IN THE SUPREME COURT OF MISSOURI

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

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

SUBSTITUTE BRIEF OF RESPONDENT AQUILA, INC.

Paul A. Boudreau #33155
Sondra B. Morgan #35482
BRYDON, SWEARENGEN & ENGLAND PC
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Telephone: (573) 635-7166
Facsimile: (573) 635-0427
E-Mail: PaulB@brydonlaw.com

Attorneys for Aquila, Inc.

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JURISDICTIONAL STATEMENT

Aquila, Inc., concurs with Appellant's statement of this Court's jurisdiction of this appeal.

INTRODUCTION

This case involves the appeal of a Missouri Public Service Commission ("Commission") Report and Order approving the merger of UtiliCorp United Inc. ("UtiliCorp") now Aquila, Inc. ("Aquila") and St. Joseph Light & Power Company ("SJLP"). The Commission issued its Report and Order approving the merger on December 4, 2000, effective December 24, 2000. On December 31, 2000, UtiliCorp and SJLP completed the merger in accordance with the Commission's order. Appellant AG Processing Inc. ("AGP") did not seek a stay of the Commission's Report and Order either before the effective date of the order or before the merger was completed. As of the effective date of the merger, the separate corporate existence of SJLP was extinguished, its shares were tendered for shares of UtiliCorp stock and all of SJLP's rights, duties and obligations became those of UtiliCorp by operation of law. Since that time, the properties of SJLP have been integrated and operated under the ownership, management and control of Aquila.

Before the effective date of the Report and Order, AGP filed an application for rehearing before the Commission asserting various grounds for rehearing, but did not seek a stay of the Report and Order from the Commission. When the application for rehearing was denied by the Commission, AGP pursued appeals to the Cole County Circuit Court, which affirmed the decision of the Commission, and then to the Missouri Court of Appeals, Western District. AGP did not seek a stay of the Commission

decision from either court. The Court of Appeals reversed the Commission's decision and remanded the case to the Commission finding that the Commission should have considered the possible effect of allowing Aquila, in a future rate case, to recoup any portion of the acquisition premium paid for the SJLP stock when considering whether the proposed merger would be detrimental to the public in the merger case. The Commission's failure to consider the effect of any future recovery of the acquisition premium in rates was not one of the grounds asserted by AGP in its Application for Rehearing filed with the Commission, nor was it argued by AGP in its brief to the Court of Appeals. Nevertheless, the Court of Appeals found that the Commission should now reconsider its December 2000 decision approving the merger.

Both Respondent Aquila and Respondent Commission filed Applications for Transfer to this Court which were granted on August 1, 2003.

STATEMENT OF FACTS

A. Procedural Background

Aquila (formerly UtiliCorp) concurs generally with the statement of procedural background contained in Appellant's Brief on pages 10 and 11.

B. Statement of Aquila's Interest in These Proceedings

Aquila (hereinafter, "Aquila" or "Respondent") is the successor by merger of the rights, privileges and obligations of the former SJLP. Consequently, Respondent has a direct and proprietary interest in the outcome of this appeal.

C. Additional facts

In accordance with Civil Rule 84.04(f), Respondent Aquila offers the following supplemental statement of facts as necessary for an accurate and complete understanding of the underlying transaction with respect to which this appeal has been filed.

1. Merger Applicants

At all relevant times herein, UtiliCorp United Inc. ("UtiliCorp," now Aquila) was a Delaware corporation with its principal office and place of business in Kansas City, Missouri. UtiliCorp was authorized to conduct business in Missouri through its Missouri Public Service operating division and, as such, was engaged in providing electrical and natural gas utility service in Missouri to customers in those areas certificated to it by the Missouri Public Service Commission (the "Commission").

UtiliCorp was an "electrical corporation," a "gas corporation" and a "public utility" as those terms were defined in §386.020 RSMo. Supp. 1998, and was subject to the jurisdiction and supervision of the Commission as provided by law. UtiliCorp had regulated energy operations in six (6) other states and in several foreign countries. UtiliCorp was authorized to do business in the State of Missouri as a foreign corporation. (C.P. 1-2; Ex. 2, p. 2)[1]

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[1]For the sake of consistency and clarity, Aquila will adopt the Appellant's convention for record citation as set forth in footnotes 2 and 3 appearing on pages 10 and 11 of its brief. In addition, references to the various documents received by the Commission as exhibits will be abbreviated "Ex." and the transcript of the hearing before the Commission will be abbreviated "Tr." An index of the Commission's case papers, exhibits and the

hearing transcript appear at pages 70 through 83 of the legal file filed by Appellant in the Court of Appeals on January 31, 2002. Unless otherwise indicated, a record reference at the end of a paragraph appearing in this section of the brief is applicable to each factual statement contained in the paragraph. *See*, Civil Rule 84.04(i).

St. Joseph Light & Power Company ("SJLP") was a Missouri corporation with its principal office and place of business in St. Joseph, Missouri. SJLP was engaged in the business of providing electrical, natural gas and industrial steam utility services in the State of Missouri to customers in those areas certificated to it by the Commission. SJLP was an "electrical corporation," "gas corporation," "heating company," and a "public utility" as those terms were defined in §386.020 RSMo. Supp. 1998, and was subject to the jurisdiction and supervision of the Commission as provided by law. At all relevant times, SJLP was a corporation in good standing with the Secretary of State of the State of Missouri. (C.P. 2; Ex. 1, p. 2)

2. <u>The Merger</u>

On March 4, 1999, UtiliCorp and SJLP (sometimes hereinafter, collectively, the "Joint Applicants") entered into an Agreement and Plan of Merger (the "Merger Agreement") pursuant to which SJLP was to be merged with and into UtiliCorp, with UtiliCorp being the surviving corporation (the "Merger"). Pursuant to the Merger Agreement, SJLP shareholders were to receive a fixed value of $23.00 per share for their SJLP common stock, which was to be converted into shares of UtiliCorp common stock when the Merger was closed. UtiliCorp was to assume SJLP's existing debt obligations in the amount of approximately Eighty Million Dollars ($80,000,000.00). (C.P. 3; Ex. 2, pp. 5-6) Upon the closing of the Merger, by operation of law, UtiliCorp, the surviving corporation, was to possess all rights, privileges, powers and franchises of a public and private nature which UtiliCorp and SJLP possessed immediately prior

to the Merger, including all certificates of convenience and necessity then held by the constituent companies. (C.P. 3; Ex. 2, p. 6)

As of December 31, 1998, SJLP had approximately 8.2 million weighted average common shares outstanding, and UtiliCorp had approximately 80 million weighted average common shares outstanding. Based upon this number of shares outstanding, the amount of equity that UtiliCorp was to issue in order to exchange shares of common stock for SJLP's stock was estimated to be One Hundred Ninety Million Dollars ($190,000,000.00). This, taken together with the indebtedness of SJLP that was to be assumed by UtiliCorp, brought the total cost of the Merger to approximately Two Hundred Seventy Million Dollars ($270,000,000.00). (C.P. 4; Ex. 2, p. 6)

The Merger was subject to various closing conditions, including without limitation, the receipt of the required SJLP shareholder approval, which was obtained on June 16, 1999,[2] and the receipt of all necessary governmental approvals on terms which would not give rise to a material adverse effect on the financial condition, income, assets, business or prospects of the business operations then owned and operated by SJLP or a material adverse effect on the business, property, assets, liabilities (contingent or otherwise), financial condition, results of operations or prospects of UtiliCorp and its subsidiaries (taken as a whole), or on the ability of UtiliCorp to perform its obligations under or to consummate the transactions

