

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>  
JAN 4 2001

Missouri Public  
Service Commission

In the matter of the Tariff Filing       )  
of UtiliCorp United Inc. d/b/a           )  
Missouri Public Service Company for       )  
an automatic natural gas adjustment       )  
clause                                       )

ER-2001-294

PROPOSED PROCEDURAL SCHEDULE  
OF JOINT INTERVENORS  
SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION,  
WIRE ROPE CORPORATION OF AMERICA, INC. AND  
TRANSWORLD AIRLINES, INC.

AND

RESPONSE TO PROPOSED PROCEDURAL SCHEDULE OF UTILICORP UNITED

COME NOW Joint Intervenors SEDALIA INDUSTRIAL ENERGY  
USERS' ASSOCIATION ("SIEUA"), WIRE ROPE CORPORATION OF AMERICA,  
INC, ("Wire Rope") and TRANSWORLD AIRLINES, INC. ("TWA") and  
pursuant to earlier orders of the Commission propose a procedural  
schedule and respond to the proposed procedural schedule proposed  
by UtiliCorp United Inc. d/b/a Missouri Public Service ("MoPub")  
as follows:

I.

Proposed Procedural Schedule

1. Pursuant to Commission Order, the parties met in  
an early prehearing conference on December 28, 2000. Parties  
represented were MoPub (represented by counsel and by relevant  
MoPub/UtiliCorp personnel), counsel for the Missouri Public

Service Commission Staff, counsel for the Missouri Public Counsel and counsel for these intervenors.

2. At that December 28 conference, a procedural schedule was discussed that permitted time for usual discovery or data requests, the needed rounds of direct and rebuttal testimony, adequate time for lists of issues and statements of position to be developed and submitted, and a reasonable decision time for the Commission itself. It was understood by these intervenors that there was consensus on that schedule, save for a final determination of available hearing dates as indicated above.

3. On January 2, 2001, these Intervenorers were surprised to learn that the discussed schedule was neither agreeable to MoPub and that, apparently in MoPub's view, an acceptable schedule could not be fashioned. No such discussion occurred at the prehearing conference.

4. The procedural schedule discussed, which is agreeable to these Intervenorers, and which they would respectfully recommend, is as follows:

Company files direct	January 16, '01
Staff/PC/Interv. direct	March 20, '01
Prehearing Conference	March 29, '01
Rebuttal (all parties)	May 9, '01
Surrebuttal (all parties)	June 7, '01
List of Issues	June 12, '01
Statements of Position	June 15, '01

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Evidentiary Hearing

June 21-22, '01<sup>1/</sup>

[Operation of Law Date]

September 30, '01

5. The foregoing schedule provides sufficient, but not extensive time for accelerated processing of this case including time for discovery, direct testimony and rebuttal and surrebuttal by all parties to narrow and crystallize issues. This schedule also presented the matter to the Commission for its decision at an early date. A decisional period sufficient to permit the Commission to act well in advance of the September 30 operation of law date was proposed to be accommodated.

6. These intervenors believe that the foregoing schedule, even with some minor adjustment for available hearing dates in the general range of those indicated, is not only reasonable but should be acceptable. It is recommended to the Commission for approval.

## II.

### Response to Motion for Expedited Treatment

Rather than follow the Commission's earlier Order regarding proposals for a procedural schedule, MoPub has, instead, sought to interrupt, intercept and derail the orderly process directed by the Commission. The Commission had earlier

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<sup>1/</sup>Staff counsel was to verify the availability of these dates. If they were not available, other dates in this range would likely be available.

acted to suspend MoPub's filing **for the full statutory period** to accommodate the rights of other parties including due process rights such as discovery, appropriate testimony presentations, the opportunity to respond to opposing testimonial presentations, an opportunity to prepare their respective cases and an opportunity for a hearing at a reasonable time and under reasonable conditions.

These Intervenor's oppose the Motion for Expedited Treatment and the procedural schedule proposed therein. MoPub's proposed procedural schedule is unreasonable and, arguably, unlawful.

**A. MoPub's Proposed Procedural Schedule Is Unreasonable In That It Provides Woefully Insufficient and Inadequate Time for Opposing Parties to Obtain Needed Discovery and Otherwise Prepare for a Hearing at a Meaningful Time.**

1. MoPub's proposed procedural schedule is unreasonable because it completely fails to provide other parties with opportunity for discovery and for presentation of their respective cases.

