IN THE SUPREME COURT OF MISSOURI

STATE ex rel. AG PROCESSING INC A COOPERATIVE,	)	
Relator-Appellant,	)	
	)	**Case No. SC85352**
v.	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI and AQUILA INC.,	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County
Hon. Byron M. Kinder, Circuit Judge
Transferred from the Missouri Court of Appeals
Western District No. WD60631

SUBSTITUTE BRIEF OF APPELLANT AG PROCESSING INC A COOPERATIVE

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ATTORNEYS FOR AG PROCESSING INC A COOPERATIVE

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JURISDICTIONAL STATEMENT

This is an appeal pursuant to ? 386.540 RSMo 2000 from a judgment of the Cole County Circuit Court affirming a decision of the Public Service Commission of the State of Missouri approving the merger of UtiliCorp United, Inc. and St. Joseph Light & Power Company. The Court of Appeals had initial appellate jurisdiction because the appeal does not involve any issue within the exclusive appellate jurisdiction of the Missouri Supreme Court. Mo. Const. art V, ? 3. Pursuant to Respondents' Applications to Transfer granted August 1, 2003, this Court accepted jurisdiction from the Court of Appeals after that Court's opinion. Court Rule 83.04.

STATEMENT OF FACTS

A. Procedural Background.

On October 19, 1999, UtiliCorp United Inc./1/ (UtiliCorp) and St. Joseph Light & Power Company (SJLP) (collectively Joint Applicants or Applicants) filed a Joint Application seeking authority to merge SJLP with and into UtiliCorp. On October 26, 1999, the Commission noticed this filing, assigned it Case No. EM-2000-292, and set a date for interventions. C.P. 117./2/ Interventions by the City of Springfield, Missouri, through its Board of Public Utilities (Springfield), Union Electric Company, d/b/a AmerenUE (AmerenUE), the Missouri Department of Natural Resources (MDNR), and Ag Processing Inc., a cooperative (AGP) were granted on November 17, 1999. C.P. 135.

An intervening prehearing conference was held on December 9, 1999. Testimony was prefiled by the various parties and a hearing was held from July 10, 2000 through July 14, 2000 at the Commission's offices in Jefferson City.

1/ Many months following the Commission's Report and Order, UtiliCorp United Inc. has recently effected a name change to Aquila, Inc. To avoid confusion, and because UtiliCorp was the name of the acquiring corporate entity in the Commission proceedings below, this Brief will continue to use the name "UtiliCorp" as a reference.

2/ "C.P." refers to the page number in the Case Papers that were filed with the Legal File (abbreviated "L.F.") on January 31, 2002. An index to the Case Papers appears beginning at page 70 in the Legal File.

On December 14, 2000 the Commission issued its Report and Order approving the merger, effective December 24 (subsequently extended to December 27, 2000). L.F. 6./3/ AGP timely filed its Application for Rehearing on December 22, 2000 (L.F. 54) and that Application was denied on January 9, 2001. L.F. 61.

AGP then timely filed for a Writ of Review pursuant to ? 536.510 which was issued on January 19, 2001. Motions to intervene were granted to UtiliCorp Inc. (L.F. 86) and the Office of the Public Counsel. L.F. 89.

After briefing and argument, the Circuit Court issued its Findings of Fact, Conclusions of Law and Judgment on September 26, 2001 (L.F. 92), and appeal was timely perfected to the Court of Appeals. L.F. 96. Following its April 22, 2003 opinion, the Court of Appeals denied the Respondents' Applications for Rehearing and Transfer on May 27, 2003. Thereafter Respondents sought transfer from this Court which was granted on August 1, 2003.

3/ "L.F." refers to the Legal File that was filed with the Court on January 31, 2002.

B. AGP's Interest in These Proceedings.

AGP is an agricultural cooperative and is a large manufacturer and processor of soybean meal and soy-related food products and other grain products throughout the central and upper Midwest, including the State of Missouri. AGP is the largest cooperative soybean processing company in the world, the third-largest supplier of refined vegetable oil in the United States and the third-largest commercial feed manufacturer in North America. L.F. 70, C.P. 3.

AGP operates a major processing facility in St. Joseph, Missouri, is an important electrical supply customer of St. Joseph Light & Power Co. ("SJLP"), and there utilizes significant quantities of electrical energy provided by or through SJLP's facilities. AGP is among the largest electrical customers of SJLP. AGP also uses significant quantities of industrial process steam purchased from SJLP in its St. Joseph processing facility. AGP is among the largest industrial steam customers of SJLP. L.F. 70, C.P. 3.

POINTS RELIED ON

I.

THE COMMISSION ERRED IN APPROVING THE MERGER OF UTILICORP UNITED INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE ITS DECISION APPROVING THE MERGER WAS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND WAS CONTRARY TO THE COMPETENT AND SUBSTANTIAL EVIDENCE OF RECORD IN THAT IT REJECTED UNREFUTED EVIDENCE FROM ITS OWN STAFF AND OTHER PARTIES THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE PUBLIC INTEREST AND REFUSED TO DECIDE WHETHER THE $92 MILLION ACQUISITION PREMIUM WOULD BE RECOVERED FROM RATEPAYERS.

State ex rel. City of St. Louis v. Public Service Commission, 73 S.W.2d 393 (Mo. en banc 1934).

State ex rel. Martigney Creek Sewer Co. v. Public Service Commission, 537 S.W.2d 388 (Mo. 1976).

Electric Public Utilities Co. v. Public Serv. Comm'n., 154 Md. 445, 140 A. 840, 844 (Md. 1930).

State ex rel. City of Lake Lotawanna v. Public Service Commission, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987).

State ex rel. Marco Sales v. Public Service Comm'n, 685 S.W.2d 216 (Mo. App. 1984).

II.

THE COMMISSION ERRED IN APPROVING THE MERGER OF UTILICORP UNITED INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE THE BURDEN OF PROOF PLACED UPON THE JOINT APPLICANTS BY SECTION 393.150 RSMO WAS INSTEAD SHIFTED TO THE OTHER PARTIES IN THE ADMINISTRATIVE PROCEEDING IN THAT THE COMMISSION FAILED TO REQUIRE THAT THE APPLICANTS PREPARE AND SUBMIT A MARKET POWER STUDY AS THE COMMISSION ITSELF HAD REQUIRED IN EARLIER DECISIONS.

Dearborn Elec. Light & Power Co. v. Jones, 7 F.2d 806 (8th Cir. 1925).

Robinson v. Benefit Ass'n of Ry. Employees, 183 S.W.2d 407, 412 (Mo. App. 1944).

Dwyer v. Busch Properties, Inc. 624 S.W.2d 848, 851 (Mo. en banc 1982).

City of Eldorado v. Pub. Serv. Comm'n., 362 S.W.2d 680, 683-84 (Ark. 1962).

State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo.App. 1982), cert. denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983).

III.

THE COMMISSION ERRED IN APPROVING THE MERGER OF UTILICORP UNITED INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE ITS DECISION APPROVING THE MERGER WAS NOT SUPPORTED BY

COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD IN THAT IT IGNORED UNREFUTED EVIDENCE FROM THE JOINT APPLICANTS' OWN DOCUMENTS AND MATERIALS THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE RATEPAYERS OF ST. JOSEPH LIGHT & POWER COMPANY.

State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957).

Missouri Gas Energy v. Public Serv. Comm'n., 978 S.W.2d 434 (Mo. App. 1998).

