BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Tariff Filing of Missouri Public Service Company, a division of UtiliCorp United, Inc., to implement a general rate increase for retail electric service provided to customers in its Missouri service area	)))))))	ER-2001-672

RESPONSE OF SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION IN SUPPORT OF MOTION TO COMPEL

COMES NOW Intervenor Sedalia Industrial Energy Users' Association (SIEUA) and for its Response to the Response of UtiliCorp United (UtiliCorp) regarding SIEUA's Motion to Compel Responses to Data Requests and Motion to Shorten Time to Respond states:

1. This pleading is necessitated by UtiliCorp's attempt to invert the pleading order on this dispute. Instead of submitting a timely objection (if it had one) within ten days as is required by Commission Rule,[1/] ***and stating the basis of its objection***, UtiliCorp chose to refuse to comply with the requested discovery requiring a motion to compel followed ***only then*** by its objections to the discovery. While those objections will be shown herein as meritless, UtiliCorp's belated objection should

[1/] 4 CSR 240-2.090(2).

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be dismissed as the untimely response that it is.[2/] To do otherwise essentially makes a meaningless exercise of the Commission's discovery practice that requires that objections be timely made within a much shorter period than responses are due and thereby allowing the discovery process to proceed in a timely and orderly fashion. If the Commission's rules no longer require that objections to data requests be timely submitted within ten days of receipt of the DRs, then those rules should be changed. Otherwise, they should be enforced. At an earlier point in this proceeding, Staff was chastened because of its failure to seek compulsory process to data requests that also had not been the subject of timely objection. SIEUA has moved promptly to address UCU's failure in this dispute after first having unsuccessfully attempted to "work things out" with UCU's counsel.

2. UtiliCorp does not dispute the statements made in SIEUA's Motion to Compel. UtiliCorp's belated refusal/objection to SIEUA's data requests instead boils down to no more than "it's too much trouble to comply with the request." Response, p. 3. Even had it been timely made, it would have had no merit.

3. UtiliCorp argues that data requests are analogous to interrogatories and invokes cases under Missouri's Rules of

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[2/]Late in the evening yesterday, counsel for SIEUA received via facsimile a letter from counsel for UCU stating that in an earlier letter to the Regulatory Law Judge we had "misstated what has taken place. Utilicorp filed timely ***responses*** to the subject data requests." (Emphasis added).

We stand by our statement. UCU did not file timely ***objections*** to the data requests as was plainly stated in our earlier letter.

Civil Procedure. Rule 4 CSR 240-2.090(1) states that discovery may be obtained by the "same means and same conditions" as in civil actions and imports the same sanctions. But, neither UtiliCorp's citations, nor this analogy support the position it takes here.

4. *State ex rel Gamble Const. Co. v. Carroll*, 408 S.W.2d 34 (Mo. *en banc* 1966) is cited by UtiliCorp. The frequently-cited *Gamble* case is often not read beyond the headnotes. While stating the proposition that a party shouldn't be forced to prepare his opponent's case and that requiring compilations, etc. is "in many circumstances, improper," the Supreme Court in *Gamble* ***enforced an order compelling the requested discovery*** and stated the following (in language that apparently was missed by UtiliCorp):

> But the objection that preparing an answer would require research by the interrogated party ***is not enough*** to bar the interrogatories in every case. In order to justify sustaining of an objection to such an interrogatory, it must be ***shown*** that the research ***is unduly burdensome and oppressive. The party seeking to avoid answering the interrogatories carries the burden of showing that the information sought is not readily available to him*** and ***where there is conflict the court will make its own determination as to the cost and inconvenience of answering the interrogatories, rather than relying on bare assertions as to this by the party.*** Thus the trial court has jurisdiction to determine whether requiring Gamble to answer . . . would subject Gamble to ***annoyance, undue expense, embarrassment or oppression.***

Gamble, *supra*, at 38 (emphasis added). Of course, the discovery sought in *Gamble* required defendant Gamble to go out from its

premises and actually interrogate third-party subcontractors who supplied most of the labor and material for the disputed project -- a task well beyond anything requested by the data requests in issue here.

