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January 31, 2000

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FILED²

JAN 31 2000

Missouri Public
Service Commission

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

RE: Case No. EM-2000-369 – 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.

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **STAFF REPLY TO RESPONSES OF UTILICORP AND SJLP AND UTILICORP AND EMPIRE TO PUBLIC COUNSEL'S MOTION TO CONSOLIDATE.**

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
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Enclosure
cc: Counsel of Record

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

FILED²

JAN 31 2000

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

**STAFF REPLY TO RESPONSES OF
UTILICORP AND EMPIRE AND UTILICORP AND SJLP TO
PUBLIC COUNSEL'S MOTION TO CONSOLIDATE**

Comes now the Staff of the Missouri Public Service Commission (Staff) in reply to (1) the Response Of UtiliCorp And SJLP and (2) the Response Of UtiliCorp And Empire to the Office of the Public Counsel's Motion To Consolidate. In support of said Motion, the Staff states as follows:

1. The Staff will begin its reply with a discussion of schedule because it is related to the question of consolidation and EDE – UtiliCorp raised the matter of schedule in a footnote on page 1 of the Response Of UtiliCorp And Empire and in paragraph 6 of the Response Of UtiliCorp And Empire. The footnote and paragraph 6 are not tied to the second bullet point in paragraph 3 of both the EDE – UtiliCorp Response and the SJLP – UtiliCorp Response, which refers to “‘the Pre-Moratorium Rate Case’ which Empire will file in the second half of 2000.” EDE – UtiliCorp may wish to not draw too much attention to the matter while raising the UtiliCorp/Empire desire for a schedule which, in the words of paragraph 6 of the EDE – UtiliCorp Response “will permit a closing of the transaction by December 31, 2000.” The EDE – UtiliCorp footnote 1 states as follows:

The Termination Date of the Agreement and Plan of Merger between Empire and UtiliCorp is December 31, 2000. The transaction must be closed on or before that date. UtiliCorp and Empire initially proposed a procedural schedule which called for hearings in June 2000. Subsequently, the Commission set hearings in the UtiliCorp/SJLP transaction for July 10-14, 2000, which suggests that hearings in the UtiliCorp/Empire case may be later. In any event, UtiliCorp/Empire desire a schedule which will permit a Commission order by year-end.

In paragraph 3 of both the EDE – UtiliCorp Response and the SJLP – UtiliCorp Response, the matter of “the Pre-Moratorium Rate Case” is raised by the joint applicants for the purpose of attempting to show how different the two mergers are and not for the purpose of showing how inappropriate the schedule proposed by EDE – UtiliCorp is. The relevant language in paragraph 3 in both Responses follows:

- The “regulatory plans” for the two transactions are significantly different. For example, the UtiliCorp/Empire regulatory plan, for which approval is sought in the merger docket, includes certain details concerning what is described as “the Pre-Moratorium Rate Case” which Empire will file in the second half of 2000. No such issues are present in the UtiliCorp/SJLP case. . . .

While EDE – UtiliCorp advise the Commission that they “desire a schedule which will permit a Commission order by year-end,” they do not remind the Commission of the details of the Pre-Moratorium Rate Case that they want approval of by year-end. The direct testimony of Mr. Robert B. Fancher’s on the Pre-Moratorium Rate Case is enlightening regarding how EDE – UtiliCorp has sought to compress the time by which the Commission, the Staff, Public Counsel and intervenors have to deal with the Pre-Moratorium Rate Case, and also reveals that EDE – UtiliCorp did not file (and as of January 31, 2000 still has not filed) all of its direct testimony in the EDE – UtiliCorp merger case:

Direct Testimony of Robert B. Fancher, p. 2, line 13 to p. 3, line 18:

Q. Why will Empire file the Pre-Moratorium Rate Case?

A. Empire is constructing the State Line Combined Cycle Plant ("SLCC"), a 500-mw plant of which 300-mw will belong to Empire. . . . This investment must be recognized and included for recovery in rates before the rate moratorium proposed in this merger case as a part of the regulatory plan can be implemented.