State ex rel. Martigney Creek Sewer Co. v. Public Service Commission, 537 S.W.2d 388, 394 (Mo. 1976).

State ex rel. Util. Consumers Council v. Public Service Commission, 585 S.W. 41, 49 (Mo. en banc 1979).

State ex rel. Noranda Aluminum, Inc. v. Public Service Commission, 24 S.W.3d 243 (Mo. App. W.D. 2000).

ARGUMENT

1. Appellate Standard of Review.

Judicial review of a decision by the Public Service Commission presents a two-part question. Review is intended to determine whether the Commission's report and order was lawful and, if so, whether it was reasonable. State ex rel. Dyer v. Public Service Comm'n, 341 S.W.2d 795, 802 (Mo. 1960), cert. den'd., 366 U.S. 924, 81 S.Ct. 1351, 6 L.Ed.2d 384 (1961); State ex rel. City of West Plains v. Public Service Comm'n, 310 S.W.2d 925, 933 (Mo. en banc 1958).

As to lawfulness, a Commission decision is not entitled

> to deference from the Court, because the Commission has no authority to declare or enforce principles of law or equity. Board of Public Works of Rolla v. Sho-Me Power Corp., 362 Mo. 730, 244 S.W.2d 55 (Mo. en banc 1952). Nor may a Commission decision stand if the Commission has acted outside its statutory authority. State ex rel. Marco Sales v. Public Service Comm'n, 685 S.W.2d 216 (Mo. App. 1984); State ex rel. Beaufort Transfer Co. v.

Clark, 504 S.W.2d 216, 217 (Mo. App. 1973).

Concerning reasonableness, unless supported by substantial and competent evidence on the record as a whole, a Commission decision must be reversed. State ex rel. National Trailer Convoy, Inc. v. Public Service Comm'n, 488 S.W.2d 942, 944 (Mo. App. 1972). Substantial and competent evidence means evidence that is admissible in a court of law and that, if true, has probative force on the issues to which it is directed. *Marco Sales, supra,* at 218.

The purpose of the public service commission law was to protect the consumer against the natural monopoly of a public utility, as provider of a public necessity while at the same time permitting a recovery by the utility of a just and reasonable return. *May Dep't Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, 48 (1937).*

In this case AGP argues that the Public Service Commission has acted unlawfully and unreasonably in two basic areas:

(1) It has approved a merger that was clearly detrimental to the public interest, has ignored critical issues necessary to that determination and has thereby wrongly applied the law;

(2) It has incorrectly shifted the burden of proof to opponents of the merger when the proponents of the merger had that burden.

AGP is concerned that, despite the clear showing of public detriment on this

record had all issues presented been considered, the reviewing court may once again defer to the supposed "expertise" of the Commission to deal with these matters. In this case, as will be shown, the Report and Order under review is not entitled to any such "deference." The source of any Commission claim of "expertise" is the Commission's own Staff, the body of technical experts (accountants, economists and engineers) that advise the Commission. In this case, that technical Staff took a forceful position against the approval of this merger, provided sworn testimony to that effect, and even testified that the application of conditions on the merger could not remove the resulting detriment to the public. Instead the Commission had to refuse to consider a critical component of that detriment in order to reach its decision and in so doing failed to completely decide the case that was presented.

I. THE COMMISSION ERRED IN APPROVING THE MERGER OF UTILICORP UNITED INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE ITS DECISION APPROVING THE MERGER WAS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND WAS CONTRARY TO THE COMPETENT AND SUBSTANTIAL EVIDENCE OF RECORD IN THAT IT REJECTED UNREFUTED EVIDENCE FROM ITS OWN STAFF AND OTHER PARTIES THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE PUBLIC INTEREST AND REFUSED TO DECIDE WHETHER THE $92 MILLION ACQUISITION PREMIUM WOULD BE RECOVERED FROM RATEPAYERS.

Section 393.190.1 RSMo. 2000 requires Commission authorization before a utility may ". . . sell, assign, lease, transfer mortgage or otherwise dispose of . . . ." any of its public utility property. Further, Commission Rule 4 CSR 240-2.060(7) requires that applicants for merger authority show "the reasons the proposed sale of the assets is not detrimental to the public

> interest." Missouri Courts have confirmed that Commission approval is required for the sale, transfer or disposition of public utility assets. State ex rel. Martigney Creek Sewer Co. v. Public Service Commission, 537 S.W.2d 388 (Mo. 1976).

This standard was approved by the Missouri Supreme Court in State ex rel. City of St. Louis v. Public Service Commission, 73 S.W.2d 393 (Mo. en banc 1934), a case involving the application by a foreign corporation to acquire and hold more than 10% of the stock of two Missouri utilities. The underlying Commission case, Re Utilities Power & Light Corp., Case Nos. 6722 and 6723, 18 Mo.P.S.C. 1 (1930) had ruled that the proposed transactions, to be approved, could have "no detrimental effect on the public." *Id.* at 4.

The *City of St. Louis* Court looked to the purpose of the Public Service Commission act, stating:

> The whole purpose of the act is to protect the public. The public served by the utility is interested in the service rendered by the utility and the price charged therefor; [the] investing public is interested in the value and stability of the

securities issued by the utility. [Citations omitted]

The *City of St. Louis* Court also noted that Maryland had an identical statute and quoted from a decision of the Maryland Court in Electric Public Utilities Co. v. Public Serv. Comm'n., 154 Md. 445, 140 A. 840, 844 (Md. 1930) as follows:

> To prevent injury to the public . . . is one of the most important functions of Public Service Commission. It is not their province to insist that the public shall be *benefitted*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. *City of St. Louis, supra,* at 400 (emphasis in original).

At least since 1930, the Commission had consistently applied the "no detriment" test, even applying it to UtiliCorp in connection with a prior merger request. In Re UtiliCorp United Inc., Case No. EM-91-290 (1991), the Commission adopted its Staff's recommendations including a condition that "future approval of acquisitions will be subject to a showing of no detriment to Missouri ratepayers based on a state-specific jurisdictional analysis." That Commission case involved UtiliCorp's application to merge Colorado Transfer Company into UtiliCorp and at least there the Commission adopted its Staff's concerns, including the following:

> Because of its concerns, Staff has recommended that the Commission put UtiliCorp on notice that future approval of acquisitions will be subject to a showing of no detriment to Missouri ratepayers based on a state-specific jurisdictional analysis.
>
> . . . .
>
> [T]he Commission is of the opinion that future decisions on acquisitions should be based on a Missouri jurisdictional analysis as such an analysis is needed to fully evaluate the possible impact on Missouri ratepayers. The Commission finds that the conditions proposed by Staff are reasonable and should be adopted.

Id., Order Approving Merger, pp. 2-4. The Commission applied this test in approving Kansas Power & Light Company's application to acquire The Gas Service Company. Re Kansas Power & Light Co., Case No. GM-84-12, 26 Mo.P.S.C.(N.S.) 254, 257-58 (1983). This standard has been consistently applied, until this case. Further, the technical analysis of its own Staff, amplified by the concerns of other intervening parties, had been persuasive to the Commission. Whomever the merger applicants in a particular transaction are, it should not be surprising that their definition of the "public interest" aligns with their own perceived financial interest.

Accordingly, an ***independent*** viewpoint is and should be persuasive to the Commission in such cases.

