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

REPLY BRIEF OF APPELLANT AG PROCESSING INC A COOPERATIVE

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ATTORNEYS FOR AG PROCESSING INC A COOPERATIVE

September 5, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Organic Law and Statutes

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. County of Jackson v. Public Service Commission, 14 S.W.3d 99 (Mo. App., W.D. 2000)

State ex rel. Riverside Pipeline Company et al., v. Public Service Commission, 26 S.W.2d 396 (Mo. App., W.D. 2000)

State el rel. Fischer v. PSC, 645 S.W.2d 39 (Mo. App. 1982)

State ex rel. A.P. Green Ref. v. P.S.C., 752 S.W. 2d 835 (Mo.App. 1988)

Mo. Const., Article V, Section 18

Section 396.500 RSMo. 2000

Section 386.510 RSMo. 2000

Section 386.500.3 RSMo. 2000

Section 393.190 RSMo. 2000

Section 386.520 RSMo. 2000

Section 536.150 RSMo. 2000

Section 393.130 RSMo. 2000

Section 386.420 RSMo. 2000

Section 536.090 RSMo. 2000

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.

Columbia v. Missouri State Board of Mediation, 605 S.W.2d 192 (Mo. App. 1980)

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. City of St. Louis v. Pub. Serv. Comm'n., 73 S.W.2d 393 (Mo. *en banc* 1934)

ARGUMENT

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.

Repetition was used for emphasis by the ancient Hebrews since their language lacked italics or the ability to "bold" words. Apparently Aquila seeks to use that method to draw attention to its concern that Appellant did not "seek a stay" of the Commission's Report and Order. Aquila's similar attempt at the Court of Appeals to argue that AGP's appeal should be dismissed as "moot" was rejected.

Aquila's conclusion is wrong. Essentially Aquila's argument boils down to this: "Even though AGP timely filed a challenge to the Commission order and the order wasn't final, we nevertheless proceeded with our merger plan. Now because we did so, you

can't obtain judicial review because the court cannot direct us to separate." A brief review of the relevant dates, conceded by Aquila, is instructive:

12/14/00	Missouri PSC issues Report and Order, approving the merger but rejecting several aspects of Aquila's and St. Joseph Light & Power's (SJLP) plan of merger. The Report and Order is stated to be effective December 27, 2000.
12/22/00	AGP, Appellant here, files its timely Application for Rehearing under Section 386.500. The City of Springfield also files an Application for Rehearing. Both were filed before the effective date of the Report and Order being challenged as required by Section 386.500. Springfield also files for a stay.
12/28/00	UtiliCorp files a Motion for Expedited Treatment and Response of UtiliCorp United Inc. to Application for Rehearing, Motion for Reconsideration and Request for Stay of City of Springfield and to Application for

	Rehearing of AG Processing, Inc. with the Commission. L.F., p. 75, C.P. 1373. See p. **Error! Bookmark not defined.**, *infra*.
12/31/00	With two Applications for Rehearing and one Application for Stay still pending, Aquila and SJLP nevertheless proceed to "close" their merger.
1/9/01	Missouri PSC denies both AGP and Springfield's Applications for Rehearing and denies Springfield's Application for Stay. The Report and Order is now final and subject to judicial review by either or both parties. Section 386.500.
1/16/01	AGP files a Petition for Writ of Review with the Cole County Circuit Court (L.F. p. 1), well within the thirty days following denial of its Application for Rehearing that are allowed by Section 386.510.

Setting aside a discussion of whether the merger can be undone as having been closed without proper approval, a more crucial question is whether Aquila should be

accorded the sole and unfettered right by its conduct to deny parties the judicial review that is guaranteed by the Missouri Constitution.

Aquila indirectly seeks shelter in Section 386.500.3's provision that:

> 3. An application for a rehearing shall not excuse any corporation or person or public utility from complying with or obeying any order or decision or any requirement of an order or decision of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct.

