LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

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

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427
Email: PAULB@BRYDONLAW.COM

DEAN COOPER
MARK G. ANDERSON
TIMOTHY T. STEWART
GREGORY C. MITCHELL
BRIAN T. McCARTNEY
DALE T. SMITH
BRIAN K. BOGARD

OF COUNSEL
RICHARD T. CIOTTONE

FILED
SEP 18 2001
Missouri Public Service Commission

September 18, 2001

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102

Re: In the Matter of the Joint Application of Gateway Pipeline Company, Inc., Missouri Gas Company and Missouri Pipeline Company, Case No. GM-2001-585

Dear Mr. Roberts:

On behalf of UtiliCorp United Inc., I deliver herewith an original and eight (8) copies of each of the following documents:

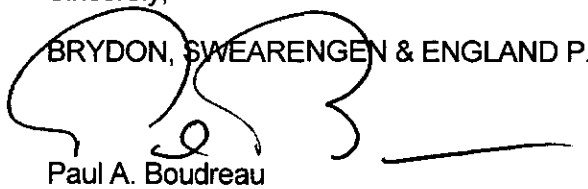
- Post-Hearing Brief of UtiliCorp United Inc., Missouri Pipeline Company and Missouri Gas Company; and
- Proposed Findings of Fact, Conclusions, and Ordered Paragraphs Submitted by UtiliCorp United Inc., Missouri Pipeline Company and Missouri Gas Company.

Please note that both of these documents are to be filed with the Commission in the referenced case. A copy of each document is also being hand-delivered to The Office of the Public Counsel this date and have been mailed to all parties of record.

Additionally, I have enclosed an extra copy of both documents which I request that you stamp "Filed" and return to the person delivering same to you. Thank you for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 
Paul A. Boudreau

PAB:aw
Enclosures
cc: Office of the Public Counsel
Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Gateway Pipeline Company, Inc. Missouri Gas Company and Missouri Pipeline Company.	))))	Case No. GM-2001-585

POST-HEARING BRIEF OF UTILICORP UNITED INC., MISSOURI PIPELINE COMPANY AND MISSOURI GAS COMPANY

Paul A. Boudreau #33155
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102
Telephone: (573) 635-7166
Facsimile: (573) 635-0427
E-Mail: PaulB@brydonlaw.com

TABLE OF CONTENTS

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POST-HEARING BRIEF OF UTILICORP UNITED INC., MISSOURI PIPELINE COMPANY AND MISSOURI GAS COMPANY

I. INTRODUCTION

Although much has been said in the course of this proceeding leading up to this point, the case before the Commission is, ultimately, rather straightforward. UtiliCorp United Inc. ("UtiliCorp") and Gateway Pipeline Company ("Gateway") have entered into an agreement pursuant to which the capital stock of UtiliCorp Pipeline Systems, Inc. ("UPL"), the unregulated parent company of Missouri Pipeline Company ("MPC") and Missouri Gas Company ("MGC"), will be sold to Gateway by UtiliCorp. UtiliCorp, as owner of the capital stock of UPL, has the right to sell this stock as it sees fit unless such a sale would be detrimental to the public interest. Accordingly, the Commission's task is to determine in this case whether the sale of the UPL stock will be detrimental to the public interest.

In this brief, UtiliCorp, MPC and MGC will demonstrate to the Commission that (a) the Joint Applicants have satisfied their burden of making a *prima facie* case that the transaction is not detrimental to the public interest and (b) none of the parties objecting to the transaction have met the burden of presenting compelling evidence that the proposed stock sale would cause a present and direct adverse impact on rates or the quality of

customer service. Consequently, the Commission is required by law to approve the Joint Application.

The Commission should not be concerned about approving the Joint Application. The transaction is transparent to the shippers (i.e., the customers) of MPC and MGC and, also, the end users who are served by the local distribution companies ("LDCs") and municipalities served by the MPC and MGC pipeline systems. The Joint Applicants have proposed no changes to the rates or other terms or conditions of service under which MPC and MGC currently operate. MPC and MGC will continue to be wholly-owned subsidiaries of UPL. The field operations of MPC and MGC will continue uninterrupted, conducted by the same employees. The Commission will retain full authority to regulate the rates, terms and conditions of service rendered by both MPC and MGC as provided by law. There will be absolutely no change to the *status quo* and, thus, no detriment to the public interest.

II. STATEMENT OF FACTS

A. The Applicants

The Joint Applicants in the case are Gateway, MPC and MGC. Gateway is a Delaware corporation with offices located in Littleton, Colorado. Gateway is authorized by the State of Missouri to do business in the State as a foreign corporation. Gateway currently conducts no business in the State of Missouri, or elsewhere. (Kreul, Exh. 1, p. 6) It has been created for the specific purpose of acquiring UPL. (Ries, Exh. 4, p. 5)

MPC and MGC are both Delaware corporations. Both companies are engaged in owning and operating natural gas transmission pipelines in the State of Missouri subject to the jurisdiction of the Commission as provided by law. (Kreul, Exh. 1, p. 5)

MPC transports natural gas for its "shippers" from a point of interconnection with Panhandle Eastern Pipeline ("Panhandle") near Curryville, Missouri, in Pike County to several delivery points on the system in the counties of Pike, Lincoln, St. Charles and Franklin to a point of termination in Sullivan, Missouri. Generally, MPC transports natural gas on behalf of shippers to requested points along the pipeline system. MPC's shippers are LDCs, municipalities, industrial and large commercial natural gas end users, or natural gas marketing companies moving gas on behalf of LDCs, municipalities or natural gas end users behind the LDCs or municipal systems. MPC has ten different delivery interconnects with Laclede Gas Company ("Laclede"), Union Electric Company, Missouri Natural Gas Company and Fidelity Natural Gas. It also has one interconnect with its sister pipeline, MGC, near Sullivan, Missouri. (Kreul, Exh. 1, pp. 3-4)