[2]Ex. 1, p. 8.

contemplated by the Merger Agreement, other than effects caused by changes resulting from the conditions affecting the electric industry or gas utility industries in general. The Merger was also subject to the obtaining of all necessary government approvals, including the approval of utility regulators in Missouri and a number of other states and filings with the Federal Energy Regulatory Commission, the Securities and Exchange Commission, and the Federal Trade Commission. (C.P. 4; Ex. 2, pp. 6-7)

On December 31, 2000, the merger of UtiliCorp and SJLP was effected pursuant to and in accordance with the Commission's valid and operative Report and Order. AGP did not seek a stay of the PSC order approving the merger either before the Commission or any court. As of the effective date of the merger, the separate corporate existence of SJLP was extinguished, its shares ceased being traded separately on the New York Stock Exchange and were tendered for shares of UtiliCorp stock, and all of SJLP's rights, duties and obligations became those of UtiliCorp by operation of law. Through the merger, SJLP's Board of Directors disbanded, and SJLP's senior management either retired or was terminated. Since that time, the properties of SJLP have been integrated and operated under the common ownership, management and control of Aquila.[3]

[3]See *Aquila's Motion to Dismiss and Suggestions* filed with the Missouri Court of Appeals, Western District. (Appendix, A64-A72)

POINTS RELIED ON

I. RESPONSE TO APPELLANT'S POINT I.

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

State ex rel. Missouri Public Service Company v. Pierce, 604 S.W.2d 623 (Mo. App. 1980).

***State ex rel. City of West Plains v. Public Service Commission,* 310 S.W.2d 925 (Mo. banc 1958).**

***State ex rel. Rice v. Public Service Commission*, 395 Mo. 109, 114, 220 S.W.2d 61 (Mo. banc 1949).**

Mo. Const., art. V, §18.

§386.240, RSMo. 2000.

§386.500, RSMo 2000.

Missouri Supreme Court Rule 83.08(b).

II. RESPONSE TO APPELLANT'S POINT II.

State ex rel. GTE North, Inc. v. Public Service Commission, 835 S.W.2d 356 (Mo. App. 1992).

State ex rel. Arkansas Power & Light Co. v. Public Service Commission, 736 S.W.2d 457 (Mo. App. 1987).

§393.190.1 RSMo. 2000.

4 CSR 240-2.060(1) and (6) [effective November 38, 1995].

III. RESPONSE TO APPELLANT'S POINT III.

State ex rel. Missouri Public Service Company v. Pierce,

604 S.W.2d 623 (Mo. App. 1980).

ARGUMENT

Standard of Review

The applicable judicial standard of review for orders of administrative agencies is found in the Missouri Constitution which provides that a review "shall include the determination of whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record." Mo. Const., art. V, § 18. Section 386.510[4] of the Missouri Public Service Commission Law states that when reviewing an order or decision of the PSC, the court may examine the "reasonableness or lawfulness" of that decision. Since the inception of the Public Service Commission Law in 1913, appellate courts have consistently found that this statutory provision is a reaffirmation of the constitutional mandate found in Mo. Const. art. V, § 18. *State ex rel. Marco Sales, Inc. v. Public Service Commission,* 685 S.W.2d 216, 218 (Mo. App. W.D. 1984). This Court reviews the decision of the Commission, not the judgment of the circuit court. *Marco Sales,* 685 S.W.2d at 218 ; *State ex rel. Capital City Water Company v. Public Service Commission,* 850 S.W.2d 903, 909 (Mo. App. 1993).

Judicial review of the Commission's decision is conducted using a two-part test. *State*

[4]All statutory references are to Missouri Revised Statutes 2000 unless otherwise indicated.

ex rel. Utility Consumers Council, Inc. v. Public Service Commission, 585 S.W.2d 41, 47 (Mo. banc 1979). First, the court must determine whether the PSC's decision is lawful. *Id.* An order's lawfulness depends on whether the Commission's order and decision was statutorily authorized. In determining whether a decision of the Commission is lawful, this Court exercises its independent judgment and "need not defer to the Commission, which has no authority to declare or enforce principles of law or equity." *Utility Consumers Council,* 585 S.W. 2d at 47. The Commission's order enjoys a presumption of validity, however, and the party challenging the validity of a Commission order bears the burden of proving its invalidity. *Id.* The challenging party must demonstrate by clear and satisfactory evidence, that the order being challenged is unlawful and unreasonable. § 386.430, RSMo 2000.

For the second part of the test, the Court must determine whether the Commission's order was reasonable. *Utility Consumers Council*, 585 S.W.2d at 47. An order's reasonableness turns on whether it was supported by competent and substantial evidence upon the whole record. *State ex rel. Office of Public Counsel v. Public Service Commission*, 938 S.W.2d 339, 341 (Mo. App. W.D. 1997); *State ex rel. Conner v. Public Service Commission*, 703 S.W.2d 577, 579 (Mo. App. 1986). Where a decision of the Commission turns on purely factual issues, a court may not substitute its judgment for that of the Commission if the order is supported by competent and substantial evidence on the record as a whole. *Utility Consumers Council,* 585 S.W.2d at 47; *Office of Public Counsel,* 938 S.W.2d at 342. The court is allowed to determine whether, upon consideration of the evidence, the Commission could reasonably have reached the result that it did. *Capital City Water Company,* 850 S.W.2d

at 912. Reversal is only warranted where the action of the Commission is without reasonable basis. *Id.*

This two-part review of the lawfulness and reasonableness of decisions of the Commission pursuant to the statutory scheme set out in § 386.510, RSMo, has been the standard of review used by appellate courts from the circuit court to the Missouri Supreme Court from the inception of the Public Service Commission Law in 1913 to the present. Missouri appellate courts, including this Court, have also consistently held that the procedure for judicial review of Commission decisions found in §386.510 is exclusive and jurisdictional. *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753 (Mo. banc 2003); *Union Electric Company v. Clark*, 511 S.W.2d 822, 825 (Mo. 1974).

Yet the Court of Appeals in its review of this case determined that because §386.510 makes no mention of the standard of review of appeals from judgments of the circuit court affirming or reversing orders or decisions of the PSC, the Court could infer that the legislature did not intend for the same standard of review to apply to Courts of Appeal or, in fact, this Court. The Court of Appeals instead applied the standard of review found in §536.140.2 stating that since Chapter 386 does not specifically refer to other appellate courts, "we are to look to MAPA to fill in the gaps." (WD60631, slip op. at 9) It is not clear what these "gaps" in the review procedure are, however, given the binding precedent of this Court in which no such "gaps" have been identified. It is clear that when reviewing decisions of the PSC, the circuit court functions as an appellate court. *State ex rel. Hoffman v. Public Service Commission*, 530 S.W.2d 434, 437 (Mo. App. 1975). Section 386.540.1 states that after review by the

circuit court, "appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this chapter." When reviewing a decision of the Commission, the appellate court reviews the decision of the Commission just as the circuit court does. *Marco Sales,* 685 S.W.2d at 218.