But this does not help Aquila. This appeal involves an application by two public utilities for Commission ***authorization*** under Section 393.190 to merge. Section 386.500.3 is inapplicable. Just as a parent's authorization in response to a child's request to "go outside and play" does not amount to a parental order to leave the house and engage in a game of tackle football, an ***authorization*** to merge does not amount to a directive ***to*** merge. Even after December 14, UtiliCorp still had the ability to control its fate and cancel or -- importantly -- defer closing the merger pending Commission disposition of any timely filed applications for rehearing. Nor does the second phrase of 386.500.3 help. There was no order of the Commission to "enforce" any prior directive or earlier order. A marriage license and a shotgun both may be physically present at a wedding, but they do not have the same effect.

Instead, what Aquila and SJLP chose to do -- at their own risk -- and in the face of pending Applications for Rehearing was to proceed with their merger. They acted at

their peril. They should not now be heard to suggest that their own actions impairs timely filed proceedings for judicial review.

Aquila was well aware of what it was doing and the risk it was running in proceeding to "close" its merger with the Applications for Rehearing still pending. On December 28, 2000 it filed its Motion for Expedited Treatment and Response of UtiliCorp United Inc. to Application for Rehearing, Motion for Reconsideration and Request for Stay of City of Springfield and to Application for Rehearing of AG Processing, Inc. L.F., p. 75, C.P. 1373. In that Motion UtiliCorp stated that it "desires that the Application for Rehearing, Motion for Reconsideration and Request for Say filed by City Utilities and the Application for Rehearing filed by AGP be processed on an expedited basis and denied immediately." *Id*., ? 2, p. 2. UtiliCorp then stated the following:

> 5. As indicated previously, the UtiliCorp/SJLP merger is scheduled to be closed on December 29, 2000. In the event the Commission ***fails to act*** upon the involved pleadings of City Utilities and AGP prior to December 29, 2000, UtiliCorp intends to close the subject merger on that date thereby rendering said pleadings moot. C.P. 1373, *see* L.F. p. 75. (Emphasis added).

Aquila cited the Commission to no authority supporting this bold -- dare we say arrogant -- assertion. It is apparently thought to be within the authority of Missouri's utilities to simply determine on their own when the statutory and Constitutional adminis-

trative and judicial review process is at an end. Regardless, UtiliCorp was obviously concerned about what it was doing and cannot support a claim of surprise. Moreover, UtiliCorp's above assertion that the Applications for Rehearing and any following judicial review would be moot as of ***the instant it closed its transaction***, even when one of the pleadings was an Application for Stay of the Commission's order belies Aquila's attempt to draw attention to the absence of a stay request when Springfield's Application for a Stay did not deter Aquila from closing its merger. Events subsequent to closing are apparently irrelevant for UtiliCorp.

Further, it is uncertain how Appellant could have sought a stay from the circuit court or from the Court of Appeals, since we could not even file an Application for a Writ of Review until the Commission had decided on the pending Applications for Rehearing, by which time the Joint Applicants already had closed their merger transaction. At that time, what is it that we would have sought to stay? Seeking a stay would have been as useless as seeking an injunction against cutting down a tree after the tree had been cut down. Nor is it clear whether Appellant could have posted the bond that appears to be required to obtain a judicial stay under Section 386.520. Doubtless the utility would have argued that vast savings, or rather, profits, would have been lost by delay and thus the bond amount required would have been $270 million purchase price.

The attention that Aquila wants to focus on a stay application reflects badly back on Aquila. It properly draws attention to the question of whether these merger partners proceeded to merge their operations in violation of Section 393.190 which

provides:

> No gas corporation, electrical corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchise or any part thereof, with any other corporation, person or public utility, ***without having first secured from the commission an order authorizing it so to do. Every*** such sale, assignment, lease, transfer . . . ***merger*** or consolidation ***made other than in accordance with the order of the commission authorizing same shall be void***. (emphasis added).

