BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of St. Joseph Light & Power Company for the Issuance of an accounting authority order relating to its electrical operations	)))))	Case No. EO-2000-845

REPLY BRIEF OF AG PROCESSING INC.

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ATTORNEYS FOR AG PROCESSING INC.

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I. INTRODUCTION.

The essence of St. Joseph Light & Power Company's (SJLP) argument is (1) this is an "extraordinary" expense, therefore SJLP should be allowed to establish a regulatory asset for the expense; and (2) the Commission may defer decision on any ratemaking for several years. Neither argument has merit.

II. ARGUMENT.

A. This Is Not An "Extraordinary" Expense As Should Support An Accounting Authority Order.

SJLP's argument that this is an "extraordinary" expense and therefore should be permitted is an exercise in sophistry and wordplay. The argument goes: Extraordinary expenses are appropriate for recovery in an accounting authority order; "extraordinary" is that which is beyond the ordinary; public utilities do not ordinarily blow up their turbine generators; therefore this

is an "extraordinary" expense and rate action should be required.[1/]

SJLP's Initial Brief focuses its efforts on the term "extraordinary," but has marshalled no authority to support the proposition that "if it's big enough, its therefore extraordinary." In its zeal to tee up a recovery, SJLP confuses amount of damage with the cause of damage.

This is the basic flaw in SJLP's smoke and mirrors logic. It is as though SJLP wants the Commission to watch the show, but, as the Wizard of Oz told Dorothy, "ignore the man behind the curtain."

Following that logic, neither negligence, recklessness nor anything short of "wilful" conduct matter, only that the resultant damage caused thereby be huge. Indeed, Mr. Rush (Tr. 286-88) and Mr. Stoll (Tr. 33-37) appeared to suggest that small items of damage would be presumed under normal rates. We are unaware of any ratemaking principle that would build into any utility's rates an explicit allowance for outright negligence or reckless behavior, nor excuse the utility from its obligation of prudence.

Unfortunately for SJLP, this Commission neither should nor can "ignore the man behind the curtain." The unrefuted

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[1/]Although SJLP seeks to hide the issue, "rate action" is required to establish a regulatory asset. If this were not so, this request would not have been filed since SJLP there are other deferred accounts into which these expenses could be placed.

evidence in this case clearly shows that SJLP has the responsibility for this incident.

That is, of course, what turns this question. Extraordinary, ***for ratemaking purposes***, addresses a situation that the utility could not have avoided even through and with prudent planning and careful conduct. For example: a prudent electric utility maintains its easements by a tree trimming program. Ice storms occur in the Midwest. Regardless of the utility's planning and implementation of a prudent tree trimming program, an ice storm of ***unexpected and unpredicted severity*** topples branches and even whole trees into utility lines. A second example: In the Missouri River basin and flood plain, it is reasonable to plan flood protection around a major plant investment, whether it be an electric generating station or a water processing plant. It is reasonable to plan that flood protection to levels such as would provide protection against floods that did not exceed historic or predictable levels. Then, regardless of the utility's implementation and maintenance of prudent flood protection, an unprecedented flood overwhelms the property. These circumstances would (and did) support prior accounting authority orders for this company.

The "man behind the curtain" that SJLP wants the Commission to ignore is the ***cause of this incident***. Unrefuted evidence showed SJLP responsibility. SJLP hired General Electric (GE), supervised GE, made joint decisions with GE to remove existing controls, made assumptions regarding controls, failed to

train or even alert operators to these changes, and inexplicably failed to conduct scheduled tests that almost certainly would have highlighted the problem. This string of errors and omissions would be comical had they not resulted in millions of dollars of damage. But it is a perversion of past Commission decisions as well as logic to simply argue that, because there was a lot of damage, it is "extraordinary" and therefore you must "ignore the man behind the curtain."

SJLP wants to argue that GE created a "trap." If you hire a man to dig a pit in your backyard, cover it with branches and leaves to camouflage it, then later forget about its existence and yourself fall in, it does not follow that the man who dug the pit is responsible for creating the "trap." In this case you would remain the responsible party. You had supervision of the project and, indeed, originally contracted for it. Moreover, in this case SJLP failed to perform its routine scheduled tests (Tr. 242) that would have, at a minimum, resulted in the operators' realization that the manual controls on which they had long relied had been removed. SJLP simply cannot escape responsibility and thus, in its brief, sidesteps the question altogether.

One further analogy may be useful. Assume that a driver is subject to epileptic seizures and has been advised not to drive his automobile. Nevertheless, he drives, and while driving, suffers a seizure, falls into unconsciousness, and in that state crosses the median and strikes plaintiff's car,

seriously injuring plaintiff. Could an adroit attorney argue that the epileptic should be excused from responsibility for the damage caused because he was unconscious and thus was nether negligent, reckless or intentional in driving across the median? Certainly. It has been attempted. But the principle that holds defendant to be liable is defendant's action in ***choosing to drive his automobile***.

SJLP created this situation, selected the contractor, failed to provide adequate supervision for that contractor, failed to alert its operators to the change, then failed to perform its routine scheduled tests. SJLP may have a claim over against GE for some aspects of this fiasco, but it has no claim whatever regarding its ratepayers.

The basic question in this case is whether it is proper to allow a utility that appears to admit its essentially reckless conduct, to nevertheless tee up a ratepayer recovery for the resulting damage? We believe that the answer to the question clearly should be **no**.

