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January 4, 2000

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

FILED²

JAN 04 2000

Missouri Public
Service Commission

Re: Case No. EM-2000-292

Dear Mr. Roberts:

Enclosed for filing in the referenced case on behalf of UtiliCorp United Inc. and St. Joseph Light & Power Company, please find an original and fourteen copies of Suggestions in Opposition to City Utilities Motion for Rehearing.

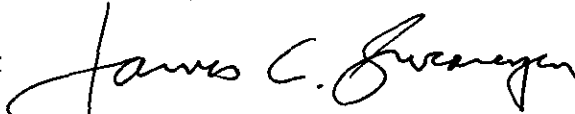
Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:


James C. Swearengen

JCS/lar

Enclosure

cc: All Parties of Record

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

FILED²

JAN 04 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

**SUGGESTIONS IN OPPOSITION TO CITY UTILITIES
MOTION FOR REHEARING**

COME NOW UtiliCorp United Inc. ("UtiliCorp") and St. Joseph Light & Power Company ("SJLP"), pursuant to Commission rule 4 CSR 240-2.080 (12), and submit the following suggestions in opposition to an Application for Rehearing¹ and Motion for Reconsideration filed by intervenor the Board of Public Utilities ("City Utilities") on or about December 29, 1999:

City Utilities contends that the Commission's Order is unreasonable and unlawful because the Commission's decision not to require UtiliCorp and SJLP to file a retail market power study in support of the Joint Application is a different approach than that taken by the Commission in a previous merger case.² In essence, City Utilities asserts that the Commission, having once directed that a market power study be submitted in support of a merger application, is bound for all time to require it of other electric companies which seek Commission approval of merger agreements. This argument is legally and factually deficient.

¹UtiliCorp and SJLP submit that the Commission's December 21, 1999, Order Denying Motion to Require Market Power Study and Adopting Procedural Schedule ("Order") is interlocutory in nature and, therefore, not subject to review under the provisions of §386.510 RSMo 1994. See, *State ex rel. Southwestern Bell Telephone Company v. Public Service Commission*, 592 S.W.2d 184 (Mo. App. 1979).

²*Re Union Electric Company*, 5 Mo.P.S.C. 3d 157, 158 (1996).

First of all, there is no express statutory or rule requirement that an electric utility file a market power study in support of a merger application. Section 393.190 RSMo is completely silent on this topic. So too is the Commission's filing requirements rule for merger applications, 4 CSR 240-2.060 (6). City Utilities contends that the applicable standard for approval of such transactions (i.e., not detrimental to the public interest³) requires that an applicant, in its positive case, conjure up every speculative scenario that could possibly result in a public detriment and then disprove each one. This, of course, is not the law. UtiliCorp and SJLP have made a *prima facie* showing that their merger is not detrimental to the public interest in their prepared direct testimony. As a consequence, the burden of persuasion has now shifted to those parties who would contend otherwise.

Furthermore, City Utilities's claim that a market power study is required as a result of a past Commission decisions enjoys absolutely no legal support. To the contrary, the Commission is not bound by principles of *stare decisis*. *State ex rel. Churchill Truck Lines, Inc., v. Public Service Commission*, 734 S.W.2d 586 (Mo. App. 1987).

"The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision." *City of Columbia v. Missouri State Board of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980).

734 S.W.2d at 593. Moreover, it is well-accepted that there is no *per se* requirement that the Commission must apply the same formula on successive applications, even by the same company. *See, State ex rel. Arkansas Power & Light Company v. Public Service Commission*, 736 S.W.2d 457, 462 (Mo. App. 1987) [The Commission is not prevented from using different methods to determine cost of producing electricity in consecutive cases].

³*See, City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934).

The Commission's reason for departing from its prior pronouncement concerning the filing of a market power study in electric utility merger cases is adequately explained in the Order. The explanation is both practical and reasonable. Based upon its recent experience with similar filings made in Case Nos. EM-96-149⁴ and EM-97-515⁵, the Commission has correctly concluded that the preparation and filing of a retail market power study at this time is a waste of time and resources. There is no retail competition in Missouri, nor will there be until legislation is enacted by the Missouri General Assembly to make it a reality. The bottom line here is that Missouri is not a competitive environment yet and until it is, a retail market power study is an exercise in theory only. In light of these considerations, the Commission correctly observed that "there are too many uncertainties surrounding the future of retail competition in Missouri to make any market power study definitive." (Order at 4) Clearly, the Commission has changed its views on this topic in light of its prior experience.

With respect to wholesale market power concerns, UtiliCorp and SJLP have filed a wholesale market power study in connection with their merger case pending before the FERC⁶. (Order at 4) Any allegations concerning the ability of the merged company to control the price (and profits) of electricity at the wholesale level is a matter best addressed at that forum.

The Commission has provided a principled, and reasonable, explanation for its departure

⁴See, *fn*nt. #2.

⁵*Re Merger of Kansas City Power and Light Company and Western Resources, Inc.*

⁶FERC Order No. 592, which was issued in December 1996, (near the time of the Union Electric Company order cited by City Utilities), includes a requirement that a market power study be filed with a merger application. Thus, the Commission now has had several years of experience with the FERC process can rely on that process in addressing wholesale power issues.

from its prior practice. There is no legal or practical requirement that the Commission mandate that UtiliCorp and SJLP undertake a meaningless act. There is no error in the Commission's Order.

Finally, City Utilities's claim that it has been denied due process because the Commission has not required the filing of retail market power study is without merit. There is nothing that prevents City Utilities from submitting its retail market power concerns to the Commission in this case. In fact, the Commission expressly reserved to the other parties to this case, including City Utilities, the right to "address the retail market power issue in their rebuttal testimony and at the hearing." (Order at 4) Accordingly, any party who chooses to do so may undertake discovery on this issue and, in their discretion prepare and may file a retail market power study of their own.

No party will be denied due process by the fact that UtiliCorp and SJLP are not being required to supplement their positive case with additional information which is not mandated either by statute or rule. Every reasonable opportunity is being extended to the parties in this case by the Commission to submit whatever evidence they may have that would tend to show that the merger of UtiliCorp and SJLP would be detrimental to the public interest because it might result in the surviving company having excessive retail market power compared to existing circumstances or for any other reason. All parties have certainly been given ample time to inquire. All parties have been given notice and a full opportunity to be heard. There is no denial of due process under these circumstances.

WHEREFORE, UtiliCorp and SJLP request that the Motion for Reconsideration be denied for the reasons aforesaid.

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 4TH day of January, 2000, to all parties of record.