It would appear to us that they did under Section 393,190, for certainly the December 14, 2000 Report and Order of the Commission was not a final order. Section 393.190 appears unambiguous. An order of approval must be "secured" from the commission before proceeding with any such plan as a merger and the failure to "secure" such an order makes any transfer or merger void. The Joint Applicants had not "secured" a final authorization from the Commission ***as they were required to do under Section 393.190*** at the time they closed their merger. The Report and Order did not become final until both pending rehearing applications had been denied on January 9, 2001. UtiliCorp's

pleadings to the Commission evidence concern regarding the status of the Report and Order with two Applications for Rehearing and an Application for Stay pending.

Section 386.510 RSMo denies access to the Courts and judicial review until the administrative decision is final. Section 386.510 conditions access to the courts upon a denial of an application for rehearing or, if a rehearing application is granted, thirty days after the rendition of a decision upon that rehearing.

Missouri appellate courts have recently held that a commission report and order that is subject to rehearing is not a "final order" of the Commission. *State ex rel. County of Jackson v. Public Service Commission*, 14 S.W.3d 99 (Mo. App., W.D. 2000). And if multiple applications for rehearing have been filed under Section 386.510, ***all*** applications for rehearing must be denied before the Report and Order becomes final and judicial review may be initiated by any party. *Id.*

In *State ex rel. Riverside Pipeline Company et al., v. Public Service Commission*, 26 S.W.2d 396 (Mo. App., W.D. 2000) the Court of Appeals rejected an attempt to obtain immediate judicial review of a PSC order that denied the appealing parties' motion to dismiss.

> Both the Missouri Constitution and Mo. Rev. Stat. ? 536.150 (1986), impose the additional requirement that the decision be final before it is deemed reviewable. 'Finality' is found when 'the agency arrives at a ***terminal, complete resolution of the***

case before it. An order lacks finality in this sense while it remains tentative, provisional, ***or contingent, subject to recall, revision or reconsideration*** by the issuing agency.'

Id., at 400 (emphasis added) (quoting from *Dore & Assoc Contracting, Inc. v. Missouri Dept. of Labor & Indus. Relations Comm'n*, 810 S.W.2d 72, 75-76 (Mo. App 1990)).

Certainly, until its effective date the Report and Order from the Commission was not final. Timely filing by AGP of its Application for Rehearing in advance of that effective date, accompanied by the separate filing by City of Springfield also for Rehearing meant that the Report and Order was still "tentative, provisional, or contingent, subject to recall, revision or reconsideration." *Id.* Timely filing of these applications for rehearing robbed the December 14, 2000 decision of finality until the Commission had disposed of those applications which did not occur until January 9, 2001, some ten days after the merger "closed" as recited by Aquila. It thus follows that on December 31, 2000 Aquila acted to merge its assets and perform numerous other transactions that are undenied by Aquila ***"without having first secured from the commission an order authorizing it so to do."*** Section 393.130 RSMo. For Aquila to suggest that seeking a stay would have prevented all this controversy amounts to arguing that its bold action in derogation of the requirements of Section 393.190 entitles it to avoid timely perfected judicial review of the Commission decision is exceptionally arrogant and certainly does not amount to "mootness" nor a basis to deny judicial review of the Commission's Report and Order.

UtiliCorp's December 28, 2000 pleading to the Commission seeking expedited disposition of the pending Applications in advance of the closing date demonstrates recognition that UtiliCorp was proceeding into dangerous territory.

It should be apparent that neither Aquila nor the Commission have any response to the Commission's complete failure to resolve all the issues in the case that was presented to them including the critical issue of the handling of the acquisition premium. This failure is made even more apparent by Aquila's attack on Appellant's Application for Rehearing and its original Brief in the Western District Court of Appeals. Perfection is not required, particularly where the administrative agency engages in a determined effort to obscure the basis of its decision by its failure to find the necessary facts to support that decision. However, Appellant did raise these issues in its Application for Rehearing, and in its Brief at the Court of Appeals. These points will be addressed in sequence.

