

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

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Missouri Public
Service Commission

In the Matter of the Joint Application of)
Gateway Pipeline Company, Inc.)
Missouri Gas Company and Missouri)
Pipeline Company.)

Case No. GM-2001-585

**PROPOSED FINDINGS OF FACT, CONCLUSIONS,
AND ORDERED PARAGRAPHS SUBMITTED BY UTILICORP UNITED INC.,
MISSOURI PIPELINE COMPANY AND MISSOURI GAS COMPANY**

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APPEARANCES

Mr. James C. Swearengen and Mr. Paul A. Boudreau, Brydon, Swearengen and England P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, MO 65102 for UtiliCorp United Inc., Missouri Pipeline Company and Missouri Gas Company

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

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

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

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

Mr. Michael C. Pendergast, 720 Olive Street, Room 1520, St. Louis, MO 63101, and Mr. Mark W. Comley, Newman, Comley and Ruth, 601 Monroe, Suite 301, P.O. Box 537, Jefferson City, MO, 65102, for Laclede Gas Company

Mr. William D. Steinmeier and Ms. Mary Ann (Garr) Young, 2031 Tower Drive, P.O. Box 104595, Jefferson City, MO 65110-4595, for Panhandle Eastern Pipeline Company

REGULATORY LAW JUDGE: **Keith Thornburg**

REPORT AND ORDER

Procedural History

On April 19, 2001, Gateway Pipeline Company, Inc. ("Gateway"), Missouri Pipeline Company ("MPC") and Missouri Gas Company ("MGC") filed a Joint

Application with the Commission seeking a determination that the Commission is without jurisdiction or, in the alternative, authorization on an expedited basis, for Gateway to acquire from UtiliCorp United Inc. ("UtiliCorp"), all of the outstanding shares of UtiliCorp Pipeline Systems, Inc. ("UPL"). On the same day, the Joint Applicants also filed a Motion for Protective Order.

UPL is a wholly-owned subsidiary of UtiliCorp. MPC and MGC are wholly-owned subsidiaries of UPL. Gateway is a corporation with offices located in Colorado. It currently conducts no business operations in the State of Missouri. UPL, like Gateway, conducts no regulated operations in the State of Missouri.

MPC owns and operates a natural gas transmission pipeline and is engaged in the business of transporting natural gas on behalf of shippers. It is interconnected with Panhandle Eastern Pipeline near Curryville, Missouri, in Pike County and has several delivery points in Pike, Lincoln, St. Charles and Franklin counties to its point of termination at Sullivan, Missouri.

MGC likewise owns and operates a natural gas transmission pipeline and is engaged in the business of transporting natural gas on behalf of shippers. It does so from a receipt point at its interconnect with MPC at Sullivan, Missouri, and has delivery points along its system in the counties of Crawford, Phelps and Pulaski to its point of termination at Fort Leonard Wood, Missouri.

MPC and MGC's customers are local distribution companies ("LDCs"), municipalities, industrial and large commercial natural gas end users or marketing companies moving gas on behalf of LDCs, municipalities or natural gas end users behind

the LDCs or municipal systems. Both MPC and MGC are intrastate natural gas transmissions operating under Line Certificates issued by the Commission.

On May 1, 2001, the Office of the Public Counsel ("Public Counsel") filed a Response in Opposition to Joint Application for Finding of Lack of Jurisdiction. Public Counsel asserted that the Commission had jurisdiction over the transaction because the seller, UtiliCorp, is itself a public utility, and that UtiliCorp proposed, in effect, to sell a part of its franchise, works or system dedicated to public service.

On May 2, 2001, the Commission issued an Order Directing Filing pursuant to which the Commission directed its Staff to file a Memorandum of Law concerning the Commission's jurisdiction over the proposed transaction.

Also on May 2, 2001, the Commission issued an Order Granting Protective Order to facilitate the exchange of confidential information between the Applicants, Staff and the Public Counsel.

On May 11, 2001, Staff filed a response to the Joint Application alleging, generally, that the Commission should deny the request of the Joint Applicants that the Commission decline to assert jurisdiction over the proposed transaction. Staff emphasized that the parent company of UPL, the unregulated parent of MPC and MGC, was UtiliCorp, a company operating as a regulated gas corporation in the State of Missouri.

