State ex rel AG Processing

2003 | Cited 0 times | Missouri Court of Appeals | April 22, 2003

Opinion Vote: REVERSED AND REMANDED.

Ulrich, P.J., and Spinden, J., concur.

Opinion

Pursuant to section 386.540, [1] AG Processing, Inc. (AGP), appeals the judgment of the Circuit Court of Cole County affirming the decision of the Missouri Public Service Commission (PSC) approving the merger of UtiliCorp United, Inc. (UtiliCorp), [2] and St. Joseph Light & Power Company (SJLP).

AGP raises three points on appeal. In Point I, it claims that the PSC erred in approving the merger of UtiliCorp and SJLP (referred to collectively as the applicants) because it "was not supported by competent and substantial evidence upon the whole record and was contrary to the competent and substantial evidence of record" in that in determining, as required, that the merger was not detrimental to the public, the PSC rejected unrefuted and contrary evidence of its own staff. In Point II, it claims that the PSC erred in approving the merger because, in doing so, it impermissibly shifted the burden of proof of section 393.150 from the applicants to AGP and the other intervenors in that, by failing to require the applicants to prepare and submit a market power study, the PSC effectively was requiring the intervenors to prove that the merger was detrimental to the public, rather than requiring the applicants to prove that it was not. In Point III, it claims that the PSC erred in approving the merger because its decision was not supported by substantial and competent evidence and was against the overwhelming weight of the evidence in that: (1) the respondent's own evidence established that the merger would be detrimental to SJLP's steam and natural gas ratepayers, insofar as UtiliCorp's Exhibit 503 suggested that the costs of the merger would be allocated in a way that would result in an annual detriment of $34,000 to SJLP 's steam customers and $35,000 to its natural gas customers; and (2) the merger would result in a drop in SJLP's credit rating, resulting in a higher interest rate on debt, which would mean higher rates for ratepayers.

Reversed and remanded.

Facts

UtiliCorp, a Delaware corporation with its principal office and place of business in Kansas City, Missouri, is engaged in providing electrical and natural gas utility services in Missouri through its Missouri Public Service (MPS) operating division. SJLP, a Missouri corporation with its principal

office and place of business located in St. Joseph, Missouri, is primarily an electric company, but also provides natural gas service to several cities, and industrial steam to a number of industrial customers in St. Joseph. AGP, an agricultural cooperative and manufacturer and processor of soybean meal and soy-related food products and other grain products, operates a major processing facility in St. Joseph. AGP purchases both electricity and industrial steam from SJLP, and, in fact, is among the largest electrical and industrial steam customers of SJLP.

On March 4, 1999, UtiliCorp and SJLP entered into a merger agreement, pursuant to which SJLP was to be merged with and into UtiliCorp, with UtiliCorp being the surviving corporation. The merger agreement provided that SJLP shareholders were to receive a fixed value of $23 per share for their SJLP common stock, which was to be converted into shares of UtiliCorp common stock when the merger was completed. The amount of equity which UtiliCorp was required to issue in order to exchange shares of its stock for SJLP's stock totaled $190,000,000, which, with the SJLP indebtedness assumed by UtiliCorp, brought the total cost of the merger to approximately $270,000,000. On June 16, 1999, SJLP shareholders approved the merger, which was subject to obtaining all of the necessary government approvals, including that of the PSC.

As described in more detail in our account of the proceedings before the PSC, infra, the PSC entered its report and order approving the merger on December 14, 2000. The merger agreement had provided for the merger transaction to close on or before December 31, 2000. Articles of merger evidencing the effective date of the merger, December 31, 2000, were filed with the Secretary of State of the State of Missouri on January 3, 2001. [3]

