

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
January 18, 2002**

CASE NO: ER-2001-672 and EC-2002-265

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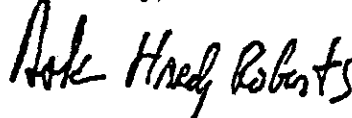
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Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

OF THE STATE OF MISSOURI

Case No. ER-2001-672
Tariff No. 200101173

Case No. EC-2002-265

Respondent.

**ORDER GRANTING CONSOLIDATION;
GRANTING LEAVE TO SUPPLEMENT TESTIMONY,
AND SHORTENING TIME TO RESPOND TO MOTION**

On December 21, 2001, the Staff of the Missouri Public Service Commission filed its Motion to Consolidate Case Nos. ER-2001-672 and EC-2002-265. The former, Case No. ER-2001-672, is a general rate case, filed on June 8, 2001, by Missouri Public Service, a division of UtiliCorp United, Inc. Therein UtiliCorp seeks an annual increase of \$49,352,769 in the Company's revenues, exclusive of franchise and occupational taxes, a 16.86 percent increase. The Commission has suspended those tariff sheets until May 6, 2002. The latter, Case No. EC-2002-265, is an overearnings complaint initiated by the Commission's Staff against UtiliCorp on December 6, 2001. In its Motion to Consolidate, Staff explains that Case No. EC-2002-265 arose out of its preparation for trial in Case

No. ER-2001-672. It is Staff's position that UtiliCorp has excess earnings amounting to about \$20 million annually.¹

Staff argues that, "because of the commonality of the facts and issues . . . , economies of time and other resources would result if these two cases were consolidated, both for hearing and for decision." Staff suggests that the existing procedural schedule in Case No. ER-2001-672 be applied to the consolidated cases. Staff also suggests that the Commission give public notice and establish a new intervention period, although Staff does not offer any suggestions as to suitable dates for this purpose. Finally, Staff urges the Commission to apply to the consolidated cases the shortened discovery response times adopted in Case No. ER-2001-672.

On December 28, Intervenor Sedalia Industrial Energy Users Association filed in Case No. ER-2001-672 a pleading stating that it supports Staff's Motion to Consolidate. On January 4, 2002, Intervenor United States Executive Agencies also filed a pleading in Case No. ER-2001-672 stating that it supports Staff's Motion to Consolidate.

On December 31, UtiliCorp filed its response to Staff's motion. UtiliCorp argues that Staff's Complaint is unauthorized and that the Commission cannot authorize its Staff to file such a complaint. UtiliCorp states that Section 386.390.1, RSMo 2000, nowhere authorizes Staff to file a complaint.² UtiliCorp also asserts that Section 386.240 does not authorize the Commission to delegate authority to file a complaint to its Staff.

¹ Staff states that UtiliCorp has \$37.2 million in annual excess earnings, however, Staff expects this figure to be reduced by \$17 million during the true-up.

² All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

Section 386.390.1 provides:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

This section places express restrictions on complaints regarding “the reasonableness of any rates or charges.” An overearnings complaint is a complaint regarding the reasonableness of rates and charges. Certain entities are expressly authorized to file such complaints and the Commission’s General Counsel is not among them. On the rule of *expressio unius est exclusio alterius*, it may be concluded that the General Assembly has withheld this power from the General Counsel.³

Section 386.071, in turn, states in pertinent part:

It shall be the duty of the general counsel for the commission to represent and appear for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission, and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all

³ *Expressio unius est exclusio alterius*; “the expression of the one excludes the other.” *Black’s Law Dictionary*, at 581 (6th ed. 1990).

actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.

This provision does not supply the authority lacking in Section 386.390.1.

The Commission is authorized, in Section 386.390.1, to proceed on a complaint involving rates "upon its own motion." The General Counsel, according to Section 386.071, must "commence and prosecute in the name of the state all [such] actions and proceedings, authorized by law and directed or authorized by the commission[.]" Where the Commission pursues a rate-related complaint upon its own motion, the General Counsel is necessarily required to commence and prosecute the action. As the Commission has had occasion to point out elsewhere, Section 386.390.1 nowhere states how or when the Commission must exercise its intention to proceed "upon its own motion":

Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority. The Commission concludes that it may do so in this order. Therefore, the Commission shall determine the merits of GST's complaint "upon its own motion" as authorized by Section 386.390.1.⁴

The Commission has previously addressed the argument made here by UtiliCorp. At that time, the Commission held:⁵

Section 386.390 sets out the persons, entities and political subdivisions which may file a complaint with the Commission. Among

⁴ *GS Technology Operating Co., Inc., d/b/a GST Steel Co. v. Kansas City Power & Light Co.*, Case No. EC-99-553 (Report & Order, issued July 25, 2000) at p. 21.

⁵ *Staff of the Public Service Commission v. Missouri Power & Light Co.*, 27 Mo.P.S.C. (N.S.) 328, 329 (1985).

those listed is the Commission by its own motion. Section 386.240, R.S.Mo. 1978, empowers the Commission to authorize any employee to do or perform any act, matter or thing, which the Commission is authorized to do or perform. The filing of a complaint is an act which may be done by the Commission, and therefore may be delegated to its Staff, which is made up of persons employed by the Commission. The Commission has authorized its Staff to file a formal complaint under rule 4 CSR 240-2.070. The Staff is therefore authorized to file a formal complaint.