Aquila's assertions that Appellant did not identify the Commission's failure to deal with relevant issues in the case, including the acquisition premium, also is without merit. Aquila "paraphrases" Appellant's Application for Rehearing at pages 31-32, but fails to quote from Appellant's Application. Quotes from the Application reveal that the issue was clearly raised. For example:

> 3. . . . . the Report and Order generally ***fails to contain adequate findings of fact upon which review of the Commission decision could be based, in violation of Missouri law.***

Certainly a finding of fact regarding the quantification of the acquisition premium and the refusal to enter that quantification into the calculation of detriment would have been revelatory but would have allowed the Commission's logic (or lack thereof) to be exposed.

4. The Commission's Report and Order fails to set forth adequate findings of fact and conclusions of law as required by Missouri law and, accordingly, ***AGP is unable to discern the actual basis of the Commission's Report and Order in a manner sufficient to more specifically frame issues for judicial review.*** Accordingly, the Commission's Report and Order is unlawful and unreasonable as a matter of law as contrary to Sections 386.420, 536.090 and State ex rel. Fischer v. PSC, 645 S.W.2d 39 (Mo. App. 1982). The Commission's decisions must be based on competent and substantial

> evidence on the whole record, Mo. Const., Art. V, Section 18, ***and are required to contain findings of fact that relate to and are dispositive of the issues present-ed.*** State ex rel., Fischer, supra; State ex rel. Rice v. Public Service Commission, 220 S.W.2d 61 (Mo. 1949). (Emphasis added).

What findings did the Commission make regarding the handling of the acquisition premium? How did it enter into the calculation of no detriment while excluding the acquisition premium? The Commission did not provide these findings of fact and thus Appellant could not challenge findings of fact that did not exist. Indeed, all we could do was point out that adequate findings of fact were not made and that all the issues that the Commission needed to decide in order properly to decide the case had not been decided. Appellant would have been speculating to have tried to anticipate what hidden findings were the basis of the Commission's decision, then list them.

> 5. The Commission failed to make adequate findings of fact throughout the Findings of Fact section of the Report and Order, the Commission merely states the positions of the parties on the

> various issues and then finds that one party's position is more reasonable than the other parties without giving reasons as to why it found such position more reasonable than the others. In order to comply with the requirement that the Commission make findings of fact which support its conclusion, the applicable test for sufficiency of findings of fact is stated as follows in State ex rel. A.P. Green Ref. v. P.S.C., 752 S.W. 2d 835 (Mo.App. 1988) at 838:
>
> The most reasonable and practical standard is to require that findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.

The Commission's Findings of Fact failed to meet this standard and consequently, the Report and Order is unlawful and unreasonable.

Again the Commission's refusal to provide specific findings of fact itself hinders effective

judicial review. This Court cannot identify the logical path to the conclusion that this merger was not detrimental and neither could Appellant.

> 6. The Commission appeared to wrongly equate immediate rate impact with ratepayer detriment . . . .

This is a basic problem with the Commission's decision and points out that the inherent problem with the decision is the Commission's failure to identify the facts that underlie its conclusions. Those facts must be supported by competent and substantial evidence as required by Mo. Const. Art. V, Section 18, and when the Commission refuses to decide issues that permeate the basic question of detriment, criticism that these critical findings of fact are absent is sufficient.

> 10. That in all other respects the Report and Order is not supported by competent and substantial evidence upon the whole record and is contrary to the competent and substantial evidence of record. It therefore is unlawful and unreasonable an in violation of Missouri law.

A decision that does not address critical issues necessary to that decision cannot be supported by competent and substantial evidence.

