JOLLEY WALSH HURLEY & RAISHER, P.C.
ATTORNEYS AT LAW

WILLIAM A. JOLLEY
JOHN P. HURLEY
SCOTT A. RAISHER
DALE L. INGRAM
DONALD R. AUBRY

204 W. LINWOOD BLVD.
KANSAS CITY, MO 64111
816-561-3755
FAX 816-561-9355
E-MAIL: jolleywalsh@compuserve.com

JAMES G. WALSH, JR.
RETIRED

STEVEN A. FEHR
OF COUNSEL

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Missouri Public
Service Commission

BY UPS-NEXT DAY AIR

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
200 Madison, Suite 800
Jefferson City, MO 65102

Re: Empire District Electric/UtiliCorp United Merger
PSC Case No. EM-2000-369

Dear Mr. Roberts:

Enclosed please find for filing in the above referenced case the original and eight (8) conformed copies of the Post Hearing Brief submitted on behalf of Intervenor International Brotherhood of Electrical Workers (IBEW) Local 1474. Copies have also been sent by overnight delivery this date to all counsel of record shown on the attached service list.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to call.

Very truly yours,

William A. Jolley

WAJ:ce
Enclosures

cc: Counsel of Record

Service List for
Case No. EM-2000-369

John Coffman, Esq.
Office of the Public Counsel
Governor Office Building
200 Madison St., Suite 650
Jefferson City, MO 65102
Tel: 513-751-5565
Fax: 513-751-5562

James Swearengen/Paul Bordreau, Esq.
Brydon, Swearengen & England, PC
P.O. Box 456
312 East Capital Avenue
Jefferson City, MO 65102-0456
Tel: 573-635-7166
Fax: 573-635-0427

Jeffrey A. Keevil, Esq.
Stewart & Keevil Law Offices, L.L.C.
1001 Cherry St., Suite 302
Columbia, MO 65201
Tel: 573-499-0635
Fax: 573-499-0638

William J. Niehoff, Esq.
Union Electric Company d/b/a AmerenUE
1901 Chouteau Drive
P.O. Box 66149 (MC1310)
St. Louis, MO 63166

Dana K. Joyce, Esq.
Steven Dottheim, Esq.
Missouri Public Service Commission
200 Madison, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Tel: 573-751-1489
Fax: 573-751-9285

Shelley A. Woods, Esq.
Assistant Attorney General
221 West High Street
P.O. Box 176
Jefferson City, MO 65102
Tel: 573-751-8795
Fax: 573-751-8464

Stuart W. Conrad, Esq.
Finnegan, Conrad & Peterson, LLC
3100 Broadway, Suite 1209
Kansas City, MO 64111
Tel: 816-753-1122
Fax: 816-756-0373

Mark Comley, Esq.
Newman, Comley & Ruth
601 Monroe St., Suite 301
P.O. Box 537
Jefferson City, MO 65101

James B. Deutsch, Esq.
Blitz, Bardgett & Deutsch, L.C.
908 East High Street, Suite 301
Jefferson City, MO 65101
Tel: 573-634-2500
Fax: 573-634-3358

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF

OF

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1474

JOLLEY WALSH HURLEY &
RAISHER, P.C.
204 W. Linwood Blvd.
Kansas City, MO 64111
Tel: (816) 561-3755
Fax: (816) 561-9355
email: jolleywalsh@compuserve.com

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204 W. Linwood Blvd.
Kansas City, MO 64111
Tel: (816) 561-3755
Fax: (816) 561-9355
email: jolleywalsh@compuserve.com

POST-HEARING BRIEF
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POST-HEARING BRIEF
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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1474

I. Preliminary Statement

International Brotherhood of Electrical Workers Local 1474 ("IBEW") intervened in this case because the interests of its members, all of whom who are currently employed by Empire District Electric ("Empire") are quite distinct from those of the general public and other parties in this case and because these distinct interests are not at all taken into account, accommodated or protected in the absence of IBEW intervention.

The record in this case demonstrates that the merger applicants, UtiliCorp United, Inc. ("UtiliCorp") and Empire, seek approval by the Commission of a merger plan that, if let intact by the Commission, will wholly fail to satisfy the Commission's "not detrimental to the public interest" standard.

The merger plan, if left intact and without the Labor Protective Provisions ("LPPs") sought by IBEW as a condition of Commission approval, will result in the elimination of 50 bargaining unit positions (positions occupied by Empire employees who are members of and represented by IBEW) and, without demonstrated justification, seriously and adversely affect

the health care and retirement benefits of remaining bargaining unit employees whose service, commitment and dedication to Empire has been premised upon the continuation of these employment benefits. If left intact and without the LPPs sought by IBEW, the plan will in fact be detrimental to the public interests in at least three very significant respects:

(1) Without LPPs, UtiliCorp will not provide service to the Empire service area as safely and as reliably as historically and currently provided by Empire;

(2) Without LPPs, Commission approval of the merger will, contrary to the public interest, constitute undue and impermissible favoritism of and preference to the investment, contribution and risk of UtiliCorp shareholders over the equally significant investment, contribution and risk of bargaining unit employees;[1]

(3) Approval by the Commission of a plan, eliminating the employment of admittedly long-term, qualified, skilled and dedicated employees and imposing adverse benefit changes without any evidence as to resulting material economic savings or other justifiable basis for doing so – and without accounting for the inevitable increase in costs resulting from such elimination of employment - is detrimental to the public interests of this state.

UtiliCorp and Empire do not, in the main, seriously rebut evidence that, if the merger is approved intact, detriment to the public interest will result. Instead, UtiliCorp and Empire argue that the Commission is legally prohibited from imposing the LPPs sought by IBEW as

[1] IBEW represents only bargaining unit employees, as it has no representative or other legal standing to speak on behalf of other adversely affect
ed Empire employees it will be noted *infra*, however, that non-bargaining unit employees will not be as severely affected by the merger for the reason, among others, that such non-bargaining unit Empire employees will be afforded employment opportunities within UtiliCorp not generally available to bargaining unit employees represented by IBEW.

a condition of the approval of the merger. UtiliCorp and Empire are incorrect. The Commission does have the authority to impose, and in the public interest must impose, the LPPs sought by IBEW.

II. The Issue

As framed in the List of Issues, the issue relating to IBEW's request for LPPs is:

> If the Commission approves the Companys', OPEC's or any regulatory plan, should the plan be modified to include "Labor Protective Provisions" protecting current employees of EDE [Empire] from adverse employment consequences including termination and loss of employment, in order for it to comply with law and otherwise satisfy the not detrimental to the public interest standard for approval of the merger?

Parties to this proceeding have presented cogent, and indeed what appear to be compelling, arguments that the Commission should not approve the merger. If the Commission should nonetheless determine to approve the merger, the LPPs sought by IBEW must be imposed as a condition of that approval.

III. IBEW Argument[2]

A. The Commission has the jurisdiction and legal authority to impose LPPs.

UtiliCorp, through the Surrebuttal Testimony of Robert B. Browning at pages 5-10, asserts "three primary reasons" (Surrebuttal Testimony, p. 5, l. 6) why the Commission should not adopt LPPs as a condition of the merger. The three reasons advanced by

[2] Except for IBEW's argument as to the Commission's legal authority to grant LPPs, which is primarily an issue of law rather than fact, IBEW arguments as to the necessity for LPPs rest exclusively on the facts as developed in the record. As the facts themselves constitute IBEW's argument, this post-hearing brief does not contain a separate section devoted to the Facts of the Case. Instead, the relevant facts will be referred to within this Argument section.