The review procedure found in Chapter 536 applies to appeals from an administrative decision *unless some other provision for judicial review is provided by statute.* §536.100. Missouri appellate decisions clearly hold that the process of judicial review set out in Chapter 386 is *some other provision. State ex rel. City of St. Louis v. Public Service Commission et al.,* 245 S.W.2d 851, 853 (Mo. 1952). Only the Court of Appeals, Western District, has insisted on applying the Missouri Administrative Procedure Act to review of decisions of the Commission. After that court's decision in *In re Osage Water Company,* 51 S.W.3d 58 (Mo. App.W.D. 2001), finding that Chapter 536 and Rule 100.01 had had a "modifying effect" on this Court's holding in *State ex rel. Anderson Motor Service Company, Inc. v. Public Service Commission,* 339 Mo. 469, 97 S.W.2d 116 (1936), the Missouri legislature enacted §386.515 which affirmed the exclusivity of the review procedure in §386.510. The legislature stated, "Prior to August 28, 2001, in proceedings before the Missouri public service commission, consistent with the decision of the supreme court of Missouri in *State ex rel. Anderson Motor Service Co., Inc. v. Public Service Commission,* 97 S.W.2d 116 (Mo. banc 1936), the review procedure provided for in section 386.510 is exclusive to any other procedure." § 386.515, RSMo Supp. 2002.

In this case, the Court of Appeals held that the standard of review from Chapter 536

should apply to the second layer of review of PSC decisions, rather than the standard of review from Chapter 386, because §386.510 does not specifically state that it applies to appellate courts other than the circuit court. However, the procedure for review of an administrative decision in Chapter 536 does not state that the standard of review in § 536.140.2 specifically applies to appellate courts other than the circuit court either. A party aggrieved by a decision of an administrative agency files a petition for review in *circuit court.* §§536.100, 536.110. The standard of review set out in §536.140.2 is the standard used by the *circuit court* when reviewing an administrative decision. Nothing in Chapter 536 states that this standard of review applies to review by other appellate courts any more than does the language of Chapter 386. Section 536.140.6 merely states that, "Appeals may be taken from the judgment of the court as in other civil cases." But, since the reviewing court (whether the circuit court, Court of Appeals or Supreme Court) all review the decision of the agency, it necessarily follows that the same standard of review should apply throughout the entire review process from circuit court to Supreme Court. Otherwise, the consistency and coherence of the judicial review process would be impaired.

Respondent Aquila urges the Court to clarify the standard of review to be used by appellate courts in their review of Commission decisions and to affirm the constitutional and statutory standard found in Mo. Const., art. V, § 18 and §386.510, RSMo.

I. RESPONSE TO APPELLANT'S POINT I.

A. Legal standard for review of merger.

There is no dispute concerning the legal standard the Commission was obligated to

apply in deciding whether to approve the Joint Application filed by UtiliCorp and SJLP for authority to proceed with the Merger. Specifically, the Commission was required by law to approve the Joint Application unless doing so would be detrimental to the public interest. This minimal benchmark for approval was established by the court in *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. App. 1934). The court's reasoning is as compelling today as it was in 1934:

> To prevent injury to the public, in the clashing of private interests 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 benefitted, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. "In the public interest," in such cases, can reasonably mean no more than "not detrimental to the public."

Id. at 400.

In rejecting the contention that the Commission must find that a sale of stock confers some affirmative public benefit, this Court instead stressed the importance of the property rights of the utility's shareholders:

> The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny them an incident important to ownership of property . . . a property owner should be allowed to sell his property unless it would be detrimental to the public.

Id. Thus, the standard established by the court is a judicial recognition of the compelling constitutional right of a property owner to sell or otherwise dispose of its property (capital stock in this case) free from unreasonable regulatory restraint. This standard balances the interests of shareholders and ratepayers.

In 1980, the Eastern District Court of Appeals looked to the *City of St. Louis* decision in determining the right of a regulated sewer company to complete the sale of regulated assets. *State ex rel. Fee Fee Trunk Sewer Company v. Litz*, 596 S.W.2d 466 (Mo. App. 1980). The Commission has routinely applied this standard when consolidating utility mergers, sales and acquisitions, a point which Appellant acknowledges at page 20 of its brief. The analysis applied by the Commission when applying the "not detrimental" legal standard to a merger is also well established. In 1971, in a case involving the acquisition of the common stock of Missouri Natural Gas Company by Laclede Gas Company, the Commission determined that all that needed to be shown to meet the test of no detriment is that the *status quo* will be maintained. Specifically, the Commission found that the standard was met simply by showing that there would be (1) no change in rates, and (2) no deterioration in quality of service. *Re Laclede Gas Company*, 16 Mo.P.S.C. (N.S.) 328, 334 (1971). This is the standard used by the Commission in this case. (L.F. 37; Appendix at A32)

The most recent examination by the Commission of the "no detriment" standard took place in its March 16, 2000, Report and Order in Case No. WM-2000-222[5]. This was a case

[5]*Re Missouri-American Water Company*, 9 Mo.P.S.C.3d 56 (March 2000).

involving the joint application of Missouri-American Water Company ("MAWC") and United Missouri Water, Inc. ("United") for authority for MAWC to acquire the common stock of United. In that case, the Commission's Staff recommended that the Commission approve the joint application, subject to the condition that MAWC not be permitted to recover any portion of the acquisition premium (i.e., the amount of the purchase price in excess of net book value) associated with the transaction in a future rate proceeding.

The Commission approved the joint application of MAWC and United. In doing so, the Commission rejected its Staff's recommended condition, however, stating:

> The only purported public detriment that any party identified is the possibility of a future attempt to recover the acquisition premium from ratepayers. The Commission reads *State ex rel. City of St. Louis v. Public Service Commission, supra,* 335 Mo. at 459, 73 S.W.2d at 400, to require **a direct and present public detriment**. The acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed, is not a present detriment. '[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is **compelling evidence** on the record tending to show that a public detriment will occur.'" *In the Matter of the Joint Application of Missouri Gas Company, et al.*, Case No. GM-94-252, *supra*, 3 Mo.P.S.C.3d at 221. There was no such compelling evidence in this record.

(*Missouri-American Water,* 9 Mo. P.S.C. 3d at 59, emphasis added.) Thus, the Commission

has determined that the mere possibility of a scenario of events which may result in future adverse consequences is not legally sufficient to make a showing that a transaction is detrimental to the public interest. To the contrary, an objecting party, Appellant in this case, was obligated to present "compelling evidence" of a "direct and present public detriment." Appellant has failed to do this.

Appellant's argument contends that the Commission has consistently followed the "not detrimental" legal standard until this case. (Appellant's Brief at 21) But the Commission's decision in this case follows prior precedent and case law. At pages 31 and 32 of its Report and Order, the Commission makes express reference to the applicable legal standard as established by the *City of St. Louis* case. (L.F. at 36-37; Appendix at A31-A32) As noted above, the Commission also acknowledges the applicability of the test established in its *Laclede Gas Company* decision that there is no detriment to the public interest if the *status quo* with respect to rates and quality of service is maintained. Ultimately, at page 44 of its Report and Order, the Commission stated the following:

> Based upon the Commission's review of the applicable law and its findings of fact, the Commission concludes the proposed merger between UtiliCorp and SJLP is in the public interest because it is not detrimental to the public.

(L.F. at 49; Appendix at A44) Thus, there is no reasonable basis for this court to find that the Commission failed to apply the correct legal standard to its review of the Joint Application of UtiliCorp and SJLP for Merger approval.

