IN THE SUPREME COURT OF MISSOURI

State ex rel. AG Processing Inc., a Cooperative, Appellant, v. Public Service Commission of the State of Missouri, and Aquila, Inc., f/k/a/ UtiliCorp United, Inc., Respondents.	)	Case No. SC85352

Appeal from the
Circuit Court of Cole County, Missouri
19th Judicial Circuit
Honorable Byron M. Kinder, Circuit Judge

Transfer from the Missouri Court of Appeals
Western District No. WD60631

SUBSTITUTE BRIEF OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

This Court has held that "review permitted under Section 386.510 is a separate action, and for purposes of procedural analysis, not an appeal." *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 389, 388 (Mo.banc 1990). Appellate review of a decision or order of the Commission is a review of the decision or order of the Commission. *State ex rel. Marco Sales, Inc. v. Public Serv. Comm'n*, 685 S.W. 2d 216, 218 (Mo.App. 1984).

STATEMENT OF FACTS

On October 19, 1999, UtiliCorp United Inc. (UtiliCorp) and St. Joseph Light & Power Company (SJLP) filed their Joint Application for authority to merge SJLP with and into UtiliCorp and, in connection therewith, certain other related transactions. UtiliCorp and SJLP filed their Joint Application pursuant to Section 393.190 RSMo. 1994 and 4 CSR 240-2.060 and also sought authorization pursuant to Section 393.106 RSMo. 1994. (C.P. 8, 18).[1]

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[1] "L.F." refers to the page number in the Legal File, which was filed with the Western District Court of Appeals on January 31, 2002. "C.P." refers to the page number in the Case Papers that were also filed with the Western District Court of Appeals on January 31, 2002. Beginning at page 70 in the L.F., an index to the C.P. appears. On July 1, 2003, this Court ordered the Western District Court of Appeals to send to this Court a full and complete transcript of the record and proceedings, together with copies

(Footnote continued to the next page)

UtiliCorp is a Delaware corporation and was authorized to conduct business in Missouri through its Missouri Public Service (MPS) operating division. As such, UtiliCorp was engaged in providing electric service and natural gas service in Missouri to customers in its MPS service areas. UtiliCorp was an "electrical corporation," "gas corporation," and "public utility" as those terms were and are defined in Section 386.020 RSMo. Cum. Supp. 1998 and 2000. (C.P. 8). SJLP was a Missouri corporation engaged in the business of providing electric service, natural gas service and industrial steam service in Missouri to customers in its service areas. SJLP was an "electrical corporation," "gas corporation," "heating company" and "public utility" as those terms were and are defined in Section 386.020 RSMo. Cum. Supp. 1998 and 2000. (C.P. 9).

On October 22, 1999, AG Processing Inc. a Cooperative (AGP) filed an Application To Intervene in Case No. EM-2000-292 as a major electric and steam customer of SJLP. AGP is an agricultural cooperative and a large manufacturer and processor of soybean meal and soy-related food products and grain products. AGP operates a processing facility in St. Joseph, Missouri and is an electric customer of SJLP. AGP is also an industrial steam customer of SJLP. (C.P. 92-98). On

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of all records and briefs before it, in this cause. References to "Ex." are to testimony or documents marked and received into evidence as exhibits at the hearing before the Commission. References to "Tr." are to transcripts of the evidentiary hearing before the Commission. References to statutes are to RSMo 2000 unless otherwise indicated.

November 17, 1999, the Commission issued an Order Granting Applications For Intervention wherein it granted the Application To Intervene of AGP. (C.P. 135-38).

UtiliCorp did not seek in the context of the merger case to change, prior to or upon the effectuation of the merger, the rates of either its MPS retail customers or the retail customers that it was acquiring as a result of the merger with SJLP. Any change in retail rates was to be effectuated in subsequent rate cases. Regarding the standard that the Commission is to apply to any proposed merger under Section 393.190, the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393, 400 (Mo.banc 1934) held that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." *See also State ex rel. Fee Fee Trunk Sewer, Inc. v. Public Serv. Comm'n*, 596 S.W.2d 466, 468 (Mo. App. 1980).

UtiliCorp agreed to acquire ownership of SJLP for approximately $270 million of which approximately $92 million was an acquisition premium. The acquisition premium was the amount paid by UtiliCorp to acquire SJLP in excess of the book value of SJLP (the book value of SJLP was the net original cost of SJLP less depreciation). As part of its merger proposal, UtiliCorp-SJLP sought Commission approval of its proposed "regulatory plan," which, *inter alia*, included: (1) a five-year moratorium on general rate increases or decreases for the SJLP operating division of UtiliCorp; (2) electric, gas and steam rate cases to be filed for the SJLP operating division in the fifth year of the regulatory plan with new rates to go into effect at the end of the fifth and final year of the moratorium; (3) rate recovery of 50% of the acquisition premium from SJLP ratepayers in future SJLP rate cases, providing that UtiliCorp proved the merger savings resulting

from the merger were at least equal to 50% of the acquisition premium costs and the costs to achieve the merger savings. (C.P. 1312-13, 1319-20; *Re UtiliCorp United, Inc.*, 9 Mo.P.S.C.3d 454 (2000).

On December 14, 2000, the Commission issued a Report and Order authorizing SJLP to merge with and into UtiliCorp, subject to certain conditions, with UtiliCorp being the surviving corporation. Regarding the issue of UtiliCorp's recovery of the acquisition premium, the Commission stated that it declined to make this ratemaking determination outside of a rate case and it would give due consideration to such a request if it was presented in a rate case. The Commission explained that the law in Missouri is clear that when determining a rate, the Commission is obligated to review and consider all relevant factors, rather than just a single factor, and that it would not prejudge factors, such as an acquisition premium, that could only be properly considered in a rate case. Respecting the "not detrimental to the public" standard for authorizing transactions covered by Section 393.190.1, the Commission noted that the definition of "detriment" that it would generally adhere to is higher rates or a deterioration in the level of customer service and that higher rates to SJLP customers due to the merger could only result if the Commission approved higher rates in future rate cases. (C.P. 1311; 9 Mo.P.S.C.3d at 472).

On December 22, 2000, AGP filed an Application for Rehearing with the Commission. (C.P. 1351). Said Application For Rehearing did not stay the Commission's Report And Order. On December 31, 2000, SJLP was merged into UtiliCorp.

AGP raised the following issues in its Application For Rehearing:

(1) The Commission failed to require UtiliCorp-SJLP to file a retail market power study, or any market power study, thereby reversing the burden of proof in violation of procedural and substantive due process and contrary to Commission precedent;

(2) In failing to require UtiliCorp-SJLP to file a retail market power study, the Commission did not consider all relevant factors, in violation of Missouri law, including whether the proposed merger would establish an entity with excessive market power in Missouri against which ratepayers have no protection;

(3) The Report And Order fails to contain adequate findings of fact in the Findings Of Fact section of the Report And Order, not giving reasons why one party's position is more reasonable than the other party's position, and fails to contain adequate Conclusions Of Law;

(4) The Report And Order is not based on competent and substantial evidence;

(5) The Commission erred in failing to apply the proper standard of proof and reversed the burden of proof;

(6) The Commission wrongly equated immediate rate impact with ratepayer detriment and failed to recognize that the proposed business combination would result in substantial market power;

(7) The Commission failed to consider unrebutted Exhibit 303 which demonstrated that detriments would result to SJLP's steam and natural gas customers.

(8) The Commission ignored unrebutted competent and substantial evidence of direct and immediate ratepayer detriment in that SJLP ratepayers would be served by a merged entity, UtiliCorp-SJLP, less secure and financially stable than a stand alone SJLP.

(C.P. 1351-56).

On January 9, 2001, the Commission denied AGP's Application For Rehearing. (C.P. 1384-87). AGP filed a Petition for Writ Of Review in Cole County Circuit Court. Said Court issued its Judgment affirming the Commission's December 14, 2000 Report And Order on September 26, 2001. (L.F. 93-94).

AGP appealed the Commission's Report And Order to the Western District Court of Appeals, and on April 22, 2003, the Western District Court of Appeals issued an Opinion (1) finding Section 536.140.2, and not Section 386.510, as setting the appellate court standard of review and (2) reversing and remanding the decision of the Commission approving the merger on the grounds that the Commission chose not to decide until a rate case whether UtiliCorp would be permitted to recover the acquisition premium that UtiliCorp paid to the SJLP shareholders for the purchase of SJLP common stock.

The Commission and UtiliCorp filed Motions For Rehearing and, in the alternative, Applications For Transfer with the Western District Court of Appeals on

May 7, 2003. The Western District Court of Appeals overruled the Motions For Rehearing and denied the Motions For Transfer on May 27, 2003.

On its own motion on May 27, 2003, the Western District Court of Appeals modified its April 22, 2003 Opinion to Reflect that this Court's April 22, 2003 *State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n*, 103 S.W.2d 753, 758, 579 (Mo.banc 2003) decision referenced Section 386.510 regarding standard of review and that Article V, Section 18 of the Missouri Constitution is applicable to the standard of review of Commission decisions, but the Western District Court of Appeals did not modify its April 22, 2003 Opinion on the merits.

Applications For Transfer were filed with this Court by the Commission and UtiliCorp on June 11, 2003 and this Court granted Transfer on July 1, 2003.

The procedural history in the case before the Commission will not be stated further herein, other than in the particular responses below. In not further reciting the facts of the proceeding before the Commission or directly challenging statements in Relator AGP's brief, concurrence by the Commission should not be assumed.

POINTS RELIED ON

I. THE COMMISSION DID NOT ERR IN APPROVING THE MERGER OF UTILICORP UNITED, INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE

(A) ITS DECISION APPROVING THE MERGER WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD PURSUANT TO SECTION 386.510 AND MISSOURI CONSTITUTION ARTICLE V, SECTION 18;

(B) THE EVIDENCE FROM ITS OWN STAFF AND OTHER PARTIES THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE PUBLIC INTEREST WAS REFUTED BY THE JOINT APPLICANTS; AND

(C) THE ACQUISITION PREMIUM ISSUE WAS NOT PRESERVED FOR JUDICIAL REVIEW BY AGP SINCE AGP DID NOT RAISE THE ACQUISITION PREMIUM ISSUE IN ITS APPLICATION FOR REHEARING, AS IS REQUIRED PURSUANT TO SECTION 386.500.2; NONETHELESS, THE COMMISSION WAS NOT REQUIRED TO DECIDE IN A MERGER CASE THE RATEMAKING ISSUE OF WHETHER THE $92 MILLION ACQUISITION PREMIUM WOULD BE PERMITTED TO BE RECOVERED FROM RATEPAYERS, AND THE COMMISSION ADEQUATELY ADDRESSED THE ACQUISITION PREMIUM ISSUE IN ITS REPORT AND ORDER.

(Responds to Appellant's Point I.)

II. THE COMMISSION BY NOT REQUIRING THAT THE APPLICANTS SUBMIT A MARKET POWER STUDY, ALTHOUGH THE COMMISSION SEVERAL YEARS EARLIER HAD SO REQUIRED SUCH A FILING IN DIFFERENT PROCEEDINGS, DID NOT SHIFT FROM THE JOINT APPLICANTS TO THOSE PARTIES IN OPPOSITION TO THE PROPOSED MERGER THE BURDEN OF PROOF PURSUANT TO SECTION 393.190.1 RSMO., CASE LAW AND 4 CSR 240-2.060(7)(D) AND (8)(D), AND THUS THE COMMISSION DID NOT REMOVE FROM JOINT APPLICANTS THE BURDEN OF SHOWING THAT THE PROPOSED MERGER WOULD NOT BE DETRIMENTAL TO THE PUBLIC

(Responds to Appellant's Point II.)

III. THE COMMISSION DID NOT ERR IN APPROVING THE MERGER OF UTILICORP UNITED, INC, AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE ITS DECISION APPROVING THE MERGER WAS REASONABLE AND LAWFUL AND SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD PURSUANT TO SECTION 386.510 AND MISSOURI CONSTITUTION ARTICLE V, SECTION 18 IN THAT

(A) EVIDENCE FROM UTILICORP UNITED, INC.'S AND ST. JOSEPH LIGHT & POWER COMPANY'S DOCUMENTS AND MATERIALS, WHICH PURPORTEDLY SHOWED THAT THE PROPOSED

MERGER WAS DETRIMENTAL TO THE RATEPAYERS OF ST. JOSEPH LIGHT & POWER COMPANY BECAUSE COSTS TO SJLP'S STEAM AND NATURAL GAS CUSTOMERS WOULD EXCEED THE BENEFITS, WAS REFUTED BY THE JOINT APPLICANTS; AND

(B) EVIDENCE FROM PUBLIC COUNSEL, WHICH PURPORTEDLY SHOWED THAT THE LOWER CREDIT RATING OF UTILICORP'S LONG TERM DEBT COMPARED TO THE CREDIT RATING OF SJLP'S LONG-TERM DEBT WOULD LEAD TO HIGHER RATES FOR SJLP'S RATEPAYERS, WAS HELD BY THE COMMISSION TO BE UNPERSUASIVE.

(Responds To Appellant's Point III.)

ARGUMENT

Appellate Standard of Review

A not inconsequential part of AGP's brief, pages 16-18 and 29-33, addresses the matter of the deference due the Commission's expertise. By statute, Section 386.430 RSMo. 2000, the burden of proof is upon the entity adverse to the Commission "to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be." Case law clearly recognizes that other than questions of law, the Commission's expertise is due deference within bounds. The Commission does not suggest otherwise. AGP cites in its brief, at pages 16 and 30-32, *State ex rel. Marco Sales, Inc. v. Public Serv. Comm'n*, 685 S.W.2d 216 (Mo.App. 1984) (hereinafter referred to as *Marco*), but does so selectively. AGP in its brief does not note the following portion of the Court's decision:

> . . . Although courts on judicial review need not defer to the Commission on questions of "lawfulness", they cannot substitute their judgment for that of the Commission where its order or decision is supported by competent and substantial evidence upon the record as a whole – *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo.banc 1979).

Id. at 218-19. Also, at pages 30-31 of its brief, AGP only partially quotes from that same decision the following sentence respecting deference to Commission decisions because of Commission expertise in the complicated and highly sophisticated matters it is legislatively authorized to resolve:

> . . . Judicial recognition thereof when and where appropriate, however, does not dictate blind acceptance of every order cut and every decision handed down by the Commission. . . .

Id. at 220.

Nonetheless, the courts do not engage in *de novo* review of Commission decisions:

> . . . The Legislature did not intend that the reviewing court should put itself in the place of the Commission, try the matter anew as an administrative body, weigh the evidence and substitute its finding and judgment on the merits as that of the Commission. The sole matter for the court's attention is whether the order complained of is reasonable and lawful, and, if it appears that the order is both reasonable and lawful, it must be affirmed; if it be found to be unreasonable or unlawful, it must be set aside. *State ex rel. Kansas City Power & Light Co. v. Public Service Commission*, 335 Mo. 1248, 76 S.W.2d 343 [1934].

State ex rel. Anderson Motor Service Co. v. Public Serv, Comm'n, 134 S.W.2d 1069, 1076 (Mo.App. 1939), *aff'd*, 154 S.W.2d 777 (Mo. 1941).

The Western District Court of Appeals in *State ex rel. GTE North, Inc. v. Public Serv. Comm'n*, 835 S.W.2d 356, 361 (Mo.App 1992) (hereinafter referred to as *GTE North*) noted that "[f]actual issues decided by the Commission are presumed to be correct and, until the contrary is shown, an appellate court is obligated to sustain the order of the Commission. *State ex rel. Missouri Office of Pub. Counsel v. Missouri Pub. Serv. Comm'n*, 782 S.W.2d 822, 824 (Mo.App. 1990)." The Court in *GTE North* also related

that "[i]n rate-making proceedings, a strong presumption exists in favor of the validity of the conclusions of an experienced administrative body after a complete hearing. *Smith v. Public Serv. Comm'n*, 351 S.W.2d768, 771 (Mo. 1961)." *Id.*

The Western District Court of Appeals in *GTE North* cited to the decision of this Court in *State ex rel. Chicago, Rock Island & Pac. R. R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo.banc 1958) that the language in Section 386.510 that suits brought in circuit court to review orders and decisions of the commission "shall be tried and determined as suits in equity" does not confer general equitable powers upon the reviewing court:

> "Consequently, we are convinced and we hold that the clause in Section 386.510 stating that cases on review 'shall be tried and determined as suits in equity', construed in the light of the overall remedial purposes of the entire act, means no more than that when the court has determined whether an order or decision of the commission (made in the lawful exercise of its discretionary powers) is supported by competent and substantial evidence upon the whole record and is reasonable, or, as is sometimes conversely stated, whether it is arbitrary or capricious or is against the overwhelming weight of the evidence, the court has performed its whole duty."