On October 19, 1999, UtiliCorp and SJLP filed a joint application with the PSC, pursuant to section 393.190 and 4 CSR 240-2.060, seeking approval to merge. As part of their joint application, the applicants submitted for approval a five-year regulatory plan. The plan provided that SJLP would be maintained as a separate operating unit of UtiliCorp, just like MPS. The plan also provided that, upon closing of the merger, there would be a five-year rate moratorium for the SJLP operating division, pursuant to which UtiliCorp would not be able to request a rate increase barring catastrophic circumstances, and in return, the PSC would order that the SJLP rates would not be decreased during the same five years. In other words, UtiliCorp anticipated that its cost of service would go down because of savings resulting from the merger, and wanted assurance from the PSC that it would not reduce SJLP rates until UtiliCorp had a chance to benefit from the decreased cost of service. The plan also addressed the issue of the recovery of the $92,000,000 acquisition premium associated with the merger, described in more detail in our discussion of Point I, infra , providing that during the last year of the rate moratorium, SJLP would be permitted to file rate cases for its electric, gas, and steam operations, in which 50% of the unamortized balance of the merger acquisition premium would be included in the rate bases of the SJLP unit's electric, gas, and industrial steam operations and the annual amortization of the premium would be included in the expenses allowed for recovery in the cost of service.

On October 22, 1999, pursuant to 4 C.S.R. 240-2.075, AGP, as a ratepayer that would be directly affected by the proposed merger, filed an application seeking to intervene in the case. The application asked that the merger not be approved, or approved only with such conditions which would assure that ratepayers of SJLP would be fully shielded from any possible detriment and would receive the full benefit of any savings that might result from the merger. In objecting to the merger, the application alleged that any savings resulting from the synergies created by the merger should be returned to ratepayers, rather than retained by the surviving entity during the five-year rate moratorium contained in the applicants' proposed regulatory plan. AGP's application also alleged that the merger might result in an undue and anti-competitive concentration of market power. AGP's application to intervene was granted by the PSC on November 17, 1999. [4]

The PSC conducted an evidentiary hearing on the proposed merger and regulatory plan from July 10, 2000, through July 14, 2000. Mark Oligschlaeger, a PSC staff member, testified that the staff opposed the merger and recommended that the PSC reject it in its entirety as being against the public interest. In that regard, he testified that the proposed recovery of the acquisition adjustment would require that customers inappropriately pay for costs properly assignable to shareholders. He maintained that the plan would result in SJLP customers in Missouri receiving the benefit of only a very small, insignificant portion of total merger savings during the first ten years after the merger, as the vast majority of the savings would be retained by UtiliCorp to pay off the acquisition adjustment or would be offset by the detrimental impact of increased corporate cost allocations from UtiliCorp to SJLP customers.

Other objections to the merger by the staff and the intervenors included claims that it would result in UtiliCorp acquiring a degree of market power that would be detrimental to ratepayers and would result in increased financial risk for SJLP ratepayers, as after the merger, in that the credit rating of the surviving entity would likely be the BBB rating of UtiliCorp rather than the A- rating of SJLP, resulting in a higher interest rate on debt. A further objection concerned applicants' Exhibit 503, a worksheet prepared by the applicants in response to a data request from AGP, pursuant to 4 CSR 240-2.090(2), [5] asking that UtiliCorp provide a description of the method used for the allocation of the acquisition premium. Exhibit 503 contained a preliminary allocation of costs and premiums from the merger, proposing that they be allocated in a way that would result in an annual detriment of $34,000 to SJLP's steam customers and $35,000 to its natural gas customers.

On December 14, 2000, the PSC entered its report and order approving the merger. In so doing the PSC rejected UtiliCorp's proposed regulatory plan, without ruling one way or the other on whether it would ever be allowed to recoup the acquisition premium. In approving the merger as not being detrimental to the public, the PSC found that the merger would permit SJLP customers to be served by a substantially larger utility better able to compete in the wholesale energy market to provide low-cost power in the future. The PSC reasoned that, with the advent of competition in the wholesale energy market, the ensuing volatility would place a smaller company, such as SJLP, at a distinct disadvantage because it would lack sufficient financial resources to compete with larger utilities for

purchased power.