UtiliCorp are that (1) LPPs would be contrary to demonstrated legislative intent and are not *required* for the Commission to comply with existing law or to satisfy the "not detrimental to the public interest" standard; (2) Commission-imposed LPPs would upset the balance of labor-management relationships; and (3) LPPs are *likely* redundant or preempted by Federal Law. UtiliCorp is in error in each of these assertions.

1. LPPs Are Not At All Contrary To Demonstrated Legislative Intent; While No Existing Missouri Statute *Requires* LPPs, Existing Law Provides The Commission With The Authority To Impose LPPs In Order To Satisfy The "Not Detrimental To The Public Interest" Standard. Mr. Browning, in his Surrebuttal Testimony goes on to state (p. 5, l. 15-p. 6, l. 2) that he is unaware of any legal requirements for Labor Protective Provisions, and that a number of bills were pending before the Missouri Legislature last session to add LPPs, such as HB 1227; and that not one of those bills passed, which "seems to demonstrate" legislative intent not to regulate this area at this time. Mr. Browning also concludes that LPPs are unnecessary to satisfy the "not detrimental to the public interest" standard "because the staffing levels proposed in the merger plan are consistent with UtiliCorp's current operating model" – a conclusion not only wholly unsupported by record evidence but one that begs the question as to whether proposed staffing levels, when applied to the Empire service area, will be detrimental to the public interest of customers and employees in *that* area.[3]

[3] UtiliCorp's current operating model, presumably based upon its practice in other localities and jurisdictions, has not previously been submitted for Commission scrutiny or approval as to the "not detrimental to the public interest" standard. When control of the Missouri Public Service (Mo Pub) was transferred from Mo Pub to UlitiCorp, such transfer of control of operation was not the subject of a merger proceeding before the Commission (Tr. 1009, l. 25 – 1010, l. 13). Whether Empire's service model meets the "not detrimental to the public interest" standard or whether, on the contrary, the contemplated reduction in Empire staffing levels provide service to the Empire area less safely

UtiliCorp correctly points out that no Missouri statute ***requires*** LPPs. That fact, however, does not answer the question as to whether the Commission – though not required - nonetheless has the ***authority*** to impose LPPs in appropriate cases in order to satisfy the "not detrimental to the public interest" standard. UtiliCorp falls far short in its argument that the failure of Missouri legislation *requiring* LPPs *in all cases* somehow demonstrates that the Commission has no *authority to do so in any case.* In *State ex rel. Laclede Gas Co. v. Public Service Commission,* 535 S.W.2d 561 (Mo. App. 1976), the court rejected arguments attempting to limit the Commission's exercise of its implied authority to provide interim rate relief on the notion that such authority was not specifically granted in the statute. On the contrary, the court found that the statutory scheme *implies such authority.* In reaching its conclusion, *the court rejected the argument that the introduction of specific legislation establishing procedures for granting interim relief demonstrated a legislative judgment that the statute as it existed did not provide such authority. The court concluded that such legislation – as in the case of the failed LPP legislation in the last term – merely demonstrated an intent to clarify rather than change existing law.*

Mr. Browning states in his Surrebuttal Testimony (p. 5, ll. 17-19) that "one reason proponents of the bills [requiring LPPs] stated Labor Protection Provisions were necessary is because the Commission has no authority to impose such requirements." In this connection, the Commission should note that no such evidence as to legislative history has been introduced by UtiliCorp. Secondly, a review of the provisions in the bill (HB 1227) shows

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and less reliably and are therefore detrimental to the public interest, is a matter squarely before the Commission in this hearing.

that at least some legislators, not questioning whether the Commission *could* impose LPPs, intended that the Commission should be *required* to do so.

Even though legislators failed in an effort to *require* imposition of LPPs, pre-existing statutes afford the Commission the authority to do so if necessary to safeguard the health and safety of employees and the public. Missouri Revised Statute 386.310 provides, in relevant part:

> 1. *The Commission shall have power,* after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, *or otherwise, to require every* person, corporation, municipal gas system and *public utility to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner to promote and safeguard the health and safety of its employees,* passengers, *customers, and the public, and to this end to prescribe, among other things,* the installation, use, maintenance and operation of appropriate safety and other devices or appliances...*and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand...* (emphasis supplied).

See also Mo. Rev. Stat. Sections 386.320, 393.130, 140, and 386.250.

This earlier broad grant of authority and power to the Commission is in no way undercut by the failure of subsequent legislation ***requiring*** imposition of LPPs, any comments by proponents of the failed legislation to the contrary. It is well settled, in matters of legislative interpretation, that comments by subsequent legislatures concerning legislation passed by previous legislatures have no relevance to the meaning to be given to such prior legislative enactments. The U.S. Supreme Court has warned against such faulty statutory construction.

> [S]ubsequent legislative history is a *hazardous basis for inferring the intent of an earlier* Congress...It is *particularly*

> *dangerous ground* on which to rest an interpretation of a prior statute *when it concerns*, as it does here, *a proposal that does not become law*... Congressional inaction lacks *persuasive significance* because *several equally tenable inferences* may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change. Pension Benefit Guaranty Corp. v. The LTV Corp.*, 466 U.S. 633, 651 (1990) (emphasis supplied, citations omitted).

Finally, as to the issue of the applicability of current statutory provisions to issues relating to LPPs in this case, it should be noted that Staff Counsel – without suggesting applicability, invited the parties to address the applicability or non-applicability of Mo. Rev. Stat. 386.315 to IBEW's request for LPPs (Tr. 59, l. 8 – 60, l.2). Mr. Browning's Supplemental Surrebuttal Testimony (at p. 3, ll. 10-14) states that it is his understanding that the Commission is not authorized by Missouri law to change the terms of a collective bargaining agreement. While Browning did not know, and was unable to identify any such Missouri law or statute (Tr. 1024, l. 18 - 1026, l. 18), it is assumed that Mr. Browning was in fact referring to Section 386.315. That statute is inapplicable to the issue currently before the Commission. First off, and as the Commission can take judicial or official notice, Sec. 386.315 was passed in the aftermath of a rate case wherein Southwestern Bell was seeking a rate increase wherein, at issue, were the terms of a collective bargaining agreement with a union calling for economic improvements. Secondly, Sec. 386.315, on its face, provides that, "[I]n *establishing public utility rates*, the Commission shall not reduce or otherwise change any wage rate, benefit, working condition or other term, or condition of employment that is the subject of a collective bargaining agreement between the public utility and a labor organization"; thus, under any principle of legislative interpretation, this section applies only to a *rate case*, and not to *a merger case*. Thirdly Sec. 386.315 is inapplicable on its face

because there is not now nor has there ever been a collective bargaining agreement between IBEW and ***UtiliCorp*** – whose employment terms, and only whose employment terms, are at issue in connection with IBEW's request for imposition of LPPs. LPPs will not change a collective bargaining agreement between IBEW and UtiliCorp (the entity bound by LPPs) because there is no such collective bargaining agreement.[4] Section 386.315 in no way impedes or prevents the Commission from imposing the LPPs.

Thus unless, as urged by UtiliCorp, imposition of LPPs by the Commission is somehow preempted by federal statute – which, as will be shown, is not the case – the Commission clearly has the authority to do so.

2. <u>LPPs Will Not Upset The Balance Of Labor-Management Relationships And Are Not Preempted By Federal Law.</u>[5] First of all, and as previously pointed out, there is no collective bargaining relationship between IBEW and UtiliCorp with which Commission-imposed LPPs could possibly be said to interfere. Secondly, and as acknowledged by Mr. Browning (Tr. 1011, l. 22 – 1012, l. 14), the merger plan and the resulting elimination of bargaining unit positions and adverse benefit cuts may well take place prior to the establishment of a collective bargaining relationship between IBEW and UtiliCorp and the commencement of collective bargaining between these two entities. Thirdly, and most importantly, *UtiliCorp's claim as to impermissible interference with a labor-management relationship fails to take into account the function that the Commission*

[4] At UtiliCorp's insistence, Empire's collective bargaining agreement with IBEW provides UtiliCorp an option to not adopt that agreement. (Browning Testimony, Tr. 1023, ll. 1-23.)

[5] In his Surrebuttal Testimony, Mr. Browning lists, as separate and distinct reasons why the Commission should not adopt LPPs, (a) that LPPs would upset the balance of labor-management relationships, and (b) that they are redundant or preempted by Federal Law. These two contentions not only overlap but, from a legal standpoint, are virtually identical. Accordingly, IBEW combines, in a single section of this Brief, its response to these two separately-stated assertions.

fulfills under Missouri's statutory scheme. It is the Commission – not the employer, and not the union – that is charged with the responsibility of protecting and taking into account the *public interest.* As acknowledged by Mr. Browning (Tr. 1012, l. 15 – 1013, l. 7), the parties to a collective bargaining relationship, namely the employer and the union, each seek to advance the respective economic interests of their constituents – shareholders in the case of employers, and employees in the case of unions; *thus in collective bargaining negotiations, no one represents the public interest;* and, in the absence of public interest representation, the employer and union are free to negotiate terms contrary to the public interest. ***Hence the public interest in ensuring that a merger does not create significant economic displacement of Missouri citizens or detrimentally affect safety and reliability of electrical service is one which the Commission, and the Commission alone, must protect and safeguard.*** Rather than interfering with a labor-management relationship that does not yet exist, protection of the public interest through imposition of LLPs merely establishes *a public interest floor* as a basis of the collective bargaining relationship once it commences.

Accordingly, imposition of LPPs is not preempted by the Labor Management Relations Act (LMRA)/National Labor Relations Act (NLRA). *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), speaks directly to the company's argument concerning interference with the collective bargaining relationship (assuming that one exists) and the argument concerning LMRA/NLRA preemption. *Coyne* dealt with alleged preemption of a state statute that mandated severance pay in the context of a plant closing, only when another agreement (such as a collective bargaining agreement) did not otherwise provide for severance pay. The Court rejected the employer's arguments that the statute gave the unions an unfair advantage in bargaining. Instead, the court made it clear that states are free to

establish substantive terms of employment that provide a floor for employee rights, but which may be enhanced through bargaining.

> [T]he NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining. "The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment" . . . . It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state laws that form a "backdrop" for their negotiations. Absent a collective bargaining agreement, for instance, state common law generally permits an employer to run the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. . . . Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for "there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues that may be the subject of collective bargaining."

Coyne at 20-21 (citations omitted).

UtiliCorp's argument is no different than the argument advanced by Fort Halifax Packing Company. UtiliCorp complains that the imposition of labor protective provisions would give the unions something that they otherwise might have to obtain through collective bargaining. The Commission is entitled, however, to establish the "backdrop" against which UtiliCorp may engage in bargaining once it begins a bargaining relationship with the union. After that relationship is established, the NLRA will govern the manner in which the parties go about their negotiations.

Many other cases have recognized that the states have the authority to establish minimum working conditions without being preempted by the federal labor laws. See for example *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1995) (statute setting maximum hours for mining work was not preempted); *Dillingham Construction v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999) (prevailing wage law for apprentices was not preempted by NLRA).

Nor is the imposition of LPPs preempted by any other Federal law. In asserting its preemption argument, Utilicorp has relied on three cases. None of those cases prevent the Commission from imposing the labor protective provisions suggested in this matter. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), cited by Browning, dealt with preemption when a state court claim was inextricably intertwined with the interpretation of a collective bargaining agreement. As has been explained earlier, no collective bargaining agreement exists between Utilicorp and the Union. Moreover, as the Supreme Court explained in *Coyne*, *supra*, the state may establish minimum working conditions without intruding into the collective bargaining process. It is not necessary for the Commission to interpret the collective bargaining agreement in order to establish the minimum conditions of employment of the employees of the merged company.

FMC Corp. v. Holliday, 498 U.S. 52 (1990), cited by Browning, found preemption where a state statute related to the administration of an employee benefit plan. That analysis does not apply here, where the action to be taken by the Commission will merely establish minimum working standards for employees that Utilicorp must provide before the Commission acts within its jurisdiction to approve a merger of the utilities.

Similarly, the preemption found in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), also cited by Browning, does not apply to the proposed

action on the part of the Public Service Commission. The *Gade* Court found state statutes preempted on the basis of the statutes' inconsistency with federal safety standards enacted under the Occupational Health and Safety Act.[6] In the matter before the Commission, the proposal for LPPs is not a generally applicable safety standard. Instead, safety has been advanced as one of a number of concerns regarding appropriate staffing levels for the power facilities involved in the proposed merger. Also of concern are the effects of staff cuts on the service to be provided to the utility customers, the costs associated with hiring subcontractors when staffing levels are inadequate, and the effect on the citizens of Missouri in displacing employees from their jobs. Again, the LPPs that IBEW has proposed do not interfere with a general federal scheme of employee safety, but establish the minimum working standards for the employees who will work for a merged utility. That is a matter that is within the jurisdiction of this commission.

B. Without LPPs, The Merger Will Be Detrimental To The Public Interest Because UtiliCorp Will Not Provide Safe And Reliable Service To The Empire Area And Will Not Provide Service As Safely And As Reliably As Historically And Currently Provided By Empire.

UtiliCorp's Counsel, in discussing the "not detrimental to the public interest" standard, stated that the Commission need only be satisfied that there will be no public detriment – meaning "higher rates ***and/or a deterioration in the level of customer service"*** (Tr. 31, ll. 11-15). But for Counsel's omission of reference to deterioration in safety – and

[6] It should be noted that, as acknowledged by Mr. Browning (Tr. 1011, ll. 7-18), OSHA has not enacted regulations or otherwise occupied the field, in connection with safety, as to staffing, manpower and crew complement. Where a federal agency or law has not occupied a given field, of course, state regulation in that field is not federally preempted.

while recognizing that Counsel may well have intended to encompasse *safety* within the term "*service*" – IBEW agrees. And, in fact, the evidence in this record amply demonstrates that the merger, without LPPs, will result in a deterioration in the level of safe and reliable service currently provided by Empire and which its customers have come to expect and should reasonably expect following a merger.