B. Source of Commission Expertise.

The real focus of Appellant's argument appears to be the fact that the Commission, when approving the Joint Application, rejected its Staff's recommendation that the Merger not be approved. The Commission's Staff, Appellant argues, is the "source" of the Commission's policy expertise[6] and, therefore, concludes Appellant, the Commission's decision on the factual issue of whether the transaction presented a detriment to the public interest is not entitled to any deference by this Court. This argument is flawed on many different levels.

[6]Appellant's Substitute Brief, p. 17 and 33.

First of all, the Commission's "Staff" consists of its employees.[7] The Appellant's contention that the Commission's expertise is simply derivative of its employees renders superfluous the Commission's role in the regulatory process. Put another way, if the Commission's Staff is the source of the Commission's expertise, as is contended by Appellant, clearly there is no need for the Commission. Appellant would have the Commission's Staff make its recommendations and the Commission be bound by them. On its face, this is an absurd result that enjoys no statutory or case law support, and Appellant offers none.

> This theory does not square with the plain language of enabling legislation providing that the Commission, not its Staff, is charged by law to make the determinations and decisions required under the Public Service Commission Act (the "Act").[8] The jurisdiction of the Commission is set forth at §386.250, RSMo.2000. It is the Commission, not its Staff, that throughout the Act is expressly charged with the responsibility of

[7]In fact, "the Staff" is not mentioned in the Public Service Commission Law as it existed at the time of the Order. §§ 386.010 - 386.800, RSMo 2000.

[8]Chapters 386, 392 and 393, RSMo.

> establishing and enforcing the rates, terms and conditions of service provided by investor-owned utilities in the State. The Commission's policymaking responsibilities have been recognized in court decisions.
>
> The public service commission is essentially an agency of the Legislature and its powers are referable to the police power of the state. It is a fact-finding body, exclusively entrusted and charged by the legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid in the accomplishment of its statutory powers.

State ex rel. Chicago, R.I. & P.R. Co. v. Public Service Commission, 312 S.W.2d 791, 796 (Mo. banc 1958). This Court has recognized that "the Commission's powers are an extension of the state's sovereignty." *Capital City Water Company*, 850 S.W.2d at 911.

Moreover, Appellant's theory (that the Staff, not the Commission, is responsible for promulgation and enforcement of public utility policy) is directly at odds with express language contained in the Act. Section 386.240, RSMo. 2000, states that the Commission may authorize employees to take actions on its behalf, "provided, that **no order, rule or regulation of any person employed by the Commission shall be binding on any public utility or any person unless expressly authorized or approved by the Commission.**"

(Emphasis added.)[9] The role of the Commission's Staff is to support the Commission, not to supplant it. Clearly, under the law, the Commission makes the ultimate decisions on public utility policy, not its Staff. Were it otherwise, the members of the Commission, each of whom serve limited and staggered fixed terms, would be mere pawns of an entrenched bureaucracy, unable to implement new policy initiatives in response to changing circumstances without the approval of their own employees.

Staff's role in cases before the Commission, as it was in this case, is to make recommendations to the Commission for its consideration. This is specifically acknowledged by Commission Rule 4 CSR 240-2.010(11), which defines the term "party" for purposes of the Commission's Rules of Practice and Procedure. That rule states that:

[9] Appendix at A52.

Party includes any applicant, complainant, petitioner, respondent, intervenor or public utility in proceedings before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate within the period of time established for interventions by commission rule or order.[10]

[10]Appendix A54.

Thus, the Staff's role in Case No. EM-2000-292 was no different from any other party presenting testimony and other documentary evidence for the Commission to consider with regard to the Joint Application. As such, the Commission was no more bound by the recommendations of its Staff than it was by any other party presenting evidence, including the evidence presented by Appellant. Staff is a party in a contested case, not an extension of the Commission itself. As such, it presents evidence and argues its position just like any other party in the case. The Commission, as factfinder, then weighs that evidence and those arguments. If the Commission were required to follow the Staff's advice, as Appellant advocates, there would be no contested case procedure, and the Commission would not be the unbiased decisionmaker that it is required to be. *Union Electric Company, et al. v. Public Service Commission*, 591 S.W.2d 134, 139 (Mo. App. 1980); *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39, 43 (Mo. App. 1983). Staff "aids" the Commission in many capacities, but in the context of a contested case, Staff only aids the Commission by presenting its position as any other party to the case would do. Thus, Appellant's argument that the decision of the Commission is contrary to the weight of the evidence is really just an argument that the Commission did not adopt the position advocated by the Staff, which the Commission was not obligated to do.[11]

[11]Appellant's argument regarding the Staff being the source of the Commission's expertise that should be followed in this case is inconsistent with its argument at pages 26-30 that the Commission's decision should not be afforded deference based on its expertise.

Had the Commission adopted Staff's position, Aquila questions if AGP would then have defended the Commission's expertise.

A review of the Commission's Report and Order reveals that its decision was based on its impartial evaluation of the evidence presented by all of the parties, including its Staff. The testimony and other evidence in opposition to the Merger presented by Staff, Appellant and various other parties was specifically rebutted by the Joint Applicants and, ultimately, rejected by the Commission for the reasons it set forth in great detail in the Report and Order. Appellant intimates at page 22 of its brief that an applicant can never define "public interest," because its definition will always align with its own perceived financial interest. Appellant states that the Commission Staff, on the other hand, has an *independent* viewpoint that should be accorded more weight by the Commission. But for various reasons, Staff may have goals and objectives of its own, as AGP certainly does. It is the Commission's duty to consider all interests and all viewpoints and make a decision based on what it considers to be the best result based on the evidence presented in the case. Appellant essentially concedes that the Commission explained the reasons why the Commission rejected much of the evidence and analysis presented by Staff and the other opposing parties. (Appellant's Brief, p. 26) Appellant simply does not like the reasons given. This is not a sufficient basis for reversal.

C. Direct and Present Public Detriment

Appellant further contends that the Merger has set the stage for detrimental consequences to ratepayers at some indeterminent time in the future. (Appellant's Brief, p. 27) To the contrary, the Commission properly rejected arguments that remote and speculative future events are a basis for denying shareholders the right to sell or otherwise alienate their shares in a public utility. As a matter of regulatory policy, the Commission has required

objecting parties to present "compelling evidence" of a "direct and present public detriment".[12] The Appellant's vague and amorphous suggestions at hearing that something bad would happen some time in the future because of the Commission's approval of the Merger application came nowhere close to making that showing. Notable by its absence is any allegation in Appellant's brief that the Merger resulted in higher rates for ratepayers or a deterioration in the quality of service by the surviving corporation. Appellants point to no evidence whatsoever that the Merger would cause rates to be increased by any particular amount or that the surviving company, UtiliCorp, was not highly qualified to provide safe, affordable and reliable utility service to the former customers of SJLP. The reason is simple. There was no such evidence in the record and, therefore, no basis for the Commission to conclude there would be a detriment to the public interest.

Appellant argues that the Commission's approval of the Merger is "clearly detrimental to the public interest" and the Commission has thereby "wrongly applied the law." (Brief, p. 17) This Court has held, however, that questions of analysis and judgment are committed by law to the decision of the Commission. *Love 1979 Partners v. Public Service Commission,* 715 S.W.2d 482, 490 (Mo. banc 1986). A subjective analysis, such as the Commission made in this case, is clearly a factual analysis, review of which is limited to review of whether there is competent and substantial evidence to support the decision. This Court has stated that, "Questions of analysis and judgment are committed by law to the decision of the Commission

[12]*See*, ftnt. no. 4.

