Exhibit No.:
Issue: Employee Benefits
Witness: Robert B. Browning
Sponsoring Party: UtiliCorp United Inc.
Case No.: EM-2000-369
Date Prepared: August 23, 2000

MISSOURI PUBLIC SERVICE COMMISSION
Case No. EM-2000-369

Surrebuttal Testimony

of

Robert B. Browning

Jefferson City, Missouri

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI
SURREBUTTAL TESTIMONY OF ROBERT B. BROWNING
ON BEHALF OF UTILICORP UNITED INC.

CASE NO. EM-2000-369

Q. Please state your name, position, and business address.

A. My name is Bob Browning. I am employed by UtiliCorp United Inc. ("UtiliCorp"), within the Enterprise Support Functions division, as Vice President of Human Resources.

Q. Are you the same Bob Browning that previously filed Direct Testimony in this case?

A. Yes.

Q. What is the purpose of your Surrebuttal Testimony?

A. The purpose of my Surrebuttal Testimony is to respond to Rebuttal Testimony from the Missouri Public Service Commission staff.

Q. The Staff, as represented by Ms. Janis Fischer on page 22 of her rebuttal testimony, claims that labor reductions have occurred in the past at UtiliCorp and Empire and, on a standalone basis, will probably continue in the future. Is this an accurate forecast?

A. No. The labor reductions that are contemplated as a result of the merger of UtiliCorp and Empire are only possible, in many cases, by combining operations. For example, UtiliCorp is able to provide certain support services for Empire with the addition of minimal headcount, or in many cases, no change in headcount, thereby allowing Empire to eliminate these functions within their operations. These reductions would not be possible now or in the future if Empire were to remain as a separate entity. In addition, UtiliCorp currently has no plans for significant labor reductions either as a result of this merger or if UtiliCorp should remain on a standalone basis.

Q. Has the Staff drawn other conclusions about the relationship of this merger to labor reductions?

A. Yes.

Q. What are these conclusions?

A. Ms. Fischer, on pages 27 and 28 of her rebuttal testimony, states that both UtiliCorp and Empire have been able to attain employee reduction on a stand-alone basis through re-engineering at UtiliCorp and through CPP at Empire. The Staff, according to Ms. Fischer, believes these types of reductions would likely continue absent the merger.

Q. Are these conclusions accurate?

A. No. While Ms. Fischer is certainly correct that it is incumbent upon the management of our two companies to strive for efficiencies, the labor reductions proposed in our merger filing could never be reached on a stand-alone basis. The merger of UtiliCorp and Empire will allow Empire to completely eliminate certain functions and for UtiliCorp to absorb these same functions within its existing operations. Continuous process improvement efforts and/or re-engineering would never be able to achieve such radical labor reductions.

Q. The Staff indicates that UtiliCorp will attain additional non-merger cost savings as a result of the use of the PeopleSoft for Human Resources (HR) application. Is this true?

A. It is a fact that the proposal developed on a joint basis by UtiliCorp's Information Technology and Human Resources departments indicated that the implementation of its PeopleSoft Human Resources Information System (HRIS) would not create cost savings. The implementation of the HRIS was a business necessity and allowed the company to

more accurately store employee data used to produce payroll checks, track employee history and provide labor reports necessary for the effective management of the business. In fact, the HRIS enables UtiliCorp the scalability to acquire additional employees without adding additional clerical staff for record keeping purposes at UtiliCorp and eliminating redundant clerical staff at the acquired company. Therefore, any savings derived by the implementation of this system are directly related to the merger.

Q. The Staff, on page 62 of Ms. Fischer's testimony, refers to an Employee Self-Service Station (ESS), within UtiliCorp's HRIS, as an example of how this software will drive non-merger related savings. Is this true?

A. The ESS is being implemented to allow employees to access their own personal data such as 401(k) balances and benefits information on line. Employees already have access to this data over the phone through UtiliCorp's outsourced third party provider and, in some cases, through quarterly reports mailed to their homes. The ESS is being provided as a convenience to employees in order to provide another means of access to their personal data, not as a cost-savings measure.

Q. The Staff, on page 53 of Mr. Steve Traxler's testimony, challenges the validity of projected savings as a result of the conversion of benefits from Empire to UtiliCorp's plans. Do you agree with Mr. Traxler's conclusions?

