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May 7, 2001

Mr. Dale Hardy Roberts
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

MAY 07 2001 *rh*

Missouri Public
Service Commission

RE: UtiliCorp United Inc. - Case No. EO-2001-477

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of the Response to Staff Recommendation. Please stamp the enclosed extra copy "filed" and return same to me.

If you have any questions concerning this matter, then please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Dean Cooper

Dean L. Cooper *lykg*

DLC/rhg

Enclosures

cc: Office of the Public Counsel
Mr. Steve Dottheim
Mr. John Coffman

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

FILED³
MAY 07 2001 *nm*

In the Matter of the Application of)
UtiliCorp United Inc. under §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

Missouri Public
Service Commission

RESPONSE TO STAFF RECOMMENDATION

COMES NOW UtiliCorp United Inc. ("UtiliCorp"), d/b/a Missouri Public Service ("MPS"), and, in response to the Staff Recommendation Regarding Provision of Public Utility Holding Company Act Section 32(k) Determinations to UtiliCorp for Its Test Power Contract with MEPPH ("Staff Recommendation"), states as follows to the Missouri Public Service Commission ("Commission"):

BACKGROUND

1. On March 8, 2001, UtiliCorp filed its Application in this case requesting that as to its Service Agreement No. 2 ("SA2") with MEP Pleasant Hill, L.L.C. ("MEPPH") the Commission determine that it has sufficient regulatory authority, resources and access to books and records of UtiliCorp and MEPPH to exercise its duties under subsection 32(k) of PUHCA¹ to ensure that SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide MEPPH with any unfair competitive advantage by virtue of its affiliation with UtiliCorp, and (iv) is in the public interest.

2. 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"). It is owned 50%

¹See, 15 U.S.C. §79z-5a(k).

by Aquila Energy Corporation - a wholly owned subsidiary of UtiliCorp – and 50% by Calpine Corporation.

3. In its Order Regarding Power Sales Agreement issued April 22, 1999, in Commission Case No. EM-99-369, the Commission reviewed the base Power Service Agreement (“PSA”) between UtiliCorp and MEPPH and made the necessary findings to satisfy the PUHCA. The Commission’s broad statutory authority over the determination of retail rates by electrical corporations, including UtiliCorp, pursuant to Chapters 386 and 393, RSMo has not changed since the Commission’s decision in Case No. EM-99-369. Thus, the Commission continues to have the ability to make the determinations required by the PUHCA.

4. MEPPH is now in a position to test the Aries Project. However, delivery obligations under the PSA commence on the initial Commercial Operation Date of the Aries Project in simple-cycle mode and the PSA does not provide for sales of test energy from the project prior to such Commercial Operation Date. In order to account for test energy, MEPPH and UtiliCorp have agreed to SA2. SA2 also provides for sales of test energy prior to the subsequent Commercial Operation date of the Aries Project in combined-cycle mode. SA2 provides for the sale by MEPPH to UtiliCorp of test energy from the Aries Project at UtiliCorp’s avoided cost of supply. However, to remove any possibility of affiliate abuse, 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.

5. This approach to the pricing mechanism was taken because the Federal Energy Regulatory Commission (“FERC”) has previously concluded that capping the price for sales from a marketer to an affiliated utility at a reasonable market proxy (such as the Into Cinergy price) mitigates any affiliate abuse concerns. E.g. DPL Energy, Inc., 90 FERC ¶ 61,212 (1999).

STAFF RECOMMENDATION

6. On April 27, 2001, the Staff Recommendation was filed in this case. The Staff stated in relevant part that the “‘Contract price’ provided for in SA2 is not in compliance with the Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting ‘Affiliate Transactions.’”

7. The Staff went on to recommend that the Commission provide the subsection 32(k) of PUHCA determinations sought by UtiliCorp, “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.”

UTILICORP RESPONSE

8. The approach to this matter suggested by the Staff is generally acceptable to UtiliCorp, with certain reservations.

9. UtiliCorp agrees as follows:

-- as stated in the Application,² Case No. EO-2001-477, i.e., SA2, shall not be utilized by UtiliCorp for ratemaking purposes (b(i));

– as stated in the Application,³ the Staff’s recommendation respecting this matter and

² 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 SA2.