Q. Is the regulatory plan described in other testimony?

A. Yes. Mr. John McKinney's testimony will discuss the proposed regulatory plan which is set forth in the Joint Application in this case. UtiliCorp and Empire expect that the details concerning the Pre-Moratorium Rate Case discussed in my testimony be addressed and decided in the context of the merger case.

Q. Why?

A. To remove the uncertainty of these matters prior to the closing of the merger which should occur by the end of 2000.

Q. Please discuss the timing for the Pre-Moratorium Rate Case.

A. The case will be filed in the second half of 2000, preferably around September 1, 2000. This would establish an operation of law date near the end of July 2001, which is two months after the expected June 1, 2001, in-service date for SLCC.

Q. Describe the test year Empire proposes for the Pre-Moratorium Rate Case.

A. The test year should be the twelve months ending December 31, 2000, or the twelve months ending at the Effective Time, as defined in the Agreement and Plan of Merger, if earlier. In essence, the Effective Time is the date for the combination of UtiliCorp and Empire to occur once all approvals are obtained.

Q. Do you propose any updates or adjustments to the test year or a true-up?

A. The test year must be updated, adjusted or trued-up to June 1, 2001, or the in-service date of SLCC, if later. In other words, some action must be taken to ensure that SLCC will be recognized in rates.

Direct Testimony of Robert B. Fancher, p. 5, lines 13 – 21:

Q. What in-service criteria do you propose for SLCC?

A. Empire's proposed criteria will be filed as Supplemental Direct Testimony after consultations with the Commission Staff. The criteria should be finally determined in the context of this merger case.

Q. Please summarize Empire's position on the Pre-Moratorium Rate Case details which you have discussed.

A. The details concerning the Pre-Moratorium Rate Case which I have discussed in this testimony should be addressed and decided by the Commission as a part of its order in this merger case.

EDE's – UtiliCorp's Application identified the details concerning the Pre-Moratorium Rate Case which are part of the Regulatory Plan for which Commission approval is sought in the merger case as follows:

- The test year will be the last 12 months of operation of Empire as an independent company or the 12 months ending 12-31-00, whichever is earlier
- The test year will be updated, adjusted or trued-up to at least 6-1-01 or the in-service/commercial operation date of SLCC, whichever is later
- The in-service/commercial operation criteria for SLCC will be established in the merger docket
- The update or adjustment period for the test year or the items to be trued-up will include the SLCC plant along with the following, directly associated adjustments only:
 - Rate base
 - SLCC plant and associated transmission plant, less accumulated depreciation
 - Revenues
 - Customer growth
 - Expenses
 - Fuel associated with customer growth
 - O&M (fixed and variable for SLCC)
 - Depreciation for SLCC
 - Property taxes for SLCC
 - Incremental demand charges for purchased power contracts
 - The cost of gas and the fixed gas transportation charges for SLCC

- Wage rates
- The capital structure for the Pre-Moratorium Rate Case will be the normalized capital structure of Empire
- The return on equity for the Pre-Moratorium Rate Case will be based on Empire as a stand-alone entity
- All open positions that are in existence because of the UtiliCorp/Empire merger will be built into the cost of service in the Pre-Moratorium Rate Case as if the positions are filled
- No synergies from the UtiliCorp/Empire merger will be flowed through the cost of service in the Pre-Moratorium Rate Case
- No costs of the UtiliCorp/Empire merger, transition or transaction costs, will be recovered through the cost of service in the Pre-Moratorium Rate Case

EDE's – UtiliCorps' endeavor to inject into a merger case numerous, significant rate case issues from a future rate increase case is unique. In that the Staff has not raised this matter previously, and is not requesting that the Commission take any specific action at this time, should not be viewed as either acquiescence or endorsement on the part of the Staff regarding the appropriateness of the Commission considering such ratemaking items in the context of this or any other merger case.