835 S.W.2d at 363 citing 312 S.W.2d at 796.

At page 11 of its brief, AGP makes the first of the three references to Chapter 536 Administrative Procedure And Review in the entirety of AGP's brief. The citation at

page 11 of AGP's brief is in error. The citation should be to Section 386.510, and not to Section 536.510. There is no Section 536.510.

The second reference to Chapter 536 in AGP's brief is on page 28 where AGP cites Section 536.150 and *State ex rel. Riverside Pipeline Co. v. Public Serv. Comm'n,* 26 S.W.3d 396 (Mo.App. 2000) (hereinafter referred to as *Riverside*) for the proposition that "[t]he agency must arrive at a terminal and *complete* resolution of the case before it." (Emphasis in AGP's brief.) The issue in *Riverside* is not as AGP has characterized it. The issue in *Riverside* involved whether Section 386.510 review is possible respecting interlocutory decisions rather than final decisions of the Commission.

The third and final reference to Chapter 536 in AGP's brief is on page 60 where AGP cites Section 536.090 in addition to Section 386.420. In relevant part, Section 386.420.2 states as follows:

> Whenever an investigation shall be made by the commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises. . . .

In addition, Section 386.490.1 provides, in part, that "[e]very order of the commission shall be served upon every person or corporation to be affected thereby. . ."

Section 536.090 provides, in relevant part, that every decision and order in a contested case are to be in writing, and are to include or be accompanied by findings of fact and conclusions of law. The findings of fact are to be stated separately from the conclusions of law and are to include a concise statement of the findings on which the

agency bases its order. The agency is to give written notice of its decision by delivering or mailing such notice to each party, or the party's attorney of record, and shall upon request furnish a copy of the decision, order and findings of fact and conclusions of law.

There is no claim in AGP's Motion For Rehearing that the standard for review of Commission decisions is controlled by Chapter 536.

The Western District Court of Appeals' decision issued on April 22, 2003 contained no reference to Article V, Section 18 of the Missouri Constitution as setting the standard of judicial review. It was only after the Respondents noted for the lower Court, in their post-Opinion motions and applications for transfer, this omission, did the Western District Court of Appeals modify, on its own motion on May 27, 2003, its Opinion to include a reference to Article V, Section 18.

Previously in their review of Commission decisions, Missouri courts have looked to Article V, Section 18 and the following language in Section 386.510 respecting the applicant applying to circuit court for the purpose of having "the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined." Section 386.510 also provides that "[n]o court in this state, except the circuit courts to the extent herein specified and the supreme court or the court of appeals on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission."

The Western District Court of Appeals held in its April 22, 2003 Opinion that the standard of appellate review in Commission cases needs clarification and held that Section 386.510 applies only to circuit court review of final Commission decisions,

findings, rules and orders, and not to appellate court review. The Western District Court of Appeals declared that Section 536.140.2, and not Section 386.510, applies to appellate court review of Commission decisions. (Rule 84.04(h) Appendix, A131-A134).[2]

The Western District Court of Appeals did not note the standard of appellate review found in Section 386.430. This statute goes beyond identifying the party adverse to the Commission or a Commission determination, requirement, direction or order as having the burden of proof. It states that such party must "show by clear and satisfactory evidence" that the Commission determination, requirement, direction or order is "unreasonable or unlawful." Thus, the standard for appellate review is not different than the standard for review for circuit court. Although the Opinion of the Western District Court of Appeals contains citations to the *Marco* case, it does not mention the applicability of Section 386.430 to judicial review, which is noted in *Marco*.

This Court in its recent *State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n*, 103 S.W.2d 753, 758 (Mo.banc 2003) Opinion cited its decision in U*nion Electric Co. v. Clark*, 511 S.W.2d 822, 825 (Mo. 1974) "'that the Legislature has provided a special statutory procedure for review of an 'original order or decision' of the Commission . . . and that procedure [is] provided for in [section] 386.510 [and] is exclusive and jurisdiction,"' and finds that review of Commission orders of rulemaking

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[2] The Rule 84.04(h) Appendix filed by the Commission will hereinafter be referred to as "Appendix." The pages are numbered consecutively beginning with page "A1."

are not to be conducted via declaratory judgment actions under Section 536.050. Instead, this Court cited *Love 1979 Partners, et al. v. Public Serv. Comm'n*, 715 S.W.2d 482, 486 n. 8 (Mo.banc 1986) (*Love 1979 Partners*), applied Section 386.510 as the standard of review of a Commission order or rulemaking and stated "'that standard of review is essentially the same as [our review of] cases decided by other administrative tribunals. "' 103 S.W.2d at 759.

Love 1979 Partners did not involve judicial review of a Commission rulemaking. It involved judicial review of a Commission Report And Order approving the application of Union Electric Company to sell its Ashley generating plant and its downtown St. Louis steam loop, and for authority to discontinue its operations as a regulated heating company serving downtown St. Louis. The jurisdiction of the Commission existed in *Love 1979* because UE's part in the transactions was covered by Section 393.190.1. 715 S.W.2d at 484 n. 1. The principal statutory provision applicable to the merger of UtiiCorp and SJLP is Section 393.190.1. This Court in *Love 1979 Partners* found Section 386.510 to be applicable and stated "that standard for review is essentially the same as cases decided by other administrative tribunals." *Id.* Thus, this Court in *Atmos* in making reference to the standard of review of Commission cases being essentially the same as the standard of review of cases decided by other administrative tribunals makes no reference to Section 536.140.2.

This Court related in *State ex rel. State Tax Commission v. Luten*, 459 S.W.2d 375, 378 (Mo. 1970) that Section 386.510 is all inclusive respecting judicial review of the Commission:

> . . . When a court review of any administrative body is sought, it is first logical to see if there are any specific provisions for the same in the statutes relating to the particular agency. Such provision may be all inclusive, as per example Section 386.510 in connection with the Public Service Commission, and the procedure therein provided should be followed. . . .

(Citation omitted.)

The UtiliCorp-SJLP merger case is another instance of the Western District Court of Appeals applying Chapter 536 to the Commission when there are provisions of the Public Service Commission Law that apply exclusively to the Commission. The Western District Court of Appeals seeks to create new law[3], in particular through cases that,

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[3] In *State ex rel. Noranda Aluminum, Inc. v. Public Serv. Comm'n*, 24 S.W.3d 243, 244 (Mo.App. 2000), the Western District Court of Appeals noted that it and this Court have differed on the source of the Commission's obligation to provide findings of fact and conclusions of law. The Western District Court of Appeals stated that it had recently declared that:

> . . . Section 536.090 is applicable to the commission's decisions and requires a "concise statement of the findings on which the agency bases its order." *Deaconess Manor Association v. Public Service Commission of the State of Missouri*, 994 S.W.2d 602, 612 (Mo.App. 1999). The Supreme Court has looked exclusively to Section 386.420 as the source for the

(Footnote continued to the next page)

unfortunately, do not necessarily reveal on their face the inappropriateness of provisions of Chapter 536 to the Public Service Commission Law.

Also, the Western District Court of Appeals gives no recognition to the express language in Section 386.515, enacted by the Missouri Legislature in 2001 which shows that when the Legislature wanted a provision of Chapter 536 to apply to the Commission it enacted a statute, Section 386.515, to specifically so provide. Section 386.515 states that prior to August 28, 2001, the review procedure under Section 386.510 is exclusive to any other procedure. Section 386.515 further states that "[o]n and after August 28, 2001,

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> commission's obligation to make findings of fact although this statute does not mention findings of fact. The Supreme Court has interpreted Section 386.420 as requiring the commission to issue written decisions which include findings of fact that are not "completely conclusory." *State of Missouri, ex rel. Monsanto Company v. Public Service Commission of Missouri*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 220 S.W.2d 61 (1949), and *State of Missouri, ex rel. Fischer v. Public Service Commission of Missouri*, 645 S.W.2d 39 (Mo.App.1982), *cert. denied*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983)). [Footnote omitted.]

24 S.W.3d at 244-45.

the review procedure provided for in Section 386.510 continues to be exclusive except that a copy of any such writ of review shall be provided to each party to the proceeding before the commission, or his or her attorney of record, by hand delivery or by registered mail, and proof of such delivery or mailing shall be filed in the case as provided by subsection 2 of section 536.110, RSMo."

The Western District Court of Appeals also gives no recognition to (1) the language in Section 536.100 that states that "unless some other provision for judicial review is provided by statute," Sections 536.100 to 536.140 apply, and (2) this Court's decision in *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 245 S.W.2d 851, 853 (Mo. 1952) that "[s]ome 'other provision for judicial review is provided' … by the laws relating to proceedings before the Public Service Commission and those laws rather than the Administrative Procedure Act determine the scope of our review." (Citations omitted.)

Section 536.140.2(5) and (3) state that the inquiry of the court on review may extend to the determination of whether the action of the agency is made upon unlawful procedure or without a fair trial and is unsupported by competent and substantial evidence upon the whole record. The Court below in adopting Section 536.140.2 for the standard of review for Commission cases does not address the case law recognizing that the "file and suspend" provisions of the Public Service Commission Law, specifically Section 393.140(11) and Section 393.150.1 and .2, do not require a hearing. The court below in adopting Section 536.140.2 for the standard of review for Commission cases mentions Article V, Section 18 of the Missouri Constitution, but does not address that

Article V, Section 18 requires that only in cases in which a hearing is required by law, must judicial review include whether final decisions, findings, rules and orders of an administrative officer or body are supported by competent and substantial evidence on the whole record. Under Section 393.140(11) and Section 393.150.1 and .2, the Commission may allow changes in schedules of rates, charges or service, rules and regulations and forms of contract or agreement, to occur without suspension and holding a hearing.

The Court of Appeals, Kansas City District, in *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 566 (Mo.App. 1976) (hereinafter referred to as *Laclede Gas*) acknowledged that "[s]imply by non-action, the Commission can permit a requested rate to go into effect." The Court held that "[s]ince no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion." *Id.* The Missouri Supreme Court held in *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31-33 (Mo.banc 1975) cert. Denied, 429 U.S. 882, 97 S.Ct 73, 50 L.Ed.2d 84 (1976) that utility customers do not have a property interest in any existing utility rate that would be protected by the due process rights found in the Fifth and Fourteenth Amendments to the United States Constitution and thus are not entitled to a due process hearing prior to the determination of the lawfulness of a proposed rate, nor does this procedure deny utility customers equal protection. This Court in *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv.* Comm'n, 585 S.W.2d 41, 49 (Mo.banc 1979) (hereinafter referred to as *UCCM* I) specifically stated that under the "file and suspend"

method a utility's rates may be increased without requirement of a public hearing, but noted that when deciding no hearing is necessary and the filed rate should not be suspended, the Commission must consider all relevant factors.

A "contested case," as defined in Section 536.010(2), is a proceeding before an agency in which legal rights, duties or privileges are required by law to be determined after hearing, but no hearing is required respecting the "file and suspend" provisions of the Public Service Commission Law, Section 393.140(11) and Section 393.150.1 and .2.

The Commission affords special recognition to the next three cases discussed herein, only because on various occasions these cases have evaded the research of litigants. Regarding the exclusivity of Sections 386.500 and 386.510, the Commission would briefly note the following three cases: (1) a proceeding in prohibition from the era when the Commission had motor carrier jurisdiction: *State ex rel. Toedebusch Transfer, Inc. v. Public Service Comm'n.*, 520 S.W.2d 38, 49 (Mo.banc 1975) (hereinafter referred to as *Toedebusch*); (2) a proceeding in prohibition for disqualification of a Commissioner: *Union Electric Co. v. Public Serv. Comm'n*, 591 S.W.2d 134 (Mo.App. 1979) (hereinafter referred to as *Slavin*); and (3) a review pursuant to Section 386.510 regarding the denial of cross-examination: *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 562 S.W.2d 688, 693 n.11 (Mo.App. 1978) (hereinafter referred to as *UCCM II*).

The *Toedebusch* case was an original proceeding in prohibition involving the Commission's granting of certificates of convenience and necessity in 51 cases. The Missouri Supreme Court held, in part as follows, finding prohibition to be appropriate:

> Relators filed verified formal protests to these 81 applications for certificates and requested hearings thereon, but certificates were granted in 51 cases without a hearing or any notice from the Commission. Relators immediately thereafter filed motions to consolidate the cases and for reconsideration of the orders granting these certificates, but the motions were overruled.
>
> The expense of appealing 51 cases, instead of one consolidated case, as well as the impact of this number of appeals upon the docket of the court to which appeal is directed and their impact and effect upon other litigants in that court who would be delayed because of high priority these 51 cases would have to be given (Sections 386.530 and 386.540) leads to the conclusion that appeal is not an adequate remedy in this case and presents extraordinary circumstances calling for like measures. However, we repeat as a caveat what the court said in the Blair case (146 S.W.2d at 874): "In saying this we do not wish to pave the way for frequent suits of this nature." 520 S.W.2d at 49.

The *Slavin* case involved a petition in prohibition to exclude Commissioner Alberta Slavin from participating in a proceeding in which she was interested prior to her being appointed to the Commission. The Court of Appeals remanded the cause with the direction that the preliminary rule in prohibition against Commissioner Slavin should be made absolute. Thus, a writ of prohibition may be appropriate to address an interlocutory decision of the Commission. *Cf. Riverside* and *City of Park Hills v. Public Serv.*

Comm'n, 26 S.W.3d 401 (Mo.App. 2000) (Section 386.510 and Article V, Section 18 do not apply to interlocutory orders of the Commission).

The Commission has given no indication that it will subsequently order the merger to be rescinded. The Commission's decision to authorize the merger is final except for the instant judicial review. What remains open is whether the Commission will order, after consideration of all relevant factors, any mitigation of the effect of the merger to address the results of the merger. The Commission's decision to authorize the merger is final and judicially reviewable as evidenced by the instant proceeding.

The *UCCM II* case entailed judicial review, pursuant to Section 386.510, of the Commission's restriction of cross-examination due to the proprietary nature of the subject matter of the cross-examination. First, it should be noted that contrary to the Western District Court of Appeals in the instant case, the Court of Appeals, St. Louis District, held that the scope of review for both the circuit court and the Court of Appeals was delineated by Section 386.510. 562 S.W.2d at 692. In a footnote, the Court stated that Chapter 536 supplements Chapter 386 except where in direct conflict with it. Thus, although the Court of Appeals held that the right to cross-examination in administrative proceedings was governed by Section 536.070(2), the Court explained that (1) Section 386.410 provides that hearings before the Commission are to be governed by rules adopted and prescribed by the Commission, (2) these rules were not introduced into evidence and (3) the Court could not take judicial notice of the Commission's rules because the provisions of Chapter 536 providing for judicial notice of the Code of State

Regulations did not take effect until after the proceedings giving rise to the *UCCM II* appeal. *Id.* at 693 n.11.

I. THE COMMISSION DID NOT ERR IN APPROVING THE MERGER OF UTILICORP UNITED, INC. AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE

(A) ITS DECISION APPROVING THE MERGER WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD PURSUANT TO SECTION 386.510 AND MISSOURI CONSTITUTION ARTICLE V, SECTION 18;

(B) THE EVIDENCE FROM ITS OWN STAFF AND OTHER PARTIES THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE PUBLIC INTEREST WAS REFUTED BY THE JOINT APPLICANTS; AND

(C) THE ACQUISITION PREMIUM ISSUE WAS NOT PRESERVED FOR JUDICIAL REVIEW BY AGP SINCE AGP DID NOT RAISE THE ACQUISITION PREMIUM ISSUE IN ITS APPLICATION FOR REHEARING, AS IS REQUIRED PURSUANT TO SECTION 386.500.2; NONETHELESS, THE COMMISSION WAS NOT REQUIRED TO DECIDE IN A MERGER CASE THE RATEMAKING ISSUE OF WHETHER THE $92 MILLION ACQUISITION PREMIUM WOULD BE PERMITTED TO BE RECOVERED FROM RATEPAYERS, AND THE COMMISSION ADEQUATELY ADDRESSED THE ACQUISITION PREMIUM ISSUE IN ITS REPORT AND ORDER.

(Responds to Appellant's Point I.)

The Commission's rule on applications for authority to merge or consolidate, 4 CSR 240-2.060(6) effective November 30, 1995 to April 29, 2000, 4 CSR 240-2.060(8) effective April 30, 2000 to April 29, 2003, and 4 CSR 240-3.115 effective since April 30, 2003, states that such applications shall include "(D) The reasons the proposed merger is not detrimental to the public interest." The Commission's rule respecting applications for authority to sell, assign, lease, or transfer assets, 4 CSR 240-2.060(5) effective November 30, 1995 to April 29, 2000, 4 CSR 240-2.060(7) effective April 30, 2000 to April 29, 2003, and 4 CSR 240-3.110 effective since April 30, 2003, states that such applications shall include "(D) The reasons the proposed sale of the assets is not detrimental to the public interest."

