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Missouri Public
Service Commission

Public Service Commission
Governor Hotel
Jefferson City, MO 65102

RE: *Joint Application of UtiliCorp, Inc., and Empire District Electric Company for Authority to Merge Empire District Electric Company with and itno UtiliCorp United,*
Case No. EM-2000-369

Dear Sir/Madam:

Enclosed for filing please find an original and 9 copies of Initial Brief of the Missouri Department of Natural Resources in the above-styled matter. Please stamp "filed" on the extra copy for my file. Thank you.

Sincerely,

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SAW:pah
Enclosure
c: Counsel of Record

Before the
Missouri Public Service Commission

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Missouri Public
Service Commission

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Re: Joint Application of UtiliCorp Inc.
and Empire District Electric Company for
Authority to Merge Empire District Electric Company
with and into UtiliCorp United

Docket No. EM-2000-369

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INITIAL BRIEF

OF

MISSOURI DEPARTMENT OF NATURAL RESOURCES

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LEGAL STANDARD

In Missouri, the standard for assessing a merger petition is set out in *State ex rel. City of St. Louis v. Public Service Commission,* 73 S.W. 2d 393 (Mo banc 1934). In that case, the Missouri Supreme Court held that:

> ' In the public interest' in such cases, can reasonably mean no more than 'not detrimental to the public.'

Supra at 459, quoting from *Electric Public Utilities Co. v Public Service Commission,* 154 Md. 445, 140 A. 840, 844.

That decision along with the language in section 393.190.1, RSMo, is commonly referred to as the "no detriment" standard and is generally defined as meaning that the merger shall not cause a detrimental impact to the public.

The evidence in this case establishes that without the addition of certain safeguards outlined in testimony from the Missouri Department of Natural Resources' (MDNR) witnesses, the merger at issue herein will result in a detriment to the public interest.

ENERGY EFFICIENCY ISSUES.

A. Low Income Weatherization.

The most telling evidence offered by the MDNR is in the testimony of MDNR witness Robert T. Jackson. Mr. Jackson is the Weatherization Program Administrator for the City of Kansas City, Missouri. (Jackson Rebuttal, p. 1.) He has over 25 years of experience in low-income housing development and management in the city. (Jackson Rebuttal, p. 1.) Mr. Jackson described his experience with the cooperative agreement entered into between his agency and UtiliCorp, which was designed to weatherize 35 homes. As of the date of his testimony, not a single home had received low-income weatherization assistance. (Jackson Rebuttal, p. 6.) The contract utilized by UtiliCorp included conditions that simply did not allow the money earmarked for the weatherization projects to be used. (Jackson Rebuttal, pp. 6-9.)

Earmarking money for this very laudable purpose is not enough. The money has to actually be spent for the purpose intended, that of low-income weatherization. While UtiliCorp may say it has entered into these contracts for the purpose of providing low-income weatherization assistance, the fact remains that because of the conditions imposed by that same company, not a single household has enjoyed any of the benefit and received the assistance. At a minimum, any Order from this Commission approving the merger must include provisions that insure that the money is not only made available, but may actually be spent.

Another piece of evidence in the record stands out in assessing the propriety of the merger now pending before the Public Service Commission (PSC).

> The review of impacts arising from the proposed merger has taken place to date with no consideration of the differences in the markets served. The analysis in the direct case has assumed that the merger impacts would arise in the same fashion, and perhaps even to the same degree, for all markets served.

(Colton Rebuttal, at 8). And low-income consumers represent a separate market.

Elasticity and the low-income market: It is generally recognized that the elasticity of demand is positively associated with the income of consumers. MDNR witness Colton testified:

> A number of consumer-side factors distinguish residential customers generally and low-income customers specifically as separate markets. In particular, the elasticity of demand distinguishes these two markets as separate markets. . .The elasticity of demand measures the extent to which consumers can and will turn to substitutes if the price of a product increases. It considers, for example, the ability of consumers to turn to reasonable alternatives to the product in question. It considers the price sensitivity of the product in question as well. There can be no serious dispute that residential customers generally, and low-income customers in particular, have fewer alternatives, and lower price sensitivity, than large user customers in the commercial and industrial classes.

(Colton Rebuttal at pp. 9 - 10). Even aside from a direct measure of demand elasticity, however, Colton testified that the surrogates used for elasticity support the conclusion that low-income consumers are a separate market as well.

> Elasticity can serve as a surrogate measure for a number of different market characteristics. Low elasticity can indicate a lack of meaningful alternatives. It can indicate the presence of high search costs associated with gains of uncertain magnitude or duration. It can indicate high hurdle rates. Demand elasticity is one of the primary measures by which to distinguish different markets.

(Colton Rebuttal at p. 10). Colton finally noted that elasticity is an important consideration in defining markets even within the monopoly situation of a distribution utility.

> The elasticity of demand helps to define a market even within the monopoly situation of a distribution electric and natural gas utility. Low-income customers are less likely to fuel switch. They are less likely to have dual fuel capabilities. They are less likely to reduce consumption. As a result, higher rates and lower levels of service can be imposed with less likelihood to the monopoly utility that consumers will respond by reducing their usage or moving to alternative fuels or fuel suppliers.

(Colton Rebuttal at pp. 10-11).

Distinct customers. The reason that there is public and industry recognition of low-income consumers as a separate market, as well as unique characteristics to the service offered to low-income consumers is because low-income consumers are distinct consumers. MDNR established: "We know that low-income customers served in Missouri routinely face unaffordable electric and natural gas bills. We know that, at the average 1998 residential bill for UtiliCorp ($899), a LIHEAP recipient with an annual income of $6,000 would bear an electric burden of 15%; with an income of $4,000, the electric burden would be 22%; at $8,000, the burden would be 11%. Given the average 1998 residential electric bill for EDE, the burdens would be 10%, 15% and 7% respectively.

These are simply electric burdens. Home heating burdens are in addition to these electric burdens. These energy burdens tend to lead to payment-troubles with the corresponding need for the customer to avail themselves of Company services." (Colton Rebuttal, at p. 12).

In sum, low-income consumers represent a separate market for merger analysis. Since in order to appropriately review the impacts that will arise as a result of this proposed merger, it is necessary for the PSC to consider all of the relevant markets, the PSC must consider the impacts on the low-income market. In reviewing the proposed merger, therefore, the PSC must: (1) assess whether the merger will generate adverse impacts that impede, at best, the passing-on of merger-related savings in the low-income market; and (2) consider whether the mechanism which the Company has proposed to distribute the dollars of synergy-induced savings disproportionately fails to distribute those savings to the low-income market. We next turn to a review of the record evidence on these issues.

Low-Income Consumers Will be Adversely Affected by the Proposed Merger.

The proposed merger of EDE with UtiliCorp will unquestionably have an adverse impact on the services offered to UtiliCorp low-income consumers. The low-income customers of UtiliCorp are in substantial need of services provided through UtiliCorp customer service representatives. "Low-income consumers frequently require assistance in dealing with their payment troubles. Low-income consumers rely upon the company to deliver a variety of services, including, but not limited to, the negotiation of payment plans, the negotiation of deposits, and the avoidance of service disconnections for nonpayment." (Colton Rebuttal, at p. 20). MDNR identified specific affirmative harms that the merger will cause, to the detriment of low-income consumers. "These harms arise from consolidation, remoteness, inflexibility, dilution, and standardization." (Colton Rebuttal, at p. 15).

The Problem of Consolidation

The first adverse impact that Mr. Colton, MDNR's witness, identified was the impact which he called "consolidation."

