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November 15, 2000

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

FILED[2]
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Missouri Public Service Commission

RE: UtiliCorp United Inc.
Case No. ER-2001-294

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Motion to Dismiss, or in the Alternative, Motion to Suspend Tariff and Request for Hearing.** Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filing of UtiliCorp United Inc., d/b/a Missouri Public Service	)))	Case No. ER-2001-294

MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO SUSPEND TARIFF AND REQUEST FOR HEARING

Comes now, the Office of Public Counsel, and respectfully moves this Commission to dismiss the proposed tariff filed Case No. ER-2001-294. This case concerns the proposed tariff filing by UtiliCorp United, Inc., d/b/a Missouri Public Service, which purports to insert a formula for an "experimental surcharge" into its rate schedule. This motion is made for the reason that the proposed tariff constitutes a Fuel Adjustment Clause. Fuel Adjustment Clauses (FACs) are prohibited under Missouri law. In the alternative, Public Counsel moves to suspend the tariff and set this matter for an evidentiary hearing at which the Commission may be presented with related to this proposal.

SUGGESTIONS IN SUPPORT OF THE MOTION

Facts and Procedural History

1. On or about November 2, 2000, UtiliCorp United, Inc. (Company) filed a proposed tariff with the Missouri Public Service Commission. This proposed tariff purports to authorize the Company to vary the amount it charges its customers for electricity based upon a mechanism described in the tariff filing and the accompanying suggestions in support of the filing as a "surcharge." The Company states that this

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"surcharge" is "experimental" in nature and asks for permission to utilize the proposed charge for a period of two years.

2. The proposed tariff, in the words of Company, "consists of a fixed rate surcharge on all existing UtiliCorp jurisdictional electric tariffs" and is a rate per megawatt hours calculated on the basis of "gas fuel costs divided by the estimated tariff sales during the recovery period."

3. The tariff filing states that this surcharge will permit the Company to forecast the price it will pay for natural gas fuel. The Company uses natural gas, among other resources, in the production of electricity. The filed tariff sheet, in explaining what costs are eligible for this "experimental recovery" states that "The maximum price of gas allowed in the forecast cost of gas is limited to 150% of the maximum price actually paid during the most recent 90 days available at the time of calculation." In its Suggestions, the utility states that "The surcharge will recover current gas fuel expense based on budgeted data. The budgeted fuel costs that will be included will not exceed 120% of the average of the actual fuel costs for the previous 90 days." Neither the proposed tariff nor the suggestions in support delineate how the maximum gas price will be determined, nor is any reference made to any other cost production factor related to the generation of electricity by the Company.

Argument

I. The requested "experimental surcharge" should not be allowed because it is, in fact, a fuel adjustment clause by another name, and Missouri does not allow electric companies to introduce fuel adjustment clauses into their rate schedules.

4. In State ex rel. Utility Consumer Council of Missouri v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979), the Missouri Supreme Court ruled that fuel adjustment clauses were not permissible under Missouri law. UCCM, at p.58. A "fuel adjustment clause" was defined as "a clause, filed as a part of an electric utility's tariff, which allows it automatically to increase or decrease the charge for power per kilowatt-hour to consumers by the amount of increase or decrease in the utility's fuel costs." UCCM, at p. 44. The fact that the proposed "experimental surcharge" in the tariff filing would be calculated on a megawatt-hour has no bearing on whether the tariff filing at issue should be considered a fuel adjustment clause, nor do any of the other limitations on when and how this charge would go into effect transform the requested "experimental surcharge" into anything other than a fuel adjustment clause (FAC). In any event, and by any name, the objections to FACs listed at page 49 of the UCCM case all apply to the requested surcharge, especially, the concerns that:

(1) utilities would lose any incentives to keep fuel costs down if the costs can be fully passed on to customers, and

(2) presence of an FAC may cause bias in the selection of fuels or production methods to the detriment of the customers.

5. In the UCCM case, the Missouri Supreme Court determined that it was inappropriate to allow a utility company to adjust its own rates to reflect changes in non-tax operating costs (such as fuel, labor, supplies, construction, etc.) without delving into all relevant factors. The court discussed the two recognized methods of rate making under Missouri law, the "file and suspend method" and the "rate case method." In either of these methods of reviewing requests regarding rates, the Commission is required to

consider all relevant factors, including all operating expenses and the utility's rate of return, in determining whether changes should be made to existing rates. UCCM, at p. 49. The court stated that to permit "such costs to be automatically adjusted" was "not within the contemplation of the authorizing statute." UCCM, at p.53.

