

LAW OFFICES

BRYDON, SWEARENGEN & ENGLAND

PROFESSIONAL CORPORATION

312 EAST CAPITOL AVENUE

P.O. BOX 456

JEFFERSON CITY, MISSOURI 65102-0456

TELEPHONE (573) 635-7166

FACSIMILE (573) 635-0427

DAVID V.G. BRYDON  
JAMES C. SWEARENGEN  
WILLIAM R. ENGLAND, III  
JOHNNY K. RICHARDSON  
GARY W. DUFFY  
PAUL A. BOUDREAU  
SONDRA B. MORGAN  
CHARLES E. SMARR

DEAN L. COOPER  
MARK G. ANDERSON  
TIMOTHY T. STEWART  
GREGORY C. MITCHELL  
RACHEL M. CRAIG  
BRIAN T. MCCARTNEY  
DALE T. SMITH

OF COUNSEL  
RICHARD T. CIOTTON

November 22, 2000

Dale Hardy Roberts  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

FILED<sup>3</sup>

NOV 22 2000 *nh*

Re: Case No. <sup>ER</sup> ~~EM~~-2001-294

Missouri Public  
Service Commission

Dear Mr. Roberts:

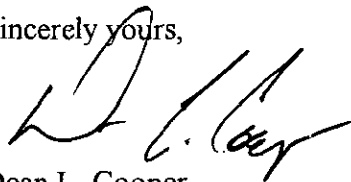
Enclosed for filing on behalf of UtiliCorp United Inc., please find an original and eight (8) copies of UtiliCorp's Response to Public Counsel's Motion to Dismiss.

Copies of this filing will be provided to all parties of record.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,



Dean L. Cooper

DLC/lar

Enclosure

cc: All Parties of Record

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

**FILED**  
NOV 22 2000

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

Case No. ER-2001-294

Missouri Public  
Service Commission

**RESPONSE OF UTILICORP TO PUBLIC COUNSEL'S  
MOTION TO DISMISS**

COMES NOW, UtiliCorp United Inc., d/b/a Missouri Public Service ("UtiliCorp") and for its Response to the Motion to Dismiss filed by the Office of the Public Counsel ("Public Counsel") on or about November 15, 2000 respectfully states as follows to the Missouri Public Service Commission ("Commission"):

1. Public Counsel's Motion to Dismiss the subject tariff filing on the grounds that it constitutes an unlawful Fuel Adjustment Clause is not compelling and should be denied. The essence of Public Counsel's argument is that UtiliCorp's proposed fixed-rate surcharge, designed to offset a portion of the natural gas price increases experienced by UtiliCorp in connection with electric generation and purchased power, is an unlawful "automatic fuel adjustment formula" and constitutes "improper" single-issue ratemaking. The Public Counsel is wrong on both counts.

2. The case law in Missouri is well-established with respect to the factors which should be considered in determining the lawfulness of a tariff such as UtiliCorp's proposed fixed-rate surcharge. The most recent pronunciation on this topic is found in State ex. rel. Midwest Gas Users Association et al. v. Missouri Public Service Commission, 976 S.W. 2d 470 (1998), ("the MGUA case"). There the Missouri Court of Appeals, Western District, with the decision of the Missouri Supreme Court in State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC 585 S.W.2d 41 (Mo. Banc 1979) ("the UCCM case") firmly in mind, described the criteria as follows:

- Whether the proposal constitutes an abdication of ratemaking authority to the

utilities;

- Whether the proposal constitutes a violation of the filed rate doctrine;
- Whether the proposal constitutes improper single-issue ratemaking; and
- Whether the proposal constitutes improper retroactive ratemaking. (MGUA p. 479)

While the Public Counsel is apparently only concerned about two of these criteria, UtiliCorp will address all four in an effort to assure the Commission that the proposed surcharge is consistent with both the UCCM and MGUA decisions.

3. Abdication of Ratemaking Authority to the Utilities

Under the file and suspend statutes, the Commission has the ultimate authority to approve the fixed-rate surcharge tariff proposed by UtiliCorp before it goes into effect. There is nothing magical about this tariff which eliminates the Commission's jurisdiction in this regard or which will prevent the Commission from suspending the tariff if it so chooses. It will not be implemented automatically. The Public Counsel apparently does not challenge the tariff on this basis and concedes the lawfulness of the tariff on this point when it requests, alternatively, that the tariff be suspended and set for hearing. Moreover, any such surcharge tariff which may be approved initially by the Commission is, under UtiliCorp's proposal, subject to Commission review and revision every six months thereafter. It is not an "automatic" adjustment clause which can change without Commission authorization. Furthermore, under the proposal, any over-collection of gas costs will result in refunds to customers with interest based on UtiliCorp's customer deposit interest rate. Any under-recovery will not be collected. Clearly, given these facts it cannot be said that the fixed-rate surcharge proposal will result in the abdication of ratemaking authority on part of the Commission.