Consolidation refers to the process of combining functions and offices so that a larger geographic area can be served with a smaller staff in fewer offices. As a company -- be it health care, financial services, or electric utility-- expands its geographic service territory, however, the customer and institutional base to whom it is accountable becomes bigger as well. The larger group to which the firm is accountable is less focused on specific services responding to individualized or localized needs.

(Colton Rebuttal at p. 15).

MDNR identified several unique characteristics facing Missouri consumers:

> EDE's residential customers have a more limited safety net of service providers, thus increasing the potential for payment troubles. This safety net includes not only energy assistance providers, but providers of other helping-services (such as food banks and rental assistance) that low-income customers often use as a mechanism to help address their home energy payment troubles.
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> The EDE service territory has a lack of local media, thus making consumer education about helping services more difficult. Education about local service providers must be more targeted and more selective than blanket media coverage by large market media outlets.

(Colton Rebuttal at p. 19).

Colton then tested the service that would be provided to low-income consumers by the merged EDE/UtiliCorp company in light of these localized needs.

> In educating customers about winter heating assistance, it is necessary not only to make low-income consumers aware of the assistance generally, but to educate them as to the specific means through which to access the specific energy assistance programs. This involves providing both program names and agency contacts. I

> know this based on my 20 years of experience in the field. The need was confirmed, as well, by a Penn State University study which identified the concept of "effective knowledge." "Effective knowledge" involves not only conveying information, but teaching consumers how to use that information as well. Consumers must know how to act upon the information they are given. Consumers must not have an awareness of energy assistance, in general, but their knowledge must be sufficient to allow them to act. Simply knowing about energy assistance in general is insufficient to provide help if the customers cannot name the specific program where help can be obtained. People who are unaware of programs or who cannot name an agency which they can contact for assistance most likely do not have effective access to help when they need it.

(Colton Rebuttal at pp. 19-20).

UtiliCorp, however, does not respond to the localized needs evidenced by the lack of local media and the more limited safety net of providers. Instead, this large multi-state, multi-national company simply does everything the same in providing information about possible winter heating assistance. The Company, for example, publishes a bi-monthly customer service newsletter distributed by UtiliCorp in the states of Colorado, Nebraska, Missouri, Iowa, Minnesota, Michigan and Kansas. The November 1999 newsletter, largely devoted to addressing high winter bills, was identical for all states. No specific (or local) knowledge was provided about how to contact local service providers. "If a customer did not know how to seek out local help before receiving the newsletter, they would not know after receiving the newsletter either." (Colton Rebuttal, at p. 20).

The Problem of Remoteness

The direct case presented by the Company in this proceeding reported that one major area of synergy savings involves the consolidation of the EDE call center into a larger center serving the larger company. (Colton Rebuttal, at p. 22). MDNR explained that increasing the distance between the company call center and the low-income customer will have direct and immediate adverse impacts on the ability of the low-income customer to retain service when faced with payment troubles.

1. Remote negotiations generally occurring by telephone have resulted in greater difficulties in reaching agreement on the immediate and long-term actions which the customer needs to take to avoid service termination. To the extent that the merger increases the physical distance between the utility offering service and the low-income consumer needing to negotiate deferred payments or the avoidance of a service disconnection for nonpayment, the merger will make it more difficult for those consumers to obtain favorable terms.
2. Low-income payment negotiations often depend on the personal relationship between the service provider and the customer service representative. This relationship results in the creation of a trusting relationship and a shared sense of morés (involving customer and company responsibilities). A move to remote customer call centers obliterates these relationships, thus making it more difficult to reach mutually beneficial payment agreements.
3. Low-income crisis resolution often results from referrals to local private sources of energy and non-energy assistance providers. These might include local churches, local community-based organizations, and local providers of services such as food banks and crisis rental assistance. It is virtually impossible for a merged call center to track these local sources of assistance for the low-income payment-troubled customer. Indeed, separate calls to the UtiliCorp 1-800 number did not result in the identification of information about local private energy assistance funds in Missouri, Kansas, Nebraska, Colorado, Michigan or Iowa, the locations about which I inquired.

(Colton Rebuttal at pp. 21 - 22).

The Problem of Standardization and Loss of Flexibility

In explaining the synergy savings it expects to generate through this merger, the Company indicated that one major area of savings will occur because of "the switch of EDE customer service operations to the use of the UtiliCorp standard platform to be used by the merged companies relating to customer service." (Colton Rebuttal, at p. 24). "This move to standardized processes can be expected to result in adverse impacts to low-income customers." (Colton Rebuttal at p. 24).

MDNR pointed out that this standardization and resulting loss of flexibility will deny low-income customers essential services such as levelized payment plans. Low-income customers virtually uniformly would benefit from their enrollment in levelized monthly billing plans. Not only do such plans take the winter peak out of home energy bills, but they create equal monthly payments that low-income customers can more easily incorporate into their monthly budgets. The levelized plans of Missouri Public Service, however, are less available to low-income customers than are the levelized plans of EDE. Missouri Public Service Tariff Rule 6.05(B) provides that if a customer has been late on three or more payments within the past 12 months, the customer is not eligible to participate in the Company's levelized budget billing plan. EDE does not have a similar restriction. Given the greater propensity of low-income customers to be late on multiple payments each year, the move to standardized customer service processes will harm low-income customers. (Colton Rebuttal at pp. 24 - 25).

MDNR noted that this standardization and resulting loss of flexibility will harm low-income customers as the companies "standardize their customer service, operations and procedures." "Even beyond the tariff provisions identified, above, customer service is directly affected by a range of policy and operational decisions, which, while affecting customer access to service, are not set out in tariffs. They are instead embodied in documents such as customer service staff procedure manuals." (Colton Rebuttal, p. 25).

"My work with local providers of service to low-income utility customers has found this to be true in areas such as negotiating payment plan terms, establishing creditworthiness, and responding to inability to pay." (Colton Rebuttal at p. 16). "Processes can become more standardized and less flexible either by limiting the demonstrations through which a customer may establish creditworthiness, limiting the processes internal to the Company through which a customer may remedy a finding of non-creditworthiness, or limiting the creditworthiness decision making that may occur at the operational level without need for higher management approval." (Colton Rebuttal at p. 24).

Colton noted that:

> The negotiation of deferred payment plans is one such process. Standardized payment plans, in particular, tend to harm low-income consumers. An increased use of standardized payment plans precludes the ability to respond to the unique situations of particular consumers. Increased payment problems arise as a result.

(Colton Rebuttal at p. 23).

> Low-income consumers often exhibit characteristics that utility companies consider to be adverse credit indicators. Low-income consumers more frequently tend to have bad credit reports for non-utility transactions; are less frequently homeowners; are less frequently financial service customers (checking and banking accounts); and are more frequently recipients of collection treatment. All of these characteristics tend to push low-income customers into a need to establish creditworthiness or to secure bill payment. (Colton Rebuttal at p. 23).

As the processes through which customers (or potential customers) can establish creditworthiness become more standardized and less flexible, however, low-income consumers will be harmed. This harm may be in the form of higher prices (such as higher cash deposits) or in the outright denial of service (in the absence of a deposit)." (Colton Rebuttal at pp. 23 - 24).

Even aside from the specific harms identified by MDNR witness Colton -- taking the form of reduced services and higher prices (through cash deposits and late payment fees) -- one additional impact of taking away the local decision making by local customer service representatives based on individualized factors is to constrain the rights conferred upon low-income customers by PSC regulations. At present, low-income customers have certain legal rights under PSC regulations, including:

1. Low-income customers not only have the right to a deferred payment arrangement for arrears, but have the right to have their individual circumstances taken into account in determining what constitutes an "affordable" deferred payment plan;
2. Low-income customers not only have the right to a deposit not exceeding a maximum amount set by regulation, but have the right to have their individual circumstances taken into account in deciding what size their cash security deposit will actually be;
3. Low-income customers not only have the right to be free from cash security deposits upon a demonstration of creditworthiness, but have the right to have their individual circumstances taken into account in any determination of creditworthiness.