2. Having initially violated Commission rules by failing to file direct testimony or support with its initial filing, MoPub now proposes to file that testimony on January 16, expecting other parties to respond **only thirteen (13) days later**. This thirteen day period is woefully insufficient. Commission rules provide for a twenty day turn-around for data requests (the

most common form of discovery in these proceedings). 4 CSR 240-2.090(2). Missouri Rules of Civil Procedure would require a **thirty day** response time for interrogatories, document production or other discovery requests. 4 CSR 240-2.090(1); Mo. R. Civ. Proc. 57.01(a). Opposing parties would not be able to obtain responses to data requests even if such requests were posed concurrently with the filing of MoPub's testimony.

3. Even assuming that initial responses from MoPub were accelerated and were sufficient -- an unlikely prospect in the circumstances -- this would leave opposing parties with only hours to prepare purportedly responsive testimony, a result that is patently unreasonable.

4. Under MoPub's proposal, opposing parties are denied the opportunity to present their own affirmative proposals through direct testimony. This point significantly relates to the requirement that all relevant factors be considered in this proceeding. That law applies to require consideration of **all** relevant factors, MoPub is not the sole determiner of what factors are relevant.

5. The exclusion of discovery from this proceeding makes it inherently one-sided and inherently unfair. Under Missouri law, Commission proceedings must be conducted in a fair manner with opportunities for all parties to present their views through a meaningful hearing. Due process requires that administrative hearings be fair and consistent with rudimentary elements

of fair play. *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39, 43 (Mo.App. 1982), cert denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). The ratemaking process is supposed to involve fair play and a full hearing. *State ex rel. Arkansas Power & Light Company v. Public Service Commission*, 736 S.W.2d 457, 460 (Mo. App. 1987). MoPub appears to assume that no other parties have due process rights. MoPub is wrong. It is not entitled to steam roll its case over other parties' due process rights.

**B. MoPub's Proposed Procedural Schedule is Unlawful Because It Operates to Deny Opposing Parties Due Process Rights and Precludes Even Identification of Other Relevant Factors, Much Less Consideration of Them By the Commission.**

1. MoPub's proposed procedural schedule is unlawful because it would preclude not only Commission **consideration** of all relevant factors but would frustrate even the disclosure and identification of relevant factors through discovery.

2. The Commission has acted to suspend this proposed tariff. In doing so, the Commission has, on behalf of the opposing parties, now invoked the panoply of legal protections for fair process and consideration of all relevant factors. This is now a contested case under Missouri law. Pursuant to § 393.150 RSMo, a utility may file a schedule stating a new rate or charge, rule or regulation, which becomes valid unless suspended by the Commission. See, *State ex rel. Jackson County v. Public*

*Service Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), cert. denied, 429 U.S. 822, 50 L. Ed. 2d 84, 97 S. Ct. 73 (1976). In acting to suspend a tariff filing for investigation, the Commission may act on its own motion or upon the request of other interested parties.

If suspended, the Commission must within a specified period hold a hearing concerning the propriety of the new rate, charge, rule or regulation. Section 393.150. A hearing may also be had without the filing of a new rate, if a complaint is filed, or on motion of the commission, §§ 393.260, 386.390. The commission may investigate any matter as to which a complaint may be filed, or in order to enable it to ascertain facts requisite to the exercise of any powers conferred upon it. Section 393.270(1). At the conclusion of any hearing and investigation, the commission shall set the maximum price to be charged for the electricity, §§ 392.270(2), 393.270(3). **An interim rate increase may be requested where an emergency need exists**, State ex rel. Laclede Gas Co. v. Public Service Comm'n, 535 S.W.2d 561, 568 (Mo. App. 1976); § 393.150.

State ex rel. Utility Consumers Council of Missouri, Inc., 585 S.W.2d 41, 48 (Mo en banc 1979) ("UCCM") (bolded emphasis added).

3. UCCM and other cases require that all relevant factors be considered. In UCCM, supra, the Missouri Supreme Court held:

This court has interpreted [the statutory provision] in a case addressing the method of valuation of property in determining the utility's proper rate of return: "[The] phrase 'among other things' clearly denotes that 'proper determination' of such charges is based upon all relevant factors," State ex rel. Missouri Water Co. v. Public Service

*Comm'n*, 308 S.W.2d 704, 719 (Mo. 1957), and that:

"however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by competent and substantial evidence upon the whole record.' Article V, § 22, Constitution of Missouri, V.A.M.S." *Missouri Water Co.*, 308 S.W.2d at 720.

*UCCM*, *supra*, at 56 (bolded emphasis added).