The standard was determined by the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393 (Mo.banc 1934) (hereinafter referred to as *City of St. Louis*) which was the judicial review of a Commission Report And Order granting the Application of a foreign corporation, not licensed to do business in Missouri, to acquire and hold more than 10% of the stock of two Missouri utilities. The underlying Commission case was *Re Utilities Power & Light Corp.*, Case Nos. 6722 and 6723, 18 Mo.P.S.C. 1 (1930).

To determine the meaning of the applicable section in the Public Service Commission Law, the Court looked to the purpose of the Public Service Commission Act and stated:

> . . . 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 therefore; investing public is interested in the value and stability of the securities issued by the utility. State ex rel. Union Electric Light & 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. Section 5251, R.S. 1929 (Mo. St. Ann. Section 5251, p. 6674), in part reads: "The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and *substantial justice between patrons and public utilities*." (Italics ours.)

73 S.W.2d at 399.

The Court stated that "[t]he owners of this stock [sought to be acquired] should have something to say as to whether they can sell it or not"; "[t]o deny them that right would be to deny them an incident important to ownership of property"; and in such a situation "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." 73 S.W.2d at 400. The Court noted that the state of Maryland has a statute "identical" to the Missouri statute and that the Maryland Supreme Court had determined "not detrimental to the public" to be the appropriate standard:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public good in the clashing of private interest with

> the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, 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. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"

73 S.W.2d at 400.

City of St. Louis is the seminal case respecting the "not detrimental to the public standard." The Commission recognized this case in the largest merger case that has gone to hearing in recent times, the merger of the Kansas Power & Light Company (KPL) and Kansas Gas and Electric Company (KGE) in 1991. *Re Kansas Power & Light Co.*, Report And Order, 1 Mo.P.S.C.3d 150, 151-53 (1991) (hereinafter referred to as *Kansas Power & Light).* Therein the Commission stated that it "may not withhold its approval of this proposed merger unless the merger is detrimental to the public interest. State ex rel. City of St. Louis v. Public Service Commission of Missouri, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo.banc 1934). State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz 596 S.W.2d 466, 468 (Mo.App. 1980)."

The Commission also acknowledged *City of St. Louis* in its Report And Order in the UtiliCorp-SJLP merger case. The Commission remarked that parties suggested that under the *City of St. Louis* standard "the public that the Commission is obligated to protect is the ratepayers and the detriments from which they are to be protected are higher rates or a deterioration in the level of customer service." (C.P. 1311; 9 Mo.P.S.C.3d at

472). The Commission remarked that it had certainly used these definitions in the past and would generally adhere to these definitions in its instant decision, but it was not limited to these definitions:

> . . . There does not, however, appear to be any controlling authority that would firmly limit the Commission to those definitions. Nevertheless, the Commission will generally adhere to those definitions in this decision.

(C.P. 1311).[4]

AGP states in its brief at page 53, and makes a similar argument at page 59 of its brief, that "[t]he 'not detrimental' standard does not brook an exception that demonstrated detriment may be vitiated as a result of subsequent 'protective' action by the Commission." AGP also asserts at those pages of its brief that the Commission departed from established cases and the Commission's own precedent. AGP's brief is noteworthy for the case law and litigated merger case that it fails to cite to this Court, in particular *Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482 (Mo.banc 1986) (hereinafter referred to as *Love 1979 Partners*), *State ex rel. Martigney Creek Sewer Co v. Public Serv. Comm'n*, 537 S.W.2d 388, 396 (Mo.banc 1976) (hereinafter referred to as *Martigney Creek)* and *Kansas Power & Light*. Due to their relevance to the instant

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[4] In these proceedings, the first time this particular discourse on the appropriate legal standard appeared was in the Commission's brief in Cole County Circuit Court.

action, the Commission will provide the details of these first two cases immediately below and the third case further below.

Love 1979 Partners involved the sale of certain facilities of UE comprising part of its system necessary or useful in the performance of its electric utility service duties to the public and the whole of its system necessary or useful in the performance of its electric utility service duties to the public. The elements of the ongoing project were as follows: (1) UE's sale of its downtown St. Louis steam loop to Bi-State Development Agency (Bi-State), a public agency, (2) UE's sale of its Ashley plant to Thermal Resources of St. Louis, Inc. (Thermal), (3) the discontinuance of UE's steam distribution operation and its replacement by Bi-State as the supplier of steam to UE's steam customers, (4) Thermal's operation of the steam production and distribution facilities by contract with Bi-State, (5) the temporary supply of electric power from Ashley until UE constructed alternate facilities and (6) the construction of a refuse-to-steam plant by Thermal. 715 S.W.2d at 485.

The steam customers that intervened argued, *inter alia*, that the project was not in the public interest because it was not feasible and economic. *Inter alia*, the Commission in granting the requested approval found that the overall plan was not detrimental to the public interest. "It rejected the users' argument that the plan would produce an unreasonable increase in rates for steam, and held that the fact of an initial rate increase was not ground for disapproving the plan." 715 S.W.2d at 485-86. Certain steam customers obtained review by the Circuit Court, which set aside the Commission's Order.

There was a direct appeal to this Court, which reversed the decree of the Circuit Court and sustained the Order of the Commission. *Id*. at 484.

This Court noted that "[t]he users have no right to the maintenance of the existing rate structure. There was strong likelihood that the rates would have been increased even if UE had remained the owner of the steam facilities." 715 S.W.2d at 487. The Missouri Supreme Court also held in *State ex rel. Jackson County v. Public Serv. Comm'n,* 532 S.W.2d 20, 31-32 (Mo.banc 1975), *cert. denied,* 429 U.S. 882, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976) that customers do not have a protected property interest in the present level of utility rates. In *Love 1979 Partners*, this Court further stated respecting the steam customers' suggestion that the governing contracts would subject steam customers to unreasonable rate increases, that in general, customers are not entitled to a guarantee of the status quo:

> . . . **As we have said earlier, the customers are not entitled to a guarantee of the status quo in the furnishing of steam. The Commission could conclude that the present facilities are obsolescent and uneconomic, and that rate increases would be anticipated even if UE were to continue the operation.** It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. The users complain of a "ratchet" effect, in which the new rates may go up but not down. **The Commission might well conclude,**

however, that the new level had to be guaranteed in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.

This case is very different from one in which we review a civil judgment for damages, to make sure that each element is supported by substantial evidence. **The problems presented to the Commission involve subjective evaluations of economic factors.** There is no sure method for predicting whether a project will succeed. **Questions of analysis and judgment are committed by law to the decision of the Commission**, which has the assistance of a technically trained staff and is better equipped to make decisions of this kind than we are. **The users are asking us to substitute our judgment for its judgment. We decline to do this because we are persuaded that the Commission's decision is a permissible one under the record.** There are times when the courts must step in to protect the public against arbitrary or unauthorized administrative action, but the users do not persuade us that such intervention is necessary or proper in this case.

715 S.W.2d at 490; Emphasis added.

On pages 24-25 of its brief, AGP notes that the Staff's principal summary witness identified the UtiliCorp-SJLP proposed acquisition adjustment[5] as a public detriment. There is *obiter dictum* in one Missouri Supreme Court decision that an acquisition adjustment might not be a detriment to the public. *State ex rel. Martigney Creek Sewer Co. v. Public Serv. Comm'n*, 537 S.W.2d 388 (Mo.banc 1976) was an appeal from an Order of the Commission denying a rate increase sought by Martigney Creek Sewer Co., but authorizing a lesser rate increase. The principal issues before this Court involved whether donated plant, contributions in aid of construction and certain connection fees may be included in rate base for ratemaking purposes. During oral argument it was suggested that if a purchaser bought the assets of Martigney Creek Sewer Co. and paid a sum equal to the value of the property used and useful in the public service, then the purchaser would have a rate base at the purchase price value and would be entitled to have a rate by which the purchaser would earn a fair return on its investment. The Court stated that the premise in the suggestion at oral argument that "the purchase price automatically becomes the rate base simply because someone paid that sum to Martigney is not necessarily correct" (537 S.W.2d at 399):

> The sale, transfer, or disposition of a sewer utility's franchise, works, or system, or any part thereof used or useful in the performance of its duties to

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[5] "Acquisition adjustment" is another term for an "acquisition premium," which also may be referred to as a "merger premium." (Oligschlaeger Rebuttal, Ex. 713, p. 6)

the public is subject to control by the PSC (sec. 393.190) and, of course, the valuation of a utility's property for rate-making purposes is also the duty of the PSC (sec. 393.230).

In Priest, "Principles of Public Utility Regulation," Vol. 1, ch. 4, pp. 188-190, it is said, "When public utility property is acquired by another public service company, should any cost of acquisition in excess of 'the cost of such property to the person first devoting it to public service' be included in an original-cost rate base? Regulatory agencies which have said 'No' constitute a majority, but there is much respectable authority to the contrary. If the transaction was at arm's-length, if it resulted in operating efficiencies, if it received regulatory approval as having been in the public interest, if it made possible a desirable integration of facilities, the 'excess' over original cost was capital dedicated to the public service. And that capital would seem entitled to amortization out of operating expenses, rather than 'below the line,' or out of income. That burden of proof may be onerous, but it has been met."

The question is not directly involved in this case because no sale of assets has taken place and the court will not speculate on a hypothetical situation. Suffice it to say that more is involved in the valuation for rate-making purposes of an asset acquired from one utility by another utility at a price substantially in excess of its cost to the utility first donating the asset to public purpose than merely the sales price.

Id.

At pages 23-25 of its brief, AGP lists a summary of the purported detriments arising from the proposed merger as found in the testimony of one Staff witness, and recites another Staff witness' testimony that a quantification of merger costs after appropriate adjustments are made shows that based on the Joint Applicants' own numbers, merger costs exceed merger savings during the first 10 years after the merger. (The allegation of merger costs exceeding merger savings is addressed, in particular, in the "Points Relied On: III" section of this brief.)

At page 24 of its brief, AGP states that a Staff witness testified that UtiliCorp recovering the acquisition premium was not dependent upon the Commission approving the UtiliCorp-SJLP regulatory plan, but follows from Commission approval of the merger and the Commission permitting the SJLP rates to stay in effect "indefinitely" while UtiliCorp reduces the costs of SJLP's operations. AGP asserts at page 28 of its brief that UtiliCorp is overrecovering the SJLP and MPS revenue requirements since "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."

First, the Staff's own witness, Mr. Oligschlaeger, identified the effects of "regulatory lag" as being inherent to the regulatory process. He defined "regulatory lag" as the time between when a utility experiences a change in its cost of service and when that change is actually reflected in the utility's rates." (Oligschlaeger Rebuttal, Ex. 713, p.

48). Thus, "regulatory lag" can result in underrecovery or overrecovery. *See Laclede Gas*, 535 S.W.2d at 570; *UCCM I*, 585 S.W.2d at 46, 50.

The Commission in approving the merger, rejected the UtiliCorp-SJLP regulatory plan, some of the specifics of which are set out below, including the proposed five year moratorium on SJLP's rates. AGP does not note that a Staff witness testified that the Staff performed earnings/revenues audits of SJLP's electric, gas and steam operations, and the results of those audits reflected that SJLP had no material need for either a rate increase or a rate reduction. The Staff did not propose any change in rates. (Traxler Rebuttal, Ex. 718, pp. 15-16, 18; Traxler Rebuttal Replacement Pages, Ex. 721, p. 17). Since the Commission did not adopt the UtiliCorp-SJLP regulatory plan, the Staff would be free to perform earnings/revenues audits of SJLP and file rate reduction complaint cases against SJLP. In fact, as discussed below, in UtiliCorp's next rate increase case for the MPS division, the Staff performed such audits and filed an excess earnings/revenues complaint case against UtiliCorp's MPS division, but not against its SJLP division.

AGP states at page 26 of its brief that the Commission approved the merger apparently upon "the lack of immediate rate impact from approval of the merger" in that the Commission stated in its Report And Order that "'[h]igher rates for SJLP's customers cannot result from this merger unless the Commission approves those rates in a future rate case.'" AGP charges that "the Commission implicitly **acknowledged** that the transaction had not been shown to be 'not detrimental"' (Emphasis in AGP's brief, p. 26).

AGP's characterization of the Commission's Report And Order is not accurate. The Commission did not proceed differently respecting the UtiliCorp-SJLP merger than it has in other merger, asset transfer or acquisition cases. As AGP notes, the Commission stated that higher rates for SJLP's customers could not result from the merger unless it approved those rates in a future rate case. (C.P. 1288; 9 Mo.P.S.C.3d at 458). As indicated above, there is case law that touches upon the matter of whether an increase in rates resulting from a merger, asset transfer or acquisition may be deemed to be a detriment to the public.

As part of its merger proposal, UtiliCorp-SJLP sought Commission approval of its proposed regulatory plan, which, *inter alia*, included (1) a five-year rate moratorium for the SJLP operating division; (2) electric, gas and steam rate cases filed in the fifth year of the rate moratorium for the SJLP operating division; (3) in rate cases and for ratemaking purposes, 50% of the unamortized balance of the premium paid by UtiliCorp for SJLP would be included in the rate bases of SJLP division's retail electric, gas and steam operations and the annual amortization of the acquisition premium would be included in the expenses allowed for recovery in cost of service, provided UtiliCorp proves that merger synergies are at least equal to 50% of the premium costs and other costs to achieve the synergies. UtiliCorp stated that approval of the regulatory plan was necessary for its shareholders to have the opportunity to recover the $92 million premium paid to acquire the ownership of SJLP. (C.P. 1312-13, 1319-20; 9 Mo.P.S.C.3d at 472-73, 477).

The Commission rejected UtiliCorp's proposal stating in part that UtiliCorp was seeking that the Commission make ratemaking determinations beyond the context of a rate case and without considering all relevant factors:

> Essentially, in each matter, UtiliCorp asks the Commission to state now how it will rule on certain issues in future rate cases. The Commission will not do so. Section 393.270.4, RSMo 1994 provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." **The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor.** ***See***. State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41[, 56] (Mo banc 1979)**; and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in

> another area. Such a practice is justly condemned as single-issue ratemaking. *Midwest Gas Users' Association* at 480.
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> In order to avoid single-issue ratemaking, the Commission has avoided making decisions about rate case matters outside of the context of a rate case. In fact, the Commission typically includes language in non-ratemaking cases that specifically provides that the ratemaking treatment to be afforded a transaction will be considered in a later proceeding. The ratemaking factors that UtiliCorp asks the Commission to decide in this case can only be properly considered within the context of all relevant factors in a subsequent rate case. The Commission will not engage in single-issue ratemaking and will decline UtiliCorp's invitation to prejudge certain factors that can only be properly considered in a future rate case.
>
> . . . .
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> 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.

(C.P. 1318-19, 1320; Emphasis added). The Commission has consistently proceeded in this manner.

In *Re Laclede Gas Co.*, Case No. 17,267, 16 Mo.P.S.C.(N.S.) 328 (1971) (hereinafter referred to as *Laclede*), Laclede Gas Company (Laclede) and three other gas companies filed for approval of a plan of merger and certain related transactions. The

Commission concluded that the proposed merger would not be detrimental to the public interest in that

> . . . [t]he status quo is to be maintained, at least for the immediate future, with no change in rates or conditions of service and no substantial changes in methods of operation. For the future, there appear to be reasonable prospects of benefits to flow from the merger in the areas of financing and gas supply.

Id. at 334.[6] The Commission also withheld deciding the treatment of any acquisition adjustment arising out of the merger:

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[6] *See also Re Kansas Power & Light Co.*, Case No. GM-84-12, 26 Mo.P.S.C.(N.S.) 254, 257-58 (1983):

> The evidence shows that the proposed stock acquisition and merger between KPL Acquisition Corporation and GSC [Gas Service Company] will not be detrimental to the public interest. It is apparent from the record that the status quo is, at the very least, to be maintained, at least for the immediate future, with no change in rates or conditions of service and no substantial changes in methods of operation. For the future, there appear to be reasonable prospects that the acquisition will not be detrimental to GSC and, therefore, its ratepayers, in the areas of financial integrity, enhanced

(Footnote continued to the next page)

> Ordered: 6. That nothing herein shall be considered as a finding of the value of property for rate-making purposes, nor shall anything herein be considered as determining or indicating the treatment or disposition of any acquisition adjustment arising out of the merger or any prior transaction, the jurisdiction to find such value and to determine such treatment or disposition being specifically retained by the Commission.

