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November 24, 1999

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FILED²

NOV 24 1999

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-2000-292 – In the Matter of 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.

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of **STAFF RESPONSE TO COMMISSION NOTICE REGARDING MOTION TO ESTABLISH PROCEDURAL SCHEDULE.**

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)

SD/df
Enclosure
cc: Counsel of Record

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

FILED²

NOV 24 1999

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

**STAFF RESPONSE TO COMMISSION NOTICE REGARDING
MOTION TO ESTABLISH PROCEDURAL SCHEDULE**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) in response to the October 26, 1999 Notice Regarding Motion To Establish Procedural Schedule of the Missouri Public Service Commission (Commission) allowing responses to the Motion To Establish Procedural Schedule of UtiliCorp United, Inc. (UCU) and St. Joseph Light & Power Company (SJLP) (collectively referred to as the Joint Applicants). In an Order issued on November 22, 1999, the Commission ordered the convening of an early prehearing conference for the purpose of assisting the parties and the Commission in establishing an equitable procedural schedule. In response to this Commission Notice and subsequent Order, the Staff requests that the Commission, in lieu of dismissing the Joint Applicants' filing as deficient, (1) order the Joint Applicants to supplement their filing respecting (a) the market power of the resulting merged entity (the only testimony that is presented by the Joint Applicants offers an explanation as to why no substantive market power testimony is presented), (b) the effect of the merger on the gas operations of UtiliCorp's electric operations and SJLP, (c) the effect of the merger on the steam operations of SJLP and (d) the effect of the merger on UtiliCorp's electric operations, and (2) withhold any determination respecting a procedural schedule until such time

as the parties to this proceeding have had an opportunity to review such supplemental filing and the soon to be submitted merger filing of UtiliCorp and Empire District Electric Co. (EDE). In support thereof, the Staff states as follows:

1. In the direct testimony of John W. McKinney filed on October 19, 1999, Mr. McKinney states at pages 30-31 that the Joint Applicants will not provide a retail market power study in connection with the instant proceeding, Case No. EM-2000-292. He says that the Joint Applicants cannot complete a retail market power analysis because "[r]etail competition does not exist in Missouri, and we are not sure when choice will come for the retail customers." He relates that the Joint Applicants propose to perform such an analysis "[o]nce the Missouri General Assembly and the Commission have decided when competition will be allowed for the retail customer, and what form the market will take" He asserts that (a) "[i]n the proposed settlement of the Western Resources / Kansas City Power & Light merger, the parties have agreed to the same basic concept of deferring the retail market power study" and (b) the Joint Applicants are asking for no more than what was required of Western Resources, Inc. and Kansas City Power & Light Company in their merger.

First, the Staff would state that the agreement on the treatment of the market power issue in the Western Resources – KCPL merger case, to which Mr. McKinney refers, occurred only after Western Resources – KCPL, the Staff and the Office of the Public Counsel had submitted retail market power studies in that merger case. If the Joint Applicants agree to the same market power conditions as are contained in the Stipulation And Agreement in Case No. EM-97-515, then the Staff would agree that there is no further need for the Joint Applicants to file a retail market power study in the instant case.

Second, the record in the Western Resources – KCPL merger case clearly indicates that UtiliCorp in its own merger case is taking a position contrary to the position of its Missouri Public Service (MPS) division and its Aquila Power Corporation (Aquila) subsidiary in the Western Resources – KCPL merger case. MPS and Aquila intervened in the Western Resources – KCPL merger case. At pages 1-2 of its Application To Intervene filed on July 7, 1997, Aquila asserted that “[c]onsideration of the Joint Application will involve significant policy issues and decisions which will include (i) the impact of the merger on market power in Missouri, (ii) access to transmission services in Missouri, and (iii) the development of an independent system operator in Missouri, all of which will affect the public and competitors such as Aquila.” Aquila’s Application To Intervene further stated at page 2 that “[a]ll correspondence, communications, orders, notices and decisions in this matter should be addressed to the following:

John McKinney
UtiliCorp United, Inc.
10700 East 350 Highway
Kansas City MO 64138
(816)936-8636

Patrick J. Joyce, Esq.
Max J. Burbach, Esq.
Blackwell Sanders Matheny Weary & Lombardi
8805 Indian Hills Drive, Suite 125
Omaha, NE 68114
(402)384-5055”