4. To be considered, these relevant factors must be identified. For example, here MoPub claims that only one portion of its fuel costs have increased. MoPub is silent regarding other changes in its fuel mix, its purchased power and net interchange sales and its current coal costs. MoPub is similarly silent about other non-fuel cost changes that may have occurred including distribution of UtiliCorp holding company-level costs to its newly acquired subsidiary St. Joseph Light & Power.<sup>2/</sup>

5. Any procedural schedule that would frustrate the objective of identifying those other relevant factors frustrates the statutory objectives, violates the law as declared by the Missouri Supreme court, denies opposing parties their ability to

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<sup>2/</sup>The Commission will no doubt recall the basic assertions of holding company-level costs that were to be allocated to the new St. Joseph Light & Power division. A portion of those costs would necessarily come from (and thus reduce the amount of such costs allocated to) MoPub.



investigate MoPub's claims and effectively prepare opposing cases, and by definition is unlawful and could not result in a lawful order.

6. MoPub selectively seeks to recover increased costs in one specific area of its fuel costs without the consideration (or under a schedule that frustrates even identification) of other relevant factors. This is single issue ratemaking at its boldest, and is in flagrant violation of Missouri law. See, *UCCM, supra*.

7. We frankly suspect that MoPub has the intent from this schedule of permitting the Commission a piddling opportunity to reject its filing after a purported "hearing," then run up the street to the General Assembly with a half-baked proposal to override the UCCM case. There is no other reason to expect a decision in March -- MoPub would still like to hopper its bill, but knows that, as long as the matter is before the Commission, it is unlikely to receive any consideration from the General Assembly. Indeed, that risk may be present, unless the Commission adopts a reasonable procedural schedule in this proceeding that is respectful of the rights of all parties. Given recent experience, the General Assembly may be expected to be reluctant to take away a case from the Commission or to intervene in a matter pending before the Commission.

8. It should not be lost on the Commission that, in the years since the UCCM decision, the General Assembly has not

chosen to act to empower the Commission to adopt a fuel adjustment clause. During that period, Missouri's utilities have generally faced declines in fuel costs -- *and have significantly benefitted from the regulatory lag and rate case/complaint procedures associated with rate reductions, all the while reaping significant financial benefits from declining costs.* Only when there is a short-term reversal in **only one item of those costs** does this utility now seek an "accelerated schedule." Records at the Commission are replete with examples of utility delays in reducing rates as costs declined. Indeed, most recently, this very utility sought a five-year rate "freeze" (that would have barred the Commission Staff, Public Counsel and any customers from seeking a rate reduction) in two merger cases while this utility simultaneously argued that the costs of operation of the combined entities would dramatically decline.<sup>3/</sup> The rules do not work just one way.

9. MoPub always has the option of filing a rate case and can certainly accompany that rate case with a request for interim relief. That very course of action was explicitly suggested by the UCCM court:

If the electric companies are faced with an "emergency" situation because of rising fuel costs, **they can take advantage of the method**

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<sup>3/</sup>Missouri Public Service Commission Case Nos. EM-2000-292 [St. Joseph Light & Power Co. and UtiliCorp United, Inc.] and EM-2000-369 [Empire District Electric Company and UtiliCorp United, Inc.]

*set up by the legislature to deal with such situations and file for an interim rate increase on the basis of an abbreviated hearing*, State ex rel. Laclede Gas Co., 535 S.W.2d at 566-67.

UCCM, *supra*, at 57 (bolded emphasis added). Since that opportunity is available, it is suspicious that MoPub seeks to constrain the Commission's view to only one selective cost, and to do so on essentially an emergency basis. MoPub would seem to want the speed of the emergency remedy without having made (or perhaps being able to make) the requisite evidentiary showing.

10. If that rate case is filed in March as is suggested by MoPub, this short-term fly-up of natural gas rates will be well within the test year that would reasonably be used. If MoPub were able to make a clear case for emergency interim relief, then it would be able to recover these costs under that procedure under such rules and restrictions as the Commission, upon evidence, might impose. Such a procedure would necessarily involve the consideration of all relevant factors and thereby avoid drawing the Commission into prohibited single issue ratemaking.

WHEREFORE, for the foregoing reasons, the recommended procedural schedule noted in Section I.4 of this pleading should

be approved and the Motion for Expedited Treatment, and the therein suggested schedule should be rejected as unreasonable.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

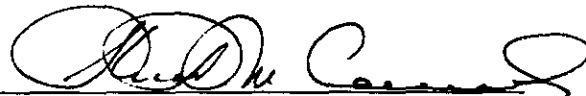


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ATTORNEYS FOR JOINT INTERVENORS  
SEDALIA INDUSTRIAL ENERGY USERS'  
ASSOCIATION, WIRE ROPE CORPORATION  
OF AMERICA, INC. and TRANSWORLD  
AIRLINES, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by U.S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.



Stuart W. Conrad

Dated: January 4, 2001