4. Violation of the Filed Rate Doctrine

The purpose of the "filed rate doctrine" is to provide for a rate to be filed with the Commission so that the consuming public will have the ability to determine what the actual rate or charge will be. As indicated, the proposed tariff constitutes a fixed-rate surcharge. The proposal is not, as alleged by the Public Counsel, a "formula" simply stuck into rate schedules which can be adjusted at will by UtiliCorp. The proposed surcharge will be a preset rate published in UtiliCorp's tariffs on file with the Commission. Each UtiliCorp customer, in reviewing the tariff, will know exactly what he or she is being charged. Accordingly, there is no violation of the filed rate doctrine.

5. Improper Single Issue Ratemaking

This is the same argument raised unsuccessfully by the Public Counsel in the MGUA case, supra. In ruling against the Public Counsel in that case, the Court of Appeals recognized that the Missouri General Assembly "has at least impliedly approved the principle that the PSC has the authority to adjust rates outside a general rate proceeding". (MGUA p. 477). Moreover, citing Hotel Continental v. Burton, 334 S.W. 2d 75 (Mo 1960) and the UCCM case, the Court of Appeals emphasized, at page 479, that as a part of its duty of setting reasonable rates, the Commission has the power to treat some items of operating expenses differently from others. In doing this, however, the Commission must not contravene the purpose of the statutes requiring it to retain regulatory control over rates.

As explained previously, there is no question that the Commission will retain regulatory control over the proposed tariff. Moreover, as in the MGUA case involving the purchase gas adjustment clause, the subject of the proposed surcharge is natural gas which the MGUA Court recognized as unique. The MGUA Court found that natural gas is "a commodity" and a "natural

resource, not a product which must be produced with labor and materials." (MGUA p. 482, 480). This distinction, according to the MGUA Court, allows "the fuel cost component of the rate" to "be treated differently than other components because it is different." (MGUA p. 480). The Missouri Supreme Court apparently agreed with this reasoning as it refused to take the decision for review. The obvious conclusion is that MGUA is not inconsistent with UCCM.

The same considerations are applicable here. The proposed surcharge seeks to recover only a portion of the involved price increases for natural gas used to generate electricity based on the actual cost of the gas itself. The surcharge also seeks recovery of the gas component of purchased power. Just as natural gas is a commodity and thus unique, likewise purchased power is a commodity bought and sold on the Chicago Board of Trade and the gas or "commodity" component of this other "commodity" should also be afforded the ratemaking treatment found lawful by the Courts. The point is that all of these features of UtiliCorp's proposed surcharge remove it from the realm of unlawful single-issue ratemaking. Consequently, the tariff does not violate this standard.

6. Improper Retroactive Ratemaking

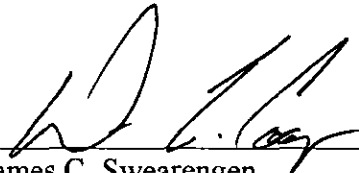
Because the surcharge is worded to be applied only on a prospective basis to future customers on future bills, and there is no provision for anyone to be retroactively charged a different amount for a service already taken, there is no retroactive ratemaking involved and the Public Counsel does not challenge the tariff on this basis.

7. In summary, it is clear that the proposed tariff satisfies the MGUA criteria. Furthermore, it is apparent that the MGUA decision is consistent with UCCM. Moreover, the logic behind the decision of the Court of Appeals in the MGUA case, in upholding the lawfulness of the purchase gas adjustment clause, is equally applicable to UtiliCorp's proposal. The proposed fixed-

rate surcharge involves only natural gas, a "unique commodity" and the natural gas competent of another commodity, purchased power. It is not an unlawful "automatic fuel adjustment formula" and does not otherwise run afoul of Missouri statutes or caselaw. As indicated, it meets the criteria of the MGUA case and that Court's interpretation of the UCCM decision, an interpretation not overruled by the Missouri Supreme Court.

8. UtiliCorp has no objection to the Public Counsel's alternative request to suspend the proposed tariff and set this matter for an evidentiary hearing. In this regard, UtiliCorp respectfully suggests that an early prehearing conference be ordered so that a schedule may be proposed to permit the processing on this matter.

Respectfully submitted,



James C. Swearengen #21510

Dean L. Cooper #36592

Brydon, Swearengen & England P.C.

P.O. Box 456

Jefferson City, MO 65102-0456

Telephone (573) 635-7166

Facsimile (573) 635-0427

E-Mail [Lrackers@brydonlaw.com](mailto:Lrackers@brydonlaw.com)

Attorneys for UtiliCorp United Inc.

**Certificate of Service**

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 22<sup>nd</sup> day of November, 2000, to all parties of record.

