

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY**

August 6, 2001

CASE NO: ER-2001-672

Office of the Public Counsel

P.O. Box 7800
Jefferson City, MO 65102

General Counsel

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

James C. Swearengen/Dean L. Cooper

Brydon, Swearengen & England, P. C.
P. O. Box 456
Jefferson City, MO 65102-0456

Stuart W. Conrad

Finnegan Conrad & Peterson, L.C.
3100 Broadway, Suite 1209
Kansas City, MO 64111

Duncan Kincheloe, Attorney

2407 West Ash Street
Columbia, MO 65203

Jeremiah D. Finnegan

Finnegan Conrad & Peterson, L.C.
3100 Broadway, Suite 1209
Kansas City, MO 64111

Mark W. Comley

Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
Jefferson City, MO 65102-0537

Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filing of Missouri Public	)	
Service (MPS), a Division of UtiliCorp United, Inc.,	)	<u>Case No. ER-2001-672</u>
to Implement a General Rate Increase for Retail	)	Tariff No. 200101173
Electric Service Provided to Customers in the	)	
Missouri Service Area of MPS.	)	

ORDER GRANTING INTERVENTION

On June 8, 2001, Missouri Public Service, a division of UtiliCorp United, Inc., submitted to the Commission proposed tariff sheets intended to implement a general rate increase for electric service provided to retail customers in its Missouri service area. The proposed tariff sheets bear a requested effective date of July 9, 2001. The proposed electric service tariff sheets are designed to produce an annual increase of \$49,352,769 in the Company's revenues, exclusive of franchise and occupational taxes, a 16.86 percent increase. On June 21, the Commission suspended Company's proposed tariff sheets for 120 days plus six months, until May 6, 2002. That order also set a deadline of July 11 for applications for intervention.

On July 9, 2001, the Missouri Joint Municipal Electric Utility Commission filed its Application for Intervention. Therein, the Municipal Commission states that it is a political subdivision of the state of Missouri, created according to statute, which acts for the benefit of the inhabitants of its 55 member municipalities.¹ The Municipal Commission points out

¹Section 393.700 et seq., RSMo 2000.

that it and its members are wholesale customers of UtiliCorp, affected by its fuel and purchased power costs, and that they may, consequently, be adversely affected by the outcome of this proceeding. The Municipal Commission asserts that its interests differ from those of the general public and cannot be adequately represented by any other party. Finally, the Municipal Commission suggests that the public interest would be best served by granting intervention.

UtiliCorp responded in opposition to the Municipal Commission's application on July 10. UtiliCorp responds that, as a *wholesale* customer, the Municipal Commission and its members cannot be affected at all by the outcome of this case because wholesale rates are set by the Federal Energy Regulatory Commission (FERC) and not by this state commission. Likewise, UtiliCorp denies that this proceeding will have any effect on UtiliCorp's fuel and purchased power costs. UtiliCorp argues that the Municipal Commission lacks a legitimate interest in this proceeding and that permitting it to intervene would be contrary to the public interest. A noninterested intervenor, in UtiliCorp's view, would make it harder to reach consensus and might well add significantly to the burden of discovery.

On July 20, the Municipal Commission replied, stating that UtiliCorp itself does not distinguish between the generation assets and purchased power used to meet the needs of its retail and wholesale customers. Thus, while FERC indeed sets the rates at which power is sold at wholesale, the fuel and purchased power costs approved by this Commission will necessarily impact those rates via the Fuel Adjustment Clause (FAC). While such costs cannot lawfully be passed on to retail customers, federal law permits UtiliCorp to collect them from wholesale customers. Contrary to UtiliCorp's assertion to the

contrary, the Municipal Commission believes that UtiliCorp's fuel and purchased power contracts will be reviewed in this proceeding. The Municipal Commission further points out that, in the year ending December 31, 2000, UtiliCorp purchased over 20 percent of its power on the spot market. The Municipal Commission renewed its request to intervene in this matter.

On July 24, UtiliCorp responded further in opposition to the Municipal Commission's application to intervene. UtiliCorp asserts that the Municipal Commission's reply raises nothing new and should be disregarded. Further, UtiliCorp states that the Municipal Commission, contrary to its specific assertion, is not a customer of UtiliCorp. UtiliCorp denies that the fuel and purchased power costs reviewed in this proceeding will have any impact on the wholesale rates set by FERC. UtiliCorp argues that the FERC FAC process is wholly separate from the matters within the scope of this proceeding and is subject to significantly different definitions and calculations. UtiliCorp further suggests that the Municipal Commission misstated the case when it complained that wholesale customers bear the risks but "share no portion of the profits from off-system sales" in that FERC took off-system sale revenues into account in setting UtiliCorp's wholesale rates.

On August 2, 2001, the Municipal Commission filed its further suggestions. First, it points out that wholesale customers have previously been permitted to intervene in UtiliCorp's rate cases before this Commission. Second, the Municipal Commission assures this Commission that it has no purpose to obstruct the resolution of these proceedings as UtiliCorp charges. Third, the Municipal Commission asserts that UtiliCorp has erred in claiming that the Municipal Commission itself is not its customer; the Municipal Commission alleges that it "has purchased \$188,000 in services from UCU/MPS" since

1998. Finally, as to UtiliCorp's contention that the Municipal Commission's interests must be litigated before the FERC and not before this Commission, the Municipal Commission states that

it is certainly not the intent of [the Municipal Commission] to relitigate issues in FERC Docket EL-68-001 in this case. [The Municipal Commission] recognizes that costs passed through FERC's fuel adjustment clause are within the sole jurisdiction of the FERC, not the Missouri Commission. However, it is the source of these purchases and the prices paid to these sources that continue to cause [the Municipal Commission] to be concerned with [UtiliCorp's] purchased power practices on a forward-going basis.

(Emphasis in original.)

Commission Rule 4 CSR 240-2.075 governs intervention. Rule 4 CSR 240-2.075(2) requires the intervention applicant to state its interest in the proceeding, its reason for intervening, and whether or not the applicant supports the relief sought. Rule 4 CSR 240-2.075(4) lists grounds upon which intervention will be granted: (A) that the intervention applicant has an interest different from that of the general public which may be adversely affected by the outcome of the proceeding; or (B) that granting intervention would serve the public interest.

Intervention is the process whereby a stranger becomes a full participant in a legal action.² The civil rules, unlike the Commission's rules, distinguish between those with a right to intervene and those with a mere desire to do so.³ However, due process requires that any person with a liberty or property interest that will be directly affected by the

² *Ballmer v. Ballmer*, 923 S.W.2d 365, 368 (Mo. App., W.D. 1996).

³ Rule 52.12, Mo. R. Civ. Pro.

outcome of a proceeding be permitted to intervene upon timely application.⁴ Such persons have a right to intervene.⁵ In applying its rule, the Commission must first determine whether the intervention applicant has such a direct interest in the outcome of the proceeding as to have a right to intervene. If so, the Commission must grant intervention.

The fact that the intervention applicant may suffer an adverse monetary impact from the proceeding is not necessarily sufficient to confer a right to intervene. In *Ballmer*, an insurance company sought to intervene in a "friendly" lawsuit wherein a father sued his son for the wrongful death of another son in an automobile accident.⁶ The insurance company sought to intervene to prevent its insured from confessing judgment. Intervention was denied because the insuror lacked an interest in the case: "As to whether State Farm has an 'interest' in the underlying action, this court has stated that 'the liability of an insuror as a potential indemnitor of the judgment debtor does not constitute a direct interest in such a judgment as to implicate intervention as a matter of right.'"⁷ State Farm was not a participant in the accident that was the subject of the suit; thus, its interest was too remote to confer a right to intervene. The Municipal Commission is not a retail customer of UtiliCorp, but a wholesale customer. Its interest in this matter is indirect and the Commission concludes that Municipal Commission does not have a right to intervene in this matter. Absence of a right to intervene does not, however, prevent the Commission from granting intervention under its rules.

⁴ See U.S. Constitution, Amendment XIV; Missouri Constitution, Article I, Section 10 (1945).

⁵ *Ballmer*, 923 S.W.2d at 368.

⁶ *Ballmer*, *supra*.

⁷ *Id.* (citations omitted).

The Commission may, in the exercise of its discretion under its rule, permit the Municipal Commission to intervene. The Municipal Commission contends that permitting its intervention would serve the public interest. This contention is similar to permissive intervention under the civil rules. An economic interest, such as the Municipal Commission claims, will support permissive intervention.⁸ Permissive intervention is, by its nature, discretionary.⁹ The Municipal Commission filed a timely application to intervene and has met the minimum standards set by the Commission's rule. Permitting the Municipal Commission's intervention will not delay resolution of this matter. Upon consideration of all of the circumstances and the arguments of the parties, the Commission will grant the Municipal Commission's application to intervene.

Also seeking intervention herein are the City of Kansas City and the County of Jackson. Their applications were untimely, having been filed on July 20 and July 25, respectively, but no party objects to their intervention.¹⁰ Therefore, the Commission will grant these applications as well.

IT IS THEREFORE ORDERED:

1. That the application to intervene filed on July 9, 2001, by the Missouri Joint Municipal Electric Utility Commission is granted. The Records Department shall add its counsel to the service list herein.

⁸ See *Meyer v. Meyer*, 842 S.W.2d 184, 188 (Mo. App., E.D. 1992).

⁹ *Id.*

¹⁰ This question was raised at the prehearing conference on August 1, 2001, and all parties indicated that they had no objection to granting these applications.

2. That the application to intervene filed on July 20, 2001, by the City of Kansas City, Missouri, is granted. The Records Department shall add its counsel to the service list herein.

3. That the application to intervene filed on July 25, 2001, by the County of Jackson, Missouri, is granted. The Records Department shall add its counsel to the service list herein.

4. That this order shall become effective on August 13, 2001.

BY THE COMMISSION



**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant Section 386.240,
RSMo 2000.

Dated at Jefferson City, Missouri,
on this 6th day of August, 2001.

CONTESTED
FYI: To Be Issued By Delegation

ALJ/Secretary: Thompson / Pope

Date Circulated 8-2 Return by 3-p.m. 8-7 10 a.m.

CASE NO. ER-2001-672

NOTE: this is a recirculation of an order discussed in agenda on 8-2,

KS

Simmons, Chair

am ps

Murray, Commissioner

OK

Lumpe, Commissioner

Absent

Gaw, Commissioner

1 Agree with Lumpe's charges

Commissioner

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 6th day of August 2001.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

