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November 17, 2000

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FILED²
NOV 17 2000
Missouri Public
Service Commission

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

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of a **STAFF MOTION TO SUSPEND TARIFF AND SCHEDULE AN EARLY PREHEARING CONFERENCE.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Steven Dottheim
Chief Deputy General Counsel
(573) 751-7489
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Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

NOV 17 2000

Missouri Public
Service Commission

In the Matter of the Tariff Filing of UtiliCorp
United Inc., d/b/a Missouri Public Service

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Case No. ER-2001-294

**STAFF MOTION TO SUSPEND TARIFF AND
SCHEDULE AN EARLY PREHEARING CONFERENCE**

Comes now the Staff of the Missouri Public Service Commission in response to the surcharge tariff filing of UtiliCorp United Inc. (UtiliCorp) on November 2, 2000 and UtiliCorp's Suggestions In Support Of Tariff Filing also filed on November 2, 2000 and requests that the Commission suspend the tariff, establish an intervention period and schedule an early prehearing conference for the purpose of suggesting to the Commission a procedural schedule that will permit adequate time for discovery, evidentiary hearings on the surcharge tariff and briefs on the legal issues presented by the surcharge tariff. In support of the Staff's response, the Staff states as follows:

1. The issues raised by UtiliCorp's filing are both factual and legal. UtiliCorp's surcharge tariff, and spare Suggestions In Support Of Tariff Filing, do not adequately address both the factual and legal questions raised by UtiliCorp's November 2, 2000 filing. The Staff would suggest to the Commission that the most appropriate procedure to adopt would be to not permit the surcharge tariff to go into effect by operation-of-law on the requested effective date of December 8, 2000 as requested by UtiliCorp. The UtiliCorp surcharge tariff is similar to the fuel adjustment clause (FAC) tariff found to be unlawful by the Missouri Supreme Court in *State ex rel. Utilities Consumer Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41 (Mo.banc 1979)(hereinafter referred to as *UCCM*). Contrary to UtiliCorp's assertion, the

UtiliCorp surcharge tariff is not akin to the purchased gas adjustment (PGA) clause found to be lawful by the Western District Court of Appeals in *State ex rel. Midwest Gas Users' Assoc. v. Public Serv. Comm'n*, 976 S.W.2d 470 (Mo.App. 1998)(hereinafter referred to as *MGUA*). Of course, UtiliCorp is well aware of the *UCCM* case, but in citing to *MGUA* chose not to even mention *UCCM* in its Suggestions In Support Of Tariff Filing.

The Court of Appeals, in affirming the Commission's use of an Actual Cost Adjustment/Purchased Gas Adjustment (ACA/PGA) in *MGUA*, carefully distinguished the PGA from an FAC. Critical to this analysis was the fact that in the PGA "the PSC is necessarily determining that due to the unique nature of gas fuel costs, including the fact that natural gas is a natural resource, not a product which must be produced with labor and materials, the fuel cost component of the rate must be treated differently than other components because it is different." 976 S.W.2d at 480. Thus, it is clear that in *MGUA*, the Appellate Court followed *UCCM*, but carefully distinguished the nature and use of natural gas as provided by gas utilities from the production of electricity by electric utilities. *Id.* There are other distinctions between the *MGUA* decision and the surcharge tariff proposal of UtiliCorp.

2. The Missouri Supreme Court in the *UCCM* case noted that the Commission may permit a tariff to go into effect without suspension but in doing so must consider all relevant factors:

. . . Even under the file and suspend method, by which a utility's rates may be increased without *requirement* of a public hearing, the commission must of course consider all relevant factors including all 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 Comm'n*, 308 S.W.2d 704, 718-19, 720 (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 can present their views. See *State ex rel. Laclede Gas Co. v. Public Service Comm'n*, 535 S.W.2d at 574.

The surcharge tariff filing made by UtiliCorp is not of the nature of the tariff filings that the Commission has permitted to go into effect without suspension, even though a request for suspension has been filed with the Commission. The tariff filings that the Commission has permitted to go into effect without suspension, even though a request for suspension has been filed with the Commission, generally have been tariffs either limited in the number of customers to whom the tariff applies, involving a choice by the customer who may opt to have the tariff apply to it or may opt to not have the tariff apply to it, or having the characteristics of tariffs that the Commission has authorized previously. The surcharge tariff filed by UtiliCorp applies to every electric customer taking electric service from UtiliCorp. The customer cannot opt out of having the tariff apply to it. Thus, the surcharge tariff effectuates general rate increases. The Commission has not approved an electric tariff similar to the UtiliCorp surcharge tariff filed in the instant case since the termination of electric utilities' fuel adjustment clause tariffs two decades ago.

3. The surcharge tariff in its "Purpose" section indicates that the tariff is designed to provide rate relief due to "undue financial hardship." The Commission already has established a long-standing procedure for providing emergency rate relief. (It should be noted that UtiliCorp's Suggestions In Support Of Tariff filing makes no mention of this asserted purpose of the tariff.)