6. The use of an FAC "permits one factor to be considered to the exclusion of all others in determining whether or not a rate is to be increased." UCCM, at p. 56. This single-issue rate making is prohibited by Missouri law. Rather, "[t]he Commission must consider all relevant factors including all operating expenses and the utility's rate of return, when determining a rate authorization." State ex. rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 812 (Mo. App. WD 1993). By adopting the proposed "experimental surcharge" the Commission will abdicate its responsibility in this regard, and allow the Company to set prices based upon one factor of operating costs -- the price of the fuel it uses to run the generators which produce the electricity it sells to its customers. The Company seeks to implement this one factor surcharge without regard to:

(1) whether it is prudent to incur those costs,

(2) whether there are less costly alternatives available to the company, or

(3) whether and how implementing this charge will affect the Company's overall rate or return.

7. By whatever name, this tariff filing requests authorization for a fuel adjustment clause, which this Commission cannot lawfully allow. Therefore, it is appropriate to dismiss this tariff filing and refuse to allow the Company to impose this "surcharge" on its customers.

II. Although the fuel adjustment clause, or "surcharge" requested by the Company is related to the cost of natural gas, this tariff filing is not analogous to a purchase gas adjustment clause (PGA clause), and so the holding of Midwest Gas Users Association v. PSC does not apply, and the Company's tariff filing should be dismissed.

8. In its Suggestions in Support of Tariff Filing, the Company suggests that the proposed tariff filing is not prohibited by Missouri law, citing as its authority, the case of Midwest Gas Users Association v. Public Service Commission, (MGUA) 976 S.W.2d 470 (Mo. App. WD 1998). This reliance is misplaced. The paragraph cited by the Company, at pp. 479-480 of the MGUA opinion, does indeed begin with the statement that "the PSC is not required to treat all items of cost and expense in exactly the same way." However, reading this paragraph in context reveals that the cost item, which is the subject of this proposed tariff, should continue to be treated as a component of the cost of production. As such, it remains just one of many relevant factors which the Commission must consider in the context of a rate case.

9. The MGUA opinion continues from the language quoted by the Company with the following discussion, harmonizing the holdings in the Hotel Continental v. Burton, (334 S.W.2d 75 (Mo. 1960)) and UCCM cases:

> "The taxes to be passed on through the (tax adjustment clause) were different in kind from the other expenses of the utility and could not be offset by other savings....
>
> Moreover, the reasons why the PSC is not to consider some costs in isolation - because it might cause the PSC to allow the company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area - did not apply to the TAC. ...
>
> By contrast, the (fuel adjustment clause) was just a formula stuck into the utilities' rate schedules. The companies could substitute new numbers in the formula and begin charging them without PSC oversight or approval. For this reason, as well as because the costs at issue were subject to the control of the utilities, and included labor costs and

other costs of producing electricity, and because the Court believed that the amount of money spent for fuel might affect the bottom line and could be offset by savings in other areas, the FAC was not approved." Id.

10. Although PGAs are allowed in natural gas cases, the court in MGUA made it quite clear that the purchase of natural gas cost incurred by local distribution companies, which supply natural gas to customers, is treated differently from a fuel component cost in producing electricity because the two industries are different. Unlike electricity generating companies, whose product must be produced with labor and materials, including a fuel cost component, when the local distribution company purchases natural gas, it is the same product it supplies to its end customer. The Court found the fact that "natural gas is a natural resource, not a product which must be produced with labor and materials" to be significant. MGUA, at 480.

11. The Court found that the PGA was a rate, not a formula. As such, PGA clauses are subject to the review of the PSC during ratemaking proceedings, including a prudence review before the rate is adopted. A further prudence review is conducted of the PGA and any ACA adjustments. All of these reasons were considered significant to the court in determining that PGA clauses did not constitute single issue ratemaking. By the same token, the very language of the MGUA case makes it clear that such considerations are restricted to the natural gas industry.

12. The proposed FAC or "experimental surcharge" the Company is requesting in this case concerns a mere component of the production costs of electricity, albeit the natural resource commodity of natural gas. For this reason, the Commission should not extend the special circumstance logic behind the decision in MGUA to allow the

company to proceed under the proposed tariff filing. Therefore, the proposed tariff filing should be disallowed and dismissed.

III. In the event that the commission does not summarily dismiss the proposed tariff filing as a matter of law, or dismiss following a hearing in the motion to dismiss, Public Counsel moves in the alternative to suspend the tariff and set this matter for hearing.

13. Public counsel moves for suspension of the proposed tariff for a number of reasons First, the Company filed a proposed tariff which purports to add an "experimental surcharge" to its rate schedule, which would address higher than expected prices for a fuel component, natural gas, of its electricity generating business.