A. No. Mr. Traxler drew this conclusion on the assumption that Empire's pension plan would be merged into UtiliCorp's master trust and that Empire's ratepayers run the risk of increased costs to fund Empire's pension plan because UtiliCorp's pension plan is not over-funded to the degree of Empire's pension plan. It is important to note that the Staff

and UtiliCorp, through a meeting between Mr. Traxler, Mr. John McKinney (of UtiliCorp), Mr. Gary Clemens (of UtiliCorp) and me on July 13, 2000 in Jefferson City, agreed that while UtiliCorp will merge the assets of the two pension plans, UtiliCorp will continue to account for the assets and liabilities of the Empire pension plan separately. In this way, UtiliCorp will be able to attain the projected savings through the elimination of dual trusts, audits and administrative costs, but maintain a separate tracking of the over-funded status of each plan. I am satisfied that we have developed a win-win agreement that maintains the integrity of the projected benefit savings. In fairness to Mr. Traxler, this agreement was struck after the submission of his rebuttal testimony.

Q. Has the Staff raised any other concerns about the conversion of Empire's benefits, which you believe are unfounded?

A. Yes.

Q. What are these concerns and why are they unfounded?

A. The Staff, on page 54 of Mr. Traxler's testimony, has indicated that UtiliCorp plans to use the excess assets of Empire's pension plan for other purposes. This is not true. The federal government has imposed significant excise tax consequences for using pension plan surpluses for other purposes to discourage such actions. Surplus funds in the pension plan exist because actual historical market returns have exceeded expectations. Conversely, market returns could just as easily fall short of expectations. The surplus funds in the plan today are used to cushion these downturns and protect the overall viability of the plan.

Q. Do you believe "Labor Protective Provisions, as outlined on pages 8 and 14 of the List of Issues filed on July 31, 2000, by the Staff, should be required by the Commission, as a condition of approval of the merger?

A. No.

Q. Why not?

A. There are three primary reasons the Commission should not adopt Labor Protective Provisions as a condition of the merger: (1) such conditions would in fact 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 provisions would upset the balance of labor-management relationships, and (3) such provisions are likely redundant or preempted by Federal Law.

Q. Why do you believe such conditions would be contrary to legislative intent, or are not required for the Commission to comply with existing law or to satisfy the "not detrimental to the public interest" standard?

A. I am aware of no legal requirement for Labor Protective Provisions. In fact, a number of bills were pending before the Missouri legislature last session to add Labor Protective Provisions, such as HB 1227. One reason proponents of the bills stated Labor Protective Provisions were necessary is because the Commission has no authority to impose such requirements. Not one of those bills passed last session. This seems to demonstrate legislative intent not to regulate this area at this time. Labor Protective Provisions are also 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.

Q. Why do you believe imposition of Labor Protective Provisions would upset the balance of labor-management relationships?

A. As to Union employees, there is a careful (albeit imperfect from both sides) balance between the respective rights of parties to a collective bargaining agreement (CBA), because of the National Labor Relations Act (NLRA), discussed further below. For non-union employees, imposing Labor Protective Provisions would legislate an area the legislature has – to this point – determined not to further regulate. At the same time, UtiliCorp and Empire have taken steps to provide reasonable protections for employees impacted by the merger, after careful consideration of operational needs. For example, UtiliCorp has committed to utilize attrition and non-replacement where management deems feasible, in lieu of reductions-in-force. As another example, Empire has severance pay plans for both union and non-union employees that will remain in force for at least 18 months following the merger. Finally, UtiliCorp anticipates a number of Empire employees will have opportunities in other parts of the company following the merger. While these cannot cover all individual circumstances, layoffs will occur only as necessary to avoid redundant costs that would otherwise be passed to consumers.

Q. Why do you believe Labor Protective Provisions would be redundant, or pre-empted by Federal law?

A. Although I am not a lawyer, what follows is my understanding of the law, based on information provided by UtiliCorp representatives in opposition to Labor Protective Laws

proposed last session. Federal preemption arises because of the Supremacy Clause of the United States Constitution. While the Supremacy Clause does not preclude private employers from doing more than Federal law requires, it does prevent State governments from regulating areas in which the Federal government has legislated, if there is an intent by the Federal government to preempt state regulation. There are three primary Federal laws where the Federal government has demonstrated an intent to preempt State laws to various degrees: the Occupational Safety and Health Act (OSHA)(29 USC 651 et seq.); the National Labor Relations Act (NLRA)(29 USC 151 et seq.); and, the Employee Retirement Income Security Act (ERISA)(29 USC 301 and other sections). Those three laws are likely to be impacted by the types of Labor Protective Provisions commonly considered in proposed legislation.

