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July 25, 2001

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

FILED²
JUL 30 2001
Missouri Public
Service Commission

RE: Missouri Public Service - Case No. ER-2001-672

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of UtiliCorp's Response to OPC's Supplemental Suggestions in Support of its Motion to Reject Tariff Filing and OPC's New Motion to Dismiss For Failure to State a Claim. Please stamp the enclosed extra copy "filed" and return same to me.

If you have any questions concerning this matter, then please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Dean Cooper
Dean L. Cooper *ly Rg*

DLC/rhg

Enclosures

cc: Office of the Public Counsel
Office of the General Counsel
Mr. Stuart Conrad
Mr. Mark Comley
Mr. Duncan Kinchloe

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED²

JUL 30 2001

Missouri Public
Service Commission

In the Matter of the tariff filing of Missouri)
Public Service, a division of UtiliCorp)
United Inc., to implement a general rate)
increase for retail electric service provided)
to customers in the Missouri service)
area of MPS.)

Case No. ER-2001-672

**UTILICORP'S RESPONSE TO OPC'S
SUPPLEMENTAL SUGGESTIONS IN SUPPORT OF ITS
MOTION TO REJECT TARIFF FILING AND
OPC'S NEW MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Comes now UtiliCorp United Inc. ("UtiliCorp") d/b/a Missouri Public Service ("MPS") and for its Response to Office of the Public Counsel's ("OPC") Supplemental Suggestions in Motion to Reject Tariff Filing (the "Supplemental Suggestions") and the OPC's new motion to dismiss for failure to state a claim (the "New Motion"), respectfully states as follows to the Missouri Public Service Commission ("Commission").

PURPOSE

1. While the Supplemental Suggestions and New Motion filed by the OPC contain an eclectic mishmash of bizarre arguments, what is missing is any persuasive basis to reject UtiliCorp's tariffs. The OPC has cited absolutely no statutory or case law which would prevent the Commission from processing a rate case for a distinct and separate corporate operating division. Contrary to the OPC's primary assertion, nothing about UtiliCorp's electric rate request for its MPS division will foreclose the Commission's ability to review "all relevant factors" or to establish a "total Missouri jurisdictional revenue requirement for UtiliCorp." Further, OPC's not-so-subtle insinuation that unless UtiliCorp files for an increase for its SJLP division, the

Commission is prohibited from examining those rates, is misleading and patently wrong. The OPC must certainly know that the Commission has statutory authority to examine whether a utility's rates, including UtiliCorp's SJLP rates, are just and reasonable. Such proceedings can be initiated in ways, such as the complaint process, that do not require the utility to propose new rates in the first instance. The OPC's points are without merit. The Commission should deny the OPC's Motion to Reject Tariff Filing.

BACKGROUND

2. On June 8, 2001, UtiliCorp filed revised tariff sheets designed to implement a general electric rate increase for its MPS operating division. On June 15, 2001, the OPC filed its Motion seeking that the tariff sheets be rejected on the grounds that UtiliCorp did not also file tariffs designed to implement a general electric rate increase for its SJLP division. On June 21, 2001, the Commission suspended the tariffs and established certain procedural dates for processing same.

3. UtiliCorp responded to the OPC's original motion on June 25, 2001, ("Response") and later provided supplemental information on July 11, 2001. On July 19, 2001, the Commission issued its Order Directing Filing wherein it sought the input of the Commission Staff ("Staff"). On July 19, 2001, OPC filed its pleading entitled "Public Counsel's Supplemental Suggestions in Support of its Motion to Reject Tariff Filing." UtiliCorp replies herein to the OPC's Supplemental Suggestions.

DISCUSSION

4. The OPC's Supplemental Suggestions are an ineffective attempt to distinguish the cases cited by UtiliCorp. The OPC also now asserts for the first time its theory that rates which differ among service territories are not just and reasonable, an

assertion which the Commission should find surprising, to say the least, in light of its recent decisions rejecting single tariff pricing. In addition, based upon UtiliCorp's filed direct testimony, the OPC now incorrectly asserts in its New Motion that a factual dispute as to the proper test year somehow represents a "failure to state a claim upon which relief can be granted."

5. In summary, the OPC's Supplemental Suggestions contain so many inaccurate, misleading and strange allegations that to deal with each would require a very lengthy response. Consequently, UtiliCorp will only attempt to respond to the most egregious.