Pursuant to section 386.510, AGP filed a petition for a writ of review of the PSC's order approving the merger of SJLP and UtiliCorp with the Circuit Court of Cole County. The PSC's order was affirmed by the circuit court, which found the order to be both lawful and reasonable.

This appeal follows.Standard of Review On appeal, we will review the order or decision of the PSC, not the judgment of the circuit court. State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n, 40 S.W.3d 381, 387 (Mo. App. 2001); State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n, 976 S.W.2d 470, 476 (Mo. App. 1998). An order or decision of the PSC is presumed valid such that the burden is on the party attacking it to prove its invalidity. Alma Tel. Co., 40 S.W.3d at 387.

Section 386.510, governing judicial review by the circuit court of orders and decisions of the PSC, provides for a two-part test in which the circuit court is to determine the reasonableness and lawfulness of the order or decision. It makes no mention, however, of the standard of review of appeals from judgments of the circuit court affirming or reversing orders or decisions of the PSC. Likewise, section 386.540, authorizing such appeals, makes no provision for our standard of review. Despite the fact that section 386.510 does not, by its express terms, extend to our standard of review on appeal, recent decisions of this court, Alma Tel. Co., 40 S.W.3d at 388; Midwest Gas Users' Ass'n, 976 S.W.2d at 476, have cited the two-part test of section 386.510, without citation to that or any other statute. In the process, those cases also included review language from section 536.140.2, governing our standard of review in appeals of contested cases falling within the purview of the Missouri Administrative Procedures Act (MAPA), codified in Chapter 356. See Sims v. Baer, 732 S.W.2d 916, 920 (Mo. App. 1987). Although not cited in those cases, the standard applied apparently goes back to prior decisions of the Missouri Supreme Court in State ex rel. Dyer v. Public Service Commission, 341 S.W.2d 795, 802 (Mo. 1960) and State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 933 (Mo. banc 1958). Thus, it appears that our standard of review in PSC cases needs clarification based upon a statutory analysis.

It is well settled that if Chapter 386 actually speaks to a procedural issue, then it is to govern in PSC proceedings, but where it does not, we are to look to MAPA to fill in the gaps. State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n, 24 S.W.3d 243, 245 (Mo. App. 2000). Applying that standard and accepting the fact that Chapter 386 does not specifically address our standard of review in PSC cases, it would appear then that by default we would apply the standard of review found in section 536.140.2. Further support for that proposition can be found in section 536.140.2 itself, which provides, in relevant part:

The scope of judicial review in all contested cases, whether or not subject to judicial review pursuant to sections 536.100 to 536.140, and in all cases in which judicial review of decisions of administrative officers or bodies, whether state or local, is now or may hereafter be provided by law, shall in all cases be at least as broad as the scope of judicial review provided for in this subsection; provided, however,

that nothing herein contained shall in any way change or affect the provisions of sections 311.690 and 311.700, RSMo.

Giving this language its plain and ordinary meaning, see Pavlica v. Dir. of Revenue, 71 S.W.3d 186, 189 (Mo. App. 2002) (holding that in interpreting statutes, we are to give the language used its plain and ordinary meaning), it is clear that the legislature intended that judicial review of decisions of administrative officers or bodies, which would include any "state agency," as defined in section 536.010(5), including the PSC, should be at least as broad as the scope of judicial review provided for in the subsection. In other words, in the absence of a statutorily stated standard of judicial review in contested cases involving a state agency, the minimum standard of section 536.140.2 is to apply.

Section 536.140.2 provides that our review is to extend to a determination of whether the order or decision of the agency, in this case the PSC:

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion.

In contemplating this standard, it quickly comes to mind that it is essentially the same as the two-part test found in section 386.510 with respect to circuit court review, providing for judicial review to determine the lawfulness and reasonableness of the PSC's order or decision in that factors (1), (2), (4) and (5) are clearly inquiries with respect to the lawfulness of the order or decision, while factors (3), (6) and (7) relate to its reasonableness. Thus, in adopting the standard of review found in section 536.140.2 for PSC cases, we are not straying from what our appellate courts have previously held is our standard of review in PSC cases, sans attribution to that section.