Whenever the PSC regulations require an exercise of discretion in Missouri, the required use of the uniform consolidated data processing system will constrain that discretion. The PSC consumer protection regulations require UtiliCorp customer service representatives to exercise discretion within ranges. Words such as "up to," "at least," and "not to exceed" confer upon Missouri customers a legal right to have decisions made based upon their individual circumstances, and confer upon UtiliCorp customer service representatives a legal obligation to exercise their discretion based upon a consideration of those individual circumstances. Whenever PSC regulations *allow* discretionary decisions to be made about which actions or inactions should occur on the part of UtiliCorp customer service representatives --for example, state utility regulations allow, but do not require, the disconnection of service upon nonpayment–[1] the discretion of the UtiliCorp customer service representative to consider the individual's circumstances is constrained by the uniform data processing system. Whenever consumer protections granted by the PSC regulations require the exercise of judgment based upon individualized circumstances --for example, the terms of deferred payment plans are to be based upon a consideration of the individual's ability-to-pay; the level of a cash deposit required is to be based upon satisfactory proof of creditworthiness-- the discretion of the UtiliCorp customer service representative to consider the individual's circumstances is constrained by the uniform data processing system.

In sum, the merger constrains the rights conferred upon Missouri customers to have their individualized circumstances taken into account and imposes upon UtiliCorp customer service representatives the obligation to instead work within the constraints of a standardized multi-state data processing system. After the merger, payment-troubled Missouri consumers, who are disproportionately low-income, will be harmed because their right to have their individual circumstances taken into account will have been reduced.

The Problem of Dilution

Aside from the problems associated with consolidation, MDNR identified harms accruing to low-income payment-troubled customers as a result of dilution as well. The proposed merger will dilute the resources available to low-income payment-troubled customers of EDE as the blending of low-income and customer service resources between EDE and UtiliCorp will likely divert resources from EDE low-income customers who are less well off than Missouri Public Service low-income customers.

> Dilution of resources available to low-income EDE ratepayers will occur because the low-income customers in EDE communities such as St. Joseph live with marginally lower incomes than customers in UtiliCorp communities. While only 20% of all UtiliCorp customers live with incomes at or below 150% of poverty, more than 31%

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[1] 4 CSR 240-13.050(1)

> of EDE customers do. Even more strikingly, while 27% of all communities served by UtiliCorp have 20% or fewer of their customers with incomes at or below 150% of Poverty Level, only 7% of EDE communities do. AT the other end of the spectrum, while 35% of UtiliCorp communities live with 35% or more of their customers with incomes at or below 150% of the poverty level, 50% of EDE communities do.

(Colton Rebuttal at pp. 28 - 29).

Through the merger, the companies are combining customer service operations, reducing customer service personnel, and diluting the resources to help address those payment problems. As Colton stated: "the blending of low-income and customer service resources between EDE and UtiliCorp will likely divert resources from EDE low-income customers who are less well off than Missouri Public Service low-income customers." (Colton Rebuttal at p. 28).

The conclusion is inescapable. The merged company will be devoting fewer resources to its payment-troubled population. At the same time these resource reductions are occurring, UtiliCorp is being combined with a company that has substantially greater affordability problems and substantially more significant payment-troubles. As a result of the combined effect of this reduction in resources directed toward an increase in payment-troubles, the resources available to deal with the existing UtiliCorp payment troubles will be diluted.

Summary of Harms That Will Impede the Passing-On of Benefits.

The harms identified above have legal consequences within the context of a merger proceeding. The passing-on requirement, discussed in detail above, and imposed upon the PSC by Missouri law, dictates that the review of a proposed merger consider whether the merger will result in *adverse* impacts that will impede the passing-on of benefits to particular markets. This is precisely the situation with the proposed merger now pending before the PSC. The proposed merger will result in adverse impacts that impede the passing-on of merger-related benefits to the low-income market. Indeed, the proposed merger will generate specific affirmative harms to the detriment of low-income consumers.

Low-income consumers frequently require assistance in dealing with their payment troubles. Low-income consumers rely upon the company to deliver a variety of services, taking into account their individual circumstances, including, but not limited to, the negotiation of payment plans, the negotiation of deposits, and the avoidance of service disconnections for nonpayment. For all of the reasons outlined above, the merger will necessarily reduce the legal rights conferred upon payment-troubled customers, will reduce the services available to low-income customers, and will increase the costs imposed upon low-income customers (either in the form of late payment fees or increased cash security deposits). These adverse impacts, standing alone, but certainly in combination with the added merger effect of disproportionately denying low-income consumers their fair share of merger benefits, justify the implementation of CEPP as described below.

Low-Income Consumers Receive a Disproportionately Small Share of the Efficiencies Generated by the Proposed Merger

MDNR conclusively established in its testimony that due to the unique attributes of low-income consumers, these consumers will receive a disproportionately small share of the merger benefits unless specific actions are taken to capture and distribute those benefits. The merger proposal initially involves "sharing" the savings generated by the merger with customers through the mechanism of a rate freeze. This mechanism, in effect, allocates merger savings back to individual customers on a per unit of energy basis. If a customer uses more energy, under the theory of distributing benefits via a rate freeze (or a rate rollback in the longer-term), which the Company claims will happen, a customer receives a higher proportion of the savings returned to him or her in the form of a bill that is lower than it would have been without the merger.

Low-Income Consumers Receive a Disproportionately Small Share of Merger Savings.

According to Company witness Siemek, one of the major areas of merger savings lies in the area of general and administrative synergies. (Siemek Direct at pp. 11 - 12). These savings include "eliminating activities needed by Empire as a stand alone entity that are not needed separately as a division of UtiliCorp." (Siemek Direct at p. 12). An example of such an activity that will be eliminated, as cited by witness Siemek, is "information systems for billing, financial reporting and managing operations." (Id.; at p. 12). Siemek reports that there will also be operating costs savings "from eliminating the separate departments for Empire and utilizing staff for existing and projected vacancies of approved UtiliCorp positions." (Siemek Direct at p. 14). In addition to these Information System synergies, Company witness Siemek testified that a major area of synergy savings comes in the distribution area. (Siemek Direct at p. 18). Included within these distribution savings are synergies relating to the use of Company call centers. (Id.)

A distribution of savings generated from such activities on a per unit of energy basis, however, provides a disproportionately small benefit to low-income consumers.

> Customer service costs are incurred as a function of numbers of customers. Indeed, the allocation of customer service costs on the basis of both usage (in units of energy) and sales (in dollars of revenue) are inappropriate as cost allocators for customer service costs. In addition, the proper cost allocation for CIS projects involves the number of customer bills. The proper allocation of IS savings involving distribution and delivery is the number of customers. If benefits are produced based on numbers of customers or customer bills, but distributed on a per unit of energy basis, those customers (or classes of customers) with higher consumption will receive a disproportionately *high* share of the benefits and those customers with lower consumption will receive a disproportionately *low* share.
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> Clearly, if you have a certain sum of benefits that are causally related to numbers of customers and you distribute those benefits *between* customer classes (*e.g.*, industrial, commercial) on the basis of units of energy, some "residential" benefits will be distributed to the high use industrial and commercial customers. The same

> is true *within* a ratepayer class as well. If you have residential savings (such as customer service savings) that are produced on the basis of numbers of customers, and if you then distribute those benefits on the basis of units of energy consumption, there will be a disproportionate distribution of benefits to high use customers.