The Commission has repeatedly relied upon the technical analysis performed by its own Staff in determining whether or not "no detriment" to the public has been shown. Yet here the Commission's own Staff, in reams of sworn testimony and briefs, futilely maintained that the interests of the captive retail ratepayers of SJLP and of Missouri Public Service Company were detrimentally affected by this merger and that this detriment could not be mitigated even by imposing conditions on the merger. The Commission's own Staff summarized its position and, by its own statements, made the

> ***unusual recommendation in this merger proceeding that the Commission reject the application for merger of UtiliCorp and SJLP, even with conditions***, because of the rather unusual circumstances of this case. As explained later in the instant initial brief, the evidence presented by the Joint Applicants in regard to merger savings and costs shows a shortfall in merger savings compared to merger costs for the first ten years following the merger . . . .

Initial Brief of Staff, EM-2000-292, September 6, 2000, L.F. 829 (emphasis added).

The Commission Staff's principal summary witness, Mark Oligschlaeger, testified to numerous public detriments that were inherent in the proposed merger.

Oligschlaeger Rebuttal, Ex. 713, pp. 9-11, 22./4/

First, Mr. Oligschlaeger stated that UtiliCorp's proposed acquisition adjustment would require that UtiliCorp's Missouri ratepayers inappropriately pay for costs properly assigned to UtiliCorp shareholders by recovering an acquisition premium from the ratepayers. He noted that this result was not dependent upon approval of a "regulatory plan," but simply flowed from approving the merger and permitting the SJLP rates to stay in effect indefinitely while UtiliCorp management significantly reduced the costs of the SJLP operations. *Id*. Indeed, the claimed merger savings reduced the cost of operations for the St. Joseph utility through reductions in payroll and dispatch. These costs were predicates for the existing rates and to the extent that costs are reduced without a corresponding reduction in rates the ratepayers are overcharged immediately.

4/ "Ex." refers to an exhibit that was part of the record of the proceeding at the Commission. Under current Commission practice, exhibits also include prefiled testimony by the various expert witnesses in the proceeding as well as exhibits offered during the hearing or as a part of cross-examination. These exhibits were submitted to the Court of Appeals in the "red rope" folders provided by the Commission on January 31, 2002. The Commission's convention brings within the heading of "exhibits" both the prepared prefiled testimony submitted by the various parties and documentary or other materials such as responses to data requests that are serially marked, offered and received at the hearing.

Second, he testified that the proposed merger resulted in ratepayers paying the merger transaction costs which properly should be the responsibility of the UtiliCorp shareholders. *Id.*

Third, Mr. Oligschlaeger testified that the proposed merger would require ratepayers to pay merger "transition" costs that properly should be assigned to share-holders such as executive severance payments, commonly termed "golden parachutes." *Id.*

Fourth, he testified that the proposed merger would require SJLP ratepayers to shoulder significant amounts of administrative and general costs transferred from UtiliCorp as compared to SJLP's stand-alone cost levels. *Id.*

Fifth, Mr. Oligschlaeger testified that the proposed merger would also detrimentally impact ratepayers of Missouri Public Service Company, another UtiliCorp division, by failing to assign to these customers any merger savings resulting from the consolidation of utility operations and the reallocation of UtiliCorp administrative and general expenses to SJLP that previously were allocated to Missouri Public Service Company. *Id.*

Sixth, he testified that the Joint Applicants' claims that merger "savings" would offset merger costs included claims of savings that could have been achieved without the merger having taken place, such as claimed savings of $60 million in joint dispatch savings, nearly 90% of which would have been achievable by SJLP on a "stand alone" basis. *Id.*

Another key Staff witness, Steven Traxler, testified that after appropriate adjustments were made to the merger cost benefit analysis, merger costs exceeded savings by a significant amount. Traxler Rebuttal, Replacement Pages, Ex. 721, pp. 3-4. Mr. Traxler testified that based on the Applicants' own numbers, a ratepayer detriment of $68.9 million was developed during the 10 years following the merger. Traxler Rebuttal, Ex. 718, p. 7; Traxler Rebuttal, Replacement Pages, Ex. 721, p. 8; Ex. 729.

Staff's position was supported by the Missouri Office of the Public Counsel, City Utilities of Springfield, AGP and the Missouri Department of Natural Resources. Certainly, the Joint Applicants disagreed with Staff's conclusions. But it is also certain that of the numerous interests represented, only the Joint Applicants claimed that the proposed merger was "not detrimental to the public."

Regardless of this overwhelming volume of evidence, technical analysis and review by its own Staff and by the expert witnesses of the other parties, the Commission approved the merger. While discussing some of its reasons for doing so at pages 6-10 of its Report and Order (L.F. 11-15), the Commission appeared to turn its decision upon the lack of immediate rate impact from approval of the merger, asserting that "[h]igher rates for SJLP's customers cannot result from this merger unless the Commission approves those rates in a future rate case." L.F. 14.

Unfortunately, in doing so the Commission erred and did not comply with the law in at least two areas:

First, the Commission completely vitiated the "not detrimental to the

public" test. By approving the merger in the face of overwhelming evidentiary showings of public and ratepayer detriment, and by simply refusing to consider the impact of the $92 million acquisition adjustment that UtiliCorp proposed to recover from the ratepayers, the Commission implicitly ***acknowledged*** that the transaction had not been shown to be "not detrimental."

Insofar as the recovery of this $92 million acquisition premium was concerned, the Commission ruled as follows:

> The matter of the acquisition premium is also not properly before the Commission. It is a matter for a rate case. Therefore, ***the Commission will not address the matter of the acquisition premium in this case.***

Report and Order, p. 41, L. F. 6 at 46 (emphasis added).

Public and ratepayer detriment cannot be evaluated without resolving whether and when this significant amount of premium would be recovered from the ratepayers. In refusing to decide that issue in this case, the Commission stacked the deck in favor of the merger by eliminating $92 million of detrimental impact on ratepayers. Moreover, as Staff Witness Oligschlaeger testified, *supra*, simply allowing the existing SJLP rates to continue at their current levels permitted UtiliCorp to begin recovering that premium from the ratepayers because SJLP's existing rates were set with respect to employment, generation and other cost levels that UtiliCorp contended were going to be reduced by reason of "savings" from the merger. There is no lawful basis on which an

evaluation of whether claimed merger "benefits" exceed the costs of the merger without considering how this $92 million premium was going to be recovered.

Without question, much of the opposing parties' evidence was directed to the calculation and proposed recovery of this acquisition premium. The above-quoted excerpt from the Report and Order demonstrates that the Commission flatly refused to decide this issue, leaving it for another proceeding. But by permitting the merger to go forward in the form that it did, the Commission ***allowed*** that acquisition premium to be recovered from the ratepayers.

And, this Court might reasonably ask: If the question

> of the acquisition premium is ***not*** to be addressed in the merger proceeding, in what proceeding and when shall it be addressed? In a rate case, rates are set only prospectively. The Commission cannot set rates retroactively to remedy even a verified past overrecovery. State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 58 (Mo. en banc 1979). Moreover, that subsequent rate case will concern matching test year costs and revenues and with adjusting the test year financial information to reflect the

> period of time in which the rates are expected to be effective. It will not look backward to see whether claims of "merger savings" were realized or whether the ratepayers paid more then their aggregate costs of service during some past period. Any such overrecoveries are forever lost to the ratepayers. An administrative order, like a judgment of a trial court, must dispose of all issues in a case. The agency must arrive at a terminal and ***complete*** resolution of the case before it. Section 536.150; State ex rel. Riverside Pipeline Co. v Pub. Serv. Comm'n., 26 S.W.3d 396, 400 (Mo.App.W.D. 2000). As a practical matter, even suggesting that merger-related questions would be considered in some rate case to be filed in the indefinite future bespeaks a certain naivete' about both the regulatory process and human nature.