In determining whether the PSC's order here approving the merger between the applicants was lawful, we "exercise unrestricted, independent judgment and correct erroneous interpretations of the law." Alma Tel. Co., 40 S.W.3d at 388. As to the reasonableness of the order, we are to "consider the evidence together with all reasonable supporting inferences in the light most favorable to the Commission's order." Id. (citation omitted). "If the PSC's decision is based on purely factual issues,

we may not substitute our judgment for that of the PSC." Midwest Gas Users' Ass'n, 976 S.W.2d at 476-77 (citation omitted).

I.

In Point I, AGP claims that the PSC erred in approving the merger of the applicants because it "was not supported by competent and substantial evidence upon the whole record and was contrary to the competent and substantial evidence of record" in that in determining, as required, that the merger was not detrimental to the public, the PSC rejected unrefuted and contrary evidence of its own staff. Specifically, AGP claims that there was unrefuted evidence that the merger would be detrimental to the public in that the projected merger costs would exceed projected merger savings such that SJLP consumers, such as itself, would be subjected to unreasonable and unnecessary rate increases.

In this point, AGP not only asserts that the PSC's decision "was not supported by competent and substantial evidence upon the whole record," but that it "was contrary to the competent and substantial evidence of record." Whether the PSC's decision was contrary to competent and substantial evidence in the record supporting a result favoring AGP, as it charges, is irrelevant. Amway Corp., Inc. v. Dir. of Revenue, 794 S.W.2d 666, 668 (Mo. banc 1990). Where the evidence supports either of two conflicting conclusions, this court is bound by the decision of the agency. Id. Thus, the question in this point is not whether there is substantial and competent evidence to support a contrary decision by the PSC, but whether there is substantial and competent evidence to support the PSC's order approving the merger, predicated on its finding that the merger was not detrimental to the public.

There is no dispute that the applicants are regulated utilities under Chapter 393. Thus, pursuant to section 393.190.1, their proposed merger required the approval of the PSC. State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. 1980). Section 393.190.1 reads, in pertinent part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

Section 393.190.1 does not set forth a standard or test for the PSC's approving a proposed utility merger. However, the Missouri Supreme Court in State ex rel. City of St. Louis v. Public Service Commission of Missouri , 73 S.W.2d 393, 395 (Mo. banc 1934), involving a merger subject to approval by the PSC under section 5195, RSMo 1929, a predecessor to section 393.190, recognized that the standard for the PSC's approval was whether the merger "would be detrimental to the public." Id. at

400. In so holding, the Court rejected the proposition that a merger should only be approved if it "benefited" the public, quoting from a Maryland Supreme Court decision, Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, 844 (Md. App. 1928), addressing an identical merger approval statute:

To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. In the public interest, in such cases, can reasonably mean no more than 'not detrimental to the public.' City of St. Louis, 73 S.W.2d at 400 (emphasis added).

The standard of "not detrimental to the public" adopted by the Court in City of St. Louis balances the rights of private investors to transfer their interests in a regulated utility against the right of the public served by the utility not to be harmed by such a transfer. Id. In 1975, the detriment standard was codified by the PSC in 4 CSR 240-2.060(8)(D), requiring that applicants seeking approval to merge under section 393.190 include in their applications "[t]he reasons the proposed merger is not detrimental to the public interest."