Q. What is covered by the OSH Act and similar federal safety laws?

A. The OSH Act safety and health standards cover electric and gas companies such as UtiliCorp and Empire. Numerous regulations govern power plant, overhead and underground electrical work under the OSH Act, including but limited to 29 CFR 1910.269. Those provisions cover both certification and safety aspects of the workers performing the associated work. Multiple parts of 29 CFR 1910 and 1926 cover construction and non-construction operations of utility companies. Moreover, apprenticeship programs applicable to many of the jobs, on top of Company-sponsored safety, health and certification programs, more than adequately protect electric utility workers and consumers. Additionally, there is extensive safety and qualification regulation of gas utility operations, pursuant to federal Department of Transportation

(DOT) regulations, and existing Missouri laws. For example, see Federal DOT regulation 49 CFR parts 192-195, and Missouri Public Service Commission regulation 4 CSR 240-40.030. While DOT regulations do not preempt Missouri law, where OSHA does not have a specific safety standard applicable to gas utility workers, the DOT and Missouri already have enacted safety provisions. The OSH Act preempts most State efforts to regulate worker safety, unless the State has a plan approved by the United States Secretary of Labor. Gade v. National Solid Waste Management Ass'n, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992); 29 U.S.C. 655. Additionally, both UtiliCorp and Empire already have extensive safety programs. Safety is something in which both companies and employees have an interest. Therefore, even if preemption were found not to apply to parts of any Commission Order, safety provisions are unnecessarily redundant and, potentially, will conflict with existing requirements.

Q. How is the NLRA potentially implicated by Labor Protective Provisions?

A. This law covers the collective bargaining relationship between management and union-represented employees. As mentioned before, any Labor Protective Provisions covering union employees would tilt the balance virtually totally to labor's side, by imposing provisions beyond those agreed to by the parties, when the provision of such benefits is normally part of the give and take of the collective bargaining process. Under Section 301 of the NLRA, State law is pre-empted if the State law is "inextricably intertwined" or otherwise substantially impacts the CBA. Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed. 410 (1988). While not all State law is preempted, if there is need for reference to the CBA for interpretation of the State law (more than

something like simple calculation of lost pay), then the State law has no legal effect. Considering the breadth of subjects covered by the existing CBA between Empire and its represented employees (a CBA which will be assumed by UtiliCorp following the merger), Labor Protective Provisions are likely to have no legal effect. For example, voluntary retirement programs, severance, pensions, who is a successor, tuition assistance and other benefits typically discussed as possible Labor Protective benefits, are subjects either expressly covered in the CBA between Empire and the IBEW, or excluded because the parties made the decision not to include them. Thus, any Commission Order covering such subjects will remain inextricably intertwined with the CBA. If the Commission includes such provisions, unions, UtiliCorp, and ultimately the Commission, will have to unravel the extent to which the Order is preempted. This is not a productive use of financial or other resources.

Q. Why is ERISA potentially implicated by proposed Labor Protective Provisions?

A. ERISA is the federal law that governs many employer-provided health and welfare benefits, such as employer-sponsored health and life insurance, pension, severance plans, and 401(k) plans. ERISA preempts most State laws that attempt to regulate such areas. See, e.g. FMC Corp v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L.Ed.2d 356. Areas such as voluntary severance, early retirement, and related benefits would all likely be preempted. Furthermore, to the extent such were only mandated as to non-managerial employees (a common theme of proposed Labor Protective legislation), the practical impact is those benefits would have to be extended to managerial employees as well, because many employee benefit plans apply to both management and non-management

employees. At the least, there will be ongoing time, effort and money poured into interpreting the impact of the Commission's Order on employee health and welfare plans, and on existing contractual relationships.

Q. Are there any other laws that provide protections to employees?

A. Yes.

Q. What are those laws?

A. There are numerous other Federal and State laws – such as Missouri's workers' compensation and unemployment compensation laws – that provide worker protection in various circumstances where the legislature has determined protection is necessary.

Q. If the Commission decides to include Labor Protective Provisions in its final Order, should the calculation of merger costs/benefits include the treatment accorded Labor Protective Provisions?

A. Yes.

Q. Why?

A. While I believe the Commission should not include such provisions, if the Commission chooses to do so, the costs should be included because those costs will be additive to the labor protection costs already anticipated by UtiliCorp and Empire as a result of this merger.

Q. Does this conclude your Surrebuttal Testimony at this time?

A. Yes, it does.

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

County of Jackson)
)
State of Missouri)

AFFIDAVIT OF ROBERT B. BROWNING

Robert B. Browning, **being first duly sworn**, deposes and says that he is the witness who sponsors the accompanying testimony entitled surrebuttal testimony; that said testimony was prepared by him and or under his direction and supervision; that if inquiries were made as to the facts in said testimony and schedules, he would respond as therein set forth; and that the aforesaid testimony and schedules are true and correct to the best of his knowledge, information, and belief.

Robert B. Browning

Subscribed and sworn before me this 21st day of August, 2000.

Notary Public

My Commission Expires:

NANCY J. MANION
NOTARY PUBLIC STATE OF MISSOURI
JACKSON COUNTY
MY COMMISSION EXPIRES 7/31/2001