. . . . ," and the reviewing court cannot substitute its judgment for the Commission's judgment so long as the Commission's decision is permissible under the record. *Id.*

The bottom line in this case is that Appellant thinks it is aggrieved because the Commission did not believe the testimony of its witness, Mr. Brubaker, or the Staff witnesses. However, the Commission is not bound to accept the recommendation of any particular witness appearing before it. In *State ex rel. Missouri Public Service Company v. Pierce*, 604 S.W.2d 623, 624 (Mo. App. 1980), the court specifically said that the Commission is not obliged to adopt any particular party's evidence as to a particular issue. To the contrary, the Commission is well within its discretion to disregard evidence which is not credible in its judgment, even if it is uncontradicted. *State ex rel. Rice v. Public Service Commission,* 220 S.W.2d 61, 65 (Mo. banc 1949).

D. <u>Commission Treatment of the Acquisition Premium.</u>

For the first time, in its brief to this Court, Appellant argues that the Commission did not correctly apply the "not detrimental to the public" test in this case because it refused to consider the possible future impact of an acquisition adjustment. (Brief at 26-29)

First of all, this issue has not been properly preserved for appeal. Section 386.500.2, RSMo 2000, states:

> No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. **Such application shall set forth**

specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. The applicant shall not in any court urge or rely on any ground not so set forth in it application for rehearing. (Emphasis added.)

Appellant timely filed its Application for Rehearing with the Commission on December 22, 2000. (L.F. 54-60; Appendix A57-A63) A review of that Application for Rehearing shows, however, that the Commission's failure to consider the effect of the acquisition premium when considering the "not detrimental" standard is not listed as grounds for rehearing. Appellant's listed grounds for rehearing were that:

1) the Commission failed and refused to require Joint Applicants to submit a retail market power study;

2) the Commission's Report and Order fails to set forth adequate findings of fact and conclusions of law;

3) the Commission appeared to wrongly equate immediate rate impact with ratepayer detriment and wholly failed to employ its expertise to recognize that the business combination presented in this matter would result in the creation of a retail hegemony that would gain substantial market power in the context of a deregulated electric market;

4) the Commission erred in failing to apply the proper standard of proof;

5) the Commission failed to consider Exhibit 303 as proof of detriment; and

6) the Commission ignored unrebutted and unrefuted evidence of immediate and direct ratepayer detriment in that the debt rating of the combined entity would be substantially

lower than the current debt rating of SJLP.

The issue of whether the Commission should have considered the possible effect of any recoupment of the acquisition premium in a future rate case was not raised by Appellant in its Application for Rehearing, and the Court is precluded from considering it in this appeal. *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 934 (Mo. banc 1958); *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission,* 924 S.W.2d 597 (Mo. App. W.D. 1996).

An additional procedural reason for not considering Appellant's argument regarding the effect of the acquisition premium is found in Missouri Supreme Court Rule 83.08(b). This rule states that, after transfer, the party filing a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Appellant did not raise the issue of the Commission's refusal to consider the recovery of the acquisition premium in the brief filed at the Court of Appeals. Appellant has inserted the phrase "and refused to decide whether the $92 million acquisition premium would be recovered from ratepayers" at the end of Point Relied On I and developed an argument relating to this matter at pages 26-29 of its Substitute Brief. This is the only substantive change from the brief that was filed in the Court of Appeals. Appellant, no doubt, felt compelled to add this argument since it was the basis for the Court of Appeals' decision reversing and remanding to the Commission. But this issue was not raised by Appellant in its brief to the Court of Appeals, so the inclusion of this issue in its Substitute Brief has substantially altered the basis of its claim before the Court of Appeals. For this reason, this claim should be denied. *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc

1997).[13]

But even if Appellant were not procedurally precluded from raising this argument, the issue should not be considered by the Court because it is contrary to both Missouri Public Service Commission precedent and appellate law. As was stated before, in considering whether the merger should be approved, the Commission looks at whether the merger will be detrimental to the public. Also as explained before, that consideration has been found to mean no present detriment. *Laclede Gas Company*, 16 Mo.P.S.C.(N.S.) at 334; *Missouri-American Water Company*, 3 Mo.P.S.C.3d at 221. Any *actual recoupment* of the acquisition premium through rates by Aquila can only take place in the future when the Commission has authorized a change in rates in the context of a general rate case where the Commission considers all relevant factors. *Utility Consumers Council*, 585 S.W.2d at 56. No change in rates could lawfully result from a merger case.

UtiliCorp raised an issue related to the recoupment of a portion of the acquisition premium with the Commission when it requested approval of the merger. The company

[13] Because this issue was not raised in the Court of Appeals, Respondents did not have the opportunity to brief the issue and raise the arguments presented here. Additionally, the court did not have the benefits of those arguments when it made its decision.

proposed a Regulatory Plan whereby, among other things, in a future *rate case*, fifty percent (50%) of the unamortized balance of the acquisition premium would be included in the rate bases of the SJLP divisions and the annual amortization of the acquisition premium would be included in the expenses allowed for recovery in cost of service, provided that UtiliCorp proved to the Commission in that future rate case that merger synergies were equal to at least 50% of the premium costs and other costs to achieve the synergies. (See Joint Application, C.P. 8) In other words, by its Regulatory Plan, Aquila was requesting that the Commission determine the *method* it would use when considering the acquisition premium in a future rate proceeding. While the Commission definitely heard evidence from all the parties regarding recovery of the acquisition premium and thus *considered* the acquisition premium in this case, the Commission chose not to adopt the proposed Regulatory Plan stating:

> UtiliCorp asks the Commission to state now how it will rule on certain issues in future rate cases. The Commission will not do so.

(L. F. 44; Appendix A39)

It was UtiliCorp's contention then, and it is Aquila's contention now, that the Commission could have considered its proposed Regulatory Plan in the context of the approval of the merger and made a determination as to what *method* it would use to identify and allocate net merger savings for consideration of the acquisition premium in a future rate case when it would also consider all other relevant factors. The Commission, however, chose not to consider UtiliCorp's proposed Regulatory Plan in this case.

Aquila and the Commission do agree, however, that the Court of Appeals' decision

remanding to the Commission for a determination of the *actual ratemaking treatment* of the acquisition premium in the context of the *merger* case in order to satisfy the no detriment standard is unlawful. The Commission cannot quantify the *amount* of the acquisition premium the company should be allowed to recover in rates except in a general rate case, and the Commission cannot factor the recovery of the acquisition premium into a consideration of the no detriment standard without knowing how much, if any, of the premium the company should be allowed to recover. While the Commission could have lawfully approved the *method* for premium recovery in the context of the merger case, the Commission was correct to defer consideration of the actual amount of the acquisition premium to be recovered through rates to a future rate case. Since that amount will be determined at a later time in a rate case in which the Commission determines just and reasonable rates, pursuant to its statutory duty which includes considering all relevant factors, the Commission properly found that the *actual amount* of the recovery of the acquisition premium was not a factor to be considered in the context of analyzing the standard for approval of the Merger.