In compliance with 4 CSR 240-2.060(8)(D), the applicants asserted, inter alia, in their joint application for merger that the proposed merger of the two utility companies would not be detrimental to the public interest. The " Public Interest" section of their application is found in paragraphs 11 – 15 of the application, which read:

11. The Merger and related transactions are not detrimental to the public interest and, in fact, will be consistent and advance the public interest. UtiliCorp is fully qualified, in all respects, to own and operate the electric, natural gas and industrial steam systems currently owned and operated by SJLP and to otherwise provide sufficient and efficient, safe, reliable and affordable electric, natural gas and industrial steam service. Following the closing of the Merger, UtiliCorp will continue SJLP's operations as part of UtiliCorp's Missouri operations, but as a separate and distinct retail energy distribution unit. In connection with the operations of the SJLP unit, except as otherwise provided in this Joint Application and/or testimony in support thereof and as authorized by the Commission, UtiliCorp will utilize the rates, rules, regulations and other tariff provisions of SJLP currently on file with and approved by the Commission and will continue to provide service to the SJLP customers under those rates, rules, regulations and other tariff provisions until such time as they may be modified according to law. As a consequence, existing SJLP customers will continue to experience quality day-to-day utility service at reasonable rates and the transactions will be entirely transparent to them. Likewise, UtiliCorp, for its MPS operations, will continue to utilize the rates, rules, regulations and other tariff provisions currently on file with and approved by the Commission for MPS and will continue to operate in its existing Missouri service territories under those rates, rules, regulations and other tariff provisions until such time as they may be modified according to law.

Accordingly, UtiliCorp's MPS customers will also continue to experience quality day-to-day utility service at reasonable rates and the transaction will be entirely transparent to them as well.

12. The Merger will strengthen the competitive position of UtiliCorp, including its MPS and SJLP operations, not only in Missouri, but also in the surrounding region in the Midwest. The financial condition of the combined entity is expected to support an investment grade bond rating. The expanded asset base, increased revenues and improved cash flows for the combined entity will allow greater access to capital markets on more reasonable terms.

13. UtiliCorp and SJLP expect that the Merger will result in significant synergies from generation, economies of scale, and efficiencies realized from the elimination of duplicate corporate and administrative services, all of which will ultimately result in a lower cost of operations for the combined entity. The Merger is expected to produce savings, which should translate into lower rates for utility service than would otherwise be the case.

14. The Merger presents opportunities for benefits for all shareholders which, absent the Merger, would in all likelihood not occur. These principal benefits are as follows:

ù Competition - The combined entity will be able to participate more effectively in the increasingly competitive market for the generation of power.

ù Cost Savings - The Merger will result in cost savings from decreased electric production and gas supply costs, a reduction in operating and maintenance expenses, and other factors.

ù Coordination of Dispatch - Coordination of the commitment and dispatch of SJLP's and UtiliCorp's electric generating units in Missouri should permit more efficient utilization by UtiliCorp of the involved electric generating and transmission facilities to meet the combined requirements of the two systems.

15. As indicated, the Merger will produce economies of scale and significant savings the benefits of which should flow to UtiliCorp's SJLP customers and UtiliCorp's shareholders alike. Accordingly, UtiliCorp and SJLP request that the Commission approve UtiliCorp's proposed Regulatory Plan ("the Plan") which will provide the shareholders of UtiliCorp, the surviving corporation, and its SJLP customers with the opportunity to benefit through a sharing of the savings generated by the Merger. This, in turn, will have the effect of affording UtiliCorp the opportunity to recover the premium paid for the SJLP stock. The key components of the Plan are as follows:

ù Upon the closing of the merger, a five year rate moratorium for the SJLP unit will be put in place.

ù During the fifth year of the rate moratorium, UtiliCorp will initiate general rate cases for the electric, gas and industrial steam operations of the SJLP unit with the new rates to take effect at the

end of the moratorium period. These rate filings will specifically set out an accounting of the synergies realized during the moratorium as a result of the merger and the balance of the acquisition premium not covered by said synergies.

ù In the context of said rate cases, and for ratemaking purposes, fifty percent (50%) of the unamortized balance of the premium will be included in the rate bases of the SJLP unit's electric, gas and industrial steam operations and the annual amortization of the premium will be included in the expenses allowed for recovery in cost of service.