Id. at 335. The Commission states in its Report And Order in the instant case that it will generally adhere to the definition of "not detrimental to the public," "the public" and "detriments" found in *Laclede*, although "[t]here does not, however, appear to be any controlling authority that would firmly limit the Commission to those definitions." (C.P. 1311; 9 Mo.P.S.C.3d at 472).

The Commission issued its Report And Order regarding the merger of Laclede and three other gas companies on December 16, 1971. Approximately two years later, on February 1, 1974, Laclede filed a permanent rate case with the Commission to increase its gross annual revenues by approximately $13.5 million, including gross receipts taxes, or approximately, $12.5 million excluding gross receipts taxes. *Re Laclede Gas Co.*, Case No. 18,015, 19 Mo.P.S.C.(N.S.) 198 (1974). On February 15, 1974, Laclede filed at the Commission to increase its gross annual revenues by approximately $5.4 million on

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> managerial capability and economies of scale and operational efficiencies and other areas on which the Commission requested information.

an interim/emergency, subject to refund, basis, pending the determination of its permanent rate increase case. *Re Laclede Gas Co.*, Case No. 18,021, 18 Mo.P.S.C.(N.S.) 544 (1974). The parties to the permanent rate increase case filed a Stipulation recommending that the Commission allow Laclede an increase in gross annual revenues of $12.2 million, including gross receipts taxes ($11.4 million, excluding gross receipts taxes). 19 Mo.P.S.C.(N.S.) at 200. The Commission issued a Report And Order on August 22, 1974 authorizing Laclede to file tariffs designed to increase its gross annual revenues by $12.2 million, including gross receipts and franchise taxes of $.854 million. *Id.* at 204.

In *Re Missouri-American Water Co.*, Case No. WM-2000-222, 9 Mo.P.S.C.3d 56, Report And Order (2000) (hereinafter referred to as *Missouri-American*), Missouri-American Water Company (MAWC) and United Water Missouri, Inc. (UWM) filed a joint application for authority for MAWC to acquire the common stock of UWM. The Commission noted in its Report And Order that it had jurisdiction over the transaction pursuant to Section 393.190.2 and that if the transaction occurred UWM would become a subsidiary of MAWC and would likely merge into MAWC at some point. (9 Mo.P.S.C.3d at 58.) Quoting from *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo.App. 1980), the Commission stated that "'[t]he obvious purpose of [Section 393.190] is to insure the continuation of adequate service to the public served by the utility.'" *Id.* The Commission related in its Report And Order that the only purported public detriment that any party had identified was the possibility of a future attempt to recover the acquisition premium from ratepayers, and *City of St. Louis* requires a direct

and present public detriment for the Commission to deny its approval of the transaction. (9 Mo.P.S.C.3d at 59.) The Commission held that "[t]he acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed, is not a present detriment." *Id.* The Commission noted that the matter of an acquisition adjustment was a matter for a rate case, and since Case No. WM-2000-222 was not a rate case, the Commission stated that it would not address the matter of an acquisition premium in Case No. WM-2000-222. *Id.*

In *Re Western Resources, Inc.*, Case No. GM-94-40, 2 Mo.P.S.C.3d 598 (1993), Western Resources, Inc., d/b/a Gas Service (Western Resources) and Southern Union Company, d/b/a Missouri Gas Energy (Southern Union) filed a joint application requesting an order from the Commission authorizing the sale, transfer, and assignment of assets of Western Resources to Southern Union related to the provision of gas service in the State of Missouri, and in connection therewith, approval to perform certain other related transactions. In testimony, the Staff and Public Counsel dealt with the specifics that they deemed might be detrimental to the public interest. All parties entered into a Stipulation And Agreement which, *inter alia*, included agreements that Southern Union would not request a general rate increase case for at least three years and the acquisition cost/purchase premium would be booked by Southern Union below the line. The Commission in its Report And Order, *inter alia*, approving the Unanimous Stipulation And Agreement and authorizing Southern Union and Western Resources to perform the terms and conditions of the contractual agreement for the sale of assets as amended by the Unanimous Stipulation And Agreement stated that the ratepayer was at least for a

period of time protected from the attempt by Southern Union to recoup many of the costs of the transaction through an increase in rates:

> Comparison of the concerns of the Staff and OPC and the resultant conditions in the Stipulation and Agreement indicate that major concerns of the parties were at least partially alleviated. The ratepayer has been, at least for a period of time, protected from any attempt by [Southern Union] to recoup many of the costs of the transaction through an increase in rates. The acquisition cost itself, called a purchase premium, will clearly not be passed on to the ratepayer. . . .

2 Mo.P.S.C.3d at 602.

In *Kansas Power & Light,* KPL filed an application with the Commission requesting authority to acquire and merge with Kansas Gas and Electric Company. The Commission found that the savings sharing plan proposed by KPL had the potential for exposing Missouri customers to higher rates than would be the case without the merger and this would be detrimental to the public interest. The Commission also determined that there was potential for the merger to have a detrimental effect on Missouri customers through increased A&G costs and capital costs. The Commission therefore decided to not approve the savings sharing plan at that time and made it clear to KPL that A&G costs and capital costs would be carefully reviewed in post-merger rate cases to assure that no such detriment would be experienced in the future by Missouri customers. 1 Mo.P.S.C.3d at 159.

The Commission held in its Report And Order that although SJLP has been able to provide relatively low cost, reliable power to its customers in the past, the changing structure of the electric power system throughout the United States may make it more difficult for SJLP to continue to provide low-cost power in the future. The Commission noted that UtiliCorp and SJLP witness Stephen L. Ferry explained, at Exhibit 23, page 4, the impact of competition on wholesale power prices to which SJLP is subject. The Commission concluded that the merger of SJLP and UtiliCorp would permit SJLP customers to be served by a substantially larger utility with greater financial resources, thereby better able to compete in the wholesale energy market. (C.P. 1285; 9 Mo.P.S.C.3d at 456-57).

The Commission related in its Report And Order that the Staff, joined by other parties, argued that the costs associated with the merger would exceed the savings attributable to the merger. It was thus contended that the merger would be detrimental to the public because the cost of service for the merged company would be higher than it would have been without the merger and the higher cost of service would be reflected in higher rates to customers. (C.P. 1285; 9 Mo.P.S.C.3d at 457). The Staff challenged UtiliCorp's and SJLP's estimates of merger savings as being significantly overstated in two areas: (1) the energy cost savings projected from the joint dispatch of the UtiliCorp and SJLP power supply compared to what SJLP could achieve if there were no merger and (2) the inflation rate assumed by UtiliCorp and SJLP for UtiliCorp's corporate overhead costs to be allocated to SJLP. (C.P. 1286; 9 Mo.P.S.C.3d at 457).

First, the Staff asserted that the power supply savings that the UtiliCorp-SJLP merger would produce were much smaller, only approximately $6.8 million (Michael S. Proctor Rebuttal, Ex. 714, pp. 40-41; Vol. 7, Tr. 957), than the $100.0 million plus amount which UtiliCorp-SJLP contended that the merger would produce over the first ten years (Robert W. Holzwarth Direct, Ex 14, p.16, adopted by UtiliCorp-SJLP witness Frank A. DeBacker, L.F. 379-80, Vol. 7, Tr. 898-99; DeBacker Surrebuttal, Ex. 20; Vol. 7, Tr. 919-38). The Commission held in its Report And Order that the Staff's arguments were not convincing on these matters. First, the Commission found that the Staff overestimated the extent to which SJLP, as a stand-alone utility, could take advantage of increased sales opportunities in the wholesale generation market. SJLP had not been active in the wholesale market; SJLP did not have a wholesale marketing group dedicated to pursuing the wholesale market; SJLP's size and limited resource mix presented problems; SJLP had not separated its generation and transmission functions; and SJLP did not have FERC approval to sell energy at market based rates. The Commission concluded that it was not reasonable to assume that SJLP could effectively and efficiently create the marketing knowledge and resources needed to operate in the wholesale market and obtain the same results as those that could be attained through a merger with UtiliCorp. (C.P. 1286-87; 9 Mo.P.S.C.3d at 457-58).

Second, the Staff took issue with UtiliCorp-SJLP's use of a 2.5% inflation rate to project UtiliCorp's corporate overhead costs allocated to SJLP in the UtiliCorp cost/benefit analysis of the merger. The Staff utilized an inflation rate of 5.0%. (Traxler Rebuttal, Ex. 718, pp. 25-29; Traxler Rebuttal Replacement Pages, Ex. 721, p. 24, Sch.

SMT-2; Ex. 275; Ex. 729; Vol. 7, Tr. 869-74). UtiliCorp argued that the Staff's development of the 5.0% inflation rate was flawed because, *inter alia*, it included the increased operational costs of reengineering initiatives that were implemented in prior years but would not continue after the new applications became operational. (Siemek Direct, Ex. 7, Sch. VJS-1; Siemek Surrebuttal, Ex. 8, pp. 507; Vol. 6, Tr. 847-55). UtiliCorp further argued that the actual rate of UtiliCorp overhead cost increases is unimportant at this time:

> The SJLP inflation rate of 2.5% which we have proposed is clearly still appropriate and reasonable. The actual rate of [UtiliCorp] cost increases is unimportant at this time. The actual rate of increase will be known in the future in the post moratorium and subsequent rate cases when [UtiliCorp] bears the burden of proof to demonstrate the actual costs and synergies. If actual costs are higher than now estimated for [UtiliCorp] allocations, those higher costs will be reflected in the future synergy analysis, and will be appropriately reflected in the net synergies.

(Siemek Surrebuttal, Ex. 8, p. 7).

The Commission held that it did not need to determine an appropriate inflation factor for corporate allocations in order to decide this case. The Commission stated that if in a future rate case UtiliCorp's corporate allocations are shown to be excessive, the Commission will be able to consider that fact when setting rates for UtiliCorp's SJLP operating division. The Commission noted that in order for SJLP's customers' rates to increase, this Commission would have to approve those rates. The Commission

commented that the Staff based its argument that merger savings could not be reliably established at this time on the Staff's assertion that it is very difficult to project what SJLP's cost of service might be in five or ten years. The Commission noted that the same argument could be applied to the Staff's contention that the costs of the merger exceeded the benefits. The Commission ultimately related that "[s]peculation about what may happen in a future rate case is not a valid basis for refusing to allow UtiliCorp and SJLP to complete their merger." (C.P. 1289; 9 Mo.P.S.C.3d at 459).

It should be noted that SJLP challenged the testimony of Staff witnesses Michael S. Proctor (Proctor Rebuttal, Ex. 714, p. 16) and Cary G. Featherstone (Featherstone Rebuttal, Ex. 704, p. 79) that SJLP's cost of service would decline in future years, by entering into the record evidence that SJLP's forecast covering 2000-2004, prepared in early 2000, shows, absent the merger, the need for an electric rate increase in 2002 and an additional electric rate increase in 2004. SJLP witness Janet K. Pullen testified that these projected rate increases were primarily driven by system requirements, unit fuel and purchased power costs, and the cost of capital, and included conservative operations and maintenance expense increases. (Pullen Surrebuttal, Ex. 24, pp. 2-3).

In *State ex rel. Missouri Pub. Serv. Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo.App. 1981), the Western District Court of Appeals did not find that uncertainty about the future authorized Commission inaction:

> There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment. That right carries as a corollary the duty by the Commission to

consider all relevant factors including the effects of inflation. *State ex rel. Missouri Water Company v. Public Service Commission*, 308 S.W.2d 704 (Mo. 1958). [Other citations omitted.]

It is no answer to the foregoing duty to say that a forecast as to future inflation is merely speculative. Despite that hazard, the Commission must make an intelligent forecast with respect to the future period for which it is setting the rate; rate making is by necessity a predictive science. *State v. N.J. Bell Tel. Co.*, 30 N.J. 16, 152 A.2d 35 (1959).

The court further stated that the Commission had discretion in how to meet the problem:

. . . The choice of method with which to meet the inflation problem rests largely within the expert discretion of the administrative body, and for that reason the court will not presume to dictate the choice of method to the Commission. *New England Tel. & Tel. Co. v. Public Utilities, supra*; *State v. N.J. Bell Tel. Co., supra*; *Potomac Elec. Power Co. v. Public Service Commission, supra*.

627 S.W.2d at 888. In *Martigney Creek*, the Missouri Supreme Court, quoting *Application of Lewiston Grain Growers*, 69 Idaho 374, 207 P.2d 1028, 1032 (1949), stated that "'[t]he general rule is that where more accurate information is unavailable estimates should be considered.'" 537 S.W.2d at 397.

AGP remarks, at page 44 of its brief, that when the Commission rejects the recommendations of its Staff and each of the intervenors the source of the Commission's

expertise is UtiliCorp-SJLP "who are obviously prejudiced in favor of the merger." Every witness who testified had an interest in the result. The interest that the witness has in the result, goes to the witness' credibility and the weight of the evidence. That the witness has an interest in the result does not mean that the witness' testimony should be disregarded:

> In this connection we may note that defendants state that plaintiff had no disinterested evidence to support his charge. That was not necessary. The interest a witness has in the result of a trial goes to the witness' credibility and the weight of the evidence, but it does not mean that the facts may not be proven by interested witnesses.

Campbell v. St. Louis Union Trust Co., 124 S.W.2d 1068, 1070 (Mo. 1939); *accord, Sale v. Brown*, 396 S.W.2d 750, 754 (Mo.App. 1965). Also, each of the UtiliCorp-SJLP witnesses was an expert and experts' testimony may be conclusory:

> . . . An expert witness, necessarily, states his conclusions about certain matters which would not be permitted of other witnesses. As long as his opinion is not a mere guess or conjecture, but is based upon facts or adequate data, it is properly received.

Vitale v. Duerbeck, 92 S.W.2d 691, 695 (Mo. 1935). The opinion of a qualified expert may amount to competent and substantial evidence. *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 37 S.W.3d 287, 294 (Mo.App. 2000).

Finally, Appellant AGP asserts in the caption of its "Points Relined On: I," on page 19 of its brief and elsewhere throughout its brief, that the Commission rejected

unrefuted evidence. In fact, all of AGP's purported evidence was refuted by UtiliCorp-SJLP. Even if it had not been, the Missouri Supreme Court in *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo.banc 1949) (hereinafter referred to as *Rice*) clearly stated that the Commission determines the weight of evidence presented to it and may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it. See "Points Relied On: III" for a further discussion of *Rice* and *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n.*, 706 S.W.2d 870 (Mo. App. 1985), *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n.*, 37 S.W.3d 287 (Mo.App. 2000), *State ex rel. Inman Freight Sys., Inc. v. Public Serv. Comm'n*, 600 S.W.2d 650 (Mo.App. 1980) and *State ex rel. Missouri Pub. Serv. Co. v. Pierce*, 604 S.W.2d 623 (Mo.App. 1980).

Section 386.500.2 clearly states that no cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation, Public Counsel, person or public utility unless the party made before the effective date of the order or decision, application to the Commission for rehearing. Section 386.500.2 further states that the corporation, Public Counsel, person or public utility shall not in any court urge or rely on any ground not specifically set forth in its application to the Commission for rehearing as the grounds on which the corporation, Public Counsel, person or public utility considers the order or decision of the Commission to be unlawful, unjust or unreasonable.

This Court stated in *State ex rel. Dyer v. Public Serv. Comm'n*, 341 S.W.2d 795, 801 (Mo. 1960), *cert denied*, 366 U.S. 924, 81 S.Ct. 1351, 6 L.Ed.2d 384 (1961) that it is

precluded by statute from considering any ground not specifically set forth in the application for rehearing. *Accord State ex rel. City of West Plains v. Public Serv. Comm'n*, 310 S.W.2d 925, 934 (Mo.banc 1958); *State ex rel. American Tel. & Tel. Co. v. Public Serv. Comm'n*, 701 S.W.2d 745, 751, 755 (Mo.App. 1985).

A review of the Application For Rehearing filed by AGP on December 22, 2000 at the Commission, clearly shows that there is nothing in that document that identifies the Commission's treatment of the acquisition premium as an issue to be decided in the context of a subsequent rate case, as a ground for AGP seeking that the Commission grant a rehearing. Even if AGP had raised this issue in its initial brief to the Western District Court of Appeals (AGP filed no reply brief), this would not have been adequate under applicable statute and case law, but AGP did not even make this argument in its brief to the Western District Court of Appeals.