Joint Applicants Gateway, MPC and MGC filed a responsive Legal Memorandum on May 18, 2001. The Joint Applicants cited a series of decisions by the Commission issued since 1997 pursuant to which it has declined jurisdiction over mergers and acquisitions involving unregulated parent companies of public utilities. The Joint

Applicants criticized the arguments of Staff and Public Counsel as incorrectly equating a sale of stock with a sale of a public utility's franchise, works or system under §393.190.1 RSMo.

On May 24, 2001, the Commission issued an Order Determining Jurisdiction and Order Directing Filing and Order Directing Notice pursuant to which the Commission determined that it had jurisdiction over the proposed transaction. The Commission made UtiliCorp a party to the case and directed the Joint Applicants to file a Tax Income Statement with the Commission. In addition, the Commission directed that its information office distribute notice of the Joint Application. The Commission also established an intervention deadline for parties requesting to participate in the proceedings.

Attorneys for UtiliCorp entered their appearance on June 1, 2001.

The Joint Applicants filed their Tax Income Statement with the Commission June 5, 2001.

Applications to Intervene were filed by Union Electric Company d/b/a AmerenUE ("AmerenUE"), Laclede Gas Company ("Laclede") and Panhandle Eastern Pipeline Company ("Panhandle").

On June 11, 2001, the Commission issued an Order Granting Intervention Request, Setting Prehearing Conference and Requiring Filing of Procedural Schedule. In that Order, the Commission granted the Applications to Intervene filed by AmerenUE, Laclede and Panhandle. The Commission also established a prehearing conference to take place on June 28, 2001, at its offices in Jefferson City, Missouri. Finally, the

Commission directed that the parties prepare and file a proposed procedural schedule by no later than July 2, 2001.

Representatives of the Joint Applicants, Staff, Public Counsel and the Intervenors met at the Commission's offices in Jefferson City, Missouri, on June 28, 2001. A Joint Recommendation for Procedural Schedule was filed with the Commission on July 2, 2001.

On July 5, 2001, the Commission issued an Order Adopting Procedural Schedule pursuant to which it established dates for the filing of prepared testimony by the Joint Applicants and other parties. The Procedural Schedule contemplated an evidentiary hearing to take place on August 20-21, 2001.

The Joint Applicants filed prepared direct testimony on July 10, 2001.

On July 20, 2001, Staff filed a Request to Modify the Procedural Schedule by extending it 45 days to allow time for Staff to further investigate the transaction which is the subject of the Joint Application. Public Counsel joined in Staff's Motion on July 23, 2001.

On July 24, 2001, the Commission issued an Order Directing Response. The Commission directed any party wishing to respond to Staff's request for modification of the procedural schedule be filed no later than July 26, 2001.

On or about July 26, 2001, the Joint Applicants filed separate suggestions in opposition to Staff's request for modification of procedural schedule. Gateway, UtiliCorp, MPC and MGC alleged, generally, that no good cause was provided for the extension of the procedural schedule requested by Staff.

On July 30, 2001, Public Counsel filed rebuttal testimony. Public Counsel also filed a motion to permit the filing of supplemental rebuttal testimony "when further information becomes available."

Also on July 30, 2001, Staff filed a Motion for Extension of Time to File Testimony alleging, again, the need for additional time to investigate the Joint Application and to evaluate the proposed transaction.

On August 1, 2001, the Commission convened the second scheduled prehearing conference in the case. At that time, the Regulatory Law Judge informed the parties of the Commission's determination of a need for a modification of the procedural schedule in the case. The parties thereafter proposed dates for the modification of the procedural schedule, which dates were adopted pursuant to an Order Modifying Procedural Schedule dated August 2, 2001. The modified procedural schedule provided for an extension of time for the filing of rebuttal and supplemental rebuttal testimony in subsequent events. The Commission also scheduled a second prehearing conference to take place on August 15, 2001. The evidentiary hearing was postponed approximately two weeks until September 5-6, 2001.

The Commission convened a third prehearing conference on August 15, 2001.

The parties thereafter filed separate Lists of Issues on August 17, 2001.

Thereafter, the parties filed their Position Statements on August 28, 2001. Also on August 28, 2001, the Commission issued an Order Regarding Classification of Responses of Data Requests pursuant to which it addressed various requests by Public Counsel in several motions to declassify responses of Gateway to certain data requests and to thereby cause additional information to become publicly available.