Second, by approving the merger, the Commission sets up a certainty that ratepayer detriment will result in the future from actions that unquestionably result from the approval, *inter alia,* by allowing the current rates to just continue even though the

Joint Applicants were contending that the very cost basis of those rates would be slashed by the merger "benefits" they claimed. The Commission sets up a line of dominoes, then pushes the first one down. Because the last domino in the queue does not immediately fall, or is not contacted by the domino that the Commission pushed, it claims that "no detriment" results from its approval. This Court should not need to be cited to the numerous cases wherein utilities have complained they are being denied appropriate recovery of some cost or appropriate earnings on some asset. Yet in this case, as a result of the Commission's decision to reject its own Staff's recommendation, the groundwork is set for exactly these recoveries that will unquestionably result in further detriment to the public. The Commission's much-vaunted expertise should permit it to look further than the end of its nose.

There is an unfortunate tendency on the part of reviewing courts to defer to supposed "expertise" on the part of the Commission. On review, Commission counsel use every opportunity to argue that utility issues are "rocket science" and that the court must always defer to the Commission's "expertise."

Appellant recognizes that there is an understandable judicial hesitancy to address decisions that are perceived as "complex" or which are perceived as requiring "administrative expertise" to resolve. Missouri's Constitution, however, requires that administrative decisions be supported by "competent and substantial evidence on the whole record." To sustain the Commission decision, the Court must be able to rule that, upon the ***whole*** record of this proceeding, the competent and substantial evidence

supports a decision that there can be no detriment to the ratepaying public, to the investing public or to the public generally. This cannot be done by postponing a decision on whether the ratepayers pay a $92 million acquisition premium resulting from the merger being considered.

Recourse to "Commission expertise" does not save this Report and Order. In *Marco Sales, supra*, the Court noted that deference to Commission "expertise" does not substitute for competent and substantial evidence. There the Commission had authorized a gas utility's heat pump surcharge based on a witness' testimony about "ads" that he had read and also on what others had told him. Rejecting this "unmitigated hearsay," the court stated:

> Cases are legion that hearsay evidence does not rise to
>
> > the level of 'competent and substantial evidence'
> > within the ambit of Mo. Const. Art. V, ? 18.
> > [citations omitted].
>
> Laclede and the Commission seek to avoid the fatal consequence of the evidentiary deficiency by the classic hue and cry of virtually limitless discretion possessed by the commission, the admonition that courts should not substitute their judgment for that of the Commission, and the ***indulgence of deference for decisions of the Commission because of its***

> ***expertise*** in the complicated and highly sophisticated matters it is legislatively ordained to resolve. Judicial recognition thereof . . . does not dictate blind acceptance of every order cut and every decision handed down by the Commission. . . . ***Unbridled bureaucracy is the subtle destroyer of people's rights and Mo. Const. Art. V, ? 18 is their response***. *Marco Sales, supra,* at 220 (emphasis added).

In cases such as this, ***the Commission performs a function similar to that of a trial court***. Beyond the limited ability to consider evidence that was proffered and rejected by the Commission (Section 386.510 RSMo. 2000), the General Assembly provides no mechanism for the initial hearing or for presentation of evidence in cases such as this ***other than before the Commission***. *Id.* If the parties before that agency, through testimony of their own witnesses and cross-examination of the witnesses of other parties, build a record that compels a particular decision on an issue, the Commission should not be able to avoid reaching that decision (or attempt support of a different decision) by hiding behind assertions of "administrative expertise." Reviewing courts should not permit the Commission to mock Missouri's constitutional limitations nor permit the Commission to perpetuate itself as the "unbridled bureaucracy" that was condemned in *Marco Sales, supra*.

It is similarly unfortunate that administrative agencies often come to the hearing room with less than open or disinterested minds. Commissioners, who are not required to be attorneys and frequently have little or no legal training or experience with the law of evidence, often bring with them preconceived ideas and notions of how public utility rates should be established and how issues presented should be determined. Concealed behind "administrative expertise," these preconceived ideas and notions cannot be cross-examined, are not subject to discovery, and frustrate even experienced counsel in attempting to ferret out, meet and respond to these unstated "hidden" agendas.

But Article V, Section 18 of Missouri's Constitution is not a "scintilla" test. An administrative record that has substantial weight in the direction of resolution of an issue in a particular manner should not be disregarded simply because there is a "scintilla" of even suspect or incredible evidence on the other side. The Constitution directs that administrative decisions be supported by substantial evidence "on the whole record," explicitly requiring that evidence be ***weighed***.

Without question, administrative expertise has its purpose. Regulatory issues are often surrounded by a specialized taxonomy. New technologies may be involved. But if judicial review of multi-million dollar administrative decisions is to be meaningful,

> "it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. ***We may***

not approve an order on faith in the Commission's expertise." [Citing *Marco Sales, supra*].

State ex rel. City of Lake Lotawanna v. Public Service Commission, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (emphasis added).

Deference to "administrative expertise" should never be used as a substitute for evidence, nor for factual findings. Nor should it be used as a means of supporting forays by the regulators into an administrative Land of Oz simply because the agency entreats reviewing courts, as the Wizard entreated Dorothy, to "ignore the man behind the curtain."

Importantly, even the "expertise" rationale falls away when the source of that expertise, the Commission's own technical Staff, is telling it on the record -- and loudly -- that the transaction should not be approved, that public and ratepayer detriment will result, and that result is echoed by all other parties to the merger save the Applicants themselves, the whole record cannot support a decision to approve the transaction anyway.

II. THE COMMISSION ERRED IN APPROVING THE MERGER OF UTILICORP UNITED INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE THE BURDEN OF PROOF PLACED UPON THE JOINT APPLICANTS BY SECTION 393.150 RSMO WAS INSTEAD SHIFTED TO THE OTHER PARTIES IN THE ADMINISTRATIVE PROCEEDING IN THAT THE COMMISSION FAILED TO REQUIRE THAT THE APPLICANTS PREPARE AND SUBMIT A MARKET POWER STUDY AS THE COMMISSION ITSELF HAD REQUIRED IN EARLIER DECISIONS.

In this case, UtiliCorp United, a public utility holding company, was allowed to purchase another public utility, St. Joseph Light & Power Company. Although described as a "merger," UtiliCorp acquired all the common stock of SJLP and SJLP was absorbed as a division of UtiliCorp, placing SJLP alongside of Missouri Public Service Company as a UtiliCorp division. However, the Commission's decisions shifted the burden of proof away from the Joint Applicants where it belonged to the other parties to the case. This was plain legal error affecting the result of the proceeding because ***the parties who had sole access to the information needed to prepare necessary studies were not compelled to provide that information.***

The problem began with a deficient filing. The Joint Applicants did not submit a market power study. The Joint Applicants appeared to contend that, if there was

no rate increase directly resulting from the merger, their supposed burden was not only met, but other parties were required to affirmatively show that some detriment would result. In effect, Joint Applicants proposed to the Commission that -- simply by filing their application -- the burden of proof was on parties opposing the merger to show that it was detrimental. While Joint Applicants were certainly entitled to assert this position, the Commission legally erred when it accepted it.