The Western District Court of Appeals reversed the Commission's Report And Order on grounds not found in AGP's Application For Rehearing or in its initial brief to the Western District Court of Appeals, and AGP filed no reply brief. In a statement at page 16 of its Opinion (Appendix, A140), the Western District Court of Appeals acknowledged this failure of AGP to raise the issue on which it was reversing the Commission:

> . . . *Although phrased in other words, AGP argues* in this point that in order to determine whether the proposed merger was detrimental to the public interest, the PSC was duty bound to consider and decide the issue of whether UtiliCorp would be allowed to recoup any of the acquisition

premium, rather than leaving that issue for a future ratemaking case. We agree. [Emphasis supplied].

Besides sweeping aside Section 386.500.2 and long standing case law on what must be argued in applications for rehearing, the Western District Court of Appeals swept aside Section 393.270.4 and two Missouri Supreme Court decisions, *State ex rel. Missouri Water Co. v. Public Serv. Comm'n*, 308 S.W.2d 704 (Mo. 1957) (hereinafter referred to as *Missouri Water*) and *UCCM I*, without even mentioning this statutory provision and these two cases, which are cited in the Commission's Report And Order (L.F. 44-46; C.F. 1318-20; 9 Mo.P.S.C.3d at 476-77) as the legal basis for it not rendering a decision on the acquisition premium issue. Section 393.270.4, *Missouri Water* and *UCCM I* were specifically addressed in the Commission's Report And Order and were cited as authority in the Commission's brief to the Western District Court of Appeals.

There was testimony in the case, overlooked by the Western District Court of Appeals and AGP, of a Staff witness, Mark L. Oligschlaeger, that "ratemaking findings are best made in rate cases or earnings complaint cases, when the Commission has the necessary information before it concerning all relevant factors affecting utility revenue requirement (revenues, expenses and rate base investment). Complete evidence concerning all relevant ratemaking factors is not generally present in non-rate case non-complaint case dockets, such as the instant merger application." (Ex. 713, p. 44.) Mr. Oligschlaeger further testified that while the Staff is opposed to recovery of acquisition adjustments in concept from ratepayers, as being inherently detrimental to the public, if

the Commission were to allow recovery of this particular cost, "it should only make that determination after a thorough examination of evidence from all parties concerning actual merger savings and costs in the context of a general rate proceeding." *Id.* at 45.

UtiliCorp and SJLP decided to proceed with the merger knowing full well that the Commission might ultimately decide to not allow recovery of any portion of the acquisition premium that might be sought by UtiliCorp-SJLP in a subsequent rate proceeding. The Commission clearly rejected the UtiliCorp-SJLP Regulatory Plan wherein the applicants sought recovery of the acquisition premium. (L.F. 50; C.P. 1324; 9 Mo.P.S.C.3d at 479.) The Western District Court of Appeals itself at page 14 of its Opinion quotes paragraph 15 of the UtiliCorp-SJLP Application wherein the Applicants themselves stated that their proposed Regulatory Plan "[would] have the effect of affording UtiliCorp the opportunity to recover the premium paid for the SJLP stock." (Appendix, A138.) Thus, the Commission in rejecting the UtiliCorp-SJLP Regulatory Plan did address the issue of the acquisition premium.

Regarding AGP's claim that the Commission erred in approving the merger because its decision was not supported by substantial and competent evidence and was against the overwhelming weight of the evidence in that the merger would lead to higher rates for ratepayers because the merger would result in a drop in SJLP's credit rating, the Western District Court of Appeals at page 21 of its Opinion found that it could not say that the Commission's findings and conclusions were an unreasonable interpretation of the facts before it. (Appendix, A145.) The Commission had concluded that the cost of debt was just one more factor that it would consider when setting future rates. The Court

itself noted the Commission's statement that "even 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." (L.F. 17; C.P. 1291.) The Commission also took this approach respecting the acquisition premium. This approach was no less lawful and reasonable respecting the acquisition premium than it was respecting SJLP's credit rating.

The Court's Opinion in reversing the Commission's Report And Order for failing to make an acquisition premium recoupment determination, did not acknowledge its statement in the very same decision regarding the inapplicability of *stare decisis* to an administrative agency, nor did the Western District Court of Appeal's Opinion address, or even note, its decision in another Commission case that the Commission is not estopped in a ratemaking proceeding from adopting different numbers than accepted in a prior accounting authority orders (AAO) proceeding.

At page 19 of the Western District Court of Appeal's Opinion, the Court notes that "an administrative agency is not bound by *stare decisis*, *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo.App. 1992)." (Appendix, A143.) In *Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434, 438 (Mo.App. 1998) (hereinafter referred to as *Missouri Gas Energy*), the Western District Court of Appeals stated that approval of a transfer pursuant to Section 393.190 does not require that the Commission accept numbers from that proceeding for purposes of a subsequent rate proceeding:

> . . . Section 393.190, RSMo. 1994, simply requires the PSC to approve transfers. There is nothing in the statutes or in the case law implying that

this approval somehow requires that the regulatory body must accept any or all figures into later rate requests. . . .

See also State ex rel. Public Counsel v. Public Serv. Comm'n, 858 S.W.2d 806, 812-13 (Mo.App. 1993) (hereinafter referred to as *Public Counsel).*

Possibly, unless the Commission conditioned its approval of a merger request on the applicants agreeing that they would not seek in any future proceeding recovery of any acquisition premium, the Commission would in all likelihood see a utility relitigate the disallowance of the recovery of the acquisition premium, in the first rate case following the merger case, which is where the utility would seek to reflect in rates the cost of the acquisition premium. Alternatively, if the Commission in a merger case found a merger premium to be not detrimental to the public, it is likely that in subsequent rate cases certain parties would seek that the Commission not allow recovery of the merger premium in rates.

Furthermore, it should be noted that the standard for authorizing the actions covered by Section 393.190 and the standard for determining rate requests are different. The standard for the former is "not detrimental to the public" and the standard for the latter is "just and reasonable." *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393, 395 (Mo.banc 1934); Sections 393.150.2, 393.130.1 and 393.140(5).

At page 16 of its Opinion, the Western District Court of Appeals states that intervenors, including AGP, pointed out to the Commission that the Commission had, in prior merger approval cases, considered the issue of the recoupment of the acquisition premium and its effects on rates paid by consumers. (Appendix, A140.) The

Commission has heard these issues in litigated merger cases, but the Commission has consistently taken the position, when there has not been a settlement of the acquisition premium issue, that only in a rate case, not in a merger case, would it decide the issue of the direct recoupment of an acquisition premium. Contrary to the import of the Western District Court of Appeals Opinion, generally merger cases before the Commission have been settled by Stipulation And Agreement and, thus, they did not go to hearing for a contested case determination of the treatment of an acquisition premium.[7] The

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[7] *Re GTE Corp.*, Case No. TM-91-123, Report And Order, 30 Mo.P.S.C.(N.S.) 461 (1991); *Re Union Electric Co.*, Case Nos. EM-91-29 and EM-91-404, Report And Order, 1 Mo.P.S.C.3d 96 (1991); *Re Union Electric Co.*, Case No. EO-87-175, Report And Order, 30 Mo.P.S.C.(N.S.) 406 (1990); *Re Southern Union Co.*, Case No. GM-94-40, Report And Order, 2 Mo.P.S.C.3d 598 (1993); *Re Union Electric Co.*, Case No. EM-96-149, Report And Order, 6 Mo.P.S.C.3d 28 (1996); *Re Atmos Energy Corp.*, Case No. GM-97-70, Report And Order, 6 Mo.P.S.C.3d 164 (1997) (Report And Order is published in 6 Mo.P.S.C.3d, but the Stipulation And Agreement is not published); *Re Western Resources Inc.*, Case No. EM-97-515, Report And Order, 8 Mo.P.S.C.3d 306 (the Report And Order is published in 8 Mo.P.S.C.3d, but the Stipulation And Agreement is not published) (1999); *Re Atmos Energy Corp.*, Case No. GM-2000-312, Report And Order, 9 Mo.P.S.C.3d 112 (2000).

Commission has consistently not decided ratemaking issues in nonratemaking proceedings, such as merger cases. Due to the Western District Court of Appeals raising, *sua sponte*, this issue in its Opinion at pages 15-18, rather than AGP developing this issue in its brief to the Court of Appeals, the Commission and UtiliCorp did not have an opportunity to address this issue in their briefs before the Western District Court of Appeals. (Appendix, A139-A142.)

Litigated Commission cases that reflect this approach of ratemaking issues not being decided by the Commission in cases that are not rate cases include, but are not limited to, *Missouri-American, Re Kansas Power & Light Co.*, Report And Order, 1 Mo.P.S.C.3d 150 (1991), *Re Union Electric Co.*, Case Nos. EM-92-225 and EM-92-253, Report And Order, 1 Mo.P.S.C.3d 501, 507-08 (1992) and *Re Missouri-American Water Co.*, Case No. WM-93-255, Report And Order, 2 Mo.P.S.C.3d 305, 308, 311, 313 (1993). Court opinions involving AAOs that reflect this approach of the Commission are the *Missouri Gas Energy* and *Public Counsel* cases noted above.

Furthermore, regarding the Western District Court of Appeals statement that AGP and the other intervenors in the case before the Commission pointed out that the Commission had in prior merger approval cases considered such issues as the issue of UtiliCorp's recoupment of the acquisition premium and its effects on rates to be paid by SJLP consumers, the Court did not identify any such cases but quoted from a paragraph in the Commission's Report And Order containing the citation "*Laclede Gas Company*, 16 Mo.P.S.C.(N.S.) 328 (1971)." This case from over 30 years ago, referred to previously herein, is consistent with the Commission's conduct in the UtiliCorp-SJLP

merger case. In the *Laclede* case, the Commission approved the proposed merger, but withheld any finding of the value of property for ratemaking purposes and any determination or indication of the treatment or disposition of any acquisition adjustment arising out of the merger or any prior transaction. The Commission specifically stated that it retained jurisdiction to find such value and determine such treatment or disposition. 16 Mo.P.S.C.(N.S.) at 335.

As noted above, the Western District Court of Appeals at page 16 of its Opinion states that AGP "phrased in other words" the acquisition premium issue on which the Court reversed the Commission's Report And Order. (Appendix, A141.) Since AGP did not directly raise the grounds on which the Court reversed and remanded the Commission's Report And Order, the Commission did not provide in its brief to the Western District Court of Appeals decisions in other jurisdictions, such as at the Federal Energy Regulatory Commission (FERC), that indicate that there are other regulatory jurisdictions like Missouri which do not in the merger case make the decision regarding the recoupment of an acquisition premium, but do so in the rate case where the utility seeks to recover in rates the acquisition premium. The Commission did not proceed in an extraordinary manner by not deciding in the merger case whether UtiliCorp-SJLP can recoup the acquisition premium.

Section 203 (a) of the Federal Power Act (FPA), 16 U.S.C. Section 824(a), states that "if the [FERC] finds that the proposed . . . [merger] will be consistent with the public interest, it shall approve the same." In 1996 the FERC issued a Merger Policy Statement which updated and clarified the FERC's procedures, criteria and policies concerning

public utility mergers. *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. And Regs. ¶ 31,044 at 30,109 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). The focus of the FERC is the merging utilities' wholesale ratepayers and transmission customers. FERC. Stats. And Regs. ¶ 31,044 at 30,123 (1996).

FERC stated in its 1996 Merger Policy Statement that the Congress had not intended the FERC to be hostile to mergers and that even if certain aspects of a proposed merger are detrimental, a merger can still be consistent with the public interest if there are countervailing benefits that derive from the merger. The FERC announced that it would generally take into account three factors in analyzing proposed mergers: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. FERC. Stats. And Regs. ¶ 31,044 at 30,114, 30,111(1996.

Previously, the FERC considered six non-exclusive factors for evaluating mergers that it had set forth in 1966 in *Commonwealth Edison Co.*, Opinion No. 507, 36 F.P.C. 927, 936-42 (1966), *aff'd sub nom. Utility Users League v. FPC*, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1969). FERC. Stats. And Regs. ¶ 31,044 at 30,113-14 (1996). The above three Merger Policy Statement factors were three of the six *Commonwealth* factors. One of the other *Commonwealth* factors was the reasonableness of the purchase price. The FERC announced in its Merger Policy Statement that the reasonableness of the purchase price would be treated as an issue only insofar as it affects rates, so that this issue is subsumed in the effect on rates factor. Specifically respecting

acquisition premiums, the FERC stated "[i]f a merger application seeks to recover acquisition premiums through wholesale rates, we will address the issue in post merger rate applications." FERC. Stats. And Regs. ¶ 31,044 at 30,1126 (1996).

The Merger Policy Statement explained that regarding the factor the effect on rates, the merger applicants should propose ratepayer protection mechanisms, such as hold harmless provisions,[8] open seasons,[9] rate freezes[10] and rate reductions, to assure that wholesale customers are protected if expected benefits do not occur. FERC. Stats. And Regs. ¶ 31,044 at 30,123-24 (1996).

On November 23, 1999, UtiliCorp and SJLP filed an application under Section 203 of the FPA with the FERC seeking authorization of the disposition of their jurisdictional facilities through the proposed merger. *UtiliCorp United, Inc. and St. Joseph Light & Power Co.*, Docket Nos. EC00-27-000 and EC00-27-001, *UtiliCorp United, Inc. and Empire District Electric Co.*, Docket Nos. EC00-28-000 and EC00-28-

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[8] A commitment from the applicant that any net merger-related costs will not raise rates for a significant period of time.

[9] Existing wholesale customers are accorded a reasonable opportunity to terminate their contracts and switch suppliers.

[10] Moratorium on increases in base rates for a significant period of time.

001, Order Conditionally Authorizing Mergers, 92 FERC ¶61,067 at 61,228 (2000). UtiliCorp and SJLP proposed a ratepayer protection plan that consisted of three forms of wholesale ratepayer protection: (1) hold harmless provisions for certain customers; (2) a five-year rate freeze for certain customers; and (3) an open season for certain customers. 92 FERC at 61,234. The FERC conditioned the proposed merger on UtiliCorp and SJLP revising a hold harmless provision and submitting a revised competitive analysis six months prior to commencement of integrated operations, at which time, according to the FERC, it would use its authority under Section 203(a) and (b) of Federal Power Act (16 U.S.C. Section 824(a) and (b) to impose any conditions necessary to mitigate potential adverse competitive effects. *Id.* at 61,236, 61,228. With these additional items, the FERC found that the proposed merger was consistent with the public interest, and it conditionally approved the proposed merger without further investigation. *Id*. at 61,230.

Subsequently, on December 21, 2000, the FERC issued in Docket Nos. EC00-27-000 and EC00-27-002, et al., Order Denying Rehearing And Denying Motion For Stay, 93 FERC ¶61,303 (2000), and on June 4, 2001, the FERC issued in Docket No. EC00-27-003, Order Accepting Compliance Filing And Authorizing Integrated Operations, 95 FERC ¶61,345 (2001), wherein it authorized UtiliCorp to integrate its MPS and SJLP operations.

Finally respecting the FERC, the Commission also would note *Minnesota Power & Light Co. and Northern States Power Co.*, 43 FERC ¶ 61,104 at 61,342-43, *reh'g denied*, 43 FERC ¶ 61,502, *reconsideration denied*, 44 FERC ¶ 61,302 (1988) to relate how the FERC has traditionally treated acquisition premiums. In what in essence was a

request for a declaratory judgment respecting an acquisition adjustment, Northern States Power Co. (Northern States Power) and Minnesota Power & Light Co. (Minnesota Power) petitioned for a declaratory order finding that the proposed sale, purchase, merger and consolidation of certain Minnesota Power facilities to Northern States Power was prudent and assuring that Northern States would be authorized to recover in wholesale rates the acquisition adjustment. The FERC, declined to issue a declaratory order, stating, among other things, that it would not decide the issue of the ratemaking treatment of the acquisition adjustment outside of the case where Northern States Power seeks to reflect the acquisition adjustment in rates:

> We take this opportunity to advise Northern States that recovery of the acquisition costs will turn on an analysis of the benefits conferred on ratepayers and the overall prudence of its investment decision; however, that issue is appropriately considered in a proceeding where Northern States proposes to reflect the acquisition adjustment in its rates.
>
> . . . .
>
> . . . A utility whose actions were prudent when made runs no risk as a result of the Commission's declining to make an advance determination as to the prudence of its actions. On the other hand, advance prudence determinations pose the risk that the Commission will become involved in day-to-day utility management decisions. In these circumstances, we shall deny the Applicant's petition for a declaratory order as premature at this time. In accordance with Commission precedent, any inquiry as to the

> prudence of the utilities' decisions should occur at such time as the companies actually seek to reflect the effect of the proposed transactions in rates.