Much like MPC, MGC transports natural gas for its shippers from a receipt point at its interconnect with MPC to several delivery points along the system in the counties of Crawford, Phelps and Pulaski to its point of termination at Fort Leonard Wood, Missouri. MGC transports natural gas on behalf of shippers to requested points along the pipeline system. MGC's shippers are LDCs, municipalities, industrial and large commercial natural gas end users, or natural gas marketing companies moving gas on behalf of LDCs, municipalities, or natural gas end users behind the LDCs or municipal systems. MGC has eight delivery interconnects. Three of those are with a LDC, Missouri Public Service ("MPS"), a division of UtiliCorp, at Rolla, Salem and Owensville. MGC also has delivery interconnects with the municipalities of Cuba, St. James, St. Robert and Waynesville. MGC also delivers natural gas to Fort Leonard Wood. (Kreul, Exh. 1, p. 4)

Both MPC and MGC are intrastate natural gas transmission pipelines regulated by the Commission. The Commission granted the companies Certificates of Convenience and Necessity in its Case Nos. GA-89-126, GA-90-280, GA-90-276, GA-91-81 and GA-91-82. (Kreul, Exh. 1, p. 4; Exh. 3, p. 6)

MPC and MGC are wholly-owned subsidiaries of UPL. In addition to holding all of the capital stock of MPC and MGC, UPL also owns a short length of pipe crossing under the Missouri River from Illinois into Missouri which has been referred to as the Trans-Mississippi Pipeline ("TMP"). This is approximately six (6) miles of pipeline stretching from West Alton, Missouri, under the Mississippi River and into Illinois. (Kreul, Tr. 152) The TMP is not currently activated for service. It is physically disconnected from the MPC pipeline. (Kreul, Tr. 151)

UPL is a wholly-owned subsidiary of UtiliCorp. UtiliCorp is a Delaware corporation. It provides regulated electric and natural gas utility service to customers in the State of Missouri in those areas certificated to it by the Commission. UtiliCorp does business in the State of Missouri under its MPS division. Pursuant to an order dated May 24, 2001, UtiliCorp was determined to be a necessary party to a full adjudication of the issues presented by the Joint Application. Consequently, the Commission added UtiliCorp as a party to the proceedings.

B. The Transaction

Subject to the terms of a Stock Purchase Agreement, as amended, UtiliCorp has agreed to sell, and Gateway has agreed to buy, all of the issued and outstanding shares of the capital stock of UPL. (Kreul, Exh. 1, p. 5) The Stock Purchase Agreement was attached as Schedule RCK-4 to the direct testimony of Richard C. Kreul. A diagram

illustrating the current versus proposed ownership of MPC and MGC is contained in a diagram marked Schedule RCK-3 to the direct testimony of Mr. Kreul. Although not an express component of the Joint Application for approval filed with the Commission (because it is not currently in operation and not, therefore, a regulated asset), the TMP assets would, like the stock of MPC and MGC, continue to be owned by UPL at the conclusion of the transaction. (Ries, Exh. 5-P, p. 5; Tr. 263)

C. Procedural History

On April 19, 2001, Gateway, MGC and MPC filed a Joint Application with the Commission asking, in the alternative, that the Commission (1) find it had no jurisdiction over the proposed transaction, or (2) grant its approval of the Joint Application pursuant to Section 393.190 RSMo. 2000. The regulatory implications of the proposed transaction were briefed by the Joint Applicants, the Staff, and the Office of the Public Counsel ("OPC"). Pursuant to an order dated May 24, 2001, the Commission determined that it had jurisdiction over the proposed transaction. The Commission established an intervention deadline and directed publication of the notice of the proceedings.

By an order dated June 11, 2001, the Commission granted the Applications to Intervene filed by Union Electric Company d/b/a AmerenUE ("AmerenUE"), Laclede and Panhandle. The Commission also convened a pre-hearing conference to take place on June 28, 2001. On July 2, 2001, the parties filed a Joint Recommendation for Procedural Schedule contemplating the filing of prepared direct, rebuttal and surrebuttal testimony. The Commission adopted the Joint Recommendation by order dated July 5, 2001. The procedural schedule was thereafter modified by virtue of an order dated August 2, 2001.

An evidentiary hearing was had at the Commission's offices in Jefferson City, Missouri, on September 5-7, 2001. At that time, the prepared testimony, including schedules, of the various parties were offered and received into evidence, and the individuals tendering pre-filed testimony were cross-examined. At the end of the proceedings, the Commission's regulatory law judge concluded the public hearing portion of the proceedings and closed the record.

III. STANDARD FOR APPROVAL OF THE JOINT APPLICATION

The standard for approval of this transaction by the Commission is not in dispute. It is one with which the Commission is quite familiar. Specifically, the Commission is required by law to approve the Joint Application unless an objecting party can demonstrate that doing so would be detrimental to the public interest. This minimal benchmark for approval was established by the Missouri Supreme Court in *State ex. rel City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. 1934). The Supreme Court's rationale is as compelling today as it was in 1934.

> "To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of public service commissions. It is not their province to insist that the public shall be benefitted, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest', in such cases, can reasonably mean no more than 'not detrimental to the public.' "

Id. at 400.

In rejecting the contention that the Commission must affirmatively find that the sale of stock confers some affirmative public benefit, the Court instead stressed the importance of the property rights of the utility's shareholders.