B. There Is No Proper Basis To Defer This Issue to Some Uncertain Future Rate Case.

SJLP argues that the Commission can defer the question of prudence to a subsequent rate case -- a rate case that might occur a year from now, or five years from now. What will we know about this case five years from now that we don't know today? Will the witnesses' recollections be sharper? Will their memories be more clear? Will an "investigation" have been concluded?

Will SJLP have made even the slightest attempt to recover costs from General Electric?

The answer to all these questions is obviously no.

We will know nothing in five years or even a year or so from now that we do not know today. Witnesses' recollections of events and circumstances will fade, not sharpen, with the passage of time. Their abilities to recall will be reduced. SJLP testified to no ongoing investigation. No SJLP witness testified that the utility had any plan to seek recovery from GE.

All this means that ***in the facts and circumstances of this case***, the Commission should put an end to this Simpson-like escapade now. This was not an "act of God" or other unforeseeable circumstance. In fact, the exact circumstance **was** foreseen, hence the existence of the redundant AC oil pumps[2/] and the separate DC oil pump. It was precisely for such a situation that multiple redundant oil pumps are called for by good utility practice. Obviously, such pumps will not provide protection if they have been left in a disabled state.

C. SJLP Has Shown No Inability to File a Rate Case Where All Relevant Factors May Be Considered.

Though clearly invited at the hearing, SJLP has failed to show any justification, save an unwillingness to "muddy" its

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[2/]As noted in our earlier brief and in the testimony of Mr. Kumar, SJLP failed to comply with good utility practice by connecting its two AC oil pumps ***to the same power source, that being the very generator that they were supposedly protecting***. Tr. 212.

merger situation, why it could not file a rate case. Its personnel recognized that it had filed such cases in the past, including requests for interim relief, should such be thought justified.

SJLP seeks to carry forward to some unspecified later period the incremental costs of purchased power during the period the unit was down as a result of the damage. The request, however, would do more than that: By a "rate action" (Tr. 86-87) it would establish those costs of purchased power as a "regulatory asset," (Tr. 389) then would seek to pull them forward to a period, perhaps five or six years hence, to allow them to be recovered when it is convenient to SJLP or its successor. That will obviously distort the matching principle and would effectively preclude the Commission's ability to compare all relevant factors in that future rate case. Moreover, as noted in our initial brief, it would cause the Commission to run afoul of *State ex rel. Utility Consumers Council of Missouri, Inc.*, 585 S.W.2d 41, 49 (Mo *en banc* 1979) ("UCCM") prohibiting a fuel adjustment.

The proper means to handle this issue would be for SJLP to file a rate case in the near future with a test year that would encompass the period of outage. That would permit the Commission to address the issue in the context of all other relevant factors which might well show that the expense was offset by other cost reductions. For example, in the merger case, EM-2000-269, it was admitted by SJLP personnel that a

number of SJLP personnel have already taken early retirement. These reductions in salary and employment costs, as well as related costs, could well offset part if not all of these purchased power expenses.

The essence of the *UCCM* decision was that there was no Commission authorization to have an adjustment clause that permitted increased costs to be collected but other and reduced costs to be ignored. That is why the court held that all relevant factors must be considered and an approach that does not do that falls short of the required measure. Absent a full rate case filing and investigation, the Commission has no assurance whatever that SJLP has any financial problem at all. Indeed, if the situation were "in extremis," it is a certainty that SJLP would "muddy" the merger waters. SJLP should simply not be permitted to attempt to preserve selectively one expense out of a large number. This application should be rejected.

D. Good Public Policy Should Deny Recovery In This Situation.

This is not a case in which a utility acted prudently. SJLP itself backhandedly acknowledges its predicament by seeking to defer the day of reckoning as far into the future as possible. As noted above, however, the evidence will never be fresher, and there will never be a better time for the Commission to address this particular issue.

Wise public regulatory policy suggests that a utility should be penalized, or at least denied recovery, of expenses it

incurs because of (among other things) its own imprudence, management failures, negligence or reckless conduct.[3/] Conversely, it would be reasonable and good policy to permit accrual and possibly recovery of expenses that were imposed on the utility, despite its prudent precautions, by forces beyond its control or which exceeded reasonable planning or protection thresholds.

The rationale for this distinction should be obvious: Only by denying a utility recovery of imprudent costs, or expenses that could, with prudent measures, been avoided, can negligent or reckless utility conduct be deterred. Conversely, if the utility takes reasonable and prudent precautions, then the ice storm or flood **exceeds** the reasonable and prudent protection measures, it serves no purpose to deny a recovery since there is no conduct to deter.

In this case, SJLP witnesses testified that they really didn't understand their systems (Tr. 189, 212), how to maintain them (Tr. 212-213), left their operators with a less than acceptable level of training, (Tr. 149-150) and completely failed to perform scheduled testing procedures. Tr. 240-43. That is conduct that should be deterred by denying an accounting authority order.

[3/]SJLP argues that this case involves no rate action nor recovery from the ratepayers. If that is not, however, the clear goal of this proceeding, then it has no rational reason behind the filing.

III. CONCLUSION.

For the foregoing reasons, the request for an accounting authority order to defer these costs in Account 182.3 should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by facsimile or electronic means and U.S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.

Stuart W. Conrad

December 4, 2000