5. UtiliCorp also cites *Arth v. Director of Revenue*, 772 S.W.2d 606 (Mo. *en banc* 1987), but to no avail. In that case the Director appealed an adverse judgment below asserting that "answering the interrogatories would require research and investigation of ***sources beyond [the Director's] available control.***" *Id.* at 607 (emphasis added) -- again far from the extensive prohibition argued by UtiliCorp.

6. But *Arth* has another issue. In a strong dissent by Judge Rendlen, joined in by Judge Welliver, and citing *Gamble*, the dissenters quoted from *Gamble* and noted that it must be ***shown that research is unduly burdensome or oppressive*** or it will not be prohibited. The dissenters also noted that the trial court had exercised the required degree of discretion. The dissenters ultimately won the day. Even trial preparation materials may now be made available upon a showing that the requesting party cannot wihtout undue hardship obtain the substantial equivalent of the materials by other means. MoR.Civ.Proc. 56.01(b)(3).

7. The argued thrust of both *Arth* and *Gamble* is that data must be "available." In fact, neither case so holds. More properly, both rule consistently that a party should not be required to conduct another party's discovery for them by being forced to effectively conduct ***third party discovery*** or ***inter-***

rogating third parties in order to prepare a response. The key is whether the means of preparing a response are ***within the control of the other party.*** Thus, neither *Gamble* nor *Arth* rule against compelling responses in this case.

8. But without regard to that, a Commission data request is a "means of discovery" under which a party may seek "documents or information."[3/] "Information" is broader than documents, thus limitations to material that is "available" or "exists" are not part of the Commission's data request process which by its own terms may seek "information" from a party. This rule was obviously assembled with computer models and computer utilization in mind, and the limitation on it is the appropriate balancing of the relative costs. The rule does ***not*** say "existing documents" nor does it say "available information."

9. Moreover, the argument that "MPS personnel . . . could be expected to testify at the hearing as to what the runs depict" is no basis for refusing to compel. Mo.R.Civ.Proc. 56.01(b)(1) clearly permits discovery "whether it relates to the claim or defense of the party seeking discovery ***or to the claim or defense of any other party*** . . . ." (emphasis added). The scope of permissible discovery is not limited to information that the opposing party is willing to share, nor to information that is consistent with its view of the case.

[3/]Under 4 CSR 240-2.090(2), a data request "shall mean an informal written ***request for documents or information*** which may be trannnnsmitted directly between [parties.]" (emphasis added).

10. As regards *Arth*, SIEUA has not asked for information that is from a source that is beyond the available control of UtiliCorp. Moreover, the situation is analogous to seeking identification through interrogatories of an expert, then seeking to depose the expert regarding the basis of their opinion. In effect, and for all practical purposes, the RealTime software is the "expert" and is entirely within the control of UtiliCorp. SIEUA has posed questions to that "expert" and requested that the responses of the "expert" be supplied. The real reason that UtiliCorp does not want to perform the "runs" requested is that it will seriously damage UtiliCorp's contentions in the case. That is, however, no basis to deny the requests or to refuse to compel compliance with them.

11. As regards *Gamble*, UtiliCorp has made no showing of that compliance would be oppressive, burdensome, or unduly oppressive or that it would subject UtiliCorp to "embarrasment." UtiliCorp's unverified pleading simply asserts that it would take "a considerable amount of time," and at "its own labor and expense." This falls far short of any required showing. Correspondingly, UtiliCorp asserts that SIEUA, its consultants, or [somewhat amazingly] "its counsel" can purchase the same computer software. If we could go to CompUSA or Staples to buy it, that might be the case. This, however, is somewhat more complicated than "off the shelf" software and is very specialized, complex, purportedly sophisticated, and expensive. Attempting to contrast a burden by arguing that an intervenor group of UtiliCorp's

customers could readily go buy this fuel modeling software compared to the trouble of simply imputing values to the software and activating it to perform the computations it was designed to perform and produce a report it was designed to produce is plainly ridiculous.