(Colton Rebuttal at pp. 31 - 32).

It is universally found that low-income customers use less energy on a per household basis than do average residential customers. Consider, for example, the Residential Energy Consumption Survey (RECS) prepared by the Energy Information Administration of the U.S. Department of Energy (EIA/DOE). The RECS reports that for the New England Census Division of the Northeast Census Region --this is the Census Division of which Missouri is a part-- energy consumption by low-income households is less than that for the average household. According to the annual report to Congress by the Low-Income Home Energy Assistance Program (LIHEAP), a program within the Administration for Children and Families of the U.S. Department of Health and Human Services (ACF/HHS), energy consumption by low-income consumers is only 87% as high as for the average household. (Colton Rebuttal at pp. 32 - 33, and Schedules RDC-4, RDC-5 and RDC-6).

> This disparity in merger savings has a direct adverse impact on low-income consumers. One can thus compare the low-income "share" of merger savings *generated* as a function of numbers of customers but which are, in fact, *distributed* on a per unit of energy basis. . .low-income customers represent 20% of all customers, while they represent only 5.5 % of all electric use. On a per thousand dollar basis, therefore, if benefits are distributed on the basis of usage (5.5%). . .rather than numbers of customers (20.2%), low-income customers will "lose" roughly $147.

(Colton Rebuttal at p. 34).

Summary of Harms Resulting from the Inequitable Sharing of Merger Savings.

The distribution of a disproportionately small share of the merger savings to low-income consumers violates the principle that merger synergies be passed-on to consumers in a fair and equitable fashion. This disproportionate sharing of savings, standing alone, violates the passing-on requirement. However, when viewed in combination with the affirmative harms discussed above, this inequitable sharing shows that the companies have not shown that the merger is in the public interest.

MDNR's Proposed Community Energy Partnership is an Appropriate Mechanism through which to Remediate both the Affirmative Harms Caused by the Merger and the Inequitable Sharing of Savings.

MDNR's CEPP is a mechanism designed to remediate the two results which MDNR found adversely affected the low-income market. The CEPP involves a package of remedies that includes:

1. Implementation of a 25-site BOSS pilot project, with a commitment to expand the program as appropriate if found to successfully deliver benefits to low-income customers;
2. Implementation of a space heating and base load energy efficiency program directed toward high use payment-troubled low-income customers;
3. Implementation of a pilot solar energy program directed toward high use low-income customers;
4. Implementation of a periodic survey process through which the merged Company will take proactive efforts to identify which of its payment-troubled customers represent low-income households;
5. Implementation of an Outcome-based Performance Reporting System (OPRS) through which the customer service outcomes to low-income customers can be systematically tracked over time.

The CEPP components are all specifically designed to remediate the two issues identified by MDNR: (1) the creation of affirmative harms, and (2) the misallocation of benefits. The CEPP components break the line of causation between the merger and the harm. The impacts of the CEPP components are to reduce the need for relying on the merged Company's customer service network and mitigate the problems associated with consolidation, remoteness and dilution.

BOSS / Chronicles

The proposed BOSS program remediates the harms caused by the merger by providing the Company with the ability to respond to payment troubles with flexibility, integration and personalization. It provides the company with flexibility, through the capacity to customize both the types of response and the degree of response to individual circumstances. It provides the Company with the ability to call upon different resources to deal with individual customer's specific inability-to-pay problems. It will enhance the ability of the Company to match specific resources with specific problems. It will enhance the ability of the Company to identify individual needs and craft an appropriate individualized response to those needs. Each of these addresses the harms specifically imposed by the merger on low-income consumers.

Low-Income Tracking

The low-income survey process will help to remediate the harms caused by the merger. This process is designed to identify the low-income payment troubled customers on the Company's system. At present, the Company has no information that allows it to track whether the customer service outcomes identified above will arise for low-income consumers in particular. Because of the customer service implications associated with being able to identify and track these customers, MDNR has proposed an affirmative, proactive process that provides for such identification and tracking. (Colton Rebuttal at p. 46).

Outcome-Based Performance Tracking

The Outcome-based Performance Reporting System (OPRS) is the final remediation measure. For all of the reasons MDNR has outlined above (with respect to consolidation, remoteness, a lack of flexibility, dilution, and standardization), substantial evidence exists that the merger will adversely affect customer service relative to the payment troubles of low-income customers. I have proposed a series of remedies to mitigate those harms. In addition, however, the

Company's *performance* should be tracked. As described above, "satisfactory" performance is when performance relative to the low-income population is no worse than performance relative to the total Company residential customer population. (Colton Rebuttal at p. 49).

ENERGY EFFICIENCY ISSUES

MDNR's witness, Martin G. Kushler, testimony was not rebutted by any of the Companies' witnesses. Thus, the Companies have tacitly acknowledged that their shareholders will receive substantial benefits in the event the merger at issue is approved by this Commission. If the shareholders were not going to receive benefits, common business sense dictates that they would not pursue the merger. (Kushler Rebuttal, p. 4.)

On the other hand, the merger poses risks for the consumer. Those risks include that the newly merged company will enjoy greater market power and that the consumers will experience increased environmental degradation. (Kushler Rebuttal, pp. 4-8.) Energy efficiency programs will mitigate those harms and protect consumers from future rate increases. (Kushler Rebuttal, p. 10.) Fairness alone dictates that if consumers share the risks with shareholders, they should also share the benefits. Unless the energy efficiency measures set out by MDNR witnesses are included in any Order approving the proposed merger, the consumers will shoulder the risks without enjoying the benefits.

Further, the Companies admit that they are not doing anything at this time to implement the type of energy efficiency programs the MDNR witnesses are proposing. The utilities have not identified any possible methods to fund such programs. (Transcript, p. 647.) While the Companies did not agree with the MDNR that these programs were necessary and instead advocate a dedicated review of such programs by this Commission, the Companies also admitted that they are not aware of any such dedicated review being conducted by this Commission. (Transcript, p. 649.)

The proposed space heating and base load energy efficiency program remediates the harms caused by the merger as well. MDNR proposed an energy efficiency program for low-income high use payment-troubled customers modeled after the Smart Comfort Program implemented by Duquesne Power Company. (Colton Rebuttal at p. 41).

> The Smart Comfort program is targeted to low-income non-electric-heating customers with monthly bills exceeding $70. Trained company personnel visit qualified homes to provide energy education on energy saving opportunities specific to the customer's home, as identified by a walk-through energy audit. New refrigerators are provided if metering at the time of the premise visit identifies the existing appliance as being energy inefficient. Duquesne has found that the primary technical sources of savings include lighting, refrigerator replacement and replacing water beds with conventional bedding.

(Colton Rebuttal at p. 42). The program is highly cost-effective in its own right. It has generated mean energy reduction (pre- to post-) of 37 percent. The average utility program cost in 1994 was approximately $1,100 per household, which resulted in an average annual bill reduction of $356 per household. The levelized cost of saved energy to the utility is approximately $0.03/kWh of saved energy. (Colton Rebuttal at pp. 42 - 43).

As a remediation mechanism, however, the program is extraordinarily successful. In addition to the energy savings, the program was found to have a substantial positive impact on arrears. During the pilot stage of the program, participants had paid an average of 78 percent of their total billing prior to their program participation. After participating in the program, customers were paying 106 percent of the total billing (meaning that they were paying their entire current bill plus retiring arrears). (Colton Rebuttal at p. 43).