Turning to Aquila's claim (at p. 33 of Respondent's Substitute Brief) that this issue was not addressed in Appellant's Court of Appeals Brief and that a "new basis" has been added, only three points need be made.

First, the contention that our Court of Appeals brief did not address the

Commission's handling of the acquisition premium is simply inaccurate. References to the acquisition premium, particularly with respect to the Staff's testimony, are found in that Brief at pages 23, 45, 48 and 49 of Appellant's Brief to the Court of Appeals.

Second, Appellant's Point III revolves around the handling of the acquisition premium and the related benefit/detriment calculations identified on Exhibit 503, for that is part of the issue that the Commission refused to require that Aquila fairly meet after Appellant and others had surfaced the issue.

Third, the Court of Appeals obviously found reference to the acquisition premium in Appellant's Brief (and oral argument which Aquila overlooks) at p. 16 of the slip opinion. Aquila's issue is without merit and should be seen as little more than an attempt to deflect the inquiry from the Commission's inexplicable failure to completely rule determinative issues in the case. There has been no change in basis of any of Appellant's points.

Rather than responding directly to Appellant's point regarding the source of the Commission's expertise, Aquila sets up a straw man, then noisily goes about demolishing its own creation. Appellant has not sought to argue or even suggest that the Commission is obligated to accept its Staff's recommendation. The point that Aquila misses is that the technical staff, with its numerous experts, have the ability, resources and expertise to analyze complicated financial material and filings and often get to the bottom of financial transactions.

Appellant's argument is that Article V, Section 18 of the Missouri

Constitution imposes on the Commission (and the reviewing courts) an evidentiary standard that requires that evidence be ***weighed***. That weighing process must necessarily involve consideration of the pecuniary and financial interest of the advocating parties. Aquila could not challenge that no party in this proceeding favored the merger, save the two Joint Applicants, whose respective managements stood to benefit from the transaction. Certainly the businesses combination has not benefited the shareholders of SJLP, nor for that matter, the shareholders of Aquila. Nor has it benefited the St. Joseph ratepayers who now face a $15 million proposed increase from Aquila.

Staff's presentation, supported by all but the Joint Applicants, opined that the proposed merger would lead to financial detriment for the ratepayers of the combined utility, certainly for the ratepayers in St. Joseph, and would lead to financial instability and financial and credit downgrades for the combined utility following the merger. Staff's reasons for this were many and extended over hundreds of pages of detailed studies and analyses. The Commission, however, decided to take its own course, without providing findings of fact thereby frustrating review, and "gamed" the outcome by refusing to consider the impact of the acquisition premium.

Given that a fair test of expertise is whether projected events occur, consider whether the Joint Applicants' assertions, on which the Commission presumably relied, have proven more accurate than those of the Commission's own Staff.

? The Joint Applicants asserted that the business combination would

result in a stronger competitor in the wholesale power market; the Staff rejected this view as a basis for approval.

? The Joint Applicants asserted that the business combination would result in a financially stronger utility; Staff however, noted that UtiliCorp's financial rating was already at the bottom of "investment grade" and would likely fall lower.

? The Joint Applicants touted Aquila's claimed expertise and size in the wholesale power market that would provide benefit for St. Joseph; Staff argued that these considerations should not be regarded as benefits, rather as injecting utility operations into far more risky unregulated spheres of activity increasing the risk for the overall operation.

? Even at this late date, Aquila continues to argue that Aquila "would be a substantially larger firm than SJLP and, consequently, would have greater overall financial strength than would SJLP." Respondent's Substitute Brief, p. 52. Along side that, Aquila now argues that the Commission "noted that a credit rating argument is of only marginal significance." *Id.*

Indeed, subsequent events would appear to validate the Staff's positions and undercut arguments that the Commission was merely making "policy" (as is suggested by Aquila at p. 26 of its Substitute Respondent's Brief) by departing from the unified recommendations of the non-applicant parties that the merger was bad for ratepayers and for the investing public. The decision-making process outlined by Article V, Section 18 of the Missouri Constitution requires more than a scintilla or mere "gut feelings." It requires careful consideration of all the evidence including consideration of the source of that evidence so that the Commission's important responsibility to protect ratepayers and, in this case, even the shareholders of the utility from the respective managements, is accomplished.