12. UtiliCorp's arguments divert attention from the role that complex computer models today perform in rate case analysis and calculations. As in the recent Empire District Case, ER-2001-299, the very output from these models may be relied upon by all parties to calculate fuel surcharges or (ultimately) fuel refunds. Statistical computer models are employed to predict customer reactions to rate level changes. Even the revenue "runs" on the Commission's Exhibit Manipulation System ("EMS") are relied upon by the Commission, utilities and parties alike because of the otherwise extended or tedious calculations that they facilitiate. In fact, in the Empire case, both Staff and Empire exchanged fuel runs because their respective software differed. UtiliCorp's response is akin to Staff refusing to make an EMS run for a utility respecting some hypothetical set of accounting adjustments and telling the utility "go buy your own."

13. Unlike *Gamble*, SIEUA has not asked UtiliCorp to interrogate third party software developers as to their algorithms, program anomolies or programming language ambiguities. Unlike the offending interrogatory in *Arth*, SIEUA has not asked for information

> regarding the background of the arresting officer, the circumstances surrounding Arth's arrest, and the functioning of the instrument used to measure the alcohol in his blood [*Id.*, at 606]

-- information that was plainly beyond the ***available control*** of the Director and which he would have had to interrogate third parties to obtain. Here SIEUA has asked UtiliCorp to make some additional runs using ***realistic natural gas prices*** [in UtiliCorp's words: "fuel costs with which it is unfamiliar [sic]" Response, p. 4] and provide the output from the model which it admits is within its possession and control. This is not different from interrogating an identified expert as to what their opinion might be if certain facts were otherwise than were assumed. Here the "expert" simply happens to be a computer program which UtiliCorp does not deny is in its possession and control and ***which program "expert" it used*** in the preparation of a critical component of its own case. UCU cannot deny other parties access to their "expert."

14. Given that there is a protective order in this case, an alternative might be for UtiliCorp to simply provide the software for inspection and operation by SIEUA's designates or to produce the software and make it available to SIEUA's designates pursuant to the protective order. Commission data requests are not limited to being "interrogatories," but may also seek access and inspection of plant sites, accounting files, and property supposedly maintained by the utility. We have little doubt that UtiliCorp has expensed the cost of RealTime in a manner that such

costs have been paid by ratepayers, though possibly by those in St. Joseph.

15. As a means of facilitating that result, SIEUA has previously served upon UtiliCorp through its counsel supplemental data requests to produce a copy of the software and is simultaneously with this filing submitting its Motion to Shorten Time to Respond. As will be noted therein, the software exists and is in the possession of UtiliCorp as evidenced by its Response. Accordingly, a copy can be produced subject to the protective order for inspection (such inspection to include operation to test its sensitivity to changes in input variables through operation) by SIEUA's designates without delay. Assertions that the software is "proprietary" should have already been addressed by the Protective Order. Otherwise, UtiliCorp can simply provide the runs as SIEUA has requested in the disputed data requests.

WHEREFORE, UtiliCorp should be compelled to forthwith and without further delay provide responses to the data requests as sought by SIEUA.

Respectfully submitted,

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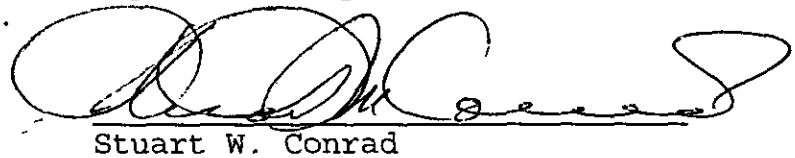
ATTORNEYS FOR SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION

November 19, 2001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Application for Leave to Intervene by facsimile upon counsel for UtiliCorp and, in addition, by Federal Express for delivery on this date, and by electronic or conventional means to the remaining attorneys of record for all parties as provided on the records of the Commission.



Stuart W. Conrad

Dated: November 19, 2001