At page 2 of its Application To Intervene filed on July 3, 1997, MPS argued that “MPS has an interest in determining whether the proposed acquisition will impede transmission access to the Missouri energy market. MPS is also interested in the Commission’s determination concerning the market power that the surviving entity will exercise in the State of Missouri.” At page 2 of its Application To Intervene filed on July 3, 1997, SJLP argued that “SJLP has an interest in determining whether the proposed transaction will result in any restrictions on transmission access to the Missouri market. Also, SJLP is interested in market power issues should the proposed acquisition be approved.” At page 2 of its Application To Intervene filed on

July 3, 1997, EDE argued that "Empire has an interest in determining whether the proposed transaction will result in any restrictions on transmission access to the Missouri market. Also, Empire is interested in market power issues should the proposed acquisition be approved."

Western Resources – KCPL in a response to these Applications To Intervene objected to Aquila, MPS, SJLP and EDE seeking to intervene on the basis of market power being an issue in the Western Resources – KCPL merger. Western Resources – KCPL contended that market power was not an issue properly within the purview of this Commission nor should Aquila, MPS, SJLP and EDE be permitted to raise market power as an issue.

In the Reply Of Aquila Power Corporation To Joint Response Of Western Resources, Inc. And Kansas City Power And Light Company To Application To Intervene, filed on July 21, 1997, Aquila stated at pages 1-2 that "[t]he Joint Applicant's contentions as to the Commission's lack of jurisdiction over issues related to market power and independent system operators are in direct contradiction to the Commission's decision in Case No. EM-96-149. That docket specifically addressed merger transactions involving Union Electric Company." (Citation omitted). Citing the Commission's Report And Order in the UE – CIPSCO merger case, Aquila stated at page 3 of its response that "it is clear that the Commission considers market power to be an essential element in approving an appropriate structure of a merger of regulated companies. The Joint Applicants' arguments related to market power being non-jurisdictional should be rejected and their request denied." In conclusion, Aquila argued at pages 4-5 of its response that "Aquila must have the ability to participate in all issues related to the merger because the manner in which the companies are merged will have a major effect on market power and, consequently, on Aquila."

In separate replies filed on July 22, 1997, SJLP and EDE stated at page 2 of their replies that "[t]he issues of transmission access and market power are not the exclusive concern of the FERC. To the contrary, the Commission has evidenced a keen interest in these issues, most recently in its Case No. EM-96-149." (Footnote omitted).

The Staff on July 24, 1997 responded to the Western Resources – KCPL pleading and stated that to the contrary, the issue of retail market power was an issue appropriate for consideration by the Commission, and the Commission itself had indicated in the Union Electric Company – CIPSCO, Inc. merger case, Case No. EM-96-149, that retail market power was an issue which was properly before this Commission for its consideration and action, and retail market power is an issue which electrical corporations seeking this Commission's authority to merge should address.

The Commission at pages 7-8 of an August 8, 1997 Order Regarding Interventions, Adopting Protective Order And Setting Prehearing Conference in the Western Resources – KCPL merger case held that market power and related issues were proper subject matter for consideration in the merger case:

The Commission has considered the various positions of the parties regarding the limiting of issues to those considered local by the Joint Applicants, but finds the Staff response to these concerns, filed July 24, to be an accurate and succinct summary of the Commission's position in regard to these issues. As the Staff points out, the Commission has made it clear in the context of the Union Electric/CIPSCO merger proceeding, Case No. EM-96-149, that market power and related issues, and transmission access issues, are proper subject matter for consideration in the context of a case of this nature. In its Report and Order approving the merger, the Commission affirmatively instructed the parties to address market power issues as they related to the creation of an ISO and deregulated retail prices. See In re Union Elec. Co. Merger with Central Ill. Public Serv. Co., No. EM-96-149 (Mo. P.S.C., Feb. 21, 1997). The Commission has not altered its approach to the issues in question and finds the concerns set out in the four applications for intervention to be potentially appropriate for consideration in this case.

. . . as the Commission has indicated above, the parties should address issues of horizontal and vertical market power. . . .

2. The setting of a procedural schedule in the instant docket should await the filing of the UtiliCorp – Empire District Electric (EDE) merger case. The UtiliCorp – SJLP merger cannot be looked at in isolation. On May 11, 1999, UtiliCorp and (EDE) announced that they had reached an agreement to merge. UtiliCorp and EDE have indicated that their merger case filing before this Commission will occur next month. In meetings with UtiliCorp, SJLP and EDE, prior to UtiliCorp's and SJLP's October 19, 1999 merger case filing, the Staff indicated to UtiliCorp, SJLP and EDE that the Staff would take the position that the procedural schedule for the two merger cases should be driven by the later of the two merger case filings. Although there will be issues specific to each merger, there will be significant issues common to the two mergers and associated with the combination of these three particular utilities, rather than related to merely just two of the three utilities. Such issues involve the purported merger savings arising from the merger of the three utilities, rather than just the two utilities, including the joint dispatch of the UtiliCorp, SJLP and EDE generating units.