Section 386.430 RSMo 2000 states that in all

> proceedings arising under the provisions of the Public Service Commission Law or growing out of the exercise of the authority and powers granted therein to the Commission, the burden of proof is upon any party adverse to the Commission or seeking to set aside any determination, requirement, direction or Commission order. Section 393.150.2 RSMo 2000 imposes the burden of proof to show that any rate change is just and

> reasonable is upon the public utility. Further, Commission rules place the burden upon the moving party with the exception of investigation proceedings. 4 CSR 240-2.110(5)(A). Further, it has been ruled that the burden of proving good faith falls upon the purchaser of the utility property, here that is UtiliCorp. Dearborn Elec. Light & Power Co. v. Jones, 7 F.2d 806 (8th Cir. 1925).

It is also clear under Missouri law that, where

> facts relating to an issue are peculiarly within the control or knowledge of one party, the burden of production falls on that party. Robinson v. Benefit Ass'n of Ry. Employees, 183 S.W.2d 407, 412 (Mo. App. 1944). *Cf. Kenton v. Massman Construction*

Co., 164 S.W.2d 349, 352 (Mo. 1942) ("A plaintiff asserting a negative generally has the burden of proof as to such matter along with the other issues on which he bases his case. But there appears to be an exception to this rule where the evidence on such a matter is peculiarly within the knowledge and control of the defendant."); Dwyer v. Busch Properties, Inc. 624 S.W.2d 848, 851 (Mo. en banc 1982). This rule is applied in public utility cases where virtually all the facts and documents relevant to the issues are particularly within the control of the public utility. *See, e.g.*, City of Eldorado v. Pub. Serv. Comm'n., 362 S.W.2d 680, 683-84 (Ark. 1962). That the

> Joint Applicants had the burden of proof in this proceeding was never disputed or even questioned by the Joint Applicants before the Commission.

On November 19, 1999, well in advance of the hearing, Public Counsel moved that the Commission require the Joint Applicants to submit a market power study. C.P. 139. Five days later, the Commission's own Staff also requested that the Joint Applicants be required to supplement their filing with a market power study in lieu of having their filing dismissed as "deficient." *Staff Response to Commission Notice Regarding Motion to Establish Procedural Schedule*, November 24, 1999, C.P. 153. The Commission Staff's pleading noted numerous issues that required a market power study, and cited several earlier Commission orders in the Union Electric/CIPSCO merger case and in the then-pending (but now abandoned) KCPL/Western Resources merger filing. Staff further supported its position on December 13, 1999 (*Reply to the December 3, 1999 Response of UtiliCorp and St. Joseph Power & Light Co.*, C.P. 192, December 13, 1999), again urging the Commission to require Joint Applicants to submit a market power study.

> The Joint Applicants allege . . . that retail market power is an issue that only should be addressed when retail competition becomes a reality in Missouri. There is a need for a retail

> market power study regardless of whether there currently is retail competition in Missouri. ***In order to address the "not detrimental to the public interest" standard, the Commission must look at potential changes in the electric industry*** that are very likely to occur in the near future. *Id.*, at 193 (emphasis added).

AGP and City Utilities of Springfield supported Public Counsel's Motion. But without regard to this support, or even that of its own technical Staff, on December 21, 1999 the Commission denied Public Counsel's Motion asserting that there were "too many uncertainties" concerning retail competition. The Commission instructed the parties that

> [i]t is important to understand that the Commission is not, by this order, excluding consideration of market power issues in this case. The Commission is merely declining to require Applicants to file a market power study as part of its direct testimony. ***If the other parties wish to address the retail market power issue in their rebuttal testimony and at the hearing they are free to do so***." *Order Denying Motion to Require Market Power Study and Adopting Procedural Schedule,* December 21, 1999, C.P. 252.

This ruling is not supported by the law, was unprecedented, and was

contrary to the Commission's own rulings in prior merger cases. It resulted in shifting the burden of proof that the law squarely places upon Joint Applicants. Since the Commission refused to require Joint Applicants to provide these materials and develop a market power analysis, the other parties were thrust into the position of having to assemble such data without access to the information held exclusively by the Joint Applicants. The opposing parties were effectively required to assume the burden of proof on this issue.

To address the "not detrimental" standard, the Joint Applicants should have been required to address changes in the electric industry that are very likely to occur in the future. Certainly the precise specifics of retail competition may not all be certain, but allowing a business combination of the magnitude approved in this order without even considering the implications that the business combination might have in the future for members of the public served by SJLP and by other UtiliCorp divisions is certainly not prudent decision making. When coupled with shifting the burden of proof away from the Joint Applicants, this failure makes the order unlawful and not based upon lawful procedure.

Analysis of market power, a retail market power study, or even some minimal inquiry into the effect that a combination of otherwise competitive wholesale power suppliers, is clearly relevant to the ultimate question of whether the captive Missouri ratepayers of the utility will be damaged by the business combination, or are being placed in a position where they will be subjected to damage or detriment in the

future.

Forty years ago, such questions were rare and rarely needed to be asked. Today, with restructuring and its effects moving forward, subtle changes in market structure, elimination or advance preclusion of competitors and potential competitors through mergers and acquisitions, and expanding the utilities' unregulated market share are the "name of the game" in the utility business. It is critical that there be market power analyses in the mergers of today.

In this case, although repeatedly warned by its own Staff, the Office of the Public Counsel and by several intervenors, the Commission simply failed to consider the right questions to determine whether the interests of captive ratepayers were going to be protected.

The issue of the accumulation of retail market power by merging utilities is properly a consideration of the Commission. In the recent Union Electric/CIPSCO merger case, the Commission ordered that additional information in the nature of a retail market power study be ordered:

> It is also true that utilities serving other customers
>
> > within the State of Missouri are now engaged in wholesale transactions with [the Applicant] and can be expected to engage in such transactions with [the Applicant] if the merger is approved. To the extent that [the Applicant] can increase

> prices and decrease sales, ***the retail customers of other Missouri utilities might be adversely affected.*** *Re Application of Union Electric Company*, 5 Mo. P.S.C.3d 157, 158 (1996) (emphasis added).

Were that not enough, the Commission's Report and Order continued:

> The term "market power" is commonly used in the electric industry to refer to the ability of a competitor to exercise some degree of control over the price which it receives for the sale of electricity. An individual competitor exercising such control may raise its prices and lower the quantity of electricity sold, thereby increasing its profits. The public interest may be harmed by the exercise of such market power. Despite the advent of open access in the wholesale electricity market, the ability of a competitor to control prices and restrict output could have a detrimental effect on ratepayers in general. Moreover, while any increased profits for Ameren Corporation could mean reduced rates for Missouri's UE ratepayers in the immediate future, the exercise of such power in the long run could be harmful to consumers.
>
> . . . .

> Therefore, the ability of Ameren Corporation to exercise such control over price and its effect upon the public interest should be addressed by the parties in their additional testimony.

Re Union Electric Company, Case No. EM-96-149, 5 Mo. P.S.C.3d 157, 158 (September 25, 1996).

In his concurring opinion in the UE matter, then Commission Chairman Carl Zobrist (who was one of the Joint Applicants' counsel in the merger under review), found it "puzzling" that in the settlement of that case that the "important issue of market power" was not discussed. Then-Chair Zobrist concluded:

> ***Any future merger case*** brought before the Commission ***should contain a careful analysis of market power issues***, in addition to the traditional means used to measure the alleged merger benefits for ratepayers . . . .