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 responding to Appellant's point regarding the shift of the burden of proof, Aquila ironically quotes from *Columbia v. Missouri State Board of Mediation*, 605 S.W.2d 192 (Mo. App. 1980). Even the portion quoted by Aquila makes Appellant's point. Alleged inconsistency is not of concern "so long as the action taken is not otherwise arbitrary or unreasonable." Respondent's Substitute Brief, p. 41.

According to Webster's New International Dictionary, Second edition, "arbitrary" describes a decision that is "fixed or arrived at through will or caprice; decisive but unreasoned." Yet Aquila makes no attempt to distinguish between prior Commission policy decisions explicitly requiring market power studies be done and this case.

Moreover, in discussing the burden of proof, Aquila appears to have forgotten

that the data and information necessary to do such a study essentially was exclusively in the possession of Aquila. Information such as transmission constraints, failures, capacities on particular portions of the system and the like. Regardless, both Staff and Intervenor City of Springfield brought forth expert testimony demonstrating concerns about load pockets where market power could be exercised and entire system flows that would require both customers and competitors to pay exorbitant rates. An analysis of "burden of proof" and "burden of going forward" is insufficient in an environment where one party has control of the relevant data and fails to provide it or make it available in a useful manner or at useful times to other parties. Interestingly, Aquila's contentions about burden of proof do not seem to apply when the discussion shifts to Exhibit 503 and the acquisition premium recovery as addressed in Point III of Appellant's Substitute Brief.

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.

Aquila again misses the significance of Appellant's point regarding the actual showing of detriment contained in Exhibit 503 and again argues that this exhibit was only a "draft." Certainly it is marked as a "draft," but while Aquila claimed that an update had been prepared, the total of the columns demonstrated a detriment to the total body of ratepayers, regardless of changes in the allocations of portions of that total.

Appellant certainly came forward with the required quantum of proof through Exhibit 503 which had been prepared by Aquila's own personnel. Despite claims of an update, Aquila never came forward with that update, so Exhibit 503 must stand on the record of this case as the last word on the subject. Even Aquila now acknowledges that Appellant only had to go forward with evidence demonstrating a detriment. Respondent's Substitute Brief, p. 45. Exhibit 503 was provided by Appellant from Aquila's own records and Aquila

failed to show what was wrong with its calculation.

Further, Aquila now argues that this Exhibit also reflected Aquila's "regulatory plan" proposal that was rejected by the Commission. Again a half-truth. Certainly the "regulatory plan" proposed by Aquila provided for half of the acquisition premium to be recovered from the ratepayers. Accordingly, Exhibit 503 demonstrated a ratepayer detriment existed when only half of the acquisition premium was proposed to be collected from ratepayers. What disposition then was made of the acquisition premium by the Commission? The Commission simply refused to consider the handling of the premium, but the result of that failure is to immediately shift the recovery of the ***entire acquisition premium to the ratepayers in St. Joseph*** when rates were not reduced even though the cost to serve these ratepayers was drastically reduced. This point was raised by Paragraph 8 of Appellant's Application for Rehearing, a point Aquila overlooks in its arguments about Appellant's Application for Rehearing.

The issue of the acquisition premium, made clear by Exhibit 503 which demonstrated a detriment with only half of that premium being recovered from the ratepayers, is sharpened when the rest of Exhibit 503 is reviewed. The benefits claimed in reduced costs are reductions in payroll resulting from layoffs and early retirements (roughly 1/3 of SJLP's employees were laid off), consolidation of operations such as power dispatch and purchasing, and the elimination of duplicative administrative and management positions, all with resulting cost savings. Since costs are the drivers of rates and were the basis of the rates that had been established for SJLP, the Commission's failure to require

that rates be reduced immediately or as a precondition to the merger going forward amounts to the immediate rate impact that even Aquila acknowledges would constitute "detriment."