UtiliCorp officials are unanimous in their acknowledgment that *Empire is currently providing, and has historically provided, safe and reliable service to its customers with its existing complement of bargaining unit employees* (Robert Green, Tr. 298, ll. 8-14; John McKinney, Tr. 440, ll. 17-22; Steve Pella, Tr. 662, l. 19 – 663, l. 1; Robert Browning, Tr. 1014, ll. 12-17). Keeping this fact in mind, ***UtiliCorp officials likewise acknowledge that it would be a detriment to the public interest*** *if the service provided by UtiliCorp to the Empire service area, following reductions in bargaining unit positions, were not as reliable and not as safe as currently and historically provided by Empire* (Robert Green, Tr. 297, l. 23 – 299, l. 7; John McKinney, Tr. 440, l. 13 – 441, l. 7; Browning, Tr. 1014, ll. 18-24). Given the acknowledged detriment to the public interest should UtiliCorp fail to provide service as safely and reliably as provided by Empire, UtiliCorp further admitted that *due diligence would be required on UtiliCorp's part to determine whether safe and reliable service could be provided by UtiliCorp in the Empire area after a reduction of 50 bargaining unit positions* (Tr. 298, l. 15 – 299, l. 10). **Remarkably, the evidence is devoid of any evidence of such due diligence. UtiliCorp has conducted no studies as to its ability to safely and reliably deliver service following the elimination of bargaining unit positions. Attached to and part of Cross-Surrebuttal Testimony of Bill Courtney, Ex. 100, is**

UtiliCorp's Response to IBEW Data Request No. IBEW-9, stating as IBEW Question and UtiliCorp Response:

> **QUESTION:**
> In connection with the elimination, amendment or modification of any job positions or classifications or reductions in force of employees represented by the Union, *please state whether UtiliCorp has conducted any studies or prepared any reports or documents relating to UtiliCorp's ability to continue to deliver safe and reliable service as well as its ability to respond to any emergency or unanticipated interruptions of service.* If the answers is yes, please provide copies of all such studies, reports or documents related to the above.
>
> **RESPONSE:**
> UCU intends to operate the assets in a safe and reliable manner, consistent with UCU's current operations and business model, including its demonstrated ability to respond to emergencies or unanticipated interruptions of service. *No specific studies have been conducted.*

That UtiliCorp has conducted no studies demonstrating its ability to provide safe and reliable service, following the elimination of bargaining unit positions, at least at levels historically and currently provided by Empire, is further admitted by UtiliCorp witnesses (e.g. John McKinney, Tr. 446, l. 25 – 448, l. 1; Robert Green, Tr. 299, l. 20 – 301, l. 19).[7]

UtiliCorp witness Steven Pella, while acknowledging UtiliCorp's Response to the IBEW Data Request stating that no studies have been conducted, proceeded to play games with the Commission and Counsel -- stating that the *"key word"* in IBEW's Data Request was "*study*"; and while UtiliCorp representatives responding to the Data Request "implied a formal concluded study with recommendations" - leading to its Response that there were no such studies - - they nonetheless sought in their testimony, albeit quite disingenuously, to

[7] Empire likewise conducted no such study (Tr. 115, ll. 1-9).

create an impression that they did their homework and analyzed these issues; Pella's testimony as to UtiliCorp's steps in this regard was vague at best and, at worst, intentionally misleading (Tr. 670, l. 21-685, l. 25). Pella even testified that written reports and data were prepared by UtiliCorp in connection with the issues relating to bargaining unit position elimination (Tr. 683, ll. 4-17) – but none were produced.[8] Moreover, UtiliCorp's so-called *analysis* or investigation of these issues did not include any opportunity for input by IBEW (Tr. 678); did not provide an opportunity for Empire employees to rebut UtiliCorp's recommendations, once made, as to position elimination (Tr. 680); and did not meet with full concurrence by Empire officials (Tr. 681, l. 7-682, l. 3; 683, l. 18-684, l. 8).

In the absence of adequate studies or other due diligence, UtiliCorp's claim that it will continue to provide the same level of safe and reliable service to the Empire area following the elimination of bargain unit positions is nothing but an unsupportable belief based upon its record and operating model developed in other locales like the MoPub area (e.g. Green, Tr. 299-301; John McKinney, Tr. 440-444) – and its assertion that UtiliCorp's tracking and monitoring system will later provide indices as to whether service is being provided safely and reliably (Pella, Tr. 661-685; Browing, Tr. 1015, l. 9 – 1016, l. 16). The Commission should conclude, however, that (1) a belief based upon a "track record" at MoPub is useless and meaningless without data and comparisons of MoPub and Empire as to equipment, number and length of lines, number and types of customers, staffing, etc. (non of which has

[8] **If UtiliCorp had such data and reports, they should have been provided.** *IBEW's Data Request No. 9 not only asked whether UtiliCorp had conducted "any studies", but asked whether it had "prepared any reports or documents relating to UtiliCorp's ability to continue to deliver safe and reliable service as well as its ability to respond to any emergency or unanticipated interruptions of service."* **UtiliCorp responded in the negative.**

been offered by UtiliCorp to support its position);[9] (2) a system of tracking and monitoring service delivery both as to safety and reliability is all well and good – but, at best, allows only a correction of operation following the deterioration of service occasioned by a reduction of employment to insufficient levels. Resulting deterioration of service in the meantime – avoidable by LPPs – is itself detrimental to the public interest.

Lacking UtiliCorp's due diligence in assuring continuation of safe and reliable service to the Empire area following the elimination of bargaining unit positions (a UtiliCorp obligation acknowledged by Robert Green, *supra*), the Commission's determination as to the impact of position eliminations on service and safety must be based on available record evidence. The record establishes that, if the elimination of bargaining unit positions is accomplished, UtiliCorp will not provide service as safely and reliably as has Empire.

1. **Service Will Be Detrimentally Affected.** It is clear that if the merger is approved, the service area currently serviced by Empire will continue to be serviced by the existing work force less, of course, the eliminated employee positions (Tr. 115, ll. 10-17). There are virtually no duplicative positions as between bargaining unit employees of Empire whose positions are being eliminated and other UtiliCorp employees (e.g. Tr. 113, l. 10–14, l. 11; Tr. 162, ll. 3-9) – meaning, of course, that the bargaining unit work performed by employees whose positions are eliminated will not be performed in the Empire area by other UtiliCorp employees. And at the present time, with some unfilled bargaining unit vacancies – *but far fewer vacancies than resulting from the elimination of 50 bargaining unit positions*

[9] **Both Myron McKinney (Tr. 119, l. 19-120, l. 7) and Robert Green (Tr. 301, ll. 3-11) admit that UtiliCorp's claim – that it will provide safe and reliable service to the Empire area because it does so elsewhere – is unsubstantiated by any evidence or comparisons based on UtiliCorp's actual experience as to number of employees working in specific classifications; the georgraphic area; the number of jobs and tasks employees are to perform (Tr. 120); the number of customers serviced; or number of lines to be maintained (Tr. 301).**

– Empire employees "are working very, very hard, including overtime" (Tr. 161, ll. 12-19). **The current experience, requiring overtime - with a greater number of employees than following the merger - is persuasive evidence that the elimination of more positions following the merger will result in a deterioration of safe and reliable service. This presumption is further established by the simple and unassailable fact that a lesser number of bargaining unit employees will be providing (or attempting to provide) service to the same number and type of customers, over the same number of electrical lines and with the same ratio of miles of electrical line per employee, with the same equipment over the same geographic area.**

The conclusion that the reduction in bargaining unit positions will result in a deterioration of safe and reliable service does not, however, rest upon presumption alone. This conclusion is borne out by additional record evidence. By way of but one conclusive example, **UtiliCorp has admitted that at least in instances of major storms or outages, UtiliCorp will be unable to restore service as quickly, following the elimination of 50 bargaining unit positions, as Empire does currently and historically.** Thus, Mr. Pella testified:

> Q. (by Mr. Jolley)...when a major storm hits where there is a major outage, does UCU have a practice whereby it assesses the damage and makes a determination as to whether to attempt to restore power with its own people or rather to bring in sources from outside, other utilities, contractors, etc. in order to restore service?
>
> A. (by Mr. Pella) Based on the event and the information available and the extent of damage,
>
> yeah, that would be the practice, to review the extent, how much available crews and staff could handle and whether supplementary personnel are necessary.