In fact, several of the Joint Applicants' witnesses make note of this very matter in their prepared direct testimony. Mr. Robert K. Green speaks in generalities stating, at pages 21-22 of his prepared direct testimony, as follows respecting the merger of the three utilities:

. . . The merger of SJLP and UtiliCorp and eventually The Empire District Electric Company is an extremely unique opportunity. This Commission has the opportunity to combine three low cost, privately owned electric utilities in the State of Missouri into an even stronger, more operationally efficient utility. The resulting synergies can only be created if these utilities are consolidated with the customers gaining the benefits. . . .

Mr. Robert W. Holzwarth is more specific, including in his testimony at pages 20 – 21 a short section entitled “Impact Of The Empire District Electric Company Merger.” Mr. Holzwarth states therein in part as follows:

Inclusion of the effects of the EDE merger will reduce the total value of the power supply synergies available to MPS and SJLP by approximately \$55.2 million. . . .

. . . The reduction in the value of the synergies available to SJLP is due to the different allocation of both on system energy savings and off system sales margins. In the MPS/SJLP merger all such synergies were allocated to SJLP. In the three-way merger, these synergies are allocated to both SJLP and EDE resulting in a reduction in the amount of synergies allocated to SJLP.

Mr. Vern J. Siemek, the purpose of whose testimony is to outline the synergies which are anticipated to be developed from the UtiliCorp – SJLP merger, states at page 10 of his testimony that “[he] used the data developed in Mr. Holzwarth’s testimony as if the merger with The Empire District Electric Company (‘EDE’) is also completed, since it is probably [sic] that both transactions will occur.”

Discovery needs in the two merger cases also will be related owing to the fact that one of the three companies is common to the two mergers and what is being proposed is the merger of three, not just two companies. The analysis required will be as follows: (a) is the merger of UtiliCorp and SJLP detrimental to the public interest; (b) is the merger of UtiliCorp and EDE detrimental to the public interest; and (c) is the merger of UtiliCorp, SJLP and EDE detrimental to the public interest. The Staff would note that of the 12 witnesses that have filed prepared direct testimony on behalf of UtiliCorp – SJLP, 11 are in the employ of UtiliCorp and 1 is in the employ of SJLP. The Staff would expect a similar situation respecting witnesses to occur in the UtiliCorp – EDE filing; i.e., many of the UtiliCorp witnesses in the UtiliCorp – SJLP merger are likely to be witnesses in the UtiliCorp – EDE merger. Thus, it appears to the Staff that there

should be joint hearings for the two mergers and that the procedural schedule should be driven by the later of the two filings, which will be the Empire merger filing.

3. There has been no indication that when this Commission has taken the time that it deems necessary to analyze a proposed merger that this Commission has impaired the proposed merger. For example, respecting the UE – CIPSCO merger, the parties initially did not address the matter of market power and submitted a Stipulation And Agreement to the Commission in settlement of UE's application for authority to merge with CIPSCO. After the hearing for the presentation of the Stipulation And Agreement, the Commission issued an Order Requesting Additional Information. In said Order, the Commission directed the parties to submit additional testimony regarding the market power which would be created by the merger. The Staff and the Office of the Public Counsel (Public Counsel) each hired a consultant to file testimony on market power. UE filed testimony on November 1, 1996 in response to the Commission's Order and the Staff and the Public Counsel filed testimony on November 26, 1996. No further proceedings occurred, and the Commission issued its Report And Order approving the merger on February 21, 1997. The merger was consummated regardless of the fact that the Commission took the time that it believed was necessary for it to render a decision on the application.

Even though the Illinois Commerce Commission (ICC) initially set a schedule for the UE – CIPSCO merger case more expedited than the Missouri proceedings, the Illinois approval of the proposed merger ultimately was issued after this Commission's approval, owing among other things to the ICC following the Missouri Commission in requiring the filing of market power testimony. As in the UE – CIPSCO merger case, the parties in the Western Resources – KCPL merger case were able to agree to a procedural schedule and the Kansas Corporation Commission (KCC), which started with a procedural schedule more expedited than the Missouri proceedings

concluded after the Missouri proceedings, in part due to the settlement negotiated by the parties in Missouri. The Staff believes that this history is relevant because it shows that the schedules found acceptable by the Staff and ordered by the Commission have been reasonable.