The surcharge tariff states, in part, that:

. . . The surcharge is intended to recover certain increased costs above prescribed target levels in a timely manner, *preventing undue financial harm* to Missouri Public Service while *avoiding frequent, costly general rate increase requests*.

The Staff would suggest to UtiliCorp that if Missouri Public Service (MPS) is truly experiencing "undue financial harm," then UtiliCorp should consider filing an emergency

(interim) general rate increase case and a permanent general increase rate case while Case No. ER-2001-294 is being processed in a judicious and timely manner by being suspended by the Commission and a procedural schedule being established by the Commission.¹ The Western District Court of Appeals held in *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 567 (Mo.App. 1976)(hereinafter referred to as *Laclede*) that "the Commission has power in a proper case to grant interim rate increases within the broad discretion applied from the Missouri file and suspend statutes and from the practical requirements of utility regulation."

The Commission's criteria for interim (emergency) rate relief was noted by the Western District Court of Appeals in *Laclede* at 568 and was found by the Court to be lawful:

A majority of the Commission follows the principle that the purpose of a special hearing concerning interim rates is to ascertain whether emergency conditions exist which call for especially speedy relief, and the Report and Order expresses the view that an interim increase should be granted only "where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity." . . .

The Western District Court of Appeals noted in *Laclede* at 574 that:

It may be theoretically possible even in a purposefully shortened interim rate hearing for the evidence to show beyond reasonable debate that the applicant's rate structure has become unjustly low, without any emergency as defined by the Commission having as yet resulted. Although some future applicant on some extraordinary fact situation may be able to succeed in so proving, *Laclede* has singularly failed in this case to carry the very heavy burden of proof necessary to do so.

The Staff also would remind the Commission of the following testimony from Mr. John W. McKinney, UtiliCorp Vice President – Regulatory Services, in the Empire District

¹ The Commission has held that an interim general rate request cannot be entertained by itself without a permanent general rate case pending. In *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 565 (Mo.App. 1976), the Court found that "in its very nature, an interim request is merely ancillary to a permanent rate request...." and in *State ex rel. Fischer v. Public Serv. Comm'n*, 670 S.W.2d 24, 27(Mo.App. 1984), the Court held that "the interim rate case in issue, although assigned a different number from that assigned the permanent case by the Commission, has no independent status but is simply a part of the company's permanent rate request."

Electric Company – UtiliCorp merger evidentiary hearings respecting an impending rate increase case to be filed by UtiliCorp:

[Mr. Dottheim]: Are there present projections for Missouri Public Service to file any rate increase proceedings within the next five years?

[Mr. John W. McKinney]: Yes. We've notified the Staff last week and in casual conversation this week that we're looking at one at this very present time.

Q. And is that an electric or a gas or both?

A. It's electric, and gas is one of the main drivers the way prices have gone up.

Q. Does it also relate to the gas operations of Missouri Public Service?

A. No. Not at this time. On the gas side we have a PGA, and so that's not causing a general increase like it is on electric.

Q. Other than the one possible rate increase which you just referred to for the electric operations in Missouri Public Service, are there any projections for later in that five-year period, the next years, for there to be a Missouri Public Service electric rate increase case?

A. Yes. I believe when I testified in St. Joe I indicated there would be two. The first one may end up - - we're going to have conversations with the Staff and with the Office of the Public Counsel on filing mechanisms. There can be one case or two cases depending on how we can possibly agree on filing it, because right now we have these gas prices coming through and a power agreement that we need to address.

In 2001, 2002 we have a new purchase agreement coming in from a power plant, the Aries power plant, and then that contract will expire in about four years, and that'll probably, depending on power prices and the structure of the industry, may cause another case.

(September 12, 2000, Vol. 3, Tr. 461-62, Case No. EM-2000-369). There was no agreement between the Staff and UtiliCorp regarding UtiliCorp's instant surcharge tariff filing.

4. Although UtiliCorp does not state as much, the surcharge tariff itself effectuates general rate increases. Apparently UtiliCorp is willing to indicate this reality indirectly, by

labeling its filing with the "ER" – "electric rate" designation that appears to have been placed by UtiliCorp on the Suggestions In Support Of Tariff filed by UtiliCorp in conjunction with the surcharge tariff.