> This program has several attributes which commend its adoption. First, it is specifically directed toward mitigating the merger harms. . .It is directed toward payment-troubled customers who otherwise would be calling upon the reduced services of the company. Second, it has a proven track record of success in helping customers to address those payment-troubles. We thus *know* that it will succeed in

> doing what it purports to do: moving low-income customers away from a reliance on those services. Third, it generates substantial and demonstrated additional benefits to the company. This program, in other words, can accomplish the mitigation which the Department of Natural Resources seeks while at the same time helping to improve the company's competitive position, which is what it seeks. Finally, it directs the mitigation measures toward, and achieves the benefits for the Company from, a class of customers that is not historically reached through low-income weatherization initiatives, *i.e.*, low-income electric baseload customers.

(Colton Rebuttal at p. 43).

RENEWABLE ENERGY ISSUES

The MDNR requests that the UtiliCorp merger, if approved, be conditioned with regard to renewables. Without a condition on merger approval requiring UtiliCorp to make significant progress on renewables, there will be detriments to the public interest. The uncontested Rebuttal Testimony of Ronald L. Lehr, (Exhibit 403) details both risks to consumers. "Renewables costs are less risky than fossil fuel costs, since there is not generally a need to rely on fuel cost projections" (Lehr Rebuttal, p 12, lines 12-13) and benefits of renewables for consumers (Lehr Rebuttal, page 15, line 33 to page 16, line 4.) These risks and benefits will not be adequately addressed unless the Commission conditions merger approval to encourage progress toward renewables by UtiliCorp.

CURRENT RENEWABLES ARE INSUFFICIENT

Apparently, UtiliCorp believes that its current commitments to renewables adequately serve the public interest. The MDNR respectfully disagrees. UtiliCorp's Mr. Pella argued that his company would continue to operate their 8% ownership of two wind turbines in Kansas and add Empire's 16 MW Ozark Beach hydro-electric facility to the merged company service so ". . . no detriment to the public interest would ensue" if the merger were to proceed without the conditions the MDNR has requested. (Pella Surrebuttal Testimony, page 30, lines 12-15.) His conclusion that continuing operation of these facilities represents enough renewables in the merged system to hedge the risks of adding additional natural gas electric generation facilities is illogical, given today's circumstances of high gas prices.

HIGH GAS PRICES REQUIRE MORE ATTENTION TO RENEWABLES

Company witness DeBacker admitted that natural gas prices are above $5.00 per mcf (see DeBacker , Transcript, page 799, lines 12-15). This is an example of the circumstances that the MDNR warned about in its filed testimony (". . .add resource diversity to manage risks. . ." (Lehr Rebuttal, page 2, line 32). Continued operation of current renewables facilities is not a sufficient response when fuel prices have changed so substantially.

HIGH GAS PRICES REQUIRE MORE ATTENTION TO RENEWABLES

Conditioning the UtiliCorp merger may be accomplished in a manner that is not in conflict with any later statewide approach, since the conditions the MDNR seeks on the merger foreclose no future options. MDNR seeks resource assessments, investigation and reports about renewables technologies and their costs and benefits, and modest pilot and demonstration programs, together with assessment of customer opinions and willingness to pay for investments in clean energy resources. (Lehr Rebuttal, pages 4, lines 12-13) None of these proposals, when required as merger conditions, would disadvantage UtiliCorp if later statewide approaches are adopted by the Commission or the legislature. The MDNR renewables conditions are not costly, (as Mr. Pella admits [Pella Surrebuttal, page 33, lines 21-22]), and appear to be supported by UtiliCorp (as Mr. Pella admits ". . .movement should be made toward implementation of more renewable resources of energy." [Pella Surrebuttal, page 31, lines 9-10). The MDNR does not propose ". . .mandatory social programs. . ." (as Mr. Pella attempts to brand them (Pella Surrebuttal, page 32, line 20)), but rather sensible business strategies for a utility that contemplates adding natural gas facilities (DeBacker, Transcript, page 798, lines 12-13) or serving customers in markets open to customer choice of generation suppliers who will offer competitive clean power options. (See Lehr Rebuttal Testimony, pages 13-15.)

THE COMMISSION HAS THE AUTHORITY TO CONDITION THE MERGER

It is within the PSC's power to place reasonable conditions on the UtiliCorp merger, which are designed to assure that the public will not be detrimentally affected by the merger. *State ex rel. Utility Consumers Council v. Public Service Commission,* 585 S.W. 2d 41 (Mo banc 1979). The PSC should place conditions on the merger, if it approves it, finding that the lack of renewable resources in the combined systems, together with the lack of purpose and progress evident on the record of this application, represent a detriment to the public interest. The MDNR has proposed modest, sensible, low cost, low risk, first steps toward the renewables that UtiliCorp has testified it supports. At a minimum, the Commission should condition the merger on UtiliCorp joining UWIG, UPVG, and AWEA to get started gathering the information that it needs to implement renewables in the longer term.

RENEWABLES ARE WELL ENOUGH UNDERSTOOD BY UTILICORP TO MOVE FORWARD

UtiliCorp witness Mr. Pella testified that implementation of renewables "must await legislation, clarification of issues and the results of the partnership investigation envisioned by Mr. Lehr." (Pella Surrebuttal Testimony, page 31, lines 10-12.) Mr. Pella also argues that "...an even more basic consideration is that neither the Federal government nor the state of Missouri has defined what constitutes a renewable resource." Fortunately, UtiliCorp and the Commission have already solved this non-problem of the definition of renewables. The MDNR believes that no legislation defining renewables is needed or required, since the PSC has approved a UtiliCorp green pricing tariff that contains a workable renewables definition, without the need for legislation. That tariff contains a generally workable definition that UtiliCorp's Missouri Public Service division (MPS) proposed and this Commission approved:

> "Green power, as used in this tariff, shall mean electricity derived from renewable energy sources such as solar, wind, low-head hydro, geothermal or biomass." (Missouri Public Service, Electric Schedule GRN, Sheet 62).

No "significant issues" need clarification to start the process of resource assessment, technology investigation, and pilot and demonstration projects that the MDNR has proposed. Since the MPS tariff contains the definitions Mr. Pella argues are required, common sense suggests that the PSC require modest merger conditions that provide the incentive for UtiliCorp to move forward on all non-disputed renewables. MDNR has proposed good first steps—resource survey, study and report, build consensus on pilot programs, and investigate customer opinions. This is not a crash program of enormous investment, but rather a cautious program of investigation, modest pilots and demonstrations, and customer consultation. MDNR proposes that the scale of renewables program implementation beyond pilots and demonstrations would be determined after study and due consideration.

DEMONSTRATIONS ARE NEEDED TO GAIN FAMILIARITY WITH RENEWABLES TECHNOLOGIES

Where there are obvious first steps that need to be taken to demonstrate technology applications in Missouri, these steps can be undertaken early, and in parallel with longer-term resource assessment projects. Such technologies as PV, landfill gas, solar hot water, passive solar design, small wind, and programs for additional green pricing for utility-scale wind turbines, biogas, as well as biomass co-firing can be undertaken in a low-cost and low-risk fashion. The data and experience gathered from these undertakings should be available to those charged with the responsibility for the investigation that the MDNR has proposed.

EXPANDED UTILITY GREEN PRICING PROGRAMS, IMPROVED MARKETING

Merger conditions should address expansion of UtiliCorp's green pricing program. Rather than capping customer demand by limiting access to wind resources, the Commission should urge UtiliCorp to meet customer demand for green power by supplying all the green power that the market demands. Landfill gas, biomass co-firing, and smaller scale wind projects located in Missouri could be rapidly developed to meet rising green market demand. Success in marketing green pricing programs requires innovative marketing that informs customers through multiple means that green power is available to them and can offset the pollution that is represented with their electric bills. Newspaper and electronic media coverage, bill inserts, affinity marketing (spreading the message by working with environmental, community, civic, and church groups), and canvassing commercial customers are some of the lower cost methods that have worked.

RENEWABLES TO DIVERSIFY UTILICORP'S GENERATION RESOURCES

Getting started on the investigation that the MDNR has proposed is important because UtiliCorp has plans to add electric generation capacity to the merged system, (DeBacker, Transcript Page 798, lines 12-13.) based on natural gas-fired generation equipment. To make reasoned and logical decisions about what resources to add to the system to achieve a balanced portfolio in the future, the investigation of renewables proposed by MDNR is a necessary prerequisite. With natural gas in today's market place at over $5.00 per mcf, the economics of Missouri-based renewable resources have improved substantially in comparison to gas. Where the costs of renewables are now equal to or lower than those of natural gas projects, they should be analyzed, understood, considered, and chosen. This is precisely the process that the MDNR has proposed and that the Commission should adopt in merger conditions. Without such analysis, consideration, and investment in the lowest cost resources over the long term, the MDNR believes that Missouri customers and the public interest will suffer a detriment by paying too much for the wrong investments.

As the MDNR's witness Lehr testified, without contradiction by any party on the record in this case, renewables hedge the environmental, fuel availability and price risks of fossil fuels. They also expand future technological and resource options, gain capabilities for the utilities that implement them and open present and future business opportunities, as well as serve customers who demand and value electricity produced by clean resources. (Ex 403, pages 11-12.) The MDNR testimony shows that the main reasons for including renewables in utility rate base are to secure the benefits of renewables:

- Solar, wind, geothermal, and hydro do not require fuel.

- Renewable energy resources diversify and manage the risks of fuel—uncertain price projections, consumer price volatility and fuel availability.
- Renewables generally do not pollute, or pollute less than fossil projects, so they protect public health.
- Renewables do not add to risks of changes in pollution regulations.
- The public supports renewables.
- Renewables technologies help to manage technology risks.
- Renewables can provide the benefits of distributed resources—more efficiency from reduced line losses; smaller, more modular projects, improved environmental performance, and diversity to maintain reliability.
- Renewable technologies exhibit economies of manufacturing scale and declining costs. (Lehr Rebuttal, pages 15-16.)

RENEWABLES ARE UNLIKELY TO BE STRANDED ASSETS

As the MDNR has testified, public support for renewables and alternative resources remains strong. In numerous instances, successful green pricing and green marketing have led to difficulty supplying adequate renewables to meet customer demand. Decision-makers are willing to support renewables with system benefit charges and renewable portfolio standards. Government and industry are turning toward clean energy resources to meet their voluntary commitments to mitigate pollution and climate change. Markets for trading green credits separate from energy purchases are starting to emerge. Given these trends, renewables investments made at today's best prices are highly unlikely to be stranded assets in retail choice markets. Markets for clean power appear to be willing to support the additional costs of providing the environmental and diversity value of utility renewable projects. Therefore, these projects are unlikely to become stranded assets when utility markets are restructured. (Lehr Rebuttal, page 16.)

NET METERING AND INTERCONNECTION STANDARDS CAN HELP SMALL RENEWABLE PROJECTS

Again, the uncontested testimony of MDNR on the record in this case (Lehr Rebuttal, page 18) shows that UtiliCorp and the Commission should investigate and implement net metering for customer-owned renewable resources. As national concerns about reliability and power quality are increasingly felt locally, and as the technologies for on-site generation proliferate and improve, Missouri customers will be taking advantage of their options to become energy producers, as well as energy consumers. Net metering simply allows customers to run their watt-hour meters backwards, rather than going to the expense and trouble of obtaining a separate meter to track their production. Net metering is advisable as a transition mechanism to keep metering of customer generation simple. Likewise, uncontested MDNR testimony (Lehr Rebuttal, pages 18-19) regarding interconnection policies advocates that customers who chose to interconnect their own sources of generation to the utility grid should be able to take advantage of interconnection policies that are reasonable, predictable, and appropriate for the size of their facility. The Commission should adopt and UtiliCorp should implement national technical standards that have been developed by national technical standards-setting bodies. These define what equipment can be interconnected to the grid safely, and eliminate hassles, both for customers and for the utility.

Along with adopting national technical standards for interconnection, the Commission should adopt simplified interconnection standards for the non-technical aspects of interconnections—simple contracts, defined procedures for interconnection decisions, reasonable liability provisions (including insurance requirements), and specifications for when utilities can require expensive and time consuming special studies. These non-technical barriers to interconnection can be as frustrating to many customer applications of new on-site generation technologies as the technical standards. With merger conditions that require UtiliCorp to study, report, and implement net metering and interconnection standards, the merger will not be detrimental to the public interest. Without such conditions, the merger perpetuates the status quo for customers that MDNR believes is detrimental to the public interest.

USE DELIBERATIVE POLLS TO DETERMINE INFORMED CUSTOMER OPINION

UtiliCorp witness Pella ". . .could not recall. . ." any specific surveys of customer support for renewable resource power undertaken by UtiliCorp. (Pella, Transcript, page 651, line 11.) UtiliCorp filed no other testimony that revealed that the company had undertaken any customer consultations on whether customers support including renewable energy in their rates, in voluntary green pricing tariffs, or as customer self-generation options. Mr. Pella did not cite EPRI research that is apparently available to UtiliCorp as an EPRI member. (See Pella Surrebuttal, page 34, line 2.) Mr. Pella further states in his Surrebuttal Testimony that ". . .in no instance of which I am aware, has a majority of customers supported renewable projects though a willingness to pay premium prices." While professing to be ". . .familiar with. . ." MDNR witness Lehr's testimony, Mr. Pella apparently did not read, or did not become aware of the CSW and TXU Electric examples cited in Mr. Lehr's rebuttal testimony at page 21, lines 20-26:

> For example, 81% of Central and Southwest utility system (CSW) customers who participated in the poll said they would pay a dollar more a month for adding renewables to the CSW system. CSW subsequently issued a renewable RFP and built a major wind power plant in rate base, adding about 25 cents a month to the average residential electric bill. 56% of TXU Electric (formerly TU Electric) customers preferred that the company pursue renewable technologies as the first option. In response to the Polls, TU Electric issued an RFP for renewable energy and contracted for a large wind plant.

Both these instances show that a majority of customers supported renewable projects through their willingness to pay premium prices.

MDNR believes that UtiliCorp's relative dearth of information about customer views is reflective of the fact that while UtiliCorp professes to support ". . .implementation of more renewable resource as sources of energy" (Pella Surrebuttal Testimony, page 31, lines 9-10) the company is not engaged in finding out what their customers want in this regard. Mr. Pella testifies that "(c)ustomers' willingness to pay premium prices for "green power" needs to be assessed." (Pella Surrebuttal Testimony, Page 31, lines 22-23) Since UtiliCorp agrees that customer opinions need to be assessed, MDNR believes that there is no contest on the record of this case about the MDNR proposal that the merger be conditioned to include a process for consulting customers. After all, who are better at defining what is or is not "detrimental to the public interest" concerning renewables than the customers who pay the bills and whose payments support both the Commission's regulation and the company's services?

MDNR's witness Mr. Lehr testified in favor of a process of Deliberative Polls™ that have a proven track record of success in Texas. (Lehr Rebuttal, pages 20-21.) The MDNR stands ready to assist the Commission and the company in considering and implementing this process or any other process that can provide equal or superior access to informed customer opinion on whether, when, and how much renewable energy to implement in Missouri. We are confident that a random sample of well-informed Missouri UtiliCorp customers would ratify the common-sense proposals made by MDNR in this case.