Q. Okay. Mr. Courtney in his cross-surrebuttal testimony described Empire's decision-making process in that event. And he said that Empire makes an assessment within hours of the incident and if Empire determines that service can be restored within a given time frame, whatever that time frame is, 16 hours or so, that no outside help is brought in, but if it's determined that their own people cannot restore within that time frame, then they start calling in troops from outside. Does UCU have some similar kind of assessment plan?

A. Assessment may – I wouldn't know what it is exactly. It would be something along the lines of if you don't believe you could restore power in a reasonable period of time, whether that's one day or 18 [hours] – you know, whatever's past that, I'm not able to articulate.

Q. That's fine. **Would you agree that in an areawide outage and assuming that no outside crews are brought in, that 98 linemen will not be able to as safely and reliably restore power as 115 linemen could have and did?**

A. **I think we may not be able to restore it as quickly.** I would *expect* [10] we would be as safe. (Tr. 703, l. 2-704, l. 9, emphasis supplied.)

It should be noted that these major outages, interrupting customer service, occur *three or four times per year* in the Empire area (Ex. 100, p. 12).

UtiliCorp officials have admitted the detriment to the public interest in the event it fails to provide service as reliably as currently and historically provided by Empire (*supra,* p. 13). **The similarly admitted inability of UtiliCorp, following the elimination of bargaining unit personnel, to restore service to the Empire area as quickly as has been**

[10] When it comes to issues of safety, all that UtiliCorp has offered is its *expectation,* wholly unsubstantiated, that it will deliver service to the Empire area, following the elimination of bargaining unit positions, as safely as Empire has done. The lives and safety of the public, including employees, are far too critical to be left to chance or *unsubstantiated expectation.* IBEW will address the safety impact in greater detail, *infra.*

done by Empire is just such a deterioration in service – and is an acknowledgment of the resulting detriment to the public interest.

Not only will UtiliCorp – as admitted by Pella – not deliver service and restoration of power as reliably as Empire in situations involving major storms and outages *when no outside personnel are brought in to assist* but, *a fortiori*, **it will be likewise unable to do so when outside sources are utilized**. In the interim of the many hours between (1) the outage, (2) the decision to bring in outside assistance and (3) the arrival of such assistance – when bargaining unit employees are working alone to restore power – the reduced number of employees simply will not provide as much service as the pre-reduction employment complement could provide.

Moreover, other than UtiliCorp's bald assertion that it will provide service as reliably as Empire because it provides reliable service at MoPub, there is absolutely no basis upon which the Commission may conclude that fewer employees will provide the same level of service to the same geographic area even in routine, day-to-day situations. No witness for either Empire or UtiliCorp was able to give any explanation to the contrary. Myron McKinney could give no explanation (Tr. 161, l. 20-162, l. 14) – other than to comment, "*you might rely more on outside contractors to do some portion of the work that's being done by [Empire] employees today*" (Tr. 116, ll. 1-15). UtiliCorp's Robert Green and John McKinney were similarly at a loss in coming up with such an explanation – other than their

unsupported assertions that it will do so at Empire because it does so at MoPub (e.g. Tr. 299, l. 20-301, l. 11; 438, l. 7-440, l. 11).[11]

Without LPPs the merger is doomed to failure. It will not result in a delivery of electrical service to Empire customers as reliably as Empire has thus far been providing. Even *if* UtiliCorp has an *intent* to increase the utilization of outside contractors – the record being devoid of any details as to such intent – the public interest of this State will be detrimentally affected by the replacement of Missouri citizens who are long-term, dedicated and qualified employees with outsiders including non-citizens of the state of Missouri.- and at obvious increased costs unmentioned by UtiliCorp.[12]

2. **Service Will Not Be Delivered As Safely.** UtiliCorp concedes the rather obvious point that, among all utility employees, bargaining unit employees (e.g. linemen, electricians, production/powerhouse workers, meter testers, etc.) are by far most exposed – in the ordinary course of their work – to the highest risks to serious injury and death (Tr. Pella, Tr. 694, l. 16 – 696, l. 25). As related by IBEW Business Manager, Bill Courtney,[13] *without contradiction by UtiliCorp or Empire*, bargaining unit employees work with high-voltage lines and equipment, high-risk electrical machinery, generators, turbines, wiring, hydro-equipment and the like; in incidents of major storms and outages, bargaining unit employees are exposed to even more dangerous working risks by virtue of icy and wet working conditions, icy and wet hot power lines, downed hot lines and trees, long hours, hazardous

[11] Both Green (Tr. 301, ll. 12-25) and John McKinney (Tr. 441, l. 18; 442-443; 443, l. 16-444, l. 17 and 446, l. 25-448, l. 1) passed the buck to Steven Pella for further explanation. Pella's vague, inconclusive and misleading testimony has been previously addressed in this Post-Hearing Brief, *supra*, pp. 14-15.

[12] Other issues as to use of outside contractors, including UtiliCorp's failure to account for the increased costs to be occasioned by such use, will be addressed in this Post-Hearing Brief, *infra*.

[13] Courtney – whose former duties for Empire were those of a Journeyman Lineman and Lineman Foreman – is the only witness with actual knowledge of Lineman work, and its safety risks, who testified or introduced evidence as to safety of bargaining unit employees.

traffic and travel conditions, and understandable pressure and desire to work even more quickly so as to be able to restore more service (Ex. 100, pp. 8-14). **In the best of working conditions and with Empire's current bargaining unit employee complement, bargaining unit employees have lost their lives and suffered permanent disabilities – including burns of arms and legs requiring amputation, and major injuries to backs and necks – in the course of their high-risk employment** (Ex. 100, pp. 8-9).

Much of Empire's electrical lines are three-phase lines – with three hot lines and a ground line each have varying ***7,200 volts of electricity,*** requiring bargaining unit work in tight and cramped quarters, requiring bucket trucks and rubber gloving. Other electrical lines are single-phase lines consisting of either one 7,200 volt line or extensions of a 240 volt line. (e.g. Tr. 691, l. 6 – 693, l. 3)

Empire's current, pre-UtiliCorp-reduction, employee complement consists of 117 Linemen and Linemen-Foreman and 30 Electricians and Electrical Foreman (Ex. 100, p. 10). Empire maintains only three or four *two-employee crews* (Ex. 100, p. 9; Pella, Tr. 687, l. 21-688, l. 2) – meaning that Empire maintains in excess of 35 three-employee crews. ***These three-employee crews perform work on the higher-risk multiple-phase lines each carrying 7,200 volts of electricity.***

As gleaned from the record, it may be concluded that the industry standard – or at least the majority view - calls for utilization of three-employee crews. Not only are three-employee crews the norm at Empire, **but it is a standard universally required as well by outside contractors retained by either Empire or UtiliCorp** (Myron McKinney, Tr. 120, ll. 12-21; Pella, Tr. 690, l. 17-691, l. 3).