Moreover, by refusing to decide the issue of the handling of the acquisition premium, the Commission allowed the utility to recover the acquisition premium from the SJLP ratepayers by failing to require that rates be reduced to match the reduced level of costs.

This is not rocket science. If rates were set to recover costs of $100 and costs decline to $70 but rates are not adjusted, the difference of $30 goes to the pocket of the utility, in this case, to apply as a recovery of its acquisition premium. And the ratepayers have been immediately detrimented by the $30 rate recovery that exceeds utility costs.

Aquila now appears to argue that merging a company with a credit rating of BBB with a company that had a credit rating of A- was "inconsequential." Respondent's Substitute Brief, p. 51.

Aquila appears to rely on some rather interesting quotes from the Commission, including "[t]here 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." Respondent's Substitute Brief, p. 51. Sadly there was such evidence, indeed Staff's financial presentation was replete with that evidence and essentially predictive of what has subsequently occurred with Aquila. Certainly Public Counsel's presentation contained similar predictions.

Another quote from the Commission is instructive: "[T]here is no guarantee [note the Commission here does not state that there is no "evidence"] that SJLP's credit rating would remain at A- if the merger does not proceed." Respondent's Substitute Brief, p. 51. Keep in mind that this is supposed to be an analysis of what detriments would occur ***from*** the merger, not of what might occur to SJLP if the merger did not go forward. Regardless, it is crystal clear that, had the merger not occurred, the ratepayers of SJLP would not have had their electric and steam utility dragged down to the depths of "junk" financial ratings and been forced to sell major assets simply to develop cash to pay its debts -- debt which, by the way, was increased as a result of this merger transaction and the need to pay an acquisition premium.

Which view have subsequent events validated?

Aquila hides behind the Commission's interpretation of *State ex rel. City of St. Louis v. Pub. Serv. Comm'n.*, 73 S.W.2d 393 (Mo. *en banc* 1934), @but it provides no shield. Aquila argues (at p. 23 of its Substitute Brief) that there must be a "direct and present detriment" through an increase in rates or an immediate deterioration in quality of service. If the "status quo" is maintained immediately following the merger, there can be no detriment, argues Aquila. This test implicitly approves serious public detriments simply because they may not immediately occur. *St. Louis*, however, contains no such language.

St. Louis dealt with an acquisition through stock purchase of the outstanding

shares of one utility by another. While certainly establishing the "no detriment" test, the Court also opined:

> The whole purpose of the [Public Service Commission 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; investing public is interested in the value and stability of the securities issued by the utility. State ex rel. Union Electric Light and Power Co. v. Public Service Commission, et al., (Mo. Sup) 62 S.W.2d 742. In fact, the act itself declares this to be the purpose. Id. at 399.

Continuing with a discussion of the Commission's obligation, the Court's language is pertinent to this dispute.

> It is . . . their [the Commission's] duty is to see that no such change shall be made ***as would work*** to the public *detriment*. (italics in original; bolded italics are our emphasis).

We draw attention, first, to the absence of the words "immediate," "status quo" or "maintain" in any of this judicial discussion. Aquila, like the Commission, has engrafted that additional language to the *St. Louis* test and thereby imposed a new requirement well

beyond that approved by the Court. Under the Commission's test, since (a) rates cannot change without a Commission order; and (b) any detriment must be essentially simultaneous with the approval of the merger, no merger could ever fail -- obviously an incorrect result both logically and under *St. Louis*. *St. Louis* sought to balance the public protection of the Public Service Commission Act with property rights, not establish a rule that made Commission review meaningless.