14. Second, if approved, Company's proposed tariff would unlawfully and unreasonably increase an electricity rate without the opportunity for the Commission to consider "all relevant factors," including the impact that this new rate would have upon the revenue and expenses of Missouri Public Service.

15. Third, the Missouri Supreme Court has clearly stated that it is unlawful for the Commission to engage in single-issue ratemaking. State ex. rel. UCCM v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979). In the UCCM case, the court stated that:

"Even under the file and suspend method, by which a utilities rates may be increased without requirement of a public hearing, the commission must of course consider all relevant factors including operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended. See, State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704, 718-719, (Mo. 1957). However, a preference exists for the rate case method, at which those opposed to as well as those in sympathy with a proposed rate case can present their views. See, State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d, at 574." UCCM, at 49.

16. Fourth, the proposed tariff in this case, although related to the component natural gas, applies to only one component of Missouri Public Service's electricity producing operations. It would be inappropriate to consider that single component in a vacuum, for the reasons set forth at I and II, above.

17. Finally, even if the Company could demonstrate that the proposed tariff could be allowed by this Commission without a consideration of all relevant factors, the proposed tariff, as it currently exists cannot be allowed to go into effect absent a hearing because the current proposed tariff is unduly vague as filed. As such, it is not possible to determine the following:

a. The proposed tariff fails to clearly explain how the "maximum price (of natural gas) actually paid during the most recent 90 days" will be determined. Is this the maximum price paid by the Company in total? The proposed tariff does not specify whether the Company will use the maximum price of one-day spot purchases on the market, the maximum monthly NYMEX price, the maximum "bid week" price, or some other method of computation.

b. The proposed tariff fails to clearly explain how the Company will acquire the natural gas fuel, which would be subject to this rate. If the maximum price actually paid in the past 90 days is the maximum price actually paid by the company's electric utility, the Commission should be informed from whom the Company is purchasing that gas? If the natural gas is purchased from company's natural gas arm, the Commission needs to know whether the Company will purchase gas at the market rate or some other rate.

c. The proposed tariff fails to clearly explain how it arrived at the conclusion that this rate would take effect when costs increased by $30 to $78 per megawatt hour. Neither the suggestions nor the proposed tariff explain the correlation between cost increases between $30.00 and $78.00 in generating electricity and the cost of natural gas? The Company fails to state how it determined that increases in electricity generation costs in this $30-$78 range would be solely due to the cost of natural gas. Is the Company suggesting that a $30-$78 increase in its electricity production costs can *only* be the result of increases in the price of natural gas?

d. The proposed tariff fails to clearly explain the extent to which the Company is dependent on natural gas as a fuel source, and to what extent it has alternate fuel sources available to generate the needed electricity. Neither the Suggestions nor the proposed tariff identify the percentage of the Company's electric generating facilities, which use natural gas as a fuel source. The Company does not identify what other fuel sources available, i.e., coal, could be used, either by increasing reliance on coal-fueled generation during peak gas prices, or by some other method, in order to keep the production costs down.

e. The proposed tariff fails to demonstrate why this rate is necessary. The Company has failed to provide the Commission with all relevant factors regarding its current earnings. The Company's current earnings may be such that it can and should absorb any price increases without making changes to its rate schedule.

f. The proposed tariff fails to acknowledge that the Company's current rates are based upon a certain level of risk, which the Company will effectively reduce by implementing the proposed tariff. If the proposed tariff is approved, thereby effectively

removing the risk factor related to fuel costs, will that serve to lower the risk associated with investing in the Company such that this reduced risk factor should affect the ROE?

g. Upon investigation, other issues may arise which can best be addressed in an evidentiary hearing.

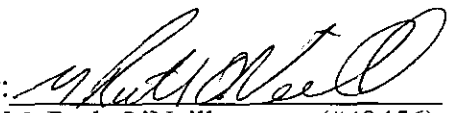
18. These and other issues must be addressed to the satisfaction of the Commission before it would be appropriate to allow this proposed tariff to take effect, even if the Commission was willing to consider the proposed tariff as something other than a rate. None of these issues can be adequately addressed unless the Commission suspends the tariff and sets this matter for a full evidentiary hearing.

Conclusion

WHEREFORE, the proposed tariff filing is a request for a fuel adjustment clause under another name. The Company is not entitled to the special treatment it requests, as a matter of law. Therefore, it is respectfully moved that this Commission grant the Public Counsel's request to dismiss the Company's proposed tariff filing in its entirety. In the alternative, Public Counsel respectfully moves to suspend the tariff and set this matter for an evidentiary hearing at which testimony can be presented to the Commission and considered by it in determining whether to allow this new rate or "experimental surcharge" to take effect.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 15th day of November 2000:

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