Currently, 334 individuals are employed in bargaining unit positions represented by IBEW at Empire (Ex. 100, p. 4). 50 of these positions will, absent LPPs, be eliminated (Ex. 100, p. 5; UtiliCorp Response to IBEW Data Request No. 6, attached to Ex. 100) – although no final decision as to the number has been reached and, indeed, that number could increase (e.g. Tr. 110, ll. 1-6). The projected position eliminations include 19 Linemen and Line Foreman (UtiliCorp Response to IBEW Data Request No. 6), representing a 16% reduction from the current complement of 117 such employees (Ex. 100, p. 10). Eight Electricians and Electrical Foreman are projected for position elimination (UtiliCorp Request to IBEW Data Request No. 6), representing a 35% reduction from the current complement of 23 employees in these classifications (Ex. 100, p. 4, as corrected in IBEW Errata Sheet). Six Dispatcher positions are being eliminated (UtiliCorp Response to IBEW Data Request No. 6), representing a 100% elimination of Dispatcher positions (with the average dispatcher seniority being 29 years and average age being 54 years (Ex. 100, p. 16). Other position eliminations are set forth in UtiliCorp's Response to IBEW Data Request No. 6.

Unrebutted by UtiliCorp is the fact that the elimination of all six of Empire's Dispatchers will, itself, have a very serious and adverse impact on the safety of the public, and particularly Empire's employees. While dispatchers are not themselves exposed to undue hazards in their working environment, their duties of directing, switching and coordinating power has the very real potential to either ensure safety or cause risk to safety for linemen, electricians and relay employees. Several of the dispatchers are themselves former linemen and electricians, and the elimination of the Dispatcher position presents increased hazards for employees and property because of their close familiarity with and knowledge of the Empire System, its power lines and their varying load capacities. Charts

and graphs, looked at by individuals in a Kansas City location, without the specific Empire knowledge of the total power pool of all the companies with whom Empire deals and with whom it exchanges power, cannot possibly assure safety to the extent that safety has been assured by Empire's dispatchers (Ex. 100, p. 17).

Twenty-seven of the 50 positions projected for elimination are held by Linemen, Linemen Foreman, Electricians and Electrical Foreman (UtiliCorp Response to IBEW Data Request No. 9). As indicated, these cuts represent a 16% reduction in Lineman and Lineman Foreman, and a 35% reduction in Electricians and Electrical Foreman.[14]

UtiliCorp's cavalier, and indeed arrogant, approach to worker safety and the issue of the detrimental impact of the bargaining unit reduction is best exemplified by the testimony of Pella. Pella was asked the question:

> Q. (by Mr. Jolley) Would you agree that *if the service provided by UtiliCorp to the Empire area, if the merger were approved and with 50 fewer bargaining unit positions,* ***were less safe and reliable as a result of the reduction of those bargaining unit positions, as a result of insufficient manpower and that that service was worse than the service that has been currently provided to customers by Empire without a reduction of heads, that that result would be detrimental to the public interest?*** (Tr. 663, ll. 13-21)

Mr. Pella answered, "***I'd say not necessarily***" (Tr. 663, l. 22) and went on to explain that this would be the case *only if UtiliCorp determined it to be the case – relying on UtiliCorp's "tracking" and "indices"*(Tr. 663, l. 23-665, l. 22). Both Pella and Browning elaborate that UtiliCorp would track injuries and deaths and, if such injuries or deaths were attributed to unsafe conditions *as determined by UtiliCorp*, UtiliCorp would later take corrective action –

[14] Lineman Foreman perform work identical to that of Lineman; Electrical Foreman perform work identical to Electricians. All provide safety-sensitive work, are exposed to high risk, work with tools, etc. on Empire's lines and equipment.

but both admit that no corrective action can undo the injuries and deaths in the meantime (Tr. 665, l. 23-667, l. 10; Tr. 1015, l. 20-1016, l. 22).

As noted above, and as appears throughout the record, UtiliCorp utilizes a basic complement of *two-employee* crews. The reduction in Linemen and Electricians will, according to UtiliCorp, be accomplished by use of a predominance of *two-employee* crews rather than the *three-employee* crews currently utilized by Empire. (e.g. Tr. 687, l. 12-20; Tr. 122, ll. 3-16). **Because of the nature and hazardous working conditions inherent in such work, an operation based on usage of two-employee crews is inherently unsafe, is less safe than the service currently provided at Empire, and is most certainly detrimental to the public interest.** Neither Empire nor outside contractors – all of whom utilize three-employee crews - can be said to incur such extra employment cost without good reason; that reason is safety! The principle of *safety in numbers* is fully applicable to the work of utility linemen and electricians, but it is one that UtiliCorp chooses to ignore in the interest of cost..

Empire's Linemen and Electricians work on very dangerous and hazardous three-phase lines (with three hot lines and a ground line carrying **7,200 volts of electricity each)** requiring *rubber gloving, in tight, dangerous and cramped quarters.* At Empire, this is the work of three-employee crews. Work on single-phase lines (either a single 7,200 volt line or an extension of a 240 volt line), while dangerous, is obviously not as dangerous or hazardous as, and presents less risk than, the three-phase lines – and can, as in Empire's operation, be performed by a *two-employee crew* with less risk to safety. And, as testified to by Myron McKinney, this is the extent of Empire's usage of *tow-employee* crews - . . ."*our two-man*

crews might set a pole with a private line or something of that nature."[15] Pella, in describing UtiliCorp's operation at other locales, first refused to acknowledge that work on three-phase lines was more dangerous than work on a single-phase or 240 volt line. . .responding only that *"all that work has its element of danger, one has higher voltage, more complications"* (Tr. 691, l. 21-692, l. 11).[16] And then, having described the three-phase line work as "*higher voltage, more complications*", Pella goes on to admit that UtiliCorp uses **outside contractors – who themselves use three-employee crews – to perform this "more complicated higher skill work"** (Tr. 693, ll. 4-13). Thus UtiliCorp – through the witness to whom other UtiliCorp witnesses pointed concerning these issues (note 11. *supra*) - *has acknowledged the need for three-employee crews to do the high voltage work that the overwhelming majority of Empire employees currently perform.*

UtiliCorp has failed to produce any evidence rebutting the testimony of Bill Courtney and the position of IBEW that the elimination of bargaining unit personnel – including the reduction from *three-employee* to *two-employee* crews in order to accomplish the position elimination – will result in service in the Empire area less safe than the service currently and historically provided by Empire. UtiliCorp's acknowledgment that it has, in fact, performed no studies on this issue has been addressed, *supra*, pp. 13-16. UtiliCorp's cavalier approach

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[15] Indeed, if the merger is not approved, Empire will continue the safer practice of utilization of predominantly three-employee crews (Myron McKinney, Tr. 156, l. 9-157, l. 14; Fancher, Tr. 508, ll. 16-21).

[16] **Despite Pella's protestations to the contrary, he actually admitted the greater hazard and risk in working on three-phase, high voltage lines. "Pole-top rescues" are a fact of life and a necessity in the case of linemen electrocuted by contact with high voltage lines. Pella admitted that a three-employee crew, allowing two employees to assist an injured lineman, would be better, more efficient and quicker than one employee (the second in a two-employee crew) attempting to do so. Pella acknowledged that if it were he on top of the pole, he would want two employees getting him down instead of just one (Tr. 695, l. 9-696, l. 25). And whereas Pella had earlier testified that UtiliCorp – using a basic complement of two-employee crews – would send additional employees as needed (e.g. Tr. 688, l. 16-689, l. 18) he admits that in a life-threatening situation involving a lineman, the likelihood is slim that other crews could be dispatched in time to be of assistance (Tr. 697, l. 21-698, l. 8).**

to its requirement of safe service in the Empire area simply cannot meet with Commission approval.