The Commission will proceed in this matter upon its own motion as authorized by Section 386.390.1. The Commission will authorize and direct its General Counsel to commence and prosecute an overearnings complaint against UtiliCorp.

The Commission will grant the motion to consolidate Case Nos. ER-2001-672 and EC-2002-265 for purposes of hearing and decision. To proceed otherwise would needlessly impose a significant burden on all of the parties. No party has objected to Staff's suggestion to proceed in the consolidated cases according to the procedural schedule already established in Case No. ER-2001-672 and the same will be adopted. However, given the very short interval remaining before the start of the hearing in the now-consolidated cases on January 25, the Commission will not give additional notice or set a new intervention period. Again, as no party has objected, the Commission will also apply to the consolidated cases the shortened time to respond to discovery already adopted in Case No. ER-2001-672.

On December 28, 2001, the Sedalia Industrial Energy Users Association filed its "Conditional" Application to Intervene in Case No. EC-2002-265. On January 4, 2002, the United States Executive Agencies filed its Motion for Leave to Intervene in Case No. EC-2002-265. On January 9, the City of Kansas City filed its Application to Intervene in Case No. EC-2002-265. All of these applicants are already parties to Case

No. ER-2001-672 and, because the two cases are hereby consolidated for all purposes, these applications are now moot.

On December 21, 2001, Staff moved for leave to file Supplemental Direct Testimony. On December 28, Intervenor Sedalia Industrial Energy Users Association filed a pleading supporting Staff's motion, as did Intervenor the United States Executive Agencies on January 4. No party has objected to this motion and the interval for doing so has passed. Therefore, the same will be granted.

On January 15, 2002, Staff filed a second Motion for Leave to File Supplemental Direct Testimony. Staff states that it desires to update the testimony of two witnesses and that it was not able to do so sooner because it was unable to obtain the necessary information from UtiliCorp. The Commission is required, in a rate case, to determine just and reasonable rates on the basis of all relevant factors.⁶ In light of this requirement, it is only in unusual circumstances that the Commission would not permit a party to supplement its testimony in order to present more reliable information to the Commission. However, Commission Rule 4 CSR 240-2.080(16) allows ten days to respond to any pleading, unless otherwise ordered by the Commission. No party has yet had an opportunity to respond to Staff's motion of January 15 and the hearing in the consolidated case will begin on January 25, 2002, only a few days from now.

The Commission will grant Staff's motion to supplement its testimony, and will permit all other parties an opportunity to make corresponding supplementations. The Commission notes that prefiled testimony is not part of the record until offered and received at hearing. Consequently, no party can be prejudiced by this early ruling as ample

⁶ Sections 393.150, 393.230 and 393.270, RSMo 2000.

opportunity will be afforded to challenge the receipt of the supplemented testimony at hearing.

On January 17, 2002, UtiliCorp filed its Objection and Motion to Strike Certain Aspects of Staff's Direct Testimony. The Commission will require that responses to this motion, if any, be filed by 4:00 p.m. on January 25, 2002. Replies to any such responses must be filed by 4:00 p.m. on January 29, 2002.

IT IS THEREFORE ORDERED:

1. That the Motion for Commission Authorization for Staff to File Excess Earnings/Revenues Complaint Case, filed by the Staff of the Missouri Public Service Commission on December 6, 2001, is granted. The Commission expressly authorizes its General Counsel to commence and prosecute an overearnings case against UtiliCorp United, Inc.

2. That the Motion to Consolidate Case Nos. ER-2001-672 and EC-2002-265, filed by the Staff of the Missouri Public Service Commission on December 21, 2001, is granted. Case Nos. ER-2001-672 and EC-2002-265 are consolidated for all purposes. Case No. ER-2001-672 shall be the lead case and further proceedings shall use its style and case number.

3. That the procedural schedule adopted by the Commission on August 14, 2001, in Case No. ER-2002-672, and modified by the Commission on November 7, 2001, shall continue in force and shall apply to proceedings in the consolidated case unless otherwise ordered by the Commission.

4. That the shortened response time for discovery, ordered by the Commission in Case No. ER-2001-672 on November 7, 2001, shall continue in force and shall apply to proceedings in the consolidated case unless otherwise ordered by the Commission.

5. That the Motion for Leave to File Supplemental Direct Testimony, filed by the Staff of the Commission on December 21, 2001, is granted.

6. That the Motion for Leave to File Supplemental Direct Testimony, filed by the Staff of the Commission on January 15, 2002, is granted. All other parties are authorized to file supplemental rebuttal testimony on or before January 25, 2002, and Staff may respond with supplemental surrebuttal on or before January 29, 2002.

7. That responses to the Objection and Motion to Strike Certain Aspects of Staff's Direct Testimony filed by UtiliCorp United, Inc., on January 17, 2002, if any, shall be filed by 4:00 p.m. on January 25, 2002. Replies to any such responses shall be filed by 4:00 p.m. on January 29, 2002.

8. That this order shall become effective on January 18, 2002.

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 18th day of January, 2002.

FYI: To Be Issued By Delegation

ALJ/Secretary:

Thompson / Page

1-18
Date Circulated

1-22-02
Return Not Later Than

ER-2001-6724

or TODAY,

EC-2002-265

CASE NOS.

if possible.
Please Expedite.

KS
Simmons, Chair

Alvest
Murray, Commissioner

JS
Lumpke, Commissioner

JS
Gaw, Commissioner

JS
Forbis, 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 18th day of Jan. 2002 .

Dale Hardy Roberts

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge