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November 16, 2001

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

**Re:** Case No. ER-2001-672

Dear Mr. Roberts:

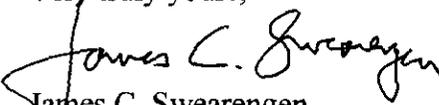
Enclosed for filing in the referenced case on behalf of UtiliCorp United Inc. d/b/a Missouri Public Service, please find an original and eight (8) copies of UtiliCorp's Response to the Motion to Compel and Motion to Shorten Time to Respond.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

A copy of this filing is being provided to all parties of record.

I thank you in advance for your cooperation in this matter.

Very truly yours,

  
James C. Swearngen

JCS/lar

Enclosure

cc: Parties of Record

**FILED**<sup>2</sup>

NOV 16 2001

Missouri Public  
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

NOV 16 2001

Missouri Public  
Service Commission

In the matter of the Tariff Filing )  
of Missouri Public Service (MPS) )  
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

**RESPONSE OF UTILICORP TO  
MOTION TO COMPEL AND  
MOTION TO SHORTEN TIME TO RESPOND**

Comes now UtiliCorp United Inc., d/b/a Missouri Public Service ("MPS"), by counsel, and for its response to the Motion to Compel and Motion to Shorten Time to Respond filed with the Missouri Public Service Commission ("Commission") by the Sedalia Industrial Energy Users Association ("Association") respectfully states as follows:

1. On November 13, 2001, the Association filed with the Commission its "Motion to Compel Responses to Data Requests", in which it asks the Commission to order MPS to answer its Data Requests Nos. 85 and 86. These Data Requests in essence ask MPS to "run" a "Real Time" production costing model for MPS fuel costs using monthly incremental fuel cost assumptions of the Association's choosing. The requests also ask that in said "run", MPS "make other corresponding adjustments to the assumptions to be consistent with the low price forecast for purchased power and the gas prices contained in the Association's assumptions." While the subject pleading recites in paragraph 17 that "This motion is being telecopied to counsel of MoPub simultaneous with its filing with the Commission" and the certificate of service executed by counsel for the Association recites that said counsel"...served the foregoing Application for Leave to Intervene by facsimile

upon counsel for MoPub..." counsel for MPS did not so receive a copy of said pleading from counsel for the Association, and was therefore required to obtain a copy by other means in order to have the opportunity to prepare a response in the time frame directed by the Commission.

2. Prior to the filing of the Association's Motion, the parties communicated verbally and in writing about the data requests. MPS, however, disputes the suggestion of the Association in paragraphs 11 and 12 of its Motion to the effect that the "alternative suggestions" for compliance with the data requests made by counsel for the Association ever took the form of separate requests requiring formal objection or response by MPS. MPS has timely complied with the applicable provisions of Commission Rule 4 CSR 240-2.090(2) with respect to Data Requests 85 and 86, by responding as follows:

"This run *is not available*, the MPSC Staff uses Realtime [programming system] and may be able to make a run for these assumptions."

See Motion, Exhibit A at p. 3 (emphasis added).

3. Commission Rule 4 CSR 240-2.090(2) states that "the term data request shall mean an informal written request for documents or information. . .". A data request is equivalent to an interrogatory. *See State ex rel. Arkansas Power & Light Co. v. Mo. Public Service Comm'n.*, 736 S.W.2d 457, 459 (Mo. App. W.D. 1997).

4. Under Missouri law, a party answering interrogatories generally "must furnish information which is in his possession and can be given without undue labor and expense." *State ex rel. Gamble Const. Co. v. Carroll*, 408 S.W.2d 34, 38 (Mo. banc 1966). However, "a party cannot generally be forced to prepare his opponent's case." *Id.* Under this

approach, interrogatories (to which data requests are conceptually similar) "which require a party to make investigations, research, or compilation of data for his adversary are in many circumstances improper." *Id.* It follows from this that relevant facts or information in the answering party's possession should be provided, but such party should not be required to perform independent research in order to provide the requested answers, because the requesting party should in that case perform its own research. *See id.*

5. The information requested by Data Requests 85 and 86 is not customarily generated or maintained by MPS, is not contained within the records kept by MPS, and is not available to MPS for use in responding to these Data Requests. In order to answer these requests, a process which could take a considerable amount of time, MPS would be required to specially create the requested data at its own labor and expense, using assumed fuel cost figures with which it is unfamiliar, make certain other undefined "corresponding adjustments" and thereby prepare a case for its opponent. This would involve making inputs of the data into the model, verifying the inputted data, completing multiple runs and verifying the outputs, a time-consuming process.

6. Under the circumstances of the pending case, it would be unduly burdensome and oppressive upon MPS to be forced to specially create the data sought by the Association at MPS's own labor and expense, when MPS has not, as part of any record in its possession, previously created or maintained this information, and would have no business need to do so, and when the requested information, through diligence of requesting counsel, could be readily obtained through other sources equally available to the Association. The Association and/or its consultants or counsel can purchase the same

Real-Time model the Staff and MPS have purchased and make its own production runs using whatever assumptions it chooses. It is not MPS's fault that the Association has waited to the 11<sup>th</sup> hour to determine that it might need a production run of its own to support a position it may want to offer. MPS's case has been on file since June with all testimony and exhibits, which included disclosure of which production model was used. (See Ferry Direct page 8). It is common that purchased software is to be only used for the entity purchasing the software and is not to be used by or for other parties because to do otherwise would be to harm the market value of the software.

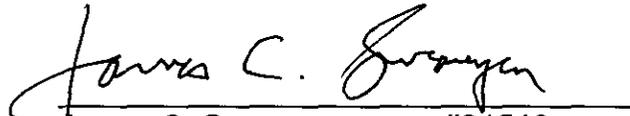
7. The requests spell out two sets of gas price assumptions to be used as inputs for the model and one set of purchase power prices that have no relationship to each other and would guarantee that the results will be flawed and of no value. The requests require MPS personnel to use their judgment to determine what other cost items area appropriate to use or not to use. If MPS would perform this run as requested by the Association the results would be flawed, but the MPS personnel that performed the runs could be expected to testify at the hearing as to what the runs depict. This testimony could then be offered to impeach the MPS's own production model run. The MPS personnel completing these functions will be the same individual. Therefore, in essence the Association is requesting the MPS witness on this matter also be the Association's witness and offer an opposing position.

8. Because the data run information sought by the Association is not contained within the records which are in the possession of MPS, such information is not available to MPS for delivery to the Association and hence there is no obligation under Missouri law that MPS be compelled to furnish the information. *See Arth v. Director of Revenue, 722*

S.W.2d 606, 607 (Mo. banc 1987); *Green v. Director of Revenue*, 952 S.W.2d 781, 782 (Mo. App. S.D. 1997).

WHEREFORE, UtiliCorp respectfully requests that this Commission deny the Association's Motion to Compel Responses to Data Requests, and requests such further relief or order as may be appropriate in the circumstances.

Respectfully submitted,



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Attorneys for UtiliCorp United Inc. d/b/a Missouri Public Service

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 16TH day of November, 2001, to:

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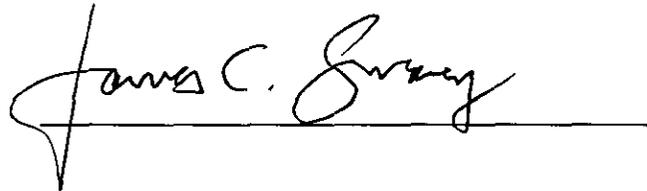
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