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November 21, 2001

FILED³
NOV 21 2001

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
Governor State Office Building
Jefferson City, MO

HAND DELIVERY

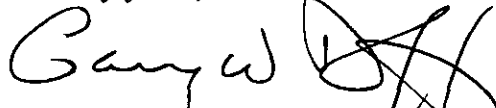
RE: Case No. ER-2001-672; Missouri Public Service

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of the Reply of UtiliCorp to Response in Support of Motion to Compel.

If you have any questions, please give me a call.

Sincerely yours,



Gary W. Duffy

Enclosures

cc w/encl:

John Coffman, Office of Public Counsel
Nathan Williams, Office of General Counsel
Stuart Conrad
Duncan Kinchloe
Mark Comley

Cpt. Robert C. Cottrell, Jr.
Jeremiah Finnegan
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BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED³
NOV 21 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

REPLY OF UTILICORP TO RESPONSE IN
SUPPORT OF MOTION TO COMPEL

COMES NOW UtiliCorp United Inc., d/b/a Missouri Public Service ("MPS"), by counsel, and for its Reply to the Response of Sedalia Industrial Energy Users' Association ("Association") In Support of its Motion to Compel, respectfully states as follows:

1. On November 16, 2001, MPS filed its Response to the Association's Motion to Compel and Motion to Shorten Time to Respond, in which MPS opposed being ordered to provide information requested by the Association's Data Requests nos. 85 and 86. MPS' argument is principally founded upon principles of Missouri common law which establish that a party should not be required, in discovery, to perform research or generate data outside of the records it has in its possession when to do so would result in undue oppression or burden to the answering party, and when the information is available to the requesting party through other sources. In its Response, the Association counters in essence that: a) MPS' "objections" to answering these requests are untimely; b) it would not be unduly burdensome or oppressive upon MPS to produce the data runs requested by the Association; c) the "Real Time" software program required for running the data is not available to it; and d) because

MPS *could* perform the computer run on its software means that it *must* be required to do so.

2. MPS was under no obligation to phrase its initial response to these data requests in the form of an "objection," as the Association argues. As previously argued, MPS timely responded to the disputed data requests, clearly stating that the requested run "is not available" and suggesting the possibility that Commission Staff might be able to perform the run. See MPS Response, p. 2. The Association fails to show how the provisions of 4 CSR 240-2.085(2) establish any requirement that a response to the effect that requested documents are not available amounts to an "objection" triggering the ten-day deadline, as indeed there is no provision of that rule creating such a requirement. Stating that something is "not available" to produce is clearly different than "objecting" to the request itself. To follow the Association's argument would mean denying MPS any meaningful opportunity to oppose the Association's Motion to Compel, simply because MPS' initial response was not phrased as an objection or supported with authority as necessary to oppose a motion to compel. Such result could obviously not have been intended via the language of 4 CSR 240-2.085(2).

3. The Association argues that the holding of ***State ex rel. Gamble Const. Co. v. Carroll***, 408 S.W.2d 34 (Mo. banc 1966) requires that research necessary to answer discovery must be "unduly burdensome and oppressive" before relieving a party of being put in a position of preparing an opponent's case, and suggests that MPS has not met this burden. However, in order to prepare the disputed data run, as requested by the Association, MPS would be required to determine all price and cost assumptions to make the output meaningful, and MPS would be forced to expend an estimated 20 to

40 hours of labor from one of its fuel pricing engineers. Contrary to the Association's suggestions, the Real Time software program is available from other sources known to the Association, or could be purchased or otherwise readily obtained by the Association. As stated by the Association, the Real Time software is not available "off the shelf," but it is a retail product that is obtainable, and it is flexible in that it can be tailored to other utilities. In fact, the Staff of the Commission purchased this same software to use for other Missouri utility rate case cases. The older products used as far back as the 1980's had to be customized for each utility.

4. This is clearly an instance of a requesting party, in the interest of its own convenience, attempting to have a portion of its case prepared by the answering party. For the reasons set forth above, this would not be permissible under the present circumstances where such would result in undue burden, time and expense to MPS. See **Gamble**, *supra*.

5. The Association analogizes MPS' Real Time software system to an "expert" witness which must be disclosed and made available by MPS. If that is true, then MPS asserts that the provisions of Mo. Civil Rule 56.01(b)(4)(b)¹ are equally applicable regarding obtaining information via deposition of an expert. Thus, is the Association suggesting that it compensate MPS for the time and effort expended by MPS in responding to Data Requests 85 and 86? The Association has not previously

¹" A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed." Supreme Court Rule 56.01(b)(4)(b) (emphasis added).

suggested this alternative, but given its argument that MPS' computer run is tantamount to expert testimony, this issue warrants consideration by the Commission if it is inclined to rule favorably on the Association's Motion to Compel and any such order should be conditioned thereon.

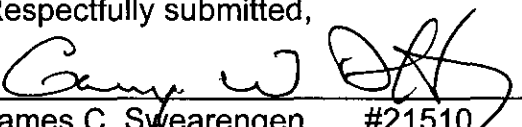
6. The Association's arguments confuse the diverging concepts of "could" and "must." There is no requirement under the Commission's statutes or rules, or under any Supreme Court rule or common law principle, that would mandate MPS to run the requested data simply because it has the capability to do so. The Association misconstrues the **Arth** line of authority² to stand for the proposition that requested information, records, or documents are "available" to the answering party (and hence must be provided) if the answering party has any way of obtaining these items, regardless of whether they in fact exist at the time the request is tendered. This construction violates the holding of **Gamble**, (a Supreme Court *en banc* opinion) which states that a party may not be required in discovery to compile data not otherwise available, or perform independent research to assist the requesting party in preparing its case, when (as in this case) undue annoyance, burden, or inconvenience would result. See **Gamble**, 408 S.W.2d at 38. In this case MPS has made the investment necessary to acquire the Real Time modeling software, (as has the Staff of the Commission) and should not be placed into the position of being required to devote its resources and personnel each time a party such as the Association asserts assumed cost figures and decides that it would like to see the results of a speculative data run.

² Cited at p. 3 of MPS Response; pp. 4-5 of the Association's Response.

Contrary to the Association's suggestions, Real Time is not uniquely available to MPS and may easily be obtained by anyone wishing to make the investment. The fact that MPS has done so should not be deemed to commit the company to producing these runs at the whim of parties who have avoided doing so.

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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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 21st day of November, 2001, to:

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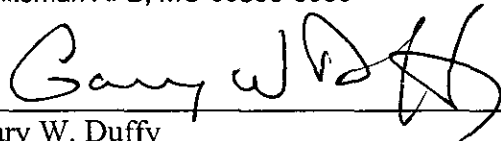
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