II. Discussion

The Applicants in this case are Gateway, MPC and MGC. UtiliCorp was made a necessary party to the Commission's May 24, 2001, Order. The transaction can be summarized as follows: 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.

The Commission has determined that Gateway cannot lawfully acquire the common stock of UPL without the Commission's approval under §393.190 RSMo. 2000. Consequently, the Joint Applicants must show why the proposed acquisition is not detrimental to the public interest. In considering this Application, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and "a property owner should be allowed to sell his property unless it would be detrimental to the public interest." *State ex. rel City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). The Joint Applicants must demonstrate that the proposed stock sale will have no impact on rates to be charged by MPC and MGC and will result in no deterioration in the quality of customer service. *See, e.g., Laclede Gas Company*, 16 Mo.P.S.C. (N.S.) 328 (1971); *Re the Merger of UtiliCorp United Inc. and The Empire District Electric Company*, Case No. EM-2000-369 (Report and Order dated December 28, 2000) Slip. Op. at pp. 32-33.

The Joint Applicants contend that the proposed transaction will have no impact on the rates of MPG or MGC and, also, will result in no deterioration of the quality of customer service provided over the facilities of MPC or MGC. They allege, generally, that the rates and rules of operation of MPC and MGC will not change by reason of the

proposed transaction and will continue in force until modified in accordance with proceedings instituted for that purpose in the future. The Joint Applicants allege that Gateway is capable of operating the MPC/MGC natural gas pipeline system safely, reliably and efficiently and that it will be using the same field personnel and facilities. The Joint Applicants also note that the Commission will retain full authority to regulate the rates and terms and conditions of service rendered by both MPC and MGC as provided by law. They note that Gateway has arranged bank and other financing for the transaction evidencing the financial qualifications of Gateway to continue operations at the time the transaction is closed and into the future. The Joint Applicants contend that the proposed transaction will be entirely transparent to the customers, communities and entities served by MPC and MGC. Consequently, the Joint Applicants contend the proposed transaction will not cause any present and direct detriment to the public interest. *Re Merger of Missouri-American Water Company and United Water Missouri, Inc.*, Case No. WM-2000-222 (Report and Order dated March 16, 2000). Slip. Op. at 7

Staff, Public Counsel and Laclede recommend that the Commission not approve the proposed acquisition. Generally, Staff and Public Counsel contend that they have not been provided with enough information to conclude that the transaction will not be detrimental to the public interest. Staff and Public Counsel allege that MPC and MGC operations have not been profitable under UtiliCorp's ownership and Gateway has not demonstrated that those circumstances will change such that Gateway can demonstrate that it will be financially viable on a long-term basis. Laclede and AmerenUE generally echo these concerns. In addition, Staff, Public Counsel and Laclede express concerns about the possibility of MPC and MGC pipeline systems coming under the jurisdiction of

the Federal Energy Regulatory Commission ("FERC") should MPC physically connect its facilities with a short length of pipeline owned by UPL and located near MPC's facilities near West Alton, Missouri, crossing under the Mississippi River into the State of Illinois. Those parties argue that it would be detrimental to the interests of Missouri ratepayers if the MPC and MGC pipeline system were to become FERC jurisdictional should Gateway make a physical connection of those facilities.

The facilities under the Mississippi River have sometimes been referred to as the Trans-Mississippi Pipeline ("TMP"). These assets will be transferred to Gateway ownership pursuant to the terms of the Stock Purchase Agreement. The TMP assets are not currently in use and, consequently, are not regulated assets under the jurisdiction of the Commission or the FERC.

Laclede has filed testimony opposing the transaction based on the involvement of one individual as an equity stakeholder in Gateway. Laclede alleges, generally, that the past involvement of this individual in a pipeline enterprise in the Kansas City area evidences a course of conduct demonstrating a lack of fitness to be involved in Missouri operations through his ownership interest in Gateway. Should the Commission approve the Joint Application, Laclede has recommended that the Commission impose seven (7) conditions set forth in the rebuttal testimony of Laclede witness, Dr. Pflaum.

Public Counsel alleges certain concerns with respect to the possibility of Gateway seeking to recover an acquisition adjustment associated with the TMP asset in the future should those assets become regulated by this Commission. Public Counsel also alleges concerns that Gateway may seek to recover transaction costs in a future rate case.