Re Union Electric Company, Case No. EM-96-149, 5 Mo. P.S.C.3d 157 (March 10, 1997; final decision date: September 25, 1996) (emphasis added).

The Commission's failure to require market power data violates its own rule, 4 CSR 240-2.130, that requires direct testimony to "include all testimony and schedules asserting and explaining that party's entire case-in-chief." Since a showing that no public detriment will result from the combination of the utility is a requirement of the Commission's rule, the Joint Applicants filing was initially deficient in failing to include a

retail market power study and the Commission legally erred in not requiring such filing and instead unlawfully shifted the burden of proof to other parties when that burden should have remained on Joint Applicants.

It is also argued that the Commission is not bound by precedent. This statement is overbroad. Certainly, that the Commission once decided a rate case for a public utility does not forever bind the utility to the rate levels established in that proceeding. Nor is the Commission unable to respond to and address new developments in regulation such as changes at the federal level. But at the same time its decisions cannot be arbitrary and capricious; they must find their basis in standards that are articulated by the Commission. All parties must be able to rely on Commission decisions rather than on mercurial temperments of Commission majorities. To say that Commission precedent has no binding force suggests decisions that are arbitrary and capricious rather than steady and measured.

As it did on the issue of overall detriment, the Commission again disregarded the recommendations of its own Staff and its own economist in failing to direct market power studies. Staff's economist, Dr. Michael Proctor, testified that even though he was not primarily concerned with ***horizontal*** market concentration in this merger, he continued to be concerned about horizontal market power concentrations in each of the service territories in the form of what Dr. Proctor termed "load pockets." Exhibit 714, p. 57. He defined these load pockets as geographical areas in the service territories where the transmission system would not allow competitive generation to

provide services to a significant percentage of end-use customers' loads on a year-round basis. *Id.* He requested that the Commission direct the Joint Applicants to submit a study showing what percentage of load can be served from competitive generation sources throughout their merged service territory -- a condition that the Commission proceeded to ignore.

As regards ***vertical*** market power, Dr. Proctor had greater concerns. He stated that even under the FERC's model of open access to the transmission system, a utility could still restrict the amount of service it offers in a way to favor its own generation thereby creating higher ratepayer costs. Exhibit 714, p. 58. He recommended that the Commission condition its order on the Joint Applicants agreeing to join the same Regional Transmission Organization, a condition that the Commission similarly ignored.

But the Public Counsel and the Commission's own Staff were not alone in requesting that market power data be provided by the Joint Applicants. Dr. Proctor testified that he had reviewed the testimony and exhibits of Mr. Whitfield Russell, a witness for City Utilities of Springfield. Mr. Russell had noted that there were several transmission system weaknesses that would be aggravated by the method proposed by the Joint Applicants to interconnect their systems that would result in increases in the very type of vertical market power that Dr. Proctor had noted could occur. Confirming these observations, Dr. Proctor recommended as follows:

> As proposed by Mr. Russell, the Commission should require UtiliCorp to file the result of this [Southwest Power Pool]

study in the instant case as supplemental direct testimony by UtiliCorp. Then each party should be given no more than four weeks to provide rebuttal testimony, with no more than two weeks for UtiliCorp to file surrebuttal. Hearings on this specific issue should then occur. Exhibit 715, p. 9.

As with other such Staff recommendations, the

> Commission simply chose to ignore them. The source of the Commission's "expertise" when it rejects the recommendations of its own Staff and the recommendations of each of the intervenors is problematic. The only other source is from the Joint Applicants who are obviously prejudiced in favor of the merger. Their assertions that a market power analysis is not required or is premature are belied by their own arguments in this case. The principal reason repeatedly stated by the Joint Applicants in support of the merger is that it would ***make the combined entity a better competitor*** (Steinbecker Direct, Ex. 1, p. 6; Green Direct, Ex. 2, p. 15) -- odd contentions if an increase in

> market power was ***not*** desired. In fact, what UtiliCorp sought to do was to gain the generation assets of SJLP in order to aggregate them with other generation assets and create a larger, more dominant utility ***in the portion of the market where there is no regulation, namely the wholesale power market because of Federal deregulation.*** *See, Regional Transmission Organizations, Order No. 2000, 65 FR 809 (January 6, 2000, issued December 20, 1999), FERC Stats & Regs. ? 31,089 (2000); Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services*, Order No. 888, 75 FERC ? 61,080 (April 24, 1996), *aff'd sub nom., New York et al v. Federal Energy Reg. Comm'n., 535 U.S. 1 (March 4, 2002)*; *Open Access Same-Time Information System*, Order No. 889, 75 FERC ? 61,076 (April 24, 1996).

The Commission's action plainly shifted the burden of proof to the other parties and resulted in prejudice to their abilities to present their respective cases. The

Joint Applicants were the parties with access to the data. Even in more traditional proceedings, the burden of production falls on the party having access to the data. *Dwyer v. Busch Properties, Inc., 624 S.W.2d 828, 851 (Mo. en banc 1982); Kenton v. Massman Construction Co., 164 S.W.2d 349, 352 (Mo. 1942).* By failing to require Joint Applicants to provide this data initially, the other parties, including AGP, were frustrated in their efforts to obtain such data because the Joint Applicants could then contend that data requests seeking retail market power data were not proper because that data did not currently exist and due to the Commission's order they were under no obligation to conduct studies or compilations to respond to data requests.

> Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo.App. 1982), cert. denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). The Fourteenth Amendment of the United States' Constitution and Sections 2 and 10 of the Missouri Constitution guarantee that parties to a rate proceeding must be accorded a fair and meaningful opportunity to heard. *Id*. By shifting the burden of proof to parties who had no access to the required data, the Commission acted unlawfully and unfairly.

In short, the Commission simply dropped the ball. The Commission should not be permitted to justify its decision with an appeal to "expertise" when it disregards the recommendations of its own Staff, the source of such "expertise." The Commission

allowed the Joint Applicants to slip by without even studying the question. It shifted the burden of proof on the issue of detriment from market power accretion to those parties (including Commission Staff) who were recommending against the merger.

III. THE COMMISSION ERRED IN APPROVING THE MERGER OF UTILICORP UNITED INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE ITS DECISION APPROVING THE MERGER WAS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD IN THAT IT IGNORED UNREFUTED EVIDENCE FROM THE JOINT APPLICANTS' OWN DOCUMENTS AND MATERIALS THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE RATEPAYERS OF ST. JOSEPH LIGHT & POWER COMPANY.

As noted earlier, the proper legal standard that the Commission should have used was whether there was "no detriment" to the ratepayers or investing public resulting from the merger. However, in approving the merger the Commission simply refused to consider data that was obtained from the Joint Applicants' own documents demonstrating that SJLP steam and natural gas customers, and all SJLP customers generally would be detrimentally affected by the merger.

SJLP provides electric, gas and steam service in its service area. Steam service is limited to an area proximate to the Lake Road generating station where such by-product steam can be supplied. AGP is the largest steam customer on the SJLP system and uses steam from SJLP in its soybean processing operations in St. Joseph.

Through discovery AGP obtained from Joint Applicants what was admitted

as Exhibit 503. Tr. 179, *see* L.F. 79./5/ This three-page exhibit (attached hereto as Appendix A for the convenience of the Court), plainly demonstrates that the steam customers were detrimentally affected by the cost shifts resulting from the merger.