In yet another disingenuous effort to mislead the Commission and other parties – through the Supplemental Surrebuttal Testimony of Mr. Pella commencing at p. 3 thereof, and in response to Bill Courtney's testimony on behalf of IBEW, Ex. 100 – UtiliCorp attempted to create an impression that safety records and statistics reveal that UtiliCorp's record as to safety, injuries, etc. is at least comparable, if not superior, to that of Empire. First of all, as demonstrated above, UtiliCorp has introduced no evidence into this record as to the basis for any comparison between its operations at other locales like MoPub and its planned level of operations at Empire; there is no evidence as to the geographic area, the number of customers, the number of lines, the number of lines or employees per mile of service, etc. More to the point, however, is the fact that ***the so-called records, safety statistics, tables, etc. in Mr. Pella's Supplemental Surrebuttal Testimony are admittedly meaningless and useless***. Mr. Pella's written testimony states that the tables therein showed the incident rates for recordable accidents for both UtiliCorp and Empire based on a formula established by the Occupational Safety and Health Administration. But in live testimony, Mr. Pella was unable to provide the definition of a *reportable accident* as used in his written testimony; he didn't know whether his testimony referred to UtiliCorp's own definition or an OSHA definition; he was unable to answer as to which UtiliCorp records, under its own definition of recordable accident, gets put into the OSHA formula to which he referred in his written testimony; **he did not know what type of accidents are reflected in his chart showing total recordable accident/incident rates between 1997 and 1999; *he did not know whether the statistics to which he referred in his written testimony encompassed all***

employees – clericals, bargaining unit employees, truck drivers – or were isolated to safety-sensitive positions like linemen, electricians and production workers. And he acknowledges that the recordable accidents were not limited to severe injuries with disability, but rather included even minor injuries where someone may or may not be off work as a result – so that a broken finger, whiplash, slip-and-fall with sprained ankle. . . and electrocution of a lineman by contact with a high voltage wire would all be given the same weight as far as these statistics are concerned. Pella further admitted that, to his knowledge, there have been no studies by UtiliCorp that would compare the specific injury and safety record of UtiliCorp and Empire electricians, linemen, production workers, etc. who worked with high voltage machinery. Finally, Pella acknowledged that, in his written testimony, he did not intend to draw comparisons, as to severe injuries and accidents, as between bargaining unit employees of Empire and their counterpart employees at UtiliCorp. (Tr. 698, l. 9-701-21).

The applicants in this case have conceded (1) that Empire currently provides and has historically provided service in its area that is both safe and reliable; (2) that it would be detrimental to the public interest if UtiliCorp, following and as a result of the elimination of bargaining unit positions, were unable to provide service to the Empire area as safety and reliably as provided by Empire; and (3) that UtiliCorp has an obligation of due diligence to demonstrate to the Commission and the public that, in fact, it will provide service as safely and as reliably following the elimination of bargaining unit positions *(supra, p. 13).* **Just as the record demonstrates, and UtiliCorp has admitted, that it will not provide service as *reliably* as Empire** *(supra, pp. 17-19)* **– so also UtiliCorp has admitted, and the record further establishes, that it will not do so *as***

safely. **The detriment to the public interest, in the absence of LPPs, is clear. In the public interest, the Commission must impose them.**

C. <u>Without LPPs, Commission Approval of the Merger Will, Contrary To The Public Interest, Constitute Undue And Impermissible Favoritism Of and Preference To The Investment, Contributions and Risks of UtiliCorp Shareholders Over The Equally Significant Investments, Contributions and Risks Of Bargaining Unit Employees.</u>

UtiliCorp argues that *shareholders* (and *only* shareholders) are making the *investment* in this transaction (e.g. Tr. 200, ll. 5-6; Tr. 36-46); and that shareholders *alone* bear the *risk* of the transaction (e.g. Tr. 43, l. 21-44, l. 3; 200, l. 23-201, l. 5). As a consequence, UtiliCorp insists that, *as a condition of the merger*, shareholder investment be recovered and shareholder risk be eliminated or minimized – through acquisition premium recovery (e.g. Tr. 38, ll. 18-25; Tr. 43, l. 21-44, l. 3; Tr. 46, ll. 15-25; Tr. 48, l. 23-49, l. 4; Tr. 200, l. 1-201, l. 5).

UtiliCorp is wrong when it states that shareholders alone have made the investments and incur the risks in this transaction. As acknowledged by Mr. Browning, at least, bargaining unit employees have similarly made significant contributions to the success of Empire and therefore to the viability of a merged entity (Tr. 1004, ll. 15-22). In fact, bargaining unit employees have contributed, on the average, in excess of 16 years of service; as to bargaining unit employees whose positions are being eliminated, Dispatchers being eliminated have an average of 23 years of service; Electricians and Electrician Foreman being eliminated have an average 7 1/2 years of service (with the most senior having over 13 years of service); and Linemen and Lineman Foremen losing their positions have average service of 5 1/2 years (Ex. 100, pp. 16-17). **The risk to these employees**

whose positions are being eliminated is immeasurable – but certainly every bit as much as the risk of shareholders.[17]

Bargaining unit employees *maintaining* their positions following the merger will be subjected not only to the increased risks to life and limb (*supra*), but will be subjected to the risks – and indeed the actuality – of severe economic consequences. Retirement benefits and retiree health care will be reduced; retirees will pay upwards of $200 per month/single and $400 per month/family for insurance benefits; and active employees will look forward not only to reduced retirement benefits when they retire, but will experience similar dramatic increases in the cost of insurance coverage; instead of the $200 - $400 per month employee contribution, bargaining unit Empire employees contribute only $22/single and $44/family to their medical coverage (e.g. 1001-1003).[18]

Retirement benefits are, at least in the view of Financial Accounting Standards Board (FASB), a form of owed, *deferred compensation* (Ret. Ex. 811; Tr. 1035, ll. 3-12). These benefits are deferred compensation not only for those who have already retired, but for those

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[17] Whatever enhanced *career opportunities* have been said by UtiliCorp to exist for Empire employees including those whose positions will be eliminated **are not applicable to bargaining unit employees.** See, e.g., Tr. 113, ll. 10-18; Tr. 304-305; and Tr. 1027-1029). These so-called career opportunities are applicable more to administrative type personnel with skills having a broader range of applicability than those of bargaining unit employees (Tr. 113, ll. 10-18). Additionally, while Browning testified that bargaining unit employees, including those losing their jobs as a result of the merger, will be looked at in filling vacancies around the country and around the globe – and noting that UlitiCorp pays travel benefits, moving, relocation costs, temporary lodging, etc. in employee transfers (Tr. 1031, l. 13-1032, l. 16), he admits that if UtiliCorp could get an employee, from within the area around the country or around the globe, to fill a vacancy for which a bargaining unit employee were qualified, UtiliCorp would - because of cost considerations - fill the vacancy locally rather than moving the Empire bargaining unit employee (Tr. 1032, l. 22-1033, l. 17). Moreover, an employee severed because of the merger-related elimination of his/her position is in fact severed and has no further link to employment (Tr. 1033, l. 18-1034, l. 10).