When all the dust has settled, a reading of the Report and Order demonstrates clearly that the Commission expertly and carefully weighed the evidence presented by all parties in the case and that it made an informed decision in the exercise of its statutory discretion. The Commission's decision in this case is a testament to the care and consideration given to weighing the competing points of view and, ultimately, resolving the issues in favor of one or another of the various parties. The Commission acted in accordance with its statutory duty. In doing so, it applied the appropriate legal standard to the facts presented. There was

competent and substantial evidence to support the Commission's finding that the Merger was not detrimental to the public interest in that there would be no adverse impact on rates or quality of customer service as a result of the Merger. Moreover, Appellant failed to offer clear and convincing evidence of a present and direct detriment to the public interest if the Merger were authorized to proceed. Consequently, its decision that the Merger was not detrimental to the public interest was lawful and reasonable as it was supported by competent and substantial evidence upon the whole record.

II. RESPONSE TO APPELLANT'S POINT II.

A. Joint Applicants' filing was not deficient.

Appellant's next point on appeal is that the Commission erred when it approved the Joint Application because the Joint Applicants' filing was deficient. A subset of Appellant's argument is that the Commission improperly shifted the burden of proof from the Joint Applicants to the adverse parties, including Appellant. The following discussion will demonstrate that these contentions, too, are incorrect.

At pages 34-46 of its Substitute Brief, Appellant argues the Commission erred by not making UtiliCorp prepare and file a "market power study." In that regard, Appellant contends that the Commission erred by not dismissing the Application as deficient. There is no merit to this contention. The fundamental problem with Appellant's argument is that there is no requirement under applicable law or regulation that the Joint Applicants prepare and submit a market power study as part of their application for approval from the Commission. As Appellant notes at page 19 of its Brief, the applicable statutory authority pursuant to which the

Joint Application was filed is §393.190.1 RSMo. 2000,[14] which requires, among other things, that an electric utility obtain authorization from the Commission before it may undertake a merger or otherwise "sell, assign, lease, transfer, mortgage or otherwise dispose of" public utility property dedicated to the public interest.[15] There is no requirement under that provision (or any other statutory provision) that merging utilities prepare or submit a market power study for the Commission's consideration.

[14]Appendix at A50.

[15]The Commission sets out at length the full text of the applicable statutory language at page 31 of its Report and Order in footnote number 3. (L.F. 36; Appendix at A31)

Likewise, the Commission's rules of practice and procedure governing the minimum filing requirements of an application for approval of a utility merger at the time the Joint Application was filed make no reference whatsoever to the filing of a market power study. *See*, *Commission rule 4 CSR 240-2.060(1) and (6)*[16] (Appendix at A55-A56). The only requirement is that the applicants state in their application "the reasons the proposed merger is not detrimental to the public interest."[17] From that general language, Appellant infers the

[16] Effective November 30, 1995. This rule was rescinded and readopted effective April 30, 2000, after the close of the Merger. The text of 4 CSR 240-2.060(6) has now been moved to 4 CSR 240-3.115 effective April 30, 2003.

[17]Appellant's reliance on Commission rule 4 CSR 240-2.130 at page 42 of its brief is inappropos inasmuch as it, too, makes no reference to a market power study. Moreover,

requirement that a market power study is required. This is clearly not the case.

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a market power study was not a part of the Joint Applicant's case-in-chief because market power is not a relevant consideration in the absence of retail competition for electricity customers. (C.P. 177, 259)

The Commission's failure to require a market power study was not an oversight. As Appellant notes, a number of parties early in the proceeding sought an order of the Commission requiring that UtiliCorp file a market power study. The Commission specifically rejected this request. The Commission concluded, correctly, that given the uncertainties concerning the prospects for retail competition in the State of Missouri, a market power study was of dubious value. The Commission declined to require the Joint Applicants to file a market power study as part of their direct testimony[18]. In doing so, the Commission did not prohibit other parties from addressing market power issues in their rebuttal testimony.

Appellant's argument that the Joint Applicants' application to the Commission was deficient for lack of a market power study has no validity. The simple fact of the matter is that there is no requirement under applicable law, rule, regulation or order of the Commission that Joint Applicants prepare or file with the Commission a market power study as a part of their application for approval of the Merger.

Appellant puts significant emphasis on the fact that the Commission had previously

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[18]*See,* Order Denying Motion to Require Market Power Study and Adopting Procedural Schedule dated December 21, 1999, pursuant to which the Commission concluded that the Joint Application **was not** deficient because no market power study had been submitted. The Commission concluded "there are too many uncertainties surrounding the future of retail competition in Missouri to make any market power study definitive." (C.P. 259) This factual finding should be left undisturbed by this Court.

required merger applicants to file market power studies. Appellant makes reference to *Re Union Electric Company*, 5 Mo.P.S.C.3d 157 (1986) (Case No. EM-96-149) and, also, the merger application of Kansas City Power & Light Company (KCPL) for authority to merge with Western Resources, Inc. (Case No. EM-97-515).[19] (Appellant's Brief, p. 36)

At the outset, what the Commission did in those prior cases was not binding on it when considering the Merger. It is a well recognized legal principle that the Commission is not bound by the principle of *stare decisis*. *State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 371 (Mo. App. 1992).

> An administrative agency is not bound by *stare decisis. State ex rel. Churchill Truck Lines, Inc. v. Public Service Commission*, 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 Board of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980).

Id.

In 1987, the Court of Appeals considered a case wherein an electric utility objected to a Commission's determination of its revenue requirement on the grounds that the Commission previously used one method to forecast load factor, but then switched to another method which had the effect of generating a lower revenue requirement calculation. The court rejected the

[19]*Re Kansas City Power & Light Company*, 8 Mo.P.S.C. 3d 306 (1999).

utility's argument. In doing so, it stated that:

> It is not the methodology, but the impact of the rate order which counts. *State ex rel. Associated Natural Gas Company v. Public Service Commission of Missouri,* 706 S.W.2d 870, 879 (Mo. App. 1985). If the total effect of the rate order cannot be said to be unjust or unreasonable, a judicial inquiry is at an end. *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 602, 64 S.Ct. 281, 287, 88 L.Ed. 333 (1944). 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. *Associated Natural Gas, supra,* at 880.

State ex rel. Arkansas Power & Light Co. v. Public Service Commission, 736 S.W.2d 457, 462 (Mo. App. 1987). This body of decisional law makes it clear that the Commission may change policy, approaches and methodology over time based on changed circumstances. All that can reasonably be required of the Commission is that it explain why it is taking a different approach.

The Commission did so in this case. In response to market power conditions advocated by Staff and the Office of the Public Counsel, the Commission stated that the KCPL/Western Resources situation was not a good precedent in this case. "The primary difference is that the earlier merger was resolved through the filing of a Stipulation and Agreement. That means that the merging parties agreed to the imposition of those conditions." (L.F. 28; Appendix at A23) By way of contrast, UtiliCorp did not agree to market power conditions.

The Commission also addressed, generally, why it thought UtiliCorp should not be required to prepare a market power study:

> Staff and other parties request that the Commission order UtiliCorp to perform market power studies at some future time when retail competition may become a reality in Missouri. However, no one can possibly know when, or if, that competition will arrive. Neither can anyone predict what form that competition may take. None of the parties have provided a satisfactory explanation of why the Commission should order the completion of these studies now, in this Report and Order, rather than waiting until the circumstances of retail electric competition become more clear. Under these circumstances, the Commission will not impose the conditions sought by Staff. If, at the time that retail electric 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.