Looking at the second page of Exhibit 503, attached as Appendix A2, shows a detriment of $34,000 annually for the steam system and a detriment of $35,000 to SJLP gas customers after costs are allocated from other UtiliCorp divisions./6/ When allocated acquisition premium costs are considered, steam customers face a detriment of $166,000 annually with gas customers' detriment even larger ($202,000).

Joint Applicants' witnesses argued that Exhibit 503 was "irrelevant," apparently because they asserted it was a "draft" and had been "updated." However, no "final" copy or "update" was produced by Joint Applicants (despite AGP's requests) and Exhibit 503 stands unrebutted in the record of this proceeding. ***There is no contrary evidence in this record***.

But UtiliCorp's argument about "draft" or "preliminary" allocation begs the question. Examination of Exhibit 503 shows that "allocation" makes no difference at all. The size of a pie is not dependent on either the number or the size of the slices that are

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5/ "Tr." refers to the transcript of the proceedings before the Commission at the hearing(s), is contained in bound volumes in the "red rope" folders filed with the Court on January 31, 2002.

6/ The numbers on the exhibit are in thousands.

cut from it. All "allocation" does in this case is spread a ***total*** detriment among gas, steam and electric customers. The ***total*** of the dollars shown on this Exhibit to be allocated remains negative ($2,503,000) for ***all*** SJLP customers and ***thus is shown to be a certain detriment for steam customers***. In fact, based on the first five years of the merger, that being the period we are now in, the Joint Applicants' own documents demonstrate that the electric, gas and steam ratepayers of the SJLP utility will be detrimentally affected by $2,503,000 on an ***average annual basis*** for the next five years, or a five-year total detriment of over $12.5 million. Again, although Joint Applicants witnesses argued about the ***allocation*** of these costs among different groups of customers, ***the SJLP ratepayer detriment is shown on the unallocated total***.

Joint Applicants' witnesses acknowledged that numbers in parentheses on this Exhibit represented detriments to customers. Joint Applicants' witness Green acknowledged the detriment to customers on his company's own document (Exhibit 503):

> Q. Well, let's talk at a concept level and see how far we get. Again, would it be your understanding that numbers that are positive represent assertive benefits, while numbers that are in parens would represent costs or negative benefits?
>
> A. That is the general approach.
>
> Q. And moving on down, at the bottom of the chart, both the gas and steam numbers remain negative, they just increase in their negativity,

do they not?

A. They have parens around them.

Q. Are they larger than the ones on five?

A. They are.

Tr. pp. 181-82. A later technical witness for Joint Applicants also confirmed that the detriment to customers was demonstrated on this Exhibit.

Q. Now, that's enclosed in parens, so that would indicate something other than a benefit. Correct?

A. That's correct.

Q. And as we move on down that sheet, we see continuing numbers that are negative that indicate a detriment at least to the steam customers, do we not?

A. Well, this exhibit, if I might explain --

Q. Well, I'll -- you'll have an opportunity to explain, but would you work with my question first?

A. They show a negative, but it's irrelevant.

Tr. pp. 340. The Joint Applicant witness contended that the information on the Exhibit was "irrelevant" because AGP had only asked for information regarding the "method" of allocation and not the "exact numbers" that resulted from the allocation. Tr. p. 340, ll. 19-23. However, in his zeal to joust with cross-examining counsel, the witness failed to note that the ***unallocated number also showed a detriment to the entire SJLP system of a***

five-year annual average of $2.5 million! Multiplied by five, this Exhibit shows roughly a ***$12.5 million detriment over the first five years of the merger***./7/ Additionally, UtiliCorp's witness failed to recognize that subpart (c) of the data request (page 1 of Ex. 503, Appendix A1) asked for a "quantification of each and every benefit you contend will be received by SJL&P's steam customers . . . ." Exhibit 503, p. 1, Appendix A1.

AGP's witness Maurice Brubaker brought this home fully in response to questions from the bench.

> I'm just looking here at the gross -- the gross numbers. And if we accept or use the company's calculated and asserted savings, the net synergies before you deal with the merger premium are an average of $4,255,000 over the first five years, but that's a plus $4,370,000 or a savings for electric customers and ***a loss or a dis-benefit, if you will, for both gas customers and steam customers. Of course, if you add premium recovery on top of that, it just becomes more of a***

7/ Though unquestionably beyond the scope of the record in the Commission proceeding, it is noteworthy that UtiliCorp (now Aquila) recently filed a steam rate case asking an additional $1.4 million and an electric case in which it requested an additional $18 million from the ratepayers in the former SJLP service territory.

> ***negative.[/8/] So I guess what I'm saying is that if you accept in total what they've said about gross savings and look at it on a class of service basis, it is a detriment to steam customers and gas customers***. Tr. p. 410-11 (emphasis and bracketed footnote added).

In its most elementary responsibility, the Commission failed to protect the interests of ratepayers generally and steam and gas customers specifically. Moreover, if the Joint Applicants own documents are to be accepted, the entire package is a detriment for all SJLP customers.

Sadly, the Commission swallowed the Joint Applicants' bait, hook, line and sinker. The Commission's Report and Order asserts:

> Exhibit 503 does not justify a finding that the UtiliCorp/SJLP merger should be blocked. The numbers set forth in Exhibit 503 are only preliminary estimates of how costs and premiums are to be allocated to the various operations of SJLP. Those numbers are not absolute results and may be changed. If those proposed allocations are unfair to SJLP's natural gas and steam customers they certainly can be changed. . . .

8/ "Premium recovery" refers again to the $92 million acquisition premium that UtiliCorp sought to recover from the ratepayers.

> UtiliCorp's internal allocation of costs and premiums cannot, by itself, create a detriment to any customer. Such a detriment could only occur if UtiliCorp were to adjust the rates charged to those customers to reflect an unfair allocation of costs and premiums. UtiliCorp cannot change its rates without the approval of the Commission and the Commission will ensure that the rates charged by UtiliCorp to its gas and steam customers are just and reasonable. *Report and Order*, L.F. 6, C.P. 1280, 1290-91.

The Commission thus was decoyed away by the specious "allocation" argument and failed to note that the crux of Exhibit 503 was that the ***total*** of the claimed "benefits" to be derived from the merger was ***negative***. The "not detrimental" standard does not brook an exception that demonstrated detriment may be vitiated as a result of subsequent "protective" action by the Commission. This Commission departed from established cases and its own precedent in refusing to even consider retail market power as a detriment.

The Commission also overlooked the ratepayer detriment that resulted from the increase in cost of debt caused by the merger of a low cost, good credit utility (SJLP) with a substantially higher cost operation (UtiliCorp).

A utility's cost of debt measures the risk of non-repayment of the enterprise's debt as perceived by the financial markets at the time of issuance. The

interest rate is used in the calculation of the utility's overall rate of return. Higher interest costs mean higher rates for ratepayers. Long term debt is involved, extending the significance of higher interest rates. The current risk perceptions are evaluated and measured by rating agencies that rate a utility's securities. Moreover, the proportions of debt and equity in a utility's overall capital structure are of concern. The rate implications for high cost debt increase as the proportion of debt in the capital structure increases.

A business transaction that results in higher interest rates and poorer financial ratings has detrimental impact on ratepayers and the public. Using the "not detrimental to the public interest" standard, a transaction that has this detrimental effect should be rejected.