4. The March 4, 1999 Agreement And Plan Of Merger (Agreement)(Schedule RKG-1, pp. 1, 37, 39-41) between UtiliCorp and SJLP provides, in part, that the Agreement may be terminated, at any time prior to such time as the certificate of merger is filed with the Secretary of State of the State of Delaware, or at such later time as is agreed to by UtiliCorp and SJLP and specified in the certificate of merger, by written notice by the terminating party to the other party, among other things, by either UtiliCorp or SJLP, if the certificate of merger is not filed with the Secretary of State of the State of Delaware on or before December 31, 2000; provided, however, if on or before December 31, 2000, the waiting period applicable to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) shall not have expired or been terminated or all other consents and approvals required under applicable laws or material agreements shall not have been obtained, but all other conditions to the closing shall have been fulfilled or shall be capable of being fulfilled, then the December 31, 2000 termination date shall be extended to December 31, 2001. In short, if the only conditions that are unmet to closing the merger by year-end 2000 are the conditions relating to compliance with the HSR Act and receipt of regulatory approvals, the deadline for closing will be extended to December 31, 2001.

The Agreement further states that at any time prior to such time as the certificate of merger is filed with the Secretary of State of the State of Delaware, or at such later time as is agreed to by UtiliCorp and SJLP and specified in the certificate of merger, UtiliCorp or SJLP may, to the extent legally allowed, (a) extend the time for the performance of any of the obligations or other acts of the other party contained in the Agreement, (b) waive any

inaccuracies in the representations and warranties of the other party contained in the Agreement and (c) waive compliance with any of the agreements or conditions of the other party contained in the Agreement. Thus, this provision allows UtiliCorp and SJLP to agree to extend the deadline for the closing the merger beyond year-end 2001, if all regulatory approvals have not been received by that time.

5. The Joint Applicants state in paragraph 3 of their Motion To Establish Procedural Schedule that “[their] proposed schedule is reasonable as it provides for a full and fair opportunity for all interested parties to inquire about the consequences of the merger through discovery and to prepare and file testimony in a timely manner.” Noting that they have already responded to 90 Staff Data Requests, the Joint Applicants further assert in paragraph 3 that their proposed schedule provides “ample opportunity for the Commission Staff, the Office of the Public Counsel and any Intervenors to conduct additional discovery, to fully develop any relevant issues and to respond to the direct testimony of UtiliCorp and SJLP.” Furthermore, in paragraph 4 of their Motion To Establish Procedural Schedule, the Joint Applicants claim that:

... assuming that the case is litigated, the proposed schedule is consistent with the Commission’s past experience given the fact that the only merger case actually litigated to decision in recent history took ten months from the time the application was filed to the issuance of the Report and Order. *Re Application of Kansas Power and Light Company, Mo.P.S.C. 3d 150 (1991).*

The reality respecting the Joint Applicants’ proposed procedural schedule is contrary to the Joint Applicants’ assertions. In fact, the Kansas Power and Light Company (KPL) – Kansas Gas & Electric (KGE)¹ merger to which they compare their filing is the most atypical merger to which the UtiliCorp – SJLP merger can be compared. The KPL – KGE merger started as a hostile merger attempt by KCPL respecting KGE. KCPL had filed on July 23, 1990 an

¹ Even though the word “gas” appears in the name of Kansas Gas and Electric, KGE was not a provider of natural gas at retail or wholesale at the time of KCPL’s 1990 takeover attempt and the 1991 merger with KPL.

application for approval of its acquisition of KGE. The Staff was well into its audit of the KCPL – KGE merger when on November 21, 1990 KPL filed its application to merge with KGE. The potential impact of the KPL – KGE merger on Missouri ratepayers was not anywhere as great as in the aborted KCPL – KGE merger or the instant proposal. In the KPL – KGE merger, the utility being acquired was an electric company with service territory solely in Kansas (KGE) and the company making the acquisition was an electric and gas company (KPL), with only gas operations, not electric operations, in Missouri (Gas Service).