> "The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny them an

> incident important to ownership of property . . . a property owner should be allowed to sell his property unless it would be detrimental to the public."

Id. Thus, the standard established by the Court was adopted in recognition of the compelling constitutional right of a property owner (UtiliCorp in this case) to sell its property (capital stock in this case) free from unreasonable regulatory restraint. The standard established by the Missouri Supreme Court contains the legal balance of the interests of shareholders and ratepayers.

Although not technically applicable in this case (in which stock, not assets, is being sold), the standard applies as well to sales of utility assets. In 1980, the Missouri Court of Appeals looked to the *City of St. Louis* decision in determining the right of a regulated sewer company to complete the sale of regulated assets. *State ex. rel Fee Fee Trunk Sewer Company v. Litz*, 596 S.W.2d 466 (Mo. App. 1980). Also, the Commission has routinely applied this standard in the context of considering utility mergers.

The application by the Commission of this legal standard in any particular case is also well known. In 1971, in a case involving the acquisition of the common stock of Missouri Natural Gas Company by Laclede, the Commission determined that all that needs to be shown to meet the test of no detriment is that the *status quo* be maintained. Specifically, the Commission found that the standard was met simply by showing that there would be (1) no change in rates and (2) no deterioration of service. *Re Laclede Gas Company*, 16 Mo.P.S.C. (N.S.) 334 (1971). Clearly, the new owner is not required to show that it can operate the acquired properties better than the current owner.

The *Laclede* standard is just as viable today. In fact, the Commission specifically applied these principles as recently as December 28, 2000, in its Case No. EM-2000-369.

In that case, the Commission looked to the factors enunciated in the *Laclede* case in approving the joint application of UtiliCorp and The Empire District Electric Company to undertake a merger. (Slip. Op. at pp. 32-33).

The most recent examination of the "no public detriment" standard is contained in the Commission's March 16, 2000, Report and Order in its Case No. WM-2000-222. This was a case involving the joint application of Missouri-American Water Company ("MAWC") and United Missouri Water Inc. ("United") for authority for MAWC to acquire the common stock of United. The Staff recommended that the Commission approve the joint application with the condition that MAWC not be permitted to seek recovery of the acquisition premium associated with the transaction in a future rate proceeding.

The Commission approved the transaction. In doing so, it rejected its Staff's recommended condition.

> "The only purported public detriment that any party has identified is the possibility of a future attempt to recover the acquisition premium from ratepayers. The Commission reads *State ex. rel City of St. Louis v. Public Service Commission, supra.*, 335 Mo. at 359, 73 S.W.2d at 400, to require a direct and present public detriment. The acquisition premium, which MAWC may seek to recover from ratepayers in a future case yet to be filed, is not a present detriment. '[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur.' *In the Matter of the Joint Application of Missouri Gas Company, et al.*, Case No. GM-94-252, *supra.*, 3 Mo.P.S.C. 3d at 221. There is no such compelling evidence in this record." (Slip. Op. at 7)

Thus, the mere possibility of a scenario of events which may result in a future adverse consequence is not legally sufficient to make a showing that a transaction is

detrimental to the public interest. To the contrary, an objecting party must present "compelling evidence" of a "direct and present public detriment."

IV. BURDEN OF PROOF AND BURDEN OF GOING FORWARD WITH THE EVIDENCE

In this case, some confusion may have arisen as to the assignment among the Joint Applicants and the parties opposing the Joint Application of the burden of proof and the burden of going forward with the evidence in this matter. Rather than embarking on a wide-ranging reexamination of those underlying legal principles, UtiliCorp, MPC and MGC will simply quote at length from the Commission's analysis of these matters contained in its December 28, 2000, Report and Order in Case No. EM-2000-369. The Commission's discussion in that case follows.

> "Who, then, has the burden of proving that this merger is not detrimental to the public? The Missouri Supreme Court has stated that the relevant inquiry in determining which party has the burden of proof is to identify who, as is disclosed from the pleadings, asserts the affirmative of an issue. Generally, that party has the burden of proof. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991); see also *Dicus v. Cross*, 869 S.W.2d 745 (Mo. banc). The Joint Applicants, UtiliCorp and Empire, are asserting that their merger will not be detrimental to the public. Therefore, they have the burden of proving that assertion. However, simply assigning a general burden of proof on UtiliCorp and Empire does not resolve all questions about burden of proof.
>
> UtiliCorp and Empire must prove that their proposed merger is not detrimental to the public interest. However, other parties have asserted that the merger is detrimental in one or more specific areas. It is not enough for a party to assert that a detriment exists and demand that UtiliCorp and Empire prove them wrong.
>
> While the burden of proof never shifts throughout a trial, a burden of going forward with the evidence may shift if a *prima facie* case is made. *Anchor Centre Partners* at 30. Therefore, the parties asserting that the merger is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions." (Slip. Op. at 33)

The Commission's analysis in that case was absolutely correct. That analysis is equally applicable in the case at hand. Accordingly, it is clear that the burden of proof in going forward with evidence that a specific public detriment will occur if the Joint Application is approved falls on the party making that claim once the Joint Applicants have put forth a *prima facie* case. In other words, the Joint Applicants in this case are not required to disprove any of the allegations of Staff, OPC, Laclede or any other adverse party. Rather, the parties opposing the transaction must present "compelling evidence" to support those specific assertions, as noted in the *MAWC/United* decision.