The Commission addresses its treatment of the acquisition premium, in particular, in three sections of its December 14, 2000 Report And Order: the "Costs Of Merger Exceed Benefits For Gas And Steam Services" section (Appendix, A10-A11), the "Stranded Costs, Condition" section (Appendix, A13-A14) and the "Recovery of the Acquisition Premium" section (Appendix, A40-A41). One of these sections speaks directly to an argument raised specifically by AGP at pages 26-28 of its brief:

> . . . In any event, 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 the rates charged by UitliCorp to its gas and steam customers are just and reasonable.

(C.P. 1290; *Re UtiliCorp United, Inc.*, 9 Mo.P.S.C.3d 454, 459 (2000)).

The acquisition premium, as it relates to a possible attempt in the future by UitliCorp to recover purported stranded costs, is addressed by the Commission in the "Stranded Costs, Condition" section of its Report And Order. (C.P. 1292; 9 Mo.P.S.C.3d at 460-61).

Finally, there is a section of the Commission's Report And Order entitled "Recovery of the Acquisition Premium" (C.P. 1319-20; 9 Mo.P.S.C.3d at 477), which AGP even quotes, in a very selective manner, at pages 26-27 of its brief. More fully than acknowledged by AGP in its brief, the Commission states that UtiliCorp proposed in the merger case that the Commission authorize UtiliCorp to place, in a future rate case, in the electric, gas and steam rate bases of the SJLP division, up to 50% of the unamortized balance of the acquisition premium if UtiliCorp proves to the Commission that the synergies/savings from the merger are equal to 50% of the premium costs plus the other costs to achieve the merger synergies/savings. As the Commission notes in its Report And Order, UtiliCorp proposed that it be allowed to recover through SJLP's utility rates the acquisition premium that it paid to purchase SJLP, to the extent that the SJLP ratepayers would benefit from the savings resulting from the merger. The Commission states that it declined to prejudge a ratemaking issue in the context of the merger case. The Commission relates that it would give due consideration to a proposal to recover in rates the acquisition premium, if the proposal is made in the context of a rate case, not a merger case. *Id.* at 477.

It has been over 30 months since the Commission's Report And Order in Case No. EM-2-000-292 and there has been rate case activity by UtiliCorp in the intervening period. Starting at page 48 of its brief, AGP argues that Exhibit 503 shows a detriment to SJLP's ratepayers in the form of projected higher costs resulting from the proposed merger. At page 51, footnote 7 of its brief, AGP noted that "[t]hough unquestionably beyond the scope of the record" in the merger proceeding before the Commission in

2000, UtiliCorp recently filed a steam rate increase case and an electric rate increase case for its L&P division. In fact, UtiliCorp filed rate increase cases for both its MPS and L&P divisions on July 3, 2003. But before further noting those cases, the Commission will address the general electric rate increase case UtiliCorp filed on June 8, 2001.

On that date, UtiliCorp filed with the Commission proposed tariff sheets to implement a general electric rate increase case, ER-2001-672, for its Missouri Public Service division of approximately $49 million in UtiliCorp's revenues, exclusive of franchise and occupational taxes, which would have been a 16.86% increase. On December 21, 2001 the Staff filed a complaint, Case No. EC-2002-265, asserting that UtiliCorp's Missouri Public Service division had excess electric earnings/revenues of about $20 million. On February 5, 2002, a Unanimous Stipulation And Agreement was filed in Case Nos. ER-2001-672 and EC-2002-265 providing for a decrease in electric revenues of approximately $4.3 million. The Commission on February 21, 2002 issued an Order Approving Stipulation And Agreement.

Shortly after UtiliCorp filed Case No. ER-2001-672, Public Counsel filed a Motion To Reject Tariff And Motion To Dismiss For Failure To State A Claim Upon Which Relief May Be Granted. *Inter alia*, Public Counsel argued that the proposed tariff sheets filed by UtiliCorp were unlawful and deficient because the tariff sheets did not include the SJLP division in addition to the MPS division. The Staff filed a response to Public Counsel's motion wherein it stated, *inter alia*, that in the course of its investigation of the general electric rate increase requested by UtiliCorp for its MPS division, the Staff would analyze information regarding all aspects of UtiliCorp's Missouri jurisdictional

operations and would file excess earnings/revenues complaint cases with respect to UtiliCorp's SJLP division public utility operations, if its analysis warranted such action. (Appendix, A71-A73, A77-A79.) The Staff filed a complaint, Case No. EC-2002-265, asserting that UtiliCorp's MPS division had excess electric earnings/revenues of about $20 million. The Staff did not file an excess earnings complaint respecting UtiliCorp's SJLP division.

The Staff in its response to Public Counsel's motion to reject tariff and motion to dismiss directed the Commission to *State ex rel. McKittrick v. Public Serv. Comm'n*, 175 S.W.2d 857 (Mo.banc 1943) (hereinafter referred to as *McKittrick*). In that case, Attorney General McKittrick sought review of a Commission order sustaining a joint application of Laclede Power & Light Company (LPL) and others to sell to Union Electric Company (UE) the property rights and franchises of LPL.

The rates charged by LPL on some classes of service were lower than those charged by UE. The Commission approved the application. The Commission directed that the rates of LPL in effect at the time of the transaction should be continued in effect by UE to the customers of LPL who elected to continue to receive service at the same premises through facilities acquired from LPL and under the same conditions of service, unless and until such rates be cancelled or changed by order of the Commission after notice and opportunity for hearing.

The Attorney General charged that (a) the Commission's Order permitting UE to continue both its own rates and the separate lesser rates of LPL, authorized special, discriminatory, lesser rates to LPL's customers in violation of Section 5645(2) and (3)

RSMo. 1939 (now Section 393.130.2 and .3 RSMo. 2000) and (b) since the question of rates was in the merger case, this question should have been decided by the Commission and the cause should be remanded to the Commission for that purpose. 175 S.W.2d at 859, 865.

This Court upheld the Commission stating that the unification of the two systems had not been accomplished and that until then, the Commission would be justified, in its reasonable discretion, in treating the two systems as separate units for rate purposes:

> . . . [The Attorney General] assumes the service rendered by the Laclede [352 Mo. 44] Electric and the Union Electric is the same, notwithstanding the greater assurance of uninterrupted and efficient service which the customers of the latter company enjoy because of its superior position in equipment and financing--as found by the Commission; and ignores the fact that there is as yet no intelligent basis for fixing a common rate. Until the unification of the two systems is accomplished or the effect thereof is reasonably discernible, we think and hold the Commission in its reasonable discretion is justified in treating the two systems as separate units for rate purposes, notwithstanding the ownership and control of both have come into the same hands. This disposes of the other kindred assignments that the question of rates is involved; and that the cause should be remanded to receive evidence thereon.

175 S.W.2d at 866.

The Commission in its October 2, 2001 Order Regarding Motion To Reject A Tariff And Motion To Dismiss in Case No. ER-2001-672 denied Public Counsel's Motion To Reject Tariff and Motion To Dismiss For Failure To State A Claim Upon Which Relief May Be Granted. (Appendix, A80.) The Commission noted that the *McKittrick* case contemplated separate treatment for an indefinite period, and that testimony had been filed in Case No. ER-2001-672 that the full integration of the MPS and SJLP divisions was at least a year away. The Commission held that it could treat the service areas of the formerly independent companies separately for ratemaking purposes. *Id.*

On July 3, 2003, Aquila filed a $65 million electric rate increase request, an approximate 19.2% increase, for its Aquila Networks - MPS ("MPS") division and a $14.6 million electric rate increase request, an approximate 15.5% increase, for its Aquila Networks – L&P ("L&P") division. (Aquila asserted that while it could support an electric revenue increase of $79 million for MPS, it limited the request to $65 million because of the impact of a $79 million increase on its customers.) Also on July 3, 2003, Aquila filed a $1.3 million steam rate increase, an approximate 19.2% increase, for L&P. On August 1, 2003, Aquila filed a $5.6 million natural gas rate increase request, an approximate 11.1% increase, for MPS and a $0.81 million natural gas rate increase request, an approximate 13.5% increase, for L&P. Those cases are now pending before the Commission.

II. THE COMMISSION BY NOT REQUIRING THAT THE APPLICANTS SUBMIT A MARKET POWER STUDY, ALTHOUGH THE COMMISSION SEVERAL YEARS EARLIER HAD SO REQUIRED SUCH A FILING IN DIFFERENT PROCEEDINGS, DID NOT SHIFT FROM THE JOINT APPLICANTS TO THOSE PARTIES IN OPPOSITION TO THE PROPOSED MERGER THE BURDEN OF PROOF PURSUANT TO SECTION 393.190.1, CASE LAW AND 4 CSR 240-2.060(7)(D) AND (8)(D), AND THUS THE COMMISSION DID NOT REMOVE FROM THE JOINT APPLICANTS THE BURDEN OF SHOWING THAT THE PROPOSED MERGER WOULD NOT BE DETRIMENTAL TO THE PUBLIC

(Responds to Appellant's Point II.)

At pages 34-35 of its brief, AGP states that the burden of proof in a merger transaction is placed upon the applicants by Section 393.150. In a merger proceeding the burden of proof is placed on the applicants by Section 393.190.1, 4 CSR 240-2.060(7)(D) and (8)(D) and the *City of St. Louis* decision previously referred to herein. Section 393.150.2 addresses rate increase cases and states that "[a]t any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation . . ."

AGP asserts, at page 31 of its brief, that "[t]he problem began with a deficient filing. The Joint Applicants did not submit a market power study." At page 42 of its brief, AGP argues that the Commission's failure to require UtiliCorp-SJLP to file a

market power study as part of its direct case violates the Commission's 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."

AGP cites to no specific language in statute or the Commission's own rules that more specifically defines what constitutes a party's case-in-chief, and in particular more specifically defines what constitutes a party's case-in-chief respecting a merger or the selling, assigning, leasing or transferring of assets. Section 393.190.1 stated, and states, in relevant part, as follows:

> No . . . electrical corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of . . . the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. . . .

There is no provision in the Public Service Commission Law which requires the filing of a market power study. The Commission's rules respecting applications (4 CSR 240-2.060, 4 CSR 240-3.110 and 4 CSR 240-3.115); pleadings (4 CSR 240-2.080); evidence (4 CSR 240-2.130); affiliate transactions (4 CSR 240-20.015, effective February 29, 2000); uniform system of accounts (4 CSR 240-20.030); electric corporation reporting requirements for certain events (4 CSR 240-20.080); and electric

utility resource planning (4 CSR 240-22.010 – 22.080) did not and do not require the filing of a market power study in mergers, reorganizations or any other Commission cases. There is no Commission rule that requires the filing of a market power study in any circumstance.

Re UtiliCorp United Inc., Case No. EM-91-290 (1991), which is cited by AGP at page 21 of its brief, arose from the Application of UtiliCorp United Inc. and Colorado Transfer Company (CTC), a subsidiary of Centel Corporation engaged in generating, transmitting and distributing electricity in Kansas and Colorado, requesting authority for UtiliCorp to merge CTC with and into UtiliCorp. The Commission's September 13, 1991 Order Approving Merger notes, *inter alia*, the Staff's recommendation, which the Commission adopted in said Order, that future UtiliCorp merger applications be subject to certain information provision, retention and analysis conditions. As can be seen from the following excerpt from pages 2-4 of said Order Approving Merger, specific provision for a market power study is not among the prerequisites required by the Commission:

> . . . Although UtiliCorp has assured the Commission in the past that Missouri ratepayers would suffer no detriment from its merger activities (See: *Re: Missouri Public Service Company*, Case No. ER-90-101, Report and Order, October 5, 1990, p. 46), it has produced no documentation to date concerning the effect on Missouri jurisdictional operations of its merger activities, including the proposed acquisition in question in this case.

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. Staff has also recommended that future merger applications be subject to the following conditions:

a. All documentation generated relative to the analysis of the merger and acquisition in question must be maintained.

b. The company must present an estimate of the impact of the merger on its Missouri jurisdictional operations.

c. The company must provide an assessment of the relative risk regarding items that impact its Missouri operations.

d. The company must propose assurances or conditions that will address the overall merger components that pose the risk of being detrimental to the Missouri public interest.

. . . .

. . . the 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.

(Appendix, A83.)

"Ordered" item "7" on page 5 of the Order Approving Merger in Case No. EM-91-290 states that "future applications involving acquisitions and mergers shall be subject to the four conditions outlined in this Order." (Appendix, A85.) The Staff neither proposed that the Commission prospectively require a market power study, nor did the Commission on its own motion require a market power study prospectively. The Commission has not issued an Order requiring the filing of market power studies that is comparable to its September 13, 1991 Order Approving Merger in Case No. EM-91-290.

In Case No. WM-2000-222, the Commission identified the four conditions that it set out in the September 13, 1991 Order Approving Merger in Case No. EM-91-290 as "a laundry list of items that the Commission stated it would require in future cases to ensure that the Missouri jurisdictional effects of a proposed transaction are highlighted and considered. The entities involved in that case were multi-jurisdictional and the Commission was concerned that the documentation provided to it did not permit it to readily ascertain the likely effects of the proposed transaction on Missouri customers." (9 Mo.P.S.C.3d at 59.)

AGP states, at page 39 of its brief, that "[i]n the recent Union Electric/CIPSCO merger case, the Commission ordered that additional information in the nature of a retail market power study be ordered." AGP also relates, at page 41 of its brief, that then-Chairman Karl Zobrist concluded that "'[a]ny future merger case brought before the Commission should contain a careful analysis of market power issues.'" AGP's discussion of the Commission's statements on market power in the 1996-1997 UE/CIPSCO merger case is quite incomplete and will be clarified for the Court.

Union Electric Company (UE) filed a merger application on November 7, 1995 to merge with CIPSCO Inc. (CIPSCO). The application created Commission Case No. EM-96-149. On July 12, 1996 a Stipulation And Agreement respecting the merger was filed with the Commission. On September 5, 1996, the Commission conducted a hearing on the Stipulation And Agreement negotiated by the parties. On September 25, 1996, the Commission issued an Order Requesting Additional Information in which it stated that "the Commission is concerned that the issue of market power has not been adequately explored either in the proposed stipulation, the filed testimony, or at the hearing. Therefore, the Commission requests the parties to submit additional testimony . . ." *Re Union Electric Company*, Case No. EM-96-149, Order Requesting Additional Information, 5 Mo.P.S.C.3d 157, 158 (1996). The Commission did not request that the parties submit market power studies. The Commission identified three "points of analysis" that it wanted the parties to address with testimony in less than 40 days: (1) "relevant market," (2) "measuring market power," and (3) "mitigation of market power." *Id*. at 158-59.

In the February 21, 1997 Report And Order of the Commission approving the merger, the Commission noted that the UE witnesses testified that the time to address market power is when the decisions are made to deregulate generation supplies and permit retail competition. *Re Union Electric Company*, Case No. EM-96-149, Report And Order, 6 Mo.P.S.C.3d 28, 35 (1997). To address vertical market power concerns, the Commission approved the merger conditional upon UE participating in a regional independent transmission system operator (ISO) that eliminated pancaked transmission

rates and that was consistent with the ISO guidelines set out in Federal Energy Regulatory Commission (FERC) Order No. 888. *Id*. at 38. The Commission further held that a market power study should be performed, but that it should not prevent the merger from being completed:

> . . . the Commission will require UE and interested parties to assess the potential ability of the merged companies to exercise vertical and especially horizontal market power in price deregulated retail generation markets. . . . Because the level of detail and development of a study of horizontal market power will require significant effort and time, the Commission will require UE to undertake the study with the participation of Staff and OPC, with a completion date of January 1, 1998. This study need not be submitted before the merger is completed.

Id. at 39.

The quote from Chairman Zobrist at page 41 of the AGP brief is from a concurring opinion of Chairman Zobrist in Case No. EM-96-149. 6 Mo.P.S.C.3d at 41-42. AGP fails to note in its brief the concurring opinion of two other Commissioners that the appropriate time for a market power study is "[i]f and when competition and restructuring become a part of the electric utility environment in Missouri, there should be an assessment of all market power issues for all electric companies in the state" (*Id.* at 43):

> With respect to the obligation placed on UE to complete a market power report in this docket, we agree with UE witness Rodney Frame that it was

> premature to require an analysis of the market power implications of the proposed merger, given the many uncertain and unknown changes facing the electric industry. It would be more prudent at this time to open a new docket to review the restructuring of the electric industry and retail wheeling in Missouri, in which all interested parties may participate. If and when competition and restructuring become a part of the electric utility environment in Missouri, there should be an assessment of all market power issues for all electric companies in the state. This was not the case to demand such an assessment. We should not be bureaucratic in demanding a report in this docket which will be incomplete because numerous variables needed for the future market power analysis are currently unknown. In addition, parties essential to providing a thorough market power report have not been given the opportunity to participate in the drafting of that report.