ù In the context of said rate cases, and for ratemaking purposes, the return allowed on the premium portion of the rate bases will be based on a UtiliCorp capital structure of 60% debt and 40% equity. The return allowed on the balance of the rate bases will be based on a SJLP unit capital structure of 47% debt and 53% equity.

ù The allocation of UtiliCorp's corporate and intra-business unit costs to MPS shall exclude the SJLP factors from the methodology for the period covered by the regulatory plan.

Paragraph 15 pertains to UtiliCorp's proposed "Regulatory Plan" concerning the proposed merger. As part of that plan, UtiliCorp was seeking a five-year rate moratorium for the "SJLP unit," but was asking that it be allowed to recover in the sixth year from SJLP's ratepayers the $92,000,000 acquisition premium it paid to purchase SJLP. The amount of the acquisition premium was calculated on UtiliCorp's agreeing to pay $23 a share to acquire the stock of SJLP, which was 36 percent above the trading value of the stock just prior to the announcement of the merger.

In approving the merger, the PSC made extensive findings and conclusions in its report and order concerning there being no detriment to the public interest. In that regard, it addressed, inter alia, the public detriment objections raised by the intervenors, including AGP, concerning whether there would be a deterioration of utility services after the merger, finding and concluding that there would not. As to the public detriment objections raised with respect to unnecessary and unreasonable rate increases caused by the merger, specifically the recoupment of the acquisition premium, the PSC found and concluded:

In asking the Commission to decide in this case how it will treat its request for recovery of its acquisition premium, UtiliCorp is asking the Commission to prejudge a ratemaking factor outside a ratemaking case. As previously indicated, the Commission will not do so. The Commission will give due consideration to a proposal to provide for recovery of a merger premium if that proposal is presented in a rate case.

The matter of the acquisition premium is also not properly before the Commission. It is a matter for a rate case. Therefore, the Commission will not address the matter of the acquisition premium in this case.

Thus, the PSC, in rejecting UtiliCorp's regulatory plan, including its provisions for recouping the acquisition premium, put off for another day deciding whether UtiliCorp would be able to recoup any portion of the acquisition premium.

With respect to the PSC's refusal to address the issue of UtiliCorp's recoupment of the acquisition premium and its effects on rates paid by SJLP consumers, the intervenors, including AGP, pointed out to the PSC that it had, in prior merger approval cases, considered such issues. In response to that argument, the PSC, in its conclusions of law, stated:

What then does it mean for the Commission to find that the proposed merger is 'not detrimental to the public'? Furthermore, who is 'the public' that is to be protected from detriment? The parties suggest that the public that the Commission is obligated to protect is the ratepayers and the detriments from which they are to be protected are higher rates or a deterioration in the level of customer service. Certainly the Commission has utilized those definitions in past cases. See e.g. Laclede Gas Company, 16 Mo P.S.C. (N.S.) 328 (1971). There does not, however, appear to be any controlling authority that would firmly limit the Commission to those definitions. Nevertheless, the Commission will generally adhere to those definitions in this decision.

Although phrased in other words, AGP argues in this point that in order to determine whether the proposed merger was detrimental to the public interest, the PSC was duty bound to consider and decide the issue of whether UtiliCorp would be allowed to recoup any of the acquisition premium, rather than leaving that issue for a future ratemaking case. We agree.

In finding that the proposed merger was not detrimental to the public interest, as it was required to do in order to approve the merger, the PSC was obviously persuaded by the theme asserted by the applicants in their joint application that the merger was essential to insuring that the ratepayers of SJLP would continue to receive low-cost power in the future. In that regard, the PSC found:

UtiliCorp and SJLP argued that their proposed merger would not be detrimental to the public and would, in fact, be beneficial for the ratepayers of both companies. SJLP is one of the smallest investor-owned, publicly traded, electric utilities in the country. While SJLP has been able to provide relatively low-cost, reliable power to its customers in the past, the changing structure of the electric power system may make it more difficult for SJLP to continue to provide low-cost power in the future.