This is an admittedly difficult showing to make. In fact, UtiliCorp, MPC and MGC are unaware of any utility merger, stock acquisition or asset sale transaction that has ever been disapproved by the Commission. Staff witness Oligschlaeger, an individual with approximately twenty (20) years in the employ of the Commission, generally confirmed this salient fact. (Tr. 664)

V. THE JOINT APPLICANTS' *PRIMA FACIE* CASE

Simply put, by complying with all filing and procedural requirements, and by clearly demonstrating that the transaction will result in no change in the *status quo* in the operations or regulatory status of MPC and MGC, the two regulated entities involved in this matter, the Joint Applicants have satisfied their burden of presenting a *prima facie* case that the transaction will not be detrimental to the public interest.

There is no deficiency in the Joint Application filed by the Joint Applicants. No party opposing the transaction in this case has even alleged the Joint Applicants have failed to submit to the Commission all of the information required under the rules applicable to the transaction at hand. As noted above, the transaction involves an

application for approval of a Stock Purchase Agreement. The Joint Applicants have submitted the information required by the Commission's Rule 4 C.S.R. 240-2.060(1) and (12). In addition, the application complies in all respects with subsection (7) of the same rule governing applications for authority to sell, assign, lease or transfer assets, particularly in light of the Commission's order directing that the Joint Applicants file a Tax Impact Statement, an order with which the Joint Applicants complied on June 5, 2001.

OPC witness Kimberly Bolin has suggested in her supplemental rebuttal testimony that the Commission review Gateway's business strategic plan to determine whether those plans "could possibly be detrimental to the ratepayers." (Exh. 13, pp. 1-2) However, there is absolutely no requirement under the applicable statutes, the Commission's rules or any order or decision of the Commission that the Joint Applicants prepare or file a "business strategic plan" as part of an application for approval of a Stock Purchase Agreement.

Had the Commission thought that a business strategic plan was an important consideration in a utility stock or asset sale, presumably it would have included that filing requirement in the minimum filing requirements. This is certainly no oversight on the part of the Commission. For example, the Commission requires the filing of a feasibility study in cases involving applications for a Certificate of Convenience and Necessity. *See*, 4 C.S.R. 240-2.060(4)(A)(5).[1] Yet, it included no such analogous directive that a formal business plan be filed in the rules governing the sale of utility assets or stock.

[1] See also the requirement of the filing of "Plans for Financing" in the case of an application for approval to construct electric or gas transmission lines or electric production facilities. 4 C.S.R. 240-2.060(4)(B)(3).

Additionally, the Joint Applicants have provided statements of why the transaction is not detrimental to the public interest consistent with the standards set forth in the *Laclede* case. (See, generally, Exh. 1, 3, 4, 4-HC, 5, 5-P and 5-HC) Gateway has sponsored the required *pro forma* financial statements. (Ries, Exh. 4, Sch. 14-HC)

Having submitted a *prima facie* case, the burden of establishing a direct and present public detriment by compelling evidence is one that must be carried by Staff, OPC and Laclede, the parties opposing approval of the Joint Application. As will be demonstrated below, they have not met this burden.

VI. THE STOCK SALE TRANSACTION SHOULD BE APPROVED

A. No Adverse Impact on Rates

Approval of the Joint Application will have no adverse impact on the rates to be charged by MPC or MGC. The proposed transaction does not contemplate any change in the rate schedules of MPC or MGC. It does not propose any change in any other terms or conditions of service currently on file with and approved by the Commission. (Kreul, Exh. 1, p. 8) The record in this case is unambiguous. The sale of UPL common stock will have no impact whatsoever on the rates charged by MPC or MGC to shippers. Nor will it have any impact whatsoever on the rates to be charged to end user customers. Three simple facts drive this point home.

First of all, as already noted, the Joint Application does not contain any request for relief with respect to rates. Specifically, there is no aspect of the Joint Application that requests that the Commission modify the rate schedules or changes any other terms or conditions of service under which MPC and MGC currently operate.

Second, there is no suggestion that Gateway, the prospective purchaser, has any intention of seeking a rate increase at any time in the near future. (Oligschlaeger, Exh. 17-HC, p. 4-5) No party opposing the transaction has contended otherwise.

Third, as UtiliCorp witness Kreul noted during cross-examination, MPC and MGC are already discounting below the maximum rates provided for in existing rate schedules. (Tr. 115) Mr. Kreul has pointed out that competitive pressure precludes charging higher rates at this time, even though existing rate schedules would permit the companies to do so. (Tr. 116) Accordingly, it seems somewhat pointless to speculate that MPC or MGC will seek to increase rates when they cannot, due to market forces, now charge the maximum already authorized under existing tariffs.

B. Arguments About Possible Future Ratemaking Consequences are Speculative and Premature

Ultimately, the testimony of witnesses in this case about the possibility of circumstances (cost of capital, capital addition considerations) which may at some point in the future cause MPC or MGC to consider requesting a rate increase are remote and speculative scenarios.[2] None of this testimony is compelling evidence of a present and direct detriment to the public interest.

If, in the future, should Gateway determine that circumstances have changed in such a manner as to justify a request for a revision to its existing rate schedules, it will be required to file that request with this Commission. At that time, the Commission will consider all relevant factors in determining a just and reasonable rate on an ongoing basis, as it does in all other rate cases. Rates cannot change without the Commission's

[2] Not only is the cost of capital testimony speculative, it is also misleading. For example, Staff witness McKiddy compares UtiliCorp's stated plans in 1994 concerning short-term debt financing (Exh. 19, p. 5)

approval. Once changed, any new rates are presumed to be lawful and reasonable. Speculation about all of this is not germane to the issue now before the Commission.