2. EDE – UtiliCorp lament that the Commission set hearings for the SJLP – UtiliCorp merger for July 10-14, 2000. The Commission gave SJLP – UtiliCorp the alternative schedule that it proposed in its filing on December 14, 1999, except instead of giving SJLP – UtiliCorp the 28 days that they requested between other parties' rebuttal testimony and schedules and the SJLP – UtiliCorp surrebuttal testimony and schedules, the Commission gave SJLP – UtiliCorp 56 days to respond to parties' rebuttal testimony and schedules. SJLP – UtiliCorp did

not file a Motion For Reconsideration¹ and request that the 56 days be shortened to the 28 days that it had originally requested, or the 27 days of the Revised UE – CIPSCO merger schedule.

SJLP – UtiliCorp and EDE – UtiliCorp should not be permitted to profess in paragraph 3 of their January 21, 2000 Responses that their merger cases are “two distinct and different cases”; “[t]he two transactions are each based on separate and distinct merger agreements, resulting from different processes, the terms of which are in no way identical”; “[t]he ‘regulatory plans’ for the two transactions are significantly different,” “separate and distinct,” and then propose overlapping procedural schedules.

3. There have been no discussions among the parties as to how the two merger cases would proceed if they were consolidated. SJLP – UtiliCorp and EDE – UtiliCorp have assumed and stated in the fourth and fifth bullet points in paragraph 3 of their January 21, 2000 Responses that if the two merger cases were consolidated there would be

- . . . a single set of witness testimony for both matters, a single statement of issues and a joint hearing with all witnesses from both cases taking the stand . . . it will be difficult and burdensome for UtiliCorp and other witnesses to undergo cross-examination on both transactions at the same time. Shifting back and forth between the two cases with respect to the various issues will be confusing . . . and will likely produce an unclear record.
- The parties to the two cases are not the same. . . . some parties will be entitled to file testimony and cross examine with respect to one case, but not the other. . . .

The Staff is not certain that it understands for each of these items/scenarios what SJLP – UtiliCorp and EDE – UtiliCorp are asserting, but the Staff’s proposal envisions a consolidation of the two cases for purposes of hearing the many common issues which are very similar if not identical in the two merger cases.

¹ A Motion For Reconsideration and not an Application For Rehearing is the appropriate procedural means of seeking redress of an interlocutory Commission Order. 4 CSR 240-2.160.

Consolidation does not necessarily mean that there would not be submitted to the Commission for each case: separate lists of issues, separate statements of positions, separate hearing memoranda, and separate hearing schedules for issues not common to the two merger cases, or common, but not similar enough, to be heard at the same time. (Apparently, public service commission hearings in certain other jurisdictions are unlike hearings before this Commission in that all of a moving party's witnesses stand cross-examination on all issues in that party's case before the other parties put on their witnesses for cross-examination respecting their cases. Evidently, in these other jurisdictions, each witness is cross-examined on all of his/her testimony during one appearance by that witness. Thus, the cases are not heard on an issue-by-issue basis, as is the practice before this Commission. Generally before this Commission, in the larger cases and in general rate proceedings, a witness, who has testimony on discrete issues or adjustments, stands cross-examination on an issue-by-issue basis. There are exceptions to this procedure, such as when the case has a limited number of issues or witnesses, or there is a witness availability problem.)

4. One paragraph in the SJLP – UtiliCorp January 21, 2000 Response and the EDE – UtiliCorp January 21, 2000 Response is particularly telling and it belies the joint applicants' approach:

Response Of UtiliCorp And SJLP To Motion To Consolidate:

4. Notwithstanding the foregoing, should UtiliCorp and SJLP later determine that joint processing in certain area(s) could be beneficial and would not jeopardize their due process rights, UtiliCorp and SJLP will bring this to the attention of the other parties and the Commission. For example, UtiliCorp and SJLP believe that it may be useful if the discovery in their case is utilized, where appropriate, in the UtiliCorp/Empire case so long as said utilization is in accordance with the Commission's orders and is otherwise lawful and reasonable.

