

June 9, 1995

DOCKET NO. G-007, 011/S-95-204

ORDER FINDING AUTHORITY, RESOURCES AND INTENT TO USE THEM AND  
REQUIRING FILINGS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm	Chair
Tom Burton	Commissioner
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
Dee Knaak	Commissioner

In the Matter of the Petition by UtiliCorp  
United, Inc. for Minnesota Public Utilities  
Commission Certification to Invest in a Foreign  
Utility Under 15 U.S.C. § 79 (c)

ISSUE DATE: June 9, 1995

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**PROCEDURAL HISTORY**

On March 8, 1995, UtiliCorp, the parent company of Peoples Natural Gas and Northern Minnesota Utilities, requested certification from the Minnesota Public Utilities Commission to purchase an investment interest in United Energy, an Australian electric distribution company located in Melbourne. UtiliCorp stated that it is seeking Commission certification, pursuant to 15 U.S.C. § 79(c), that the Commission has reviewed the proposed acquisition and determined that the Commission

- has the authority and resources to protect ratepayers subject to its jurisdiction and
- intends to exercise its authority.

On March 8, 1995, the Minnesota Department of Public Service (the Department) filed its comments. The Department recommended that the Commission certify, subject to certain conditions and limitations, that pursuant to 15 U.S.C. § 79z-5b(a)(2), the Commission has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise its authority with respect to UtiliCorp's proposed investment in United Energy.

On May 4, 1995, the Commission met to consider this matter.

## FINDINGS AND CONCLUSIONS

### **A. UtiliCorp's Request**

UtiliCorp stated that its request for Commission certification was made in compliance with the Commission's June 15, 1993 Order in Docket No. G-011/S-93-281, "which requires UtiliCorp to obtain separate certifications for new foreign investments."

UtiliCorp explained that it is filing an application with the Securities Exchange Commission pursuant to Section 3(b) of the Public Utilities Holding Company Act of 1935 (PUHCA or the Act) 15 U.S.C. § 79(c), for an exemption from the SEC's registration requirements. The Company stated that in the past, when making a determination pursuant to Section 3(b) of PUHCA, the SEC applied the certification requirements found in Section 33(a)(2) of the Act, 15 U.S.C. § 79z-5b(a)(2). As a result, UtiliCorp believes that in order to obtain an exemption under Section 3(b) of the Act, it may need the certification from the Commission.

The Company added that because SEC approval under Section 3(b) of the Act applies, state *permission* to make the loan guarantee is not required in this instance.

### **B. Comments of the Department**

The Department stated that the Company's request in this case is similar to those in Docket Nos. G-011/S-93-281 and G-011/S-94-907.

The Department indicated that while state regulatory approval is not *required* for this investment, SEC approval *is* required and certification by the Commission *may* be required by the SEC<sup>1</sup> for UtiliCorp to receive an exemption to make the foreign investment. The Department advised that the Commission's authority under Minn. Stat. § 216B is adequate to protect Minnesota ratepayer interests with respect to these acquisitions.

Regarding the potential for adverse impact upon Minnesota ratepayers, the Department claimed that ownership of the foreign interest through a separate UtiliCorp subsidiary corporation will effectively insulate Peoples and NMU from any transactions or potential liabilities of the foreign interest.

In addition, the Department reviewed UtiliCorp's pro forma capital structure and determined that any potential increase in risk would be balanced by the potential benefits from diversification.

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<sup>1</sup> The Department noted that as of March 31, 1995, the Company had not filed an application with the SEC and no State certifications have been required.

In sum, the Department recommended that the Commission certify that pursuant to 15 U.S.C. § 79z-5b(a)(2), the Commission has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise its authority with respect to UtiliCorp's proposed investment in United Energy. However, the Department also recommended that the Commission's certification be subject to the following conditions and limitations:

- a. The certification is limited to UtiliCorp investments in United Energy in Australia as proposed in this docket;
- b. UtiliCorp shall provide advance notification of any other intent to acquire interest in foreign utility companies and obtain separate certification for any such additional investments;
- c. UtiliCorp shall file with the Commission:
  - (1) Copies of all required filings and reports filed with the SEC pursuant to its SEC exemption at the time it files the reports with the SEC;
  - (2) Copies of all rulings or Orders by the SEC in this matter; and
  - (3) an annual report on all UtiliCorp foreign investments.
- d. the annual report filed pursuant to c(3) above shall contain the following information:
  - (1) UtiliCorp's total foreign investment to-date by subsidiary and country;
  - (2) a list of all outstanding bonds issued for any foreign investment the Company has acquired;
  - (3) the Company's capital structure, including short term debt.

## **C. Commission Analysis**

### **1. UtiliCorp's Proposed Investment in United Energy**

#### **a. Details of the Proposal**

UtiliCorp is forming a consortium with one corporate investor and two or three institutional inventors from Australia in order to submit a bid for an investment interest in United Energy, an Australian electric distribution company located in Melbourne. By terms of its agreement with the consortium, UtiliCorp will fund between twenty percent and thirty-five percent of the consortium bid.

Based on the February 28, 1995 exchange rate, the total cost to acquire United Energy is expected to be between U.S. \$375 and \$600 million. Through its subsidiary, UtiliCorp is expected to invest between U.S. \$95 and \$200 million.

UtiliCorp plans to finance the acquisition with a loan or loans to its subsidiary from a bank or syndicate of banks. UtiliCorp will be required to guarantee the loan.

**b. Effect on Minnesota Ratepayers**

The Company claimed that the acquisition and the related loan guarantee will have no impact on the rates and services provided by Peoples or NMU.

As support for this claim, UtiliCorp indicted that:

- No Minnesota property would be encumbered as a result of the acquisition
- The expected maximum purchase price equals seven percent of the Company's assets and the effect on UtiliCorp's capital structure would be minor.
- Peoples and NMU each have been assigned their own capital structures which would be unaffected by any changes in the UtiliCorp capital structure.
- The Commission has sufficient authority under Minn. Stat. § 216B to protect the interests of Minnesota ratepayers.
- The Commission intends to exercise its regulatory authority over Peoples and NMU in the future cannot be seriously questioned.
- The Commission has sufficient authority under Minn. Stat. § 216B to protect the interests of Minnesota ratepayers.
- The Commission intends to exercise its regulatory authority over Peoples and NMU in the future cannot be seriously questioned.

The Department claimed that ownership of the foreign interest through a separate UtiliCorp subsidiary corporation will effectively insulate Peoples and NMU from any transactions or potential liabilities of the foreign interest.

The Department reviewed UtiliCorp's proforma capital structure and determined that any potential increase in risk would be balanced by the potential benefits from diversification.

The Department recommended that the Commission certify pursuant to 15 U.S.C. § 79z-5b(a)(2) that the Commission has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise its authority with respect to UtiliCorp's proposed

investment in United Energy, subject to certain reporting requirements and with the clarification that the certification was limited to the UtiliCorp investment under consideration in this docket.

**c. Commission's View of the Proposed Investment**

Based on its review of the matter, the Commission agrees with the Department that ownership of the foreign interest through a separate UtiliCorp subsidiary corporation should effectively insulate Peoples and NMU from any transactions or potential liabilities of the foreign interest and that any potential increase in risk would be balanced by the potential benefits from diversification. Consequently, the Commission finds no reason to obstruct the Company's efforts in this regard.

**2. Commission Certification**

A threshold question in this matter, however, is whether *any* Commission action relating to UtiliCorp's proposed transaction is warranted. Concern for the appropriate scope of the Commission's responsibility in this regard arises from review of the statutes which the Company and the Department cite as the basis for Commission involvement.

**a. 15 U.S.C. § 79z-5b(a)(2)**

The past dockets before the Commission involving requests for Commission certification regarding UtiliCorp foreign investments have fallen under section 15 U.S.C. § 79z-5b(a)(2) which *requires* state certification. The cited section applies to investments which do not exceed a specific amount. This filing is different because this investment will cause UtiliCorp to exceed that investment threshold. Certification pursuant to this statute, as recommended by the Department, could be interpreted as exceeding the Commission's jurisdiction and asserting jurisdiction over federal issues.

**b. 15 U.S. C. § 79 (c)**

UtiliCorp requested that the Commission provide the certification pursuant to 15 U.S.C. § 79(c). When providing an exemption under this provision of the law, the SEC has, in the past, required the same kind of state Commission certification as is provided pursuant to 15 U.S.C. § 79z-5b(a)(2). However, the Company has not received an indication from the SEC that any type of action would be necessary from the state commissions.<sup>2</sup>

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<sup>2</sup> UtiliCorp also argued that its request for certification was required by the Commission's June 15, 1993 Order in Docket No. G-011/S-93-281 which stated that the Company would have to obtain separate certification for "any such additional investments." The Commission did not intend by this language to claim unilateral authority to certify with respect to foreign investments falling outside the scope of 15 U.S.C § 79z-5b(a)(2). Ordering Paragraph 1 (a) of the June 15, 1993 Order applies only to foreign investments for which 15 U.S.C. § 79z-5b(a)(2) applies.

In these circumstances, the Commission's presumption to certify (as requested) pursuant to either 15 U.S.C. § 79z-5b(a)(2) or 15 U.S. C. § 79(c) would appear unwarranted.

However, having reviewed UtiliCorp's proposed transaction, the Commission is willing, consistent with its concern not to invoke any federal statute incorrectly or prematurely, to expedite the Company's process before the SEC when and if the SEC does require state Commission certification. Accordingly, based on its review of the Company's anticipated transaction in light of the Commission's staffing capabilities and proclivities, the Commission will proceed with this matter and make the relevant findings. See Ordering Paragraph 1.

### **ORDER**

1. The Commission hereby finds that it has not only the authority but the resources to protect ratepayers subject to its jurisdiction. The Commission further states that it intends to exercise its authority regarding UtiliCorp's proposed investment in United Energy, as proposed in this docket.
2. The Commission authorizes its Executive Secretary to transmit a copy of this Order to the Securities Exchange Commission (SEC) should that be requested as representing the Commission's official position on these questions.
3. The Commission clarifies that the certification represented in this Order is limited to UtiliCorp investments in United Energy in Australia as proposed in this docket.
4. UtiliCorp shall provide advance notification of its intent to acquire any other interest in foreign utility companies and obtain separate certification for any such additional investments if such certification is required under federal law or the SEC.
5. UtiliCorp shall file the following items with the Commission:
  - (1) copies of all required filings and reports filed with the SEC pursuant to its SEC exemption at the time it files the reports with the SEC;
  - (2) copies of all rulings or Orders by the SEC in this matter; and
  - (3) an annual report on all UtiliCorp foreign investments.
6. The annual report filed pursuant to Ordering Paragraph 5(3) above shall contain the following information:
  - (1) UtiliCorp's total foreign investment to-date by subsidiary and

country;

(2) a list of all outstanding bonds issued for any foreign investment the Company has acquired;

(3) the Company's capital structure, including short term debt.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)