UtiliCorp depends largely on relatively risky and polluting fossil fuels to provide customer electricity supplies. MDNR believes that Missouri UtiliCorp customers are capable of understanding that the efficiency and renewables alternatives promoted in this case by MDNR will lead to lower bills, cleaner power, and less risk for them. If a random sample of informed customers had a voice in the decision-making process, MDNR believes that they would make it clear to the Commissioners and the company managers that it is time to make these resources investment priorities to meet demand for electric services. This is MDNR's challenge to the Commission and the company: ask the customers in a fair and informative process what they want. Then just do it.

CONDITION MERGER APPROVAL TO MOVE RENEWABLES FORWARD

The Commission should condition any merger approval to require UtiliCorp to join with the Missouri Department of Natural Resources and a broad range of stakeholders to assess the state's renewable and alternative resources. Merger conditions should require the company to develop pilot and demonstration projects, review and implement policy and market options (including adopting net metering and interconnection policies), and allow a random sample of customers to understand and speak out on the issues in a Deliberative Poll™.

The renewables pilot is an appropriate remedy for the passing-on problems identified by MDNR in this proceeding as well. When PV can reach the necessary critical mass for reducing the cost and thus the payback time, it promises to address not only affordability concerns, but environmental concerns as well. Moreover, distributing merger synergy savings to low-income customers in the form of a PV pilot will allow the merged Company to test a mechanism for addressing affordability concerns that addresses many of the issues MDNR identified in its testimony. PV is a low-maintenance installation. It does not require complex interactions between customers and machines to deliver its benefits. It does not readily break down. If these qualities persist, the ease of maintenance, both rural and urban, will be a significant value to this resource. With respect to solar hot water, these technologies are proven. What is not yet understood as well is the viability of these installations in rental situations and existing low-income housing stock of various kinds. (Colton Rebuttal at p. 46). In addition to the CEPP, the Department of Natural Resources would not oppose the proposed EDE/UtiliCorp merger, so long as:

> there are no detrimental impacts on the price of energy to low-income and residential customers;
>
> the companies make every reasonable attempt to offer and provide cost-effective energy-efficiency programs for both residential and low-income residential customers; *and*
>
> the companies make every reasonable attempt to evaluate and implement potential alternative- or renewable-energy-based electric generation projects,
>
> in the event that the proposed merger is approved by the PSC.

(Randolph Rebuttal at p. 4).

These merger conditions are important because a merger must ensure that there is no detriment to the public. Missouri, however, imports in excess of 95 percent of all of its primary energy resources to sustain the state's economy, its basic day-to-day activities, and its quality of life.

Missouri ranks as the 16th largest consumer of energy per capita in the nation, spending more than $10 billion each year. Missouri citizens spend nearly 11 percent of their income on energy. "Most of this money leaves Missouri because of our dependence on energy from sources outside of Missouri." (Randolph Rebuttal at p. 6). The merger of a local utility such as EDE with a multi-state, multi-national company such as UtiliCorp will exacerbate this economic drain from the state and will thus result in a detrimental impact to the state unless specifically mitigated.

The energy efficiency and renewable proposal advanced by MDNR will mitigate the harms identified as arising from the merger. As Anita Randolph, Director of the Missouri Energy Center (a component of MDNR) testified: "Increased availability and use of many of these renewable and alternative energy sources can increase Missouri's energy independence, keep more energy dollars at home, and help Missourians make environmentally sound energy choices." (Randolph Rebuttal at p. 8). Randolph testified: "Energy efficiency and increased use of alternative energy benefit the Missouri economy by keeping energy dollars closer to home and giving us diverse energy choices that strengthen our energy independence." (Randolph Rebuttal at p. 9).

In addition to responding to the adverse impacts of the merger on draining economic resources from the state, the energy efficiency and renewable proposal by MDNR will generate several positive benefits as well.

> A first set of positive benefits, in addition to redressing the harms of the merger resulting from the dollar drain identified above, involves environmental impacts. "Energy, the environment, and the economy are inextricably linked," she said. "Energy production and use account for more than 75 percent of air pollution. Electric power plants were the state's leading source of carbon emissions from primary consumption of fossil fuels in 1990. As Missourians use energy, we annually emit about 133 million tons of carbon dioxide into the air." (Randolph Rebuttal at pp. 7 - 8).
>
> A second set of positive benefits, in addition to redressing the harms of the merger resulting from the dollar drain identified above, involves benefits to low-income consumers.

Roughly 355,000 low-income housing units remain to be weatherized in Missouri. The Weatherization Assistance Program serves approximately 2,000 units statewide each year. If this rate continues, if no weatherized home ever needs to be re-weatherized, and if no expansion in Missouri's low-income population occurs, these un-weatherized homes will all be treated with energy-efficiency improvements by the year 2109, roughly 109 years. Clearly, on-going and additional sources of low-income energy efficiency services are needed.

In the EDE service territory in particular, there are more than 23,000 elderly citizens eligible for assistance, of whom 5,600 are handicapped. At current resource levels, it would take approximately 116 years to serve the Empire District Electric Company's low-income residential clients. (Randolph Rebuttal at p. 11).

CONCLUSION

In sum, MDNR has established that the ongoing consumption of electric power has an adverse economic impact on the state of Missouri as dollars are drained from the state's economy. Through this merger, those adverse impacts will be exacerbated as a small local utility is merged with a multi-state, multi-national company. As a remediation measure, or at least a measure that can mitigate these impacts, MDNR has proposed that the merger be conditioned on the offer of additional residential energy efficiency investments by the merged company. These investments will directly remediate the adverse economic impacts that have been identified.

> Well-designed energy efficiency programs have been shown to produce substantial economic benefits for local and state economies. The Missouri Statewide Energy Study prepared by Missouri's Environmental Improvement and Energy Resources Authority concluded that energy efficiency would 'sustain more employment opportunities than either the continued current level of energy use or the development of new energy supplies.'

(Randolph Rebuttal at pp. 20 - 21). Accordingly, MDNR requests that, in addition to the CEPP discussed above, any merger approval be specifically conditioned on UtiliCorp establishing a specific partnership with the Missouri Energy Center to market and leverage funds for the development of residential energy efficiency programs. This partnership should include a process that will identify cost-effective energy efficiency programs and that will implement those programs were appropriate. (Randolph Rebuttal at p. 25).

MDNR would propose that the process begin within 30 days after entry of a final order in this proceeding. If no collaborative agreement has been reached by December 31, 2000, the Energy Center and UtiliCorp should submit proposals to the PSC within 30 days after that deadline for determination by the PSC of what level of residential energy efficiency funding is justified as a means to implement the requested partnership.

Programmatic Remedies are Common in Merger Cases.