Response Of UtiliCorp And Empire To Motion To Consolidate:

4. Notwithstanding the foregoing, should UtiliCorp and Empire later determine that joint processing in certain area(s) could be beneficial and would

not jeopardize their due process rights, UtiliCorp and Empire will bring this to the attention of the other parties and the Commission. For example, UtiliCorp and Empire believe that it may be useful if the discovery in their case is utilized, where appropriate, in the UtiliCorp/SJLP case so long as said utilization is in accordance with the Commission's orders and is otherwise lawful and reasonable.

In light of the arguments that the joint applicants make in the other paragraphs of their January 21, 2000 Responses the above paragraphs seem exceedingly curious. The Staff believes that the Commission's experience on the procedural matter of consolidation should weigh heavy in the Commission's evaluation of matters such as the veracity of the parties. When the Commission is deliberating on the merits of these cases, the Commission should consider which parties were correct regarding the matter of consolidation. If the joint applicants later suggest to the Commission that certain issues can or should be heard on a consolidated basis, the Commission should consider what, other than posturing, could have prevented the joint applicants from identifying the issues that should be consolidated no later than when the EDE – UtiliCorp direct testimony and schedules were filed on December 15, 1999.

One of the strongest arguments for consolidation is for the Commission to consider how it will go about its deliberations in these two merger cases. The procedure advocated by SJLP – UtiliCorp and EDE – UtiliCorp would call for the Commission to first process the SJLP – UtiliCorp merger case and then process the EDE – UtiliCorp merger case. Assume that the Commission adopts this approach. What does the Commission do if after it approves the SJLP – UtiliCorp merger it decides in the context of the EDE – UtiliCorp merger case that it is detrimental to the public interest to authorize both mergers, i.e., it is not detrimental to the public interest to authorize only the SJLP – UtiliCorp merger, it is not detrimental to the public interest to authorize only the EDE – UtiliCorp merger, but it is detrimental to the public interest to authorize both mergers, and of the two mergers, the EDE – UtiliCorp merger is the better

merger? The Commission is confronted with the reality that it has already approved the SJLP – UtiliCorp merger. How does the Commission undo its authorization of the SJLP – UtiliCorp merger? The only option open to the Commission is to not approve the EDE – UtiliCorp merger. If the Commission were to make its authorization for SJLP – UtiliCorp conditional on its determination of the EDE – UtiliCorp merger case, then from a timing perspective that is not any different than deciding the two merger cases contemporaneously.

The Responses of SJLP – UtiliCorp and EDE – UtiliCorp state that:

Both Responses:

Each should be decided on its own merits by a separate and distinct Commission order based on record evidence pertaining to the transaction.

SJLP – UtiliCorp Response:

To “consolidate” and thereby “join together into one whole” these two separate transactions would not only create confusion and processing inefficiencies, but would also deny UtiliCorp and SJLP the opportunity to have their application and merger agreement considered and decided on its own merits based on the record evidence by a separate Commission order and consequently a consolidation of these applications would violate their due process rights.

EDE – UtiliCorp Response:

To “consolidate” and thereby “join together into one whole” these two separate transactions would not only create confusion and processing inefficiencies, but would also deny UtiliCorp and Empire the opportunity to have their application and merger agreement considered and decided on its own merits based on the record evidence by a separate Commission order and consequently a consolidation of these applications would violate their due process rights.

The Staff is not proposing that the Commission not consider and decide the SJLP – UtiliCorp and the EDE – UtiliCorp applications and merger agreements on their own merits, based on record evidence and by a separate Commission order; nor is the Staff proposing that the Commission deny the joint applicants the due process that they are lawfully due. The Staff is merely proposing to proceed consistent with what is permitted by statute, case law and Commission rule.

Wherefore the Staff requests that the Commission consolidate Case No. EM-2000-369 and Case No. EM-2000-292 and adopt the Staff's proposed procedural schedule for a consolidation of the EDE – UtiliCorp and SJLP – UtiliCorp merger cases.

Respectfully submitted,
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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 31st day of January, 2000.



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Case No. EM-2000-369
January 31, 2000**

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