Statutes, Regulations and Case Law

6. The OPC now shifts from its initial statutory and regulation-based argument to one based on case law. It cites *State ex rel. Utility Consumer's Council of Missouri v. PSC*, 585 S.W.2d 41 (Mo banc 1979) ("*UCCM*") for the principle that the Commission must consider "all relevant factors" in setting rates.

7. UtiliCorp agrees that "Section 393.270 empowers the Commission to investigate matters about which complaint may be made, or to investigate to ascertain facts necessary to the exercise of its powers and to fix maximum rates after hearing and investigation upon consideration of all relevant factors." *UCCM* at 56. Contrary to the OPC's accusations, however, nothing in UtiliCorp's filing is intended to or is even able to limit the Commission as to what relevant factors it may decide to consider in this rate case. Presumably the Staff, OPC and other parties will be able to address these matters through the discovery and evidentiary process in this case. Nothing in UtiliCorp's filing is intended to limit the parties in this regard.

8. The OPC also now attempts to use UtiliCorp's test year proposal, that the Commission "treat MPS as though the merger did not take place," for its claim that UtiliCorp has somehow "limited" the Commission. UtiliCorp's test year proposal is, as a mere proposal, not binding on the Commission. "The accepted way in which to establish future rates is to select a test year upon the basis of which past costs and revenues can be ascertained as a starting point for future projection." *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 645 S.W.2d 44, 53 (Mo. App. 1982). A test year is a tool used to find the relationship between investment, revenues, and expenses. Certain adjustments are made to the test year figures; "normalization" adjustments are used to eliminate non-recurring items of expenses or revenues and "annualization" adjustments are used to reflect the end-of-period level of investment, expenses and revenues. Adjustments are also made for events occurring outside the test year." *State ex rel. GTE North, Inc., et al. v. Missouri Public Service Commission, et al.*, 835 S.W.2d 356, 368 (Ct. App. W.D. 1992). The appropriate test year is a factual question to be determined by the Commission. Test periods and adjustments thereto "are factual determinations and, as such, within the expertise of the Commission." *Id.*

9. UtiliCorp has merely made its recommendation for a test year based on a customary calendar year period, which happens to conclude prior to the SJLP merger. Eventually, the Commission must reach a factual decision as to the appropriate test year for this case and the appropriate adjustments to be made to that test year. UtiliCorp has in no way "limited" the Commission. The Commission-ordered test year, as adjusted, may or may not reflect the SJLP merger.

10. The OPC boldly calls UtiliCorp's tariff filing for its MPS division

“unprecedented.” The OPC is wrong. The Commission itself has initiated proceedings that treat UtiliCorp’s operating divisions separately. For example, the Commission treats the SJLP and MPS operating divisions separately for natural gas rate-making treatment. For the purposes of natural gas actual cost adjustments, the Commission has opened one case for SJLP (Case No. GR-2001-497) and a separate case for MPS (Case No. GR-2001-461).

11. The OPC’s bold statement that this is “unprecedented” also requires it to distinguish the examples of similar filings provided by UtiliCorp in its Response. Many of the filings entertained by the Commission in the past have included the filing of something less than a “company-wide” rate increase request. Examples of this include:

- UtiliCorp itself, which provides natural gas and electric service through its MPS division. These services are provided through the same corporate entity -- UtiliCorp. However, UtiliCorp has historically sought increases separately for gas and electric operations.
- Ameren-UE has both electric and gas operations in Missouri. Ameren-UE has never been required to seek rate increases for all of these operations if it only desired to seek an increase for a portion.
- Prior to the merger, SJLP was never required to put at issue its gas and industrial steam tariffs if it only sought an adjustment to its electric rates.
- The Commission has not required its Staff to file complaints on a “company-wide” basis when challenges have been made to existing rates.

12. Even more directly on point, the Commission has previously considered proposed rate increases for some public utility divisions, but not others, offering the

same utility service:

- Missouri Water Company was a public utility engaged in providing water service through two operating divisions – the Lexington Division and the Independence Division. In *In the matter of Missouri Water Company for authority to file tariffs increasing rates for water service provided to customers in the Independence Division of the Company*, 23 Mo.P.S.C.(N.S.) 451 (1980), the Commission considered and ordered an increase for the Independence Division without requiring the consideration of any similar proposal for the Lexington Division. The Commission considered similar Independence Division rate case filings in *In the matter of Missouri Water Company for authority to file revised tariffs reflecting increased rates for water service and new Rate J to customers in the Independence Division of the Company*, 22 Mo.P.S.C.(N.S.) 77 (March 28, 1978) and in *In the matter of Missouri Water Company for authority to file tariffs reflecting increased rates for water service provided to customers in the Independence Division of the Company*, 18 Mo.P.S.C.(N.S.) 203 (October 4, 1973).
- Similarly, in *In the matter of Missouri Cities Water Company for authority to file tariffs reflecting increased rates for water service*, 18 Mo.P.S.C.(N.S.) 421 (1974), the Commission entertained a company proposal for a “general increase in rates in [the company's] Brunswick and Mexico division affecting all residential, commercial and industrial customers” and a rate increase proposal in the company’s “Platte County

and St. Charles County divisions [which] would affect only apartments and condominiums served with a single connection." (*Missouri Cities* at p. 423). No proposals were made concerning the company's Warrensburg division and not all customers in the involved divisions were even impacted by the company proposal.

13. The OPC attempts to distinguish these cases by arguing that they involve "the non-interconnected operations of water companies," a phrase that appears nowhere in the statutes cited by the OPC. The OPC also asserts that "rate design decisions [in those cases] were only made after an appropriate company-wide revenue requirement was determined based upon 'all relevant factors'." This claim is made by the OPC as if it is the ultimate end to its argument. However, it is unclear to UtiliCorp why this approach would be abandoned in this case since, in fact, this is what normally occurs in rate cases through the allocation process. Overall or company-wide costs are determined and then allocated to the various operating divisions or business units. If the OPC wishes to suggest this conventional ratemaking approach in this case they are more than welcome to do so. The OPC's announcement of the obvious is not a reason, however, to reject the tariffs.

Single Tariff Pricing Required?

14. A somewhat astounding position taken by the OPC, in light of matters that have recently been decided by the Commission, is the OPC's belief that establishing separate rates for different service territories "may violate the Commissions' anti-discrimination statute." (Section 393.130.2, RSMo). The OPC states that "if the Commission issues a Report and Order increasing rates for residential customers in

UtiliCorp's MPS division that are greater or lesser than the rates charged for the same residential service elsewhere within its interconnected electrical corporation service territory, it would be unlawful discrimination." Essentially, the OPC is asserting that any rate design other than "single tariff pricing" (one rate for all of UtiliCorp's electric customers) would be unlawful discrimination.

15. The Commission addressed similar issues recently in *In the Matter of Missouri-American Water Company's Tariff Sheets*, Case No. WR-2000-281 (August 31, 2000) and rejected this proposition. In the *Missouri-American* case, certain parties took a position in opposition to the OPC positions in this case. They argued that use of a single tariff pricing methodology was unlawful discrimination because costs of service are necessarily different between different divisions of a company. The Commission's response to that argument is equally applicable to the OPC's argument in this case:

The Commissions decision herein should not be read to suggest that the Commission agrees with those parties that contend that STP is not lawful in Missouri. Their theory is that STP creates undue preferences for some customers and unlawfully discriminates against others, in violation of Section 393.130. The Commission agrees with the Staff that the Missouri Supreme Court disposed of that view some years ago:

We are able to discern no legitimate reason or basis for the view that a utility must operate exclusively either under a systemwide rate structure or a local unit rate structure, or the view that an expense item under a systemwide rate structure must of necessity be spread over the entire system

regardless of the nature of the item involved. Experts in utility rates may well conclude that a 'hybrid system' or a 'modified system' of rate making, wherein certain expense items are passed on to certain consumers and certain items are thereby treated on a local unit basis and others on a systemwide basis, is the system which will produce the most equitable rates. And it would appear to be the province and duty of the commission, in determining the questions of reasonable rates, to allocate and treat costs (including taxes) in the way in which, in the commission's judgment, the most just and sound result is reached.

State ex rel. City of West Plains v. Public Service Commission, 310

S.W.2d 925, 933 (banc 1958).

16. Additionally, the Commission has ruled that "as a practical matter the cost of serving each customer is different. This is the reason discrimination is allowed in utility rates. It is only undue discrimination which is proscribed by statutes and court decisions." In the matter of Missouri Utilities Company of Cape Girardeau, Missouri, for authority for a permanent increase in its natural gas rates in accordance with its filed permanent tariffs for both its Central and Southeast Divisions; In the matter of Missouri Utilities Company of Cape Girardeau, Missouri, for authority for a permanent increase in its electrical rates for its Southeast Electrical Division; and, In the matter of Missouri Utilities Company of Cape Girardeau, Missouri, for authority for a permanent increase in its water rates for the City of Cape Girardeau, Missouri. Case Nos. 18,246, 18,352 and

18,371, 20 Mo. P.S.C. (N.S.) 294 (December 2, 1975). In other words, if the cost of service differs among the operating divisions of a single corporation, the rates may also lawfully differ.

