the Commission should review and decide a case already pending before it. The Commission already has that duty, and the letters about the Lake Road plant are not an excuse to defer that duty. It would be unprecedented for the Commission to decree that it will not decide merger cases unless the parties certify they will not differ about the meaning they assign to the terms and conditions of the contract they signed.

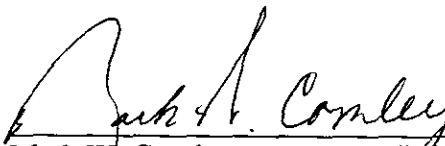
CONCLUSION

The correspondence between the parties is preliminary and does not deter from the proceedings before the Commission. The subject matter of the letters is not relevant to the merger application and moreover concerns itself with elaborate legal issues over which the Commission has no jurisdiction. The Staff has overreacted to the parties' differences concerning the Lake Road plant fire and has tried to inject itself into a matter which is committed by contract to the parties themselves to resolve or contest. The Commission should not convene a special conference or hearing about the subject matter over which it lacks any power to adjudicate. Based upon the pleadings filed to date and the representations of the parties, the joint application for approval of their merger is still very much alive and the Commission should proceed to a prompt decision.

Respectfully submitted,



Gary L. Myers #26896
Vice President, General Counsel and Secretary
St. Joseph Light & Power Company
520 Francis Street
P.O. Box 998
St. Joseph, MO 64502



Mark W. Comley #28847
NEWMAN, COMLEY & RUTH P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266
(573) 636-3306 FAX

Attorneys for St. Joseph Light & Power Company

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 4th day of October, 2000, to:

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

James C. Swearengen
Brydon, Swearengen & England
P.O. Box 456
Jefferson City, MO 65102-0456

Karl Zobrist and Christine Egbarts
Blackwell Sanders Peter Martin
Two Pershing Sq., Suite 1100
2300 Main St.
Kansas City, MO 64108

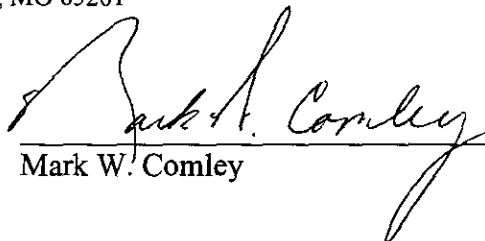
Stuart W. Conrad
Finnegan, Conrad & Peterson
3100 Broadway, Suite 1209
Kansas City, MO 64111

Shelley A. Woods
Mo. Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

General Counsel's Office
Mo. Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

William J. Niehoff
Ameren Services Co.
(MC 1310)
PO Box 66149
St. Louis, MO 63166-6149

Jeffrey A. Keevil
Stewart & Keevil
1001 Cherry St., Suite 302
Columbia, MO 65201



Mark W. Comley