Also irrelevant is the speculative testimony of witnesses about the impact of a possible rate increase on competition at the burner tip by alternative sources of fuel such as propane. (Pflaum, Exh. 9, p. 9; Lock, Exh. 15, p. 5) The fact of the matter is that MPC and MGC have no end use customers. (Pflaum, Tr. 528) Thus, competition at the burner tip is an issue directly relevant only to those entities providing end use service in various municipalities along the pipeline. These are LDCs such as Laclede, AmerenUE and MPS. This is also an issue for municipal gas utility taking delivery of gas supplies off the pipeline. (Pflaum, Tr. 529-531; Oligschlaeger, Tr. 655-656)

MPC and MGC only provide gas transportation service. Gas transportation cost is only one aspect of the cost of doing business by LDCs or municipalities. Many other costs go into the determination of the competitiveness of natural gas versus alternative sources of energy. Other considerations are commodity cost, cost of capital, general and administrative overhead expense, and a veritable smorgasbord of other considerations. Even in the unlikely event that gas transportation rates were to increase, there is absolutely no way to state with any degree of assurance whatsoever that such a change in the cost of just one element of cost of service will have any adverse competitive impact on LDCs or municipal utilities. (Oligschlaeger, Tr. 655-658)

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with Gateway's plans for long-term embedded debt (Exh. 19-HC, p. 7). This is an apples to oranges comparison which is unreliable.

C. All of the Alleged, Public Detriments Concern Circumstances that Already Exist

Many allegations have been made in this case that some specified public detriment may come about if the Joint Application is approved. *Not one* of the scenarios offered represents a change from current circumstances.

1. Unprofitable Operations

Staff and Laclede point to the fact that MPC and MGC operated at a net loss in year 2000. (Pflaum, Exh. 9-HC, p. 8; Oligschlaeger, Exh. 17, p. 3; McKiddy, Exh. 19, p. 13) They contend, generally, that losses will continue. (Pflaum, Exh. 9-HC, p. 9; Oligschlaeger, Exh. 17-HC, p. 3-5) Assuming the allegation is correct (and there is substantial evidence showing otherwise), that does not represent a change in the *status quo*.

2. Prospect of Abandonment of Operations

Staff presents the spectre that Gateway may seek to abandon MPC/MGC operations. (Oligschlaeger, Exh. 17, p. 7-8) This, too, is a theoretical possibility under UtiliCorp's ownership. (Oligschlaeger, Tr. 660-661) Additionally, no utility may abandon operations absent an order of this Commission. (Oligschlaeger, Tr. 661) This does not represent and change in the *status quo*.

3. Prospect of a Rate Increase

Staff suggests that a shortfall of revenues may cause MPC and MGC to seek a rate increase under Gateway's ownership. (McKiddy, Exh. 19, p. 22-23) Nothing prohibits UtiliCorp from doing that now.

(Kreul, Tr. 107; Oligschlaeger, Tr. 654) This does not represent any change in the *status quo*.

4. Possibility of Adding Additional Shippers

Laclede worries that Gateway will attempt to add new customers by increasing throughput on existing facilities. (Pflaum, Exh. 9-HC, p. 9) Nothing prohibits UtiliCorp from doing the same thing. (Kreul, Tr. 114, 197) This does not represent a change to the *status quo*.

5. Physical Connection with the TMP

All of the objecting parties express some varying degree of agitation concerning the possibility that MPC could undertake to physically connect its facilities with those of the TMP. As noted by Mr. Kreul, UtiliCorp can also do so now so long as the assets are not owned and operated by MPC. In fact, it almost filed an application for Federal Energy Regulatory Commission ("FERC") certification of TMP several years ago. (Tr. 108-109) This represents no change in the *status quo*.

6. Restriction on Bypass of LDCs

Staff and Laclede raise the prospect that Gateway may cause MPC and MGC to seek a removal of the anti-bypass condition of their certificates. (Lock, Exh. 7, p. 7; Pflaum, Exh. 9-HC, p. 10) Nothing prohibits UtiliCorp from pursuing this option now. (Lock, Exh. 7, p. 7; Kreul, Exh. 3, p. 5) This represents no change in the *status quo*.

7. And All the Rest

One could go on and on, but the simple fact remains that everything that has been raised as an alleged detriment under Gateway's ownership is already a possibility. The consummation of this transaction changes nothing.

VII. THE STOCK SALE AGREEMENT WILL CAUSE NO DETERIORATION IN QUALITY OF CUSTOMER SERVICE

A. Safety Considerations

At page 3 of his rebuttal testimony, Staff witness John Kottwitz has outlined three conditions that he believes should be applied to any order authorizing the transaction. Mr. Kottwitz's three conditions essentially go to the continued safe operation of the pipeline facilities of MPC and MGC. (Exh. 14)

As Mr. Kottwitz indicates on the following page of his testimony, Gateway's President and CEO, David Ries, is agreeable to these three conditions. Mr. Ries has confirmed that fact at page 2 of his rebuttal testimony. (Exh. 5) Consequently, there is no dispute in this case concerning Gateway's commitment or ability to operate the pipeline system in a safe manner.

B. Gateway is Capable of Operating the Pipeline in a Safe and Efficient Manner

The evidence on this point, too, is essentially undisputed. Gateway will continue to operate the MPC and MGC pipelines using the same field personnel and practices as are currently in place. Likewise, there is no question that Mr. Ries, the individual with primary operational responsibilities for the pipelines on an ongoing basis[3], is highly

[3] Intervenor Laclede has argued that it should not be compelled to do business with Gateway because MPC is the sole source of gas transportation service for certain of its service territories. (Tr. 466-468) Laclede's

qualified to provide reliable and high quality service to the shippers currently using the pipeline system. Mr. Ries has over 27 years of experience in the natural pipeline business. During that time, he has functioned in nearly all facets of the industry, with management and executive responsibilities with during nearly 24 of those years with two of the largest natural gas pipeline operators in the country today. While at Enron, he had engineering oversight responsibilities for over 27,000 miles of natural gas pipelines, with approximately 1.5 million operating horsepower utilized for gas compression.