Instead, review of the *St. Louis* case draws attention to the phrase "as would work" suggesting quite the contrary of the interpretation urged by Aquila. Instead these words explicitly indicate that the initiation of a ***process*** that "would work," that is, ***result*** in a detriment is sufficient to cause the rejection of a merger as against the public interest.

Second, please note that *St. Louis* not only identified the ***ratepaying*** public as being protected by the act, but also the ***investing*** public. Certainly setting in motion a course of events that has resulted in rendering the investment that thousands of members of the public had in SJLP shares virtually valueless is a process that "would work" public detriment and that clearly would have been avoided had the merger been rejected.

A process that "would work" ratepayer detriment was certainly set in place by a Commission decision that (1) refused to deal with all the issues in the case so as to concoct a "not detrimental" conclusion; and (2) failed to require that rates be reduced as costs were reduced resulted in ratepayer detriment. Investor detriment to the investors in SJLP certainly resulted from allowing the fusion of a financially strong utility with a weak one and was a result that not only could have been foreseen, but was foreseen by Staff and

Public Counsel testimony and experts. See, for example, Exhibit 704, Featherstone Rebuttal,/[1]/ p. 79:

> Q. Are St. Joseph's customers entitled to rate reductions related to cost savings?
>
> A. Yes. Historically, customers have enjoyed the benefits of cost reductions, as well as declines in rate base and growth in revenues.

UtiliCorp's "regulatory plan" asked for SJLP rates to be frozen for five years and even proposed that the Commission prohibit Staff, Public Counsel and other parties from filing earnings complaints during that five year period. The result of that plan was that "[a]ll savings, merger and non-merger-related, will be fully retained by UtiliCorp. It is inconceivable how the Joint Applicants' regulatory plan will result in lower rates . . . ." *Id.*, Exhibit 704, p. 81. Although the Commission ***said*** it was rejecting the regulatory plan, by leaving the existing rates in place and not requiring that they be reduced as costs were reduced, there was a detriment to the ratepaying public and a detriment to the ratepaying public "would work" from the events that the Commission set in motion. Indeed, even UtiliCorp witnesses acknowledged that they would recover $4.255 million of claimed merger savings by leaving the rates in place post-merger. Those rates have been in place post-merger since December, 2000 (approaching three years) for a rough acquisition premium recovery through merger savings alone of $12.7 million, based on Aquila calculations and testimony. Siemek Direct, C.P. Exhibit 7, L.F. 0078, Tr. 1176, Schedule VJS-1, Relevant Cross-examination at Tr. 905-06; *see*, Initial Brief of Staff at 26, beginning

at C.P. 829. Aquila's witness also quantified the *indirect* recovery of the acquisition premium from freezing allocators at an additional $2.394 annually (3-year figure: $7.18 million). These two total to $19.95 million of acquisition premium recovery from the SJLP ratepayers ***above their costs*** over the three-year period following the Commission's decision. Certainly approving events such "as would work" a recovery of nearly $20 million in excess of costs from SJLP ratepayers -- we respectfully submit -- should be considered something akin to a detriment.

Aquila's argument that the Commission can overlook public detriments that result from the events that are set in place is also inconsistent with general ratemaking principles that look forward to the period in which the rates that are being set are expected to be in place. In a general rate case, a test year is utilized, then adjusted for known and measurable changes in an attempt to make it representative of the future period in which the rates to be made are expected to be in effect. Certainly, when the Commission refuses to look no further than the end of its nose, neither the interests of the ratepaying public nor those of the investing public are well served. Subsequent events conclusively show that the approval of this merger by the Commission, over the strong recommendation of its own technical staff, has "worked" a detriment upon the ratepayers in St. Joseph and upon those who had invested in SJLP shares.

CONCLUSION

The merger between UtiliCorp and SJLP was shown to work a detriment to the public interest. It was shown to work a detriment 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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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 7,136 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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L./ C.P. Index to Exhibits, L.F. at 79, received at Tr. 11004.