[18] It is acknowledged by UtiliCorp that it intends to place into effect for Empire employees, including bargaining unit employees, the same overall health care package currently existing at UtiliCorp – with employees paying a much higher percentage of the cost; while UtiliCorp states that this would be a matter of union negotiation, it should be noted that no group of employees of UtiliCorp has ever succeeded in obtaining a health care package different from or better than its overall package applicable to all employees (Tr. 1007, ll. 15-25). Without LPPs, IBEW and the employees it represents will be in the same position as bargaining unit employees of MoPub, whose option was to either accept or strike (Tr. 1008, ll. 1-20). Under the circumstances unique to this case, neither can be said to be in the public interest.

active employees whose service to date has already earned them this deferred compensation. *It cannot be said to be in the public interest of this state for the Commission to adopt a contrary view.* Similarly, other benefits like medical coverage are an inducement and attraction in decisions by individuals to become employed and to remain employed by an employer. Bargaining unit employees, in reliance on this inducement, have the right to expect the delivery of these promises. With the well-recognized national crisis in health care, it must be considered as detrimental to the public interest to eliminate these benefits or to pass the cost on to employees, in one fell swoop, for the purpose of enabling a return on the investment of shareholders. **Shareholders make no investment and incur no risk in this transaction any greater than the investments and risks of bargaining unit employees. Approval of the merger without LPPs constitute an undue and impermissible preference and favoritism inconsistent with public policy of this state.**

D. Approval by the Commission Of A Plan, Eliminating The Employment Of Admittedly Long-Term, Qualified, Skilled And Dedicated Employees And Imposing Adverse Benefit Changes Without Any Evidence As To Resulting Material Economic Savings Or Other Justifiable Basis For Doing So – And Without Accounting For The Inevitable Increase In Costs Resulting From Such Elimination Of Employment – Is Detrimental To The Public Interest Of This State.

The record in this case is devoid of any estimate or projection as to the savings to be realized by the elimination of bargaining unit positions and from changes in benefits following the merger. Despite IBEW efforts to ascertain this information at the hearing,

witnesses for the Applicants were, in all cases, unable to provide it.[19] (e.g. Siemek, Tr. 875, ll. 2-5 and 876, ll. 19-25; Browning, Tr. 997, ll. 8-16 and Tr. 998, l. 9-999, l. 1). While the reductions in bargaining unit positions and adverse benefit changes are detrimental to the public interest in any case, approval of a merger plan calling for such reductions – in the absence of demonstrated savings to customers and rate payers – is even more so.

Not only has UtiliCorp failed to justify its plans relating to bargaining unit employees on the basis of savings, it has remained silent on or hidden obvious related increased costs resulting from the elimination of these bargaining unit positions. Increased usage of outside contractors – all using three-employee crews – will necessarily result from the elimination of bargaining unit positions; this usage of outside contractors to perform the work currently performed by bargaining unit employees will *increase* UtiliCorp's costs. UtiliCorp has conveniently ignored these inevitable increases in costs.

1. **The Elimination Of Bargaining Unit Positions Will, At Best, Result In A Dramatic Increase In The Usage Of Outside Contractors Using Three-Employee Crews.** If approval of the merger plan allows UtiliCorp to eliminate bargaining unit positions, one of two results will necessarily follow: either (1) UtiliCorp will utilize *two-employee crews* to perform not only the pole setting and work on single lines that two employees can perform with less risk to safety, but work on all of the far more hazardous three-phase, high voltage lines of 7,200 volts of electricity each – a clear detriment to the public interest as discussed *supra*; or (2) UtiliCorp will be forced to dramatically increase the

[19] **Indeed, UtiliCorp has not calculated and was unable to provide the Commission with the overall labor savings attributed to the elimination of 270 (bargaining unit and non-bargaining unit) Empire-wide positions** (Tr. 875, ll. 6-22).

usage of outside contractors, all of whom use three-employee crews (*supra,* p. 21) at unnamed costs. **In either case, the public interest is detrimentally affected.**

The record is quite clear that UtiliCorp, after eliminating bargaining unit personnel, will be forced to rely and will rely more heavily on outside contractors. Thus, with the Empire service area remaining the same, the amount of work remaining the same, and fewer bargaining unit employees, "*. . .you might rely more on outside contractors to do some portion of the work that's being done by employees today*" (Myron McKinney, Tr. 116, ll. 1-15). And:

> Q. (by Mr. Jolley) Okay. And if, in fact, it turns out that you are servicing the same area with the same amount of work with fewer employees, it may result that while you'd have to increase the number of outside contractors to make up for the slack?
>
> A. I think that's a possibility, but that's really a decision that UtiliCorp would have to make (Tr. 117, ll. 2-8).

And while UtiliCorp will indeed have to make this decision, the decision seems clear. As testified to by Pella, UtiliCorp – like Empire – uses its two-employee crews to perform the *lesser voltage and less complicated work*, **but [unlike Empire] uses outside contractors to perform the "more complicated higher skill work"** (*supra,* pp. 24-25; Tr. 693, ll. 4-13). **It is clear from the record therefore that the high-voltage work currently performed by bargaining unit three-employee crews will be performed, following the merger and the elimination of bargaining unit positions, by outside contractors themselves utilizing three-employee crews.**

2. <u>The Inevitable Increase In And An On-going Usage Of Outside Contractors Is More Costly Than Retention Of Current Bargaining Unit Employees.</u>

Bill Courtney testified concerning the common knowledge that bringing in outside crews is

substantially more costly than using the utility's own employees; the Empire District wage scale is generally lower than those of employees of contractors performing work for Empire; in addition to increased wage rates, for regular-time and overtime work, there are additional costs resulting from travel expenses, lodging expenses, and the use or rental of trucks and equipment of such outside contractors (Ex. 100, p. 14). The Applicants do not seriously disagree. Pella testified that if outside contractors were utilized on an interim, shorter term, less than annual basis (like using an outside contractor for the equivalent of 30 man days or the equivalent of one month out of a year), costs of an outside contractor may be less than the annualized cost of retaining employees on utility payroll; but he acknowledged that outside contractor costs would be higher if utilized on a year-round basis (Tr. 693, l. 14-694, l. 15). The reality, however, is that UtiliCorp routinely utilizes outside contractors at its MoPub operation – "[*We use – yes, we usually have contractors out*"] (Tr. 694, ll. 14-15); and, as a result of using outside contractors at Empire to do the higher-voltage work currently performed by over 30 of Empire's three-employee crews, this usage at Empire will necessarily increase.

UtiliCorp has provided no data as to the increased costs occasioned by the increased usage in outside contractors in the Empire area. Without such costs data, and with the adverse impact on delivery of safe and reliable service, approval of the merger without LPPs is most clearly detrimental to the public interest.

IV. Conclusion

On the basis of the foregoing and the record presented to the Commission, IBEW respectfully requests that if the Commission otherwise approves the merger, it impose the

Labor Protective Provisions sought and recommended by IBEW as specified, *inter alia*, at pages 21-22 and 24-26 of the Cross-Surrebuttal Testimony of Bill Courtney, Ex. 100.

IBEW further requests that, should it approve the merger, the Commission impose a condition or requirement that UtiliCorp continue to maintain medical insurance coverage for bargaining unit employees with no increase in the percentage of employee contributions than is currently required. And IBEW requests that, if the merger is approved, the Commission impose as a condition or requirement that UtiliCorp not terminate or adversely change the Empire retirement plan, retirement funding or retirement benefits affecting bargaining unit members (or that, at the very least, the Commission impose a requirement that the retirement benefits currently employed bargaining unit members be *grand-fathered* until their respective retirements; and that UtiliCorp be prohibited from adversely affecting, through increased employee contributions or otherwise, the retiree health coverage of currently employed members of the bargaining unit.

Under the unique circumstances of this case, the public interest requires these Labor Protective Provisions, and that interest will be detrimentally affected in their absence.

Respectfully submitted,

JOLLEY WALSH HURLEY &
RAISHER, P.C.
204 W. Linwood Blvd.
Kansas City, MO 64111
Tel: (816) 561-3755
Fax: (816) 561-9355
email: jolleywalsh@compuserve.com

By William A. Jolley
William A. Jolley #18359