He has prior experience, and significant involvement in, managing pipeline project and business development efforts. Those efforts have resulted in numerous expansions to these pipeline systems. This activity includes the construction and operation of thousands of miles of new pipelines, tens of thousands of installed horsepower for gas compression, multiple types of natural gas processing plants and nearly all types of ancillary support requirements utilized in the pipeline business. The details of his credentials are outlined in Schedule 16 to his rebuttal testimony. During the time of the hearing, not one party seriously questioned Mr. Ries's knowledge, abilities or credentials.

C. Gateway's Financial Viability

Much testimony was offered by the detractors of the Joint Application that Gateway does not have sufficient financial wherewithal to be regarded as a viable long-term owner/operator of MPC and MGC. UtiliCorp, MPC and MGC are confident that Gateway will thoroughly address its financial capability to the satisfaction of the

argument is contrary to the law on this topic. Customers of regulated utilities have no entitlement to continuation of service from any particular provider. *Love 1979 Partners v. Public Service Commission*, 715 S.W.2d 482 (Mo. banc 1986). Thus, Laclede's stated preference that UtiliCorp continue to own and

Commission. Consequently, only a few salient observations will be offered at this juncture.

First, UtiliCorp has something significant at stake in this proceeding beyond just the sale of UPL's common stock. UtiliCorp's natural gas operating division in the State of Missouri, MPS, will continue to be a shipper along the MPC and MGC pipeline systems. As noted above, MPS will continue to operate the local distribution networks in the communities of Rolla, Salem and Owensville. The MPC networks at those locations are dependent on the continued operation of the MPC/MGC pipeline system. UtiliCorp would not have entered into the transaction in this case if it did not have a high degree of confidence in the ability of Gateway to safely, reliably and efficiently operate those properties indefinitely into the future. UtiliCorp is content with the knowledge that in the unlikely event that problems arise in the future, MPC has recourse to this Commission for resolution of those problems. (Kreul, Tr. 144-145)

Second, the efforts by opponents of the Joint Application to cast Gateway as a thinly capitalized start-up company (contrasting it with UtiliCorp's long history of utility operations in the State) are simply misleading. Gateway has secured substantial and sound financial backing for its acquisition of UPL. A significant line of debt financing has been obtained through Bank One Capital Markets, Inc. ("Bank One"). Bank One is a highly sophisticated financial institution that specializes in analyzing the business prospects of prospective borrowers. Gateway would have not been able to secure this line of credit had that institution had any concerns about Gateway's ability to operate the pipelines profitably and to generate adequate revenues to meet its financial obligations.

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operate MPC and MGC (through its ownership of UPL) is simply not a consequential consideration in this case.

Moreover, Gateway has lined up significant commitments from savvy and capable prospective equity investors, one of which is a very large equity investment company. Testimony in this case revealed that entity has approximately $80 billion of total assets under management. Another of the named equity investors has been a principal in a number of other natural gas pipeline projects. The total equity component is substantial and at risk if the enterprise is not successful. Clearly, this ownership group has the ability, and the motivation, to make additional capital infusions as necessary to ensure the financial viability of Gateway.

Finally, without discussing the specifics of the financial projections of MPC and MGC under new ownership, Gateway has submitted information showing that it is reasonable to expect that the MPC and MGC pipeline operations will be financially remunerative under reasonable assumptions. Those figures show that there is every reason to believe that Gateway will be able to meet its debt service obligations and still provide some meaningful level of return on equity even without any substantial change to the nature of current operations. (Ries, Tr. 319-320) But the record also reflects that is not the end of the story. Further business developments present every prospect of further improving the revenue flow over existing operations. (Ries, Exh. 4-HC. pp. 7-8; Tr. 290-291)

Staff and OPC have offered nothing but doomsday scenarios to justify the recommendation that the Joint Application be denied. Although both Staff[4] and OPC witnesses have complained that they have not been privy to enough information to draw

[4] Even Staff witness Oligschlaeger's refrain that he had no meaningful information concerning Gateway's business plan and prospects is nothing new. In Commission Case No. GM-89-151, he prepared a memorandum noting the difficulty of assessing the likelihood of future events in transactional dockets such as this case. He noted that past "discovery efforts related to UtiliCorp's acquisition dockets have not

an informed conclusion, neither of these parties complains that they have not been provided with all of the information they have requested. In the alternative, they voice the general complaint that Gateway has not submitted "definitive plans" supporting its financial projections. (McKiddy, Exh. 19, p. 15) This provides no basis for denying the Joint Application. It was incumbent on Staff and OPC to investigate and submit compelling evidence to support their contention that Gateway is "too risky" to be allowed to operate in the State of Missouri. They have not done so. It is not the responsibility of the Joint Applicants to disprove their claims or to generate formal business plans not specifically required by the Commission's rules. Nevertheless, as noted above, the record in this case provides a compelling rebuttal by the Joint Applicants of the vague and misleading criticism that Gateway is too new or too small to make a go of it.

VIII. CONDITION NO. 7 IN MPC'S CERTIFICATE

A. The Commission's Order in Case No. GA-89-126

MPC was granted a Certificate to operate an intrastate natural gas transportation pipeline in Commission Case No. GA-89-126. In granting the Certificate in that case, the Commission adopted eleven conditions recommended by its Staff. Condition No. 7 required:

> "The physical separation of the intrastate pipeline from the portion of the Applicant's segment crossing the state boundary into Illinois;" [5]

No party disputes that Condition No. 7 was attached to the original Certificate and that it continued without interruption at the time UtiliCorp acquired the pipeline operation

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obtained meaningful data and information from which to determine the question of future detriment." (Exh. 22) UtiliCorp's application in that case was nevertheless approved by the Commission.

[5] *Re Missouri Pipeline Company*, 30 Mo. P.S.C. (N.S.) 10, 15 (1989).

subsequently in Case No. GM-94-252.[6] UtiliCorp and MPC witness Kreul has testified in this case that the restrictive language in Condition No. 7 will continue to be attached to the Certificate in the event the Application is approved. (Kreul, Exh. 3, p. 6)

What is clear from the testimony is that the different parties interpret the meaning of Condition No. 7 in different ways. Staff, OPC and Laclede contend that the language prohibits MPC from making a physical connection of its facilities to the TMP assets without the Commission's approval. UtiliCorp, MPC and Gateway have a much different view of the meaning of that language.

Since there is clearly a difference of opinion between the proponents and the opponents of the Joint Application, UtiliCorp and MPC believe it would be entirely appropriate for the Commission to clarify the meaning of Condition No. 7 to MPC's Line Certificate. If the Commission interprets Condition No. 7 not to prohibit MPC from connecting MPC assets with the under the river unregulated assets if the under the river assets are owned by an entity other than MPC, then the Commission should so find.

IX. REBUTTAL OF MISCELLANEOUS CRITICISMS

A. The Failed Kansas Pipeline Analogy

One of the parties to this case, Laclede, has unfortunately taken the opportunity to undertake an attack on one of the prospective equity principals in Gateway.[7] This sort of personal attack on an individual in the context of a serious business transaction is, in the view of UtiliCorp, MPC and MGC, inappropriate. It is particularly unfortunate because it

[6] With respect to that condition, the Commission in that case stated, "[a]s to the physical separation of MPC intrastate pipeline from a portion of a pipeline which crosses the Mississippi River, all parties agree that the prohibition against connecting the intrastate system to the interstate system is a condition which was imposed at the time the Certificate was issued to MPC in Case No. GA-89-126 and that it will remain a condition of the Certificate if transferred." *Re UtiliCorp United Inc.*, 3 Mo. P.S.C.3d 216 (1994).

[7] It is worth noting that Staff has not made the involvement of this individual an issue in this case. (Morrissey, Tr. 805-806)

does not appear that Laclede has had any previous first hand business dealings with the individual named. Its allegations are premised on the unreliable hearsay testimony of Dr. Pflaum. Consequently, it is simply not productive to engage in a line by line debate about the events that took place in Kansas that ultimately led to proceedings before the Kansas Corporation Commission or the courts.

As a general matter, however, the fact that a regulated utility in the past may have invoked a court's legal protection to address a grievance is simply no basis on which to claim an individual associated with the utility is unfit. Similarly, utilities (as well as other parties) routinely make novel or innovative proposals to regulatory bodies with respect to operations or rates. Regulated utilities often disagree with members of an agency's regulatory Staff as to appropriate ratemaking treatment for particular items of expense. Even Laclede may disagree with the Commission's Staff from time to time and has litigated at least one rate case because those differences could not be resolved. This, too, is merely business-as-usual for a regulated enterprise. It is certainly no basis to contend that the utility, or its management or its shareholders are unfit or unworthy to do business in a particular state or jurisdiction.

As the Commission could well see from the angular and unfocused questions and answers that the inquiry necessarily invoked at the time of hearing, there is no way to get a firm fix on what transpired, much less who, if anyone, was in the wrong in some prior case in another jurisdiction dealing with a completely different set of facts and issues than those presented in this case. An inquiry of this type quickly degenerates into meaningless innuendo and recriminations that are of no help to the Commission in understanding the nature of the proposal that is actually under consideration now. As is typically the case,

who was in the right, who was in the wrong, or who did what to whom is a matter of perceptions too lost in the events of the past to be resurrected and fully understood in the present. It quite clearly is not germane to the matter at hand. Consequently, Laclede's attempt to distract the Commission's attention from the real task at hand should be disregarded.

B. The Unlikely Prospect of FERC Jurisdiction

Another constant, troubling undercurrent to this case is the question of the possibility of the FERC asserting jurisdiction over MPC and MGC if the MPC pipeline facilities were to ever be connected to the TMP assets. Much was said about this issue, but it is capable to being reduced to two relatively straightforward propositions.

First, there is nothing that would suggest that the approval of the Application in this case would make the prospect of FERC jurisdiction any more likely than it already is. Mr. Kreul's testimony made it clear that if UtiliCorp is unable to sell UPL's common stock to Gateway, it may very well entertain a business expansion that would implicate many of the very same jurisdictional questions. (Kreul, Tr. 107-108) In fact, UtiliCorp several years ago nearly filed a request with the FERC for certification of the TMP assets in anticipation of placing them in service. (Kreul, Tr. 108-109) Consequently, the risk of the FERC asserting jurisdiction if the two pipelines are connected is just as likely now as it will be if the Commission approves the Joint Application. Nothing will change.