Re Union Electric Company, Concurring Opinion of Commissioner Harold Crumpton and Vice Chair M. Dianne Drainer, 6 Mo.P.S.C.3d at 43.

AGP also makes reference in its brief at pages 36-37 to the Staff citing in a pleading in the UtiliCorp-SJLP merger case, on the issue of the necessity of a market power study, the Western Resources, Inc.(Western Resources)-Kansas City Power & Light Company (KCPL) merger case. The Staff did note in Case No. EM-2000-292, in a November 24, 1999 Staff Response To Commission Notice Regarding Motion To Establish Procedural Schedule, that the Commission in an Order in a Western Resources-

KCPL merger case, Case No. EM-97-515, held that market power and related issues were proper subject matter for consideration in that merger case. (C.P. 157-58).

Furthermore, at page 43 of its brief, AGP notes that Staff witness Michael S. Proctor recommended in his rebuttal testimony that the Commission, if it approves the merger, condition its Order on UtiliCorp and SJLP joining the same regional transmission organization. Nonetheless, AGP fails to note that in the aforementioned concurring opinion of two Commissioners in Case No. EM-96-149, they took issue with the directive that a condition of Commission authorization of the UE-CIPSCO merger was that UE become a member of an ISO:

> . . . It is premature to state that participation in an independent system operator (ISO) company is a necessary condition in order to assure that the merger is not detrimental to the public interest. Although we would encourage UE to recognize that becoming a member of an ISO is a prudent move in the current pre-competitive electric environment, it is going too far to make it a <u>necessary</u> condition when, in fact, there is presently no Midwest ISO established for UE to join in Missouri. Additionally, although the Commission states "that joining an ISO at 'any cost' would be unwise," it does not define the criteria that UE should use to evaluate when the ISO concept has become too costly to join.

6 Mo.P.S.C.3d at 43.

Regardless of the Commission's and individual Commissioner's statements in the UE-CIPSCO merger case or the Western Resources-KCPL merger case, the Commission

is not bound by *stare decisis*. *GTE North*, 835 S.W.2d at 371, citing *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586 (Mo.App. 1987). The Court in *GTE North* further stated as follows:

> An administrative agency is not bound by *stare decisis*. *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586 (Mo.App.1987). "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.App.1980). It is the impact of the rate order which counts; the methodology is not significant. *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457 (Mo.App.1987).
>
> In *State ex rel. Arkansas Power & Light*, despite AP & L disputing the Commission's determination of its revenues, the court upheld the action of the Commission, stating that, "The mere fact AP & L's methodology would be more favorable to it than that chosen by the Commission will not alone, amount to reversible error." *Id.* at 461. The court further held:
>
> > If the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry is at an end. No methodology being statutorily prescribed, and ratemaking being an inexact science, requiring use of different formulas, the Commission may use different approaches in different cases.

Id. at 462. (citations omitted).

835 S.W.2d at 371.

In *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n,* 706 S.W.2d 870 (Mo. App. 1985), Associated Natural Gas Company appealed a Commission Report And Order wherein the Commission utilized double-leveraging to determine said company's revenue requirement. In affirming the Commission, the Court stated:

> . . . the fact that the Missouri Commission has never before applied double leveraging in determining rates for the Company is of no consequence. The Supreme Court of Arkansas, in dealing with this issue, stated that there is no "judicial mandate requiring the Commission take the same approach to every rate application, or even to consecutive applications by the same utility, when the commission, in its expertise, determines that its previous methods are unsound or inappropriate to the particular application." *Southwestern Bell Telephone Co., supra,* 593 S.W.2d at 445.

706 S.W.2d at 880.

In *State ex rel. General Tel. Co. v. Public Serv. Comm'n,* 537 S.W.2d 655 (Mo. App. 1976), General Telephone Company of the Midwest (GTMW) appealed certain Commission decisions in a 1972 GTMW rate case. The Court of Appeals held that the Commission's prior decision in a 1962 rate case had no binding effect in a subsequent case:

> Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable

rule is found in 2 Davis, Administrative Treatise Section 18.09, 605, 610, (1958), as follows:

> " * * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)

Clearly the commission in this case was not bound by the action in the 1962 case. 537 S.W.2d at 661-62.

Finally, in *State ex rel. Chicago, Rock Island, & Pac. R.R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo.banc 1958) which was an appeal of a Commission order denying a railroad's application for authority to discontinue certain train service, the Missouri Supreme Court stated that the Commission in its discretion may prospectively change prior orders and directives:

> . . . Its supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of

any utility are always subject to change to meet changing conditions, as the Commission in its discretion, may deem to be in the public interest . . . .

See also, *State ex rel. St. Louis v. Public Serv. Comm'n*, 47 S.W.2d 102, 105 (Mo.banc 1931); *Marty v. Kansas City Light & Power Co*., 259 S.W. 793, 796 (Mo. 1923).

At pages 42 and 45-46 of its brief, AGP does not merely argue that the Commission failed to require UtiliCorp-SJLP to file a market power study and supplement its direct testimony, but contends that the Commission shifted the burden of proof that the merger is not detrimental to the public interest from the Joint Applicants to the other parties in the case, including AGP, to show that the proposed merger is detrimental to the public interest. As previously noted, AGP, at page 42 of its brief, also argued that the Commission "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.'"

The Commission in its December 21, 1999 Order Denying Motion To Require Market Power Study And Adopting Procedural Schedule notes that the Staff and other parties argued that UtiliCorp-SJLP's direct testimony is deficient since it does not adequately address the allocation of merger savings and costs between UtiliCorp and SJLP and within the electric, steam heating and gas operations of SJLP. The Commission agreed that the Joint Applicants, UtiliCorp-SJLP, had the burden of proof, and stated that the Staff and other parties should address this in their rebuttal testimony and at the hearing. The Commission explained that "[i]t would be inappropriate for the Commission to prejudge the sufficiency of Applicants' evidence" by requiring UtiliCorp-

SJLP file supplemental direct testimony, and "[i]f Applicants' evidence is indeed insufficient, Applicants risk having their Application denied." (C.P. 263).

The Commission also commented on the matter of burden of proof in its Report And Order citing *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.,* 803 S.W.2d 23, 30 (Mo.banc 1991). *Anchor Centre* cites *Tower Grove Bank & Trust Co. v. Duing*, 144 S.W.2d 69, 72 (Mo. 1940) which states that although the burden of proof of a necessary allegation remains with the party asserting it throughout the case, the burden of evidence, or the necessity of meeting prima facie proof offered by an opponent, may shift from time-to-time during the progress of the trial. The Commission noted in its Report And Order that while UtiliCorp and SJLP must prove that their proposed merger is not detrimental to the public, "simply assigning the general burden of proof on UtiliCorp and SJLP does not resolve all questions about burden of proof." (C.P. 1311). The Commission noted that "the parties asserting that the merger is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions." (C.P. 1312).

As AGP noted at pages 37-38 of its brief, although the Commission declined to require UtiliCorp-SJLP to file a market power study as part of its direct testimony, the Commission did state that it was not excluding consideration of market power issues in the case and if the parties other than UtiliCorp-SJLP wanted to address the retail market power issue in their rebuttal testimony they were free to do so. (C.P. 262). AGP (Maurice Brubaker, Ex. 500, pp. 3, 13-15), the City of Springfield (Whitfield A. Russell, Ex. 300, pp. 47-52), the Staff (Michael S. Proctor, Ex. 714, pp. 56-64) and the Public

Counsel (Ryan Kind, Ex. 201, pp. 40-54) submitted rebuttal testimony on market power and proposed conditions that UtiliCorp-SJLP should agree to or which the Commission should impose should the Commission approve the merger. The portion of the evidentiary hearings respecting market power occurred on July 14, 2000, and initial and reply briefs were submitted on market power by the parties, along with the other issues in the merger case.

The Commission's Report And Order remarked that the merger of UtiliCorp and SJLP might affect wholesale market power, but this matter would not be addressed by the Report And Order because wholesale market power is subject to the jurisdiction of the FERC. (C.P. 1300 n.1; 9 Mo.P.S.C.3d at 465 n.1). The Report And Order related that AGP, City of Springfield, the Staff and the Public Counsel argued that the merger, to the possible future detriment of the public, would permit UtiliCorp to exercise greater vertical and horizontal retail market power, and various parties proposed conditions that the Commission was asked to impose. (C.P. 1300; 9 Mo.P.S.C.3d at 465). The Commission noted that such detriment could only occur if retail competition were authorized in Missouri, which had not happened as yet. (C.P. 1300 n. 2; 9 Mo.P.S.C.3d at 465 n.2). AGP acknowledges in its brief at pages 34 and 36 that there still is no retail competition in Missouri.

AGP and the Public Counsel argued that market power conditions agreed to in 1999 by merger applicants Western Resources, Inc. and Kansas City Power & Light Company (KCPL) in Case No. EM-97-515 (*Re Western Resources and KCPL,* Report And Order, 8 Mo.P.S.C.3d 306 (1999)) should be prerequisites to merger approval by the

Commission in Case No. EM-2000-292. (Ex. 500, pp. 14-15 and Ex. 201, p. 53). UtiliCorp contended that the Western Resources-KCPL merger was a different case with different circumstances and that those conditions should not be imposed on UtiliCorp in its merger case with SJLP. (C.P. 1302; 9 Mo.P.S.C.3d at 466).

The Commission declined to impose on UtiliCorp the conditions agreed to by Western Resources-KCPL in Case No. EM-97-515. The Commission remarked in its Report And Order that while a party can agree not to pursue the passage of certain legislation, as Western Resources-KCPL had agreed in the Stipulation And Agreement in Case No. EM-97-515, it is not clear that the Commission has the authority to order a utility to not exercise its right to petition the General Assembly. The Report And Order explained the bases for the Commission rejecting mandating the other market power conditions agreed to by Western Resources-KCPL in the Stipulation And Agreement in Case No. EM-97-515. (C.P. 1302; 9 Mo.P.S.C.3d at 466-67).

The Commission would add that the Stipulation And Agreement in Case No. EM-97-515 contained the standard language in settlement agreements presented to the Commission that limits what any entity might seek to use the Stipulation And Agreement for:

> **20. <u>No Acquiescence</u>**
>
> None of the signatories to this Stipulation And Agreement shall be deemed to have approved or acquiesced in any question of Commission authority, accounting authority order principle, cost of capital methodology, capital structure, decommissioning methodology, ratemaking principle,

valuation methodology, cost of service methodology or determination, depreciation principle or method, rate design methodology, cost allocation, cost recovery, or prudence, that may underlie this Stipulation And Agreement, or for which provision is made in this Stipulation And Agreement.

21. Negotiated Settlement

This Stipulation And Agreement represents a negotiated settlement. Except as specified herein, the signatories to this Stipulation And Agreement shall not be prejudiced, bound by, or in any way affected by the terms of this Stipulation And Agreement: (a) in any future proceeding; (b) in any proceeding currently pending under a separate docket; and/or (c) in this proceeding should the Commission decide not to approve this Stipulation And Agreement in the instant proceeding, or in any way condition its approval of same, except as stated herein; or should the proposed merger not be consummated.

(Appendix, A119-A120.)

The Staff had suggested in its testimony on market power that to address horizontal market power concerns UtiliCorp should be required to submit, at the time retail competition is approved in Missouri, a study showing what percentage of load can be served from competitive generation sources throughout the UtiliCorp (Missouri Public Service (MPS))-SJLP service territory. UtiliCorp indicated that it would be willing to perform such a study if ordered to do so at the time that retail competition is instituted.

The Commission commented in its Report And Order that none of the parties had provided a satisfactory explanation of why the Commission should order then, when retail competition would only be a reality at some future time in Missouri, the market power studies that the Staff and other parties were requesting be performed. The Commission held that "[i]f at the time that retail competition becomes a reality, it finds that a market power study is needed, the Commission will exercise its authority to order the completion of any needed studies." (C.P. 1301; 9 Mo.P.S.C.3d at 466).

Respecting the Staff's recommendation that the Commission require MPS and SJLP to join the same regional transmission entity that meets the independent system operator principles set out in FERC Order No. 888 before the October 15, 2000 deadline mandated by FERC Order No. 2000, the Commission stated that the deadline had passed and this recommendation was therefore moot. (C.P. 1300; 9 Mo.P.S.C.3d at 465-66).

At pages 42-43 of its brief, AGP notes recommendations of the Staff witness in the UtiliCorp-SJLP merger case that were not accepted by the Commission. The Staff witness recommended that, as conditions for approval of the merger, (1) UtiliCorp and SJLP agree to submit a study showing what percentage of load can be served from competitive generation sources throughout the merged service territory and (2) UtiliCorp and SJLP should be required to make a commitment to join the same regional transmission entity that meets the eleven independent system operator principles of FERC Order No. 888 before the October 15, 2000 deadline of FERC Order No. 2000. (Proctor Rebuttal, Ex. 714, pp. 58-59). AGP then goes on to state at page 43 of its brief: "But the Public Counsel and the Commission's own Staff were not alone in requesting

that market power data be provided by the Joint Applicant's." AGP's brief at page 44 then refers to certain testimony of the Staff's witness in support of a proposal by the City of Springfield's witness that a study be performed. It should not be assumed that all of the testimony of the Staff's witness was in support of the testimony of the City of Springfield's witness. In fact, the Staff's witness testified that because the assumptions used by the Southwest Power Pool (SPP) in modeling the impact of aggregating the MPS, SJLP and The Empire District Electric Company (EDE) systems were not the assumptions which SPP should have used in performing the modeling, the SPP study that had been performed did not conclusively show the validity of the two concerns raised by the City of Springfield's witness. (Proctor Cross-Surrebuttal, Ex. 715, pp. 6-7).

The City of Springfield's witness had identified concerns about UtiliCorp's minimum cost plan to jointly dispatch the generating units of MPS, SJLP and EDE to meet the coincident loads of MPS, SJLP and EDE. The overarching concern was that the transfer capability within the region used by the joint dispatch of the generating units of MPS, SJLP and EDE would not be replaced by the upgrades and construction proposed in the UtiliCorp minimum cost plan. The consequences of the failure to replace the transfer capability would be (1) to make it more difficult for Missouri utilities and marketers to carry out transactions in the off-system energy markets, resulting in higher costs, and (2) higher transmission costs to transmit power already purchased long-term. (Proctor Cross-Surrebuttal, Ex. 715, pp. 1-3).

Citing the Federal Power Act (FPA), 16 U.S.C. Sections 824(a) and (b); FERC Order No. 888, 75 FERC ¶ 61,080 (1996) (Promoting Wholesale Competition Through

Open Access Non-Discriminatory Transmission Services By Public Utilities; Recovery of Stranded Costs By Public Utilities And Transmitting Utilities, Docket Nos. RM95-8-000 and RM94-7-001);[11] and *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000),[12] the Commission held that the issues raised by the City of Springfield regarding transmission access and reliability are regulated by the FERC and not the Commission, and thus, the Commission would not impose the conditions proposed by the City of Springfield. (C.P. 1320-22; 9 Mo.P.S.C.3d at 477-78).

At pages 44-45 of its brief, AGP asserts that what UtiliCorp sought to accomplish by its merger with SJLP was to aggregate the SJLP generation assets with its own and create a larger, more dominant utility in the wholesale power market where there is no regulation due to Federal deregulation. AGP cites various FERC dockets at page 45 of its brief but does not cite FERC Docket No. EC00-27-000, where UtiliCorp and SJLP, and FERC Docket No. EC00-28-000, where UtiliCorp and EDE, filed an application under Section 203 of the FPA on November 23, 1999 for disposition of the FERC jurisdictional facilities of SJLP and EDE to UtiliCorp through proposed mergers.

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[11] *Aff'd sub nom. New York, et al. v. FERC,* 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002).

[12] *Aff'd sub nom. New York, et al. v. FERC,* 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002).

On July 26, 2000, the FERC issued an Order Conditionally Authorizing Mergers, respecting the merger of SJLP and UtiliCorp and the merger of EDE and UtiliCorp subject to UtiliCorp, SJLP and EDE submitting a revised competitive analysis six months prior to commencement of integrated operations, at which time the FERC would use its authority under FPA Section 203(b) to impose any conditions necessary to mitigate potential adverse competitive effects. 92 FERC ¶ 61,067. The FERC found that although the analysis of system integration by SJLP, UtiliCorp and EDE raised questions, the proposed merger raised no competitive concerns because SJLP, UtiliCorp and EDE did not plan to integrate their systems until mid- to late-2002 and there were no competitive concerns without system integration. The FERC stated that it would review the revised analysis of SJLP, UtiliCorp and EDE, along with any proposed mitigation, and use its authority under Section 203(b) of the FPA if necessary to impose any conditions necessary to mitigate potential adverse competitive effects.