(L. F. 27; Appendix A22) Distilled to its essence, the Commission concluded, correctly, that no retail electric competition was authorized in the State of Missouri and, consequently, performing a market power study would be a meaningless exercise[20]. It concluded, in its

[20]That a market power study had been filed in the Union Electric Company case (and agreed to in the KCPL case) actually is a validation of the Commission's decision in this case. It is apparent from the Commission's decision in this case that it has previously found

informed discretion, that no good purpose would be served by ordering the Joint Applicants to prepare a study based upon a speculative set of future circumstances that could not be predicted with any certainty at the time of the Merger.

B. The Commission did not unlawfully shift the burden of proof.

Finally, at page 38 of its Brief, Appellant argues that the Commission's refusal to require the Joint Applicants to perform a meaningless task is tantamount to a shifting of the burden of proof to those parties opposing the Merger. There are two fundamental flaws to Appellant's argument. First, since the Joint Applicants were not required by law, rule or order to prepare and file a retail market power study with their Joint Application, no obligation was shifted to the Appellant. In other words, there being no obligation, it could not be shifted. Appellant's argument regarding the burden of proof is thus a "red herring, as a market study was never pertinent or relevant to the Commission's decision approving the merger.

Secondly, Appellant confuses the concept of the burden of proof with the burden of going forward with the evidence. This, too, the Commission explicitly addressed in its Report

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market power studies to be of little value of light of current market circumstances. The Commission is entitled to apply that prior unsatisfactory experience during its deliberations concerning the Merger.

and Order at pages 32 and 33:

> Who, then, has the burden of proving this merger is not detrimental to the public? The Missouri Supreme Court has stated that the 'relevant inquiry in determining which party has the burden of proof is to identify who, as is disclosed from the pleadings, asserts the affirmative of an issue. Generally that party has the burden of proof.' *Anchor Centre Partners Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991); *See also Dycus v. Cross*, 869 S.W.2d 745 (Mo. banc 1994). The joint applicants, UtiliCorp and SJLP, are asserting that their merger will not be detrimental to the public. Therefore, they have the burden of proving that assertion. However, simply assigning the general burden of proof on UtiliCorp and SJLP does not resolve all questions about burden of proof.
>
> UtiliCorp and SJLP must prove that their proposed merger is not detrimental to the public interest. However, other parties have asserted that the merger is detrimental in one or more specific areas. It is not enough for a party to assert that a detriment exists and demand that UtiliCorp and SJLP prove them wrong. While the burden of proof never shifts through a trial, the burden of going forward with the evidence may shift if a prima facie case is made. *Anchor Centre Partners* at 30. Therefore, 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.

(L.F. 37-38; Appendix A32-A33)

UtiliCorp and SJLP proved their *prima facie* case by presenting evidence showing that the proposed Merger would not (1) result in an increase in rates, or (2) adversely impact the quality of customer service. Since the Joint Applicants met their burden of making a *prima facie* case that the *status quo* would not be disturbed by the Merger, the burden of going forward with evidence to prove a particular detriment shifted to the party alleging a specific detriment.

To do otherwise would have UtiliCorp and SJLP bearing the burden of proving the negative of every claimed hypothetical and speculative detriment made by the opposing parties - an impossible task. The Commission concluded, correctly, that a specific allegation of detriment should be proven up by the party making the allegation. Appellant alleged that the Merger would be detrimental to the public interest because of alleged adverse impacts caused by an unacceptable (and theoretical) aggregation of retail market power by the merged entity. It was Appellant's burden to go forward with evidence proving the allegation. It did not do so. It cannot now be heard to complain that it was unfair that the Commission insisted that the Appellant prove its allegations.

To conclude, UtiliCorp was not required by law, rule, regulation or order of the Commission to prepare or file a market power study in conjunction with its merger application with SJLP. The Commission found, as a matter of fact, that a retail market power study would be inherently speculative and of little value in the absence of retail competition for electric service in the State of Missouri. Appellant failed to present compelling evidence of an adverse

consequence resulting from UtiliCorp not undertaking such an analysis. Consequently, the filing of UtiliCorp and SJLP was not deficient, and the Commission's decision was lawful and reasonable.

III. RESPONSE TO APPELLANT'S POINT III.

Appellant's third and final point of error is that the Commission was compelled to find that there was a detriment to the public interest resulting from the Merger (1) because of preliminary allocations information contained in Exhibit 503 and (2) because the merged entity would have a less favorable credit rating than SJLP. Neither argument justifies a reversal of the Commission's decision.

A. Exhibit 503 does not show that the Merger is detrimental to SJLP customers.

Appellant's reliance on one solitary document out of a record consisting of thousands of pages of documents is misplaced. Appellant points to Exhibit 503 for the proposition that UtiliCorp's own financial analysis of the Merger demonstrated an aggregate negative impact for SJLP ratepayers. This argument is deficient on its face.

Exhibit 503 is a copy of a response to Appellant's data request No. SJAG-22[21]. Among other things, it contained a request that UtiliCorp provide a "description and complete explanation of the rationale for the method used for the allocation of [acquisition] premium related to investments and expenses" for SJLP's operations. This data request was directed to

[21]A data request is an informal discovery mechanism commonly used in Commission cases. *See*, 4 CSR 240-2.090(2).

the Regulatory Plan proposed by UtiliCorp in which it proposed to include fifty percent (50%) of the unamortized balance of the merger premium in the rate bases of SJLP's electric, gas and industrial steam operations and to expense the annual amortization of the premium in cost of service. In response to the data request, UtiliCorp provided a "Preliminary Allocations Worksheet." That document was clearly stamped "**DRAFT**." (Ex. 503) A copy of the data request, response and attachment is appended to Appellant's Brief.

The Preliminary Allocations Worksheet was provided to Appellant by UtiliCorp to illustrate the method to be utilized in allocating various investments and costs. The numbers provided were, by definition, preliminary, and its line entries were inherently unreliable. Appellant has erroneously attributed certitude to the contents of a document clearly denominated as a "draft."

The UtiliCorp witness, John McKinney, explained at the time of hearing that the individual line entries in the draft preliminary analysis had been updated and the entries in the draft document were, consequently, irrelevant. (Tr., 340; 342) He explained that the data request had sought a description of the allocations *method*, and the draft document had been provided *to demonstrate the method*, not the actual outcome, which was still tentative at the time the response had been provided. (Tr., 340-341; 346-347) The allocations analysis was subsequently superseded as UtiliCorp further refined its inputs and analysis.

The Commission considered and believed the testimony of UtiliCorp witness John McKinney:

Exhibit 503 does not justify a finding that the UtiliCorp/SJLP merger should be

> blocked. The numbers set forth in Exhibit 503 are only preliminary estimates of how costs and premiums are to be allocated to various operations of SJLP. Those numbers are not absolute results and may be changed. If those proposed allocations are unfair to SJLP's natural gas and steam customers, they certainly can be changed. Indeed, Maurice Brubaker, witness for AGP, suggests 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, Exhibit 500, p. 13) Clearly these proposed allocations can be changed to avoid a detriment to SJLP's gas and steam customers. In any event, UtiliCorp's internal allocation of costs and premiums cannot, by itself, create a detriment to any customer.

