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November 30, 2000

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

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 **Reply to UtiliCorp United, Inc.'s Response to Public Counsel's Motion to Dismiss.** 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

REPLY TO UTILICORP UNITED, INC.'S RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS

COMES NOW, the Office of the Public Counsel (Public Counsel), and hereby respectfully replies to the response filed by UtiliCorp United Inc., d/b/a Missouri Public Service (Company), in regard to Public Counsel's Motion to Dismiss Company's proposed tariff filing. The Company's response does not answer the many questions raised in Public Counsel's Motion to Dismiss, nor does it clarify the Company's reasons for requesting this "surcharge" tariff. Public Counsel stands by and continues to advance all arguments in its Motion to Dismiss, although some arguments will not be repeated here. However, because the Company's response misstates the law and misconstrues portions of Public Counsel's argument in the Motion to Dismiss, this reply is necessary.

1. The proposed "surcharge" tariff is properly characterized in the motion to dismiss as a fuel adjustment clause. The characterization is descriptive and does not depend whether or not the "surcharge" is adjusted "automatically", or is renewed (adjusted) every six months. What makes this proposed "surcharge" tariff virtually identical to the outlawed fuel adjustment clause is the fact that the "surcharge" would be imposed based solely upon the price of one type of fuel (among many) used by the Company to produce of electricity: natural gas. It does not involve costs related to a mere pass-through of a commodity (natural resource) that the utility sells. A rate

imposed on the basis of a single cost related to production, without regard to all other relevant factors, falls squarely into the fuel adjustment clause category. The Company's suggestion that its "surcharge" proposal is anything other than single-issue ratemaking is wrong on its face. This is single-issue ratemaking in its purest form.

2. The Company continues to advance the argument that the Commission's decision in this matter should be governed by State ex rel. Midwest Gas Users Association et al. v. Missouri Public Service Commission, 976 S.W.2d 470 (1998) (MGUA). Public Counsel agrees that the MGUA case would be helpful to the commission in deciding this matter, but disagrees with the Company's claim that the MGUA case dictates approval of the proposed tariff. The Company argues that it should be allowed to impose this "surcharge" because the proposed "surcharge" relates to Company's costs as an end purchaser of natural gas, which Company uses to produce the commodity it sells: electricity. This reliance is misplaced, and fails to recognize that the Court's core rationale in the MGUA case is that purchase gas adjustment clauses are permitted to natural gas distributors because of the unique nature of natural gas: a commodity which is also a natural resource. While electricity is a commodity, it is not, at least as marketed and/or purchased by the Company, a natural resource.

3. The Company is mistaken to state that Public Counsel has "concede[d] the lawfulness of the tariff " on the issue of whether the proposed tariff "constitutes an abdication of rate-making authority to the utilities." Public Counsel does not concede that this proposed tariff is lawful in any respect. Whenever a utility is given the authority to change its rates without consideration of all relevant factors, the authority of the Commission is diminished, and the authority of the Company is enhanced. Regardless of

the whether the Commission decides that this proposed tariff would result in an abdication of some of its ratemaking authority, the proposed tariff should not be approved.

4. The Company states that the proposed "surcharge" tariff does not constitute a violation of the "filed rate doctrine." It is heartening to see that the Company now concedes that its proposed "surcharge" is, in fact, a rate. Public Counsel concedes that the proposed tariff was indeed filed. However, the proposed tariff is a rate which will result in a general rate increase, and the Company failed to comply with the legal requirements of filing for a rate increase when it failed to file direct testimony in support of the requested rate increase. (See, Rule 4 CSR 240-2.065, Tariff Filings Which Create Cases.) The failure to file testimony is but one example of the legal requirements the Company did not meet. By failing to comply with the Rule, the Company has failed to provide the Commission with the necessary information to decide whether to approve the rate increase.

5. The Company claims that the proposed "surcharge" tariff will not result in improper single-issue ratemaking. This claim is without merit. The proposed tariff will effect a general rate increase. The law requires the Commission to consider all relevant factors when asked to approve a general rate increase "including all operating expenses and the utility's rate of return". See, State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704, 718-719 (Mo. banc 1957). The Company attempts to circumvent this basic regulatory requirement by its insistence that the MGUA case controls its request, even though that case is clearly inapposite to this situation. The Company cloaks its proposed tariff in natural gas clothing, but the Company is not selling

natural gas to its customers; it is selling electricity. In the MGUA case, the distribution of natural gas and the production and distribution of electricity are clearly distinguished.

In that case, the Western District Court of Appeals stated that "the costs which the PGA mechanism allows the (gas) companies to pass on are almost entirely the cost of obtaining the gas itself; they do not include the type of labor and material costs used in the making of electricity." 976 S.W.2d, at 482. Public Counsel would agree that the MGUA case should be considered by this Commission because, under the rationale of MGUA, the Company's request for this "surcharge" must fail.

The Company admits, at page 4 (in its last paragraph under the topic "single issue ratemaking"), that the proposed tariff seeks to recover the increased price it may have to pay "for natural gas used to generate electricity". It therefore admits that it is seeking this special rate treatment because of material costs used in the making of electricity" which the MGUA case continues to prohibit, following the rule established in State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979)(UCCM).

6. The Company makes much of language at page 479 of the MGUA case regarding the authority of the Commission's authority to determine it will not "treat all items of cost and expense in exactly the same way." 976 S.W.2d, at 479. This language must be read together with the language of the rest of the opinion, including the following language at p. 480: "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."

The MGUA Court goes on to state that fuel adjustment clauses, such as the proposed tariff in this case, deal with costs which are "subject to the control of the utilities" including labor and production costs of producing electricity. Id. The decision by the Company, to use natural gas to power the generators used to make electricity, is a cost within the control of the Company. Further, the decision to purchase power rather than generate power with cheaper, coal-fired generators, is a cost within the control of the company. These costs, if incurred, could be offset by savings in other areas. If no offsetting savings are available to the Company, it is free to file a rate case and demonstrate that the "surcharge" in the proposed tariff is necessary in order to allow the Company to have an opportunity to earn its authorized rate of return.

7. While the limited information which the Company provided to the Commission regarding its proposed tariff does not suggest that adoption of this tariff would constitute improper retroactive ratemaking, this factor is not case dispositive. Public Counsel reserves the right to make any challenges on this basis, should Public Counsel learn that the Company is attempting to impose this "surcharge" tariff retroactively.

8. If the Commission remains unwilling to dismiss the tariff filing at this time, suspension is in order. Public Counsel requests that adequate time be granted within any such schedule to allow all relevant factors in this matter to be investigated properly.

WHEREFORE, the Company has filed a proposed tariff, which proposes to raise rates on the basis of a single issue. The Company has not provided sufficient information to the Commission to determine whether the increase is justified, either on an "experimental" or any other basis. For the forgoing reasons, and those set forth in the original Motion to Dismiss, it is respectfully moved that this Commission dismiss the tariff filing, and deny the Company's request to impose this new rate. In the alternative, Public Counsel renews its request for an evidentiary hearing in this matter.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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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 30th day of November 2000:

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