17. Thus, the Commission has determined that it is not required by statute to follow either a single tariff or district specific type of rate design. It is free to allocate and treat costs in a whatever way it deems appropriate to reach a just and reasonable result.

18. On the federal level, the OPC's argument has also been dispatched as ineffective. The U.S. Court of Appeals for the District of Columbia Circuit has asserted that "[t]he mere fact of a rate disparity...does not establish unlawful rate discrimination under section 205(b) of the Federal Power Act. Rate differences may be justified and rendered lawful by 'facts—cost of service or otherwise.'" *Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984) citing *St. Michaels Utilities Commission v. FPC*, 377 F. 2d 912, 915 (4th Cir. 1967).

19. Two crucial elements emerge from this discussion. First, only *unreasonable* rate differences are deemed improper, allowing a utility company by and through the flexibility granted the Commission to establish a varying schedule of rates that may include legitimate and reasonable differences. See *State of Missouri ex rel. Capital City Water Co. v. Missouri Public Service Commission*, 850 S.W.2d 903, 911 (Mo. App. 1993). Second, the remedy in the case of two (or more) rates that are considered "unjust, unreasonable, unduly discriminatory or preferential" is for the Commission itself to set the rate by order.

FAILURE TO STATE A CLAIM

20. The OPC now comes up with a new theory for rejection of the tariffs that was not included in its original Motion to Reject Tariffs. The OPC states that "[t]o the extent that UtiliCorp is requesting increased rates for a mere selected portion of its service territory, and essentially asking the Commission to hypothetically assume that the merger did not take place, it is requesting relief that cannot lawfully be granted." The OPC then argues that pursuant to Missouri Civil Procedure Rule 55.27(a)(6), failure to state a claim upon which relief can be granted "is proper grounds to grant summary judgment."

21. As stated above, the appropriate test year and what adjustments to make to that test year are factual decisions for the Commission. The OPC mistakes a factual dispute with a question of whether UtiliCorp has requested relief that is within the Commission's power to grant.

22. The process for the initiation of a rate case is found in Section 393.150, RSMo (2000). This statute follows the "file and suspend" approach to rate making. That is, the process is begun by the utility filing a "schedule stating a new rate or charge."

23. This process of rate making was explained by the Supreme Court of Missouri in *State ex rel. Jackson Cty. v. PSC of Missouri*, 532 S.W.2d 20, 28 (Mo. banc 1975) wherein it was stated:

In *May Department Stores Co. v. Union Electric Co.*, supra, this court held: "These provisions mean that a public utility may by filing schedules suggest to the commission rates and classifications which it believes are

just and reasonable, and, if the commission accepts them, they are authorized rates, but the commission alone can determine that question and make them a lawful charge."

24. UtiliCorp has complied with the statutory requirement for asking the Commission to review a change in its rates. It has filed schedules suggesting "to the Commission rates and classifications which it believes are just and reasonable." Therefore, UtiliCorp has stated a claim upon which relief can be granted.

25. The only other requirements for the filing of a rate case are found in Commission Rule 4 CSR.240-2.065(1), which requires the filing of direct testimony with the tariff, and Commission Rule 4 CSR 240-10.070(3), which establishes minimum filing requirements. There is no allegation that UtiliCorp's filing fails to include the items specified by these rules.

26. A rate case is begun when the company alleges that current rates are insufficient by the filing of new rates. UtiliCorp has done this. Thus, it has stated a claim upon which relief can be granted by the Commission. Whether or not the Commission grants such relief will be derived from the Commission's answers to a series of factual and related legal questions that must be addressed within the context of the proceeding before the Commission.

27. Instead of waiting for these matters to be presented to the Commission through the contested evidentiary process, the OPC appears to want to short-circuit established lawful procedure and to dictate UtiliCorp's rate design proposal before the evidentiary process has begun. The OPC has improperly asked the Commission to enter a summary judgment on rate design while a factual dispute still exists.

WHEREFORE, UtiliCorp respectfully requests that the Commission:

- (a) deny the OPC's Motion to Reject Tariff Filing; and,
- (b) grant such further relief as the Commission deems appropriate.

Respectfully submitted,


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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 30th day of July, 2001, to:

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