5. The Staff would note that as a general rate increase, UtiliCorp's filing is deficient because of its failure to include direct testimony consistent with Commission rule 4 CSR 240-2.065, Tariff Filings Which Create Cases. Also, it may be argued that consistent with the Missouri Supreme Court's *UCCM* decision, 4 CSR 240-2.065 prohibits a general rate increase effectuated by an adjustment clause or other similar filing provisions contained in a utility's tariffs. Commission rule 4 CSR 240-2.065 states, in part, as follows:

(1) A general rate increase request is one where the company or utility files for an overall increase in revenues through a company-wide increase in rates for the utility service it provides, but shall not include requests for changes in rates made pursuant to an adjustment clause or other similar provisions contained in a utility's tariffs. When a public utility submits a tariff which constitutes a general rate increase request, the commission shall establish a case file for the tariff. The tariff and all pleadings, orders, briefs, and correspondence regarding the tariff shall be filed in the case file established for the tariff. The tariff submitted shall be in compliance with the provisions of the rules relating to the separate utilities. A tariff filed which proposes a general rate increase request shall also comply with the minimum filing requirements of these rules for general rate increase requests. Any public utility which submits a general rate increase request shall simultaneously submit its direct testimony with the tariff.

(Emphasis added).

6. The Staff believes that an intervention period, adequate time for discovery and evidentiary hearings are required because of the significance of the substance of the provisions of the surcharge tariff (the meaning of which provisions are not necessarily clear to the Staff at this point) and the need to determine whether the surcharge tariff will produce just and reasonable rates if approved by the Commission. There also may be rate design issues respecting the surcharge tariff. From the Staff's very limited perusal of the surcharge tariff filed on November

2, 2000, the Staff has certain larger concerns at this stage without even addressing the surcharge tariff in detail:

- a. The surcharge tariff encourages uneconomic dispatch of MPS's generating units by providing an incentive for burning gas to generate electricity rather than coal, which is a less expensive fuel.
- b. The surcharge tariff encourages the purchase of more expensive gas or more expensive purchased power than otherwise would be the situation if there were no surcharge tariff in effect.
- c. In purportedly "preventing undue financial harm to Missouri Public Service while avoiding frequent, costly general rate increase requests," the surcharge tariff does not consider increased profits from interchange sales as an offset to the impact of "significant increases in the cost of natural gas used for electric generation and the increases in the cost of power purchased which are directly related to natural gas market prices."

7. The Staff would note that when increases in fuel costs due to inflation were a concern in the late-1970's and the early- to mid-1980's, "forecasted fuel" was a mechanism developed to address the inability to utilize a fuel adjustment clause due to the Missouri Supreme Court's holding in the *UCCM* case. Forecasted fuel is not being mentioned herein by the Staff as an alternative to UtiliCorp's surcharge tariff, but because the forecasted fuel mechanism was used in the context of an electric utility's general rate increase case when all other relevant factors were also reviewed and considered. The Commission chose to discontinue use of the forecasted fuel mechanism in the Kansas City Power & Light Company-Wolf Creek rate case, stating as follows:

A joint recommendation was submitted by Staff and Company which sets forth the incremental portion of fuel expense to be included in the rates established in this case. . . . The portion of rates which is based upon the additional revenue requirement associated with forecasted increases in the prices of coal and gas (unless it was excluded under paragraph 2 of the joint recommendation) will be subject to true-up (rate reduction) and refund. . . .

Public Counsel opposes the joint recommendation and believes the Commission should deny any increment to the Company's fuel expense which is related to

forecasted fuel. . . . Public Counsel maintains that the Commission should no longer engage in a forecasted fuel procedure which allows a utility to change its rates after the operation of law date with consideration given to only one of several factors affecting those rates; i.e.: fuel costs.

. . . . The Commission finds the allowance of forecasted fuel is an extraordinary remedy for highly inflationary times which protects the Company from paying costs which are beyond its control.

The Commission finds that low inflation rates and stabilizing fuel prices indicate there is no need for forecasted fuel in the instant case. . . .

The Commission does not mean to infer by this decision that it will abandon forecasted fuel as a matter of regulatory policy. The Commission finds a fuel forecast is unnecessary based upon the facts of this case.

Re Kansas City Power & Light Co., Case No. EO-85-185 and EO-85-224, 28 Mo.P.S.C.(N.S.) 228, 403-04 (1986).


8. It is not clear from UtiliCorp's filing why the proposed surcharge tariff is characterized by UtiliCorp as an experiment, and what is it that UtiliCorp means by calling the surcharge tariff an experiment. In thinking of experiments, the Staff thinks of matters that offer benefits to both the utility and its customers. Although not a basis for rejecting UtiliCorp's surcharge tariff proposal, UtiliCorp's filing identifies only benefits for UtiliCorp from the surcharge tariff. Again, if UtiliCorp is asserting in essence the existence of a financial emergency which threatens MPS's ability to provide safe and adequate service, UtiliCorp has provided nothing that shows that to be the case and the mechanism for emergency rate relief is already available to UtiliCorp.

Wherefore the Staff requests that the Commission suspend the surcharge tariff filed on November 2, 2000 by UtiliCorp, establish an intervention period and schedule an early prehearing conference for the purpose of suggesting to the Commission a procedural schedule

that will permit adequate time for discovery, evidentiary hearings on the surcharge tariff and briefs on the legal issues presented by the surcharge tariff.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 17th day of November 2000.



Service List for
Case No. EO-2001-294
November 13, 2000

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