Programmatic merger conditions such as those advocated by MDNR in this proceeding are a common response to the types of problems identified by MDNR. In California, for example, the SBC/Pacific Bell merger was specifically conditioned on the implementation of a Community Partnership Commitment, under which PacBell promised to fund $80+ million in education and community technology projects over the next ten years. (A description of the Community Partnership Commitment was provided at Colton Rebuttal, Schedule RDC-8.) Similarly, in Ohio, based on testimony regarding the disproportionate sharing of merger savings for the poor, the stipulated agreement endorsing the proposed SBC/Ameritech merger was conditioned on Ameritech's funding a $12+ million commitment to consumer education, technology diffusion, and community computer centers.[2]

These telecommunication merger agreements were specific responses to specific adverse impacts that would have been caused or substantially exacerbated by the proposed mergers. The mergers were explicitly proposed as one mechanism to facilitate the development and distribution of high

2 I/—/O Joint Application of SBC Communications Inc, SBC Delaware, Inc., Ameritech Corporation and Ameritech Ohio for Consent and Approval of a Change of Control, Case No. 98-1082-TP-UNC, Public Utility Commission of Ohio (1999).

technology telecommunication services. The information presented in the merger proceedings, however, demonstrated the existing and widening technology gap for low-income consumers. As a result, the benefits of the merger were found to be largely denied to low-income consumers. The Community Partnership Agreement, as well as the Ameritech-Ohio programmatic commitments, were the mechanisms for assuring that the adverse effects of each merger, which impeded the passing-on of merger benefits, were redressed.

The programmatic responses have not been confined to telecommunications cases. For example, in February, 2000, the Colorado Public Utilities Commission (PUC) approved a settlement between Public Service Company of Colorado (PSCO) and low-income groups addressing a host of low-income issues. The settlement of the PSCO merger included funding for (1) low income energy assistance; (2) low income energy efficiency programs; (3) computers and training to energy assistance agencies to review a client's account, determine an appropriate assistance amount, and communicate financial commitments to PSCO customer services staff; and (4) a pilot low-income rate affordability project directed toward testing cost-effective means of delivering rate assistance to low-income consumers. In addition, the settlement required the company to make annual reports on low-income payment troubles, including termination of service, payment agreements, arrears, PSC complaints, energy efficiency and rate affordability program impacts.

Finally, as MDNR witness Colton noted, programmatic remedies are common responses to adverse impacts that adversely affect distinct markets in a merger setting. Consider, for example, the recent merger of Butterworth Health Corporation with Blodgett Memorial Medical Center in Michigan.[3] In that proposed merger, the principal claim of "efficiency savings" involved claims of "capital avoidance." Concerns were raised, however, that the capital avoidance really involved excluding the offer of products and services that consumers would otherwise demand from an unmerged hospital.

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3 946 F.Supp. 1285 (W.D. Mich. 1996), *aff'd per curiam*, 121 F.2d 708 (6th Cir. 1997).

In response to these concerns, the federal court hearing a challenge to the merger required the merging hospitals to enter into a consent decree to implement a "Community Commitment" plan proposed by the hospitals as a condition of allowing the merger to proceed. The Community Commitment provided a binding commitment by the hospitals "not to raise prices *or otherwise injure the community. . .*" (emphasis added). The Community Commitment has five elements: (1) a freeze on prices and charges; (2) a freeze on prices to managed care plans to pre-merger levels; (3) a commitment to limit margins; (4) a commitment to the medically under served and needy;[4] and (5) a commitment to governance of the merged hospitals with community input. In the decision approving the merger, the court found that the hospitals' Community Commitment plan *partially* described how efficiencies achieved would benefit all consumers. The court required the merging hospitals to enter into the consent decree partially to ensure that they complied with the plan's commitment to pass along benefits to consumers.

Similarly, the merger of two corporate parents of three hospitals in central Pennsylvania was only allowed by the Pennsylvania Attorney General's office on the condition that the merged entity pass on at least 80% of the net savings to consumers through reduced prices (or limited actual price increases for existing services), and low-cost or no-cost health care programs for the indigent;[5] In addition, Massachusetts settled its objections to the merger of that state's second and third largest HMOs on the latters' agreement to freeze group rates for one year, double enrollment in the Medicare risk program, and spend $4 million on services placed at risk by the merger, such as health care for the homeless, violence prevention, and AIDS prevention.[6]

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4 The merged company will provide a minimum of $6.0 million each fiscal year to assist the under served and general community. The funds are distributed through 30 specific programs to address specific locally-identified needs.

5 ***Pennsylvania v. Providence Health Sys.***, No. 4CV-94-772, 1994 WL 374424, at 2-3 (M.D. Pa. May 26, 1994); *see also*, ***Pennsylvania v. Capital Health Sys. Servs.***, No. CIV.A.4:CV-95-2096, 1995 WL 787534 (M.D.Pa. Dec. 15, 1995).

6 Merging HMOs Agree to State Plan on Social Spending, Contract Approvals, 4 ***Health L. Rep. (BNA)*** 6 (Jan. 20, 1995).

While MDNR Has Proposed that the Costs be Netted Against Merger Savings, That is Not the Only Mechanism for Treating the Expenses Associated with MDNR's Proposed CEPP.

MDNR has proposed that the costs of its Community Energy Partnership Program (CEPP) be paid out of merger savings. (Colton Rebuttal at p. 56).

This process, however, is not the exclusive process that can be used as a mechanism for paying for the programmatic costs. An additional mechanism, for example, would be to capitalize the costs and amortize those costs over a longer period of time. It would be possible to fully expend the CEPP budget in the first three years, capitalize it, and amortize it over ten years if the PSC wanted each year of expenditures to be less.

Amortizing the costs of the CEPP in this fashion makes eminent sense. The affirmative harms generated by the merger may be viewed as economic externalities arising as a result of the merger. When viewed in this fashion, the costs of the CEPP are merely remediation costs, or part of the costs to achieve the merger savings. The cost of programs to remediate the externalities could rationally be considered costs to achieve and could be amortized over some period of time.

It would be possible, even, to allow the Company to defer netting the CEPP program costs against merger savings until *after* its proposed rate freeze. In this fashion, the Company is allowed to keep the merger savings during those rate freeze years as a means of recouping its acquisition premium. Moreover, the deferred costs could be amortized over a reasonable period of time, the length of which could be a litigated issue (if need be) in the rate case at the end of the stay out period.

Summary and Conclusions

Merger analysis requires defining the markets that will be affected by the merger and determining the impacts of the merger on those markets. MDNR has demonstrated that there is a distinct low income market (or submarket). MDNR has further demonstrated that the merger will cause adverse impacts on the low income market. These adverse impacts impede the passing-on of merger savings to the low income market.

MDNR has also demonstrated that merger synergy savings are not being fairly allocated to the low income market. The distribution of such a disproportionately small share of savings violates the Missouri requirement that a just and reasonable amount of savings be received by all UtiliCorp customers.

The harms resulting from the adverse impacts of the merger and the unfair allocation of merger benefits to low income customers provide independent grounds for the programmatic merger remedies proposed by MDNR. The Commission should therefore condition approval of the merger on the adoption, in whole or in part, of the proposed Community Energy Partnership Program. The proposed merger should additionally be conditioned upon the implementation of the Renewables Program outlined at page 22 of MDNR witness Ron Lehr's Rebuttal Testimony and page 22 of MDNR witness Anita Randolph's Rebuttal Testimony. The program would include marketing renewable energy programs, polling, net metering, interconnection, joining utility renewable energy groups, renewable energy assessment in the service area and demonstration projects.

In addition to the low-income specific harms identified by MDNR, MDNR has demonstrated that one harm of the proposed merger is the further economic drain caused by exporting energy dollars out-of-state. As a small local utility is merged into a large, multi-state, multi-national company, Missouri dollars will flow out-of-state, thus weakening the economy, reducing the number of available jobs, and reducing spendable income. MDNR established that an appropriate remediation measure for these merger-induced harms is the funding of residential energy efficiency through a partnership between the Missouri Energy Center and the merged companies. The specific dollar commitments to be made through partnership is proposed to be determined by a collaborative process to be convened within 30 days of the entry of a final order in this proceeding, with resource to the PSC should agreement not be reached by December 31, 2000.

Respectfully submitted,

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