Even though the UE – CIPSCO merger is not a good fit with the instant merger proposal because the proposed treatment of the purported merger premium / acquisition adjustment in the UE – CIPSCO merger was not highly complex, whereas the UtiliCorp - SJLP proposal is very complex, the UE – CIPSCO merger is closer in nature to the instant merger proposal than is the KPL – KGE merger. As much as an earnings audit is advisable when there is a merger application filed with the Commission, there was no practical reason to engage in an earnings audit of UE in the context of its application to merge with CIPSCO because UE was in the first year of a three-year alternative regulation plan and a merger was not one of the conditions which terminated the alternative regulation plan at the option of either UE or the Commission.

The instant merger may require an earnings audit of UtiliCorp's MPS division, electric and gas, and at the very least an examination of UtiliCorp's corporate allocations factors and the impact of the merger on these factors. The UtiliCorp – SJLP merger application seems to indicate that a significant shifting of UtiliCorp's corporate costs to SJLP will occur as a result of the merger. Based upon the Joint Applicants' proposed regulatory plan, an update of the recent earnings audits of SJLP's electric, gas and steam heat operations will be necessary. An earnings review of EDE also may be required, depending upon the details of UtiliCorp's and EDE's

regulatory plan contained within said merger filing. Moreover, the UtiliCorp - SJLP proposed merger premium / acquisition adjustment is the most complex encountered to date by the Staff, containing elements not seen before in this jurisdiction and perhaps not seen anywhere else in the United States.

Another similarity / dissimilarity between the UE – CIPSCO merger and the instant merger is that UE's Missouri gas operations were part of its merger with CIPSCO, as UtiliCorp's and SJLP's gas operations are part of their merger, but whereas UE in its merger filing provided adequate testimony respecting the effect of the merger on its gas operations, neither UtiliCorp nor SJLP have done so respecting the effect of the merger on their gas operations. In addition, the Joint Applicants have not provided adequate testimony respecting the effect of the merger on SJLP's steam heat operations or even MPS' electric operations (e.g., what level of merger savings and costs are or will be allocated or charged to MPS' electric operations).

The most immediate and significant difference between the Joint Applicants' proposed schedule and the UE – CIPSCO procedural schedule, which the parties did not need to take to the Commission for resolution, is that the Staff would have two months less to perform the UtiliCorp -- SJLP audit than it had to perform the UE – CIPSCO audit:


<u>Event</u>	<u>UtiliCorp – SJLP</u>	<u>UE – CIPSCO</u>	<u>REVISED UE – CIPSCO</u>
Joint Application & Direct Testimony	October 19, 1999 115 Days	November 7, 1995 175 Days	November 7, 1995 182 Days
Rebuttal Testimony	February 11, 2000 28 Days	April 30, 1996 31 Days	May 7, 1996 27 Days
Surrebuttal & Cross - Surrebuttal Testimony	March 10, 2000 31 Days	May 31, 1996 31 Days	June 3, 1996 28 Days

Evidentiary Hearings	April 10-14, 2000	July 1-3, 8-12, 1996	July 1-3, 8-12, 1996
Briefs	May 2000		
Stipulation & Agreement Filed			July 12, 1996
Hearing Regarding Stipulation & Agreement			September 5, 1996
Order Directing Filing of Market Power Testimony			September 25, 1996
Market Power Testimony UE			November 1, 1996
Staff & Public Counsel			November 26, 1996
Order Approving Merger			February 21, 1997

To sum up, UtiliCorp's and SJLP's merger application is significantly more complex than past merger filings for two reasons: (1) it is part of a proposed combination of three utilities, not just two utilities, and (2) UtiliCorp's and SJLP's unique and very complex regulatory plan proposal. Notwithstanding these facts, the Joint Applicants have suggested a procedural schedule which would give the Commission and the Staff significantly less time to review and process their merger filing than the Commission and the Staff required for other significant merger transactions. This result clearly would be unreasonable.

WHEREFORE the Staff requests that the Commission, in lieu of dismissing the Joint Applicants' filing as deficient, (1) order the Joint Applicants to supplement their filing respecting (a) the market power of the resulting entity, (b) the effect of the merger on the gas operations of UtiliCorp and SJLP, (c) the effect of the merger on the steam operations of SJLP and (d) the effect of the merger on UtiliCorp's electric operations, and (2) withhold any determination respecting a procedural schedule until such time as the parties to this proceeding have had an opportunity to review such supplemental filing and the merger filing of UtiliCorp and EDE.

Respectfully submitted,
DANA K. JOYCE
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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 24th day of November, 1999.