Finally, Public Counsel discusses the applicability of this Commission's affiliate transactions rules with respect to regulated gas corporations.

AmerenUE echoes, generally, some of the concerns expressed by the other parties with respect to financial liability of the purchaser, and it supports Laclede's seven proposed conditions. However, AmerenUE has taken no position with respect to whether the Joint Application should be approved or denied.

The proposed transaction now before the Commission is not a rate case. Consequently, many of the concerns expressed by Staff, Public Counsel, Laclede and AmerenUE with respect to the possible future ratemaking consequences should this transaction be approved are not properly before the Commission. The proper time for the Commission to consider the ratemaking consequences of a particular transaction is when a request for a modification of rate schedules is actually filed with the Commission. There is no evidence in this case that Gateway plans to file a request for rate increase in the foreseeable future. In fact, the evidence demonstrates that MPC and MGC are currently charging less than the maximum gas transportation rate allowed under existing tariffs. The evidence suggests that competitive pressures are acting as restraint on upward movement on gas transportation rates even under existing rate schedules.

The possibility of FERC asserting jurisdiction over the MPC and MGC pipeline systems is speculative under the facts presented in this case. Staff witness Morrissey testified that the primary factor in determining whether FERC would consider asserting jurisdiction over the MPC and MGC operations if connected to the TMP assets is the location of ultimate deliveries of natural gas. In other words, she testified that if gas is coming into the State of Missouri from another state through the TMP for delivery and

ultimate consumption in the State of Missouri, it would be highly unlikely that anything would change as far as the jurisdiction of this Commission over the operations of MPC and MGC is concerned. The Staff, Public Counsel and Laclede have not provided compelling evidence that the FERC would be likely to consider asserting jurisdiction over the operations of MPC or MGC if the proposed transaction is approved. In any event, this scenario is no more likely under Gateway's ownership than it is under the ownership of UtiliCorp. UtiliCorp witness Kreul testified that it had considered in the past, and would consider in the future, a physical interconnection of the TMP and the facilities of MPC.

Staff, Public Counsel and Laclede have all variously pointed to other circumstances that they contend may come about in the event that Gateway becomes the new owner of MPC and MGC through its acquisition of UPL's common stock. There are allegations of continued unprofitability, the prospect that Gateway may be more likely to abandon operations because of continued unprofitability, the possibility of a decline in system reliability by adding additional shippers, thus taxing the physical capacity of the existing facilities and current operations, and the prospect that Gateway may seek to lift the restriction on bypass of LDCs currently imposed on the line certificates of MPC and MGC's.

The scenarios presented by these parties are remote, speculative and uncertain. No party alleges that any of these circumstances will actually come about as a consequence of the Commission's approval of this transaction. Moreover, all of the scenarios set out by the parties opposing the Application are scenarios that can come about now under UtiliCorp's ownership and no party has presented compelling evidence

to convince this Commission that these scenarios are significantly more likely to occur under Gateway's ownership than they would be under UtiliCorp's ownership.

The Commission is not convinced by the characterizations put forth by Staff, Public Counsel and Laclede that Gateway's capital structure and size renders Gateway to operate the MPC and MGC reliably over the long term. The fact of the matter is that Gateway has secured a substantial debt financing commitment from a sophisticated lending institution. Moreover, it has available to it a substantial source of equity investment through one individual and an investment management company with over \$80 billion in assets currently under management. Moreover, the Commission is satisfied that Gateway's financial projections demonstrate a reasonable expectation of profitability even under existing operations. Consequently, the opponents of the proposed transaction have not presented compelling evidence that Gateway will not be a financially viable entity capable of operating the MPC and MGC system safely and reliably over the long term. Moreover, any problems that arise with respect to quality of customer service may always be brought before this Commission for resolution.

Finally, Gateway has indicated that it is agreeable to the three conditions recommended by Staff witness Kottwitz with respect to safe operation of the pipeline system. The Commission believes that those conditions should be adopted as part of its order authorizing this transaction.

The Commission finds that no compelling basis has been provided to justify imposing the seven conditions sought by Laclede. The anti-bypass condition is unnecessary and the other six conditions are better left to private contract negotiations

between Gateway, Laclede and other shippers. It would be premature for the Commission to insert itself in those discussions.

The Joint Applicants have shown, and the Commission finds, that the transaction is not detrimental to the public interest. The record shows there will be no change in rates or terms and conditions of services by either MPC or MGC as a consequence of the proposed transaction. Additionally, the Commission finds that there is no compelling evidence that there will be any deterioration in customer service as a consequence of the Commission's approval of this transaction. The Commission is satisfied that Gateway has the financial ability to own and operate the system into the foreseeable future.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law. MPC and MGC are each "gas corporations" and "public utilities" within the meaning of the language contained in §386.020 RSMo. 2000. Consequently, the Commission has jurisdiction over the services, activities and rates of MPC and MGC under applicable provisions of Chapters 386 and 393.

UtiliCorp is a "gas corporation" and "electrical corporation" and "public utility" within the meaning of §386.020 RSMo. 2000. Consequently, the Commission has jurisdiction over the services and activities of UtiliCorp pursuant to applicable provisions of Chapters 386 and 393 RSMo.

Section 393.190 provides that no gas corporation shall:

"Sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system necessary or useful in the performance of the its duties to the public . . . without having first secured from the Commission an order authorizing it to do so."

The Commission determines that the proposed transaction is, in essence, a sale of part of UtiliCorp's franchise, works and system through the vehicle of a stock sale.

Pursuant to applicable Commission rules, a gas corporation seeking such authorization must show "why the proposed sale is not 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); *See also, State ex. rel Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

As noted above, an Applicant may demonstrate that there is no detriment to the public interest by making a showing that the transaction will not result in any change of rates and will not have the consequence of any deterioration on quality of service. *Re Laclede Gas Company*, 16 Mo.P.S.C. (N.S.) 334 (1971). A prospective purchaser is not required to show that it can operate the acquired properties better than the current owner.

In order to demonstrate the existence of a public detriment, an opposing party must present compelling evidence of a direct and present public detriment. (Report and Order in Case No. WM-2000-222, Slip. Op. at p. 7) The mere possibility of events which may in the future result in adverse consequence is not sufficient to make a showing that the transaction is detrimental to the public interest.

The burden of proof is on the Applicants to demonstrate that the transaction will not be detrimental to the public interest. Once the Applicants have submitted a *prima facie* case, however, the burden shifts to the parties opposing the transaction to present compelling evidence that a specific alleged detriment will occur. (Report and Order in Case No. EM-2000-369, Slip. Op. at p. 33)

Based on the Findings of Fact made herein, the Commission concludes that the Joint Applicants have satisfied their burden of making a *prima facie* case that the transaction will not be detrimental to the public interest. They have shown that it will not have any adverse impact on rates or cause any deterioration in customer service. The Commission is satisfied the *status quo* will be maintained. Staff, Public Counsel and Laclede have not provided compelling evidence to demonstrate that the proposed transaction will result in any specific direct and present adverse impact on the public interest. Accordingly, the Commission further concludes that the acquisition by Gateway of all of the capital stock of UPL is not detrimental to the public interest and should be approved.

IT IS THEREFORE ORDERED that:

1. Gateway Pipeline Company is hereby authorized to acquire all of the capital stock the UtiliCorp Pipeline Systems Inc. as proposed in the Joint Application filed on April 19, 2001. In that regard, Gateway Pipeline Company and UtiliCorp United Inc. are authorized to enter into, execute and perform in accordance with the terms and conditions set out in the Stock Purchase Agreement, as amended, Appendix 5 to the Joint Application. Those parties are further authorized to take such other lawful actions as may be necessary to consummate the acquisition herein authorized.

2. The Commission imposes the following condition on its approval:

A. MPC and MGC must follow the pipeline safety regulations as contained in 4 C.S.R. 240-40.020, 40.030, and 40.080;

B. MPC and MGC must continue to use an adequate number of qualified personnel to operate and maintain the pipelines and respond to

any emergencies along the pipeline. These personnel must continue to be qualified in accordance with 4 C.S.R. 240-40.030(12)(D);

C. There must be no lapse in the call center, dispatch, emergency response, SCADA monitoring and gas control functions for MPC and MGC during the transition of UPL to Gateway. Gateway should plan for the transition of these functions because they must continue to be provided on a 24-hour a day, 7-day a week and 365-day a year basis.

3. Nothing in this Order shall be considered a finding by the Commission of the value for ratemaking purposes for properties, transactions or expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

4. This Report and Order shall become effective on **[10 days after the date of issuance]**.