³ UtiliCorp 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

the Commission's Order making the requested PUHCA Section 32(k) determinations shall not be cited as precedent for any matter, except for those specific matters for which the Application has been filed (PUHCA compliance) (b(ii)); and, – as stated in the Application, 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 (b(iii)).

10. UtiliCorp also agrees to file a motion for the identified variance within this case. UtiliCorp's actions in doing so, however, should not be interpreted as a concession on the part of UtiliCorp that the "contract price" provided for in SA2 is necessarily not in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting Affiliate Transactions or that the price contained in SA2 is necessarily within the jurisdiction of a state commission, rather than the FERC.⁴

11. Staff correctly cites Commission Rule 4 CSR 240.20.015 as stating in relevant part as follows:

any expense, charge, cost or allocation incurred or accrued by MEPPH or UtiliCorp d/b/a MPS in or as a result of SA2 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 SA2.

⁴ The FERC generally has exclusive jurisdiction over wholesale power prices. "In 1935, Congress passed the Federal Power Act, which created Federal jurisdiction over the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. §§ 824(a). That act also provides that the various states retain jurisdiction over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. §§ 824(b). In 1996 the FERC issued Order No. 888, which interprets the Federal Power Act as leaving regulation of only bundled retail transmissions to the various states. The FERC's order asserts federal jurisdiction over all unbundled retail transmissions as well as wholesale transmissions. . . . The FERC's interpretation of the Federal Power Act was recently upheld by the United States Court of Appeals for the District of Columbia Circuit in *Transmission Access Policy Study Group v. F.E.R.C.*, 225 F.3d 667 (D.C. Cir. 2000)." *In the Matter of the Joint Application of UtiliCorp United Inc. and The Empire District Electric Company*, Case No. EM-2000-369 (December 28, 2000).

(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.

12. This Rule does not impose a requirement to use specific contract language.⁵ It merely imposes a test for the resulting compensation paid to the affiliate. Thus, Staff's allegation that the contract will not be in compliance with Commission Rule 2 CSR 240-20.015(2)(A)(1) is merely speculation. Compliance, or noncompliance, will ultimately be measured by comparing the actual amount paid, on the one hand, to the lower of fair market price and fully distributed cost, as defined by the Rule, on the other hand.

13. SA2 provides for a contract price that will be the lower of UtiliCorp's "avoided cost," as defined by the contract, and a market price. UtiliCorp believes that the "avoided cost" identified by the contract will in fact be lower than the Commission's "fully distributed cost" and therefore within the parameters of Commission Rule 2 CSR 240-20.015(2)(A)(1). To provide comfort on this point, UtiliCorp committed in its Application that "MEPPH 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-MPS business by MPS's customers."

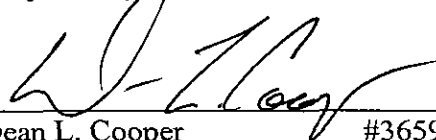
14. To the extent it may be in error, UtiliCorp will ask for a variance as suggested by the

⁵ Contrary to Staff's assertions, there likewise is no requirement that contractual terms such as the "Commercial Operation Date" be defined consistent with terms contained in the Missouri Revised Statutes (i.e. "in-service" date).

Staff. The Staff has stated that "the costs associated with SA2 are not considered by the Staff to be material." UtiliCorp agrees with this statement and believes that the added benefit of fully testing the Aeries Project so that this power can be added to UtiliCorp's portfolio to the benefit of UtiliCorp's customers and the State of Missouri weighs in favor of the variance suggested by the Staff. SA2 will allow the energy produced during the test of the Aries Project to be used in a beneficial manner and enable the Aries Project to move toward the production of a steady, affordable and reliable source of electric power for distribution by MPS to its electric utility customers.

WHEREFORE, UtiliCorp respectfully requests that the Commission consider its above response and hereby affirmatively states its intention to file a variance as suggested by the Staff Recommendation, with the reservations identified above.

Respectfully submitted,



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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 7th day of May, 2001, to:

Mr. Steven Dottheim
Missouri Public Service Commission
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