The FERC stated in its July 26, 2000 Order Conditionally Authorizing Mergers that its concern about the effect of the merger on state regulation went to the effect on state regulation where a state does not have authority to act on a merger and the state raises concerns about the effect on state regulation. SJLP, UtiliCorp, and EDE stated that the proposed mergers would be submitted to the appropriate state commissions and the state commissions would have a full opportunity to review the proposed mergers. The FERC found that there was no indication that the proposed mergers would have an adverse effect on state regulation, and no commenter contended otherwise. As to the proposed mergers' effect on rates, the FERC stated that the concerns of Intervenors ICI

Explosives and AG Processing about retail ratepayer protection would not be addressed since the proposed mergers had been submitted to the state commissions with jurisdiction over the retail rates of the operating utilities. 92 FERC at 61,235.

On December 21, 2000, the FERC issued an Order Denying Rehearing And Denying Motion For Stay in Docket Nos. EC00-27-002 and EC00-28-002. 93 FERC ¶ 61,303.

UtiliCorp ultimately chose not to proceed forward with its proposed merger with EDE, but did close its merger with SJLP on December 31, 2000. On March 27, 2001, UtiliCorp filed a revised competitive analysis and requested that the FERC authorize the integrated operations of MPS and SJLP. The FERC found that the revised competitive analysis of UtiliCorp and SJLP addressed the issues regarding integrated system operation raised by the FERC in its July 26, 2000 Order Conditionally Authorizing Mergers. On June 4, 2001, the FERC issued an Order Accepting Compliance Filing And Authorizing Integrated Operations in Docket No. EC00-27-003 wherein it accepted the compliance filing and authorized UtiliCorp to integrate its MPS and SJLP operations. 95 FERC ¶ 61,345.

III. THE COMMISSION DID NOT ERR IN APPROVING THE MERGER OF UTILICORP UNITED, INC, AND ST. JOSEPH LIGHT & POWER COMPANY BECAUSE ITS DECISION APPROVING THE MERGER WAS REASONABLE AND LAWFUL AND SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD PURSUANT TO SECTION 386.510 AND MISSOURI CONSTITUTION ARTICLE V, SECTION 18 IN THAT

(A) EVIDENCE FROM UTILICORP UNITED, INC.'S AND ST. JOSEPH LIGHT & POWER COMPANY'S DOCUMENTS AND MATERIALS, WHICH PURPORTEDLY SHOWED THAT THE PROPOSED MERGER WAS DETRIMENTAL TO THE RATEPAYERS OF ST. JOSEPH LIGHT & POWER COMPANY BECAUSE COSTS TO SJLP'S STEAM AND NATURAL GAS CUSTOMERS WOULD EXCEED THE BENEFITS, WAS REFUTED BY THE JOINT APPLICANTS; AND

(B) EVIDENCE FROM PUBLIC COUNSEL, WHICH PURPORTEDLY SHOWED THAT THE LOWER CREDIT RATING OF UTILICORP'S LONG TERM DEBT COMPARED TO THE CREDIT RATING OF SJLP'S LONG-TERM DEBT WOULD LEAD TO HIGHER RATES FOR SJLP'S RATEPAYERS, WAS HELD BY THE COMMISSION TO BE UNPERSUASIVE.

(Responds To Appellant's Point III.)

As previously noted herein, in addition to providing electric service, SJLP provides steam service and natural gas service in service areas in Missouri. AGP contended that the costs of the merger would exceed the benefits of the merger for SJLP's steam and natural gas customers even if the costs did not exceed the benefits for SJLP as a whole, and, as a consequence, the Commission should reject the proposed merger. (AGP's brief, pp. 47-53; C.P. 1289; 9 Mo.P.S.C.3d at 459).

AGP cited Exhibit 503 as showing annual benefits for SJLP's electric customers but annual detriments of $34,000 for SJLP's steam customers and $35,000 for its natural gas customers. The Commission related in its Report And Order that UtiliCorp witness John W. McKinney testified that Exhibit 503 did not support AGP's argument. First, it should be observed that Exhibit 503, which is UtiliCorp-SJLP's response to AGP Data Request No. SJAG-22, refers to "preliminary allocations," and the "preliminary allocations worksheets," which are part of the response to the data request, are stamped "draft." AGP's brief only identifies part of Mr. McKinney's testimony respecting the premium allocation shown on Exhibit 503. *Inter alia*, Mr. McKinney testified that UtiliCorp's proposed allocation methodology and the numbers had changed since the development of Exhibit 503. At the time of the evidentiary hearing, Mr. McKinney stated that the premium would be allocated to the various jurisdictional areas (electric, steam, gas and nonregulated) "based on the capability of developing synergies. If an area cannot develop a synergy, than [sic] no premium would be allocated to that area. So, therefore, that does change the mix here and the premium allocation has changed for that." (Vol. 4, Tr. 347; *See also* Vol. 4, Tr. 339-46). The Commission determined that

Exhibit 503 did not justify a finding that the merger should be rejected. (C.P. 1289; 9 Mo.P.S.C.3d at 459).

AGP, at page 48 of its brief, argues that "Exhibit 503 stands unrebutted in the record of this proceeding. *There is no contrary evidence in this record*." (Emphasis in AGP's brief.) AGP's assertion is unfounded. Regardless of there being contrary evidence in the record, as noted above in the "Points Relied On: I" section of this brief, the Missouri Supreme Court in *Rice* clearly stated that the Commission determines the weight of evidence presented to it and may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it:

> Rice objects to the findings of the commission because they ignore his evidence. **He contends since there was no other evidence adduced which contradicted his figures and calculations, or even disputed them, that the commission is bound to accept them as true. Accordingly he contends his evidence is the only substantial evidence in the record. In asserting his contention he overlooks that on cross examination his evidence was discredited to such an extent that the commission held it not entitled to credence.** And certainly if evidence is not credible, it does not meet the required test of being substantial. **An appellate court as a matter of law passes upon the matter of substance and not of credibility.** In other words an appellate court may say that particular evidence is substantial if the triers of the facts believed it to be true. Keller v. Butcher's Supply Co., Mo.Sup., 229 S.W. 173.

> Whenever an investigation is conducted by the commission it is required under the statute to make a report in writing which shall state its conclusions and its decision or order. Sec. 5688, R.S.1939, Mo.R.S.A. Thus it must find and determine the facts. And in doing so **the commission determines the weight of evidence presented to it.** (*cf. Ohio Utilities Co. v. Public Utilities Comm., 108 Ohio St. 143, 140 N.E. 497*.) **It may disregard evidence which in its judgment is [359 Mo. 117] not credible, even though there is no countervailing evidence to dispute or contradict it. The rule is established in this State that the triers of fact under their duty to weigh the evidence may disbelieve evidence although it is uncontradicted and unimpeached.** Wiener v. Mutual Life Ins. Co., 352 Mo. 673, 179 S.W.2d 39; Woehler v. City of St. Louis, 342 Mo. 237, 114 S.W.2d 985.

Emphasis added.

The Western District Court of Appeals has more recently stated, in *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985), that in evaluating expert testimony, the Commission may adopt or reject any or all of any witness' testimony:

> Not only can the Commission select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances, but it also may adopt or reject any or all of any witnesses' testimony. *In re Permian Basin Area Rate Cases, supra*, 390 U.S. at 800,

88 S.Ct. at 1377. Evaluation of expert testimony was for the Commission.

Southwestern Bell Telephone Co., supra, 593 S.W.2d at 445-46. . . .

As noted previously herein, the opinion of a qualified expert may amount to competent and substantial evidence. 37 S.W.3d at 294.

The Court is not authorized to weigh the evidence heard by the Commission, the findings of the Commission are prima facie correct and the challenger carries the burden of making a convincing showing that those findings are not reasonable and lawful. *State ex rel. Inman Freight Sys., Inc. v. Public Serv. Comm'n*, 600 S.W.2d 650, 654 (Mo.App. 1980); *See State ex rel. St. Louis-San Francisco Ry. Co. v. Public Serv. Comm'n*, 439 S.W.2d 556, 559 (Mo.App. 1969). Evidentiary determinations by the Commission are favored by a strong presumption of validity which extends to determinations based on expert opinion. *State ex rel. Missouri Pub. Serv. Co. v. Pierce*, 604 S.W.2d 623, 625 (Mo.App. 1980). It is up to the Commission to choose between the conflicting testimony of expert witnesses and the court will not second guess that determination. *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 882 (Mo.App. 1985); *State ex rel. Midwest GasUsers' Ass'n v. Public Serv. Comm'n*, 796 S.W.2d 485, 495 (Mo.App. 1998).

The Commission noted that AGP's own witness, Maurice Brubaker, testified that "'even if the merger is permitted to go forward and even if the regulatory plan is approved in much the same form as proposed, adjustments to the allocations must be made to ensure that the gas and steam customers do not experience these detriments.' Brubaker Rebuttal, Ex. 500 at p. 13." (C.P. 1290; 9 Mo.P.S.C.3d at 459). This statement

of AGP's own witness is contrary to AGP's assertion at page 53 of its brief that "[t]he 'not detrimental' standard does not brook an exception that demonstrated detriment may be vitiated as a result of subsequent 'protective' action by the Commission." The Commission remarked in its Report And Order that a detriment could only occur if UtiliCorp adjusted rates charged these customers to reflect an unfair allocation of costs, this could not happen without the approval of the Commission, and the Commission would ensure that the rates charged by UtiliCorp to these customers are just and reasonable. *Id.*

AGP, starting at page 53 of its brief, adopts an argument made by the Public Counsel in the case before the Commission. Public Counsel contended that in that SJLP's long-term debt had a higher credit rating than UtiliCorp's long-term debt, the credit rating of the merged company would be lower than SJLP's former credit rating, which would lead to higher rates for SJLP's ratepayers. Public Counsel argued that this situation would constitute a detriment to the public that should cause the Commission to reject the merger. The Commission found Public Counsel's argument not to be persuasive. (C.P. 1290; 9 Mo.P.S.C.3d at 460).

The Commission stated that first, there was no evidence that UtiliCorp was financially unstable or that the merger would put SJLP's ratepayers at any great risk. Second, there was no evidence presented to quantify the amount that the cost of the debt attributable to SJLP would increase as a result of the merger. Also, there was no guarantee that SJLP's credit rating would have remained what it was had there not been the merger with UtiliCorp. Third, if the merged company's cost of debt were

unreasonable, appropriate adjustment could be made in a rate proceeding by the Commission to protect ratepayers. Fourth, an increase in the cost of debt of the former SJLP does not alone require the Commission to reject the merger. It is only one of the factors considered by the Commission. (C.P. 1291; 9 Mo.P.S.C.3d at 460).

The Commission previously identified herein that in its Report And Order, (C.P. 1285; 9 Mo.P.S.C.3d at 456-57) it succinctly set out the circumstances which caused it to determine that it might be more difficult for SJLP to continue to provide low cost power. As noted in the Commission's Report And Order, this matter is addressed in the surrebuttal testimony of SJLP witness Stephen L. Ferry. It is also addressed in the direct testimony of Terry F. Steinbecker, who at the time was the President and Chief Executive Officer of SJLP. (Steinbecker Direct, Ex. 1, pp. 2-3, 6-7). Mr. Steinbecker also identified why UtiliCorp was deemed to be the right merger partner for SJLP. *Id.*

As previously noted, the largest merger case that had gone to hearing in recent times was the merger of KPL and KGE. 1 Mo.P.S.C.3d 150. That case is instructive and will be related here in some detail. KPL provided gas service in Missouri in the Kansas City metropolitan area and also in Oklahoma, and provided gas and electric service in Kansas. KGE provided electric service in Kansas. KPL filed an application on November 21, 1990 requesting authority to acquire and merge with KGE. The Staff recommended that the Commission deny the application, but that if the Commission were to approve the application, it should impose certain conditions on KPL to shield Missouri ratepayers from any detriment. *Id.* at 154.

Thus, the Staff did not take the position that if a merger, as proposed by the applicant(s), is detrimental to the public interest, it should not be authorized even if there are conditions that could be adopted by the Commission which would render the merger not detrimental to the public interest. The Commission noted in its Report And Order that Public Counsel, Industrial Intervenors, Department of Energy and Missouri Gas Users Association all took approaches similar to that of the Staff. 1 Mo.P.S.C.3d at 155.

The Staff stated that the effect of the proposed merger would be that capital costs would initially fall because of the debt incurred by KPL to acquire KGE, but KPL would ultimately experience higher capital costs as a result of lower bond ratings due to KGE's lower bond ratings. The Staff also saw as a merger detriment that administrative and general (A&G) costs would rise significantly. 1 Mo.P.S.C.3d at 154. The conditions recommended by the Staff, if the Commission were to authorize the merger, included the imposition of ceilings on KPL's cost of capital and A&G expenses to be applied by the Commission in KPL's post merger rate cases. If KPL's costs were to rise above these ceilings, these costs would be presumed to be associated with the merger and would not be permitted to be recovered from Missouri ratepayers. *Id.* at 155.

The Commission determined that KPL should be permitted to proceed with the merger "since there is no evidence in this case showing that the merger would interfere with KPL's capacity to render safe and adequate service to its Missouri ratepayers." 1 Mo.P.S.C.3d at 156. Nonetheless, the Commission stated that "there is considerable merit in the concerns of the other parties that detriment could accrue to the Missouri ratepayers as a result of the merger through increased capital and A&G expenses" (*Id*)

and that "the Commission will not permit costs generated by the merger to flow to Missouri ratepayers through increased A&G and capital costs" (*Id.* at 157). The Commission further stated as follows:

> Increases in capital costs due to a lower bond rating or other effects of the merger will not be allowed to increase Missouri rates. . . .
>
> The Commission will direct its Staff to carefully audit KPL in future rate cases to screen out costs caused by the merger and to suggest methods, if necessary in future rate cases, such as those recommended herein, which might be used to shield Missouri ratepayers from costs arising from the merger.

Id.

. . . .

> The Commission believes that, by committing itself to these protections for Missouri ratepayers, it is possible to find in this case no detriment to the public interest arising from the proposed merger as required by Missouri case law.

Id. at 158.

At page 60 of its brief, AGP, citing statutes and cases, makes a passing reference to the requirement that the Commission must support its decisions with findings of fact. Throughout the instant brief, the Commission shows that its Report And Order meets all legal requirements, containing more than adequate findings of fact and conclusions of law. The Commission's findings of fact do not leave the reviewing court to speculate as

to what part of the evidence the Commission found to be true and believed and what part it rejected. The Commission's findings of fact provide insight into how controlling issues were resolved. In *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo.App. 2003), the Western District Court of Appeals noted that "[a]n inflexible standard for determining the adequacy of findings of fact has not been espoused in Missouri. *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo.App. 1976)."

CONCLUSION

The Court should affirm the Commission's Report And Order on all matters raised by Appellant AG Processing Inc. The Commission's Report And Order approving the merger of UtiliCorp United Inc. and St. Joseph Light & Power Company is based on competent and substantial evidence upon the whole record and is lawful in all respects. There is no requirement whatsoever that in a merger proceeding before the Commission the applicant(s) must file a market power study, nor did the Commission shift the burden of proof because it did not require UtiliCorp United Inc. and St. Joseph Light & Power Company to file a market power study. Contrary to the April 22, 2003 Opinion of the Western District Court of Appeals, the Commission need not have determined in the merger case, rather than in a rate case, whether UtiliCorp-SJLP would be permitted to recover from ratepayers the acquisition premium, in order for the Commission to make the determination whether the proposed merger was detrimental to the public. The content of the Commission's Report And Order reflects that the Commission considered the evidence in the record and properly applied the relevant legal standard in approving

the merger, i.e., the transactions for which authorization is sought must not be detrimental to the public. In addition, the Commission's Report And Order contains appropriate findings of fact and conclusions of law based upon the record.

Finally, the Court should make clear that Section 386.510 applies to Missouri appellate courts in their review of Commission final decisions, as does Article V, Section 18 of the Missouri Constitution, and contrary to the holding of the Western District Court of Appeals in its April 22, 2003 Opinion, modified on its own Motion on May 27, 2003, Section 536.140.2 does not apply.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing brief of Respondent Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and pursuant to Missouri Supreme Court Special Rule No. 1, I further certify that this brief complies with the provisions of Special Rule No. 1(b), and that:

(1) The signature block above contains the information required by Rule 55.03;

(2) The entire brief contains 27,314 words, as determined by the word count feature of Microsoft Word;

(3) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and

(4) That the attached computer disk has been scanned for viruses and that it is virus free.

I further certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the service list the 29th day of August 2003.

Steven Dottheim