(L.F. 15-16; Appendix at A10-A11) Again, the Commission considered the evidence submitted by the Joint Applicants and by Appellant, weighed the evidence, and found the evidence of UtiliCorp witness John McKinney to be true. In doing so, it discounted the testimony of Appellant's witness, Maurice Brubaker. This is precisely the fact finding role for which the Commission was created. That factual finding cannot be disturbed by this Court on appeal absent a showing of abuse of discretion.

Appellant argues further, however, that the allocation makes no difference at all because the "size of a pie is not dependent on either the number or the size of the slices that are cut from it." (Brief at 49) It is Appellant's argument that completely misses the point, however,

as the data request directed to Respondent requesting the allocations was only relevant if the Regulatory Plan proposed by UtiliCorp for recovery of a portion of the acquisition premium through a sharing of net savings was accepted by the Commission. As was stated before, the Commission did not accept the proposed Regulatory Plan stating:

> 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. (L.F. 45; Appendix A40)

While Aquila does not agree that a ratemaking method cannot be considered outside a rate case, since the Regulatory Plan was not accepted by the Commission, the preliminary allocations set out in Exhibit 503 are not relevant to the Commission's ultimate decision to authorize the merger on the grounds that it was not detrimental to the public interest. Whatever the total "pie" or the preliminary allocations may have shown, since the Regulatory Plan was not accepted by the Commission, the allocations cannot have had any effect on the Commission's decision, and the evidence included in Exhibit 503 cannot have been considered by the Commission or influenced its decision to approve the Merger.

B. <u>The change in bond rating did not make the Merger detrimental to the public</u>.

Lastly, Appellant complains that the Commission erred in finding that the Merger would not be detrimental to the public interest because the evidence demonstrated that the surviving company's bond rating would not be as favorable as that of SJLP. Appellant notes that

immediately prior to the merger, SJLP's long-term debt was rated A- by Standard & Poor's, while UtiliCorp's debt was rated BBB. Appellant contends this fact illustrates that the surviving corporation would be more "risky" than SJLP resulting, ultimately, in an increased cost of debt to the surviving corporation. (Appellant's Brief, pp. 54-57)

The Commission found these facts to be essentially inconsequential in determining whether SJLP's customers would be adversely affected by the Merger. The Commission noted, correctly, that a Standard & Poor's rating of BBB is investment grade. It found this argument unpersuasive:

> First, UtiliCorp's credit rating of BBB, while lower than SJLP's current rating, is still considered to be investment grade. There is no evidence to support that UtiliCorp is financially unstable, or that the merger with UtiliCorp will put SJLP's ratepayers at any great risk. Second, no evidence was presented that it would quantify the amount that the cost of debt attributable to SJLP would increase because of the merger. Indeed, there is no way to reliably quantify such an amount. Certainly, there is no guarantee that SJLP's credit rating would remain at A- if the merger does not proceed. Third, the cost of debt is just one factor the Commission will consider when setting future rates for UtiliCorp's SJLP unit. If the company's cost of debt is unreasonable, appropriate adjustments can be made to protect the ratepayers. Finally, 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. 16-17; Appendix at A11-A12) The Commission found that the risk of an increase in cost of debt was just one factor out of many for the Commission to consider when considering the merits of the Merger. Clearly, the Commission considered the issue, but was not overly concerned about it. Again, the Commission's factual finding (that is, that an investment grade credit rating for the surviving company would not be detrimental to the public interest) should not be disturbed on appeal.

Another pertinent factor associated with this decision was evidence proffered by the Joint Applicants to the effect that the surviving corporation would be a substantially larger firm than SJLP and, consequently, would have greater overall financial strength than would SJLP. (Ex. 1, p. 6-7; Ex. 2, p. 15) The Commission could reasonably conclude that this would likely neutralize any apparent marginal advantage to SJLP's A- rating.

Again, the Commission noted that a credit rating argument is of only marginal significance and, further, no compelling evidence had been offered by any objecting party that the differential in credit ratings would actually result in an increased cost of debt. In any event, the Commission noted, correctly, that it could make appropriate adjustments in a future rate case to the extent that UtiliCorp's less favorable credit rating in fact would adversely impact the cost of debt capital with respect to SJLP's former ratepayers.

Appellant argues that it was the Commission's responsibility to ascertain this alleged adverse financial and rate impact resulting from the credit rating of the merged entity. (Appellant's Brief, p. 58) To the contrary, it was the obligation of Appellant to offer competent and substantial evidence of this alleged fact. It failed to do so. The Commission

is not obligated to validate the general allegations of adverse parties. The Commission's role is to make findings of fact based on the competent and substantial evidence presented to it, not to engage in conjecture. As the Commission noted, no convincing evidence was offered by Appellant as to the alleged adverse impact the Merger would have on the cost of debt to the surviving corporation and, ultimately, on the cost of service to the former SJLP customers.

Ultimately, and again, Appellant's grievance is simply that the Commission did not agree with Appellant's interpretation of the facts. The Commission, however, is not obligated to accept the testimony of any particular party's witness. *Missouri Public Service Company*, 604 S.W.2d at 624.

The Commission was not compelled to conclude that the Merger would be detrimental to the public interest as a consequence of the preliminary allocations information contained in Exhibit 503, or by the fact that the merged entity might have a less favorable credit rating than SJLP (though still investment grade). The Commission discounted the significance of Exhibit 503 based on competent and substantial testimony by UtiliCorp witness John McKinney and, further, found that the information about the credit rating of the surviving corporation was simply one factor to be considered along with many others in determining whether the public interest would be detrimentally affected by the Merger. Ultimately, the Commission found that the surviving corporation would have an investment grade credit rating and that any associated increase in cost of debt could be dealt with in a subsequent rate case. The Commission's findings were based on competent and substantial evidence and were not arbitrary or capricious or an abuse of discretion.

Conclusion

The Commission's Report and Order in its Case No. EM-2000-292 is lawful and reasonable and should be approved by this Court. The Commission's findings were based on competent and substantial evidence and were not arbitrary or capricious or an abuse of discretion. The reasons for the Commission's findings are set forth in a clear and understandable form. Moreover, those findings are thoughtful and articulate and within the informed discretion reserved to the Commission by the Act. Respondent Aquila requests that the Court affirm the Report and Order of the Commission in its Case No. EM-2000-292.

Respectfully submitted,

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Paul A. Boudreau #33155
Sondra B. Morgan #35482
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Telephone: (573) 635-7166
Facsimile: (573) 635-0427
E-Mail: PaulB@brydonlaw.com
Attorneys for Aquila, Inc.

Certificate of Service

I hereby certify that two (2) true and correct copies of the above and foregoing document were sent by U.S. Mail, postage prepaid, overnight delivery, or hand delivered, on this 29th day of August, 2002, to:

Mr. Stuart W. Conrad
Finnegan, Conrad & Peterson, L.C.
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111

Mr. Steven Dottheim
Missouri Public Service Commission
Governor Office Bldg., 200 Madison St.
Suite 100
Jefferson City, MO 65101

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Paul A. Boudreau

RULE 84.06(c) CERTIFICATE

The undersigned certifies that the information required by Rule 55.03 is provided above and that this brief complies with the limitations contained in Rule 84.06(c) in that it contains12,639 words as counted by the word processing system being utilized, and that the disk attached containing an electronic copy of this Appellant's Brief in WordPerfect 8.0 format has been scanned by a current version of Norton Anti-Virus and is free of known viruses.

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Paul A. Boudreau