The record under review contains undisputed evidence that the proposed merger increased the cost of debt that will be charged to the current customers of SJLP and thus negatively impacts their rates. It was not disputed that UtiliCorp's capital structure had more debt and less equity than the capital structure of SJLP. Ex. 200, p. 10, ll. 2-6. SJLP's long term debt was rated at A-; UtiliCorp's debt was rated at BBB -- a rating far below that of SJLP's. *Id.*, ll. 6-7.

Value Line Investment Survey showed that UtiliCorp paid rates of 8.5% while SJLP paid 8.26% (Ex. 200, p. 12, ll. 12-16), demonstrating that UtiliCorp is a more "risky" company than SJLP. Multiplied by millions of dollars of debt, even these small differences result in large financial rate impacts.

Evidence demonstrated that following the merger the rating agencies would

drop the rating on SJLP's previous A- debt to the UtiliCorp rating of BBB. Ex. 200, p. 10, ll. 9-27 ("The CreditWatch with negative implications reflects the ***weaker credit profile*** of the much larger UtiliCorp.") (emphasis added). These changes demonstrate an actual change in market risk that was shown would occur on approval of the merger, even without the ultimately-rejected "regulatory plan" proposed by the Joint Applicants. It represents substantial and unrefuted evidence of actual current detriment to the public and SJLP ratepayers. The greater risk associated with UtiliCorp's long-term debt leads directly to an increased cost of debt greater than that of SJLP. Ex. 200, p. 12, ll. 8-9.

The Commission appeared to recognize these facts, but failed to recognize that these facts represented detriment to the public as a direct result of the merger. The Commission rationalized its decision with four statements:

> First, UtiliCorp's credit rating of BBB, while lower than SJLP's current rating, is still considered to be investment grade. ***There is no evidence to support that UtiliCorp is financially unstable or that the merger with UtiliCorp will put SJLP's ratepayers at any great risk***. *Report and Order*, L.F. 6, C.P. 1280, 1290-91 (emphasis added).

The "not detrimental" test inquires as to detriment, not degrees of financial instability. Certainly, a credit rating of "BBB" does not equal insolvency. But it is unquestioned that a credit rating of "BBB" will result in a ***higher interest rate on debt***. The Commission misapplied its own test resulting in a decision that is unjust and

unreasonable.

> Second, no evidence was presented that would quantify the amount that the cost of debt attributable to SJLP would increase because of the merger. Indeed, there is no way to reliably quantify such an amount. Certainly there is no guarantee that SJLP's credit rating would remain at A- if the merger does not proceed. *Report and Order*, L.F. 6, C.P. 1280, 1292.

This statement simply ignores the evidence that was presented on Exhibit 200. The interest rate differential was 24 basis points, with UtiliCorp's actual debt payment being the higher. It is certainly true that SJLP's debt would not need to be reissued, but this is simply sticking one's head in the sand and ignoring the implications of the future. The "not detrimental" test does not require that a detriment be instantaneous with consummation of the merger. Indeed, the very implications of a merger or acquisition approval are limited. Missouri Gas Energy v. Public Serv. Comm'n., 978 S.W.2d 434 (Mo. App. 1998). In the case before this Court, the facts are clear as to the results of the merger and they result in a detriment to all the ratepayers of SJLP. The Commission's analysis focused on immediate rate impact, but surely its "expertise" -- what ratepayers count on -- should look further than immediate into what the future may

reasonably bring.

As regards the difficulty of quantifying a precise amount, such a quantification is unnecessary to a finding of detriment. The Commission appears to be asserting that such a change would be "de minimis," yet a 24 basis point difference on UtiliCorp's debt of $2.234 billion is a 3 percent variance, represents an interest cost difference of $5.3 million annually and is certainly not "de minimis." Ex. 200, p. 12.

Moreover, difficulty in making a decision does not excuse the requirements of the law. In State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957), the Commission had adopted a formula to establish a value for rate base, but failed to make a determination of the fair value of that rate base, citing the interest of expediency, economy and the difficulty of determining such value with any degree of accuracy. The Court rejected the Commission's approach and reminded the Commission that recitations of difficulty do not substitute for the requirements of law.

> But ***however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates***, ***neither impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by compe-***

> ***tent and substantial evidence upon the whole record***.' Article V, Sec. 22, Constitution of Missouri, V.A.M.S. For the reasons stated, we are forced to the conclusion that the order of the Commission is neither authorized by law nor supported by competent and substantial evidence upon the whole record. *Id.*, at 720 (emphasis added).

In *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission, 537 S.W.2d 388, 394 (Mo. 1976),* the Court similarly rejected the Commission's use of expediency as a method of establishing rates for a sewer company.

> The Commission's Report and Order continued:
>
> Third, the cost of debt is just one factor the Commission will consider when setting future rates for UtiliCorp's SJLP unit. If the company's cost of debt is unreasonable, appropriate adjustments can be made to protect the ratepayers. *Report and Order*, L.F. 6, C.P. 1280, 1292.

See also, State ex rel. Kansas City v. Public Service Commission, 257 S.W. 462 (Mo. en banc 1923); State ex rel. Util. Consumers Council v. Public Service Commission, 585 S.W. 41, 49 (Mo. en banc 1979); State ex rel. Missouri Cable Telecommunica-

tions Ass'n v. Public Service Commission, 929 S.W. 2d 768, 772 (Mo. App. W.D. 1996).

Again, the Commission appears to assert that the "not detrimental" test means that "We recognize that there is ratepayer and public detriment, but we may choose in the future to protect you from it." AGP has previously addressed this assertion as a clear departure from the Commission's own prior tests and the statutory requirements as construed by the courts. The Commission's action is unjust and unreasonable.

Finally the Commission argued:

> [E]ven if it is assumed that the merger will result in an increased cost of debt for SJLP's ratepayers, that fact alone does not require the Commission to reject the merger. The risk of an increased cost of debt is just one more factor for the Commission to weigh when deciding whether or not to approve the merger. *Report and Order*, L.F. 6, C.P. 1280, 1292.

Here the Commission acknowledges the proof of detriment, yet chooses to define it away as "just one factor." According to the Commission, the "not detrimental" standard has been demoted and become "just one factor" that it can consider. Again, in this statement, the Commission even admits that there is a detriment, but says that it doesn't matter anyway.

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CONCLUSION

The merger between UtiliCorp and SJLP was shown to be detrimental to the public interest. It was shown to be detrimental to SJLP ratepayers. Without regard to that undisputed evidence, the Commission allowed the merger to go forward.

The Commission decision is unlawful, arbitrary and is not supported by competent and substantial evidence on the whole record as is constitutionally required. It should be reversed and the matter remanded to the Commission for a proper result based on the evidence in this matter.

WHEREFORE, Relator/Appellant Ag Processing prays that the Court enter its judgment reversing the Report and Order of the Commission in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was served on the following by United States Mail, first class postage prepaid, and by agreement in accessible electronic form to their respective e-mail addresses:

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Attorney for the Missouri Office of the Public Counsel

Dated: August 5, 2003

_____
An Attorney for Relator/Appellant

RULE 84.06(c) CERTIFICATE

The undersigned certifies that the information required by Rule 55.03 is provided above and that this brief complies with the limitations contained in Rule 84.06(b) in that it contains 12,010 words as counted by the word processing software being utilized, and that the disk attached containing an electronic copy of this Appellant's Brief in WordPerfect 5.1+ format has been scanned by a current version of Norton Anti-Virus software which reported that it was free of known viruses.

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