Moreover, it became clear during the course of the hearing that the prospect of the FERC asserting jurisdiction even if the two pipeline systems are physically connected is very unlikely indeed. Staff's own FERC expert, Carmen Morrissey, testified that the principal consideration in the FERC's considerations in terms of determining whether or

not to asset jurisdiction over the pipeline system is the location of the ultimate deliveries. She stated that if the gas is brought into Missouri from out of state and delivered in Missouri, it was her view that nothing would change as far as the jurisdiction to regulate MPC and MGC. (Tr. 785-787, 828) In other words, there is no reasonable probability that the FERC will assert jurisdiction over MPC and MGC even if they are connected to the TMP asset to gain access to another source of gas supply. It is also important to note that the affiliation between MPC and whatever entity now owns, or may hereafter own, the TMP asset was not a consideration thought by Ms. Morrissey to be pertinent to her analysis. (Tr. 828)

The bottom line here? The possibility that the FERC would even consider asserting jurisdiction over the MPC and MGC pipeline system is highly unlikely if a physical connection is made with the TMP assets for purposes of serving as an additional source of supply for ultimate delivery into Missouri. Moreover, the possibility of the scenario already exists because there is nothing prohibiting the current owner, MPC, from making a physical interconnection with the TMP assets so long as they are not owned or operated by MPC. (Kreul, Tr. 108, 128-129)

X. CONDITIONAL APPROVAL OF THE JOINT APPLICATION

A. The Commission has Statutory Authority to Impose Conditions on Approval

As a general proposition, UtiliCorp, MPC and MGC are of the view that the Commission may include conditions to eliminate or mitigate a public detriment in an order approving the Joint Application. However, it may unilaterally impose conditions only if there is compelling evidence of a present adverse impact on the public that will come about as a direct

consequence of the transaction. At noted above, no such showing has been made. (Kreul, Exh. 3, pp. 8-9)

B. Agreed-to Safety Conditions

Clearly, the Commission may also make its approval conditional if the conditions are agreeable to the purchaser. (Oligschlaeger, Tr. 724-725) Staff witness Kottwitz has proposed three specific safety conditions. (Exh. 14, p. 3) Apparently, Gateway is agreeable to these commitments. (Exh. 5, p. 2) That being the case, it would appear to be appropriate that the Commission adopt those three items in a conditional approval.

C. Approval Not Binding for Ratemaking Purposes

UtiliCorp, MPC and MGC would anticipate that the Commission will include its customary cautionary statement that any approval of the stock sale would not be binding on it in any subsequent proceeding for determination of rates to be charged by MPC and MGC. *See, Re Southeast Missouri Telephone Company*, 3 Mo. P.S.C. (N.S.) 19 (1950); *Re Capital City Telephone Company*, 13 Mo. P.S.C. (N.S.) 519 (1968); *Re Middle South Utilities*, 14 Mo. P.S.C. (N.S.) 499 (1969); *Re Laclede Gas Company*, 15 Mo. P.S.C. (N.S.) 136 (1970); *Re Laclede Gas Company*, 16 Mo. P.S.C. (N.S.) 338 (1971); *Re UtiliCorp United Inc.*, 29 Mo. P.S.C. (N.S.) 3 (1986); *Re Kansas Power & Light Company*, 1 Mo. P.S.C. 3d 150 (1991); *Re Missouri Gas Company*, 3 Mo. P.S.C. 3d 216 (1994). This statement recognizes that the absolute ratepayer protection is the

Commission's authority to determine just and reasonable rates and terms and conditions under which utility service is to be rendered.

XI. CONCLUSION

When all the dust has settled in this case, one thing becomes clear. Nothing of any consequence will change because of the change of ownership of UPL. There will be no change in rates or other terms or provisions governing customer service of MPC or MGC. There is no competent or substantial evidence that would suggest that Gateway is unwilling or unable to operate the pipeline system safely, efficiently and reliably over the long term.

Most of the time in this case has been wasted on issues that are not germane to the topic at hand. The remote and speculative ratemaking scenarios brought up by the Staff, OPC and Laclede are not properly before this Commission. This is not a rate case and no party has even suggested otherwise. Certain challenges have been made concerning the character of one of the equity stakeholders in Gateway. These attacks are based on circumstances that occurred in Kansas and which have no parallel or relevance to the circumstances of this case. Finally, the prospect of possible FERC jurisdiction is, at best, an extremely remote and unlikely circumstance that is made no more likely by the transaction at hand.

There will be no change in the *status quo* if this transaction is completed. There will no change in rates and no deterioration in the quality of customer service. Consequently, there is no evidence demonstrating that the approval of the transaction would be detrimental to the public interest. The Commission should approve the Joint Application for the reasons aforesaid.

Respectfully submitted,

Paul A. Boudreau #33155
BRYDON, SWEARENGEN & ENGLAND P.C.
P.O. Box 456
Jefferson City, MO 65102-0456
Telephone (573) 635-7166
Facsimile (573) 635-0427
E-Mail: PaulB@brydonlaw.com

Attorneys for UtiliCorp United Inc., Missouri Pipeline Company and Missouri Gas Company

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 18th day of September, 2001, to the following:

Ms. Lera L. Shemwell
Missouri Public Service Commission
Governor Office Building
200 Madison Street
P.O. Box 360
Jefferson City, MO 65102

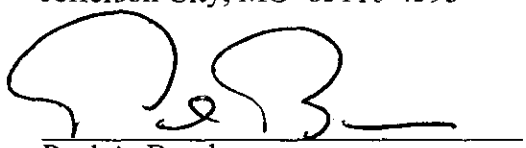
Ms. M. Ruth O'Neill
Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 7800
Jefferson City, MO 65102

Mr. Thomas M. Byrne
Ameren Services Company
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149

Mr. Michael Pendergast
Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, MO 63101

Mr. Jeffrey A. Keevil
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, MO 65201

Mr. William D. Steinmeier
William D. Steinmeier, P.C.
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595



Paul A. Boudreau