Without considering the issue of the recoupment of the acquisition premium, the PSC then made extensive findings as to why it believed that the savings from the merger would exceed the cost, which coupled with the financial strength of UtiliCorp would allow it to provide SJLP customers low-cost power in the future.

We fail to see how the PSC could make critical findings with respect to cost allocations of the merger

without making a determination as to whether UtiliCorp would be allowed to recoup any of the $92,000,000 acquisition premium from those same ratepayers. The PSC conceded that in a subsequent ratemaking case it was possible that UtiliCorp would be permitted to recoup the acquisition premium as an allocated cost. Of course, the issue of whether to allow the merger would not be an issue in a ratemaking case. Thus, the fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of deciding it as a relevant and critical issue in ruling up or down on the proposed merger in that the merger once approved could not be disapproved. To proceed as the PSC did in this case is akin to not determining the cause of death in a murder case, but instead leaving that issue for the wrongful death case that was to follow. The fact that an issue can be decided in a subsequent proceeding does not mean that it is not a relevant and an essential issue to the present proceeding, requiring resolution therein. While we understand the PSC's position that it cannot speculate as to an increase in rates that might result in the future due to the merger, it certainly can determine presently whether the payment of the acquisition premium by UtiliCorp was reasonable as to the acquisition of SJLP and, therefore, should have been considered as part of its savings versus cost analysis in determining whether the proposed merger would be detrimental to the public. See State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n, 537 S.W.2d 388, 399 (Mo. banc 1976) (stating that, for ratemaking purposes, the recoverability of the cost of an asset acquired from another utility depends on the reasonableness of the acquisition, considering the factors of whether the transaction was at arm' ;s length, if it resulted in operating efficiencies, and if it made possible a desirable integration of facilities).

Because we find that the PSC, in determining whether to approve the merger, failed to consider and decide all the necessary and essential issues, specifically the issue of UtiliCorp's being allowed to recoup the acquisition premium, we find that it erred, requiring us to reverse and remand for the PSC to consider and decide that issue in making its determination of whether to approve the merger. section 536.140.5; Phipps v. Sch. Dist. of Kansas City, 645 S.W.2d 91, 105-06 (Mo. App. 1982).

II.

In Point II, AGP claims that the PSC erred in approving the merger because, in doing so, it impermissibly shifted the burden of proof of section 393.150 from the applicants to AGP and the other intervenors in that, by failing to require the applicants to prepare and submit a market power study, the PSC effectively was requiring the intervenors to prove that the merger was detrimental to the public, rather than requiring the applicants to prove that it was not. We disagree.

In claiming as it does in this point with respect to the applicants' burden of proof, AGP relies, at least in part, on section 393.150.2. That section, however, does not address merger cases, but ratemaking cases and, thus, has no application here. The applicants, however, concede that under section 393.190, 4 CSR 240-2.060(7)(D), (8)(D), and the City of St. Louis , they had the burden of proving that the merger was not detrimental to the public. Nonetheless, it disputes AGP's claim that as part of that burden, it was required to submit a market power study.

In support of its claim that the applicants were required, as part of their burden of proof, to submit a market power study, AGP cites several prior PSC decisions in which the PSC required merger applicants to file market power studies. However, an administrative agency is not bound by stare decisis, State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n, 835 S.W.2d 356, 371 (Mo. App. 1992), nor are PSC decisions binding precedent on this court. Cent. Hardware Co., Inc. v. Dir. of Revenue, 887 S.W.2d 593, 596 (Mo. banc 1994). It is AGP's burden, as the appellant, to show on appeal that the PSC erred by failing to order the applicants to submit a market power study as part of their application for approval of their merger. Snelling v. S.W. Bell Tel. Co., 996 S.W.2d 601, 603 (Mo. App. 1999). They wholly failed in that burden.

Point denied.

III.

In Point III, AGP claims that the PSC erred in approving the merger because its decision was not supported by substantial and competent evidence and was against the overwhelming weight of the evidence in that: (1) the applicants' own evidence established that the merger would be detrimental to SJLP's steam and natural gas ratepayers, insofar as UtiliCorp's Exhibit 503 demonstrated that the costs of the merger would be allocated in a way that would result in an annual detriment of $34,000 to SJLP's steam customers and $35,000 to its natural gas customers; and (2) the merger would result in a drop in SJLP's credit rating, resulting in a higher interest rate on debt, which would ultimately lead to higher rates for ratepayers.

A. Exhibit 503 AGP, pursuant to 4 CSR 240-2.090(2), filed the following data request:

The joint application states, at page 4, that Applicants propose to include 50% of the unamortized balance of the merger premium in the rate bases of SJL& P's electric, gas and industrial steam operations, and to expense the annual amortization of the premium in cost of service. With respect to this statement please provide the following information:

a. A complete explanation of why none of this premium is proposed to be included in the rate base or expenses of the Missouri Public Service Company.

b. A description and complete explanation of the rationale for the method to be used for the allocation of premium related investments and expenses to SJL&P's electric, gas and industrial steam operations.

c. A comprehensive discussion and quantification of each and every benefit which you contend will be received by SJL&P's steam customers as the result of the proposed merger.

In response to parts b and c of the request, UtiliCorp produced Exhibit 503, a "preliminary

allocations worksheet," marked "DRAFT," showing proposed allocations that would result in an annual detriment of $34,000 to SJLP's steam customers and $35,000 to its natural gas customers. The allocations reflected in Exhibit 503 were predicated on the applicants' regulatory plan being accepted by the PSC, which did not occur. Hence, the detriment argument of AGP as to the steam and natural gas customers is without merit.

B. Credit Rating

In recommending against the merger, Public Counsel charged that it would cause a lowering of the credit rating presently enjoyed by SJLP in that it had a rating of A-, while UtiliCorp only had a rating of BBB, and that this drop in rating would result in a higher interest rate on debt and higher rates for ratepayers. In addressing this issue, the PSC found and concluded:

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 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. The risk of an increased cost of debt is just one more factor for the Commission to weigh when deciding whether or not to approve the merger.

AGP claims that these findings and conclusions were not supported by the evidence. We disagree.

Although couched in terms of sufficiency of the evidence, what AGP is really challenging is the interpretation given this evidence by the PSC with respect to the credit rating issue. Based on the undisputed evidence in the record concerning this issue, we cannot say that the PSC's findings and conclusions with respect thereto amount to an unreasonable interpretation of the facts before it.

Point denied.

Conclusion

The decision of the PSC, approving the merger of UtiliCorp and SJLP, is reversed and remanded to the PSC for further proceedings in accordance with this opinion.

1. . All statutory references are to RSMo 2000, unless otherwise indicated.

2. . UtiliCorp has changed its name to Aquila, Inc., but we will continue to use the name UtiliCorp to remain consistent with the proceedings below.

3. . Aquila filed with this court a motion to dismiss the appeal for mootness, claiming that, from a practical standpoint, this court cannot grant the relief requested, given the fact that, after January 1, 2001, the former SJLP properties have been integrated and operated under the common ownership, management and control of UtiliCorp, now Aquila, and that SJLP's Board of Directors has disbanded and SJLP's senior management has retired or been terminated. Aquila argues that " [i]t is not reasonable or feasible now to unwind the merger and put matters as they stood prior to December 31, 2000," the effective date of the merger. The Missouri Supreme Court rejected a similar contention in State ex rel. Consumers Public Service Company v. Public Service Commission, 180 S.W.2d 40, 43-44 (Mo. banc 1944). Aquila's motion is denied.

4. . Other intervenors included the City of Springfield, Missouri, Union Electric Company, d/b/a AmerenUE, and the Missouri Department of Natural Resources.

5. . 4 CSR 240-2.090(2) provides, in pertinent part, that " [p]arties may use data requests as a means for discovery.. .. As used in this rule, the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties. Answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers."