

**REPORTS**  
**OF THE**  
**PUBLIC SERVICE COMMISSION**  
**OF**  
**THE STATE OF MISSOURI**

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**Volume 19 MPSC 3d**

**July 1, 2009 – August 31, 2010**

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**Morris Woodruff**

Reporter of Opinions

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**JEFFERSON CITY, MISSOURI**

**(2014)**



## PREFACE

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This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning July 1, 2009 through August 31, 2010. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2000, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.



**TABLE OF CONTENTS**

---

Commission Organization ..... vii  
Table of cases reported .....xiii  
Reports and Orders of the Commission..... 1  
Digest ..... 5



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**UTILITY SERVICES DIVISION DIRECTOR**

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**Reported Cases**

xiii

-A-

Page

<b>SR-2010-0023, WR-2010-0025, SR-2010-0026, and WR-2010-0027</b>	<b>Aqua Development Company, d/b/a Aqua Missouri, Inc.; Aqua RU, Inc. d/b/a Aqua Missouri, and Aqua Missouri, Inc. – Order Approving Non-Unanimous Disposition Agreements and Approving Tariffs</b>	341
<b>AO-2010-0366</b>	<b>Assessment Order for Fiscal Year 2011</b>	499
<b>GE-2009-0443</b>	<b>Atmos Energy Corporation – Order Approving Unanimous Stipulation and Granting Waiver</b>	75
<b>GR-2006-0387 and GR-2010-0192</b>	<b>Atmos Energy Corporation – Order Consolidating Cases</b>	235
<b>GR-2010-0192</b>	<b>Amos Energy Corporation – Order Approving Stipulation and Agreement</b>	634

-B-

<b>WO-2007-0410</b>	<b>Black Oak Mountain Water Company and Black Oak Mountain Sewer Company – Order Approving Transfer of Assets and Canceling Certificates and Tariffs</b>	228
---------------------	--	-----

-C-

<b>TC-2009-0440</b>	<b>Communicate Technological Systems, L.L.C. – Order of Default and Authorizing General Counsel to Seek Penalties</b>	32
---------------------	---	----

-E-

<b>ER-2010-0130</b>	<b>The Empire District Electric Company – Order Approving Stipulation and Agreement and Approving Proposed Procedural Schedule</b>	322
<b>ER-2010-0130</b>	<b>The Empire District Electric Company – Order Approving Unanimous Stipulation and Agreement</b>	368
<b>ER-2010-0130</b>	<b>The Empire District Electric Company – Order Approving Stipulation and Agreement and Cancelling Hearing</b>	619
<b>GR-2009-0434</b>	<b>The Empire District Gas Company – Order Approving Partial Stipulation and Agreement and Partial Stipulation and Agreement on Transportation Tariff Issues</b>	213
<b>GR-2009-0434</b>	<b>The Empire District Gas Company – Report and Order on DSM Funding</b>	308
<b>GR-2009-0434</b>	<b>The Empire District Gas Company – Order Clarifying Report &amp; Order on DSM Funding</b>	336
<b>AO-2011-0035</b>	<b>Chairman’s Request for a Status Report Regarding Energy Efficiency Advisory Groups and Collaboratives</b>	514

-K-

<b>ER-2009-0089</b>	<b>Kansas City Power &amp; Light Company – Order Regarding Staff’s Motion to Compel</b>	125
<b>EO-2009-0431</b>	<b>KCP&amp;L Greater Missouri Operations Company – Order Approving Annual Fuel Adjustment Clause True-Up</b>	23
<b>EC-2009-0430</b>	<b>KCP&amp;L Greater Missouri Operations Company and Kansas City Power &amp; Light Company – Order Granting Motion for Summary Determination and Dismissing Complaint</b>	160

-L-

<b>GR-2005-0203 &amp; GR-2006-0288</b>	<b>Laclede Gas Company – Order Directing Laclede to Produce Information</b>	95
<b>GT-2009-0056</b>	<b>Laclede Gas Company – Report &amp; Order</b>	201
<b>GF-2009-0450</b>	<b>Laclede Gas Company – Report &amp; Order</b>	459
<b>GR-2010-0171</b>	<b>Laclede Gas Company – Report &amp; Order</b>	621
<b>SR-2010-0110 &amp; WR-2010-0111</b>	<b>Lake Region Water &amp; Sewer Company – Report and Order</b>	515

-M-

<b>IU-2010-0164</b>	<b>Mid-Missouri Telephone Company of Pilot Grove, Missouri – Order Granting Application for Accounting Authority Order</b>	167
<b>SO-2010-0237</b>	<b>Mill Creek Sewers, Inc. – Report &amp; Order Appointing Interim Receiver and Directing Action for Court-Appointed Receiver</b>	331
<b>SO-2010-0237</b>	<b>Mill Creek Sewers, Inc. – Order Granting Motion for Clarification</b>	339
<b>WR-2010-0131</b>	<b>Missouri-American Water Company – Order Granting Interventions and Waiver</b>	152
<b>WE-2010-0136</b>	<b>Missouri-American Water Company – Order Granting Variance for Discontinuance of Service in St. Louis County</b>	327
<b>WR-2010-0131</b>	<b>Missouri-American Water Company – Report and Order</b>	481
<b>GR-2009-0355</b>	<b>Missouri Gas Energy – Order Regarding Customer Comments</b>	110
<b>GR-2009-0355</b>	<b>Missouri Gas Energy – Report and Order</b>	245
<b>GA-2009-0422</b>	<b>Missouri Gas Utility, Inc. – Order Granting Certificate of Public Convenience and Necessity</b>	2



<b>GA-2010-0012</b>	<b>Missouri Gas Utility, Inc. – Order Granting Certificate of Convenience and Necessity</b>	102
<b>GA-2010-0189</b>	<b>Missouri Gas Utility, Inc. – Order Granting Certificate of Convenience and Necessity</b>	351
<b>GA-2010-0289, et al.</b>	<b>Missouri Gas Utility, Inc. – Order Granting Certificate of Convenience and Necessity</b>	501
<b>GO-2009-0094</b>	<b>MoGas Pipeline, LLC – Order Denying Application to Terminate the Commission’s Intervention Before the FERC</b>	9

-N-

<b>RA-2009-0375</b>	<b>Nexus Communications, Inc., d/b/a TSI – Order Granting Application for Eligible Telecommunications Carrier Status and Waiver of Regulations</b>	43
---------------------	--	----

-R-

<b>SA-2010-0096</b>	<b>RDG Development, LLC – Order Granting Certificate of Convenience and Necessity</b>	146
<b>SA-2010-0096</b>	<b>RDG Development, LLC – Order Acknowledging Satisfaction and Modifications of Conditions for the Grant of a Certificate of Convenience and Necessity</b>	355

<b>EW-2011-0031</b>	<b>Renewable Energy Standard Law Workshop – Order Opening a Workshop File to Explore Legislative and Regulatory Means to Improve and Clarify Missouri’s Renewable Energy Standard Law, Mo. Rev. Stat. §§ 393.1020 to 393.1030</b>	510
<b>EX-2010-0169</b>	<b>Renewable Energy Standard Requirements Rulemaking – Order Denying Motion and Applications for Rehearing and Requests for Stay</b>	505

-S-

<b>WA-2008-0403, <i>et al.</i></b>	<b>Seges Partners Mobile Home Park, L.L.C. – Order Granting Certificates of Convenience and Necessity</b>	29
<b>SW-2011-0042 and WW-2011-0043</b>	<b>Sewer &amp; Water Capital Recovery Mechanisms Workshop – Order Directing Notice of Working Case and Directing Filing</b>	643
<b>GA-2010-0114</b>	<b>Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas – Order Granting Certificate of Convenience and Necessity</b>	156
<b>IE-2009-0357</b>	<b>Southwestern Bell Telephone Company, d/b/a AT&amp;T Missouri – Order Approving Unanimous Stipulation and Agreement</b>	20

-T-

<b>SA-2010-0100</b>	<b>Timber Creek Sewer Company – Order Granting Certificate of Convenience and Necessity</b>	121
<b>SA-2010-0100</b>	<b>Timber Creek Sewer Company – Order Acknowledging Dismissal and Rescinding Certificate of Convenience and Necessity</b>	225
<b>SA-2010-0063</b>	<b>Timber Creek Sewer Company – Order Dismissing Contested Case and Granting Certificate of Convenience and Necessity</b>	360
<b>TA-2009-0327</b>	<b>TracFone Wireless, Inc. – Order Granting Designation as an Eligible Telecommunications Carrier</b>	36
<b>CE-2010-0077</b>	<b>tw telecom of kansas city, llc – Order Granting Partial Waiver of 4 CSR 240-32.050(4)(B)</b>	92

-U-

<b>EO-2008-0218</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Accepting Staff’s Report and Closing Case</b>	1
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting the Application to Intervene of the Consumers Council of Missouri</b>	47

<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting the Application to Intervene of AARP</b>	48
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting the Application to Intervene of Missouri-ACORN</b>	50
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting the Application to Intervene of the Natural Resources Defense Council</b>	52
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting the Application to Intervene of Missouri Retailers Association</b>	53
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting the Application to Intervene of Missouri Joint Municipal Electric Utility Commission</b>	55
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting Application to Intervene Out of Time of the City of O’Fallon, the City of University City, the City of Rock Hill, and the St. Louis County Municipal League</b>	78
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing</b>	80

<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Regarding the Late-Filed Application to Intervene of Kansas City Power &amp; Light Company</b>	108
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Report &amp; Order Regarding Interim Rates</b>	169
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Denying AmerenUE’s Request for Clarification Regarding Application of Statutes and Rules</b>	199
<b>ER-2010-0165</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Approving Tariff to Adjust Rate Schedules for Fuel Adjustment Clause</b>	220
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Approving First Stipulation and Agreement</b>	350
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Approving Second Stipulation and Agreement, Third Stipulation and Agreement, and Market Energy Prices Stipulation and Agreement</b>	358
<b>EA-2010-0216</b>	<b>Union Electric Company, d/b/a AmerenUE – Order Granting Certificate of Convenience and Necessity</b>	366
<b>ER-2010-0036</b>	<b>Union Electric Company, d/b/a AmerenUE – Report and Order</b>	376

-W-

<b>WM-2009-0436</b>	<b>Rodger Owens, d/b/a Whispering Hills Water System – Order Approving Unanimous Stipulation and Agreement</b>	26
<b>WA-2009-0031</b>	<b>Jerry Reed, d/b/a Woodland Acres Water System – Order Approving Unanimous Stipulation and Agreement</b>	16

**REPORTS OF  
THE PUBLIC SERVICE COMMISSION  
OF THE  
STATE OF MISSOURI**

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**In the Matter of an Investigation of Union Electric Company, d/b/a  
AmerenUE's Storm Preparation and Restoration Efforts**

File No. EO-2008-0218  
Decided July 8, 2009

**Electric §33.** The Commission accepted Staff's report regarding AmerenUE's storm restoration efforts following the January 2009 ice storm in Southeast Missouri.

**ORDER ACCEPTING STAFF'S REPORT AND CLOSING CASE**

In January 2008, the Commission directed its Staff to investigate Union Electric Company, d/b/a AmerenUE's response to the severe ice storm of December 2007. Staff completed that investigation and offered several suggestions on how AmerenUE could improve its response to future storm related outages.

Thereafter, in January 2009, AmerenUE again faced a massive outage resulting from a severe ice storm that devastated Southeastern Missouri. In April 2009, the Commission directed Staff to again investigate AmerenUE's response to the outages that resulted from the ice storm. This time, the Commission directed Staff to evaluate the effectiveness of the storm response improvements implemented by AmerenUE following the 2007 ice storm. Staff completed that investigation and filed its final report on June 15, 2009.

Staff's report concluded that AmerenUE applied the lessons it learned from previous storm restoration events to improve its response to the latest ice storm. As a result, AmerenUE was able to restore power to its customers faster and was able to assist other electric providers that were also facing massive outages following the storm.

The Commission finds that no further investigation is required at this time. Therefore, the Commission will accept Staff's report and close this file.

MISSOURI GAS UTILITY, INC.

2

19 Mo. P.S.C. 3d

**THE COMMISSION ORDERS THAT:**

1. The Commission accepts Staff's report on Union Electric Company, d/b/a AmerenUE's storm preparation and restoration effort.
2. This order shall become effective on July 8, 2009.
3. This file shall be closed on July 9, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Morris L. Woodruff, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain a Distribution System to Provide Gas Service in Benton County, Missouri, as a New Certificated Area.**

*File No. GA-2009-0422  
Decided July 8, 2009*

**Certificates §43.** Section 393.170 RSMo authorizes the Commission to grant two types of certificates of convenience and necessity. A "line certificate" permits the constructions of transmission lines or production facilities, while an "area certificate" is Commission approval to exercise a franchise by serving customers.

**Gas §1.** The Commission previously granted Missouri Gas Utility, Inc. a certificate of convenience and necessity to provide natural gas sales and transportation services for a certain area when the corporation realized a planned highway expansion by the Missouri Department of Transportation would likely require construction of a new line in a few years. The Commission approved a new certificate to allow for an alternate route of service.

**Gas §2.** When Missouri Gas Utility, Inc. applied for a certificate of convenience and necessity authority to construct, install, own, operate, control, manage, and maintain a distribution system to provide natural gas service in a new area, the Commission conditioned approval of the certificate on corporation's shareholders being totally responsible for the success of the project, with no liability or responsibility put on customers.

**Gas §3.** Section 393.170 RSMo authorizes the Commission to grant two types of certificates of convenience and necessity. A "line certificate" permits the constructions of transmission lines or production facilities, while an "area certificate" is Commission approval to exercise a franchise by serving customers.



MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

3

**ORDER GRANTING CERTIFICATE  
OF PUBLIC CONVENIENCE AND NECESSITY**

**Syllabus:**

This order expands the previous certificate of convenience and necessity to provide natural gas sales and transportation service in the cities of Green Ridge, Cole Camp, Lincoln and Warsaw, Missouri (“area certificate”) and various other unincorporated areas located in Pettis and Benton County of Missouri Gas Utility, Inc.

**Procedural History:**

On April 29, 2009, the Commission granted MGU a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain a natural gas distribution system in the cities of Green Ridge, Cole Camp, Lincoln and Warsaw, Missouri, and various other unincorporated areas located in Pettis and Benton County, and a transmission line certificate from the tap on the Southern Star Central Pipeline running approximately 2.5 miles to its requested general service area.<sup>1</sup> Subsequently, MGU filed this application to revise that service area to include additional areas in Benton County.

The Commission issued an order directing notice of the application. In that order, the Commission directed interested parties to ask to intervene no later than June 16, 2009. The Commission received no intervention requests.

On June 16, 2009, the Staff of the Commission filed its verified recommendation. Staff stated that granting the application would be in the public interest so long as the same conditions as placed on the earlier certificates are also attached to this certificate. MGU responded that it did not object to the conditions proposed by Staff. Staff filed a clarification of its conditions on June 29, 2009. MGU did not file a further response.

**Findings of Fact:**

The Commission has reviewed the verified application and pleadings and finds as follows:

1. MGU is a Colorado corporation in good standing, and has a certificate from the Missouri Secretary of State authorizing it to do business in Missouri. MGU is a “gas corporation” and provides natural gas service in the Missouri counties of Harrison, Daviess and Caldwell.<sup>2</sup>
2. MGU was recently granted a certificate of service for the service area including Green Ridge, Cole Camp, Lincoln, and

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<sup>1</sup> File No. GA-2009-0264.

<sup>2</sup> Application and Motion for Expedited Treatment, (filed May 22, 2009) paras. 1-3.

MISSOURI GAS UTILITY, INC.

4

19 Mo. P.S.C. 3d

Warsaw. Each of these cities is a 4<sup>th</sup> Class city located in Pettis or Benton County, Missouri.<sup>3</sup>

3. As part of its project, MGU originally planned to bring its main line south along Highway 65 from Highway ZZ to Warsaw, Missouri.<sup>4</sup>

4. During the planning process, however, MGU discovered that a planned expansion of Highway 65 by the Missouri Department of Transportation would likely require the line to be moved within a few years. Thus, MGU requests that the Commission approve this certificate so that it may use an alternate route for providing service.<sup>5</sup>

5. The route of the proposed main line is described in the Application at paragraph 8.

6. The legal description of the new certificate area in Benton County, Missouri, is as follows:

- Sections 5, 6, and 7 in Township 41 North, Range 21 West
- Sections 1, 12, and 13 in Township 41 North, Range 22 West
- Sections 2, 3, 9, 10, 15, 16, 17, 19, 20, 21, 28, 29, 30, 31, 32 in Township 42 North, range 21 West
- Sections 12, 13, 24, 25, 36 in Township 42 North, Range 22 West

7. The proposed route of the line is shown on the map attached as Appendix A to the Application.

8. The proposed service area is an area where MGU currently does not hold a certificate for natural gas service from the Commission and no other natural gas supplier serves that area.<sup>6</sup>

9. MGU incorporated by reference its feasibility study provided in File No. GA-2009-0264. The feasibility study contains a description of the plans and specifications for the project, including the estimated cost of construction and an estimate of the number of customers, revenues, and expenses during the first three years of operations. The change in the route will not have a material effect on the previously filed feasibility study because additional footage cost will be offset by additional customer usage.<sup>7</sup>

10. MGU will use rates approved by the Commission in File No. GA-2009-0264 for service in this new area.<sup>8</sup>

11. MGU was granted permission by the Commission to finance this construction in Commission File No. GF-2009-0331.

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<sup>3</sup> Application, para. 5; and File No. GA-2009-0422.

<sup>4</sup> Application, para. 6.

<sup>5</sup> Application, paras. 7-8.

<sup>6</sup> Application, para. 16.

<sup>7</sup> Application, para. 11.

<sup>8</sup> Application, para. 11.

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

5

12. Construction of the project will follow MGU's customary standards and the rules of the Commission.<sup>9</sup>

13. MGU has obtained franchises from the Cities of Green Ridge, Cole Camp, Lincoln, and Warsaw.<sup>10</sup>

14. Other than state highway and county road rights-of-way and permits which have been acquired, no other franchise or permit from municipalities, counties, or other authorities in connection with the proposed construction is required to serve this area.<sup>11</sup>

15. MGU has the ability to provide service in the proposed area by the construction of new facilities.<sup>12</sup>

16. Staff has proposed the following conditions to the certificate:

- a. MGU's shareholders are totally responsible for the success of this project, with no liability or responsibility put on customers;
- b. The service area granted in this case is to be treated as a modification to the service area recently granted in GA-2009-0264 and the service area granted in this case is to be made a part of, and included in, the GA-2009-0264 service area for the purpose of keeping separate books and records, class cost of service studies and revenue requirements, and depreciation rates;
- c. MGU must keep books and records for the proposed service areas granted in GA-2009-0264 and this case separate from the books and records for its other service areas;
- d. MGU must file class cost of service studies and revenue requirements for the new service areas granted in GA-2009-0264 and this case in its next rate case. These class cost of service studies and revenue requirements shall be separate from MGU's other service areas;
- e. MGU must use the depreciation rates contained in Appendix B to the Staff Recommendation for the service territory requested in this application;

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<sup>9</sup> *Application*, para. 13.

<sup>10</sup> *Application*, para. 15.

<sup>11</sup> *Application*, para. 15.

<sup>12</sup> *Application*, para. 16; *Staff Recommendation*, (filed June 16, 2009) Appendix A, p. 2.

MISSOURI GAS UTILITY, INC.

6

19 Mo. P.S.C. 3d

- f. MGU will submit to a rate review for this certified area 36 months after the effective date of the order in case GA-2009-0264; and
- g. MGU can obtain the capacity on the pipeline to fully serve this area for all of its customer classes, including capacity to serve any future growth.

17. The requested certificate of convenience and necessity would not jeopardize MGU's current natural gas service if Staff's conditions are met.<sup>13</sup>

18. The proposed service with Staff's conditions will provide an option for customers in the area and is in the public interest.

**Conclusions of Law:**

1. MGU is a "gas corporation" and a "public utility" as defined in subsections 386.020(18) and (42), RSMo Cum. Supp. 2008.

2. MGU is subject to the Commission's jurisdiction under Chapters 386 and 393, RSMo 2000.

3. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the Commission.<sup>14</sup> A gas corporation may not exercise any right under a franchise unless the Commission gives it a certificate.<sup>15</sup> Also, the Commission may impose such conditions on the certificate as it deems reasonable and necessary.<sup>16</sup>

4. The permission and approval that may be granted pursuant to section 393.170 is of two types: The PSC may grant CCNs for the construction of power plants, as described in subsection 1, or for the exercise of rights and privileges under a franchise, as described in subsection 2. See *Harline*, 343 S.W.2d at 185 (quoted in *Aquila I*, 180 S.W.3d at 33). Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two subsections of section 393.170. Permission to build transmission lines or production facilities is generally granted in the form of a "line certificate." See 4 CSR 240-3.105(1)(B). A line certificate thus functions as PSC approval for the construction described in subsection 1 of section 393.170.<sup>FN6</sup> Permission to

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<sup>13</sup> *Staff Recommendation*, Appendix A, p. 2.

<sup>14</sup> Section 393.170.1, RSMo. 2000.

<sup>15</sup> Section 393.170.2, RSMo. 2000.

<sup>16</sup> Subsection 393.170.3, RSMo 2000.

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

7

exercise a franchise by serving customers is generally granted in the form of an "area certificate." See 4 CSR 240-3.105(1)(A). Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170.<sup>17</sup>

4. The Commission concludes that the conditions recommended by Staff are reasonable and necessary.

5. Based on its findings of fact above, the Commission concludes that with the conditions proposed by Staff, the proposed service area is both necessary and convenient for the public service.

6. The Commission authorizes MGU to construct, install, own, operate, control, manage, and maintain a natural gas distribution system as described in its application.

7. The Commission also concludes that it is reasonable and necessary for MGU to file revised tariff sheets that reflect this new certificated area and the rates for that area.

**THE COMMISSION ORDERS THAT:**

1. Subject to the conditions set out below, Missouri Gas Utility, Inc., is granted a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain a natural gas distribution system to provide natural gas sales and transportation service in a portion of Benton County specifically as set out in the map showing the "Additional MGU Certificate Area" and filed as Appendix A to the Application filed on May 22, 2009. Appendix A is attached to this order.

2. The certificate is granted with the following conditions:
  - a. MGU's shareholders are totally responsible for the success of this project, with no liability or responsibility put on customers;
  - b. The service area granted in this case is to be treated as a modification to the service area recently granted in GA-2009-0264 and the service area granted in this case is to be made a part of, and included in, the GA-2009-0264 service area for the purpose of keeping separate books and records, class cost of service studies and revenue requirements, and depreciation rates;
  - c. MGU must keep books and records for the proposed service areas granted in GA-2009-

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<sup>17</sup> *State ex rel. Cass County v. Public Service Com'n*, 259 S.W.3d 544, 549 (Mo. App. 2008) (footnote omitted).

MISSOURI GAS UTILITY, INC.

8

19 Mo. P.S.C. 3d

- 0264 and this case separate from the books and records for its other service areas;
- d. MGU must file class cost of service studies and revenue requirements for the new service areas granted in GA-2009-0264 and this case in its next rate case. These class cost of service studies and revenue requirements shall be separate from MGU's other service areas;
  - e. MGU must use the depreciation rates contained in Appendix B to the Staff Recommendation for the service territory requested in this application;
  - f. MGU will submit to a rate review for this certified area 36 months after the effective date of the order in case GA-2009-0264; and
  - g. MGU can obtain the capacity on the pipeline to fully serve this area for all of its customer classes, including capacity to serve any future growth.
3. The certificate of convenience and necessity referenced in ordered paragraph 1 shall become effective on July 18, 2009.
4. Missouri Gas Utility, Inc., shall file with the Commission tariff sheets describing the new area and line certificates and the rates set out in this order no later than August 7, 2009. The tariffs shall specifically describe the Sections for which Missouri Gas Utility, Inc., has an area certificate.
5. Missouri Gas Utility, Inc., shall not serve the new service area granted in this order before the tariff sheets described in paragraph 4 become effective.
6. Nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures involved, or of the value for ratemaking purposes of the properties involved, nor as acquiescence in the value placed on the property.
7. The Commission reserves the right to consider the ratemaking treatment to be afforded the properties involved, and the resulting cost of capital, in any later proceeding.
8. This order shall become effective on July 18, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

MOGAS PIPELINE, LLC

19 Mo. P.S.C. 3d

9

**In the Matter of FERC Docket No. CP07-450, MoGas Request for Authorization Under Blanket Certificate\***

*File No. GO-2009-0094*

*Decided July 15, 2009*

**Evidence, Practice and Procedure §2.** The Commission has authority under Missouri law to intervene before the FERC in matters involving an interstate pipeline operating in this state.

**Evidence, Practice and Procedure §2.** The Commission has authority under Missouri law to employ outside legal counsel to represent it in matters before the FERC.

**Gas §7.** The Commission has authority under Missouri law to intervene before the FERC in matters involving an interstate pipeline operating in this state.

**Gas §7.** The Commission has authority under Missouri law to employ outside legal counsel to represent it in matters before the FERC.

**ORDER DENYING APPLICATION TO TERMINATE THE COMMISSION'S INTERVENTION BEFORE THE FERC**

**Procedural History**

On September 9, 2008, MoGas Pipeline, LLC, filed what it called an Application to Terminate. MoGas explained that it is an interstate pipeline, operating in Missouri under the jurisdiction of the Federal Energy Regulatory Commission (FERC). MoGas complains that the Commission, acting through its Staff, intervened to file a protest in a pending FERC case brought by MoGas for approval of a compression project on its interstate pipeline. MoGas contends the Commission has no statutory authority to intervene in a matter of interstate commerce before the FERC. MoGas also complains that the Commission has violated Missouri law by hiring outside counsel to represent its interests before the FERC. On those bases, MoGas asks the Commission to withdraw its protest in the FERC case, terminate its intervention in the FERC case, and instruct Staff to cease its investigation into the substance of the FERC case.

Staff filed a response to MoGas' Application to Terminate on September 23, 2008. Staff contends the Commission has statutory authority to investigate and intervene as it sees fit in matters before the FERC. Staff also contends the Commission has authority to retain outside counsel to represent it at the FERC. MoGas reiterated its position in its reply to Staff's response, which it filed the next day, on September 24, 2008.

\*This case was appealed to the Missouri Supreme Court and was reversed and remanded. See 366 S.W. 3d 493 (Mo. 2012).

## MOGAS PIPELINE, LLC

10

19 Mo. P.S.C. 3d

The Commission took no immediate action on MoGas' application, so on October 16, 2008, MoGas filed a supplement to its application. MoGas now explained that the interstate compression case before the FERC in which the Commission had intervened has been resolved. However, MoGas continued to object to the Commission's continued appeal in Federal Court of the FERC's decision to certify MoGas as an interstate pipeline, as well as to the Commission's appeal of a state court decision denying the Commission's petition for an injunction against MoGas becoming an interstate pipeline. MoGas asked the Commission to terminate its involvement in all matters relating to MoGas.

Staff responded to MoGas' supplement to its application on October 20, 2008, and at the same time, asked the Commission to determine the matter in favor of Staff's position, based on the filed pleadings. MoGas countered with its own Motion for Determination on the Pleadings, filed on January 15, 2009.

On February 5, 2009, MoGas filed a First Amended Application to Terminate, which incorporates all its previous filings. That amended application, and an accompanying Renewed Motion for Determination on the Pleadings, reiterates MoGas' position and again urges the Commission to determine this matter on the pleadings.<sup>1</sup> Staff responded on February 17, 2009, with its own Renewed Motion for Determination on the Pleadings.

Subsequently, MoGas filed petitions for writs of mandamus in the Circuit Court of Cole County, the Missouri Court of Appeals - Western District, and the Missouri Supreme Court seeking relief similar to the relief it seeks before the Commission. Each petition for writ has now been dismissed or denied.<sup>2</sup>

### **Findings of Fact**

1. The Public Service Commission is a statutorily created entity, consisting of five member commissioners appointed by the governor,

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<sup>1</sup> MoGas' First Amended Application to Terminate seeks the following specific relief:

MoGas moves that the Commission:

- (A) Withdraw its Intervention and Protest in the FERC rate case;
- (B) Terminate permanently its involvement in all FERC matters related to MoGas;
- (C) Instruct Staff, General Counsel, and outside counsel to refrain from further interfering with MoGas' operation as a FERC-regulated entity engaged in interstate commerce; and
- (D) Decide the issues of general public importance raised by the pleadings in this action, as set forth in Applicant's Motion for Determination on the Pleadings.

<sup>2</sup> 19<sup>th</sup> Circuit Court, Cole County, Case No. 09AC-CC00246, petition dismissed May 11, 2009; Missouri Court of Appeals – Western District, Case No. WD71005, petition denied May 18, 2009; and Supreme Court of Missouri, Case No. SC90166, petition denied June 30, 2009.



## MOGAS PIPELINE, LLC

19 Mo. P.S.C. 3d

11

with the advice and consent of the senate.

2. The Commission's Staff consists of various technical and subject matter experts who assist the Commission in its regulatory duties. Staff provides advice to the Commission in contested cases and other proceedings before the Commission in the form of pleadings, briefs, and expert testimony.

3. General Counsel is a statutorily created officer of the Commission, appointed by the Commission, to serve at the pleasure of the Commission. General Counsel represents Staff in proceedings before the Commission. However, General Counsel represents the Commission itself in all outside litigation before various courts as well as before federal regulatory agencies, such as the FERC.

4. MoGas operates an interstate natural gas pipeline that delivers natural gas to customers in Missouri. As an interstate pipeline company, MoGas is subject to regulation by the FERC.

5. Before reorganizing in a manner that brought the pipeline within the interstate jurisdiction of the FERC, affiliates of MoGas operated intrastate pipelines within the borders of the state of Missouri and thus were subject to the jurisdiction of the Missouri Public Service Commission.

6. The Commission has intervened in several matters before the FERC involving MoGas.

### **Conclusions of Law**

Both MoGas and Staff have asked the Commission to determine this matter on the pleadings. Commission rule 4 CSR 240-2.117(2) provides:

**Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.**

**There are no facts in dispute between the parties and this matter can be resolved as a question of law.**

The controlling FERC regulation, 18 C.F.R. Section 385.214(a)(1), allows any state commission, including this Commission, to intervene in a proceeding before the FERC as a matter of right, simply by filing a timely application to intervene. In view of that regulation, MoGas does not contend this Commission cannot intervene at FERC under FERC's law. Instead, MoGas argues Missouri law prevents this Commission from intervening at FERC.

MoGas points to Section 386.040, RSMo 2000, the statute that

establishes the Commission, for the proposition that the Commission's powers are limited to those "necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter". MoGas then points to Section 386.030, RSMo 2000 as support for its claim that this Commission is expressly forbidden to become involved in matters of interstate commerce.

Section 386.030 states in full:

Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, **except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.** (Emphasis added).

When read in full, Section 386.030 is the legislature's disclaimer of any intent to allow the Commission to become entangled in interstate commerce in any way that would violate the Commerce Clause of the United States Constitution. However, it specifically does not forbid the Commission to involve itself in interstate commerce to the extent it is allowed to do so by the Constitution and federal law. As previously indicated, the Commission is allowed to intervene before the FERC as a matter of right under the applicable FERC regulation. Therefore, Section 386.030 does not forbid the Commission to intervene before the FERC.

As further support for its argument that the Commission is forbidden to intervene at the FERC, MoGas points to Section 386.210.7, RSMo Supp. 2008. That section gives the Commission explicit authority to engage in joint investigations, hold joint hearings, or issue joint orders with federal utility commissions or public utility commissions of other states. MoGas interprets that grant of specific authority as an implied restriction on the authority of the Commission to become involved with a federal agency such as the FERC.

In its Reply to Staff's Response, filed on September 24, 2008, MoGas selectively and misleadingly slices and dices a quote of the statute to make it appear that the Commission can only become involved in matters at the FERC if it is doing so as an agent of the FERC. This is the entire section of the statute to which MoGas refers:

The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurring orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any instrumentality thereof, except that in the

MOGAS PIPELINE, LLC

19 Mo. P.S.C. 3d

13

holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

Viewed in its entirety, this section merely authorizes the Commission to engage in joint activities with other state and federal agencies under terms of agreements or contracts between the states, or as an agent of the federal government, or otherwise. It does not limit the Commission's authority to intervene before the FERC.

In its Application to Terminate, MoGas cites Section 386.330.1 RSMo 2000 for the proposition that "the investigatory power of the Commission with regard to public utilities is expressly limited to the investigation of violations of law." MoGas completely misrepresents the meaning of the statute.

This is the complete text of the cited statute:

The Commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by an such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission.

Clearly, this section of the statute does not limit the Commission's authority to investigate MoGas. First, the cited section of the statute applies only to the commission's regulation of telecommunications companies. Second, the statute allows the Commission to investigate any act of a telecommunications company and requires it to investigate acts alleged to be in violation of any provision of law or an order or decision of the Commission. It certainly does not limit the Commission's investigative authority to the investigation of alleged violations of law.

Thus far, the Commission has found that there is no provision in either Missouri or federal law that would prevent the Commission from intervening before the FERC. However, as MoGas points out, this Commission is a creature of statute, and therefore, its powers are limited to those powers conferred by the enabling statutes, "either expressly, or by clear implication as necessary to carry out the powers specifically

MOGAS PIPELINE, LLC

14

19 Mo. P.S.C. 3d

granted.”<sup>3</sup> Therefore, the Commission must find positive authority to allow it to intervene before the FERC.

Section 386.250(1), RSMo 2000 expressly gives the Commission jurisdiction regarding:

the manufacture sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same.

MoGas transports natural gas into Missouri through an interstate pipeline and the statute’s grant of authority makes no distinction between operators of interstate and intrastate natural gas pipelines. Of course, any authority the Commission may have over the interstate transportation of natural gas is limited by the federal jurisdiction of the FERC. However, as previously indicated, Section 386.030, RSMo, allows the Commission to become involved in interstate commerce to the extent that involvement does not conflict with the United States Constitution or federal law. Moreover, as previously indicated, FERC’s regulations allow the Commission to intervene in matters before it.

There are other provisions of law that grant the Commission specific authority to appear or intervene in various forums, including the FERC. Section 386.120.4, RSMo 2000, gives the Commission authority to sue and be sued in its official name. In addition, Section 386.071, which authorizes the appointment of a general counsel to represent the Commission, provides in relevant part:

It shall be the duty of the general counsel for the commission to represent and appear for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission **and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved;** to commence and prosecute in the name of the state all actions and proceedings authorized by law and directed or authorized by the commission. ... (Emphasis added).

That is a very broad grant of authority to intervene and the Commission’s authority to engage in litigation is necessarily as broad as the authority

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<sup>3</sup> State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Pub. Serv. Comm’n, 585 S.W.2d 41, 49, (Mo banc 1979).

MOGAS PIPELINE, LLC

19 Mo. P.S.C. 3d

15

granted to the general counsel as the Commission's attorney.

MoGas also complains that there is no public record in which the Commission has directed its general counsel to intervene in proceedings before the FERC involving MoGas. However, MoGas does not cite any authority for the proposition that the Commission can provide direction to its legal counsel only by issuing an order or by some other means that would appear in the public record. Indeed, Missouri's Sunshine Law specifically exempts discussion of legal actions and a governmental body's communications with its legal counsel from disclosure as a public record.<sup>4</sup>

Finally, MoGas complains that the Commission is spending public funds to retain the services of outside legal counsel to represent it before the FERC. MoGas then cites *State ex rel. Nixon v. American Tobacco Co.*<sup>5</sup> for the proposition that "the expenditure by a state agency of public funds to retain a private law firm, if not contemplated by the agency's enabling legislation, is illegal and subject to injunction."<sup>6</sup> That may be a true statement of the law, but it certainly is not the holding of the *Nixon v. American Tobacco* case. In fact, that case held that the attorney general has authority to hire outside counsel in the absence of a statute to the contrary.<sup>7</sup>

In any event, Section 620.010.6, RSMo 2000, specifically gives the Commission authority to "employ such staff as it deems necessary for the functions performed by the general counsel ...." MoGas contends such staff must be full-time state employees, thereby excluding the employment of contract attorneys. However, aside from some dictionary definitions, MoGas cites no authority for that proposition.

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<sup>4</sup> Section 610.021(1) RSMo Supp. 2008.

<sup>5</sup> 34 S.W.3d 122, 133 (Mo. banc 2000).

<sup>6</sup> First Amended Application to Terminate, Paragraph 13.

<sup>7</sup> *Nixon v. American Tobacco*, at 136. The portion of the decision cited by MoGas is dicta concerning a taxpayers standing to bring suit alleging an illegal public act. It does not specifically relate to the legality of an agencies employment of outside legal counsel.

WOODLAND ACRES WATER SYSTEM

16

19 Mo. P.S.C. 3d

Section 386.040, RSMo 2000, gives the Commission the authority to exercise "all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter." As previously indicated, the Commission has the authority to intervene in matters pending at the FERC. Appearances before the FERC are a specialized area of legal practice that, in the judgment of the Commission, may best be handled by specialized legal counsel, employed by the Commission on a contract basis. The power to employ such legal counsel is necessary and proper to enable the Commission to fully carry out the purposes for which it was created.

**Decision**

Based on its findings of fact and conclusions of law, the Commission concludes it has authority to intervene before the FERC in matters involving MoGas. Furthermore, the Commission finds it has authority to employ outside legal counsel to represent it in matters before the FERC. MoGas' First Amended Application to Terminate is without merit and shall be denied.

**THE COMMISSION ORDERS THAT:**

1. MoGas Pipeline LLC's First Amended Application to Terminate, including its original Application to Terminate, which was incorporated therein, is denied.
2. This order shall become effective on July 25, 2009.

Clayton, Chm., Jarrett and Gunn, CC., concur.  
Davis, CC., concurs, with separate concurring opinion to follow.

Woodruff, Deputy Chief Regulatory Law Judge

**NOTE:** At the time of publication, no concurring opinion has been filed.

**In the Matter of the Application of Jerry Reed, d/b/a Woodland Acres Water System, for a Certificate of Convenience and Necessity to Provide Water Service in St. Clair County, Missouri**

*File No. WA-2009-0031  
Decided July 24, 2009*

**WATER §2.** In making determinations to grant certificates of convenience and necessity, the Commission has used the following criteria: there must be a need for the service; the applicant must be qualified to provide the proposed service; the applicant must have the

## WOODLAND ACRES WATER SYSTEM

19 Mo. P.S.C. 3d

17

financial ability to provide the service; the applicant's proposal must be economically feasible; the service must promote the public interest.

### **ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

#### **Background**

Jerry Reed is one of the original developers of the Woodland Acres subdivision and has been operating a water system to serve the residents since 1996. The residents were paying an annual fee of \$200 for service. The Staff of the Missouri Public Service Commission was made aware of the operation when the Department of Natural Resources forwarded a letter to the Commission from a former customer regarding water rates. Upon an investigation Staff found that Mr. Reed was operating the system without a certificate of convenience and necessity from the Commission. Staff then informed Mr. Reed that he needed to file an application for a certificate, which he did on July 21, 2008. The Commission then issued notice of the application and set a deadline for intervention requests. No requests were filed.

After prolonged discussions with Mr. Reed, Staff filed its recommendation on May 29, 2009. Among other things, Staff recommended that the 12 residential customers being served by the system be charged a quarterly fee of \$170.34 for full-time customers and \$136.27 for part-time customers.<sup>1</sup> Although Mr. Reed agreed with the majority of Staff's recommendations, he took issue with the amount of quarterly rates. His position was that the rates should be \$30 lower. The Office of the Public Counsel also disputed Staff's recommendation with regard to contribution in aid of construction, the lack of a requirement for a rate case in the near future and the lack of a refund/credit provision pending the outcome of that future rate case. In light of these pleadings, the Commission set the matter for a prehearing conference, which was later cancelled upon Staff's filing of a Notice of Agreement. Finally, on behalf of the parties, Staff filed the Unanimous Stipulation and Agreement on July 13.

#### **The Agreement**

The parties agree that it is in the public interest for the Commission to grant a certificate of convenience and necessity for water service to Mr. Reed. Mr. Reed agrees to submit a tariff within 30 days after the effective date of this order.

With regard to the concerns of Mr. Reed and Public Counsel, as set out in their responses to Staff recommendation, the parties agreed

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<sup>1</sup> For some customers, the home in Woodland Acres is a second residence.

## WOODLAND ACRES WATER SYSTEM

18

19 Mo. P.S.C. 3d

that full-time customers will be charged \$140.34 per quarter and part-time customers will be charged \$106.27. Mr. Reed will also commence a small utility rate case within 12 months of the effective date of this order. Additionally, the agreed-upon rates will be interim, subject to a customer refund of credit, based upon the rates established in the rate case.

### **Discussion**

The Commission may grant a certificate of convenience and necessity to provide water service upon a determination that doing so is “necessary or convenient for the public service.”<sup>2</sup> In making determinations to grant certificates of convenience and necessity, the Commission has used the following criteria:

- There must be a need for the service.
- The applicant must be qualified to provide the proposed service.
- The applicant must have the financial ability to provide the service.
- The applicant’s proposal must be economically feasible.
- The service must promote the public interest.<sup>3</sup>

Based on the verified application, Staff recommendation and the Agreement, the Commission finds that the above criteria have been met. The certificate will be granted and the Agreement will be approved.

The Commission reminds the company that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

A) The obligation to file an annual report, as established by Section 393.140(6), RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of \$100 and an additional \$100 per day that the violation continues. 4 CSR 240-3.640 requires water utilities to file their annual report on or before April 15 of each year.

B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000. Because assessments are facilitated by order of the Commission, failure to comply with the order will subject the company to penalties ranging from \$100 to \$2,000 for each day on noncompliance, pursuant to Section 386.570, RSMo 2000.

C) The obligation to provide safe and adequate service at

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<sup>2</sup> Section 393.170.3, RSMo 2000.

<sup>3</sup> *In re Tartan Energy Company*, 3 Mo. P.S.C. 173, 177 (1994).



WOODLAND ACRES WATER SYSTEM

19 Mo. P.S.C. 3d

19

just and reasonable rates, pursuant to Section 393.130, RSMo Supp. 2008.

D) The obligation to comply with all relevant state and federal laws and regulations, including but not limited to, rules of this Commission, the Department of Natural Resources, and the Environmental Protection Agency.

E) The obligation to comply with orders issued by this Commission. If the company fails to comply it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.

F) The obligation to keep the Commission informed of its current address and telephone number.

This certificate is granted conditioned upon the compliance of the company with these obligations. Moreover, if the Commission finds, after conducting a hearing, that the company fails to provide safe and adequate service, or has defaulted on any indebtedness, the Commission shall petition the Circuit Court for an order attaching the assets, and placing the company under the control of a receiver, as permitted by Section 393.145, RSMo Supp 2008. As a condition of granting this certificate, the company hereby consents to the appointment of a temporary receiver until such time as the Circuit Court grants or denies the petition for receivership.

The company is also placed on notice that Section 386.310.1, RSMo 2000, provides that the Commission can, without first holding a hearing, issue an order in any case, "in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property."

Furthermore, the company is reminded that, as a corporation, its officers may not represent the company before the commission. Instead the company must be represented by an attorney licensed to practice law in Missouri.

**THE COMMISSION ORDERS THAT:**

1. Jerry Reed, d/b/a Woodland Acres Water System, is granted a certificate of convenience and necessity to provide water service for the public in St. Clair County, Missouri in the area specifically described in the Unanimous Stipulation and Agreement.

2. The Unanimous Stipulation and Agreement is approved and the parties are ordered to comply with its terms.

3. The certificate of convenience and necessity is granted upon the condition set out in the body of this order and those set out in the Unanimous Stipulation and Agreement.

4. Jerry Reed, d/b/a Woodland Acres Water System shall

SOUTHWESTERN BELL TELEPHONE COMPANY,  
D/B/A AT&T MISSOURI

20

19 Mo. P.S.C. 3d

comply with all Missouri statutes and Commission rules.

5. Nothing in this order shall bind the Commission on any ratemaking issue in any future rate proceeding.

6. The certificate of convenience and necessity granted to Jerry Reed, d/b/a Woodland Acres Water System, in this order shall become effective at the same time as the tariff to be submitted by Jerry Reed becomes effective.

7. This order shall become effective on August 3, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

**NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of Southwestern Bell Telephone Company, d/b/a AT&T Missouri's Application for Waiver of the General Distribution Requirement of White Page Directories Under 4 CSR 240-32.050(4)(B).**

*File No. IE-2009-0357*

*Decided July 24, 2009*

**Telecommunications §8.** The Commission approved a unanimous stipulation and agreement by which AT&T Missouri was allowed to distribute white pages directories only to those customers who request such a directory.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

On April 2, 2009, Southwestern Bell Telephone Company, d/b/a AT&T Missouri filed an application requesting a waiver of Commission rule 4 CSR 240-32.050(4)(B), which requires the company to distribute a copy of its phone directory to each of its customers. AT&T Missouri proposed to continue to publish its white pages residential phone directory, but asked that it be required to distribute that directory only to those customers who affirmatively request a copy. AT&T Missouri asked the Commission to act on its requested waiver by August 1, 2009, so that the company would have time to adjust its paper purchases and printing requirements before beginning to print the next

SOUTHWESTERN BELL TELEPHONE COMPANY,  
D/B/A AT&T MISSOURI

19 Mo. P.S.C. 3d

21

directory.

On April 3, the Commission ordered that notice of AT&T Missouri's filing be given to the public and to potentially interested parties. The Commission also established April 23 as the deadline for the filing of applications to intervene. Charter Fiberlink-Missouri, LLC filed a timely application and was allowed to intervene. Subsequently, the Communications Workers of America, the union that represents some of AT&T Missouri's workers, filed a late application to intervene, which the Commission also granted.

On June 16, all of the parties joined in filing a unanimous stipulation and agreement regarding AT&T Missouri's request for waiver. Under the terms of the unanimous stipulation and agreement, AT&T Missouri requests a waiver that will apply only to the Kansas City, St. Louis, and Springfield metropolitan calling area (MCA) markets. AT&T Missouri will initially implement its new method of providing residential white page directories only in Kansas City and St. Louis, but it could subsequently expand that method to Springfield without seeking an additional waiver from the Commission.

Under the new distribution method, all AT&T customers will have a yellow page business directory delivered to their homes as before. The new yellow page directory will contain the business white pages, government listings, the customer guide information, and other information required under the Commission's rule that was previously included with the white page residential listings. An information sheet will be delivered along with the yellow page directory informing the customer that they will receive a white page residential customer directory only if they request that directory by calling a dedicated toll-free 800 number. The same information will be prominently displayed in the yellow pages directory. AT&T Missouri will mail the white page residential customer directory to any requesting customer free of charge.

In addition to allowing customers the opportunity to receive a free white pages directory if they want one, AT&T Missouri will also make residential listing information available to its customers through its directory website, [www.RealPagesLive.com](http://www.RealPagesLive.com), as well as [www.yellowpages.com](http://www.yellowpages.com).

Furthermore, AT&T Missouri agrees to provide a white page directory to CLEC customers residing in AT&T Missouri's service territory in the same manner it provides directories to its own customers. Charter Fiberlink – Missouri, one of the signatories to the stipulation and agreement, will inform its customers of the new method by which they can request a white page directory. The stipulation and agreement also asks the Commission to grant Charter Fiberlink – Missouri the same

SOUTHWESTERN BELL TELEPHONE COMPANY,  
D/B/A AT&T MISSOURI

22

19 Mo. P.S.C. 3d

exemption from the regulation that it grants to AT&T Missouri.

After reviewing the stipulation and agreement, the Commission held an on-the-record presentation regarding the stipulation and agreement on July 8. At that presentation, the Commission questioned the parties about the details of their agreement. In addition, the Commission conducted local public hearings in Kansas City on July 6 and St. Louis on July 8 to receive comments from affected members of the public.

After carefully considering the unanimous stipulation and agreement, the Commission finds that the agreement is in the public interest and should be approved. Customers who want to receive a residential white page directory will still be able to receive a free directory by calling a toll-free number provided by AT&T Missouri. Customers who do not want such a directory will be relieved of the burden posed by the appearance of a massive directory on their front step. Most importantly, less paper pulp will be wasted in making unwanted directories and less land-fill space will be required to dispose of old directories.

The Commission will only partially waive its regulation requiring distribution of the residential white page directory so that AT&T Missouri and Charter Fiberlink – Missouri can implement a new means for delivering that directory to the customers who want to receive that directory. The Commission will retain authority to deal with any customer complaints about how those companies implement those new distribution plans. If AT&T Missouri and Charter Fiberlink – Missouri fail to live up to their obligations, the Commission will not hesitate to revise or revoke the waivers it is granting in this order.

The Commission will address one other matter even though it is not explicitly an element of AT&T's request for waiver or the unanimous stipulation and agreement. A witness at the local public hearing in St. Louis extensively described the difficulty of recycling used phone books. Currently the Commission's regulations do not require phone companies to make an effort to encourage their customers to recycle their phone books. Perhaps they should. The Commission would like to have more information as it considers whether its regulations should be amended. Therefore, the Commission will order AT&T Missouri to file a report in this case briefly describing what efforts it currently makes, or will undertake in the future, to encourage and facilitate the recycling of old telephone directories.

**THE COMMISSION ORDERS THAT:**

1. The unanimous stipulation and agreement filed on June 16, 2009, is approved. A copy of the unanimous stipulation and agreement is attached to this order.

KCP&L GREATER MISSOURI OPERATIONS COMPANY

19 Mo. P.S.C. 3d

23

2. The signatory parties are ordered to comply with the terms of the unanimous stipulation and agreement.

3. Southwestern Bell Telephone Company, d/b/a AT&T Missouri is granted a limited waiver of Commission Rule 4 CSR 240-32.050(4)(B) as described in the approved unanimous stipulation and agreement.

4. Charter Fiberlink – Missouri, LLC is granted a limited waiver of Commission Rule 4 CSR 240-32.050(4)(B) as described in the approved unanimous stipulation and agreement.

5. Southwestern Bell Telephone Company, d/b/a AT&T Missouri shall file a report in this case no later than September 1, 2009, briefly describing its current and future efforts to encourage and facilitate the recycling of old telephone directories.

6. This order shall become effective on August 1, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

**NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Application of KCP&L Greater Missouri Operations Company Containing its Annual Fuel Adjustment Clause True-Up**

*File No. EO-2009-0431*

*Decided July 29, 2009*

**Electric §20.** Based on the agreement between Staff and the utility, the Commission approved a true-up of the utility's annual fuel adjustment clause

**ORDER APPROVING**  
**ANNUAL FUEL ADJUSTMENT CLAUSE TRUE-UP**

On May 29, 2009, KCP&L Greater Missouri Operations Company (KCPL-GMO) filed an application containing the company's annual fuel adjustment clause true-up to remedy what the company claimed to be an under collection of \$1,136,160 for the territory formerly served by Aquila Networks-MPS and an under collection of \$188,893 for the territory

KCP&L GREATER MISSOURI OPERATIONS COMPANY

24

19 Mo. P.S.C. 3d

formerly served by Aquila Networks-L&P. On June 1, the Commission issued an order notifying the public and interested parties of KCPL-GMO's filing. That order also directed that any party wishing to intervene file an application to do so by June 19. By Commission rule,<sup>1</sup> the parties to KCPL-GMO's most recent rate case, ER-2007-0004, are automatically parties to this case. No additional parties applied to intervene.

The Commission's rule regarding fuel adjustment clauses requires the Commission's Staff to examine and analyze the information submitted by the company and to submit a recommendation within 30 days.<sup>2</sup> Staff filed its initial recommendation on June 25. In that initial recommendation, Staff proposed two adjustments to the true-up amounts identified by the company. First, Staff adjusted the short-term interest rates utilized in the company's calculations, reducing the company's proposed under collection by \$3,729 for the MPS territory and \$968 for the L&P territory. Second, Staff contended that 100 percent of off-system sales revenue should be netted against fuel and purchased power cost before calculating the 95 percent of fuel and purchased power costs that should have been recovered in the fuel adjustment clause recovery period. Staff's second adjustment would have turned the under collections identified by KCPL-GMO into over collections of \$2,963,976 for the MPS territory and \$1,015,531 for the L&P territory. The Commission ordered KCPL-GMO to respond to Staff's recommendation by July 6. The Commission also ordered that any other party wishing to respond to Staff's recommendation do so by July 6. KCPL-GMO filed its response on July 6. No other party responded to Staff's initial recommendation. In its response, the company accepted Staff's first proposed adjustment relating to short-term interest rates, but rejected the much larger adjustment relating to the netting of fuel and purchased power costs. In light of the disagreement between Staff and the company, the Commission scheduled a prehearing conference for July 23 to discuss how to proceed to resolution of this matter.

On July 16, Staff filed a revised recommendation in which it withdrew its proposed adjustment relating to the netting of fuel and purchased power costs. As a result, Staff reports that it now agrees with KCPL-GMO's proposed true-up, subject to Staff's adjustment relating to short-term interest rates. Specifically, Staff's revised recommendation indicates KCPL-GMO under collected \$1,132,431 for the MPS territory and \$187,925 for the L&P territory.

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<sup>1</sup> 4 CSR 240-3.161(10)(A).

<sup>2</sup> 4 CSR 240-20.090(5)(D).

KCP&L GREATER MISSOURI OPERATIONS COMPANY

19 Mo. P.S.C. 3d

25

After receiving Staff's revised recommendation, the Commission ordered that any party wishing to respond to Staff's revised recommendation do so by noon on July 22. KCPL-GMO responded on July 20, indicating its agreement with Staff's revised recommendation. No other party responded to Staff's revised recommendation.

However, on July 22, AG Processing, Inc., and Sedalia Industrial Energy Users' Association (Industrial Intervenors) filed a pleading entitled "Objection to True-Up." The objection does not respond to the specifics of Staff's revised recommendation. Rather it contends fuel adjustment clauses unconstitutionally deny due process in that they allow for retroactive ratemaking. The Industrial Intervenors' pleading does not request an evidentiary hearing and the Industrial Intervenors did not appear at the prehearing conference held on July 23. The parties who did appear for the prehearing conference agreed that no factual matters are in dispute and indicated no evidentiary hearing would be necessary.

The Industrial Intervenors contend any fuel adjustment clause would be unconstitutional. However, section 386.266, RSMo (Supp. 2008), specifically authorizes the Commission to approve a fuel adjustment clause. The Industrial Intervenors may wish to argue that section 386.266 violates the Constitution, but the declaration of the validity or invalidity of a statute is purely a judicial function.<sup>3</sup> This Commission is not a court and thus has no authority to declare a statute unconstitutional.<sup>4</sup> There are no related factual issues that require the Commission's attention. Therefore, the Commission does not need to further address the Industrial Intervenors' constitutional argument, and will deny their objection to the true-up.

Based on the revised recommendation of its Staff, the Commission will approve the under collection amounts described in Staff's revised recommendation and will authorize KCPL-GMO to include those amounts in its next accumulation period.

**THE COMMISSION ORDERS THAT:**

1. The Objection to True-Up filed by AG Processing, Inc., and Sedalia Energy Users' Association is denied.

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<sup>3</sup> State Tax Com'n. v. Administrative Hearing Com'n., 641 S.W.2d 69, 75 (Mo. 1982).

<sup>4</sup> State ex rel. Missouri Southern Railroad v. Public Service Com'n., 259 Mo. 704, 727, 168 S.W. 1156, 1164 (Mo. banc 1914).

WHISPERING HILLS WATER SYSTEM

26

19 Mo. P.S.C. 3d

2. KCP&L Greater Missouri Operations Company is authorized to include the following under collection amounts in its next accumulation period, covering the six-month period ending May 31, 2009:

\$1,132,431 for the territory formerly served by Aquila Networks-MPS; and

\$187,925 for the territory formerly served by Aquila Networks-L&P.

3. This order shall become effective on August 8, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of Rodger Owens d/b/a Whispering Hills Water System for Authority and Approval of the Acquisition of Certain Assets of Whispering Hill Water System and, in Connection Therewith, Certain Other Related Transactions.**

File No. WM-2009-0436

Decided August 5, 2009

**Water §2.** The Commission stated five criteria it will use to decide whether to grant an applicant a certificate of convenience and necessity: 1) there must be a need for the service; 2) the applicant must be qualified to provide the proposed service; 3) the applicant must have the financial ability to provide the service; 4) the applicant's proposal must be economically feasible; 5) the service must promote the public interest.

**Evidence, Practice and Procedure §8.** Based upon the Unanimous Stipulation and Agreement, the Commission found that the applicant met the stated criteria to receive a certificate of convenience and necessity.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

Procedural History

On June 5, 2009<sup>1</sup>, Rodger Owens, d/b/a Whispering Hills Water System (hereafter "Whispering Hills") filed an application. That

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<sup>1</sup> All calendar references are to 2009 unless otherwise noted.



## WHISPERING HILLS WATER SYSTEM

19 Mo. P.S.C. 3d

27

application requests, among other things, authority from the Commission for Whispering Hills to purchase certain regulated assets and to receive a certificate of convenience and necessity to operate a water system.<sup>2</sup>

The Commission issued notice of this application on June 15, and set a deadline of July 6 for intervention requests. The Commission received no applications to intervene.

### The Agreement

On July 29, Whispering Hills, the Staff of the Commission (hereafter "Staff") and the Office of the Public Counsel (hereafter "OPC") filed a Unanimous Stipulation and Agreement. The parties agreed that it would be in the public interest for the Commission to approve the application of Rodger Owens, d/b/a Whispering Hills Water System, to purchase the assets of Whispering Hills. They also agreed that it would be in the public interest for the Commission to grant a certificate of convenience and necessity to Rodger Owens, d/b/a Whispering Hills Water System.

Moreover, the parties agreed that the new water system would file an adoption notice whereby Rodger Owens, d/b/a Whispering Hills Water System, would adopt the existing tariff of Whispering Hills Water System, subject to the conditions stated in the Unanimous Stipulation and Agreement. One of the agreed-upon conditions is that a new tariff sheet Rodger Owens, d/b/a Whispering Hills Water System, should file on or before August 13, 2009 will be designed to generate an additional \$5,942.00 of additional annualized revenue.

### Discussion

The Commission may grant a water corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either "necessary or convenient for the public service."<sup>3</sup> The Commission has stated five criteria that it will use:

- 1) There must be a need for the service;
- 2) The applicant must be qualified to provide the proposed service;
- 3) The applicant must have the financial ability to provide the service;
- 4) The applicant's proposal must be economically feasible; and
- 5) The service must promote the public interest.<sup>4</sup>

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<sup>2</sup> Whispering Hills serves 41 residential customers in the Whispering Hills Subdivision in Wayne County, Missouri.

<sup>3</sup> Section 393.170, RSMo 2000.

<sup>4</sup> *In re Tartan Energy Company*, 3 Mo. P.S.C. 173, 177 (1994).

## WHISPERING HILLS WATER SYSTEM

28

19 Mo. P.S.C. 3d

Based on the Unanimous Stipulation and Agreement, the Commission finds that granting the application for a certificate of convenience and necessity to provide water service meets the above listed criteria.

Further, the Commission may approve of a sale of a water company if that sale is not detrimental to the public interest.<sup>5</sup> Based on the Unanimous Stipulation and Agreement, the Commission finds that granting the application for the sale of the water company would not be detrimental to the public interest.

The application will be granted, and the Unanimous Stipulation and Agreement will be approved.

### **THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement is approved.
2. The signatories of the Unanimous Stipulation and Agreement are ordered to comply with its terms.
3. Rodger Owens, d/b/a Whispering Hills Water System, is granted a certificate of convenience and necessity to operate a water system to serve Whispering Hills Subdivision, as defined by the following service area: all of the Northwest Quarter of Section 26, Township 27 North, Range 7 East, and all of the Southwest Quarter of the Southwest Quarter of the Southwest Quarter of Section 23, Township 27 North, Range 7 East, containing 170 acres, more or less, all in Wayne County, Missouri, and the certificate of convenience and necessity previously issued to Leo Temples and James E. Ketcherside on April 5, 1988, in Case No. WA-88-111 to serve the same above-described service territory is canceled.
4. The transfer of assets of Whispering Hills Water System from Leo Temples, Dorothy Temples and James E. Ketcherside to Rodger Owners, d/b/a/ Whispering Hills Water System, is approved.
5. This order shall become effective on August 15, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Pridgin, Senior Regulatory Law Judge

**NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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<sup>5</sup> See Commission Rule 4 CSR 240-3.605(1)(D).

SEGES PARTNERS MOBILE HOME PARK, LLC

19 Mo. P.S.C. 3d

29

**In the Matter of the Application of Seges Partners Mobile Home Park, L.L.C., for Certificates of Convenience and Necessity to Provide Water and Sewer Service**

*File No. WA-2008-0403, et al.*

*Decided August 12, 2009*

**Water §2.** The Commission stated five criteria it will use to decide whether to grant an applicant a certificate of convenience and necessity: 1) there must be a need for the service; 2) the applicant must be qualified to provide the proposed service; 3) the applicant must have the financial ability to provide the service; 4) the applicant's proposal must be economically feasible; 5) the service must promote the public interest.

**ORDER GRANTING CERTIFICATES OF CONVENIENCE AND NECESSITY**

**Procedural History**

On June 19, 2008, Seges Partners Mobile Home Park, L.L.C. ("Seges Partners"), filed an application with the Missouri Public Service Commission. It requests a certificate of convenience and necessity to operate a water system in Callaway County, Missouri. On May 11, 2009, Seges Partners also filed an application for a certificate of convenience and necessity to operate a sewer system, also in Callaway County.<sup>1</sup>

The Commission ordered that notice of the applications be given to the public and interested parties. The Commission did not receive any requests to intervene.

On July 24, 2009, the Commission's Staff (hereafter "Staff") filed a Recommendation that asks the Commission to approve the application, subject to certain conditions. Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings. No party responded to Staff's Recommendation; therefore, the Commission finds that no party objects to the Commission granting Seges Partners the certificates subject to the conditions requested by Staff.

**Decision**

The Commission may grant a water or sewer corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either "necessary or convenient for

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<sup>1</sup> Seges Partners' application for a sewer certificate was docketed File No. SA-2009-0401, and later consolidated into File No. WA-2008-0403.

SEGES PARTNERS MOBILE HOME PARK, LLC

30

19 Mo. P.S.C. 3d

the public service.”<sup>2</sup> The Commission has stated five criteria that it will use:

- 1) There must be a need for the service;
- 2) The applicant must be qualified to provide the proposed service;
- 3) The applicant must have the financial ability to provide the service;
- 4) The applicant’s proposal must be economically feasible; and
- 5) The service must promote the public interest.<sup>3</sup>

Based on the verified applications and the verified recommendation of Staff, which are admitted into evidence, the Commission finds that granting Seges Partners’ applications for certificates of convenience and necessity to provide water and sewer service meet the above listed criteria.<sup>4</sup> The applications will be granted.

The Commission reminds Seges Partners that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

A) The obligation to file an annual report, as established by Section 393.140(6), RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of \$100 and an additional \$100 per day that the violation continues. Commission Rule 4 CSR 240-3.640 requires water utilities to file their annual report on or before April 15 of each year. Commission Rule 4 CSR 240-3.335 imposes the same requirement on sewer utilities.

B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000. Because assessments are facilitated by order of the Commission, failure to comply with the order will subject the company to penalties ranging from \$100 to \$2,000 for each day of noncompliance pursuant to Section 386.570, RSMo 2000.

C) The obligation to provide safe and adequate service at just and reasonable rates, pursuant to Section 393.130, RSMo Supp. 2008.

D) The obligation to comply with all relevant state and federal laws and regulations, including but not limited to, rules of this Commission, the

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<sup>2</sup> Section 393.170, RSMo 2000.

<sup>3</sup> *In re Tartan Energy Company*, 3 Mo.P.S.C. 173, 177 (1994).

<sup>4</sup> The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

SEGES PARTNERS MOBILE HOME PARK, LLC

19 Mo. P.S.C. 3d

31

Department of Natural Resources, and the Environmental Protection Agency.

E) The obligation to comply with orders issued by the Commission. If the company fails to comply it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.

F) The obligation to keep the Commission informed of its current address and telephone number.

These certificates are granted conditioned upon the compliance of the company with all of these obligations, as well as the obligations listed below in the ordered paragraphs.

Moreover, if the Commission finds, upon conducting a hearing, that the company fails to provide safe and adequate service, or has defaulted on any indebtedness, the Commission shall petition the circuit court for an order attaching the assets, and placing the company under the control of a receiver, as permitted by Section 393.145, RSMo Supp. 2008. As a condition of granting this certificate, the company hereby consents to the appointment of a temporary receiver until such time as the circuit court grants or denies the petition for receivership.

The company is also placed on notice that Section 386.310.1, RSMo 2000, provides that the Commission can, without first holding a hearing, issue an order in any case "in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property."

Furthermore, the company is reminded that, as a corporation, its officers may not represent the company before the Commission. Instead, the corporation must be represented by an attorney licensed to practice in Missouri.

**THE COMMISSION ORDERS THAT:**

1. Seges Partners Mobile Home Park, L.L.C., is granted permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage, and maintain water and sewer systems for the public in Callaway County, Missouri, as more particularly described in its application.

2. These certificates of convenience and necessity are granted upon the conditions set out in the body of this order.

3. Seges Partners Mobile Home Park, L.L.C. must submit a complete water tariff specifying a monthly customer charge of \$12.49 plus \$2.37 for each 1,000 gallons of metered usage, and the customers

COMMUNICATE TECHNOLOGICAL SYSTEMS, LLC

32

19 Mo. P.S.C. 3d

will not be billed for service until such time as the tariff is approved and made effective.

4.. Seges Partners Mobile Home Park, L.L.C. must submit a complete sewer tariff specifying a monthly customer charge of \$19.45 plus \$2.73 for each 1,000 gallons of metered usage, and the customers will not be billed for service until such time as the tariff is approved and made effective;

5. The Commission approves the schedules of depreciation rates attached to the Staff Recommendation, and orders Seges Partners Mobile Home Park, L.L.C. to use those rates.

6. Seges Partners Mobile Home Park, L.L.C. shall comply with all Missouri statutes and Commission rules.

7. Nothing in the Staff Recommendation or this order shall bind the Commission on any ratemaking issue in any future rate proceeding.

8. This order shall become effective on August 22, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Pridgin, Senior Regulatory Law Judge

**The Staff of the Missouri Public Service Commission v.  
Communicate Technological Systems, L.L.C.**

*File No. TC-2009-0440  
Decided August 12, 2009*

**Evidence, Practice And Procedure §33.** When a telecommunications company filed to answer a staff complaint or comply with Commission orders, the Commission found the company to be in default and authorized its general counsel to pursue penalty actions in circuit court.

**ORDER OF DEFAULT AND AUTHORIZING GENERAL COUNSEL  
TO SEEK PENALTIES**

**Syllabus:** The Missouri Public Service Commission concludes that Communicate Technological Systems, L.L.C. ("CTS") is in default for failure to answer Staff's complaint alleging failure to submit annual reports. The Commission further concludes that CTS is in violation of Section 386.570 for failing to comply with Commission orders. The

COMMUNICATE TECHNOLOGICAL SYSTEMS, LLC

19 Mo. P.S.C. 3d

33

Commission will authorize its General Counsel to seek penalties in Circuit Court.

**Procedural History**

On June 17, 2009,<sup>1</sup> the Commission's Staff filed a complaint against CTS. CTS was given notice and directed to answer no later than July 23.<sup>2</sup> As of the date of this order, CTS has filed no answer, nor has it responded to the Commission's July 24 show cause order.

"If the Respondent in a complaint case fails to file a timely answer, the complainant's averments may be deemed admitted and an order granting default entered."<sup>3</sup> Therefore, the Commission grants a default on the complaint and deems CTS to admit the complaint's allegations, now findings of fact, as follows.

**Findings of Fact**

1. CTS is a Delaware L.L.C. and is listed by the Missouri Secretary of State as an active L.L.C. providing long distance telecommunications in Missouri.

2. In Case No. TA-99-537, the Commission granted CTS a certificate of service authority to provide intrastate interexchange telecommunications services in Missouri, effective June 11, 1999.

3. On January 19, 2007, January 15, 2008, and January 30, 2009 (for each of the prior calendar year's reporting requirement) the Executive Director of the Commission e-mailed or mailed to CTS a message notifying the Company of the requirement to file an annual report covering the calendar years 2006, 2007 and 2008, respectively.

4. Enclosed with each letter the Executive Director sent the appropriate form for the CTS to complete and return to the Commission along with instructions on how the CTS could complete its filing electronically.

5. This correspondence was sent to the address provided by CTS that was current in the Commission's Electronic Filing and Information System ("EFIS").

6. In addition to the correspondence sent in January for each year's annual report, on April 19, 2007, May 27, 2008, October 14, 2008, and May 4, 2009, respectively, the General Counsel of the Commission mailed CTS a letter notifying CTS that the Commission had not yet

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<sup>1</sup> All dates throughout this order refer to the year 2009 unless otherwise noted.

<sup>2</sup> The certified mail receipt was signed by CTS's registered agent on June 25<sup>th</sup> and returned to the Commission on June 29<sup>th</sup>.

<sup>3</sup> Commission Rule 4 CSR 240-2.070(9), as authorized by §§ 386.410.1 and 536.067(2)(d). Sections are in the 2000 Revised Statutes of Missouri except as noted otherwise.

## COMMUNICATE TECHNOLOGICAL SYSTEMS, LLC

34

19 Mo. P.S.C. 3d

received its annual report for the appropriate year and CTS would be subject to legal action under state law for failure to submit an annual report on time.

7. CTS never filed its 2006, 2007 or 2008 annual reports.

8. CTS failed to respond to the Commission's June 23 order directing it file an answer to Staff's Complaint.

9. CTS failed to respond to the Commission's July 24 show cause order.

### **Conclusions of Law**

Because CTS is a "telecommunications company"<sup>4</sup> and "public utility"<sup>5</sup> subject to the Commission's jurisdiction,<sup>6</sup> the Commission may hear Staff's complaint.<sup>7</sup> Section 386.390 authorizes Staff to bring this complaint, and "[i]n cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof."<sup>8</sup> In order to meet its burden of proof, Staff must convince the Commission it is "more likely than not" that CTS acted unlawfully when failing to file its annual reports.<sup>9</sup>

Section 392.210.1 requires every telecommunications company to file annual reports with the Commission, and Commission Rule 4 CSR 240-3.540(1) requires these reports be submitted before April 15 of each year. Section 392.210.1 provides that if any telecommunications company fails to make and file its annual report as required it shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report. Additionally, Section 386.570 provides that any corporation or public utility failing to comply with any order of the Commission is subject to penalty, and each

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<sup>4</sup> Section 386.020(52), RSMo Supp. 2008.

<sup>5</sup> Section 386.020(43), RSMo Supp. 2008.

<sup>6</sup> Section 386.250(2).

<sup>7</sup> Section 386.390.1 and 4 CSR 240-2.070.

<sup>8</sup> David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), citing to, Margolis v. Union Electric Company, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); Michaelson v. Wolf, 261 S.W.2d 918, 924 (Mo. 1953); Farnham v. Boone, 431 S.W.2d 154 (Mo. 1968).

<sup>9</sup> The preponderance of the evidence standard is the minimum standard in civil disputes. *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).



COMMUNICATE TECHNOLOGICAL SYSTEMS, LLC

19 Mo. P.S.C. 3d

35

day's continuing violation is a separate and distinct offense.<sup>10</sup>

CTS's deemed admissions establish that Staff has met its burden of proving CTS has violated Section 392.210 and Commission Rule 4 CSR 240-3.540. CTS's failure to comply with the Commission's orders issued in this complaint action are separate violations of Section 386.570.

The Commission's General Counsel, when authorized, must commence and prosecute to final judgment all action seeking penalties for violations of the Commission's rules or seeking enforcement of the Commission's power.<sup>11</sup> Having concluded that CTS has committed multiple violations of the Commission's governing statutes and the Commission's rules, the Commission shall authorize its General Counsel to bring any and all appropriate penalty actions in circuit court.

**THE COMMISSION ORDERS THAT:**

1. Communicate Technological Systems, L.L.C. ("CTS") is in default on the complaint.
2. The allegations made by the Staff of the Missouri Public Service Commission against CTS are deemed to be admitted by CTS.
3. CTS is in violation of Section 392.210 and Commission Rule 4 CSR 240-3.540 for failing to file the annual reports delineated in the body of this order.
4. CTS is in violation of Section 386.570 for failing to comply with the Commission's orders outlined in the body of this order.
5. The Missouri Public Service Commission authorizes its General Counsel to pursue any and all appropriate penalty actions in circuit court.

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<sup>10</sup> Section 386.570.

<sup>11</sup> Section 386.600

TRACFONE WIRELESS, INC.

36

19 Mo. P.S.C. 3d

6. When prosecuting the authorized penalty actions, the General Counsel shall seek the maximum penalties allowed by law.
7. This order shall become effective on August 22, 2009.
8. This file shall close on August 23, 2009.

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur.

Stearley, Senior Regulatory Law Judge

**In the Matter of the Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Missouri for the Limited Purpose of Offering Lifeline and Link Up Service to Qualified Households**

*File No. TA-2009-0327*  
*Issue Date: August 26, 2009*

**Telecommunications §7.** Under 47 CFR §54.409(a), federal law requires that state commissions establish income-related eligibility requirements for consumers receiving Lifeline service.

**Telecommunications §14.1.** In order to be eligible for Lifeline service, the Commission will require that consumers present documentation showing participation in an income eligible program.

**Telecommunications §14.1.** The argument that the ease of self-certification acting as an effective disincentive to abuse the Lifeline program, does not constitute "good cause" to waive the Commission's rule requiring documentation of participation in an income-eligible program to qualify for Lifeline services.

**ORDER GRANTING DESIGNATION AS AN  
ELIGIBLE TELECOMMUNICATIONS CARRIER**

**Background**

On March 10, 2009, TracFone Wireless, Inc. filed a petition with the Missouri Public Service Commission for designation as an Eligible Telecommunication Carrier (ETC) under the Telecommunications Act of 1934 for the limited purpose of offering Lifeline services to qualified households. The Commission issued an order directing that notice of TracFone's application be sent to all

incumbent and competitive local telecommunications companies. Also, as part of its notice, the Commission set a deadline for requests to intervene. There were no requests to intervene.

**The Application**

TracFone is a Delaware corporation headquartered in Florida. It is a reseller of commercial mobile radio service throughout the United States and has provided service throughout Missouri for the past 10 years. TracFone points out that its Lifeline offerings will differ from that of other ETCs' in that TracFone will offer wireless service to low income consumers and that its Lifeline service will be free.

TracFone recognizes that under the Act,<sup>1</sup> ETCs must offer services, at least in part, over their own facilities and that state commissions are prohibited from designating a carrier as an ETC when that carrier offers services exclusively through resale. To address this limitation, the company sought and has received a waiver from the Federal Communications Commission.

With the exception of Commission rules 4 CSR 240-3.570(3)(A) and (B),<sup>2</sup> TracFone avers that it will offer all services required under the Act and under the Commission's rules, which include: voice grade access to public switched network; local usage; dual tone multi-frequency signaling or its functional equivalent; single-party service or its functional equivalent; access to 911 and E911 emergency service; access to operator and interexchange services; access to directory assistance; and toll limitation for qualified low-income customers.

Finally, TracFone emphasizes that because it seeks designation as an ETC solely for the purpose of providing Lifeline plans to low-income customers, it does not seek high cost support and therefore will not erode high cost support from any rural telephone company.

For all of the above reasons, TracFone avers that it is in the public interest for the Commission to grant the requested relief.

**Staff Recommendation**

With the exception of Commission rules 4 CSR 240-3.570(3)(A) and (B), Staff states that TracFone has committed to comply

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<sup>1</sup> 47 U.S.C. §214(e)(1)(A).

<sup>2</sup> Commission rules 240-3.570(3)(A) and (B) are relevant only to companies that issue bills to customers. TracFone is a prepaid service and does not issue bills. These rules are therefore inapplicable.

TRACFONE WIRELESS, INC.

38

19 Mo. P.S.C. 3d

with the Commission's rules. Staff points out that because the company provides wireless service to customers on a prepaid basis, the aforementioned rules, which concern the issuance of bills to customers, are inapplicable.

Consistent with concerns of the public interest, Staff recommends that the Commission approve TracFone's application under the following conditions:

1. That TracFone receive no more support reimbursement per customer than the amount a TracFone customer would have paid in such customer's respective underlying service area;
2. Individuals shall only be eligible for Lifeline assistance if the customer requesting or receiving TracFone service participates or has a dependent residing in the customer's household who participates in a program pursuant to 42 U.S.C. sections 1396-1396v, food stamps (7 U.S.C. section 51), Supplementary Security Income (SSI) (42 U.S.C. section 7), federal public housing assistance or Section 8 (42 U.S.C. section 8), National School Lunch Program's free lunch program (42 U.S.C. section 7(IV)), or Low Income Home Energy Assistance Program (LIHEAP) (42 U.S.C. section 94);
3. TracFone shall require customers to complete an application similar to the Missouri Universal Service Board approved application, which certifies under penalty of perjury that the individual or a dependent residing in the individual's household:
  - i. receives benefits from one of the qualifying programs, identifies the program(s) from which that individual receives benefits; and,
  - ii. agrees to notify the carrier if that individual ceases to participate in the program(s);
4. TracFone shall require customers to provide documentation of participation in the applicable program(s) as identified on the application;
5. TracFone shall develop a process for recording the type of documentation received;
6. TracFone shall develop a process for returning or destroying the documentation once recorded;
7. TracFone shall establish state procedures to verify a customer's continued eligibility and shall provide such procedures to the Commission's Staff or the Office of the Public Counsel for review within

thirty days of a request;

8. TracFone shall terminate an individual's enrollment in Lifeline if the individual ceases to meet eligibility requirements.

**Customer Certification and TracFone's Request for a Waiver**

TracFone takes issue with Staff's recommended conditions that TracFone: require its customers to provide documentation of participation in an income-eligible program; develop a process for recording the type of documentation received; and, develop a process for returning or destroying the documentation once recorded. TracFone argues that these conditions are set out in the Commission's rules, which establish eligibility to receive support from Missouri's Universal Service Fund, not the federal fund from which TracFone seeks its support.

Alternatively, if the Commission concludes that its rules are applicable, TracFone seeks a waiver. TracFone posits that the federal requirement that customers self-certify that they are enrolled in an income-eligible program, coupled with computer programs TracFone has in place, is sufficient to prevent customers from fraudulently using Universal Service support.

For its request for a waiver TracFone makes the following points:

- Ease of self-certification encourages eligible consumers to participate in LifeLine and imposes minimal burdens on consumers.
- Certification of qualified program participants, under penalty of perjury, serves as an effective disincentive to abuse the system.
- As determined by the FCC, there is no evidence of fraud and abuse resulting from self-certification.
- TracFone provides service in a number of states and fraud has not been a problem.
- TracFone has internal procedures in place to identify fraud, which include computer programs that review each applicant's name, address and last 4 digits of their social security number to verify the identity of the applicant and confirm whether the address provided is associated with the applicant. TracFone has identified very few instances of potential fraud.
- Self-certification allows processing without delay.

TRACFONE WIRELESS, INC.

40

19 Mo. P.S.C. 3d

- Requiring TracFone to review documentation from each applicant will unjustifiably and unnecessarily delay commencement of LifeLine services.
- The Commission's rules are inconsistent with the federal policy of a uniform national and deregulatory framework for CMRS.

TracFone also anticipates that with its aggressive marketing, there will be a dramatic increase in the consumers accessing the program.

As to whether the Commission's rules apply to the TracFone's request, Staff directs the Commission to 47 CFR § 54.409(a), which states:

To qualify to receive Lifeline service in a state that mandates state Lifeline support, a consumer must meet the eligibility criteria established by the state commission for such support. The state commission shall establish narrowly targeted qualification criteria that are based solely on income or factors directly related to income.

Accordingly, Staff's position is that through federal law the Commission's rules apply to TracFone's request. With regard to TracFone's request for a waiver, Staff points out that under the Commission's rules<sup>3</sup> a showing of good cause is required and that TracFone is unable to show good cause.

**Discussion**

The Telecommunications Act requires that state commissions designate common carriers as an eligible telecommunications carrier if the carrier: (1) offers the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services; and (2) advertise the availability of such service and the charges therefor using media of general distribution. Finally, the state commission must find that the designation is in the public interest, convenience and necessity.<sup>4</sup> Based on the application and Staff's verified memorandum, the Commission finds that designating TracFone as an Eligible Telecommunications Carrier is in the public interest and for the public's convenience and

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<sup>3</sup> Commission rule 4 CSR 240-31.050(5).

<sup>4</sup> 47 U.S.C. 214 (e)(1) and (2).

TRACFONE WIRELESS, INC.

19 Mo. P.S.C. 3d

41

necessity.

TracFone argues that the Commission's rule with regard to customer certification is inapplicable. As pointed out by Staff, federal law specifically requires that state certification criteria be used. The Commission therefore concludes that Missouri's certification criteria are applicable.

Because the Commission has concluded that its customer certification criteria are applicable, TracFone requests a waiver of the Commission's rules. The Commission may waive its rules for good cause.<sup>5</sup> Generally, TracFone argues that the ease of self-certification encourages eligible consumers to participate and that self-certification, as required under the federal rules, is an effective disincentive to abuse the system.

TracFone does note that it has identified very few instances of potential fraud.<sup>6</sup> The company also points out that in Missouri only 10% of eligible households participate in the program and that a dramatic increase in participation is anticipated. With this in mind, the Commission finds that with an increase in participation, comes an increase in potential fraud.

TracFone goes on to argue that this Commission's certification of eligibility for Lifeline service is inconsistent with federal policy.<sup>7</sup> TracFone's point is taken out of context. The quote offered by TracFone has to do with truth in billing, as the title of the proceeding suggests. In fact, the first paragraph of the reference states:

In this item, we address a Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates seeking to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state or local law. . . we also take this opportunity to reiterate certain aspects of our existing rules and policies affecting billing for telephone service.<sup>8</sup>

The policy to which TracFone refers relates to a uniform billing process, not a uniform policy with regard to certification of LifeLine support.

In its pleading, TracFone does, however, make reference to

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<sup>5</sup> 4 CSR 240-31-050(5).

<sup>6</sup> TracFone's Response to Staff Recommendation and Petition for Waiver, page 5, ¶ 6.

<sup>7</sup> *Id.*, ¶ 9.

<sup>8</sup> Truth-in-Billing and Billing Format, 20 FCC Rcd 6448, ¶ 1 (2005).

TRACFONE WIRELESS, INC.

42

19 Mo. P.S.C. 3d

a relevant FCC proceeding.<sup>9</sup> This is a recommended decision by the Joint Board on Universal Service to the FCC regarding LifeLine service.<sup>10</sup> Although TracFone uses this reference as support for its position that Missouri's certification process is unwarranted, the document has numerous references concerning a desire to follow state procedures in states that have a certification process in place.<sup>11</sup> Further, these references apply to initial certification as well as continued verification.

The determination of "good cause" for a waiver rests with the Commission.<sup>12</sup> Federal law and policy encourages use of state certification procedures. Staff indicated that it has required use of the state certification procedures for one year and has not had complaints from carriers or customers that the procedures delay service or are inconvenient.<sup>13</sup> The inconvenience of the customer supplying a document to show participation in an income-eligible program is outweighed by the benefit that customer receives. Further, that TracFone has uncovered instances of fraud using its current system shows that customers do attempt to defraud the system. Finally, this fact coupled with the expected increase in the level of participation supports the premise there may be an increase in the level of attempts to defraud. TracFone has not shown good cause to waive the Commission's rules intended to thwart customer fraud. The request for a waiver will therefore be denied.

**THE COMMISSION ORDERS THAT:**

1. TracFone Wireless, Inc., is granted designation as a federal Universal Service Fund eligible telecommunications carrier for wireless telecommunications service subject to those conditions as suggested by the Staff of the Commission and as set out in the body of this order.

2. TracFone Wireless, Inc. is granted a waiver of Commission rules 4 CSR 240-3.570(3)(A) and (3)(B).

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<sup>9</sup> See, footnote 6, TracFone's Response to Staff Recommendation and Petition for Waiver.

<sup>10</sup> In the Matter of Federal-State Joint Board on Universal Service, Recommended Decision, 18 FCC Rcd 6589, ¶ 1 (2003).

<sup>11</sup> See, *Id.*, ¶¶ 11, 25, 26, 27, 32 and 34.

<sup>12</sup> *State ex rel. Office of the Public Counsel v. Public Service Com'n of State*, 236 S.W.3d 632, 637 (Mo. 2007)

<sup>13</sup> Transcript, pages 22-25.



NEXUS COMMUNICATIONS, INC., D/B/A TSI

19 Mo. P.S.C. 3d

43

3. TracFone Wireless, Inc.'s request for a waiver of Commission rule 4 CSR 240-31.050(3) is denied.
4. This order shall become effective on September 5, 2009.
5. This case shall be closed on September 6, 2009.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Jones, Senior Regulatory Law Judge

**In the Matter of the Application of Nexus Communications, Inc.,  
d/b/a TSI for Designation as an Eligible Telecommunications Carrier  
in the State of Missouri for the Limited Purpose of Offering Wireless  
Lifeline and Link up Service to Qualifying Households**

*File No. RA-2009-0375  
Issued: August 26, 2009*

**Evidence, Practice, And Procedure §25.** The Commission denies a request for waiver not pled, not proven, and first raised until an on-the-record proceeding.

**Telephone §14.1.** The Commission waives regulations that govern a type of service that applicant does not want to offer.

**ORDER GRANTING APPLICATION  
FOR ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS  
AND WAIVER OF REGULATIONS**

The Missouri Public Service Commission grants eligible communications status for wireless Lifeline and Link-Up service by Nexus Communications, Inc., dba TSI, and waives regulations related to high-cost service, as follows.

On April 15, 2009, Nexus filed the verified application and

NEXUS COMMUNICATIONS, INC., D/B/A TSI

44

19 Mo. P.S.C. 3d

amended it on May 14, 2009 (“application”). The Commission allowed until May 18, 2009, for intervention. As of the date of this order, no party has filed an application for intervention. On May 18, 2009, the Commission’s staff (“Staff”) filed its recommendation, with a supporting affidavit, favoring the amended application with specified conditions. On May 22, 2009, Nexus filed a reply agreeing to those conditions. On June 12, 2009, the Commission scheduled an on-the-record presentation, which the Commission convened on July 7, 2009.<sup>1</sup> On July 13, 2009, the transcript was filed.

The application seeks:

- a. designation as an eligible telecommunications carrier (“ETC”), to provide Commercial Mobile Radio Service (“wireless”) services with Lifeline and Link-UP support to qualified low-income Missouri consumers;
- b. waiver of certain regulations related to federal Universal Service Fund (“FUSF”) high-cost support.

Nexus seeks no federal Universal Service Fund (“FUSF”) high-cost support. Such an application is within the Commission’s jurisdiction to decide.<sup>2</sup> Because all parties agree to the application, no law requires a formal adversarial evidentiary hearing before granting the application.<sup>3</sup> Therefore, the Commission deems the hearing waived,<sup>4</sup> and bases its findings on the verified filings, and makes its conclusions as follows.

Nexus is an Ohio corporation authorized to do business in Missouri. Nexus holds certificates of service authority to provide the following telecommunications services in Missouri: basic local, local exchange, and interexchange. Within the last three years before the application’s filing, no pending action or final unsatisfied judgment or

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<sup>1</sup> At the on-the-record presentation, Nexus asked for an exemption from the conditions (“request”). The request was contingent on the Commission granting such an exemption in file no. TA-2009-0327. In that file, the Commission denied that exemption. Further, neither the request, nor any law or fact supporting it, appears in the application or the amendment. Nexus has not filed a separate application for variance under the Commission’s regulation 4 CSR 240-31.050(5). Thus, neither Staff nor any possible intervenor has had any opportunity to address any reasons supporting the request. Moreover, the request contradicts Nexus’ reply. Therefore, the Commission is granting the application without the requested exemption.

<sup>2</sup> 47 U.S.C. 214(e)(2).

<sup>3</sup> State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com’n, 776 S.W.2d 494 (Mo. App. 1989).

<sup>4</sup> Section 536.060, RSMo 2000.

NEXUS COMMUNICATIONS, INC., D/B/A TSI

19 Mo. P.S.C. 3d

45

decision, involving customer service or rates, has occurred in any state or federal agency or court against Nexus, and Nexus has no overdue annual report or assessments fees.

As to ETC designation and low-income ETC designation, federal law provides that the FUSF's purposes include providing:

Consumers in all regions of the Nation,  
including low-income consumers . . .  
access to telecommunications . . .  
services [<sup>5</sup>]

All parties agree that Nexus meets the requirements for designation and low-income eligibility.

As to waivers, good cause is the standard for waiving a regulation.<sup>6</sup> The regulations for which Nexus seeks a waiver are the following paragraphs of 4 CSR 240-3.570:

- (2)(A)1, 2 and 3;
- (4)(A)1, 2, 3, 4, and 5; and
- (4)(B)1, 2, 3, and 4.

Those provisions relate to construction and installation for high-cost services. Good cause to waive those provisions stands on two facts: (1) Nexus expressly does not seek funds to provide high-cost service and (2) its system is already built out.

Therefore, the Commission will grant the application subject to conditions set forth below.

**THE COMMISSION ORDERS THAT:**

1. The application of Nexus Communications, Inc., dba TSI for designation as a federal Universal Service Fund eligible telecommunications carrier for wireless telecommunications services, is granted subject to the conditions in ordered paragraph 2.

2. The conditions referred to in paragraph 1 are the conditions set forth in the recommendation of the Commission's staff, which read as follows:

- Individuals shall only be eligible for Lifeline and Link Up assistance if the customer requesting or receiving Nexus service participates or has a dependent residing in the customer's household who participates in a program

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<sup>5</sup> 47 USC § 254(b)(3).

<sup>6</sup> 4 CSR 240-3.015(1) and 4 CSR 240-2.015(1).

pursuant to 42 U.S.C sections 1396-1396v, food stamps (7 U.S.C. section 51), Supplementary Security Income (SSI) (42 U.S.C. section 7), federal public housing assistance or Section 8 (42 U.S.C. section 8), National School Lunch Program's free lunch program (42 U.S.C. section 13), Temporary Assistance for Needy Families (42 U.S.C. section 7(IV)), or Low Income Home Energy Assistance Program (LIHEAP) (42 U.S.C. section 94);

- Customers shall complete an application similar to the Missouri Universal Service Board approved application, which certifies under penalty of perjury that the individual or a dependent residing in the individual's household:
    - receives benefits from one of the qualifying programs, identifies the program or programs which that individual receives benefits;
    - agrees to notify the carrier if that individual ceases to participate in the program or programs;
  - Customers shall provide documentation of participation in the applicable program(s) as identified on the application;
  - Nexus shall develop a process for recording the type of documentation received;
  - Nexus shall develop a process for returning or destroying the documentation once recorded;
  - Nexus shall establish state procedures to verify a customer's continued eligibility and shall provide such procedures to the commission staff and/or the office of public counsel for review within thirty days of request; and
  - Nexus shall terminate an individual's enrollment in Lifeline and Link Up if the individual ceases to meet eligibility requirements.
3. The requirements under the following regulations are waived:
- 4 CSR 240-3.570(2)(A)1, 2 and 3;

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

47

- 4 CSR 240-3.570(4)(A)1, 2, 3, 4, and 5; and
  - 4 CSR 240-3.570(4)(B)1, 2, 3, and 4.
4. This order is effective on September 5, 2009.
  5. This file may close on September 6, 2009.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Jordan, Regulatory Law Judge

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036*  
*Issued: September 2, 2009*

**Evidence, Practice and Procedure §22.** The Consumers Council of Missouri was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest.

**ORDER GRANTING THE APPLICATION TO INTERVENE OF  
THE CONSUMERS COUNCIL OF MISSOURI**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene.

The Consumers Council of Missouri applied to intervene on August 10. The Consumers Council is a non-governmental, nonpartisan, nonprofit membership organization dedicated to educating and empowering consumers statewide and to advocating for their interests. Many of its members are residential customers of AmerenUE. More than ten days have passed since the Consumers Council applied to intervene and no party has objected to that application.

The Commission finds that the interest of the Consumers Council in this case is different from that of the general public, and may

UNION ELECTRIC COMPANY, D/B/A AMERENUE

48

19 Mo. P.S.C. 3d

be adversely affected by a final order arising from this case. Furthermore, the Commission finds that allowing the Consumers Council to intervene will serve the public interest. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene by the Consumers Council of Missouri is granted.
2. This order shall become effective immediately upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur.  
Davis, C., concurs, with separate concurring opinion to follow.  
Jarrett, C., dissents, with separate dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** At time of publication, no opinion of Commissioner Davis has been filed. Commissioner Jarrett's opinion can be found on page 57.

**\*NOTE:** See pages 48, 50, 52, 53, 55, 78, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Issued: September 2, 2009*

**Evidence, Practice and Procedure §22.** AARP was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest.

**ORDER GRANTING THE APPLICATION TO INTERVENE OF  
AARP**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE,

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

49

filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene.

AARP applied to intervene on August 12. AARP is a nonpartisan, nonprofit membership organization that advocates for people who are 50 years of age and older. More than ten days have passed since AARP applied to intervene and no party has objected to that application.

The Commission finds that the interest of AARP in this case is different from that of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission finds that allowing AARP to intervene will serve the public interest. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene by AARP is granted.
2. This order shall become effective immediately upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur.

Davis, C., concurs, with separate concurring opinion to follow.

Jarrett, C., dissents, with separate dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** At time of publication, no opinion of Commissioner Davis has been filed.

Commissioner Jarrett's opinion can be found on page 57.

**\*NOTE:** See pages 47, 50, 52, 53, 55, 78, 80, 108, 169, 199, 350, 358 and 376 for other orders in this case.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Issued: September 2, 2009*

**Evidence, Practice and Procedure §22.** Commission regulation regarding applications to intervene does not require an incorporated consumer advocate organization to list its members when applying to intervene in a case before the Commission.

**ORDER GRANTING THE APPLICATION TO INTERVENE OF  
MISSOURI-ACORN**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene.

The Missouri Association of Community Organizations for Reform Now (MO-ACORN) applied to intervene on August 14. MO-ACORN is a non-governmental, nonpartisan, nonprofit membership organization of low and moderate-income families working for social justice and stronger communities. Many of its members are customers of AmerenUE. More than ten days have passed since MO-ACORN applied to intervene. No party has objected to that application, but on August 24, AmerenUE filed a response to MO-ACORN's application. MO-ACORN answered that response on August 28, and at the same time filed an amended application to intervene,<sup>1</sup> clarifying that it is a not-for-profit corporation organized under the laws of the State of Arkansas.

AmerenUE does not oppose MO-ACORN's application to intervene but expresses concern that MO-ACORN's application does not comply with the Commission's rule on intervention in that as an association it is required by 4 CSR 240-2.075(3) to file a list of all its members. The Commission's rule does indeed require an association seeking to intervene to list its members. However, while MO-ACORN includes the word "association" in its title, it is not the type of association

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<sup>1</sup> MO-ACORN also filed a motion seeking leave to amend its application to intervene. The Commission will grant that motion.



to which the regulation is aimed. The purpose of the regulation is to require informal associations of companies or individuals who wish to participate in a case as a group to identify their members. Examples of such associations who are already parties to this case include the Missouri Energy Group and the Missouri Industrial Energy Consumers. The limited membership of those associations changes from case to case and it is helpful to the Commission, and to the other parties, to know which companies are part of the association in a particular case.

In contrast, MO-ACORN, which is a corporation, has a permanent existence apart from its individual members. Requiring such a membership organization to provide a list of its members would be unduly burdensome, and could unconstitutionally chill the first amendment rights of its members. Therefore, the Commission will not require MO-ACORN to provide a list of its members.

AmerenUE also expresses concern that MO-ACORN will violate the Commission's rule regarding conduct during proceedings, 4 CSR 240-4.020, and asks the Commission to specifically order MO-ACORN to comply with that rule. As a party, MO-ACORN will be required to comply with applicable Commission rules to the same extent as any other party. No further order is necessary.

The Commission finds that the interest of MO-ACORN in this case is different from that of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission finds that allowing MO-ACORN to intervene will serve the public interest. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene by the Missouri Association of Community Organizations for Reform Now is granted.
2. Missouri Association of Community Organizations for Reform Now's Motion for Leave to Amend Application to Intervene is granted.
3. This order shall become effective immediately upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur.  
Davis, C., concurs, with separate concurring opinion to follow.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

52

19 Mo. P.S.C. 3d

Jarrett, C., dissents, with separate dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** At time of publication, no opinion of Commissioner Davis has been filed. Commissioner Jarrett's opinion can be found on page 57.

**\*NOTE:** See pages 47, 48, 52, 53, 55, 78, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036*

*Issue Date: September 2, 2009*

**Evidence, Practice and Procedure §22.** The Natural Resources Defense Council was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest.

**ORDER GRANTING THE APPLICATION TO INTERVENE OF THE NATURAL RESOURCES DEFENSE COUNCIL**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene.

The Natural Resources Defense Council (NRDC) applied to intervene on August 17. The NRDC is a nonprofit corporation organized under the laws of New York. The NRDC and its members are interested in promoting energy efficiency, peak demand reduction, and renewable energy resources to meet Missouri's energy needs. More than ten days have passed since the NRDC applied to intervene and no party has objected to that application.

The Commission finds that the interest of the NRDC in this case is different from that of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

53

finds that allowing the NRDC to intervene will serve the public interest. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene of the Natural Resources Defense Council is granted.
2. This order shall become effective immediately upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur.  
Davis, C., concurs, with separate concurring opinion to follow.  
Jarrett, C., dissents, with separate dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

\*NOTE: At time of publication, no opinion of Commissioner Davis has been filed. Commissioner Jarrett's opinion can be found on page 57.

\*NOTE: See pages 47, 48, 50, 53, 55, 78, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036*

*Issue Date: September 2, 2009*

**Evidence, Practice and Procedure §22.** The Missouri Retailers Association was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest.

**ORDER GRANTING THE APPLICATION TO INTERVENE OF THE MISSOURI RETAILERS ASSOCIATION**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE,

UNION ELECTRIC COMPANY, D/B/A AMERENUE

54

19 Mo. P.S.C. 3d

filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene.

The Missouri Retailers Association applied to intervene on August 14. The Retailers Association is a not-for-profit association dedicated to serving the needs of retailers and grocers and their distribution facilities statewide. Some of its members are served by AmerenUE and rely on dependable electric service at reasonable rates. More than ten days have passed since the Retailers Association applied to intervene and no party has objected to that application.

The Commission finds that the interest of the Retailers Association in this case is different from that of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission finds that allowing the Retailers Association to intervene will serve the public interest. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene by the Missouri Retailers Association is granted.
2. This order shall become effective immediately upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur.  
Davis, C., concurs, with separate concurring opinion to follow.  
Jarrett, C., dissents, with separate dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** At time of publication, no opinion of Commissioner Davis has been filed. Commissioner Jarrett's opinion can be found on page 57.

**\*NOTE:** See pages 47, 48, 50, 52, 55, 78, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Issued: September 2, 2009*

**Evidence, Practice and Procedure §22.** The Missouri Joint Municipal Electric Utility Commission, even though it serves wholesale customers, was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest.

**ORDER GRANTING THE APPLICATION TO INTERVENE OF  
THE MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY  
COMMISSION**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene.

The Missouri Joint Municipal Electric Utility Commission (MJMEUC) applied to intervene on August 17. MJMEUC is a body corporate and politic of the State of Missouri, organized as a joint municipal utility commission pursuant to Missouri statute. It has authority to exercise public powers of a political subdivision for the benefit of the inhabitants of the municipalities jointly contracting to establish the MJMEUC. MJMEUC serves four municipalities that have wholesale power contracts with AmerenUE and fourteen municipalities directly embedded in AmerenUE's transmission system that take transmission service through the Midwest Independent System Operator (MISO).

On August 27, AmerenUE filed a pleading opposing MJMEUC's application to intervene. AmerenUE contends the municipalities represented by MJMEUC are exclusively wholesale customers of AmerenUE. That wholesale relationship, as well as the municipalities' connections to AmerenUE's transmission system through MISO, is governed by the Federal Energy Regulatory Commission (FERC). For that reason, AmerenUE argues the members of MJMEUC cannot be affected by the decisions made by the Commission in this case. Thus, MJMEUC is not qualified to intervene.

MJMEUC responded to AmerenUE's opposition on September 1.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

56

19 Mo. P.S.C. 3d

MJMEUC explains that its member cities pay to use a portion of AmerenUE's transmission and distribution network. As a result, they are affected by the reliability of that network. In addition, they claim an interest in ensuring that the cost of new transmission and distribution upgrades is properly charged to retail customers and not to other entities.

Commission rule 4 CSR 240-2.075(4) allows the Commission to grant an application to intervene on a showing that:

- (A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or
- (B) Granting the proposed intervention would serve the public interest.

The Commission finds that the interest of MJMEUC in this case is different from that of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission finds that allowing MJMEUC to intervene will serve the public interest. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene by the Missouri Joint Municipal Electric Utility Commission is granted.
2. This order shall become effective immediately upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur.  
Davis, C., concurs, with separate concurring opinion to follow.  
Jarrett, C., dissents, with separate dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

\*NOTE: At time of publication, no opinion of Commissioner Davis has been filed. Commissioner Jarrett's opinion can be found on page 57.

\*NOTE: See pages 47, 48, 50, 52, 53, 78, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**DISSENTING OPINION OF**  
**COMMISSIONER TERRY M. JARRETT**

Because I believe that this Commission should follow its rules, I dissent from the grants of intervention discussed below.

*PROCEDURAL HISTORY*

The Missouri Public Service Commission (“PSC”) received thirteen timely applications to intervene in this matter<sup>1</sup>. The majority of the Commission voted to grant the applications to intervene of The Consumers Council of Missouri (“Consumers Council” or “CCM”), AARP, Missouri-ACORN (“MO-ACORN”), Natural Resources Defense Council (“NRDC”), Missouri Retailers Association (“Missouri Retailers” or “MRA”), and the Missouri Joint Municipal Electric Utility Commission “MJMEUC”). In my opinion, none of these applications complied with the Commission’s rules.

The applications of MO-ACORN and MJMEUC’s both received responses. AmerenUE filed a response to MO-ACORN’s application to intervene wherein AmerenUE alleged that MO-ACORN failed to comply with the Commission’s rules in making its Application, and alleged that MO-ACORN had engaged in conduct that violates Commission rules, specifically, 4 CSR 240-2.075(3).<sup>2</sup> MO-ACORN in response raised questions about the constitutionality of the Commission’s rules.

AmerenUE also filed a response to the application to intervene of MJMEUC, raising the issue of the Commission’s jurisdiction. AmerenUE alleged MJMEUC serves wholesale customers of AmerenUE, and that MJMEUC’s members take transmission from the Midwest Independent Transmission System Operator, Inc. (“Midwest ISO” or “MISO”). AmerenUE argues that these two areas are regulated exclusively by the Federal Energy Regulatory Commission (“FERC”). MJMEUC responded by stating that transmission and distribution are within this Commission’s jurisdiction and directly relate to delivery of safe and reliable service to

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<sup>1</sup> On August 17, 2009 the Commission granted intervention to The Missouri Energy Group; *See Order Granting the Application to Intervene of The Missouri Energy Group.*

<sup>2</sup> AmerenUE has raised serious allegations concerning the actions of MO-ACORN with regard to this case. Absent a hearing, which has not been set regarding these allegations and which would allow for the admission of evidence, this Commission should not at this time make any findings as to the claims asserted by AmerenUE regarding MO-ACORN.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

58

19 Mo. P.S.C. 3d

MJMEUC's members, showing their interest in this case. AmerenUE renewed its opposition to a grant of intervention by filing a response.

During the public agenda meeting on August 26, 2009, the Commission considered and discussed twelve applications to intervene. The Commission subsequently granted the intervention of five of the twelve applicants, leaving seven applications for future consideration.<sup>3</sup> On September 2, 2009, the remaining seven applications came before the Commission. The application to intervene of the IBEW was granted by a 5 – 0 vote of the Commission. As to the remaining six applications, Commissioners Clayton, Davis, Gunn and Kenney voted in favor of granting the applications. I voted nay to granting the six remaining applications for reasons which I will more fully set out below; specifically, these six applications did not comply with Commission rules nor did the applicants seek a waiver from rule compliance.

The majority has not only disregarded existing Commission rules<sup>4</sup>, but also has engaged in improper making of special rules for select persons and entities.<sup>5</sup> For this reason I dissent from the Commission's Orders Granting Intervention to Consumers Council, AARP, MO-ACORN, NRDC, Missouri Retailers Association, and MJMEUC. In my view, the Orders in effect represent an unlawful act of an administrative body, are arbitrary and capricious, and as improper rulemaking are void.

*THE LAW AND THE RULES*

This Commission has promulgated rules which control Applications to Intervene,<sup>6</sup> as well as rules regarding Waiver of Rules.<sup>7</sup>

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<sup>3</sup> On August 26, 2009 the Commission granted intervention to three additional applicants. See Order Granting the Application to Intervene of Laclede Gas Company, Order Granting the Application to Intervene of Charter Communications, Inc., Order Granting the Application to Intervene of The Missouri Industrial Energy Consumers. On August 28, 2009 the Commission granted intervention to two additional applicants. See Order Granting the Application to Intervene of Missouri Department of Natural Resources, and Order Granting the Application to Intervene of The Midwest Energy User's Association.

<sup>4</sup> Under 4 CSR 240-2.075(4)(A) in determining whether the applicant's interest is different from the general public interest it appears necessary to understand what interest is being represented by the Office of The Public Counsel ("OPC"). Absent an order directing the OPC to show cause as to what segment of the public interest it is representing, the intervention applicants may not meet the standards set out in 4 CSR 240-2.075(4)(A).

<sup>5</sup> These new special rules relate to applications, intervention, and waiver of Commission rules.

<sup>6</sup> 4 CSR 240-2.075; see also, 4 CSR 240-2.060 regarding Applications.



UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

59

Once properly promulgated by an administrative agency under properly delegated authority, a rule has the force and effect of law.<sup>8</sup> **Simply put, Commission rules are law.**

Considering an application to intervene, the Commission *must* determine whether the applicant has complied with all of the applicable Commission rules: 4 CSR 240-2.060 setting forth the process for making an Application at the Commission, and 4 CSR 240-2.075 setting forth the application procedures for an individual or entity to intervene in a case; or to file a brief as *amicus curiae* for those not intervening, and who are not parties to the case.<sup>9,10</sup> Applicants may also seek a waiver of any of the Commission's intervention or application rules,<sup>11</sup> under 4 CSR 240-2.015(1), by showing "good cause"<sup>12</sup>. If the application does not comply with the rules, no waiver from any rule has been sought *by the applicant*, and no waiver is granted for "good cause", then the Commission must deny the application. ***To do otherwise is an unlawful act.***<sup>13</sup>

*THE APPLICATIONS TO INTERVENE*

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<sup>7</sup> 4 CSR 240-2.015; *describing* Waiver of Chapter Two rules.

<sup>8</sup> *Psychare Management*, 980 S.W.2d 311, 313-314 (Mo. banc 1998); *United Pharmacal Co. of Missouri Inc. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005).

<sup>9</sup> The Commission rules provide two very distinct methods for advocates to address this Commission; intervention and as *amicus curiae*. Beyond these two methods, the Commission holds public hearings in contested rate cases, which provide a forum for non-represented persons to provide feedback to the Commission. Missouri law and Commission rules limit the content of communication with the Commission as well as when that communication may occur and by whom. And while the law and rules do permit the free flow of information and exchange of ideas at the Commission, there are limitations which ensure transparency during Commission cases.

<sup>10</sup> Intervention provides advocates access to participation in a case by affording them an opportunity to offer testimony, evidence and cross examine witnesses as compared to the filing of *amicus curiae* briefs which allow for argument and advocacy based upon the record of the case by "non-parties". 4 CSR 240-2.075(6).

<sup>11</sup> The burden of meeting the intervention standards lie squarely on the applicant. See *generally Augspurger v. MFA Oil Co.*, 940 S.W.2d 934, 937 (MO. App. W.D. 1997).

<sup>12</sup> 4 CSR 240-2.015(1); "A rule in this chapter may be waived by the commission for good cause."

<sup>13</sup> Denial of an application to intervene would not leave interested persons without an advocate's voice before the Commission because public hearings as well as *amicus curiae* briefs are also available. Multiple avenues exist for comment; for example, persons can file a complaint or comments with the Commission or call the Commission's Consumer Services Department. Additionally, persons can lodge comments or complaints with the Office of the Public Counsel, or participate in Commission scheduled local public hearings.

In considering an application to intervene the Commission must determine that each element of the Commission's rules has been met<sup>14</sup>. 4 CSR 240-2.075(1) provides that "[A]n application to intervene **shall** comply with these rules ..." (emphasis added) making clear that absent a waiver,<sup>15</sup> compliance is not discretionary, but mandatory. So, before the Commission can move to the Commission's waiver provision, 4 CSR 240-2.015(1), the Commission must first find that the rules set forth in 4 CSR 240-2.060<sup>16</sup> and 4 CSR 240-2.075<sup>17</sup> have been met.

**WAIVER FOR "GOOD CAUSE"**

After making these findings the Commission must then move on to rule on any application for waiver including whether "good cause" exists.<sup>18</sup> Even a deficient application to intervene can be granted by the Commission if a waiver is requested and the waiver standard of "good cause" is met. While no words in 4 CSR 240-2.015(1) set forth *who* is responsible for making the showing of "good cause" to the Commission for waiver, the burden to establish that an applicant has met the Commission's requirements for intervention are squarely on the applicant<sup>19</sup> and therefore, if an applicant cannot meet those requirements, the burden rests with the applicant to seek relief through the waiver rule.<sup>20</sup>

Although the term "good cause" is frequently used in the law,<sup>21</sup> the Commission's rule does not define it.<sup>22</sup> Of course, not just *any* cause

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<sup>14</sup> These rules include 4 CSR 240-2.060 Applications, 4 CSR 240-2.075 Intervention, and 4 CSR 240-2.080 Pleadings, Filing and Service. Nothing in 4 CSR 240-2.075 excuses an Applicant seeking intervention from compliance with any Chapter Two rules. To the extent a particular rule does not squarely fit a particular applicant; the applicant is free to plead as to its reason for non-compliance; See 4 CSR 240-2.015(1).

<sup>15</sup> 4 CSR 240-2.060(4) sets forth that additional information is required when seeking a waiver under 4 CSR 240-2.060(1). As no applicant considered here sought a waiver from Commission rules, no "additional information" was supplied.

<sup>16</sup> Applications.

<sup>17</sup> Intervention.

<sup>18</sup> Waiver of Rules.

<sup>19</sup> See, e.g., *Augspurger v. MFA Oil Co.*, 940 S.W.2d 934, 937 (Mo. App. W.D. 1997) (discussing the corollary intervention rules contained in the Missouri Rules of Civil Procedure).

<sup>20</sup> 4 CSR 240-2.015(1).

<sup>21</sup> *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

<sup>22</sup> It is appropriate to resort to the dictionary to determine its ordinary meaning. See *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause")

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

61

or excuse will do. To constitute *good cause*, the reason or legal excuse given “must be real not imaginary, substantial not trifling, and reasonable not whimsical.”<sup>23</sup> And some *legitimate factual showing is required, not just the mere conclusion of a party or his attorney.*<sup>24</sup> By the Commission on its own initiative proffering facts and evidence upon which to reach its findings and ultimately its conclusion outside of the hearing process, and where no other party is permitted to participate, creates a new Commission rule for intervention in violation of Chapter 536, RSMo., and runs squarely afoul of the rights afforded through due process. One party filed responses to at least two different applications to intervene. Those responses do not in any way address any fact that the majority raised outside the hearing process during the Commission’s agenda discussion of the applications to intervene, or the resulting orders in this case. The majority’s orders rely on facts not alleged in the applications or responses.

The majority chose to act in an arbitrary and capricious manner and chose to rationalize that action by suggesting that it would better promote transparency and create a more open and full adversarial process which will keep the case moving forward in a timely manner. These goals are not the purpose of intervention. The majority’s approach ignores the Commission’s rules and the protections of due process which are embedded in promulgated rules.

*COMMISSIONERS ACTING ON BEHALF OF THE APPLICANTS*

Commission rules provide the authority for the Commission to waive its own rules when an applicant seeks a waiver. But, the

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as used in a Missouri statute). Good cause “generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.” *Black’s Law Dictionary*, 692 (6th ed. 1990); similarly, “good cause” has also been judicially defined as a “substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.” *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective “ordinary person” standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm’n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”)

<sup>23</sup> *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

<sup>24</sup> See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

Commission does not have the authority on its own initiative to waive its rules. The Commission runs the risk of improper rulemaking including the attendant violations of due process which accompany that action. **The circumstance before the Commission is whether (1) when examining deficient applications to intervene under rules 4 CSR 240-2.060 and 4 CSR 240-2.075, (2) the Commission can reach 4 CSR 240-2.015(1) (the waiver provision), and (3) ultimately grant a waiver of Commission rules<sup>25</sup> *without acting as an independent advocate for an interested person seeking to become a party to a case.*<sup>26</sup> In this case, that is exactly what the majority has done by raising a motion to waive commission rules under 4 CSR 240-2.015(1) on its own initiative. This action is tantamount to acting for the applicants in this case and unnecessarily subjects the majority's impartiality to question. Further, the Commission waiver rule applies to any rule in Chapter 2 – so if Commissioners advocate for interested persons (or parties in cases), such unfettered discretion could have sweeping ramifications in Commission practice and procedure.**

Even assuming, for the sake of argument, that any Commissioner could act for interested persons (or parties) in a contested case, waiver is still permissible only upon a showing of “good cause” and due process afforded to parties affected by the motion to waive the rules.

The majority could have taken a different path here, one which it has taken many times before, by issuing a notice of deficiency to the applicants giving them the opportunity to cure the deficiencies, or to seek a waiver.<sup>27</sup> This procedure allows the applicants to advance their position while also following the rules. Instead, the majority has acted for the applicants by acknowledging that failure to follow Commission rules is acceptable (4 CSR 240-2.060, 4 CSR 240-2.075), and that a waiver of Commission rules under 4 CSR 240-2.015(1) can be advanced, argued and granted by the majority on its own initiative where the application provides no request or factual support for a waiver or for the granting of the application under the rules.

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<sup>25</sup> Assuming the Commission can find the “good cause” threshold met after it reaches 4 CSR 240-2.015(1).

<sup>26</sup> It should be noted that all of the Applicants are represented by legal counsel.

<sup>27</sup> The Commission by waiving rules on its own motion may have created its own conundrum if one of the intervention applicants moves for withdrawal.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

63

Beyond the majority's action in contravention of its rules, the Commission also indirectly has taken on the question of the constitutionality of Commission rules despite its lack of authority to do so.<sup>28</sup> "Administrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments [and] [r]aising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide."<sup>29</sup> Accordingly, the Commission must "presume [a] statute is constitutional and has no power to declare it otherwise."<sup>30</sup> Nevertheless, since "it is the duty of courts of competent jurisdiction to review justiciable constitutional claims put before them,"<sup>31</sup> the Commission "may hear evidence from [the parties] to develop a factual record in which the constitutionality of the statute[s] may be determined later, in the proper forum."<sup>32</sup> No authority provides otherwise for regulations. With regard to at least one application to intervene,<sup>33</sup> the Commission did not merely create evidence for the purpose of developing a record outside the hearing process on a constitutional question; it actually rested a portion of its Order on constitutional grounds, which is beyond the scope of this agency's jurisdiction.<sup>34</sup>

A complete and comprehensive review of the applications to intervene, as well as the Commission's orders granting intervention, reveal how the majority has ignored this Commission's rules. The majority also sought comfort and refuge in the notion that many of the

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<sup>28</sup> See *Order Granting Application to Intervene of Missouri-Acorn* ("Requiring such a membership organization to provide a list of its members **would be unduly burdensome**, and could unconstitutionally chill the first amendment rights of its members.") (Emphasis added).

<sup>29</sup> *Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988) (citing *Joplin v. Indus. Comm'n of Missouri*, 329 S.W.2d 687, 689 (Mo. banc 1959)). See also *State ex rel. Kansas City Terminal Ry. v. Public Serv. Comm'n*, 272 S.W. 957, 960 (Mo. 1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern R.R. v. Public Serv. Comm'n*, 168 S.W. 1156, 1164 (Mo. banc 1914) (Public Service Commission has no power to declare statutes unconstitutional).

<sup>30</sup> *Missouri Bluffs Golf Joint Venture v. St. Charles County Bd. of Equalization*, 943 S.W.2d 752, 755 (Mo. App. E.D. 1997).

<sup>31</sup> *Fayne v. Dept. of Social Services*, 802 S.W.2d 565, 567 (Mo. App. W.D. 1991) (citing *State ex rel. Hughes v. Southwestern Bell Tel. Co.*, 179 S.W.2d 77, 81 (Mo. 1944)).

<sup>32</sup> *Missouri Bluffs*, 943 S.W.2d at 755; in the case at hand, the proper forum would be the circuit court.

<sup>33</sup> See *Application to Intervene of Missouri-Acorn*.

<sup>34</sup> *Id.* at FN.<sup>26</sup>

UNION ELECTRIC COMPANY, D/B/A AMERENUE

64

19 Mo. P.S.C. 3d

applicants for intervention have sought intervention in prior cases and been granted intervention. An administrative agency is not bound by *stare decisis*, nor are agency decisions binding precedent on the Missouri courts.<sup>35</sup> *Stare decisis* does not apply here and an applicant's prior intervention in Commission proceedings does not support intervention under 4 CSR 240-2.075(1)-(6). The majority also advanced as a rationale for ignoring its rules, that the element of time and moving the process forward were considerations in granting intervention, elements not enumerated under the rules. The Commission's rules represent the protections of due process to parties and other interested persons. The time rationale overlooks the fact that the Commission has influence over its calendar and timing with regard to a case. If there is a concern about timing, the appropriate course of action is to amend the case procedural schedule, not to ignore the Commission rules. Besides, late intervention is frequently granted in Commission cases, which further illustrates that the timing argument is not persuasive.

(1) Application to Intervene by the Consumer's Council of Missouri and Order Granting the Application to Intervene of the Consumers Council of Missouri

Section 4 CSR 240-2.060(1) – (6) governing applications also apply to an Application to Intervene under 4 CSR 240-2.075(1)<sup>36</sup>. Here,

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<sup>35</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

<sup>36</sup> The purpose of Section 4 CSR 240-2.060 is stated as "Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

65

the Consumer's Council of Missouri failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically the Council has omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M).

Even though the application is deficient, the rules have leniency built in. Deficiencies can be cured if they are made prior to the granting of the authority sought in the application. Moreover, the Council could have sought a waiver pursuant to 4 CSR 240-2.015(1), which it did not. Each of these items represents a failure to comply with Commission rules and as such, fail to provide the Commission with an application that is satisfactory, and warranting denial.

The Council further fails to meet the requirements of 4 CSR 240-2.075(4)(A) and (B), in that paragraph 3 of the Council's application states that its interest is "different from the general public interest," which is nothing more than a conclusory statement unsupported by any allegation of fact. Accordingly, the Council's efforts fail on this rule. Also, 4 CSR 240-2.075(4)(A) requires more than just an interest different from that of the general public interest, but there must be a *showing* that the interest may be "adversely affected by a final order arising from the case." The Council makes no such showing. The Council does state at paragraph 4 its grounds for opposition as to revenue requirement and discriminatory rate design, but this does not demonstrate how the Council will be adversely affected by a final order as required by the rule. Thus, the Council fails to meet the requirements of 4 CSR 240-2.075(4)(A). 4 CSR 240-2.075(4)(B) does provide an alternative to 4 CSR 240-2.075(4)(A) if the applicant can show that "granting intervention would serve the public interest." The Council states at paragraph 5 that it "believes that its intervention and participation in this proceeding would serve the public interest ..." which again is nothing more than a mere conclusion and completely fails to make any showing as is required by the rule.

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this rule".

UNION ELECTRIC COMPANY, D/B/A AMERENUE

The Council's application is deficient, fails to make the showing required by Commission rules, and as such, by law, must be denied by this Commission. Instead, the Commission has issued an Order Granting Intervention which specifically *finds* that the interest of the Council is "different from that of the general public, and may be adversely affected by a final order arising from the case." Nothing in the application supports such a finding and as such, can only be based upon facts and evidence relied upon outside the pleading of the Applicant. Commissioners are expected to come to cases with knowledge, experience and expertise. But, where the majority creates facts and makes evidentiary rulings regarding an Application without providing existing parties an opportunity to rebut, refute, or even respond to such facts and evidence, other parties are denied due process. Additionally, the Commission's order finds that "allowing the Council to intervene will serve the public interest" while the Council provided no basis in its pleading which supports the Commission's finding. The majority has created evidence, relied upon that evidence and ultimately made a finding based upon that evidence in granting the application of the Council. This does not comport with our rules.

(2) Application to Intervene by AARP and Order Granting the Application to Intervene of AARP

AARP failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically, AARP has omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M).

Additionally, AARP omits from its application a list of its members as required by 4 CSR 240-2.075(3), but does disclose that there are approximately 755,000 AARP members currently residing in the state of Missouri. AARP did not request a waiver from any of the Commission rules. Under 4 CSR 240-2.075(4)(A), AARP must show that the interest it represents here are different from that of the general public and that the interest may be adversely affected by a final order in this case. AARP states at ¶13 that the interest it represents is different and



UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

67

goes on to describe how that interest is different; (1) seniors are particularly vulnerable to increases in energy prices, (2) seniors devote a higher percentage of their total spending than do other age groups on residential energy costs, and (3) many seniors have special needs and safety concerns with regard to access to their electric service. AARP also in ¶3 describes how proposals in this matter may “directly and adversely impact those Missouri seniors who are receiving electric service from AmerenUE.” AARP however goes further in its application by also providing a public interest basis for intervention in ¶4 by articulating that it has provided testimony regarding rates and services for older utility consumers in “numerous cases.” While compliance with 4 CSR 240-2.075(4)(A) or (B) is laudable, this does not overcome the other deficiencies which have already been put forth here, and even despite AARP’s efforts with regard to compliance with some portions of the rules, its deficiencies none the less garner the conclusion that intervention should not have been granted.

The Commission’s order granting the application to intervene of AARP makes no showing that AARP was compliant with Commission rules (including 4 CSR 240-2.060 and 4 CSR 240-2.075) or that any waiver was requested and granted. Because the application of AARP is deficient, there is no support for the Commission’s Order granting intervention.

(3) Application to Intervene by Missouri-ACORN and Order Granting the Application to Intervene of Missouri-ACORN

MO-ACORN filed an application to intervene in this matter, and like the Council and AARP, did not meet the requirements of the Commission rules. MO-ACORN also filed an Answer to AmerenUE’s response to MO-ACORN’s application. The answer challenged the constitutionality of 4 CSR 240-2.075. MO-ACORN did however overlook 4 CSR 240-2.060 in its response, which has provisions similar to 4 CSR 240-2.075.<sup>37</sup>

MO-ACORN’s application failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically, MO-ACORN omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the

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<sup>37</sup> 4 CSR 240-2.075(3) “An association filing an application to intervene shall list all of its members.” *cf.* 4 CSR 240-2.060(1)(J) “If any applicant is an association, a list of all of its members.”

UNION ELECTRIC COMPANY, D/B/A AMERENUE

68

19 Mo. P.S.C. 3d

applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M). Additionally, MOACORN omitted from its application a list of its members as required by 4 CSR 240-2.075(3). At a minimum, MO-ACORN in its Amended Application to Intervene and response to AmerenUE states that “it is not an association of persons but is an Arkansas corporation[.]”<sup>38</sup>, which thus raises the issue of MO-ACORN’s failure to comply with 4 CSR 240-2.060(1)(C), by not providing a certificate from the secretary of state that it is authorized to do business in Missouri as well as 4 CSR 240-2.060(1)(E), by not providing a copy of the registration of a fictitious name from the secretary of state.

MO-ACORN does state its proposed interest in the case at ¶6 of its Amended Application by purporting to represent “low-and moderate-income families” but later in ¶7 purports to represent “residential electric customers” a distinction which has a difference in this Commission’s consideration of the application. Additionally, MOACORN claims to also represent “communities” of “low-and moderate-income families” without providing any details as to how these communities have unique interests to be represented here.<sup>39</sup> Assuming that MO-ACORN represents both “low-and moderateincome families” and “residential electric customers” it is difficult to square this representation with that advanced by other intervention applicants and the interest represented by the Office of the Public Counsel, as such, under 4 CSR 240-2.075(4)(A) it is unclear from the application how MO-ACORN’s interest is different from that of the “general public” and more specifically – how these two groups interest may be adversely affected by a final order of the Commission in this case. Rather MO-ACORN simply states that it is opposed to “any unjust and unreasonable revenue requirement or discriminatory rate design for AmerenUE’s residential electric customers[.]” which presumably attempts to demonstrate an adverse affect.

Since unjust and unreasonable rates are unlawful along with discriminatory rates, MO-ACORN’s alleged support for intervention is merely a restatement of the law, and not necessarily a demonstration of

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<sup>38</sup> See *Answer of MO-ACORN to Response of AmerenUE to Application to Intervene of MO-ACORN*, ¶1.

<sup>39</sup> See *Application to Intervene of Missouri-Acorn*, ¶6.

an interest that is different from the general public. MO-ACORN does state to the Commission that it represents a “separate demographic from the general public interest” which does not *de facto* “create[ ] a unique perspective and interest ...” Representing a separate demographic does not necessarily differentiate a group’s interest from that of the general public interest and here, MO-ACORN has provided no facts or evidence to provide such an explanation. Rather, MO-ACORN rests on its own conclusion to purportedly meet the requirements of 4 CSR 240-2.075(4)(A). MO-ACORN has not met its burden under this section, and as such, intervention would rest instead on meeting the threshold set forth in 4 CSR 240-2.075(4)(B), “that granting the proposed intervention would serve the public interest.” MO-ACORN again falls short in its Application and its Amended Application, by drawing its own conclusion, not supported by facts; “MO-ACORN believes that its intervention and participation in this proceeding would serve the public interest ...”<sup>40</sup> This statement provides neither a how, or why, for this Commission’s consideration.

MO-ACORN raises questions regarding the constitutionality of this Commission’s rules, but as I have already addressed earlier, this Commission lacks jurisdiction to rule on questions of constitutionality.

MO-ACORN does however draw to the Commission’s attention that AmerenUE did not oppose its intervention. Opposition by a party does not relieve MO-ACORN of its obligation to comply with Commission rules. MO-ACORN has not met the requirements of 4 CSR 240-2.075(4)(B) either. The Commission’s Order granting intervention to MO-ACORN provides an analysis of the “purpose of the regulation” regarding disclosure of association under 4 CSR 240-2.075(3), but provides no basis whatsoever to support this alleged purpose. The majority even goes so far in this order as to state that “limited membership” and its attendant changes from case to case is helpful for the Commission and other parties to know, but provides no corollary explanation as to why this same rationale would not similarly apply to membership, which is not limited. The Commission finds that inclusion of the word “association” in a title is not the “type of association to which the regulation is aimed” – without providing any factual or evidentiary basis for reaching this conclusion. The Order further finds that requiring such a list from MO-

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<sup>40</sup> See Amended Application to Intervene by Missouri-Acorn, ¶10.

ACORN would be “unduly burdensome”. Nothing in the applicant’s pleadings in this case suggests that meeting the requirements of 4 CSR 240-2.075(3) is “unduly burdensome”; creating a due process problem because no party had any notice of or opportunity to rebut the majority’s finding.

The Commission’s order also finds that MO-ACORN’s interest in this case is different from that of the general public and that this interest may be adversely affected by a final order arising from this case, despite the absence of any showing by MOACORN as to how its interest is different and how that interest would be adversely affected. In evaluating how an interest is different, compliance with 4 CSR 240-2.075(3) could provide additional evidence to support that a difference exists. Lastly, the Commission’s order finds that allowing MO-ACORN to intervene “will serve the public interest” despite the fact that the only basis for this finding by the Commission is the conclusion by MO-ACORN themselves that intervention will serve the public interest. Since MO-ACORN did not seek a waiver from any of the Commission’s rules, intervention was not appropriate because MO-ACORN’s application, and its amended application, failed to comply with the Commission’s rules.

(4) Application to Intervene by NRDC and Order Granting the Application to Intervene of NRDC

Section 4 CSR 240-2.060(1) – (6) governing applications also apply to an Application to Intervene under 4 CSR 240-2.075(1)<sup>41</sup>. Here, the NRDC failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically NRDC failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M).

The NRDC further failed to address the requirements of 4 CSR 240-2.075(4)(A), and (B) unless one concludes that the application in ¶1, and its explanation of the NRDC’s member’s interest would amount to “an interest which is different from that of the general public”. While NRDC states that their reason for intervening is so that its “members and

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<sup>41</sup> The purpose of Section 4 CSR 240-2.060 is stated as “Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule”.

others may benefit from well designed and cost-effective energy efficiency programs and renewable resources” this statement alone in ¶1 and the remainder of the pleadings, do not demonstrate what “adverse affect[]” would occur on its members by a final order of the Commission in this case. NRDC does plead a bare conclusion at ¶5 by concluding that “NRDC has interests different from those of the general public or average ratepayer, which could be adversely affected by the decision in this case.”<sup>42</sup> Under 4 CSR 240-2.075(4)(B) NRDC can still make a showing worthy of intervention if they demonstrate that granting intervention “would serve the public interest” – but here the NRDC specifically pleads that it’s “members and others may benefit” – which is not synonymous with serving the public interest. NRDC’s claimed expertise in the design and implementation of utility programs and policies designed to deploy energy efficiency and peak demand reduction “to benefit the public” may arguably be meant to “serve the public interest” but NRDC’s pleading falls well short of connecting the dots which are specifically set out in 4 CSR 240-2.075(4)(A) and (B). The NRDC does offer its own conclusion at ¶6 that “[I]t will serve the public interest for NRDC to be allowed to intervene” a conclusion which is not supported. As such, in my opinion, NRDC’s application is incomplete and deficient.

The Commission’s Order granting intervention specifically *finds* that the interest of the NRDC is “different from that of the general public, and may be adversely affected by a final order arising from the case.” This finding is not supported by NRDC’s application, and further, no facts are found to support the Commission’s finding as well. Additionally, the Commission’s Order finds that “allowing the NRDC to intervene will serve the public interest” where the NRDC has provided nothing but its own conclusion that this is so. Again, as in the prior applications reviewed, the Commission overlooked deficiencies in the application and made findings in its final Order which are unsupported by the application. The Order is unlawful under the circumstances.

(5) Application to Intervene by Missouri Retailers Association  
and Order Granting the Application to Intervene of Missouri  
Retailers Association

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<sup>42</sup> The NRDC provides no factual support for, or definition of, “average ratepayer”, a category which it purports to represent based upon its application for intervention.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

The Missouri Retailers Association failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically, the MRA omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M). The MRA requested no waiver from any Commission rules.

The MRA failed to meet the requirements of 4 CSR 240-2.075(3) by failing to list all of its members and under 4 CSR 240-2.075(4)(A), and (B), in that ¶1 states that its interest is “different from the general public interest” which is nothing more than a conclusory statement. The MRA does explain the distinctive characteristics of its members in ¶1, which arguably are intended to support the conclusion that its interest is “different” but it is not entirely clear from the pleading that this is the case. It could be said that depending on reliable electric service at reasonable rates “in order to survive in this economy” is not unique or different from that of the general public interest. Also, that “employ[ing] their workforce, and to continue to provide their products and service at reasonable prices” may be a difference, but it cannot with any certainty be said that this interest is different from the “general public interest”. In my opinion, the MRA’s efforts fail on this rule. Also, 4 CSR 240-2.075(4)(A) requires more than just an interest different from that of the general public interest, but there must be a showing that the interest may be “adversely affected by a final order arising from the case.” The MRA makes no such showing. 4 CSR 240-2.075(4)(B) does provide an alternative to 4 CSR 240-2.075(4)(A) if the applicant can show that “intervention and participation would serve the public interest.” Here, the MRA states at ¶5 that it “believes that its intervention and participation in this proceeding would serve the public interest ...” which again is nothing more than a mere conclusion and completely fails to make any factual showing as is required by the rule.

The Commission’s Order also does nothing more, as in the NRDC order, with findings made to support conclusions which were not supported by facts in the application. As such, the MRA’s application to intervene is deficient on many counts and should not have been granted.

(6) Application to Intervene by MJMEUC and Order Granting the Application to Intervene of MJMEUC

MJMEUC failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Notably, MJMEUC does not provide the necessary statutory reference required by 4 CSR 240-2.060(1)(F), but failed to include a statement indicating whether the applicant has any pending action or final unsatisfied judgments or decisions against it as it required by 4 CSR 240-2.060(1)(K). MJMEUC failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M), and these items were not furnished “prior to the granting of the authority sought.”<sup>43</sup>

MJMEUC did not state whether it supports or opposes the relief sought by AmerenUE, and therefore, MJMEUC’s application was deficient under 4 CSR 240-2.075(2). Also, under 4 CSR 240-2.075(4)(A) the Commission may permit intervention on a showing that the proposed intervenor has an “interest which is different from that of the general public”. MJMEUC’s application at ¶5 states that its interest “is different from that of the general public” in that it represents municipal electrical systems throughout the state which take transmission through MISO and that have wholesale power contracts with AmerenUE, an interest that is not presently represented. MJMEUC however fails to demonstrate in its application how these interests “may be adversely affected by a final order” in the case. As such, MJMEUC’s pleading fails to meet the requirements of 4 CSR 240-2.075(4)(A).

Next MJMEUC tries to plead its way into the case through 4 CSR 240-2.075(4)(B) by showing that its intervention would “serve the public interest.” At ¶6 MJMEUC provides a rationale for intervention under the “public interest” threshold but still does not indicate how intervention serves that interest. As was stated earlier in this dissent, interests can be represented before the Commission in avenues other than intervention, specifically through the filing of *amicus curiae*. Here MJMEUC provides no details on how the interests of the municipal utilities will be impacted, or how the public interest is served by granting intervention. ¶6 at best is designed to provide a conclusion on the question of public interest and

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<sup>43</sup> 4 CSR 240-2.060(2).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

74

19 Mo. P.S.C. 3d

nothing more, and as such does not bring MJMEUC into compliance with the Commission rule.

Further, in dissecting the response of AmerenUE to MJMEUC's application to intervene, there is a question of fact which has been raised, which is whether a wholesale customer has an interest in a general *retail* rate increase request, when *wholesale* rates are regulated by the Federal Energy Regulatory Commission ("FERC"), and how that wholesale customer can be affected by the final order in the case.<sup>44</sup> Since there is no relationship between MJMEUC and AmerenUE with respect to this case, it is difficult to understand how it would serve the public interest to grant them intervention. MJMEUC, in its response to AmerenUE's opposition to its application to intervene also tries to build an argument that MJMEUC cities are reliant on AmerenUE's transmission and distribution systems, that AmerenUE's participation in MISO has uncertainty and thus creates risk for MJMEUC cities, as well as how transmission and distribution upgrade costs are being charged to "bundled retail customers." MJMEUC is a wholesale customer and thus its interest in "bundled retail" is not an appropriate dovetail into this case. While AmerenUE's participation in MISO may create uncertainty for MJMEUC, FERC's exclusive jurisdiction over regional transmission operators does not create a backdoor for intervention in this general retail rate increase proceeding which rises to the level of serving the public interest as contemplated by the rules.

As such, MJMEUC's application is not in compliance with the Commission's rules and should have been denied. Denial however would not mean that MJMEUC would not have a voice before the Commission, as the filing of *amicus curie* under 4 CSR 240-2.075(6) is another avenue for advocacy.

**CONCLUSION**

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<sup>44</sup> See *Reply of the Missouri Joint Municipal Electric Utility Commission to AmerenUE's Opposition to Application for Intervention*, ¶1.



## ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

75

This Commission may have liberally granted intervention in the past, but that past approach is no excuse for this Commission in this case to disregard its properly promulgated rules. A deficient application to intervene does not require denial of that applicant's request for participation. On the contrary, this Commission's rules provide for a waiver upon a showing of good cause. Furthermore, my suggestion with regard to these applications was for the Commission to issue a notice of deficiency, or allow time to seek a waiver. This procedure allows each applicant an opportunity to comply with the Commission rules and, where compliance could not be achieved, seek a waiver.

Because the Commission's Orders granting intervention as to these applicants are not final for purposes of appeal, I believe that a corrective course of action is warranted. That course is for the Commission to withdraw its Orders granting intervention and issue new orders to the applicants to correct the rule deficiencies or seek waivers.

The result reached by the majority here could have been achieved in a lawful manner, and still can be. The majority has the opportunity now to right the wrong.

### **In the Matter of the Application of Atmos Energy Corporation for a Variance and Waiver from the Provisions of 4 CSR 240-3.235.**

*File No. GE-2009-0443*

*Decided September 16, 2009*

**Depreciation §2.** Atmos Energy Corporation Sought a variance and waiver from 4 CSR 240-3.235, thereby allowing the company to file a new rate case without the inclusion of depreciation study. The Commission approved the terms of a stipulation and agreement and granted the waiver request. Under terms of the agreement, the company agreed to remove negative amortization of the depreciation reserve from the cost of service in the next filed rate case.

**Evidence, Practice And Procedure §30.** Where Atmos Energy Corporation, Office of the Public Counsel and State of the Missouri Public Service Commission submitted a non-unanimous stipulation and agreement, and intervenor did not submit an objection within seven days of its filing, the Commission relied on 4 CSR 240-2.115 to treat the stipulation and agreement as unanimous. The Commission approved the stipulation and agreement after concluding it was a reasonable resolution of all the issues.

## ATMOS ENERGY CORPORATION

76

19 Mo. P.S.C. 3d

**Gas §2.** When Atmos Energy Corporation determined it was necessary to complete vintaging of current plant assets before conducting a depreciation study based on an actuarial life analysis, it sought a waiver of 4 CSR 240-3.235, in order to file its next rate case without a new depreciation study. The Commission approved the waiver request subject to conditions, including company's agreeing to remove the negative amortization of the depreciation reserve from the cost of service in its next rate case.

**Rates §62.** When Atmos Energy Corporation determined it was necessary to complete vintaging of current plant assets before conducting a depreciation study based on an actuarial life analysis, it sought a waiver of 4 CSR 240-3.235, in order to file its next rate case without a new depreciation study. The Commission approved the waiver request subject to conditions, including company's agreeing to remove the negative amortization of the depreciation reserve from the cost of service in its next rate case.

### ORDER APPROVING UNANIMOUS STIPULATION AND GRANTING WAIVER

On June 19, 2009, Atmos Energy Corporation filed an Application for Variance and Waiver from the portion of 4 CSR 240-3.235 requiring Atmos to file a new depreciation study in its next general rate case.<sup>1</sup> The Office of the Public Counsel objected to the waiver, the Staff of the Missouri Public Service Commission recommended that the waiver be granted with certain conditions, and Noranda Aluminum, Inc., objected to one of the conditions proposed by Staff.

The Commission set this matter for hearing, but prior to the hearing Atmos and Public Counsel reached a settlement and the hearing was cancelled. On August 26, 2009, Atmos and Public Counsel filed a stipulation and agreement which purports to settle all the issues in this case. The major terms and conditions of the agreement are as follows:

- a. Atmos agrees to remove the negative amortization of the depreciation reserve from the cost of service in its next rate case filed in 2009.
- b. Atmos will not offer testimony in said rate case supporting a negative amortization of the depreciation reserve.
- c. Public Counsel hereby withdraws its opposition to the granting of the subject waiver in this proceeding.
- d. Atmos and Public Counsel agree that the Commission's approval of the requested waiver is subject to the following conditions

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<sup>1</sup> The Commission granted Atmos a waiver regarding vintaging of the same records in File No. GE-2008-0342 without objection.

ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

77

recommended by the Staff: (1) the waiver will apply only to a rate case filed in calendar year 2009; and (2) Atmos will not propose changes to its depreciation rates as a part of its 2009 rate case.<sup>2</sup>

Atmos and Public Counsel requested that the Commission approve the stipulation and agreement and grant Atmos a waiver as requested.

Commission Rule 4 CSR 240-2.115 provides that if no party objects to a non-unanimous stipulation and agreement within seven days of its filing, the stipulation and agreement may be treated as unanimous. Since no party has filed a timely objection to the stipulation and agreement, it will be treated as a unanimous agreement.

The stipulation and agreement is a reasonable resolution of all the issues in this matter. The Commission will approve the stipulation and agreement.

Atmos has been working with Staff to vintage its asset retirements and has done so for a majority of those records but will require substantial work to complete the process. A depreciation study cannot be completed until the vintaging is completed. Under the conditions of the stipulation and agreement Atmos will not request a change to its depreciation rates in a rate case filed by the end of 2009. Staff has indicated that in its opinion, granting this waiver will not harm the ratepayers or the utility. For these reasons, the Commission finds that good cause exists to grant a waiver of the depreciation study requirement for a rate case filed in 2009.

**THE COMMISSION ORDERS THAT:**

1. The unanimous stipulation and agreement filed on August 26, 2009, is approved. A copy of the stipulation and agreement is attached to this order.

2. The signatory parties are ordered to comply with the terms of the stipulation and agreement.

3. Atmos Energy Corporation is granted a waiver from 4 CSR 240-3.235 so that it may file its next rate case without the inclusion of a new depreciation study subject to the terms and conditions as set out in the Stipulation and Agreement.

4. This order shall become effective on September 26, 2009.

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<sup>2</sup> *Stipulation and Agreement*, filed August 26, 2009, para. 9.

UNION ELECTRIC COOMPANY, D/B/A AMERENUE

78

19 Mo. P.S.C. 3d

5. This file shall be closed on September 27, 2009.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

**\*NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Decided September 22, 2009*

**Evidence, Practice and Procedure §22.** The applicants were allowed to intervene because their interest as street lighting customers was different from that of the general public and because their intervention would serve the public interest.

**ORDER GRANTING THE APPLICATION TO INTERVENE OUT OF  
TIME OF THE CITY OF O'FALLON, THE CITY OF UNIVERSITY CITY,  
THE CITY OF ROCK HILL, AND THE ST. LOUIS COUNTY  
MUNICIPAL LEAGUE**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene. The City of O'Fallon, the City of University City, the City of Rock Hill, and the St. Louis County Municipal League (collectively the municipal group) applied to intervene out of time on September 3. No party has opposed that application.

The municipal group is comprised of municipalities that are large street lighting customers of AmerenUE. They seek to intervene to address the impact of AmerenUE's proposed rate increase on its street lighting customers. The municipal group explains they filed their application to intervene after the established deadline because of the

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

79

delays occasioned by the meeting times of the City Councils and Boards of Alderman for the intervening municipalities.

Commission Rule 4 CSR 240-2.075(4) provides that the Commission may grant an application to intervene upon a showing that the applicant has an interest in the case that is different from that of the general public and that may be adversely affected by the Commission's final order in the case. In the alternative, the Commission may grant an application to intervene if doing so would serve the public interest. Subsection (5) of that same rule indicates the Commission may grant a late-filed application to intervene upon a showing of good cause.

As street lighting customers, the interests of the municipal group are different from those of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission believes that allowing the municipal group to intervene will serve the public interest in that those municipalities will be able to represent the interests of the street lighting customer class, which otherwise will not be represented. Further, the municipal group has shown good cause for filing their application to intervene approximately two weeks after the filing deadline established by the Commission. Therefore, in accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application to Intervene Out of Time of the City of O'Fallon, the City of University City, the City of Rock Hill, and the St. Louis County Municipal League is granted.

2. This order shall become effective immediately upon issuance.

Clayton, Chm., Davis, Jarrett, and  
Gunn, CC., concur;  
Jarrett, C., dissents with dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** See pages 47, 48, 50, 52, 53, 55, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**DISSENTING OPINION OF**  
**COMMISSONER TERRY M. JARRETT**

Because I believe that the application to intervene of The City of O'Fallon, the City of University City, the City of Rock Hill, and the St. Louis County Municipal League (collectively the municipal group) does not comply with the Commission's rules, I do not support the Commission's grant of intervention, and dissent.

My dissenting opinion regarding the applications to intervene of The Consumers Council of Missouri, AARP, Missouri-ACORN, Natural Resources Defense Council, Missouri Retailers Association and the Missouri Joint Municipal Electric Utility Commission detail compliance with Commission rules in the context of an application to intervene. While the application of the municipal group in my opinion complies with 4 CSR 240-2.075, it fails to meet the requirements set out in 4 CSR 240-2 .060, as such, the Commission should withdraw its Order granting intervention and issue a new order to the applicant to correct the rule deficiencies or seek waivers.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036*  
*Decided October 7, 2009*

**Rates §114.** The Commission scheduled an evidentiary hearing to take evidence regarding whether the utility had established the need to implement interim rates.

**ORDER FURTHER SUSPENDING INTERIM RATE TARIFF AND SCHEDULING EVIDENTIARY HEARING**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, issued a tariff that would implement an interim rate increase of 1.67 percent, subject to refund, as an accompaniment to its general rate increase request. That tariff carried an October 1, 2009 effective date, but the Commission previously suspended that tariff until October 10.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

81

In response to AmerenUE's tariff filing, Staff, Public Counsel, and several intervening parties filed suggestions opposing AmerenUE's request for an interim rate increase. One intervenor, Laclede Gas Company, supports AmerenUE's request. The Commission heard oral arguments from the parties regarding AmerenUE's request for an interim rate increase on September 14.

The key disagreement between the supporters and opponents of AmerenUE's request for an interim rate increase concerns the proper standard the Commission should apply when considering that request. The parties opposing the interim rate increase contend the Commission should apply an emergency or near emergency standard. AmerenUE concedes it is not facing an emergency or near emergency. However, AmerenUE argues the Commission should apply a more flexible good cause shown standard. AmerenUE attempts to meet that good cause standard by showing that an interim rate increase is necessary to offset the adverse effects of regulatory lag on the company's profitability.

AmerenUE is not the first utility to ask the Commission for an interim rate increase, and previous cases have clearly established the Commission's authority to grant such requests. In a 1976 case involving Laclede Gas Company, the Missouri Court of Appeals held "the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation."<sup>1</sup>

In that case, in denying Laclede's request for an interim rate increase, the Commission indicated it would allow such requests only where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity.<sup>2</sup>

That standard has come to be known as the "emergency" standard and the Commission's use of that standard was upheld by the court of appeals in the Laclede decision.

The *Laclede* decision recognizes that the Commission acted within its discretion when it applied an "emergency" standard to deny

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<sup>1</sup> State ex rel. Laclede Gas Co. v. Pub. Serv. Commission, 535 S.W.2d 561, 567 (Mo. App. 1976).

<sup>2</sup> *Laclede Gas*, at 568-569.

UNION ELECTRIC COOMPANY, D/B/A AMERENUE

82

19 Mo. P.S.C. 3d

Laclede's request for an interim rate increase. That decision does not, however, establish the "emergency" standard as the only standard that the Commission may lawfully apply when exercising its discretion. In fact, the court explicitly recognized that in some future case an applicant could meet a standard defined by the Commission without any emergency.<sup>3</sup> Indeed, in other cases, the Commission has found that it has authority to grant interim rate increases on the basis of something other than an "emergency" standard. For example, in a 2008 order, the Commission found it had the authority to grant an interim rate increase on a nonemergency basis where particular circumstances necessitate such relief on the basis of good cause shown by the requesting utility.<sup>4</sup>

Although the Commission has claimed authority to grant interim rate increases on something less than an emergency basis, in practice, the "good cause shown" standard looks a lot like the "emergency" standard. A good example is found in a 1997 case. In an order rejecting an interim rate increase tariff proposed by The Empire District Electric Company, the Commission concluded that it "may authorize the implementation of interim rates upon a showing of good cause, and such good cause may be less than an emergency or near-emergency."<sup>5</sup> Despite that conclusion, the Commission rejected Empire's request for an interim rate increase, finding:

There is no showing by the Company that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted. Furthermore, the Company has shown no other exigent circumstances that would merit interim relief.

Thus, the Commission applied a good cause standard, but still required the company to demonstrate an emergency or near emergency before it

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<sup>3</sup> *Laclede Gas*, at 574.

<sup>4</sup> In the Matter of the Joint Application of Stoddard County Sewer Company, R.D. Sewer Co., LLC and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., LLC and for an Interim Rate Increase, Report and Order, Case No. SO-2008-0289, Page 117 (October 23, 2008).

<sup>5</sup> In the Matter of The Empire District Electric Company's Tariff Revision Designed to Increase Rates, on an Interim Basis and Subject to Refund, for Electric Service Provided to Customers in the Missouri Service Area of the Company, Report and Order, 6 Mo P.S.C. 3d 17, 21 (1997).



UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

83

would be allowed an interim rate increase.

Interim rate increase requests are a relatively rare occurrence. The grant of an interim rate increase is even more rare. By definition, an interim rate increase would be implemented without the full audit and review that will be available to the Commission when it establishes permanent rates for AmerenUE. The Commission has granted interim rate increases only in extraordinary circumstances.

The Commission will set an evidentiary hearing to allow AmerenUE an opportunity to present evidence to show that it is entitled to an interim rate increase. The Commission may, or may not, ultimately find that AmerenUE has presented enough evidence to justify the relief the company seeks, but the Commission needs to fully consider that evidence and any countering evidence the other parties may produce, before deciding whether AmerenUE has made its case. For that reason, the Commission will schedule an evidentiary hearing and establish a procedural schedule.

This will be an expedited proceeding, but the Commission believes the parties can best present evidence on this dispute through prefiled testimony. Therefore, the procedural schedule will require the parties to submit prefiled direct, rebuttal, and surrebuttal testimony. Staff has advised the Commission that it can promptly perform a review of the net plant additions AmerenUE is seeking to include in its interim rate increase. Staff shall include the results of that review in its direct testimony.

The Commission will not be able to conduct an evidentiary hearing before October 10, when AmerenUE's tariff becomes effective. Therefore, the Commission will further suspend that tariff until January 29, 2010, which is 120 days after its original effective date, as permitted by Section 393.150, RSMo 2000.

**THE COMMISSION ORDERS THAT:**

1. The following procedural schedule is established:  
**AmerenUE identifies which previously filed direct testimony applies to this issue and submits additional direct testimony if it so desires -** **October 20, 2009**  
**Non-AmerenUE parties file direct testimony -** **November 3, 2009**

UNION ELECTRIC COOMPANY, D/B/A AMERENUUE

84

19 Mo. P.S.C. 3d

**Rebuttal testimony filed by all parties - November 17, 2009**

**Surrebuttal testimony filed by all parties- November 24, 2009**

**Hearing - December 7, 2009, beginning at 8:30 a.m.**

**Post Hearing Briefs- December 21, 2009**

2. The tariff submitted under Tariff File No. YE-2010-0055, on July 24, 2009, by Union Electric Company, d/b/a AmerenUE, for the purpose of implementing an interim rate increase, previously suspended from October 1, 2009, to October 10, 2009, is further suspended until January 29, 2010.

3. The specific tariff sheet suspended is:  
**Union Electric Company**  
**MO P.S.C. Schedule No. 5**  
Original Sheet No. 98.14

4. This order shall become effective immediately upon issuance.

Clayton, Chm., Jarrett, Gunn, and Kenney, CC., concur;  
Davis, C., concurs with separate concurring/dissenting  
opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** See pages 47, 48, 50, 52, 53, 55, 78, 108, 169, 199, 350, 358, and 376 for other orders in this case.

**CONCURRENCE OF COMMISSIONER JEFF DAVIS TO THE  
“ORDER FURTHER SUSPENDING INTERIM RATE TARIFF AND  
SCHEDULING EVIDENTIARY HEARING,”  
AND DISSENT REGARDING PROCEDURE AND STANDARD**

I concur with the Missouri Public Service Commission's order<sup>1</sup> (“the order”) as to its ruling to further suspend, and order a hearing

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<sup>1</sup> Dated October 7, 2009.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

85

on, AmerenUE's MO PSC Schedule No. 5, Sheet No. 98.14, tracking no. YE-2010-0055 ("the disputed tariff").<sup>2</sup> The disputed tariff is subject to the "just and reasonable" standard, as determined after a full evidentiary hearing, as Section 393.150.2<sup>3</sup> expressly provides. Nevertheless, the order implies expedited procedures and higher standards without authority, so I must respectfully dissent from the order in part and to that extent.

I. Procedural Background

On July 24, 2009, Union Electric Company, d/b/a AmerenUE ("AmerenUE"), filed two tariffs. One tariff consists of 36 tariff sheets describing a rate increase of approximately \$402 million.<sup>4</sup> The other is the disputed tariff, consisting of a single tariff sheet describing a rate increase of approximately 1.67 percent, or \$37 million, subject to refund.<sup>5</sup> On September 14, 2009, the Commission heard the parties' argument on the procedure and standard for approving or rejecting the disputed tariff. On September 24, 2009, the Commission suspended the tariff. On October 7, 2009, the Commission issued the order extending the suspension pursuant to Section 393.150.<sup>6</sup>

II. The Statutes

The Commission is a legislative creation, so it has only such power as the legislature has given it by statute.<sup>7</sup> The statutes set forth procedures and standard for approving or rejecting a tariff. Such provisions include the following.

A filed and effective tariff governs an electric corporation's rate:

No corporation shall charge . . . different compensation for any service rendered . . . than the rates . . . applicable to such services as specified in its [tariff] **filed**

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<sup>2</sup> I use the term "disputed" for tariff tracking no. YE-2010-0055 to better distinguish it from tracking no. YE-2010-0054. Tracking no. YE-2010-0054—on becoming effective—replaces tracking no. YE-2010-0055, so the parties view tracking no. YE-2010-0055 as temporary, and tracking no. YE-2010-0054 as permanent. Yet, ultimately, all tariffs are equally temporary and permanent as they replace one another, as the statutes provide.

<sup>3</sup> RSMo 2000.

<sup>4</sup> Tracking No. YE-2010-0054.

<sup>5</sup> Tracking No. YE-2010-0055.

<sup>6</sup> Section 393.150.1, RSMo 2000.

<sup>7</sup> State Bd. of Regis'n for the Healing Arts v. Masters, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

UNION ELECTRIC COOMPANY, D/B/A AMERENUE

86

19 Mo. P.S.C. 3d

**and in effect** at the time [<sup>8</sup>]

Under that provision, and the following provision, the corporation may initiate a change to its rate by filing another tariff giving notice of such change:

Unless the commission otherwise orders, no change shall be made in any [tariff], except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe.<sup>9</sup>

Under that language, filing a tariff may lead to a rate change either within the 30-day notice and publication period, or without such period if the Commission so orders. Such order stands upon "good cause [.]"

Further, filing a tariff may also lead to specified proceedings:

Whenever there shall be filed with the commission by any . . . electrical corporation [a tariff], the commission [may] enter upon **a hearing concerning the propriety** of such [tariff].<sup>10</sup>

The issue at the hearing—the tariff's propriety—includes a standard for the rate described:

At any hearing involving a rate sought to be increased, the burden of proof to show **that** the increased rate or proposed increased rate is **just and**

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<sup>8</sup> Section 393.140(11), RSMo 2000 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> Section 393.150.1, RSMo Supp. 2008 (emphasis added). Such hearing may commence "upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested . . . electrical corporation . . . , but upon reasonable notice[.]" *Id.*

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

87

**reasonable** shall be upon the . . . electrical corporation . . . , and the commission shall give to the **hearing and decision of such questions** preference over all other questions pending before it and decide the same as speedily as possible.<sup>11</sup>

Hence, any tariff is subject to the “just and reasonable” standard after a “hearing and decision [.]”

Because such hearing and decision may require more time than the 30-day minimum notice and publication period allows, the Commission may extend that period:

Whenever there shall be filed with the commission by any . . . electrical corporation . . . any [tariff], the commission [may] enter upon a hearing concerning the **propriety** of such [tariff], and pending **such hearing and the decision** thereon, the commission . . . may **suspend** the operation of such [tariff] and **after full hearing**, . . . the commission may make **such order** in reference to such [tariff].<sup>12</sup>

That is the authority that the Commission exercised in the order.

The order suspended the disputed tariff, which the Commission may do only pending a “decision” on whether the tariff describes a rate that is just and reasonable. Such decision may only occur “after a full hearing.” The full, pre-decision hearing provisions signify that this action is now a “contested case.”<sup>13</sup> Contested case procedure allows for waiver of procedural formalities<sup>14</sup> and a decision without a hearing,<sup>15</sup> including by stipulation and agreement,<sup>16</sup> but otherwise entitles the parties to a

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<sup>11</sup> Section 393.150.2, RSMo Supp. 2008 (emphasis added).

<sup>12</sup> Section 393.150.1, RSMo Supp. 2008 (emphasis added).

<sup>13</sup> Section 536.010(4), RSMo Supp. 2008.

<sup>14</sup> Sections 536.060(3) and 536.063(3), RSMo 2000.

<sup>15</sup> Sections 536.060, RSMo 2000.

<sup>16</sup> 4 CSR 240-2.115.

formal hearing procedure.<sup>17</sup>

### III. The Order

Those provisions of chapters 386 and 393, RSMo cited above constitute the “file-and-suspend” procedure for rate-making. There is no ambiguity in them. The order includes no authority contrary to the reading of their plain language. Nevertheless, the order suggests the Commission can invoke “expedited” procedure and standards of review not found in the statute. It does so upon the premise that the temporary tariff is somehow a different type of tariff: an “interim” tariff.

#### *a. Statutory Usage*

That usage is contrary to the statutes. The statutes use the term “interim” in conjunction with rates, charges or tariffs in only one section:

1. [A]ny electrical corporation may make an application to the commission to approve [tariffs] authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation[.]
2. [A]ny electrical . . . corporation may make an application to the commission to approve [tariffs] outside of general rate proceedings to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any [law<sup>18</sup>].

That does not describe the disputed tariff, so that statute—and the statutory term “interim”—do not apply to the disputed tariff.

#### *b. Case Law*

The order also cites ***State ex rel. Laclede Gas Co. v. Public Serv. Com’n of Mo.***,<sup>19</sup> which used the term “interim,” 29 years before the statutes made that usage a term of art for rates. The court uses the term “interim” to describe an earlier tariff and its rate, which a later tariff

<sup>17</sup> Section 536.060 to 536.095, RSMo.

<sup>18</sup> Section 386.266, RSMo Supp. 2008.

<sup>19</sup> 535 S.W.2d 561 (Mo. App., K.C.D. 1976).

replaces when the other takes effect. Of course, every tariff is “interim” in the sense that a later tariff replaces it as the statutes provide. The tariff at issue in ***State ex rel. Laclede Gas Co.*** shares a distinguishing feature with the disputed tariff: the later tariff is filed contemporaneously with the earlier.

The issue in ***State ex rel. Laclede Gas Co.*** was simply the procedure for “accelerated action”<sup>20</sup> “in a purposefully shortened interim rate hearing”<sup>21</sup> on the earlier tariff. As to approval, the court endorsed the Commission’s authority to make such tariff effective with less than the 30-day notice and publication period.<sup>22</sup> As to rejection, the court held that the appellant utility did not show that such decision was unreasonably or unlawfully<sup>23</sup> confiscatory<sup>24</sup> on the record made in the expedited proceeding.<sup>25</sup>

But those holdings have no application to the disputed tariff for two reasons. First, the disputed tariff carried an effective date 68 days after its filing date, so AmerenUE does not offer good cause to reduce the 30-day period. Second,—unlike the tariff at issue in ***State ex rel. Laclede Gas Co.***—the Commission has suspended the disputed tariff, requiring a full hearing on the propriety of the tariff, including whether it is just and reasonable under Section 393.150.2.

In ***State ex rel. Laclede Gas Co.***, the court stated that Section 393.140(5)’s complaint procedure, which includes the just and reasonable standard, does not apply to the expedited procedure for an unsuspended tariff. That holding does not negate the application of such standard under Section 393.150.2 after suspension. On the contrary, it distinguished “a special hearing for the limited purpose of considering an interim increase, since the setting of fair rates is the purpose and subject of the full rate hearing.”<sup>26</sup>

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<sup>20</sup> *Id.* at 569.

<sup>21</sup> *Id.* at 574.

<sup>22</sup> *Id.* at 566.

<sup>23</sup> *Id.* at 574.

<sup>24</sup> *Id.* at 569.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The reason for allowing summary approval or rejection, while requiring a full hearing upon suspension, appears clearly in ***State ex rel. Laclede Gas Co.*** Such provisions balance two legitimate interests. The first is “the practical need for this power” to rule expeditiously. *Id.* at 566. The second is “. . . the desirability of leaving the whole question of just and reasonable rate (unless imperative facts require to the contrary) to the

Thus, ***State ex rel. Laclede Gas Co.*** does not support the order.

*c. Commission Rulings*

The order also cites Commission decisions and orders applying ***State ex rel. Laclede Gas Co.*** But those rulings cannot expand the facts of ***State ex rel. Laclede Gas Co.*** to include a suspended tariff or alter the statutes requirements for a suspended tariff. This Commission's rulings are of no precedential authority.<sup>27</sup>

Conclusion

Like appellant in ***State ex rel. Laclede Gas Co.***, the order cites no other procedure other than file-and-suspend,<sup>28</sup> and merely calling the disputed tariff "interim" does not support a departure from such statutes. Those statutes prescribe a contested case to determine whether the disputed tariff describes a just and reasonable rate, and departure from those provisions stands on no authority cited in the order. Therefore, I dissent and urge my colleagues to carefully review the express language of the applicable statute in this context.

**CONCURRENCE OF COMMISSIONER TERRY M. JARRETT  
IN ORDER FURTHER SUSPENDING INTERIM RATE TARIFF  
AND SCHEDULING EVIDENTIARY HEARING**

I respectfully concur with my colleagues in the outcome of the Order as to the further suspension of AmerenUE's interim rate tariff and the setting of an evidentiary hearing. I write in concurrence to express my concerns with some of the representations made in the Order, but agree that an evidentiary hearing should have been scheduled. I do not believe adequate emphasis has been placed upon the fact that the September 14, 2009, oral argument was prior to any Commission order suspending the interim rate tariff. Counsel arguments therefore should be considered in the light in which they were given - prior to the suspension of the interim rate tariff, and those arguments must not be

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permanent rate proceeding in which all the facts can be developed more deliberately with full opportunity for an auditing of financial figures and a mature consideration by the Commission of all factors and all interests." *Id.* at 574. Suspension delays an expeditious ruling, so it leans toward the second interest.

<sup>27</sup> Central Hardware Co. v. Director of Revenue, 887 S.W.2d 593, 596 (Mo. banc 1994).

<sup>28</sup> 535 S.W.2d at 567.



UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

91

mistakenly considered as "evidence" - which they are not. I also do not believe that adequate emphasis has been placed upon the fact that the Commission suspended the interim rate tariff before it ultimately ordered an evidentiary hearing with regard to that tariff. While the Commission's Order and Commissioner Davis' Concurrence and Dissent all outline these issues, the value of timing in this matter could be inadvertently overlooked or lost in the analysis which is why I bring these two items to the forefront here. Accordingly, suspension of a tariff is accomplished under the authority set forth in Section 393.150 RSMo (2000), and as such, once a tariff is suspended beyond its effective date, the provisions of Section 393.140(11) RSMo (2000) are no longer controlling.

Additionally, I believe that the Order mischaracterizes interim rate requests by stating that "[I]nterim rate increase requests are a relatively rare occurrence ." While the Order correctly acknowledges that "AmerenUE is not the first utility to ask the Commission for an interim rate increase ...," by any measure, the frequency of interim rate requests could be said to be less than general rate increase requests. However to over simplify frequency- and equate it to rarity obfuscates that the legislature has granted this Commission the authority to grant such relief. The numerosity of such tariff filings by electric utilities has no bearing whatsoever on the validity of the claims made in those filings. Each case stands on its own facts. The Commission regulates far fewer electric utilities' due to mergers and acquisitions than it has in the past, and similar reductions through consolidation, regulatory changes in the gas industry, and the nearly complete deregulation of telecommunication companies leave little room for wonder about the number of requests considering the quantity of regulated entities.

There has also been considerable discussion as to what the appropriate standard is for granting the relief requested here. Missouri law sets the standard, and as such, this Commission is bound to follow the law. While the parties argued that the Commission has applied differing standards in past cases, in my opinion, the Commission has not; rather, the Commission was applying the facts of a particular case to the law. Just as each past interim rate increase request stands on its own facts before the Commission, this matter will as well.

**In the Matter of the Application of tw telecom of kansas city llc for  
Partial Waiver of Commission Rule 4 CSR 240-32.050(4)(B)**

*File No. CE-2010-0077  
Decided October 7, 2009*

**Telecommunications §7.** Where tw telecom of kansas city llc submitted an application requesting the Commission issue a blanket waiver for all similarly situated CLECs of a regulation which required the distribution of white pages to every customer, the Commission denied that request, concluding it would be improper rulemaking.

**Telecommunications §43.** tw telecom of kansas city llc requested a waiver from 4 CSR 240-32.050(4)(B) consistent with a waiver of the mandatory white pages distribution requirement provided to other CLECs operating in AT&T Missouri's St. Louis, Kansas City and/or Springfield territories. Unlike the partial waivers previously granted to other CLECs that allowed the companies to only provide white pages to customers that called the companies and requested the white pages, tw telecom of kansas city llc requested permission to have its customers call AT&T Missouri directly in order to receive a copy of the white pages. The Commission approved the waiver for tw telecom of kansas city llc.

**ORDER GRANTING PARTIAL WAIVER  
OF 4 CSR 240-32.050(4)(B)**

On September 1, 2009, tw telecom of kansas city llc (referred to as "TWTC") filed an application for partial waiver of 4 CSR 240-32.050(4)(B) in its St. Louis, Kansas City, and Springfield service areas. TWTC filed its request after the Commission granted a waiver to Southwestern Bell Telephone Company, d/b/a AT&T Missouri,<sup>1</sup> from distributing white pages to every customer in those service areas except upon request of the customer. Charter Fiberlink-Missouri, LLC, was also granted a limited waiver from the white pages requirement along with AT&T and later, Socket Telecom, LLC, was granted a similar waiver.<sup>2</sup> TWTC also urged "the Commission to grant a blanket waiver for all CLECs operating in AT&T's St. Louis, Kansas City and/or Springfield service territories, or establish an expedited, less formal procedure for such waivers to be granted individually."

TWTC requested similar treatment to that of Charter

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<sup>1</sup> Case No. IE-2009-0357.

<sup>2</sup> See, Case No. TA-2010-0006.

Fiberlink and Socket with the exception that TWTC requested to be able to instruct its customers who want a white pages directory to call AT&T's toll-free number on the yellow pages directory. This request differs from Charter Fiberlink and Socket's waiver in that those competitive local exchange companies (CLECs) will be receiving the calls from their customers and passing the information on to AT&T instead of the call going directly to AT&T. In the Stipulation and Agreement approved in Case No. IE-2009-0357, "AT&T Missouri agrees to use the same process to provide printed residential white page directories for CLEC customers residing within AT&T Missouri's service territory as it will use for its own customers . . ." TWTC believes this more direct process will result in less customer confusion, less cost, and fewer errors.

The Commission directed notice of the application be sent and received a recommendation on September 28, 2009, from the Staff of the Missouri Public Service Commission. Staff recommends that the waiver be granted. Staff also supports the extension of the exemption to all other similarly situated CLECS. No other responses were filed.

Under 4 CSR 240-32.010, the Commission may grant a temporary or permanent waiver from any rule in 4 CSR 240-32. In addition, the Commission has granted AT&T, Charter Fiberlink, and Socket similar waivers with certain conditions and limitations. TWTC's request is slightly different in that it requests that its customers use AT&T's toll-free number to request a white pages directory. This more direct contact by the customers will reduce the number of errors and will be more efficient.

The Commission finds that good cause exists to grant a partial waiver of 4 CSR 240-32.050(4)(B) to the same extent that waiver was granted to AT&T in Case No. IE-2009-0357, with the exception that TWTC may opt to instruct its end-user customers to use AT&T's toll-free number to receive a copy of the directory.

TWTC has also asked that the Commission grant a "blanket waiver" for all similarly situated CLECs, and Staff does not object to this waiver being granted. The Commission, however, cannot grant such a "blanket waiver" as that would be akin to making a regulation without having first gone through the rulemaking process set out in the statutes. The Commission will direct its Staff to review Chapter 32 in light of the waivers that have been granted, and recommend the promulgation of any new rules or the amendment of current rules that it believes is

necessary. In the meantime, the Commission will make every attempt to expedite similar waiver requests when received.

**THE COMMISSION ORDERS THAT:**

1. tw telecom of kansas city llc is granted a waiver of 4 CSR 240-32.050(4)(B) consistent with the waiver granted to Southwestern Bell Telephone Company, d/b/a AT&T Missouri, and Charter Fiberlink-Missouri, LLC, in Case No. IE-2009-0357 and Socket Telecom, LLC, in Case No. TA-2010-0006, with the exception that tw telecom of Kansas city llc may opt to instruct its end-user customers to use Southwestern Bell Telephone Company, d/b/a AT&T Missouri's toll-free number found on the yellow pages directory in order to receive a copy of the white pages directory.

2. The request for a "blanket waiver" is denied.

3. The Staff of the Missouri Public Service Commission shall review 4 CSR 240-32.050 and make recommendations to the Commission regarding any new regulations or amended regulations Staff believes should be promulgated.

4. This order shall become effective on October 17, 2009.

5. This case may close on October 18, 2009.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

95

### **In the Matter of Laclede Gas Company's Purchased Gas Adjustment (PGA) to be Audited in its 2004-2005 and 2005-2006 Actual Cost Adjustment**

**Evidence, Practice and Procedure §29.** If the information sought appears reasonably calculated to lead to the discovery of admissible evidence, it is discoverable.

*File Nos. GR-2005-0203 and GR-2006-0288  
Decided November 4, 2009*

### **ORDER DIRECTING LACLEDE TO PRODUCE INFORMATION**

#### **Procedural Background**

In September of 2008, the Staff of the Missouri Public Service Commission filed a motion to compel Laclede Gas Company to produce information relevant to activities of a Laclede affiliate. By order issued on October 20, the Commission granted Staff's request. Laclede then filed a motion requesting that the Commission reconsider its order. Staff and the Office of the Public Counsel filed responses to Laclede's motion, to which Laclede filed replies. In December of 2008, the Commission denied Laclede's requests for reconsideration. Laclede then filed a request for clarification, to which Staff responded. In January of 2009, the Commission issued an order regarding Laclede's request for clarification.

In February of 2009, Staff notified the Commission of Laclede's refusal to produce the requested information. In its response to Staff's notification, Laclede requested oral argument. The Commission set the matter for oral argument, which was held on March 26. After oral argument, the Commission reversed its decision to compel Laclede to produce information and on April 22 issued an order denying Staff's request. Staff and Public Counsel both requested reconsideration, with Laclede filing replies. After numerous other pleadings were filed, the Commission granted Staff's motion for reconsideration to the extent that additional oral argument was heard.

#### **Discussion**

Throughout this discovery dispute, the parties have discussed the Commission's Affiliate Transaction Rule and its applicability to Staff's discovery request. As the Commission stated in its

## LACLEDE GAS COMPANY

96

19 Mo. P.S.C. 3d

Order Regarding Clarification,<sup>1</sup> although it is true that by granting Staff's motion, Staff is permitted to investigate Laclede's affiliate transactions, such investigation is limited to information that may lead to evidence that may be relevant to the instant cases and therefore, discoverable. Additionally, Staff and Public Counsel have asserted that Laclede is bound under an agreement reached in Case No. GM-2001-342 to provide the information Staff seeks.

The Commission emphasizes that Staff's discovery request is not an investigation under the Commission's Affiliate Transaction rule nor is it a complaint through which Staff or Public Counsel seeks enforcement of the agreement reached in Case No. GM-2001-342. These issues have but served as red herrings in what is a discovery request governed by the rules of civil procedure. Mirroring what was set out in the Commission's initial order granting Staff's motion to compel,<sup>2</sup> Commission rule 4 CSR 240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions. Under the rules of civil procedure, "it is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>3</sup>

After having considered the arguments, the Commission reaches its initial conclusion that Laclede must produce the information sought by Staff. The Commission will also direct Staff to file a notice informing the Commission of whether Laclede has complied with this order.

### **THE COMMISSION ORDERS THAT:**

1. Laclede Gas Company shall produce, no later than November 9, 2009, the confidential information described in the Commission's Order Granting Motion to Compel, issued on October 20, 2008.
2. The Staff of the Commission shall file on November 10, 2009, a notice informing the Commission of whether Laclede Gas Company has complied with this order.
3. This order shall become effective upon issuance.

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<sup>1</sup> Issued on January 21, 2009.

<sup>2</sup> Order Granting Motion to Compel, issued October 20, 2008. The Commission herein incorporates the discussion set out in its order of October 20.

<sup>3</sup> Missouri Rules of Civil Procedure, Rule 56.1.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

97

Clayton, Chm., Gunn and Kenney, CC., concur.  
Davis, C., dissents.  
Jarrett, C., dissents, with separate dissenting  
opinion to follow.

Jones, Senior Regulatory Law Judge

**DISSENT OF COMMISSIONER TERRY M. JARRETT  
TO THE COMMISSION ORDER DIRECTING  
LACLEDE TO PRODUCE INFORMATION**

I dissent from the Missouri Public Service Commission's order<sup>1</sup> (the "Order") directing the Laclede Gas Company<sup>2</sup> ("Laclede") to produce information of its unregulated affiliate, Laclede Energy Resources Group<sup>3</sup> ("Group" or "LER"). The majority's treatment of this as a "discovery dispute" has no basis in statute or rule.

**Background**

This matter has a long and torturous history, which I will not repeat in its entirety. I only set out the relevant background for this inquiry. In Case No. GR-2006-0288, upon the completion of the Staff's review of Laclede's estimated and actual gas purchases, on December 31, 2007, the Staff filed a recommendation that requested the Commission do three things; (1) adopt the Staff's recommendations set out in the "Staff's Memorandum," (2) establish the ACA balances set forth in the Staff's recommendations and (3) "open an investigatory docket into the affiliate relationship between LER and LCG."<sup>4</sup> <sup>5</sup> It is

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<sup>1</sup> Issued and effective November 4, 2009.

<sup>2</sup> Laclede Gas Company and Laclede Energy Resources are subsidiaries of the holding company The Laclede Group, Inc.

<sup>3</sup> Id.

<sup>4</sup> LCG refers to Laclede Gas Company.

<sup>5</sup> The Staff acknowledges in its December 31, 2007 report that "Given the expansive nature of the affiliate relationship between LER and LGC, the ever increasing scope and materiality of affiliate transactions, the common management of the gas supply functions, the dramatic rise in LER's net income that could in part be due to the affiliate relationship, the Staff recommends an investigation be opened to review the affiliate practices, and transactions between LER and LGC. This investigation should include an evaluation of the

LACLEDE GAS COMPANY

98

19 Mo. P.S.C. 3d

important to note that no case or investigatory docket has been opened or re-opened by the Commission in response to this request.

In Case No. GR-2005-0203, upon the completion of the Staff's review of Laclede's estimated and actual gas purchases, on December 28, 2006, the Staff filed its recommendations. The Staff recommended that the Commission accept Staff's recommendations and issue an Order consistent with Staff's Recommendations. The Commission has not issued any such order or opened any case. One of the recommendations made by Staff, among other things, was the disallowance of approximately \$5.5 million in demand charges paid by Laclede during the ACA period to obtain first of the month pricing on its swing supplies on the apparent grounds that such charges were imprudently incurred.<sup>6</sup> Laclede in its response to the Staff's recommendation to the Commission vigorously disputed the recommendations.<sup>7</sup> A prehearing conference was held in this case which focused on issues in the GR-2005-0203 case being similar to those in the GR-2006-0288 matter.<sup>8</sup>

In both cases, on July 25, 2008<sup>9</sup>, the Staff submitted to Laclede a list of documents that it claimed was necessary to complete Staff's inquiry into the prudence of Laclede's gas purchasing practices and Laclede's compliance during the ACA periods with the affiliate transactions rules, 4 CSR 240-40.015 and 40.016. Many of the documents concern Laclede's relationship with its affiliate, LER. This July 25, 2008, filing included a motion for Laclede to produce documents.

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compliance with the Commission's affiliate transaction rule, any further adjustment necessary to the 2005-2006 sharing account for off-system sales and capacity release, and additional review of how fair market value is determined and shared between LGC and LER. **This separate investigation is also necessary due to the likelihood that LER documents will need to be subpoenaed and examined.**" (Emphasis added).

The Staff clearly understood, at the time of its report, that a non-party unregulated affiliate would require subpoena power in order for the Staff to obtain LER's documents.

<sup>6</sup> *Staff Recommendation* Case No. GR-2005-0203, December 28, 2006, No. 4, p. 13, and pp. 4-5 of *Staff's Memorandum* Case No. GR-2005-0203.

<sup>7</sup> *Response to Staff's Recommendation*, Case No. GR-2005-0203, February 16, 2007.

<sup>8</sup> The simple scheduling of a conference, even where an audit is controversial and adversarial, does not make a matter a contested case.

<sup>9</sup> *List of Documents Required by Staff to Analyze Laclede's ACA Filings and Motion for Order Directing Laclede to Produce*, filed July 25, 2008.



Staff subsequently withdrew the July 25, 2008 filing<sup>10</sup> and on September 18, 2008, Staff filed a Motion to Compel, which essentially mirrored the July filing, except that the new filing was framed as a discovery matter. Following several related proceedings, oral arguments, numerous filings and other machinations, we come to this point in time.

**Discovery versus an Investigation or Audit**

Although the majority in this case has characterized this as a “discovery dispute,” I disagree. File Number GR–2006–0288 was formally closed on November 21, 2006, following the effective date of the compliance tariff filings resulting from the Commission’s approval of the tariff. Likewise, File Number GR–2005–0203 was formally closed on April 5, 2006, following the effective date of the compliance tariff filings resulting from the Commissions’ approval of the tariff. No other docket or case has been opened. As such there is no open contested case in this matter.

Commission Rule 4 CSR 240–2.090 provides that: “[D]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court.”

“The rules of discovery enumerated by our Missouri Supreme Court are found at Rule 56 through Rule 61 of the Missouri Rules of Civil Procedure (the Discovery Rules).”<sup>11</sup>

“Litigants and lawyers involved in lawsuits have a right to perform discovery, and they are entitled to do so within the parameters of rules of discovery enacted by our Missouri Supreme Court.”<sup>12</sup> There is no provision or mechanism for the application of discovery rules outside the boundaries of the existence of a contested action.

To be sure, Supreme Court Rule 56.01(a) provides:

**Parties** may obtain discovery by one or more of the following methods:

depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and

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<sup>10</sup> See Withdrawal Of Motion For Order Directing Laclede To Produce Documents, August 21, 2008.

<sup>11</sup> *State ex rel. Proctor v. Messina*, 2009 WL 3735919, 14 (Mo. App. W.D. 2009).

<sup>12</sup> *Id.*

LACLEDE GAS COMPANY

100

19 Mo. P.S.C. 3d

mental examinations; and requests for admission.  
(Emphasis added).

And, Commission Rule 4 CSR 240–2.090(2) provides:

**Parties** 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.

When, as here, there is no case, there are no parties. Accordingly, the above-referenced rules are inapplicable in this matter.

Further, Staff did not even use data requests in this case. Rather, staff filed a July 25, 2008, notice where staff submitted to Laclede a list of documents it wanted. The July 25, 2008, filing was nothing more than an informal written request for documents and information, and when used outside of the framework of a contested case, discovery rules do not provide any basis to compel production of the information requested. Requests for information in a non-case audit falls under the Commission's investigatory power, and production of documents in this procedural context can only be compelled by use of a *subpoena* as provided for in Sections 386.440 and 536.077, RSMo. Section 536.077 sets out the enforcement procedures for *subpoenas*:

The agency or the party at whose request the subpoena is issued shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefor shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

101

same manner as though said subpoena had been issued in a civil case in the circuit court. The court shall permit the agency and any party to intervene in the enforcement action. Any such agency may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, subpoenas duces tecum shall be issued only by order of the agency or a member thereof.<sup>13</sup>

The proper mechanism for Staff to have followed was to seek production of the disputed documents by means of a subpoena and its enforcement under Section 536.077, not under the rules of discovery which are inapplicable in this matter.

**Conclusion**

What we have here is not a contested matter at all – but rather it is an investigation for the purposes of conducting a prudence audit. This is not and never has been a discovery dispute. The benefits of the rules of discovery are triggered when a contested case is before the Commission. Here, there is no evidence or even allegation of any violation of any rule, law or Commission Order; the undertaking by Staff is merely an investigation, and Staff is not entitled to use the discovery rules.

Initially I supported Commission orders in each of these cases with regard to Staffs Motion to Compel. However, after a multitude of filings and allegations I supported the scheduling of oral argument.<sup>14</sup> After hearing the oral argument, it became apparent to me that this was not a discovery dispute and that the most basic tenet of administrative law had been overlooked.

For the reasons stated above, I respectfully dissent.

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<sup>13</sup> See also *Division of Labor Standards, Department of Labor and Indus. Relations v. Chester Bros Const. Co.*, 42 S.W.3d 637, 639 (Mo. App. E.D. 2001).

<sup>14</sup> Order Directing Filing and Setting Oral Argument, March 5, 2009.

MISSOURI GAS UTILITY, INC.

102

19 Mo. P.S.C. 3d

**In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Distribution System to Provide Gas Service In Benton, Morgan, Camden and Miller Counties in Missouri, as a New Certificated Area.**

*File No. GA-2010-0012  
Decided November 12, 2009*

**Certificates §34.** Necessity refers to the regulation of competition, cost justification, and safe and adequate service.

**Certificates §34.** The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area.

**Gas §3.** The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area.

**Gas §10.** The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area.

**Gas §14.** The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area.

**ORDER GRANTING  
CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Commission is granting the application of Missouri Gas Utility, Inc., (“MGU”) to construct gas facilities (“construction”) and provide gas service (“service”) as described in the caption of this order (“application”). The Commission is also issuing a certificate of convenience and necessity for those purposes. The legal description of the area to which this order applies is in the Appendix to this order.

Procedure

On July 9, 2009, MGU filed the application.<sup>1</sup> On August 14, 2009, the Commission granted the motion of Union Electric Company

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<sup>1</sup>The application identified persons to receive notice of the application. One of those persons—Kris Campbell—filed a letter on September 1, 2009, stating that some persons owning no property received notice and some persons owning property received no notice. The Commission’s regulations provide that persons receiving notice of the application may include fewer than all property-owners and persons owning no property. 4 CSR 240-3.205(1)(A)2. Therefore, the letter does not show deficient notice.

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

103

d/b/a AmerenUE (“AmerenUE”) to intervene. On October 9, 2009, the Commission’s staff (“Staff”) filed its recommendation favoring the application under certain conditions. On October 26, 2009, MGU filed a statement of no objection to those conditions, and AmerenUE filed a statement of no objection to the application. The statutory provision for a “due hearing”<sup>2</sup> means that the Commission may grant the unopposed application without a hearing,<sup>3</sup> so the Commission convened no hearing and bases its findings on the verified filings.

Standard

Gas facility construction<sup>4</sup> and service<sup>5</sup> require the Commission’s prior permission and approval. Such permission and approval depend on MGU showing:

. . . that the granting of the application is required by the public convenience and necessity[<sup>6</sup>]

and the Commission determining:

. . . that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service[<sup>7</sup>]

Further, the Commission may condition its approval and permission as follows:

The commission may by its order impose such condition or conditions as it may deem reasonable and necessary [<sup>8</sup>]

“Necessary” and “necessity” relate to the regulation of competition, cost justification, and safe and adequate service.<sup>9</sup> On finding convenience and

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<sup>2</sup> Section 393.170.3, RSMo 2000.

<sup>3</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). For the same reason, the Commission need not separately state its findings of fact.

<sup>4</sup> Section 393.170.1, RSMo 2000.

<sup>5</sup> Section 393.170.2, RSMo 2000, first sentence.

<sup>6</sup> 4 CSR 240-3.205(1)(E).

<sup>7</sup> Section 393.170.3, RSMo 2000.

<sup>8</sup> Section 393.170.3, RSMo 2000.

<sup>9</sup> *State ex rel. Intercon Gas, Inc. v. Public Serv. Com’n of Mo.*, 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

MISSOURI GAS UTILITY, INC.

104

19 Mo. P.S.C. 3d

necessity, the Commission embodies its permission and approval in a certificate,<sup>10</sup> which the regulations call a certificate of convenience and necessity.<sup>11</sup>

Findings and Conclusions

The convenience and necessity of MGU's proposed construction and service find support in the verified filings. Such filings show that:

1. MGU is a Colorado corporation authorized to do business in Missouri as a gas corporation in the counties of Harrison, Daviess and Caldwell, Pettis and Benton. MGU has 20-year franchise agreements with the cities of Camdenton, Osage Beach and Lake Ozark.

2. Other than cases that have been docketed at the Commission, MGU has no pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court within the past three (3) years that involve customer service or rates. MGU has no annual report or assessment fees that are overdue.

3. The area in which MGU proposes to install a natural gas distribution system to provide natural gas sales and transportation service ("proposed service area") consists of:

- a. Camdenton, Osage Beach and Lake Ozark, all of which are fourth class cities in Camden County, or in Miller County, or in both; and
- b. Certain unincorporated portions of Benton, Camden and Morgan Counties;

as set forth in the Appendix to this order. MGU does not hold a certificate for natural gas service for the proposed service area. No natural gas service is available in the proposed service area.

4. The proposed service area is already developed, and propane from dealers not regulated by the Commission, is available. Potential new customers should have service available from MGU. MGU can provide service in the proposed service area by construction of new facilities serving all the sections in the proposed service area with natural gas in five years.

5. At the end of year five, according to Staff's

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<sup>10</sup> Section 393.170.2, RSMo 2000, second sentence.

<sup>11</sup> 4 CSR 240-3.205.

MISSOURI GAS UTILITY, INC.

estimates:

a. the customer counts will be:

Residential or General Service	4,737
Commercial Services	365
Large Volume Service	3
Total	5,105

and

b. MGU's estimated over-earnings will be \$271,667, if such customers are subject to the general terms and conditions of service in MGU's currently approved tariffs, including its Main Extension tariff and the rate structure for the proposed service area.

Those amounts justify building and operating a line to provide service.

6. MGU has the resources available to meet the needs of the system as it grows over the next five years.

7. MGU has the operational capability to provide gas service in its requested service area and the requested CCN area for gas service will not jeopardize natural gas service to the Company's current existing customers.

On those grounds, the Commission independently finds and concludes that Staff's recommended conditions will render MGU's construction and service necessary and convenient for the public service. Therefore, the Commission will grant the application subject to the conditions.

**THE COMMISSION ORDERS THAT:**

1. The application is granted, and a certificate of convenience and necessity reflecting such permission and approval shall be issued, subject to the conditions at ordered paragraph 2.

2. The conditions are that:

a. MGU's shareholders are totally responsible for the success of this project, with no liability or responsibility put on customers;

b. MGU shall keep separate books and records for the proposed service area;

c. MGU shall file separate class cost of service studies and revenue requirements for this new service area in its next rate case;

MISSOURI GAS UTILITY, INC.

106

19 Mo. P.S.C. 3d

- d. MGU shall use the depreciation rates currently on file with the Commission;
  - e. MGU shall submit to a rate review for this certified area 36 months after the effective date of the order in this case; and
  - f. MGU shall obtain adequate capacity on the pipeline to reliably serve all customers in this area, including capacity necessary to serve any future growth.
  - g. MGU shall file revised tariff sheets reflecting this order within 30 days of this order.
3. This order shall become effective on November 30, 2009.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Jordan, Regulatory Law Judge

**Appendix**

**Benton County**

Township Range Sections  
39 North 20 West Sections 1-26, and 36  
39 North 21 West Sections 1-15, and 24  
39 North 22 West Sections 1-4, 10-12  
40 North 21 West Sections 15-22, 27-35  
40 North 22 West Sections 25, and 33-36  
41 North 20 West Sections 5-11, 13-18, 21-26  
41 North 21 West Sections 1-3, 11-12  
42 North 21 West Sections 26-27, 33-36

**Camden County**

Township Range Sections  
37 North 16 West Sections 3-10  
37 North 17 West Sections 1-4, 10-12  
38 North 15 West Sections 6 and 7  
38 North 16 West Sections 1-23, 26-35  
38 North 17 West Sections 1-36  
38 North 18 West Sections 1-3, 10-14, and 24  
39 North 15 West Sections 6, 7, 17-21, 29-32



MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

107

39 North 16 West Sections 1-36  
39 North 17 West Sections 1-36  
39 North 18 West Sections 1-30, 33-36  
39 North 19 West Sections 1-33  
40 North 16 West Sections 15-36  
40 North 17 West Sections 24, 25, 31-36  
40 North 18 West Sections 19, 20, 29-36  
40 North 19 West Sections 4-10, 15, 16, 21-28, 33-36

**Miller County**

Township Range Sections  
39 North 15 West Sections 4, 5, 8, 9, 16, 17, 21  
40 North 15 West Sections 7-9, 15-22, 27-34  
40 North 16 West Sections 3, 10-15, 22-24  
41 North 16 West Sections 27, 34

**Morgan County**

Township Range Sections  
40 North 16 West Sections 4-9, 16-18  
40 North 17 West Sections 1-30  
40 North 18 West Sections 1-30  
40 North 19 West Sections 1-6, 9-15, 23-27, 34-36  
41 North 16 West Sections 7, 17-21, 28-33  
41 North 17 West Sections 8-17, 20-29, 32-36  
41 North 18 West Sections 30-35  
41 North 19 West Sections 17-23, 25-36

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**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Decided November 12, 2009*

**Evidence, Practice and Procedure §22.** Kanas City Power & Light Company was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest.

**ORDER REGARDING THE LATE-FILED APPLICATION TO  
INTERVENE OF KANSAS CITY POWER & LIGHT COMPANY**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, filed a tariff designed to increase its annual revenues for electric service. The Commission suspended that tariff and established August 17 as the deadline for interested parties to apply to intervene. Kansas City Power & Light Company applied to intervene out of time on October 27. Public Counsel opposed KCP&L's late-filed application to intervene in a response filed October 29.

KCP&L is an electrical corporation and public utility that generates, transmits, distributes and sells electricity in western Missouri and eastern Kansas. KCP&L claims it has an interest in this case that is different from that of the general public in that it is one of only four investor-owned electric utilities regulated by the Commission and thus has an interest in the Commission's treatment of various revenue and expense items. KCP&L offers no explanation for its failure to apply to intervene within the time established by the Commission, although it represents that it will accept the record as it currently stands.

Public Counsel argues KCP&L has no particular interest in AmerenUE's rate case because KCP&L rates are separate from those of AmerenUE and will not be affected by any decisions the Commission makes about AmerenUE's rates. Public Counsel contends the mere fact KCP&L is a regulated utility does not justify its request to intervene in AmerenUE's rate case. Public Counsel also points out that KCP&L has not offered any justification for its failure to file a timely application to intervene.

KCP&L replied to Public Counsel on November 6. In its reply, KCP&L explained that as an electric utility it has an interest that is

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

109

different than that of the general public in that it is interested in how the Commission decides revenue and expense items in this case. In particular, KCP&L explains that it is interested in AmerenUE's ability to recover demand side management costs and its request for an interim rate increase. KCP&L also cites its interest in the proposed interim rate increase and the Commission's October 7 decision to schedule a hearing on AmerenUE's request for such an increase as a justification for its failure to apply to intervene before the intervention deadline.

Commission Rule 4 CSR 240-2.075(4) provides that the Commission may grant an application to intervene upon a showing that the applicant has an interest in the case that is different from that of the general public and that may be adversely affected by the Commission's final order in the case. In the alternative, the Commission may grant an application to intervene if doing so would serve the public interest. Subsection (5) of that same rule indicates the Commission may grant a late-filed application to intervene upon a showing of good cause.

The Commission finds that the interest of KCP&L in this case is different from that of the general public, and may be adversely affected by a final order arising from this case. Furthermore, the Commission finds that allowing KCP&L to intervene will serve the public interest. KCP&L filed its application to intervene several months after the deadline but its late interest in participating in this case is explained by the Commission's October 7 decision to conduct a hearing regarding AmerenUE's application for an interim rate increase. Since KCP&L will accept the record as it exists, no party will be prejudiced by the late intervention. In accordance with Commission Rule 4 CSR 240-2.075(4), the Commission will grant the application to intervene.

**THE COMMISSION ORDERS THAT:**

1. The Application of Kansas City Power & Light Company to Intervene Out of Time is granted.
2. This order shall become effective immediately upon issuance.

Clayton, Chm., Davis, Gunn, and Kenney, CC., concur;  
Jarrett, C., dissents, with dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge.

## MISSOURI GAS ENERGY

110

19 Mo. P.S.C. 3d

**\*NOTE:** See pages 47, 48, 50, 52, 53, 55, 78, 80, 169, 199, 350, 358, and 376 for other orders in this case.

### **DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT**

Once again this Commission has granted an application for intervention despite a deficient application, specifically counsel's failure to file a verified application pursuant to 4 CSR 240-2.060.

As stated in my previous dissent in this case regarding the granting of intervention when applications are deficient, I again renew and restate my position. That position is that this Commission should follow its rules. Because Commissions rules are law they should be followed. Just because this Commission may have liberally granted intervention in past practice does not make the Commission's current action any more defensible . The majority's continuing actions to ignore the law for the alleged purpose of economy and consistency make it no more acceptable.

My prior suggestion in dissent was that applicants presenting deficient applications should be issued a notice of deficiency or that the Commission should allow the applicant time to seek a rule waiver. This would allow an applicant an opportunity to comply with the Commission rules and, where compliance could not be achieved, seek a waiver.

The result reached here by the majority again could have been achieved in a lawful manner, but it was not. Practitioners will continue to be lax until this Commission requires them to follow the Commission's rules. Therefore I dissent from the grant of intervention.

### **In the Matter of Missouri Gas Energy and Its Tariff Filing to Implement a General Rate Increase for Natural Gas Service**

*File No. GR-2009-0355  
Decided December 2, 2009*

**Evidence, Practice and Procedure §3.** Judicial notice is a rule of evidence that allows the Commission to dispense with proof of certain facts. Those facts include matters of common knowledge and facts capable of accurate and ready determination. Customer comments noted on cards sent to the Commission do not contain the type of facts that are

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

111

matters of common knowledge or capable of accurate and ready determination. Thus, the Commission did not take official notice of the content of those cards.

**Evidence, Practice and Procedure §5.** The customer cards are admissible because they are relevant. They are logically probative of a party's position and are admissible unless excluded by a rule of policy or law. The cards are not excluded as hearsay because they are not being offered for the truth of the matter asserted, but being offered to consider the state of mind of the customers making the comments.

### **ORDER REGARDING CUSTOMER COMMENTS**

#### **Background**

On October 26<sup>1</sup>, during the evidentiary hearing, the Office of the Public Counsel (hereafter "OPC") requested the Commission to take official notice of customer comment cards (hereafter "Cards") sent to the Commission regarding Missouri Gas Energy's (hereafter "MGE") proposed rate increase.<sup>2</sup> MGE sent the Cards at the Commission's behest.<sup>3</sup>

The Cards included a portion that a customer could write comments on and return to the Commission. MGE objected to OPC's request during the evidentiary hearing,<sup>4</sup> and filed written objections on November 3.<sup>5</sup>

MGE states that OPC's request does not comply with § 536.070 RSMo, in that the Cards are not matters of which courts may take judicial notice at trial, nor are they technical or scientific facts that would permit the Commission to otherwise take notice of them. Further, MGE argues that OPC has failed to lay a proper foundation for the Cards, and that the Cards are hearsay.

On November 5, the Commission ordered its Staff and OPC to respond to MGE's objections no later than November 10. Staff replied on November 10.

Staff stated that the Commission has a long history of

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<sup>1</sup> All calendar references are to 2009 unless otherwise noted.

<sup>2</sup> Tr. Vol. 8, p. 95.

<sup>3</sup> The Commission notes that OPC and MGE disagreed on the form of the notice the customers should receive. The Commission resolved that dispute by incorporating both the information OPC wanted and the information MGE wanted into the customer notice. See *Order Directing Customer Notice And Setting Local Public Hearings* (July 8, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> This order pertains only to MGE's objections concerning customer comment cards. MGE's motion to deny admission of certain pages of Staff Exhibit 103 remains pending.

## MISSOURI GAS ENERGY

112

19 Mo. P.S.C. 3d

keeping a “letter file” with rate case filings. In this case, the file is part of the rate case in the Commission’s Electronic Filing Information System (hereafter “EFIS”). Staff believes that the Commission may take official notice of the **number** of Cards, but not rely on the comments themselves, for much the same reasons that MGE states the Cards are inadmissible. Staff points out that a Commission employee testified generally about the Cards, and that her testimony may be relied upon.

OPC filed a response on November 11, one day out of time. OPC argues that the Commission may take official notice of its own records, which includes the Cards. Further, OPC states that the Cards are not being offered for the truth of any asserted facts; therefore, they are not hearsay. OPC also claims that the comments are a survey of customers made under the supervision of a witness subject to cross-examination, with said survey being admissible under § 536.070(11).

MGE responded on November 13. MGE denigrates OPC’s assertion that the Cards are not being offered for the truth of the matter asserted, asking rhetorically what other value could possibly be derived from offering the Cards. Moreover, MGE states that those Cards do not become an official record of the Commission merely because the Commission is a passive repository of customer comments. In addition, MGE states that OPC failed to meet the foundational requirements of § 536.070(11) for admitting results of a survey, in that Staff’s witness testified merely that Staff received the Cards, and did not perform any analysis of them. Indeed, MGE argues that the entire process of issuing the Cards was a novel approach that MGE objected to strenuously before the Commission ultimately ordered MGE to send them.

OPC filed another response on November 20. It again stated that the Cards are admissible as a “survey” pursuant to § 536.070(11) RSMo, and as position statements of MGE customers pursuant to Commission Rule 4 CSR 240-2.040(5), as well as official records of the Commission under § 536.070(6) RSMo.

### **Analysis**

#### **Official Notice**

The Commission may take official notice of those things of which courts may take judicial notice.<sup>6</sup> Judicial notice is a rule of

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<sup>6</sup> Section 536.070.6

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

113

evidence that allows a court to dispense with proof of certain facts. Such facts include matters of common knowledge and facts capable of accurate and ready determination.

Courts take judicial notice of things such as geographical facts, maps, populations, mortality tables, state law, laws of other states, court rules and court records.<sup>7</sup> The Commission may also take official notice of technical or scientific facts within its competence.<sup>8</sup>

The statements in the Cards are not the type of facts courts judicially notice. The statements are not matters of common knowledge or facts capable of ready and accurate determination. The Commission will not take official notice of Cards.

### Non-hearsay

However, the comment Cards may still be admissible if they are relevant. The Cards are relevant in much the same way testimony from ratepayers at a local public hearing is relevant. The public, who is represented by OPC before the Commission, is a party, and has a right to comment on a proposed rate increase, just like any other party. The Cards are logically probative of a party's position, and are therefore relevant and admissible unless excluded by a rule of policy or law.<sup>9</sup>

MGE objects that, even if relevant, the Cards are hearsay. But the Cards are admissible as non-hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.<sup>10</sup> OPC states that the Cards are not being offered for the truth of the matters asserted within them.<sup>11</sup> If the relevance of the Cards is that customers made certain comments, rather than the truthfulness of the comments themselves, then the Cards are not hearsay.<sup>12</sup> Also, the Commission may admit them to consider such matters as the state of mind of the customers who submitted the Cards.<sup>13</sup>

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<sup>7</sup> W. Schroeder, 33 Missouri Practice-Courtroom Handbook on Missouri Evidence, Sec. 201.2 at 46-59 (2003).

<sup>8</sup> *Id.*

<sup>9</sup> See *Albertson v. Wabash R. Co.*, 253 S.W.2d 184, 189 (Mo. 1952).

<sup>10</sup> See, e.g., *Lauck v. Price*, 289 S.W.3d 694, 698 (Mo. App. 2009).

<sup>11</sup> See Public Counsel's Reply to MGE's Objections Regarding Customer Comments, p. 2 (November 11, 2009).

<sup>12</sup> See, e.g., *Doe v. McFarlane*, 207 S.W.3d 52, 73 (Mo. App. E.D. 2006); *Coon v. American Compressed Steel, Inc.*, 207 S.W.3d 629, 635 (Mo. App. W.D. 2006).

<sup>13</sup> See, e.g., *Kelly v. St. Luke's Hosp. of Kansas City*, 826 S.W.2d 391, 396-97 (Mo. App. 1992); *Estate of Oden v. Oden*, 905 S.W.2d 914, 918 (Mo. App. E.D. 1995); *State v.*

MISSOURI GAS ENERGY

114

19 Mo. P.S.C. 3d

Moreover, even if the Cards were hearsay, which they are not, the Commission is not bound by the technical rules of evidence.<sup>14</sup> Courts may exclude relevant evidence where its probative value is outweighed by its tendency to inflame, mislead, or confuse a jury.<sup>15</sup> Thus, hearsay or not, the Commission can consider the Cards and give them, as well as all other evidence, the proper weight.

Furthermore, § 386.410.2 states that no formality before the Commission in any proceeding or in the manner of taking testimony shall invalidate any Commission order. In admitting the customer cards, as in admitting any other evidence, the Commission is mindful of its goal to set rates that are just and reasonable for the ratepayers and the utility, based upon competent and substantial evidence.<sup>16</sup>

**THE COMMISSION ORDERS THAT:**

1. Missouri Gas Energy's Objections to a Request that the Commission Take Official Notice of Certain Matters are denied.
2. The Office of the Public Counsel's request that the Commission take official notice of the content of the Cards is denied, but the Cards are admitted into evidence.<sup>17</sup>
3. This order shall become effective no later than December 12, 2009.

Clayton, Chm., Gunn and Kenney, CC., concur.  
Davis and Jarrett, CC., dissent, with separate  
dissenting opinions to follow.

Pridgin, Senior Regulatory Law Judge

\*NOTE: At time of publication, no opinion of Commissioner Davis has been filed.

\*NOTE: See page 245 for another order in this case.

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*Chambers*, 891 S.W.2d 91, 104 (Mo. banc 1994).

<sup>14</sup> Section 386.410 RSMo. 2000.

<sup>15</sup> See, e.g., *Stapleton v. Grieve*, 602 S.W.2d 810, 814 (Mo. App. 1980).

<sup>16</sup> Section 393.130.1 RSMo.

<sup>17</sup> The Commission assigns the Cards Exhibit No. 106.



**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT  
IN RESPONSE TO ORDER REGARDING CUSTOMER COMMENTS**

I dissent in the Commission's *Order Regarding Customer Comments* ("Order")<sup>1</sup> because it did not comport to the rules of evidence, deprived parties of their due process rights, stretches the imagination and defies logic. The majority has admitted into the record in this case *as evidence* approximately 12,000 individual comment cards,<sup>2</sup> without any party moving for their admission, or having given the parties any opportunity to object, cross examine, conduct *voir dire* as to the proponent, or in any manner test the veracity of the item proffered for admission into the record. First, the cards have been proffered without any notice as to the proponent, or any foundation laid for their consideration. Second, the cards have not been authenticated. Third, the cards represent hearsay evidence, for which no satisfactory exception is available. Fourth, if the cards were offered as "non hearsay" and *not* "for the truth of the matter asserted" the cards do not represent relevant evidence.<sup>3</sup> Lastly, no party was given any opportunity to conduct any manner of cross examination, of anyone, from the time the majority's position moved from denying Public Counsel's pending motion that the Commission take official notice of customer comments, and instead moving the comment cards into the record as evidence.

In Case No. EM – 2007 – 0374 I filed a *Statement Responding to the "Statement in Dissent to Regulatory Law Judges' Evidentiary Ruling and Objections to Procedural Irregularity"* addressing the Presiding Officer's denial into evidence of "anonymous letters" offered by Staff. I incorporate here by reference my statement in that case because I view the comment cards in much the same way I view the anonymous letters; they neither one should be evidence. That is not to imply that the comment cards are not relevant, but relevance for the purposes of admission into the record requires evidence to be both logically and legally relevant in order to be admissible. Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other

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<sup>1</sup> Issued December 2, 2009 and effective December 12, 2009.

<sup>2</sup> Tr. Vol. 13, p. 807, lns.8 – 9, 10.

<sup>3</sup> See discussion at pgs. 2 – 3 *infra*.

## MISSOURI GAS ENERGY

116

19 Mo. P.S.C. 3d

relevant evidence which bears on the principal issue.<sup>4</sup> Even if logically relevant, the finder of fact has discretion to limit such evidence, or exclude it all together, if the fact-finder believes the evidence is not legally relevant. Legal relevance refers to the probative value of the purported evidence outweighing its risks of unfair prejudice, confusion of issues, delay, waste of time, or cumulativeness.<sup>5</sup> Consequently, even logically relevant evidence may be excluded unless its benefits outweigh its costs.<sup>6</sup> The lack of a discernible proponent of the comments cards, and the fact that the motion and admission of the comment cards was accomplished at a time which prohibited any party from an opportunity to object or even question the logical or legal relevance of the evidence violates a fundamental rule of evidence. The “let it all in and we will sort it out later” approach still is not the legal standard for the admission of evidence in contested cases.

Here I would have fully supported granting the Office of the Public Counsel’s (“Public Counsel” or “OPC”) motion seeking official notice, thereby allowing the Commission to fully recognize the existence of and number of comments submitted in this case. The Public Counsel, during the evidentiary hearing moved that the Commission take official notice of customer comments.<sup>7</sup> Just because this motion was proffered does not equate official notice as legally synonymous with a motion to admit the cards into evidence in the case. To the extent that the majority infers that the **Public Counsel’s Reply to MGE’s Objections Regarding Customer Comments** moved for the admission of the comment cards into evidence, Public Counsel’s filing does not support such a proposition. First, had the Public Counsel intended the cards to become a part of the record in this case, it defies understanding why

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<sup>4</sup> *State v. Liles*, 237 S.W.3d 636, 638 – 639 (Mo. App. 2007); *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005); *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004); *Kendrick v. Bd of Police Cont’rs of Kansas City, Mo.*, 945 S.W.2d 649, 654 – 655 (Mo. App. 1997); *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 116 (Mo. App. 1995) (quoting *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 942 (Mo. App. 1992)).

<sup>5</sup> *State v. Liles*, 237 S.W.3d 636, 638 – 639 (Mo. App. 2007).

<sup>6</sup> *Id.* Even when evidence is relevant, it is within the discretion of the fact finder to exclude the evidence if its probative value is outweighed by its prejudicial effect. *Stevinson v. Deffenbaugh Industries, Inc.*, 870 S.W.2d 851, 860 (Mo. App. 1993).

<sup>7</sup> Tr. Vol. 8, p. 95, lns. 9 – 12; as stated by Public Counsel, “I did have one more thing to mention. We had discussed those customer comments. I just wanted to ask the Commission to take **official notice** of those.” (Emphasis added).

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

117

Public Counsel would provide fervent support for its limited motion for official notice, therefore reading something into Public Counsel's filing that is not there. Any reading by the majority of the Public Counsel's filing to reach a result which could have as easily been raised during the hearings in this case, or by a plain simple motion which included a prayer for the relief which the Public Counsel sought, further demonstrates the mental contortions the majority has taken here.<sup>8</sup>

The majority seems to find comfort in the Public Counsel's representations in paragraph 10 of its reply filing to support the notion that a motion was before the Commission for admission of the comment cards into evidence. Paragraph 10 of Public Counsel's reply does not seek to move anything into evidence, but rather asks that the Commissioners read the "comments." Paragraph 10 of the Public Council's reply states:

10. The public trusts that when the Commission solicits comments from the public on a proposed rate increase that those comments will be read by the Commission. **OPC asks that the Commission** be consistent with the Commission's goal of protecting the public interest by **reading the public comments to better understand the public's positions on what is in the public interest.**

Asking this Commission to read the public comments does not support that Public Counsel moved for the admission of the comment cards. My conclusion that the reply filing did not represent such a motion is further supported by the reply's lack of any prayer for relief supporting any alleged motion. In the "wherefore" clause of the reply Public Counsel

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<sup>8</sup> *Public Counsel's Reply to MGE Response Regarding Customer Comments*, filed on November 20, 2009 further suggests that the Public Counsel's motion was limited to "official notice." Paragraph 1 states:

On November 11, 2009, OPC replied to MGE's objections and explained that the Commission could grant OPC's motion and take **official notice of the comments** as:

- Position statements of MGE's customers under 4 CSR 240-2.040(5);
- Evidence of official records of the Commission under § 536.070(6) RSMo; and/or
- Evidence of a survey under § 536.070(11) RSMo.

(Emphasis added). There is nothing that suggests that anything other than "official notice" was ever requested by the Public Counsel with regard to this matter.

## MISSOURI GAS ENERGY

118

19 Mo. P.S.C. 3d

states that "... the Signatory Parties respectfully offer[s] this **reply** to MGE's objections regarding customer comments and Staff Exhibit 103." (Emphasis added). Public Counsel prays for nothing, either specific or general, and most certainly not for admitting the comment cards into evidence. A careful reading of paragraph 10 together with the prayer for relief demonstrates that paragraph 10 is nothing more than a request framed in the form of argument, and was not a motion before the Commission for consideration. To the extent that this Commission relies upon the Public Counsel's reply to support admission of the comment cards into evidence, the majority has exceeded its authority by granting relief which was not requested.

It is well recognized that a court is without authority to enter a judgment which grants relief beyond that which was requested in the petition. **Colbert v. State, Family Support Div.**, 264 S.W.3d 699 (Mo. Ct. App. W.D. 2008).<sup>9</sup> Where no motion or prayer exists, no relief can be granted. There is an exception to this general rule vested in Courts possessing equitable powers, where the court may grant any relief warranted by pleaded issues whether or not it was specifically included in the prayer for relief, but only when such relief is fully supported by facts which were either pleaded or tried by consent. **Id.** In this case, the Commission, lacking equitable powers, cannot grant relief where none is specifically or even generally requested by the movant.<sup>10</sup> See **Report and Order, Ahlstrom Development Corp. v. Empire Dist. Elec. Corp.**, 1995 WL 789409 (Mo.P.S.C. Nov 08, 1995) (Case No. EC – 95 – 28).<sup>11</sup>

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<sup>9</sup> Missouri courts are restrained from deciding an unpleaded factual issue however a court of equity can grant any relief warranted by pleaded issues whether or not it was specifically included in the prayer for relief but only when such relief is fully supported by facts which were either pleaded or tried by consent. **Feinberg v. Feinberg**, 924 S.W.2d 328, 330 (Mo. Ct. App. 1996).

<sup>10</sup> This Commission, as an administrative tribunal, has no authority to propound or enforce principles of equity. **State ex rel. Jenkins v. Brown**, 19 S.W.2d 484, 486 (Mo. 1929); **Bliss v. Lungstras Dyeing and Cleaning Co.**, 130 S.W.2d 1983, 201 (St.L. Ct. App., 1939); and **Soars v. Soars-Lovelace, Inc.**, 142 S.W.2d 866, 871 (Mo. 1940); See also **Am. Petroleum Exch. v. Pub. Serv. Comm'n**, 172 S.W.2d 952, 955 (Mo. 1943) "Likewise, the Commission does not have the authority to do equity or grant equitable relief."

<sup>11</sup> The Commission in striking surebuttal testimony stated that "**this testimony represents a request for relief which is clearly at odds with the relief requested in the Complaint.** This testimony goes beyond merely mischaracterizing the relief requested [...]. Rather, this testimony reflects a different request for relief the effect of which would be to fundamentally change the nature of this proceeding from the one framed by [the] Complaint. To allow this

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

119

If the Public Counsel is not the movant, then to the extent that the Commission itself is the movant, the question then turns on the manner in which the motion occurred and the deprivation of the rights of the parties to this case in the advancement and granting of the motion.<sup>12</sup> The motion for the admission into evidence did not occur during an evidentiary hearing where all parties to the contested matter were given an opportunity to be present and participate in the process; rather, this matter was taken up by the Commission during an Agenda meeting, where parties were not provided an opportunity to participate or be heard prior to final Commission action.

By voting on an evidentiary issue, the majority has also disregarded its own rule, 4 CSR 240 – 2.130(3) which provides that “[T]he presiding officer shall rule on the admissibility of all evidence.” Here the majority, in disregard for its own rules, voted in favor of an order which ruled on the admissibility of evidence, in direct contravention of the Commission’s rule in that the regulatory law judge was the presiding officer in this matter. No Missouri law, read in any context, can lawfully strip away the guarantees afforded through due process. Laws such as section 386.410 RSMo do not take away lawful protections, but rather provide the Commission with latitude to operate in an environment that is indicative of its charge as a quasi-judicial body. To the extent the majority wished to move evidence into the record, the proper time and place would have been one which provided notice to all the parties, and provided them with a meaningful opportunity to be heard with regard to the motion.<sup>13</sup>

In this case, there is no doubt that no party was afforded an opportunity to question, conduct *voir dire*, or in any way challenge the motion, regardless of whether it was the Commission or Public Counsel making the proffer. Evidence which is nothing more than a one way

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evidence to remain in the record would unduly prejudice the positions of parties other than [the complainant]. In addition, the Commission will strike this testimony because it does not respond to rebuttal testimony but merely attempts to inject a new request for relief.”

<sup>12</sup> Assuming that the reply of the Public Counsel is the basis for admission of the comment cards into evidence, the same procedural irregularities discussed *infra* also apply.

<sup>13</sup> Section 536.070. RSMo “In any contested case: [...] (2) Each party **shall have the right** to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, **and to rebut the evidence against him.**” (Emphasis added).

## MISSOURI GAS ENERGY

120

19 Mo. P.S.C. 3d

exchange of information and where witnesses are not subject to cross examination by opposing counsel does not generate competent evidence upon which the Commission may base a decision on the merits of any action.<sup>14</sup> The Commission's admission of the comment cards as evidence, into the record in this case, was not only unlawful, but what is most disturbing is that it was accomplished with a disregard for the rights of parties to a contested case.<sup>15</sup>

The Order fails to demonstrate who the proponent was, how the comment cards were legally relevant to this proceeding, their authenticity, and for what purpose they were admitted into the record. The Order does provide a recitation of the positions and arguments of the parties in this matter. The Order also recites wishful evidentiary thinking with regard to evidentiary standards including hearsay, and non-hearsay, all of which is nothing more than dicta, because the Order speaks to nothing more than this point; ***"the Cards are admitted into evidence."*** As ordered here, the cards can be used for any purpose and for any reason, without limitation. The Commission has not only erred, but in my opinion, has acted unlawfully.

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<sup>14</sup> *Colyer v. State Bd. of Registration For Healing Arts*, 257 S.W.3d 139, 146 (Mo. App. 2008). See also *Goldberg v. Kelly*, 397 U.S. 254, 268 – 69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). *Jamison v. State, Department of Social Services*, 218 S.W.3d 399, 405 – 415 (Mo. banc 2007).

<sup>15</sup> A detailed analysis here of the evidence, now admitted into the record, would be premature since no final order relying upon this evidence has issued in this case.

TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

121

**In the Matter of the Application of Timber Creek Sewer Company,  
for Permission, Approval and a Certificate of Convenience and  
Necessity Authorizing it to Construct, Install, Own, Operate,  
Control, Manage and Maintain a Sewer System for the Public,  
Located in an Unincorporated Area in Clinton County, Missouri**

*File No. SA-2010-0100  
Decided December 2, 2009*

**Certificates §34.** The Commission grants a certificate of convenience and necessity to applicant sewer company to serve residential subdivision conditioned on homeowners' association for that subdivision voting for that service.

**Sewer §2.** The Commission grants a certificate of convenience and necessity to applicant sewer company to serve residential subdivision conditioned on homeowners' association for that subdivision voting for that service.

**ORDER GRANTING**  
**CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Commission is granting the application ("application") of Timber Creek Sewer Company ("Timber Creek") to acquire and upgrade sewer facilities ("construction"), and provide sewer service ("service"), as described in the caption of this order. The Commission is also issuing a certificate of convenience and necessity for those purposes. The legal description of the area to which this order applies is Timber Springs Estates Subdivision in Clinton County, Missouri.

Procedure

Timber Creek filed the application with a supporting affidavit on September 21, 2009. On September 22, 2009, the Commission gave notice of the application, and set a deadline for motions to intervene. The Commission received no motions to intervene.

The Commission's staff ("Staff") filed its recommendation, with a supporting affidavit, favoring the application subject to certain conditions, on November 13, 2009. The Commission set a deadline for any responses to the recommendation. The Commission received one response from Timber Creek on November 20, 2009, agreeing with Staff's proposed conditions.

TIMBER CREEK SEWER COMPANY

122

19 Mo. P.S.C. 3d

The statutory provision for a “due hearing”<sup>1</sup> means that the Commission may grant the unopposed application without a hearing,<sup>2</sup> so the Commission convened no hearing and bases its findings on the verified filings.

Standard

Sewer facility construction<sup>3</sup> and service<sup>4</sup> require the Commission’s prior permission and approval. Such permission and approval depend on Timber Creek showing:

. . . that the granting of the application is required by the public convenience and necessity[. <sup>5</sup>]

and the Commission determining:

. . . that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service[. <sup>6</sup>]

Further, the Commission may condition its approval and permission as follows:

The commission may by its order impose such condition or conditions as it may deem reasonable and necessary [. <sup>7</sup>]

“Necessary” and “necessity” relate to the regulation of competition, cost justification, and safe and adequate service.<sup>8</sup> On finding convenience and necessity, the Commission embodies its permission and approval in a certificate,<sup>9</sup> to which the statutes refer as a certificate of convenience and necessity.<sup>10</sup>

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<sup>1</sup> Section 393.170.3, RSMo 2000.

<sup>2</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). For the same reason, the Commission need not separately state its findings of fact.

<sup>3</sup> Section 393.170.1, RSMo 2000.

<sup>4</sup> Section 393.170.2, RSMo 2000, first sentence.

<sup>5</sup> 4 CSR 240-3.205(1)(E).

<sup>6</sup> Section 393.170.3, RSMo 2000.

<sup>7</sup> *Id.*

<sup>8</sup> *State ex rel. Intercon Sewer, Inc. v. Public Serv. Com’n of Mo.*, 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

<sup>9</sup> Section 393.170.2, RSMo 2000, second sentence.

<sup>10</sup> Section 393.170.3, RSMo 2000, third sentence.



## TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

123

### Findings and Conclusions

The convenience and necessity of Timber Creek's proposed construction and service have support in the verified filings. Such filings show that:

1. Timber Creek is a Missouri corporation in good standing authorized to do business as a sewer corporation in the counties of Platte and Clay. Timber Creek is not overdue on any annual report or assessment fees. Timber Creek has another action pending before this Commission,<sup>11</sup> and that action does not affect the application.
2. Other than as described in the preceding paragraph, Timber Creek has no pending action or final unsatisfied judgments, or decisions against it from any state or federal agency or court within the past three (3) years that involve customer service or rates.
3. The area in which Timber Creek proposes to install sewer distribution facilities and provide sewer service ("proposed service area") is called Timber Springs Estates. Timber Springs Estates is a residential subdivision that will have 61 residences in 2010. Above that number the is room for 12 more residences at the most.
4. The proposed service area receives sewer service from Timber Springs Homes Association ("association"). The association's facilities consist of a collection system and wastewater treatment plant. There is no other sewer system available to the proposed service area.
5. The association has voted to join Timber Creek's service area. The association has asked Timber Creek to assume ownership of the association's facilities and operation of the association's service. A transfer of assets from the association to Timber Creek is pending.
6. The association has also approved a contribution in aid of construction as part of the financing to upgrade the facilities.

On those grounds, the Commission independently finds and concludes that, with Staff's recommended conditions, Timber Creek's construction

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<sup>11</sup> File No. SA-2010-0063.

TIMBER CREEK SEWER COMPANY

124

19 Mo. P.S.C. 3d

and service is necessary and convenient for the public service. Therefore, the Commission will grant the application subject to the conditions.

**THE COMMISSION ORDERS THAT:**

1. The application is granted and a certificate of convenience and necessity reflecting such permission and approval shall be issued to Timber Creek Sewer Company ("company") for the North ½ of the Northeast ¼ of section 22 and all of section 15 south of route Z Township 54 North Range 33 West in Clinton County, Missouri ("Timber Springs Estates").

2. The certificate of convenience and necessity described at ordered paragraph 1 is subject to the following conditions.

a. The contract to transfer the collection system and wastewater treatment plant, now owned by Timber Springs Homes Association, to the company shall be finalized.

b. The tariffs in effect for the company's Platte County service area shall apply to Timber Springs Estates, including contributions in aid of construction for customers joining after issuance of this order, monthly customer rate, general service charges, and depreciation rates.

c. In the company's annual reports, the company shall note the number of customers in each of its service areas separately.

d. The company shall maintain its books and records in a manner sufficient to allow the performance for area-specific cost-of-service analyses and area-specific rates for Timber Springs Estates, and other service areas, if needed in the future.

e. The company shall file the finalized contract transferring the collection system and wastewater treatment plant, now owned by Timber Springs Homes Association, to the company.

f. The company shall file proof that it holds clear title to the wastewater treatment facility and the land on which such facility is located, and easements for access to and maintenance of the collection system, now owned by

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

125

Timber Springs Homes Association.

g. No later than 60 days from the date of this order, the company shall file tariff sheets, new or revised or both, for Timber Springs Estates bearing an effective date not less than 30 days from the filing date of such tariff sheets.

3. This file shall remain open for the filing of, Staff recommendation on, and Commission decision as to, the tariffs described at ordered paragraph 2.g.

4. Nothing in this order precludes the Commission from considering any ratemaking treatment of any future company expenditure, and any other matter, pertaining to the certificate of convenience and necessity issued under ordered paragraph 1.

5. This order shall become effective on December 12, 2009.

Clayton, Chm., Davis, Jarrett, Gunn  
and Kenney, CC., concur.

Jordan, Regulatory Law Judge

\*NOTE: See page 225 for another order in this case.

**In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of its Regulatory Plan**

*File No. ER-2009-0089  
Decided December 9, 2009*

**Evidence, Practice And Procedure §29.** Commission found KCP&L's delay in responding to Staff's data request was reasonable based on volume of material requested and provided by KCP&L, and the continuous communication between KCP&L and Staff.

**Evidence, Practice And Procedure §32.** Denying Staff's motion to compel, Commission determined KCP&L properly asserted attorney-client privilege and work product privilege.

**Evidence, Practice And Procedure §32.** Inadvertent disclosure of documents by KCP&L, which was not knowingly or voluntarily provided did not waive KCP&L's right to assert

## KANSAS CITY POWER & LIGHT COMPANY

126

19 Mo. P.S.C. 3d

privilege with respect to a data request submitted by the Staff of the Missouri Public Service Commission.

### **ORDER REGARDING STAFF'S MOTION TO COMPEL**

#### **Background**

On October 30,<sup>1</sup> the Commission's Staff filed a motion to compel the production of documents from Kansas City Power and Light Company ("KCPL"). The motion generically referred to documents referenced in Staff's Data Request 0631, which are invoices requested in association with the prudence review of environmental upgrades to Iatan I.

On September 14 and 15, the Regulatory Law Judge ("RLJ") held a discovery conference with the parties concerning thousands of pages of invoices, a small percentage of which contained redactions. During that conference, KCPL waived certain claims of privilege and the RLJ found the remaining asserted privileges appropriate.

On November 2, because: (1) the volume of materials encompassed by Staff's motion; (2) numerous assertions of privilege had been waived by KCPL and un-redacted documents were provided to Staff; and (3) because of Staff's generic reference to all of the documents, the Commission directed its Staff to identify the specific invoice numbers and the page and line numbers of redactions in the much smaller number of documents that remain in dispute. The Commission ordered KCPL to provide the RLJ a copy of the pages of the invoices, once identified by Staff, revealing the redacted portions in the same manner KCPL had done for the discovery conference and to list its specific defenses or privileges that covered each item subject to the motion to compel. In this manner, the Commission could evaluate Staff's motion.

On November 9, Staff filed its response claiming that it could not comply with the Commission's order and would not identify the specific documents and redactions at issue because of the manner in which KCPL had effectuated its redactions, i.e. using whiteout. Staff simply stated that it was challenging every redaction. Staff's response at that time made it impossible for the Commission to evaluate each redaction that remains in dispute because the Commission had no way to identify

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<sup>1</sup> All dates throughout this order refer to the year 2009 unless otherwise noted.

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

127

which specific items are in dispute and evaluate KCPL's defenses to producing those items.

On November 12, another discovery conference was held. At that conference, issues were raised with regard to Staff's Data Requests Numbers 339, 342, 350, 358, 360, 363, 370, 411, 413, 415, 430, 490 (the DRs 339-490 were all made on January 14, 2009), and 0710 (request made August 17, 2009). At this conference the RLJ directed KCPL to disclose certain portions of the redacted documents at issue, and KCPL agreed to revisit certain documents following the RLJs instructions on which information was discoverable. Staff's motion to compel does not involve these data requests.

Also at the November conference, DR 0631 was again discussed. The parties agreed to submit a timeline for responses wherein KCPL would correct problems Staff claimed it was having with determining the extent of the redactions; i.e. provide blacked-out versions versus white-out versions. Staff would then provide a complete list of documents encompassed within its motion to compel involving DR 0631, and KCPL would then file its reply to Staff's amended motion. KCPL provided Staff with blacked-out versions of the redactions on November 16. Staff filed suggestions in support of its motion to compel on November 19, and amended its motion by including the required list of documents it sought on November 20. KCPL responded to the initial motion on November 19, and on November 30, it provided the RLJ with redacted and unredacted versions of the documents at issue.

To put the audit in perspective, KCPL, in its November 19 response, included the affidavit of Tim Rush, KCPL's Director of Regulatory Affairs. Mr. Rush, *inter alia*, states:

KCP&L initiated both electronic and manual analyses of the documents provided during its 2009 rate cases and associated construction audit. Based on the results of these analyses, KCP&L has provided over 103,000 documents (equivalent to approximately 4.0 million pages), including documents contained in CD and DVD computer disks and jump drives, or provided in hard copy. Of these, over 65,900 documents were provided to the MPSC audit and engineering Staff in the ER-2009-0089 case, with the remaining documents provided in the concurrent ER-2009-0090, HR-2009-0092 and 09-

KANSAS CITY POWER & LIGHT COMPANY

128

19 Mo. P.S.C. 3d

KCPE-246-RTS dockets. Additionally, KCP&L has responded to a total of 2,861 data requests during these cases, not including a large amount of data provided to the Commission's engineering staff. This total includes 1,457 data requests in this case (1,100 from the Commission's auditing staff) as well as an additional 878 data requests in the companion KCP&L Greater Missouri Operations Company rate cases (Case No. ER-2009-0090 and HR-2009-0092), and 526 data requests in Kansas Docket 09-KCPE-246-RTS.

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With regard to the scope of discovery in this case, it should be noted that KCP&L has worked diligently to timely provide Staff with the requested information requested and has objected and asserted the attorney-client or work product privilege sparingly (privilege has been asserted with respect to roughly only two percent of the data requests and many of those data requests have been subsequently answered). We asserted objections to approximately 50 data requests with unprivileged documents supplied. Subsequently, we withdrew in whole or in part over 20 of those data requests as a result of negotiations with Staff.

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In addition to providing the substantial documentation above, KCP&L conducted over 100 meetings and document review sessions with the MPSC audit and engineering Staff during both the main rate case and the subsequent construction audit. The majority of these meetings included multiple company subject matter experts in order to address Staff's request for additional information and explanations. Counsel for the Company and Staff have also engaged in a series of meetings in which discovery issues are addressed in an attempt to reach resolution. In early September 2009, KCP&L's counsel and Staff's counsel established a weekly call to discuss and attempt to resolve any outstanding discovery issues. In addition, counsel discuss matters

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

129

as needed when they arise. All of these discussions are focused on Staff's concerns with discovery and KCP&L's attempt to resolve those concerns.

KCPL provided an itemized overview of the discovery requests in tabular form and that table appears in an appendix at the end of this order.

What remains in dispute with DR 0631 are approximately 41 documents, of which there are approximately 168 pages that bear some redacted language. The documents in question are composed of legal invoices from law firms providing both legal and business consulting services for KCPL.<sup>2</sup>

**Discovery versus an Investigation or Audit**

Although the Regulatory Law Judge agreed to assist the parties with these disputes, characterized as discovery disputes, it is noteworthy that the RLJ pointed out early on in these discussions that these attempts at mediating these disputes were occurring outside of a contested case docket. File Number ER-2009-0089 was formally closed on August 8, following the effective date of the compliance tariff filings resulting from the Commission's approval of parties' stipulations and agreements.<sup>3</sup> However, all disputed evidentiary issues in this matter were decided when the Commission's "Order Approving Non-Unanimous Stipulations and Agreements and Authorizing Tariff Filing" became effective on June 23, 2009.<sup>4</sup> A separate order was issued on June 10 directing Staff to complete and file the construction audit and prudence review of the environmental upgrades at Iatan I no later than December 31.<sup>5</sup> That order was an exercise of the Commission's investigatory authority encompassed within Chapters 386 and 393, RSMo.<sup>6</sup>

Commission Rule 4 CSR 240.090 provides that: "Discovery may

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<sup>2</sup> The law firms are: Schiff Hardin, L.L.P., Sonnenchein Nath & Rosenthal, L.L.P., Morgan, Lewis & Bockluis, L.L.P., Spencer Fane Britt & Browne, L.L.P., the Law Office of James W. Farley, Cafer Law Office, L.L.C., and Fischer & Dority, P.C.

<sup>3</sup> EFIS Docket Entry Number 300, *Order Approving Tariff Filings In Compliance With Commission Order*, issued July 28, 2009, effective August 7, 2009. File No. ER-2009-0089 is merely a depository for documents at this time.

<sup>4</sup> EFIS Docket Entry Number 288, *Order Approving Non-Unanimous Stipulations and Agreements and Authorizing Tariff Filing*, issued June 10, 2009, effective June 23, 2009.

<sup>5</sup> EFIS Docket Entry Number 287, *Order Regarding Joint Motion To Extend Filing Date*, issued June 10, 2009 and effective immediately upon issuance.

<sup>6</sup> See in particular Sections 386.310, 386.360, 386.390, 386.420, 386.440, 386.460, 386.470, 393.110, 393.130, 393.140, 393.145, 393.146, 393.160, 393.170, 393.190, 393.260, and 393.270, RSMo 2000 and its supplements.

KANSAS CITY POWER & LIGHT COMPANY

130

19 Mo. P.S.C. 3d

be obtained by the same means and under the same conditions as in civil actions in the circuit court.” “The rules of discovery enumerated by our Missouri Supreme Court are found at Rule 56 through Rule 61 of the Missouri Rules of Civil Procedure (the Discovery Rules).”<sup>7</sup> “Litigants and lawyers involved in lawsuits have a right to perform discovery, and they are entitled to do so within the parameters of rules of discovery enacted by our Missouri Supreme Court.”<sup>8</sup> There is no provision or mechanism for the application of discovery rules outside the boundaries of the existence of a contested action.

Indeed, Supreme Court Rule 56.01(a) states:

**Parties** may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. (Emphasis added).

And, Commission Rule 4 CSR 240-2.090(2) provides:

**Parties** 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.

The Commission has recognized the party – non-party distinction and has declared that data requests cannot be directed to non-parties in a contested case.<sup>9</sup> However, the Commission has also recognized that Staff and the Public Counsel may use data requests outside of the

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<sup>7</sup> *State ex rel. Proctor v. Messina*, 2009 WL 3735919, 14 (Mo. App. W.D. 2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Staff of Missouri Public Service Com'n v. Missouri Pipeline Co., LLC and Missouri Gas Company, L.L.C.*, 2006 WL 2658490 (Mo. P.S.C.) 2006 WL 2658490 (Mo.P.S.C.), Case No. GC-2006-0491, Order Denying Staff's Motion to Compel Response to Discovery Request, issued and effective on September 12, 2006. Commissioners Davis, Murray, Gaw, Clayton and Appling concurring.



KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

131

context of a contested case pursuant to the specific statutory authority in Section 386.450, RSMo 2000,<sup>10</sup> which provides:

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

Data requests, by definition, are informal written requests for documents and information, and when used outside of the framework of a contested case discovery rules do not provide any means to compel production of the information requested. Use of data requests in a non-case audit fall under the Commission's investigatory power, and production of documents in this procedural context can only be compelled by use of a subpoena as provided for in Sections 386.440 and 536.077, RSMo. Section 536.077 delineates the enforcement mechanism of subpoenas as follows:

The agency or the party at whose request the subpoena is issued shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefor shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that

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<sup>10</sup> *In re Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, 2003 WL 22866791 (Mo. P.S.C.), Case No. WR-2003-0500, Order Concerning Motion to Compel, issued and effective on December 2, 2003. Commissioners Gaw, Simmons and Clayton concurring; Commissioner Murray dissenting.

## KANSAS CITY POWER & LIGHT COMPANY

132

19 Mo. P.S.C. 3d

the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the same manner as though said subpoena had been issued in a civil case in the circuit court. The court shall permit the agency and any party to intervene in the enforcement action. Any such agency may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, subpoenas duces tecum shall be issued only by order of the agency or a member thereof.<sup>11</sup>

The proper procedure for Staff to have followed was to seek production of the disputed documents by means of a subpoena and its enforcement. Nevertheless, the Commission will still review and analyze Staff's request pursuant to general principles of discovery.

### **Discovery Standards and Assertion of Privilege**

Commission Rule 4 CSR 240.090 provides that: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Data requests are frequently used during Commission proceedings in forms similar to interrogatories or requests for production of documents and the rule further provides that: "If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission."

Rule 56.01 governs the scope of discovery in civil actions in the circuit court, and generally, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...."<sup>12</sup> Relevance, for purposes of discovery, is "broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence."<sup>13</sup> The party seeking discovery shall

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<sup>11</sup> See also Division of Labor Standards, Department of Labor and Indus. Relations v. Chester Bross Const. Co., 42 S.W.3d 637, 639 (Mo. App. E.D. 2001).

<sup>12</sup> Rule 56.01(b)(1); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 -547 (Mo. App. W.D. 2008).

<sup>13</sup> *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. E.D. 1997); *State ex rel. Pooker ex rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. banc 2007).

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

133

bear the burden of establishing relevance.<sup>14</sup>

"The discovery process' purpose is to give parties access to relevant, non-privileged information while reducing expense and burden as much as is feasible."<sup>15</sup> "The circuit court must ascertain that the process does not favor one party over another by giving it a tactical advantage: 'The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants.'"<sup>16</sup>

As noted, the information sought in discovery must not only be relevant, it must not be protected by a legally recognized privilege. "According to Black's Law Dictionary, a privileged communication is a "communication that is protected by law from forced disclosure."<sup>17</sup> "Claims of privilege present an exception to the general rules of evidence which provide that all evidence, material, relevant and competent to a judicial proceeding shall be revealed if called for."<sup>18</sup>

As Missouri courts have elucidated:

Under subdivision [Rule 56] (b)(1), privileged matters are absolutely non-discoverable. *Id.*; *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134, 136, 137 (Mo. App. E.D. 1985). The attorney-client privilege prohibits "the discovery of confidential communications, oral or written, between an attorney and his client with reference to ... litigation pending or contemplated." *State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn*, 363 Mo. 1065, 257 S.W.2d 69, 73 (Mo. banc 1953) (citation omitted). To be privileged, the purpose of a communication between an attorney and client must be to secure legal advice. *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d

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<sup>14</sup> *State ex rel. Collins v. Roldan*, 289 S.W.3d 780, 786 (Mo. App. W.D. 2009).

<sup>15</sup> *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. W.D. 2008), citing to, *State ex rel. Ford Motor Company v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002).

<sup>16</sup> *Id.*

<sup>17</sup> *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 49 (Mo. banc 2004); Black's Law Dictionary 273 (7th ed. 1999).

<sup>18</sup> *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 229 (Mo. App. S.D. 1996).

KANSAS CITY POWER & LIGHT COMPANY

134

19 Mo. P.S.C. 3d

146, 150 (Mo. App. E.D. 1984).<sup>19</sup>

In addition to the Attorney-Client privilege,<sup>20</sup> Missouri also recognizes the work-product privilege:

The work product doctrine in Missouri protects two types of information from discovery: both tangible and intangible. *Ratcliff v. Sprint Mo., Inc.*, 261 S.W.3d 534, 547 (Mo. App. W.D. 2008). Tangible work product consists of documents and materials prepared for trial and is given a qualified protection under Rule 56.01(b)(3); its production may be required on a showing of substantial need. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367-68 (Mo. banc 2004). Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. *Ratcliff*, 261 S.W.3d at 547. Intangible work product has absolute protection from discovery. *Bd. of Registration for Healing Arts v. Spinden*, 798 S.W.2d 472, 476 (Mo. App. W.D. 1990). The doctrine limits discovery in order to prevent a party in litigation “from reaping the benefits of his opponent’s labors” and to guard against disclosure of the attorney’s investigative process and pretrial strategy. *Westbrooke*, 151 S.W.3d at 366 n. 3; *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O’Malley*, 898 S.W.2d 550, 553 (Mo. banc 1995).<sup>21</sup>

The party claiming that a privilege precludes discovery of a matter bears the burden to show the privilege applies.<sup>22</sup>

**DR 0631**

Staff submitted DR 0631 to KCPL on June 17, 2009 requesting the following:

1. Please provide a copy of the document titled ‘Iatan Projects - Accounting for Certain Activities.’
2. Please provide a copy of the meeting minutes and

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<sup>19</sup> *Ratcliff*, 261 S.W.3d at 546-547.

<sup>20</sup> Privilege communications also include spousal, physician-patient, clergy, etc., but those privileges are not at issue in this matter and will not be discussed.

<sup>21</sup> *Kenney v. Vansittert*, 277 S.W.3d 713, 719 (Mo. App. W.D. 2008).

<sup>22</sup> *Ratcliff*, 261 S.W.3d at 549.

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

135

other documents provided at or discussed in the 12/14/06 Joint Owners meeting.

3. Please provide copies of computer disks of all invoices given to the Kansas Corporate Commission (KCC) regarding their investigation into Joint 1 and Common Facilities.

On July 30, Staff Counsel and Counsel for KCPL had a telephone conversation about the status of DR 0631, in which KCPL's Counsel stated that KCPL was in the process of replacing the disks provided to the KCC and would shortly provide Staff with the copies of the new disks it was providing KCC. Tim Rush, KCPL's Director of Regulatory Affairs, in his affidavit accompanying KCPL's response to Staff's motion to compel, explained the reason for replacing the disks provided to KCC was an inadvertent disclosure of privileged matters to KCC and the Citizens Utility Ratepayer Board ("CURB"). Mr. Rush further explained the complicated process involved with managing this information that led to the inadvertent disclosure, a disclosure KCC and CURB agreed to allow KCPL to retract. As Mr. Rush explains:

KCP&L has taken great strides to timely provide responses to the immense number of discovery requests while maintaining its internal review process and protecting highly confidential and attorney-client and work product privileged information. However, even with the Company's best efforts in place, we experienced a rare clerical error that resulted in an inadvertent disclosure of attorney-client and work product information contained in legal invoices that KCP&L fully intended to be redacted and designated as attorney-client and/or work product privileged before production. This error occurred in the release of information to the KCC Staff and CURB in response to Kansas Data Requests 0267, 0267S2, 0267S3 and 0267S5, related to all vendor invoices. To my knowledge, that is the only inadvertent disclosure of privileged information that has occurred throughout this discovery process.

The following is a summary of the system established to protect privileged information contained in the legal

KANSAS CITY POWER & LIGHT COMPANY

136

19 Mo. P.S.C. 3d

invoices from disclosure:

- a. Information containing potential attorney-client or work product privileged information was reviewed, processed, and redacted or released through attorneys in the Law Department.
- b. Legal invoices, in particular, Schiff-Hardin legal invoices, were excluded from the Company's normal invoice approval process of scanning all invoices, including all supporting documentation, into the Company's Voucher Imaging Payment System. Legal invoices are routed directly to the Law Department, reviewed by the Law Department and supporting documentation is removed and retained by the Law Department prior to submission for scanning into the Company's Voucher Imaging Payment System and processed for payment.
- c. As with other potential attorney-client or work product privileged information, if legal invoices were requested in discovery, they were to be reviewed, processed, and redacted or released through attorneys in the Law Department.
- d. Despite our best efforts, there was an inadvertent disclosure of certain attorney-client and work product privileged information that was contained on various legal invoices provided to the KCC Staff and CURB.
- e. The inadvertent disclosure occurred due to an error in the process described above whereby these certain legal invoices were scanned into the Voucher Imaging Payment System without being submitted to the Law Department for review and removal of supporting documentation first. This error in the process resulted in the Company providing un-redacted legal invoices, including supporting documentation, in a data request without first going to the Law Department for review and release of the information.
- f. In preparing the response to Kansas Data Requests 0267, 0267S2, 0267S3 and 0267S5, a Company

## KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

137

employee unknowingly transferred these certain legal invoices and supporting documentation onto computer disks that were provided to the KCC Staff and CURB. The inadvertent disclosure consisted of 121 un-redacted legal invoices out of a total of 6,414 vendor invoices contained on 14 DVDs provided to Kansas Staff and CURB in the above mentioned data requests.

g. Once discovered, the inadvertent disclosure was brought to the attention of the KCC Staff and CURB and was rectified without objection with all invoices containing privileged information destroyed and replaced with redacted invoices.

h. I understand that the legal counsel for KCC Staff was notified of the inadvertent disclosure on July 13, 2009 and the matter was fully concluded on August 18, 2009 with the agreement that KCC Staff and CURB would destroy and/or erase the un-redacted invoices from any computer upon which they were downloaded and KCP&L would provide a DVD containing the redacted replacement invoices. Because the invoices had been loaded onto the KCC Staff and CURB's computers, some level of coordination was required to identify and replace the invoices in question.

On August 4, KCPL provided Staff with thirteen compact disks containing the copies of the legal invoices encompassed by DR 0631. Staff states that 6227 batches of invoices were contained in KCPL's response, and as previously noted, approximately 41 of these invoices contained the redactions.

### **Staff's Arguments and KCPL's Responses**

Staff argues KCPL must produce unredacted copies of the 41 documents at issue in DR 0631 for two reasons. First, Staff asserts that because KCPL failed to redact the same documents when it *first* provided them to the Kansas Corporation Commission ("KCC") in KCPL's 2008 Kansas rate case that KCPL has waived all privileges. Staff does not believe this disclosure was inadvertent because of the time it took for KCPL to replace the documents with redacted versions.

Second, Staff claims that KCPL failed to timely object to DR 0631 when it provided Staff with the redacted documents. DR 0631 was

## KANSAS CITY POWER & LIGHT COMPANY

138

19 Mo. P.S.C. 3d

submitted to KCPL on June 17, 2009. Staff states that it and KCPL agreed to maintain a shortened response time to data requests after the Commission's decision in ER-2009-0089 was issued, and that KCPL had only 10 days to answer DR 0631 and raise objections. KCPL, according to Staff, has waived any claim to privilege by not timely objecting to the data request.

KCPL responds to Staff's first argument by asserting that the disclosure to KCC was inadvertent, and that because of the process involved with processing the massive amounts of documents involved that it took some time to discover the inadvertent disclosure and correct it. KCC agreed to return or destroy the unredacted documents, which KCPL replaced with redacted versions, thus preserving their claim of privilege with KCC. KCPL further argues there is no authority to support the position that an inadvertent disclosure in a different jurisdiction, in a different case, before a different governmental entity constitutes a waiver of privilege in an audit in Missouri.

KCPL's response to Staff's second argument is that assertion of privilege through the provision or redacted documents is not the equivalent of an objection to a data request. KCPL states that it was not objecting to the data request and provided answers to it, but that it is claiming that some of the documents provided in response to the data request contain privileged information. KCPL points out that the Commission has previously ruled on this very issue and consistently held that privilege is not the same as an objection and need not be asserted within the ten-day objection period. Consequently, KCPL maintains that it appropriately asserted privilege protection of the redacted materials.

### **Analysis**

#### **A. Inadvertent Disclosure**

Because Missouri courts have not adopted a *specific* test regarding when an inadvertent disclosure of privileged matters could constitute a waiver of privilege, both Staff and KCPL point to federal case law and federal rules for persuasive authority regarding how the Commission should analyze whether privilege has been waived.<sup>23</sup> Staff

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<sup>23</sup> KCPL cites to *Zapata v. IBP, Inc.* 175 F.R.D. 574 (D. Kansas 1997); *Monarch Cement Co. v. Lone Star Industries, Inc.*, 132 F.R.D. 558, 559 (D. Kans. 1990); *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 133 F.R.D. 171, 172 (D. Kan. 1989). These courts have employed a five-factor test to determine if inadvertent disclosure of documents effects a waiver of the attorney-client privilege or attorney-work product



KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

139

cites to one Missouri state case that is more closely on point, but appears to miss the pertinent language in the holding. As Staff notes: in *Lipton v. St. Louis Housing Authority*, the Missouri Appellate Court for the Eastern District stated:

Confidentiality of communications between attorney and client is essential for an effective attorney-client relationship because confidentiality fosters candor on the part of a client who is seeking advice and guidance from his chosen representative. . . . Generally all of what the client says to the lawyer *and* what the lawyer says to the client is protected by the attorney-client privilege. 705 S.W.2d 565, 570 (Mo. App. 1986) (internal citations omitted).

As Staff observes further, the Court went on to state that the attorney-client privilege is waived where the client ***voluntarily*** shares the communication with a third party, with an exception if the client and third party share a common interest in the outcome of the litigation and the communication by the client to the third party was made in confidence. *Id.* (Emphasis added).

KCPL correctly notes that Missouri provides strong protection for attorney-client communications.<sup>24</sup> And the crux of Missouri's *general* test

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protections. The factors typically applied are as follows: 1) The reasonableness of the precautions taken to prevent inadvertent disclosure; 2) The time taken to rectify the error; 3) The scope of the discovery; 4) The extent of the disclosure; and 5) The overriding issue of fairness. Zapata at 4. See also *Gray v. Bicknell*, 86 F.3d 1472 (8th Cir. 1996) (endorsing a middle ground balancing test) and Federal Rule of Evidence Rule 502.

Staff cites to *United States v. Massachusetts Institute of Technology*, where the First Circuit held that by disclosing legal bills to the Defense Contract Audit Agency, the auditing arm of the Department of Defense, MIT waived attorney-client privilege as to those billings. 129 F.3d 681, 684-686 (1st Cir. 1997). Staff also references *Bergonzi* (*not fully cited*) where Defendants sought production of document reports of an internal investigation made by McKeeson and shared with the Government in response for leniency. 216 F.R.D. 487 (N.D. Cal. 2003). Defendants argued the Company waived any claim of privilege by producing the material to the Government. *Id.* Staff finally cites to The U.S. District Court for the Northern District of California where it determined that once a party has disclosed work product to one adversary, it waives work product protection as to all other adversaries. See *McMorgan v. First Cal. Mortg. Co.*, 931F.Supp. 703 (N.D. Cal. 1996). The Court found that disclosure of the Report and Back-up Materials to the Government constitutes a disclosure of the documents to an adversary.

<sup>24</sup> *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000), citing to, *State*

as to whether a privilege has been waived is the disclosure must be voluntary, and disclosure of information in response to an adverse party's discovery is not normally considered to be voluntary.<sup>25</sup> It must be remembered that the attorney-client privilege belongs to the client,<sup>26</sup> and a waiver of that privilege "presupposes both knowledge and acquiescence."<sup>27</sup> In order to waive privilege, the waiver must be made knowingly, voluntarily, and the entity waiving privilege must be acquiescing, i.e. not attempting to preserve the privilege. Moreover, the inadvertent disclosure in Kansas was to adversarial parties in response to their discovery requests, and as Missouri courts have noted, this was not, by its nature, a voluntary disclosure.

KCPL's inadvertent disclosure to the KCC was not made knowingly, was not done voluntarily, and KCPL did not acquiesce. Instead, as soon as KCPL discovered the disclosure, it asserted its privileges, and withdrew and replaced the unredacted documents. KCPL's inadvertent disclosure to KCC did not waive its asserted privileges with respect to this Commission's audit.

**B. Timely Objection versus Assertion of Privilege**

With regard to Staff's second argument, that KCPL waived its privileges by not raising timely objections to the data request, the Commission has addressed this same argument before and determined it is without merit. The Commission has previously determined an objection is not the same as an assertion of privilege.<sup>28</sup> KCPL did not object to the data request on the basis of some defective inquiry, i.e. relevance for example, but ultimately complied with the data request by producing documents redacting only those portions considered to be privileged. As the Commission elucidated in EM-2000-753, where a discovery dispute arose when KCPL sought authority to transfer electrical generation assets:

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*ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379 (Mo. banc 1978).

<sup>25</sup> *State ex rel. Chance v. Sweeney*, 70 S.W.3d 664, 670 (Mo. App. S.D. 2002). This case involved the confidential physician-patient privilege.

<sup>26</sup> *State v. Timmons*, 956 S.W.2d 277, 285 (Mo. App. W.D. 1997).

<sup>27</sup> *Frazier v. Metropolitan Life Ins. Co.*, 141 S.W. 936, 938 (Mo. App. 1911), citing to, *Haysler v. Owen*, 61 Mo. 270 (1875).

<sup>28</sup> Moreover, KCPL provided the documents requested in a redacted form, and arguably, the form itself asserts the privilege. Privileged materials, as a matter of law, are not discoverable – they are not subject to discovery, unless the privilege is knowingly and voluntarily waived. Supreme Court Rule 56(1).

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

141

A party must comply with 4 CSR 240-2.090(2) by making a timely objection to a data request. Thus, for example, if a data request is vague, over broad or unduly burdensome, or if, on its face, a data request calls for the production of documents that would be protected by the attorney-client or work product privilege, then the responding party must make its written objection to the data request within ten days as required by the rule. **However, the requirement that such written objection be filed within ten days does not, and cannot, apply to privilege claims relating to specific documents to be disclosed under otherwise unobjectionable data requests.** The Commission holds that claims of privilege relating to specific documents need not be asserted within ten days of service of a data request.<sup>29</sup> (Emphasis added).

This distinction has been further explained by the Commission and supported by Missouri case law.

Given the volume of data requests, and the volume of documents sought in the data requests, the company must have sufficient time, frequently beyond the 10-day response period, to review the documents and ascertain the fact that the data would be protected by privilege.<sup>30</sup> The ten-day response rule is inapplicable to the assertion of

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<sup>29</sup> In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing the Transfer of Certain Electric Generation Assets Used to Provide Electric Service to Customers in Missouri and Other Relief Associated with Kansas City Power & Light Company's Plan to Restructure Itself into a Holding Company, Competitive Generation Company, Regulated Utility Company and Unregulated Subsidiary, Case No. EM-2000-753, Order Regarding Motion to Compel, issued January 30, 2001, effective February 9, 2001, Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC. concur. It should be noted that in subsequent Commission orders referencing this order, a typographical error occurred whereby the word "unobjectionable" was replaced with the word "objectionable." "Unobjectionable" is the proper word. See also Footnote 30, *infra*.

<sup>30</sup> *Staff of the Missouri Public Service Commission v. Union Electric Company, d/b/a AmerenUE*, 2002 WL 1311615 (Mo. P.S.C.), Case No. EC-2002-1, Order Denying Motion to Compel Data Requests 554 and 555, issued on January 24, 2002 and effective on February 3, 2002; Simmons, Ch., Murray, Lumpe, Gaw, Forbis, CC., Concur; AND 2002 WL 1584623, Order Denying Motion to Compel Data Requests 554 and 555, issued and effective on February 3, 2002; Simmons, Ch., Murray, Lumpe, Gaw, Forbis, CC., Concur. In the Matter of the Application of Union Electric Company, Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions, 2004 WL 431838 (Mo. P.S.C.), EO-2004-0108, Order on

KANSAS CITY POWER & LIGHT COMPANY

142

19 Mo. P.S.C. 3d

privilege.<sup>31</sup> Instead, the proper time for objection on the basis of privilege falls between when the question calling for disclosure of privileged matters is asked and before that question is answered.<sup>32</sup> Or stated differently, privilege is not waived unless the answer has already been given.<sup>33</sup>

The relevant timeline of the data request and the response is as follows:

1. June 17, 2009: Staff submitted data request 0631 to KCPL, a part of which requested documents submitted to KCC regarding their investigation into Iatan 1 and Common Facilities.
2. July 13, 2009: KCPL discovers the inadvertent disclosure to KCC Staff and CURB while reviewing the material and notifies Legal Counsel for KCC Staff and CURB of the inadvertent disclosure.
3. July 28, 2009: Staff sends KCPL a “Golden Rule” letter concerning the discovery request.
4. July 30, 2009: KCPL’s counsel informs Staff that it is delaying its response until corrected documents can be prepared and swapped out with KCC and CURB.
5. August 4, 2009: KCPL provides Staff with the invoices in redacted form.
6. August 18, 2009: Everything concluded with KCC & CURB destroying the set of documents containing the inadvertent disclosure.

Staff was made aware of the assertion of privilege on July 30 and the data request was fully answered on August 4. The documents in question have not been disclosed or become public in any other format or manner.

While KCPL could have more timely replied to the data request, it asserted privilege protection prior to answering the data request and did not waive the attorney-client or work product privileges. Staff has not

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Reconsideration Concerning Discovery, issued and effective on February 26, 2004. Gaw, Ch., Murray, and Clayton, CC., Concur.

<sup>31</sup> See Footnotes 29 and 30, *supra*.

<sup>32</sup> *Id.*; *Rock v. Keller*, 312 Mo. 458, 278 S.W. 759, 766(4) (1926); *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107, 109 (Mo. App. E.D. 1981).

<sup>33</sup> *Id.*

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

143

objected to the late response to the data request, but claims no formal objection on the basis of privilege was raised by KCPL until Sept 6, 2009 when a conference call was held with the RLJ.

Given the volume of materials requested and provided, and the continuous communications ongoing between Staff and KCPL, as demonstrated in Mr. Rush's affidavit, the Commission believes KCPL's delay in responding to the data request was reasonable. KCPL's actions do not demonstrate bad faith, nor do they constitute actions being maintained for an improper purpose, to create unnecessary delay, to gain an unfair tactical advantage or to increase the cost of litigation. The Commission believes that Staff was fully aware of KCPL's assertion of privilege on July 30, and that the assertion of privilege was cemented when redacted documents were submitted to Staff on August 4.

**Decision**

In making its decision, the Commission bears in mind the relevant purpose of the prudence audit, i.e., to determine the prudence of the expenditures outlined in the invoices. In that regard, it is noteworthy that Staff makes no allegation or demonstration that it lacks sufficient information to perform its audit, i.e. evaluate the prudence of KCPL's expenditures.

Staff also failed to follow proper audit procedure (i.e., seeking production of the unredacted documents by means of a subpoena and its enforcement), and even the unnecessary application of discovery principles outside the boundaries of a contested case does not aid Staff's position. Staff not does not allege or demonstrate that it would be a hardship to acquire any additional necessary information in order to overcome the properly raised qualified privilege for tangible work product. Moreover, after reviewing the unredacted invoices *in camera*, it is abundantly clear that sufficient information has been provided in the redacted invoices for Staff to complete its prudence review, and that the attorney-client privilege and the intangible work product privilege, both absolute privileges, have been properly asserted.

**THE COMMISSION ORDERS THAT:**

1. The Staff of the Missouri Public Service Commission's motion to compel is denied.
2. This order shall become effective immediately upon issue.

Clayton, Chm., Davis, Gunn, and Kenney, CC., concur;

KANSAS CITY POWER & LIGHT COMPANY

144

19 Mo. P.S.C. 3d

Jarrett, C., concurs with concurring opinion attached.

Stearley, Senior Regulatory Law Judge

**Appendix A**

**Number of Documents Provided by KCPL In Response to Data Requests**

	ER-2009-0089 KCPL-MO	ER-2009-0090 GMO-Elec	HR-2009-0092 GMO-Steam	09-KCPE-246-RTS KCP&L-KS	All Cases
<b>Approximate number of Documents/Invoices Provided in Response to Data Requests</b>					
Number of Data Requests:	1,457 (a)	761	117	526	2,861
<b>Number of Attachments</b>					
Electronic in CaseWorks	24,478	9,903	1,548	4,382	
CD's, DVD's, jump drives	31,754	13,501		7,757	
Hard copy (estimate)	120	30			
Provided to Engineering	78				
Hard copy from Legal Dept	9,500				
<b>Total Attachments</b>	<b>65,930</b>	<b>23,494</b>	<b>1,548</b>	<b>12,139</b>	<b>103,111</b>
<b>Data file size (Megabytes)</b>					
Electronic in CaseWorks	193	137	50	96	
CD's, DVD's, jump drives	56,490	10,769		8,612	
Provided to Engineering	1,288				
<b>Total Electronic Files-Mb</b>	<b>57,968</b>	<b>10,906</b>	<b>50</b>	<b>8,708</b>	<b>77,622</b>
<b>Approximate Total Page Count of These Documents</b>					
Electronic files (b)	2,898,421	544,809	2,494	435,379	
Hard copy attachments (c)	1,800	1,400			
To Audit Staff	1,400			11,800	
Audit from KCPL Legal	54,494				
To Engineering Staff	10,400				
<b>Total Approx Pages</b>	<b>2,966,615</b>	<b>546,209</b>	<b>2,494</b>	<b>447,179</b>	<b>3,962,396</b>
<b>Number of Meetings to Discuss Information and Resolve Issues</b>					
Main Case	49 (d)	13	1	4	
Construction Audit					
Audit Staff	24				
Engineering Staff	13				
<b>Total</b>	<b>86</b>	<b>13</b>	<b>1</b>	<b>4</b>	<b>104</b>

**NOTES**

- (a) MPSC Staff - 1,088; Other Parties - 359
- (b) Conversion rates from megabyte to pages differ depending on file type.  
 Microsoft Word = 63 pages per Mb; Excel = 161 pages/Mb; Images = 15 pages/Mb.  
 A approximate average conversion of 50 pages per Mb was used.
- (c) New ream of paper - 2 inches = 500 sheets. Use conversion of 2-1/2 inches = 500 sheets
- |                      | Inches | No. of Pages  |
|----------------------|--------|---------------|
| KCPL-MO              |        |               |
| To Audit Staff       | 8      | 1,800         |
| To Engineering Staff | 43     | 8,600         |
| KCPL-MO              |        | 10,400        |
| GMO-Elec             | 7      | 1,400         |
| GMO-Steam            | 0      | 0             |
| KCPL-KS              | 0      | 0             |
|                      |        | <b>11,800</b> |
- (d) Includes 27 joint KCPL/GMO meetings

KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

145

**Appendix B**  
**Staff's List of Documents in Dispute**

Invoice Number	Voucher #	Date of Document	Pages Needed
1066785	00790995	September 1, 2006	12 & 13
1066783	00790996	September 1, 2006	5,6,7,24,25 & 27
1081919	00801488	October 31, 2006	3 & 18
1081005	00801489	October 31, 2006	12, 13 & 18
1104268	00814254	January 19, 2006	5, 7 & 19
1111931	00821214	February 20, 2007	4, 5 & 6
1120268	00829753	March 20, 2007	18, 21, 22,27,34, 35 & 36
1120263	00829754	March 20, 2007	4

Invoice Number	Voucher #	Date of Document	Pages Needed
1120996	00833671	April 18, 2007	2, 30 & 33
1128177	00833672	April 18, 2007	4, 5 & 6
1135852	00837904	May 16, 2007	5 & 12
1164989	00854202	July 20, 2007	4
1164991	00854203	July 20, 2007	14,15, 18 & 25
1200604	00880773	December 18, 2007	2 & 21
1199180	00882176	November 20, 2007	15, 18 & 19
1299813	00958216	September 18, 2008	4, 5, 9, 17, 29, 36 & 50
1300980	00958218	September 18, 2008	2 & 11
11301027	00978781	October 20, 2008	17
1314876	00978787	November 10, 2008	5, 6, 8 & 17
1339931	00997181	December 17, 2008	32, 33 & 47
1347479	00999014	January 20, 2009	4
1347475	00999017	January 20, 2009	4, 9, 31, 57, 59, 61 & 62
901182	00799185	October 9, 2006	2, 3, 4, 5 & 6
1021136	00799205	October 12, 2006	4
288114	00799673	October 19, 2006	3,4,5,6,7,8,9,10,11,12,13,14,15 & 16
KCPL Statement	00801193	October 31, 2006	1, 2 & 3
288982	00801613	November 7, 2006	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 & 20
907419	00802065	November 7, 2006	2, 3 & 4
1031325	00803458	November 14, 2006	4 & 5
920711	00813720	January 11, 2007	2, 3, 4 & 5
296956	00819838	February 13, 2007	5, 6, 7, 8, 9, 10,11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 & 26
KCPL Statement	00824718	March 1, 2007	2 & 3
931837	00827246	March 13, 2007	1
931824	00829114	March 13, 2007	2, 3, 4 & 5
937516	00833317	April 10, 2007	2, 3, 4, 5, 6, 7, 8 & 9
303703	00836364	May 13, 2007	3
303700	00836639	May 13, 2007	3
1134886	00837902	May 16, 2007	17, 23 & 28
14727	00854293	July 13, 2007	1 & 2
14774	00867526	October 15, 2007	1
Check Request	00962782	October 28, 2008	2

RDG DEVELOPMENT, LLC

146

19 Mo. P.S.C. 3d

**CONCURRING OPINION OF  
COMMISSIONER TERRY M. JARRETT**

I concur in the result of the Commission's Order Regarding Staff's Motion to Compel (the "Order"). I write separately because I believe that this is an investigatory, not a discovery, matter, and the Order's analysis setting forth "Discovery versus Investigation or Audit" is dispositive of this matter. As such, the Order's discussion and analysis of the rules of discovery are inapplicable at this point in time.

**In the Matter of RDG Development, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage a Sewer System in Callaway County, Missouri**

*File No. SA-2010-0096  
Decided December 9, 2009*

**Sewer §2.** The Commission granted a certificate of convenience and necessity and authority to own, operate, maintain, control and manage a sewer system to RDG Development, LLC. The Commission granted a waiver of Commission Rule 4 CSR 240-3.305(1)(A)(5) to file a construction plan of the sewer system, but did require company to submit a map of the subdivision to show the location of manholes and sewer collection main lines.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND  
NECESSITY**

**Procedural History**

On September 14, 2009, RDG Development, L.L.C. ("RDG") filed an application requesting the Commission grant it authority to own, operate, maintain, control and manage an existing sewer system that it acquired in Callaway County, Missouri.<sup>1</sup> The system serves approximately 33 residential customers in the Greenwood Hills Subdivision.

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<sup>1</sup> The application was filed pursuant to Sections 393.140 and 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.305.



## RDG DEVELOPMENT, LLC

19 Mo. P.S.C. 3d

147

The Commission issued notice, set an intervention deadline and set a deadline for its Staff to file a recommendation. No person, group or entity sought intervention. No party requested a hearing.<sup>2</sup>

### **Background on the Sewer System**

Greenwood Hills Subdivision, which consists of a total of 134 lots, was originally developed in the 1970's. RDG is not the original developer of the subdivision, but purchased the entire development in 2000. The purchase included the wastewater treatment lagoon, collection system, and the remaining unsold lots in the subdivision. The residents of the subdivision were not billed for sewer service by any entity until RDG, without the authority of a CCN, billed them for service in November of 2008.<sup>3</sup> RDG was not aware that a CCN was required and, upon learning of the requirement, it ceased billing customers immediately after its initial bill.<sup>4</sup>

The treatment facility consists of a two-cell lagoon with no aeration or disinfection, and operates under DNR Permit Number MO-0121274.<sup>5</sup> The service area is served by all-gravity collecting sewers that carry sewage from each customer's premises to the two-cell lagoon treatment facility. There are no mechanical components (grinder pumps or lift stations) on the collection system and there are no aerators or disinfection components on the lagoon. However, the current permit contains a Schedule of Compliance (SOC) that requires disinfection for the lagoon discharge by August of 2011 and the DNR will require a certified operator once a CCN is issued.

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<sup>2</sup> "The term 'hearing' presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'. The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence." *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Com'n of State of Mo.*, 776 S.W.2d 494, 495-496 (Mo. App. 1989).

<sup>3</sup> RDG billed each customer a "base rate" of \$20, plus \$5 for every 1,000 gallons of water use over 4,000 gallons, per month for the sewer service. (A partial discount was offered for customers who opted to pay for twelve months of service up front.)

<sup>4</sup> The Commission's Water and Sewer Department was made aware of RDG's operation as a utility in December of 2008 by the Department of Natural Resources (DNR).

<sup>5</sup> Water service is provided to the development and surrounding area by Callaway County Public Water District No. 2. The Water District does not currently operate any sewer utility.

**Standard for Granting a CCN**

Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."<sup>6</sup> The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"<sup>7</sup> and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.<sup>8</sup> It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.<sup>9</sup>

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide sewer service, it offers little statutory guidance as to specific criteria that must be satisfied prior to the grant of such certificates. However, Section 393.170.3, does give the Commission the authority to impose the conditions it deems reasonable and necessary for the grant of a CCN. In the 1994 *Tartan Energy*<sup>10</sup> case, this Commission recognized five criteria that should be considered when determining if a CCN should be granted:

- 1) There must be a need for the service;
- 2) The applicant must be qualified to provide the service;
- 3) The applicant must have the financial ability to provide

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<sup>6</sup> Section 393.170; St. ex rel. Intercon Gas, Inc. v. Public Service Commission, 848 S.W.2d 593, 597 (Mo. App. 1993); State ex rel. Webb Tri-State Gas Co. v. Public Service Commission, 452 S.W.2d 586, 588 (Mo. App. 1970); In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

<sup>7</sup> Id.; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

<sup>8</sup> Id. *Beaufort Transfer Co.*, 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

<sup>9</sup> In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas*, supra, quoting St. ex rel. Ozark Electric Coop. v. Public Service Commission, 527 S.W.2d 390, 392 (Mo. App. 1975).

<sup>10</sup> *In re Tartan Energy Company*, 3 Mo. P.S.C. 3d 173, 177 (1994).

RDG DEVELOPMENT, LLC

19 Mo. P.S.C. 3d

149

the service;

4) The applicant's proposal must be economically feasible; and

5) The service must promote the public interest.

Additionally, Commission Rule 4 CSR 240-3.305 requires that applicants for a sewer CCN affirmatively plead these requirements in their application.

**Staff's Recommendation**

On October 23, the Staff of the Commission filed its verified recommendation and memorandum recommending that the Commission approve the application. Staff states that RDG has satisfied the Tartan factors because:

(1) there is a need for service because the central sewer system is in place and serving the customers in the proposed service area, which is not located within a public sewer district's boundaries;

(2) the applicant is qualified to provide the service because the owner of the Company has demonstrated technical and managerial ability to develop and operate the sewer system in that (a) RDG has been doing so effectively for nine years; (b) the owner is an established property developer, and owns and operates a building contractor business, and thereby has experience in business operation; and (c) the owner will contract with an established certified operator to run the system, or will take steps to become certified to operate the facility himself, per DNR requirements;

(3) the applicant has the financial ability to provide the service because the initial investment in the sewer treatment facilities has been, and will continue to be, recouped in the sale of the lots and therefore does not represent a debt that remains to be paid, and RDG has the financial capability through bank financing and its owner's funding support and will be able to generate sufficient cash flow to remain viable, given the proposed rates;

RDG DEVELOPMENT, LLC

150

19 Mo. P.S.C. 3d

(4) the proposal for the sewer system is economically feasible if Staff's proposed rates are adopted, and there is potential for numerous additional customers that the sewer system is adequately sized to accept, which would further add to the viability of the utility; and,

(5) RDG's proposal promotes the public interest because the existing central sewer system is desirable for a good living environment for the existing residential customers and potential additional customers as the subdivision expands, and because the other Tartan Energy Criteria have been met.

RDG also requested a waiver of Commission Rule 4 CSR 240-3.305(1)(A)5 that requires that "plans . . . for the utility system" be provided with an application for a certificated area. RDG states that it has provided the commission a general description of the system, and not having constructed the system it does not have any plans for the construction of the utility system and has no way to obtain such plans. Staff recommends that the waiver be granted, but requests that the Commission require RDG to submit a map of the subdivision showing, at minimum, the location of the manholes and sewer collection main lines.

**Response to Staff's Recommendation**

On November 6, RDG and Public Counsel both filed objections to Staff's recommendation. The Regulatory Law Judge convened a procedural conference on November 17, and directed the parties to file a status report after engaging in further discussions. On November 25, RDG and Public Counsel jointly filed an amended response to Staff's recommendation stating they no longer have objections.

**Decision**

Based on RDG's application and the Staff's unopposed verified recommendation and memorandum, the Commission finds that RDG's application satisfies the statutory and regulatory requirements for a grant of CCN. Staff has recommended a number of conditions be imposed upon the grant of RDG's CCN and the Commission finds these conditions to be reasonable and in the public interest. Those conditions will be encompassed in the ordered paragraphs below.

RDG DEVELOPMENT, LLC

19 Mo. P.S.C. 3d

151

**THE COMMISSION ORDERS THAT:**

1. RDG Development, L.L.C. is granted a certificate of convenience and necessity and the authority to own, operate, maintain, control and manage the sewer system as more fully described in its September 14, 2009 application.

2. RDG Development, L.L.C. is granted a waiver of the requirement in Commission Rule 4 CSR 240-3.305(1)(A)5 to file construction plans of the sewer system.

3. RDG Development, L.L.C. shall use the schedule of depreciation rates attached to Staff's October 23, 2009 Memorandum.

4. RDG Development, L.L.C. shall submit a complete tariff specifying a monthly rate of \$40.06 for residential customers. The customers shall not be billed for service until such time as the tariff is approved and made effective.

5. RDG Development, L.L.C. shall commence a Small Company Rate Case pursuant to Commission Rule 4 CSR 240-3.050 no later than August 31, 2011, to address the costs associated with meeting the DNR disinfection requirement in the facility's current permit.

6. RDG Development, L.L.C. shall satisfy the DNR requirement of retaining a certified operator within 90 days of the effective date of this order.

7. RDG Development, L.L.C. shall submit, to the Manager of the Commission's Staff's Water and Sewer Department, a map of the Greenwood Hills Subdivision that shows, at a minimum, the location of the manholes and sewer collection main lines within 90 days of the effective date of this order.

8. Nothing in this order shall bind the Commission on any ratemaking issue in any future rate proceedings.

9. This order shall become effective on December 18, 2009.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

\*NOTE: See page 355 for another order in this case.

MISSOURI-AMERICAN WATER COMPANY

152

19 Mo. P.S.C. 3d

**In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water Service Provided in Missouri Service Areas**

*File No. WR-2010-0131  
Decided December 9, 2009\*\**

**Evidence, Practice, And Procedure §22.** The Commission grants a motion for late intervention, and a motion to waive the requirement that an association list its members' names, on findings of good cause for each.

**ORDER GRANTING INTERVENTIONS AND WAIVER**

The Missouri Public Service Commission is granting each application to intervene ("application"), including one filed late, and is waiving of the requirement that an association list all its members.

The Commission set<sup>1</sup> the intervention date at November 30, 2009. Filing of the applications occurred as follows.

<i>Date Filed</i>	<i>Intervenor</i>
11/2/2009	UWUA Local 335
11/9/2009	AG Processing Inc
11/12/2009	City of Warrensburg <sup>2</sup>
11/19/2009	St. Louis Area Fire Sprinkler
11/23/2009	City of Joplin, Missouri <sup>3</sup>
11/24/2009	Missouri Energy Group
11/25/2009	Public Water Supply District No. 1 of Andrews County, Public Water Supply District No. 2 of Andrews County, Public Water Supply District No. 1 of DeKalb County
11/25/2009	Metropolitan St. Louis Sewer District
11/30/2009	City of Riverside
11/30/2009	City of St. Joseph
11/30/2009	Triumph Foods, LLC
12/1/2009	City of Jefferson

<sup>1</sup> By order dated November 18, 2009.

<sup>2</sup> All cities, counties and districts are in Missouri.

<sup>3</sup> City of Joplin also filed an amended application on 11/30/09.

\*\*This order was voted on in the December 9, 2009 Agenda and was issued on December 11, 2009.

MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

153

Any response to any application was due on December 4, 2009.

The Commission received no response to any application.

A. Late Filing

The City of Jefferson filed after the intervention date, but cites the Commission's regulation on intervention, which provides:

Applications to intervene filed after the intervention date may be granted upon a showing of good cause. [<sup>1</sup>]

"Good cause" in this context means reasonableness and good faith.<sup>2</sup> Those elements appear in the City of Jefferson's allegations that the time for intervention included holidays, which impede counsel's communication with a government client, and that the press of other business prevented filing by the intervention date. The intervention date was earlier than usual<sup>3</sup> and the City of Jefferson filed the very next day. No party or intervenor opposed the City of Jefferson's intervention. Therefore, the Commission finds good cause for the City of Jefferson's filing after the intervention date.

B. Intervention

The standard for intervention is as follows:

(4) The commission may on application permit any person to intervene on a showing that--

(A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest. [<sup>4</sup>]

The public interest includes "efficient facilities and substantial justice between patrons and public utilities [.]"<sup>5</sup> Such considerations appear in each application's allegations, so the Commission will grant each of the

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<sup>1</sup> 4 CSR 240-2.075(5).

<sup>2</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. W.D. 1996).

<sup>3</sup> 4 CSR 240-2.075(1).

<sup>4</sup> 4 CSR 240-2.075(4).

<sup>5</sup> Section 386.610, RSMo 2000.

MISSOURI-AMERICAN WATER COMPANY

154

19 Mo. P.S.C. 3d

applications.

C. Waiver

UWUA Local 335 seeks a waiver of the following requirements:

All applications shall comply with the requirements of these rules and shall include the following information:

\* \* \*

(J) If any applicant is an association, a list of all of its members; [<sup>6</sup>]

and:

An association filing an application to intervene shall list all of its members.[<sup>7</sup>]

Waiver of that provision is subject to the following standard:

A rule in this chapter may be waived by the commission for good cause. [<sup>8</sup>]

In support of its request, UWUA states:

Though Local 335 is an "association," it does not seem to be the type of association to which 4 CSR 240-2.060(1)(J) and 4 CSR 240-2.075(3) are directed. It does not appear to be the intent of those regulatory subsections for Local 335 to file a list of all its members [.]

That reading of the Commission's regulations has no opposition from any party or intervenor, so the Commission will grant that request.

**THE COMMISSION ORDERS THAT:**

1. The application for intervention filed by AG Processing, Inc. is granted.
2. The application for intervention filed by UWUA Local 335 is granted.
3. The application for intervention filed by City of Warrensburg, Missouri is granted.
4. The application for intervention filed by St. Louis Area Fire Sprinkler is granted.

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<sup>6</sup> 4 CSR 240-2.060(1).

<sup>7</sup> 4 CSR 240-2.075(3).

<sup>8</sup> 4 CSR 240-2.015(1).



MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

155

5. The application for intervention filed by City of Joplin, Missouri is granted.

6. The application for intervention filed by Missouri Energy Group is granted.

7. The application for intervention filed by Public Water Supply District No. 1 of Andrews County, Public Water Supply District No. 2 of Andrews County; and Public Water Supply District No. 1 of DeKalb County is granted.

8. The application for intervention filed by Metropolitan St. Louis Sewer District is granted.

9. The application for intervention filed by City of Riverside, Missouri is granted.

10. The application for intervention filed by City of St. Joseph, Missouri is granted.

11. The application for intervention filed by Triumph Foods, LLC is granted.

12. The application for intervention filed by City of Jefferson, Missouri is granted.

13. The request of UWUA Local 335 to waive the requirements of 4 CSR 240-2.060(1)(J) and 4 CSR 240-2.075(3) is granted.

14. This order shall become effective immediately upon issuance.

Clayton, Chm., Davis, Gunn, Kenney, CC., concur;  
and Jarrett, C., concurs with separate concurring opinion to follow.

Jordan, Regulatory Law Judge

**\*NOTE:** At the time of publication, no concurring opinion has been filed.

**\*NOTE:** See page 481 for another order in this case.

SOUTHERN MISSOURI GAS COMPANY, L.P., D/B/A  
SOUTHERN MISSOURI NATURAL GAS

156

19 Mo. P.S.C. 3d

**In the Matter of the Application of Southern Missouri Gas Company,  
L.P. d/b/a Southern Missouri Natural Gas for a Certificate of  
Convenience and Necessity Authorizing it to Construct, Install,  
Own, Operate, Control, Manage and Maintain a Natural Gas  
Distribution System to Provide Gas Service in Laclede County,  
Missouri as an Expansion of its Existing Service Area**

*File No. GA-2010-0114  
Decided December 16, 2009*

**Gas §14.** The Commission approves an application for a certificate of convenience and necessity to extend service to an area that includes an asphalt plant because that service will be profitable in 10 years and reduce the cost of service to other customers.

**ORDER GRANTING  
CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Commission is granting the application (“application”) of Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas (“SMNG”) to construct gas facilities (“construction”) and provide gas service (“service”), as described in the caption of this order. The Commission is also issuing a certificate of convenience and necessity for those purposes. Further, the Commission is granting SMNG’s motion for expedited treatment and issuing this order within the time requested.

Procedure

On October 13, 2009, SMNG filed the application with a motion for expedited treatment and a supporting affidavit. The Commission issued notice of the application and set a deadline for applications to intervene, but the Commission received no application to intervene. On November 30, 2009, the Commission’s staff (“Staff”) filed its recommendation, also with a supporting affidavit. On December 8, 2009, SMNG filed a response agreeing with the recommendation. The statutory provision for a “due hearing”<sup>1</sup> means that the Commission may grant the unopposed application without a hearing,<sup>2</sup> so the Commission convened

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<sup>1</sup> Section 393.170.3, RSMo 2000.

<sup>2</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). For the same reason, the Commission need not separately state its findings of fact.

SOUTHERN MISSOURI GAS COMPANY, L.P., D/B/A  
SOUTHERN MISSOURI NATURAL GAS

19 Mo. P.S.C. 3d

157

no hearing, grants the motion for expedited treatment, and bases its findings and conclusions on the verified filings.

Standard

Gas facility construction<sup>3</sup> and service<sup>4</sup> require the Commission's prior permission and approval. Such permission and approval depend on SMNG showing:

. . . that the granting of the application is required by the public convenience and necessity[;<sup>5</sup>]

and the Commission determining:

. . . that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service[.<sup>6</sup>]

"Necessary" and "necessity" relate to the regulation of competition, cost justification, and safe and adequate service.<sup>7</sup> On finding convenience and necessity, the Commission embodies its permission and approval in a certificate,<sup>8</sup> which the statutes call a certificate of convenience and necessity.<sup>9</sup> Further, the Commission may condition its approval and permission as follows:

The commission may by its order impose such condition or conditions as it may deem reasonable and necessary [.<sup>10</sup>]

In Staff's recommendation, Staff supports the application "with the understanding that the failure of the proposed extension will not affect [SMNG]'s rates." SMNG's response agrees that this matter does not determine the SMNG's rates. This order decides the application only.

Findings and Conclusions

The verified filings support the convenience and necessity of

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<sup>3</sup> Section 393.170.1, RSMo 2000.

<sup>4</sup> Section 393.170.2, RSMo 2000, first sentence.

<sup>5</sup> 4 CSR 240-3.205(1)(E).

<sup>6</sup> Section 393.170.3, RSMo 2000.

<sup>7</sup> State ex rel. Intercon Gas, Inc. v. Public Serv. Com'n of Mo., 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

<sup>8</sup> Section 393.170.2, RSMo 2000, second sentence.

<sup>9</sup> 4 CSR 240-3.205.

<sup>10</sup> Id.

SOUTHERN MISSOURI GAS COMPANY, L.P., D/B/A  
SOUTHERN MISSOURI NATURAL GAS

158

19 Mo. P.S.C. 3d

SMNG's proposed construction and service because such filings show the following.

8. SMNG is a Missouri limited partnership authorized to do business in Missouri as a gas corporation. SMNG has no pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court within the past three years that involve customer service or rates. No annual report or fees assessed are overdue from SMNG.

9. SMNG holds a certificate for parts of Laclede County, Missouri, but not for the area that is subject to the application ("proposed service area"), for which the legal description is in the Appendix to this decision. SMNG does not hold a certificate for natural gas service for the proposed service area. No natural gas service is available in the proposed service area.

10. The proposed service area includes the site of Willard Asphalt Paving, Inc., which seeks natural gas service from SMNG. SMNG can provide service in the proposed service area by constructing an extension to its current system. Such extension will be profitable in ten years and reduce costs to other SMNG customers, which justifies building and operating the extension. SMNG has the resources and operational capability to provide gas service in its requested service area without jeopardizing natural gas service to SMNG's current existing customers.

On those grounds, the Commission independently finds and concludes that SMNG's proposed construction and service are necessary and convenient for the public service. Therefore, the Commission will grant the application.

**THE COMMISSION ORDERS THAT:**

1. The motion for expedited treatment is granted.
2. The application described in the caption of this order is approved and a certificate of convenience and necessity, reflecting the Missouri Public Service Commission's permission and approval for construction and service in the area described at the Appendix to this order, shall be issued to Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas ("SMNG").
3. The approval and permission granted in ordered paragraph

SOUTHERN MISSOURI GAS COMPANY, L.P., D/B/A  
SOUTHERN MISSOURI NATURAL GAS

19 Mo. P.S.C. 3d

159

2 is conditioned on SMNG's shareholders assuming total responsibility for any loss associated with this project, with no liability or responsibility put on customers.

4. The Commission makes no finding as to the prudence or ratemaking treatment to be given any costs or expenses incurred as the result of the granting of this certificate of convenience and necessity, and reserves the right to make any disposition of costs and expenses which it deems reasonable, in any future ratemaking proceeding.

5. Service provided pursuant to the certificate of convenience and necessity granted in ordered paragraph 3 shall comply with the applicable tariff on file with the Commission and in effect as of the date of this order.

6. This order shall become effective December 26, 2009.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Jordan, Regulatory Law Judge

Appendix

Proposed Service Area, Laclede County

<i>Township</i>	<i>Range</i>	<i>Section</i>
Township 34 North	Range 16 West	Section 1
Township 34 North	Range 15 West	Section 6
Township 35 North	Range 16 West	Section 31
Township 35 North	Range 15 West	Section 32
Township 35 North	Range 15 West	Section 29
Township 35 North	Range 15 West	Section 28

KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

160

19 Mo. P.S.C. 3d

**The Staff of the Missouri Public Service Commission v. KCP&L  
Greater Missouri Operations Company and Kansas City Power &  
Light Company**

*File No. EC-2009-0430  
Decided December 23, 2009*

**Public Utilities §1.** KCP&L Greater Missouri Operations Company's use of the name KCP&L is a shortened version of a true name and as such is a permitted use of a brand or trademark rather than a forbidden use of an unregistered fictitious name.

**ORDER GRANTING MOTION FOR SUMMARY DETERMINATION AND  
DISMISSING COMPLAINT**

**Syllabus:** This order grants summary determination in favor of the Respondents. KCP&L Greater Missouri Operations Company (KCPL-GMO) and Kansas City Power & Light Company (KCPL). It also denies Staff's motion for summary determination.

**Background and Procedural History**

On May 29, 2009, the Staff of the Commission filed a complaint against KCP&L Greater Missouri Operations Company and Kansas City Power & Light Company. KCPL-GMO and KCPL filed their answer to Staff's complaint, along with a motion for determination on the pleadings, on June 26. The Commission denied that motion on July 29 on procedural grounds.

Staff and the Respondents filed competing motions for summary determination on October 2. Both motions were accompanied by supporting legal memorandums. Staff and the Respondents replied to the respective motions for summary determination on October 16. The Commission heard oral arguments on the motions for summary determination on November 19.

**FINDINGS OF FACT**

Based upon undisputed facts agreed upon by the parties, the Commission makes these Findings of Fact.<sup>1</sup>

1. KCPL is a Missouri general business corporation in

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<sup>1</sup> The numbered series of facts is set out in KCPL and KCPL-GMO's October 2, 2009 Motion for Summary Determination. Staff admitted the truth of those facts in its October 16, 2009 response to that motion for summary determination.

KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

161

good standing, formed on July 29, 1922, with its principal place of business located at One Kansas City Place, 1200 Main, Kansas City, Missouri 64106. Its registered agent is National Registered Agents, Inc., 300-B East High Street, Jefferson City, Missouri 65101. KCPL is an integrated electric utility that provides electricity to customers primarily in the states of Missouri and Kansas.

2. KCPL-GMO is a Delaware general business corporation in good standing, duly qualified to do business in Missouri since March 27, 1987, with its principal place of business located at One Kansas City Place, 1200 Main, Kansas City, Missouri 64106. Its registered agent is CT Corporation System, 120 South Central Avenue, Clayton, Missouri 63105. KCPL-GMO is an integrated electric utility that primarily provides electricity to customers in the state of Missouri.

3. Both KCPL and KCPL-GMO are wholly-owned subsidiaries of Great Plains Energy Incorporated, a publicly-traded Missouri general business corporation in good standing, formed on February 26, 2001, with its principal place of business located at One Kansas City Place, 1200 Main, Kansas City, Missouri 64106. Its registered agent is National Registered Agents, Inc., 300-B East High Street, Jefferson City, Missouri 65101. In filings with the Securities and Exchange Commission and on its corporate website, Great Plains Energy represents that, through KCPL and KCPL-GMO, it provides retail electric service to some 820,000 customers in Missouri and Kansas. Great Plains Energy also represents that it controls generation assets rated at more than 6,000 MW.

4. Great Plains Energy acquired KCPL-GMO, then called "Aquila, Inc." on July 14, 2008, pursuant to authority granted by the Commission in its Report and Order in Case No. EM-2007-0374, issued on July 1, 2008, and effective on July 11, 2008.

5. Pursuant to the order of the Commission set out in the Report and Order in Case No. EM-2007-0374, KCPL and KCPL-GMO on October 10, 2008, executed and filed their Joint Operating Agreement in Case No. EM-2007-0374, in which KCPL was designated as KCPL-GMO's agent and operator of its business and properties and expressly accepted responsibility therefor.

6. KCPL and KCPL-GMO are electrical corporations and public utilities within the intendments of Chapters 386 and 393, RSMo, and thus subject to the jurisdiction, regulation and control of this

KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

162

19 Mo. P.S.C. 3d

Commission.

7. On July 2, 2008, KCPL-GMO filed tariff sheets and initiated a name change proceeding docketed as Case No. EN-2009-0015, seeking authority for KCPL-GMO, then still known as Aquila, Inc., and which had been operating as “Aquila Networks – L&P” and “Aquila Networks – MPS” to operate as “Aquila, Inc. doing business as KCP&L Greater Missouri Operations Company.” Upon satisfactory proof that the new fictitious name had been duly registered with the Missouri Secretary of State, the Commission granted the requested authority on August 7, 2008, effective August 8, 2008.

8. On November 3, 2008, KCPL-GMO filed tariff sheets and initiated a name change proceeding, docketed as Case No. EN-2009-0164, seeking authority for KCPL-GMO to change its name from “Aquila, Inc., doing business as KCP&L Greater Missouri Operations Company,” to “KCP&L Greater Missouri Operations Company.” Upon satisfactory proof that the new name had been approved by the Delaware Secretary of State, the Commission granted the requested authority on November 20, 2008, effective December 3, 2008.

9. The name “KCP&L, Inc.” is that of a Missouri close corporation in good standing, formed on April 10, 2009, by Mark English, headquartered at One Kansas City Place, 1200 Main, Kansas City, Missouri 64106. Its registered agent is National Registered Agents, Inc., 300-B East High Street, Jefferson City, Missouri 65101.

10. On June 1, 2009, KCPL and KCPL-GMO each submitted a Registration of Fictitious Name form with the Missouri Secretary of State registering “KCP&L” as a fictitious name. Collectively, those registrations indicate that both KCPL and KCPL-GMO are doing business under the fictitious name “KCP&L”.

11. Bills that included the “KCP&L” brand were issued to KCPL-GMO’s customers.

12. Signs at locations owned by KCPL-GMO include the “KCP&L” brand.

13. KCPL-GMO’s schedule of rates are filed with the Commission under the name “KCP&L Greater Missouri Operations Company”.

14. The schedule of rates of KCPL-GMO is not maintained under the name “KCP&L”; nor are any rates maintained under that name.

15. In the future, the companies expect to seek



KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

163

authorization to merge KCPL and KCPL-GMO.

**CONCLUSIONS OF LAW**

The Missouri Public Service Commission has reached the following conclusions of law:

**Jurisdiction**

This Commission has jurisdiction and authority over electrical corporations that provide service within Missouri.<sup>2</sup> The Commission has authority to hear and decide complaints brought against public utilities operating in Missouri.<sup>3</sup>

**Standard of Review for Summary Determination**

Commission Rule 4 CSR 240-2.117, which is titled "Summary Disposition," authorizes the Commission to decide all or any part of "a contested case by disposition in the nature of summary judgment or judgment on the pleadings."

Commission Rule 4 CSR 240-2.117(1), provides, in relevant part:

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period.

\* \* \*

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

This is not a case seeking a rate increase, or a case subject to an operation of law date. Moreover, as set out below, to grant summary determination in this case will not be "otherwise contrary to law" since no genuine factual dispute remains for hearing,<sup>4</sup> one of the

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<sup>2</sup> Section 393.140, RSMo 2000.

<sup>3</sup> Section 386.390, RSMo 2000.

<sup>4</sup> *Determination on the Pleadings, In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc., Case No. TD-2003-*

KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

164

19 Mo. P.S.C. 3d

parties is entitled to a determination in its favor as a matter of law,<sup>5</sup> and the contents of the parties' pleadings make it plain that the merits of this controversy can be fairly and fully decided in a summary manner. Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing<sup>6</sup> inasmuch as "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest."<sup>7</sup> Therefore, the Commission may finally dispose of this case on the basis of the law and the undisputed material facts before it.<sup>8</sup>

**The Statute Staff Alleges the Respondents have Violated**

Staff alleges KCPL and KCPL-GMO have violated Section 417.200, RSMo 2000. That statute states as follows:

That every name under which any person shall do or transact business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the

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0582 (Nov. 4, 2004). See also *Order Denying Motion for Determination on the Pleadings, Tony Walker v. Kansas City Power & Light Company, Case No. EC-2006-0451* (Aug. 28, 2006) (denying request for determination on the pleadings under 4 CSR 240-2.117(2) as contrary to law and the public interest where it was obvious that the parties did not agree on the essential facts underlying the complainant's claim for relief); *McGuire v. Dir. of Revenue, 174 S.W.3d 87, 89 (Mo. App. E.D. 2005)* (a motion for judgment on the pleadings should be denied where there is a genuine issue of material fact on the face of the pleadings).

<sup>5</sup> *Determination on the Pleadings, In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc., Case No. TD-2003-0582* (Nov. 4, 2004); *Neel v. Strong, 114 S.W.3d 272, 274 (Mo. App. E.D. 2003)* ("A motion for judgment on the pleadings is properly granted . . . if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.").

<sup>6</sup> See, e.g., *Determination on the Pleadings, The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation, Case No. WC-2004-0342* (Oct. 19, 2004).

<sup>7</sup> *Determination on the Pleadings, In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases, Case No. EU-2005-0041* (Oct. 7, 2004).

<sup>8</sup> See, e.g., *Determination on the Pleadings, The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation, Case No. WC-2004-0342* (Oct. 19, 2004).

KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

19 Mo. P.S.C. 3d

165

secretary of state as herein required.

Section 417.230, RSMo 2000, makes the violation of Section 417.200 a misdemeanor.

**The Order Staff Alleges the Respondents have Violated**

Staff alleges KCPL and KCPL-GMO have violated an order recognizing name change that the Commission issued in Case No. EN-2009-0164 on November 20, 2008. That order recognizes the name change of Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company. It also approves an adoption notice tariff submitted by KCPL-GMO to change the name that appears on the company's tariffs. The Commission's order in EN-2009-0164 does not order KCPL-GMO to take any action, nor does it order the company to refrain from taking any other action.

**DECISION**

Staff's complaint asserts, and the agreed upon facts confirm, that KCPL-GMO and KCPL have both been using the name "KCP&L". That means, for example, the bills KCPL-GMO sends to its customers carry the KCP&L logo rather than a separate logo for KCPL-GMO. The bills sent by KCPL to its customers carry the same KCP&L logo. Similarly, the service trucks for both KCPL-GMO and KCPL carry the same KCP&L logo. Staff contends the two companies' use of the same logo is confusing to customers and violates a prior Commission order, as well as Section 417.230, RSMo 2000, which forbids any person to engage in or transact any business in Missouri under a fictitious name without first registering that name with the Secretary of State.

The parties agree that KCPL and KCPL-GMO registered their use of the fictitious name "KCP&L" with the Missouri Secretary of State on June 1, 2009, after Staff filed this complaint. Therefore, any violation of Section 417.230, if indeed there ever was such a violation, ended at that time. Nevertheless, Staff asks for authority to seek financial penalties from the companies for what it claims are previous violations of the statute.

However, the Commission finds that the Respondents did not violate the statute, even before they registered their use of a fictitious name. Rather, KCPL and KCPL-GMO's use of the shortened name "KCP&L", as described in Staff's complaint, is in the nature of a brand or trademark, rather than a fictitious name. Section 417.230 forbids the use of an unregistered fictitious name, but does not forbid the use of a

KCP&L GREATER MISSOURI OPERATIONS COMPANY AND  
KANSAS CITY POWER & LIGHT COMPANY

166

19 Mo. P.S.C. 3d

shortened version of a true name.<sup>9</sup> For that reason, KCPL and KCPL-GMO have not violated Section 417.230.

Staff also argues that KCPL and KCPL-GMO's use of the "KCP&L" name and trademark violates the Commission's order in Case No. EN-2009-0164. However, that order merely acknowledges the change in the name under which KCPL-GMO would submit an operating tariff. It does not order KCPL or KCPL-GMO to take any action, or to refrain from taking any other action. For that reason, KCPL and KCPL-GMO have not, and indeed, could not, violate that order.

In sum, the Commission finds that Staff has failed to establish that either KCPL or KCPL-GMO have violated any statute or order of the Commission. The Commission also notes that Staff did not present sufficient evidence to establish that the use of the KCP&L brand by KCPL and KCPL-GMO has caused significant confusion among the customers of those companies. Summary determination in favor of the Respondents is appropriate and the Commission will dismiss Staff's complaint.

**IT IS ORDERED THAT:**

1. The Motion for Summary Determination filed by Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company is granted.
2. The Motion for Summary Determination filed by Staff is denied.
3. Staff's Complaint against Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company is dismissed.
4. This order shall become effective on January 2, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

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<sup>9</sup> See. *Williams v. Nuckolls*, 644 S.W.2d 670 (Mo. App. E.D. 1982).

MID-MISSOURI TELEPHONE COMPANY

19 Mo. P.S.C. 3d

167

**In the Matter of the Application of Mid-Missouri Telephone Company of Pilot Grove, Missouri to Authorize A Minimum Depreciation Rate and to Record Depreciation Expense in Excess of Such Minimum Rate**

*File No. IU-2010-0164  
Decided December 23, 2009*

**Depreciation §34.** The Commission permitted a telecommunications company to book depreciation rates on new equipment in excess of depreciation rates previously allowed for ratemaking purposes in order to allow the company to replace equipment and improve services in response to competition and rapidly changing technology.

**ORDER GRANTING APPLICATION  
FOR ACCOUNTING AUTHORITY ORDER**

On November 25, 2009, Mid-Missouri Telephone Company of Pilot Grove, Missouri ("Mid-Missouri") filed an application pursuant to Section 392.280.2 RSMo and Commission Rule 4 CSR 240-2.060 for an accounting authority order to book depreciation rates on new equipment in excess of depreciation rates currently allowed for ratemaking purposes.<sup>1</sup> Specially, Mid-Missouri requests that the Commission establish its current depreciation rate for Account No. 2212 of 6.7% as its "minimum" rate, and authorize a depreciation rate in excess of the minimum rate (20% for five years) to allow for accelerated depreciation of switch equipment to be placed in service on December 31, 2009. Mid-Missouri requests that the accelerated depreciation rate be authorized to become effective on January 1, 2010.

In support of its application, Mid-Missouri states that competitive forces and technological advances have driven their decision to replace their current 5ESS switch with a soft switch capable of working with fiber and other advanced technologies, in order to allow the Company to provide additional and improved services, including, but not limited to, greater bandwidth for broadband services such as DSL access, VoIP, find me follow me feature, simultaneous ring, and voice mail that can

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<sup>1</sup> Section 392.420, RSMo Cum. Supp. 2008, permits a telecommunications company to elect not be subject to section 392,280, but Mid-Missouri has not pursued such an election.

MID-MISSOURI TELEPHONE COMPANY

168

19 Mo. P.S.C. 3d

send messages to email.<sup>2</sup> Mid-Missouri also believes the new switch could generate substantial cost savings for the company.

The Commission's Staff filed a recommendation on December 16, 2009. Staff recommends the Commission approve Mid-Missouri's application and authorize the higher depreciation rate so the company can remain competitive in the rapidly advancing telecommunications technology. Staff reports that Mid-Missouri is not delinquent in paying the Commission's assessment, the MoUSF assessment, or Relay Missouri, and it has submitted an annual report to the Commission.

Section 392.280.2 RSMo allows the Commission to authorize a telecommunications company to use minimum depreciation rates in lieu of fixed rates, and allows the Commission to authorize a telecommunications company to record depreciation expense on the basis of depreciation rates in excess of such minimum rates. The Commission has reviewed Mid-Missouri's verified application and Staff's verified recommendation, and, finding it reasonable, will grant the requested accounting authority order.

**IT IS ORDERED THAT:**

1. The Verified Application for Accounting Authority Order Regarding Depreciation Rates filed by Mid-Missouri Telephone Company of Pilot Grove, Missouri is granted.
2. Mid-Missouri Telephone Company of Pilot Grove, Missouri may book a depreciation rate of 20% per year for five years for equipment in Account Number 2212 beginning January 1, 2010.
3. This ruling is not binding for ratemaking purposes and the Commission reserves the right to consider what ratemaking treatment to give the accounting authority order described herein in a subsequent proceeding or proceedings.
4. This order shall become effective on January 1, 2010.
5. This case shall be closed on January 2, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

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<sup>2</sup> The replacement switch is a Metaswitch MG 3510, which is compatible with fiber.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

169

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Decided January 13, 2010*

**Rates §114.** The Commission has broad discretion to determine whether a utility may implement an interim rate increase.

**Rates §115.** In determining when an interim rate increase is appropriate, the Commission is not limited to an emergency or near emergency standard.

**Rates §115.** The Commission will not act to short circuit the rate case review process by granting an interim rate increase unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase.

**Rates §115.** An interim rate increase should be used only in situations requiring a quick infusion of cash into a utility.

**Rates §117.** AmerenUE did not meet its burden of proving that it is facing extraordinary circumstances and has not demonstrated a compelling reason to implement an interim rate increase.

**REPORT AND ORDER REGARDING INTERIM RATES**

**APPEARANCES**

**Thomas M. Byrne**, Managing Associate General Counsel, Union Electric Company, d/b/a AmerenUE, 1901 Chouteau, Ave., MC-1310, St. Louis, Missouri 63101-6149 and **James B. Lowery**, Smith Lewis, LLP, Suite 200, City Centre Building, 111 South Ninth Street, Columbia, Missouri 65205-0918;  
For Union Electric Company, d/b/a AmerenUE.

**Kevin A. Thompson**, Chief Staff Counsel, **Steven Dottheim**, Chief Deputy Counsel, and **Eric Dearmont**, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102;  
For the Staff of the Missouri Public Service Commission.

**Lewis R. Mills**, Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102;

UNION ELECTRIC COMPANY, D/B/A AMERENUE

170

19 Mo. P.S.C. 3d

For the Office of the Public Counsel and the Public.

**Shelley A. Woods**, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102;  
For the Missouri Department of Natural Resources.

**Diana M. Vuylsteke**, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102;  
For the Missouri Industrial Energy Consumers.

**Michael C. Pendergast**, Vice President and Associate General Counsel, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101;  
For Laclede Gas Company.

**Lisa C. Langeneckert**, Sandberg Phoenix & von Gontard P.C., 515 North Sixth Street, No. 1500, St. Louis, Missouri 63101-1880;  
For Missouri Energy Group.

**John B. Coffman**, John B. Coffman, LLC, 871 Tuxedo Blvd., St. Louis, Missouri 63119-2044;  
For AARP and the Consumers Council of Missouri.

**Roger W. Steiner**, Sonnenschein Nath & Rosenthal, LLP, 4520 Main Street., Suite 1100, Kansas City, Missouri 64111;  
For Kansas City Power & Light

**Thomas R. Schwarz, Jr.**, Blitz, Bardgett & Deutsch, L.C., 308 East High Street, Suite 301, Jefferson City, Missouri 65101;  
For the Missouri Retailers Association

**Douglas L. Healy**, Healy & Healy, LLC, 939 Boonville, Suite A, Springfield, Missouri 65802;  
For the Missouri Joint Municipal Electric Utility Commission.

**CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff**



UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

171

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

**Procedural History**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, submitted a tariff designed to implement a general rate increase for electric service. The Commission has suspended the effective date of that general rate increase tariff until June 21, 2010, and a hearing on the general rate increase is scheduled to begin on March 15, 2010. Along with its general rate increase tariff, AmerenUE filed a separate tariff to implement an interim rate adjustment increasing AmerenUE's rates by approximately \$37.3 million, which would amount to a 1.67 percent increase for its customers. That interim rate tariff was to go into effect on October 1, 2009.

On September 24, 2009, the Commission suspended AmerenUE's interim rate tariff from October 1, 2009, until October 10, 2009. Thereafter, on October 7, 2009, the Commission further suspended that tariff until January 29, 2010. In the same order, the Commission directed the parties to prefile direct, rebuttal, and surrebuttal testimony and scheduled an evidentiary hearing to take place on December 7, 2009.

In compliance with the established procedural schedule, the Commission conducted an evidentiary hearing on December 7, 2009. AmerenUE, Staff, Public Counsel, Missouri Industrial Energy Consumers (MIEC), Kansas City Power & Light Company (KCP&L), and Laclede Gas Company, filed post-hearing briefs on December 21, 2009.

**Findings of Fact**

AmerenUE's interim rate tariff would allow the company to recover approximately \$37.3 million of its total requested annual rate increase on an interim basis, subject to refund.<sup>1</sup> The proposed interim rate would end when the Commission establishes "permanent" rates following completion of the general rate increase procedure. The money

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<sup>1</sup> Weiss, Interim Direct, Ex. D, Page 2, Lines 6-7.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

172

19 Mo. P.S.C. 3d

AmerenUE would collect under the interim rate tariff would be subject to refund, with interest, pending the Commission's final determination regarding AmerenUE's request for a general rate increase.<sup>2</sup>

AmerenUE requested \$37.3 million as its interim rate increase because that amount is the cost of net plant the company placed in service from October 1, 2008, through May 31, 2009.<sup>3</sup> The balances used by AmerenUE to support that \$37.3 million figure are reflective of the plant and depreciation reserve balances recorded in AmerenUE's general ledger at May 31, 2009.<sup>4</sup> However, other parties do not agree that \$37.3 million is an appropriate amount to be recovered through an interim rate increase if such a rate increase were otherwise appropriate. They contend that various adjustments would need to be made to that amount to reflect the revenue requirement associated with the net plant additions. In response, AmerenUE explained that it chose the \$37.3 million cost of net plant as a likely number for its interim rate increase simply as a means of illustrating why it needs the interim increase. The company contends the number chosen could as easily have been expressed simply as a percentage of the total amount of permanent increase it is requesting. In either event, it contends the exact derivation of the chosen number does not affect the company's rationale for an interim rate increase.<sup>5</sup>

AmerenUE asserts the Commission should allow it to receive an interim rate increase to help mitigate the effect of what it describes as excessive regulatory lag. Regulatory lag is simply the delay between when a regulated utility incurs a cost or receives an item of income and when that cost or income is recognized in the rates the regulatory body allows the utility to charge. As AmerenUE concedes, some level of regulatory lag is a good thing for both customers and utilities.<sup>6</sup> Such lag creates a strong economic incentive for a utility's management to aggressively manage costs between rate cases to be as efficient as possible.<sup>7</sup> Furthermore, regulatory lag works in both directions. When a utility's costs are increasing or its income is decreasing, regulatory lag

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<sup>2</sup> Proposed Tariff No. YE-2010-0055.

<sup>3</sup> Baxter, Interim Direct, Ex. A, Page 7, Lines 13-14.

<sup>4</sup> Rackers, Interim Direct, Ex. J, Page 3, Lines 10-13.

<sup>5</sup> Transcript, Pages 320-322, Lines 8-25, 1-25, 1-15.

<sup>6</sup> Baxter, Interim Direct, Ex. A, Page 8, Lines 10-12.

<sup>7</sup> Gorman, Interim Direct, Ex. Q, Page 2, Lines 22-23.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

173

will tend to erode the utility's profits. But when costs are decreasing or income is increasing, regulatory lag will allow a utility to earn increased profits during the delay encountered while the regulatory agency acts to decrease the utility's rates to match the decreased costs or increased income.

AmerenUE does not propose to eliminate all regulatory lag. Rather, it would impose an interim rate increase to alleviate what it describes as excessive regulatory lag. AmerenUE claims it is suffering from excessive regulatory lag because for several years it has been earning substantially less than its authorized rate of return as established by the Commission in the company's last two rate cases. For the 27 months from June 2007 through August 2009, AmerenUE's average earned return on equity was 8.06 percent, which is more than 200 basis points below the 10.2 percent return authorized in Case No. ER-2007-0002 and the 10.76 percent return authorized in Case No. ER-2008-0318.<sup>8</sup> If AmerenUE's return on equity is adjusted to reflect the unavailability of the Taum Sauk Plant, the company's average return on equity for that same period increases to just 8.52 percent, still substantially below the authorized rate of return.<sup>9</sup>

Between January 1, 2007, and June 30, 2009, AmerenUE experienced a negative free cash flow of approximately \$1.6 billion.<sup>10</sup> Because of its large negative free cash flow, AmerenUE must borrow more money and pay more interest, or must defer making certain desirable capital investments in its electrical system.<sup>11</sup> AmerenUE cites these facts as support for its claim that it is suffering from excessive regulatory lag.

Furthermore, AmerenUE asserts that excessive regulatory lag is a systemic problem in Missouri, caused by four key drivers.<sup>12</sup> First, the rate case review process in Missouri generally takes eleven months from the time a rate case is filed until revised rates go into effect. Some other states process rate cases more quickly. Second, Missouri uses historical costs to set rates while some other states use projected costs. Third, Missouri law does not permit utilities to include construction work in

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<sup>8</sup> Weiss, Interim Direct, Ex. D, Page 3, Lines 7-21.

<sup>9</sup> Weiss, Interim Direct, Ex. D, Page 5, Lines 1-13.

<sup>10</sup> Baxter, Interim Direct, Ex. A, Page 3, Lines 6-7.

<sup>11</sup> Transcript, Page 392, Lines 19-25.

<sup>12</sup> Baxter, Interim Direct, Ex. A, Page 5, Lines 11-23.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

174

19 Mo. P.S.C. 3d

progress (CWIP) in rate base. Fourth, Missouri law does not permit the use of a mechanism to periodically adjust rates between rate cases to reflect the return, property taxes, and depreciation associated with increases in net plant in service. To illustrate these problems, AmerenUE submitted the testimony of Johannes Pfeifenberger, whose comparison of five regulatory factors that affect regulatory lag among the fifty states concluded that the regulatory lag in Missouri is greater than the lag present in all but two other states.<sup>13</sup> AmerenUE contends the Commission could alleviate this systemic tendency toward excessive regulatory lag if it allows AmerenUE, and similarly situated utilities, to implement an interim rate increase early in the rate case process.

While AmerenUE claims that systemic excessive regulatory lag would justify the Commission in approving its request for an interim rate increase, a closer examination of the facts indicates otherwise.

First, AmerenUE's recent inability to earn its allowed rate of return is attributable more to the ongoing global financial crises than to any systemic regulatory lag problem in Missouri. AmerenUE made frequent reference to a chart showing actual monthly earned returns on equity compared to allowed returns.<sup>14</sup> That chart shows AmerenUE's earnings from June 2007 through August 2009. It also reveals that between June 2007 and August 2008, AmerenUE was slightly under earning, with actual returns on equity generally ranging between 9 and 10 percent, compared to an allowed return on equity of 10.2 percent. AmerenUE's actual return on equity did not really start dropping until September 2008, when it quickly fell to below 6 percent. That substantial drop coincides with the onset of the global financial crises that has harmed not only AmerenUE, but its ratepayers as well.<sup>15</sup> Thus, much of AmerenUE's inability to earn its allowed return on equity can be attributed to general economic factors rather than systemic regulatory lag peculiar to Missouri. Indeed, Warner Baxter, President and Chief Executive Officer of AmerenUE, acknowledged that economic factors resulting from the unprecedentedly severe global financial crises have reduced the company's revenues and earnings.<sup>16</sup> Baxter also acknowledged, and the Commission finds, that if the economy improves, that portion of the

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<sup>13</sup> Pfeifenberger, Interim Direct, Ex. I, Page 3, Lines 1-10.

<sup>14</sup> The chart is found at Baxter, Direct, Ex. A. Page 3, Line 4.

<sup>15</sup> Transcript, Page 406, Lines 1-9.

<sup>16</sup> Transcript, Page 385, Lines 9-18.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

175

under-earnings problem facing the company would be mitigated.<sup>17</sup>

Second, while AmerenUE is currently experiencing a large negative cash flow, some amount of negative cash flow for an electric utility such as AmerenUE is normal.<sup>18</sup> Indeed, AmerenUE has not had a positive cash flow since 2000.<sup>19</sup> Cash flows did not turn sharply negative until 2005 when AmerenUE sharply increased its capital expenditures.<sup>20</sup> Thus, while AmerenUE's concern about negative cash flows certainly explains the company's desire for an interim rate increase, the evidence does not demonstrate that any systemic regulatory lag problem in Missouri is causing AmerenUE's negative cash flow.

Despite AmerenUE's current negative cash flow of approximately \$150 million for 2009,<sup>21</sup> the company's bond ratings have remained stable. Currently the company maintains an investment grade bond rating of BBB, A3, and A from Standard & Poor's, Moody's and Fitch respectively, and that bond rating outlook is stable.<sup>22</sup> Furthermore, Standard & Poor's has continued to rate AmerenUE as having an excellent business risk profile.<sup>23</sup>

Third, Johannes Pfeifenberger's study of regulatory lag in the various states, which purports to show that Missouri has more regulatory lag than all but two other states, is of doubtful validity. When questioned at the hearing, Pfeifenberger acknowledged that he had not verified the accuracy of the data included in the tables in his study.<sup>24</sup> He further acknowledged that some of the data he used is, in fact, inaccurate.<sup>25</sup> In any event, the assertion that Missouri has more regulatory lag than some other states does not establish that regulatory lag in Missouri is excessive.

Ultimately, the most important fact is that AmerenUE will continue to provide safe and adequate service to its customers with or without an

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<sup>17</sup> Transcript, Page 359, Lines 8-20.

<sup>18</sup> Transcript, Page 439, Lines 2-4.

<sup>19</sup> Transcript, Page 482, Lines 12-13.

<sup>20</sup> Transcript, Page 483, Lines 5-12.

<sup>21</sup> Transcript, Page 482, Lines 21-24.

<sup>22</sup> Gorman, Interim Direct, Ex. Q, Page 9, Lines 18-20, as corrected at Transcript, Page 505, Lines 14-17.

<sup>23</sup> Transcript, Page 472, Lines 4-12.

<sup>24</sup> Transcript, Pages 495-496, Lines 18-25, 1-5.

<sup>25</sup> Transcript, Page 498, Lines 10-14.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

176

19 Mo. P.S.C. 3d

interim rate increase.<sup>26</sup> As the company freely acknowledges, AmerenUE is not facing any sort of financial emergency.<sup>27</sup>

**Conclusions of Law**

AmerenUE is an electrical corporation and a public utility, as those terms are defined by Section 386.020(15) and (43), RSMo Supp. 2008. As such, the Commission has jurisdiction over AmerenUE pursuant to Sections 386.250(1), RSMo 2000, and 393.140, RSMo 2000.

Section 393.150, RSMo 2000, allows the Commission to suspend a tariff filed by an electric utility for a maximum of 120 days, plus six months, beyond the date the tariff would otherwise become effective. That statute provides that “after a full hearing, ... the commission may make such order in reference to such rate, ... as would be proper in a proceeding initiated after the rate, ... had become effective.” The statute also states “[a]t any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the ... electrical corporation, ...” In deciding whether a proposed rate is just and reasonable, the Commission must consider all relevant factors.<sup>28</sup> Ultimately, the Commission’s purpose is to fix a rate that is just and reasonable both to the utility and to ratepayers.<sup>29</sup>

The Commission’s authority to grant an interim rate increase was recognized by the Missouri Court of Appeals in a 1976 case involving Laclede Gas Company.<sup>30</sup> The *Laclede* decision found that the Commission has an implied power to grant interim rate adjustments under the “file and suspend” provisions of the statutes that require public utilities to change rates by filing tariffs and that allow the Commission to suspend a rate change tariff to allow time to conduct a full hearing to determine whether that tariff will result in just and reasonable rates.<sup>31</sup> Specifically, the *Laclede* decision holds that “the Commission has power in a proper case to grant interim rate increases within the broad

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<sup>26</sup> Transcript, Page 410, Lines 10-21.

<sup>27</sup> Transcript, Pages 419-420, Lines 18-25, 1-4.

<sup>28</sup> State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979).

<sup>29</sup> State ex rel. Valley Sewage Co. v. Public Service Commission, 515 S.W.2d 845, 850 (Mo. App. K.C. Dist. (1974).

<sup>30</sup> State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. K.C. Dist. 1976).

<sup>31</sup> *Laclede*, at 565-567.

discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.”<sup>32</sup>

Thus, the Commission has “broad discretion” to determine whether to grant an interim rate adjustment. In the *Laclede* case, the Commission applied an emergency standard to determine that Laclede was not facing an emergency and thus should not be allowed to implement an interim rate increase. The *Laclede* decision upheld the Commission’s use of such an emergency standard against Laclede’s contention that the existing rates were so unreasonably low as to result in a confiscation of Laclede’s property.<sup>33</sup> However, the decision does not limit the Commission’s “broad discretion” by requiring the Commission to use an emergency standard when considering an interim rate adjustment.

An interim rate increase request is part of the same proceeding as the permanent rate increase request. “Consequently, orders made in the interim request cannot be considered as having been made in an action separate and apart from the permanent request. ... Thus, under such conditions an appeal from a final order made in the permanent rate case will subject to review orders made in connection with the interim case.”<sup>34</sup>

#### **Decision**

Based on its findings of fact and conclusions of law, the Commission finds that it has broad discretion to determine whether AmerenUE may implement an interim rate increase. In determining when an interim rate increase is appropriate, the Commission is not limited to an emergency or near emergency standard. However, any rate, including an interim rate, the Commission approves must be just and reasonable to both the utility and its ratepayers.

By its nature, an interim rate increase will take money from the pocket of ratepayers and give it to the utility’s shareholders before the complete review of the company’s earnings and expenses that will occur during the full rate case process. In some situations, an interim rate increase may be appropriate, but interim rate increases should not be granted routinely and should not be implemented simply to benefit the utility’s rate of return.

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<sup>32</sup> *Laclede*, at 567.

<sup>33</sup> *Laclede*, at 573-574.

<sup>34</sup> State ex rel. Fischer v. Public Service Commission, 670 S. W. 2d 24, 26 (Mo. App. W.D. 1984).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

178

19 Mo. P.S.C. 3d

A utility does not need to be facing a dire emergency to justify an interim rate increase. The Commission would want to act to remedy the problem long before such a situation would arise. However, the Commission will not act to short circuit the rate case review process by granting an interim rate increase unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase.

The Commission is sympathetic to the financial challenges facing the investor-owned electric utilities and recognizes that excessive regulatory lag may be a part of those challenges. There may be additional mechanisms or regulatory adjustments that would allow AmerenUE and the other electric utilities to deal with those challenges in the future. However, an interim rate increase should be used only in situations requiring a quick infusion of cash into a utility. An interim rate increase is not merely another regulatory tool in the Commission's tool box. It is an extraordinary tool that should only be used in extraordinary circumstances.

AmerenUE also expresses concern about the connection between its bond rating and what it calls excessive regulatory lag. It suggests that allowing it to implement an interim rate increase would partially offset the alleged adverse effects excessive regulatory lag may have on those bond ratings. However, this is a solution without a problem in that AmerenUE already maintains stable, investment-grade bond ratings. Given the effects of the current global financial crisis, attributing AmerenUE's bond ratings and related credit problems to analyst perceptions of excessive regulatory lag is merely unsubstantiated speculation.

AmerenUE did not meet its burden of proving that it is facing extraordinary circumstances and has not demonstrated a compelling reason to implement an interim rate increase. There is no systemic problem in Missouri causing excessive regulatory lag. Rather, the ongoing global financial crisis is causing AmerenUE to experience some of the same financial difficulties currently afflicting its ratepayers. Despite the difficulties cause by the economic recession, AmerenUE continues to have a solid and stable investment grade bond rating. Most importantly, AmerenUE will continue to provide safe and adequate service to its customers without the benefit of an interim rate increase.

AmerenUE is not facing an extraordinary circumstance and there is



UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

179

no compelling reason to implement an interim rate increase. Therefore, the Commission will reject the tariff that would implement such an increase.

**IT IS ORDERED THAT:**

1. The tariff sheets filed by Union Electric Company, d/b/a AmerenUE, on July 24, 2008, and assigned tariff tracking number YE-2010-0055, are rejected.

2. This report and order shall become effective on January 23, 2010.

Gunn and Kenney, CC., concur,  
Clayton, Chm., concurs with separate concurring opinion attached,  
Davis and Jarrett, CC., dissent, with dissenting opinions to follow.  
and certify compliance with the  
Provisions of Section 536.080, RSMo.

\*NOTE: At time of publication, no opinion of Commissioner Davis has been filed.

\*NOTE: See pages 47, 48, 50, 52, 53, 55, 78, 80, 108, 199, 350, 358, and 376 for other orders in this case.

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner concurs in the Commission's denial of AmerenUE's request for an interim rate increase. Although this is not the first time a utility has made such a request, any rate increase without a full, comprehensive audit by the PSC staff is atypical of Commission process because it would take effect without consideration of "all relevant factors."<sup>1</sup> In 1974, the Commission defined an exception to this rule and allowed an interim rate increase using an "emergency standard."<sup>2</sup> Following a challenge to the Commission's ruling, the Court utilized the "emergency standard" as an appropriate exception to standard practice.<sup>3</sup> Ever since, the Commission has generally followed that standard when evaluating interim rate increase requests.

"Emergency" was defined in the *Laclede* case as a circumstance

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<sup>1</sup> State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979).

<sup>2</sup> Commission, Case No.18021 (1974).

<sup>3</sup> State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561, 574 (Mo. App. K.C. Dist. 1976).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

180

19 Mo. P.S.C. 3d

of when “the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility’s ability to render adequate service or render it unable to maintain its financial integrity.”<sup>4</sup> The Commission has departed from that standard only in rare situations, either limited to small utilities or limited to well-defined circumstances with larger utilities. In recent cases, the few examples of departure from the emergency standard have involved small companies with limited capital and a need to make necessary investments.<sup>5</sup> Throughout the years, instances of interim request have also appeared in larger cases filed by large utilities.<sup>6</sup>

The request before us today is nothing like that. It is a request by a large (the largest) Missouri utility with complex books, geographically diverse investment needs and operations in various sectors. The utility has admitted that it is not facing an emergency, that the company’s ability to offer safe and adequate service is not in question and that customers do not face any change in service. The “danger” of not approving the request is that certain investment decisions “may” be delayed or canceled at some undefined or speculative point in the future. While AmerenUE’s interim request pales in comparison to its overall requested increase, AmerenUE could not affirmatively establish how a 1.67 percent temporary increase in rates would have any impact on significant investment decisions, attempts to attract capital or overall debt ratings.

AmerenUE, and other regulated utility intervenors, seek approval of this interim increase based on evidence that the utility is “chronically underearning” due to significant or “excessive regulatory lag.” AmerenUE cites an inability to effectively recover costs or to make needed investments in infrastructure. AmerenUE argues that it is earning a return, but it is not earning enough to accomplish its goals or continue its infrastructure plan. AmerenUE and the utility intervenors argue that this process employed since 1913 must be changed because

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<sup>4</sup> Id.

<sup>5</sup> In the Matter of the Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., L.L.C., and for an Interim Rate Increase (SO-2008-0289); and In the Matter of Evergreen Lakes Water Company, Inc. Small Company Rate Increase (WR-2006-0131).

<sup>6</sup> Staff Post-Hearing Brief pg. 30-42 (GR-2010-0036).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

181

of inherent unfairness in waiting for processing of rate cases which statutorily cannot exceed eleven months. Other parties argue that these are the same utilities which enjoyed beneficial “regulatory lag” during the 1990s and 2000s when their earnings may have exceeded their authorized rate of return.<sup>7</sup> Utilities are the principal holders of such earnings information, they control the timing of when to file a rate case and as the managers of the business, they have control over costs.

In reviewing this request, we must be mindful of the significance of departing from past practice. We must be mindful of the implications for future applications with other utilities and in other cases. While the rhetoric suggests this decision only applies to AmerenUE and its customers, this decision will establish precedent for future cases affecting nearly all Missouri customers. If the Commission departs from the “emergency standard,” it is important to establish a standard that will provide guidance to future applicants and opponents. Alternative proposals or standards have proven either to not be standards at all (that we should just use the Commission’s discretion on a cases by case basis, which leads to arbitrary decisions)<sup>8</sup> or weak standards that do not take into account external circumstances such as management decisions or the overall economy.<sup>9</sup> It is this Commissioner’s opinion that the “emergency standard” serves a purpose and should be kept as the precedent employed by the Commission. If the Commission is to change precedent and set a new policy for circumstances beyond an “emergency,” it must have definable criteria that either offer direct benefits to rate paying customers or further some infrastructure goal or policy of the Commission. Neither example is present in this case.

The Commission has conducted a full hearing, full opportunity for

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<sup>7</sup> “If there is any kind of a chronic condition with respect to AmerenUE’s earnings, history demonstrates that AmerenUE chronically exceeds its authorized rate of return. In fact, over the last twenty-five years, regulatory lag has worked in AmerenUE’s favor about ten times as long as it has worked to AmerenUE’s detriment.” Public Counsel’s Brief on Interim Rate Request pg. 10-11 (GR-2010-0036).

<sup>8</sup> “The bottom line is that there can be no serious debate that the Commission has the legal authority to exercise its “broad discretion” to approve interim rates in a non-emergency situation.” Ameren Post Hearing Brief on Interim Rates, pg. 15 (GR-2010-0036).

<sup>9</sup> “Over the past few years, due to excessive regulatory lag, AmerenUE has been chronically and consistently unable to earn anywhere close to its authorized return.” Ameren Post Hearing Brief on Interim Rates, pg. 1 (GR-2010-0036).

briefing and opportunity for cross examination of witnesses to fully explore the implications of the request. It has been a helpful exercise in reviewing the history of such requests and to fully examine the financial circumstances faced by AmerenUE. While this policy may cause everyone to have more work, we should err on the side of more process than less, when making such a critical decision.

Aside from AmerenUE's admission that it does not face an emergency and that there has been no acceptable alternative standard of exception suggested, now is not the right time to change this policy. The national and regional economies are struggling and there is great uncertainty in the markets. Further, granting a rate increase without benefit of a full audit on questions of disputed facts sends the wrong message to the rate paying customers who may also be facing challenging financial circumstances.

There is no question that AmerenUE faces challenging times from a downturn in the economy and a reduction in energy consumption. There is no question that all businesses are struggling with their rates of return. But, those factors alone do not justify application of a new standard to grant rate increases without a full staff audit and consideration of "all relevant factors."

Therefore, I must concur in the denial of the request.

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT  
IN THE REPORT AND ORDER REGARDING INTERIM RATES**

I respectfully dissent. In my opinion, the substantial evidence in the record demonstrates that the company is lawfully entitled to the interim rate adjustment increasing its rates by approximately \$37.3 million. I find that the majority's findings of fact are incomplete, requiring me to make additional findings of fact as set out below.<sup>1</sup>

I. Procedure

The majority decision sets out the procedural history in this case. For ease of reference, I repeat it here.

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<sup>1</sup> All references herein are to RSMo 2000 unless otherwise noted.

## UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

183

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, submitted a tariff, YE-2010-0054, along with supporting schedules, and testimony designed to implement a rate increase for electric service. The Commission has suspended the effective date of that rate increase tariff until June 21, 2010, and a hearing on the general rate increase is scheduled to begin on March 15, 2010. Along with this rate increase tariff, AmerenUE filed a separate tariff to implement an interim rate adjustment<sup>2</sup>, YE - 2010 - 0055, increasing AmerenUE's rates by approximately \$37.3 million, which would amount to a 1.67 percent increase for its customers. That interim rate tariff was to go into effect on October 1, 2009.

On September 24, 2009, the Commission suspended AmerenUE's interim rate tariff from October 1, 2009, until October 10, 2009. Thereafter, on October 7, 2009, the Commission further suspended that tariff until January 29, 2010. In the same order, the Commission directed the parties to prefile direct, rebuttal, and surrebuttal testimony and scheduled an evidentiary hearing to take place on December 7, 2009.

In compliance with the established procedural schedule, the Commission conducted an evidentiary hearing on December 7, 2009. No party made any request for additional hearing time on this case, either at the December 7, 2009 hearing or by pleading.<sup>3</sup> AmerenUE, Staff, Public Counsel, Missouri Industrial Energy Consumers (MIEC), Kansas City Power & Light Company (KCP&L), and Laclede Gas Company, filed post-hearing briefs on December 21, 2009.

### II. Findings of Fact

What the majority has put forward as "findings of fact," in my opinion, are not a model of fact finding. Instead, they appear more as a recitation of positions of parties, without any fact being identified or specifically found by the Commission. As such, I offer here the facts<sup>4</sup>

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<sup>2</sup> The majority failed to mention that the interim rates proposed by the company were subject to refund with interest if the Commission later found that the company was not entitled to the rate increase.

<sup>3</sup> See generally, *Transcript*, Vol. 3, p. 226, Ins. 4 – 25, p. 227, Ins. 1 – 25.

<sup>4</sup> Section 393.270.4, specific to complaint cases, is nonetheless instructive on relevant factors in rate determination matters, making clear that the Commission determines what facts are considered, rather the parties. Section 393.270.4 states:

"In determining the price to be charged for gas, electricity, or water **the**

UNION ELECTRIC COMPANY, D/B/A AMERENUE

184

19 Mo. P.S.C. 3d

relevant to make a decision in this case, and the conclusions of law which can be drawn from those facts to reach the ultimate conclusion that AmerenUE's interim rate increase is just and reasonable on the whole record and its filed tariff should be placed into effect immediately, with the rate increase subject to refund by the terms of the tariff. To the extent that there are any facts in the majority's findings of fact section, I incorporate them herein by reference, and make the following additional findings of fact:

1. In its Report and Order in Case No. ER – 2008 – 0318 issued on January 27, 2009, the Commission approved rates which would permit the Company to earn a rate of return on its common equity ("ROE") of 10.76 percent. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 3, Ins. 3 – 5.

2. AmerenUE filed with this Commission an interim tariff, YE – 2010 – 0055, along with supporting schedules and testimony on July 24, 2009. The tariff would allow the company to recover approximately \$37.3 million in additional revenue on an interim basis. *Weiss, Direct Testimony (Interim Rate)*, Ex. D. p. 2, Ins. 6 – 16. The money collected under the tariff, along with interest, would be subject to ratepayer refund pending the Commission's final determination in AmerenUE's additional rate increase request filed simultaneously with this rate increase request. *Id.*

3. The calculation is based upon the net plant additions that AmerenUE placed in service from October 1, 2008 to May 30, 2009, and also includes depreciation expense, income taxes, and return on the net plant additions. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 2, Ins. 6 – 16. The revenue requirement was calculated in accordance with the depreciation rates and rate of return as Ordered in Case No. ER – 2008 – 0318. *Id.* The calculations begin with the first day after the end of the true up period in Case No. ER – 2008 – 0318 and the last day of the most current month at the time this rate case was filed, or May 31, 2009.

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***commission may consider all facts which in its judgment have any bearing upon a proper determination of the question*** although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." (Emphasis added).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

185

*Id.*, See also, *Baxter, Direct Testimony (Interim Rate)*, Ex. A, p. 7, Ins. 13 – 14.

4. The plant and reserve balances stated by AmerenUE are confirmed by expert testimony that the \$37.3 million interim rate request is reflective of the plant and depreciation reserve balances that are recorded in AmerenUE's general ledger on May 31, 2009. *Rackers, Direct Testimony (Interim Rate)* Ex. J, p. 3, Ins. 10-13.

5. The Company has invested \$346.8 million in net plant additions from October 1, 2008, through September 30, 2009. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 6, Ins. 7 – 8. All of this investment was placed in service after the true-up cut-off date established in the Company's most recent rate case, ER – 2008 – 0318. *Id.* Ins. 8 – 10.

6. Without the interim rate increase, the Company will fail to recover approximately \$75 million over this period associated with these in-service investments. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 6, Ins. 17 – 18. This figure reflects the Company's underearnings associated with net rate base additions from October 1, 2008, through September 30, 2009, and reflects the return, depreciation, and taxes on net increased investment in plant during that period. *Id.* Ins. 18 – 22. These costs will be permanently lost in total if no interim rate increase is authorized. *Id.* In. 22, p. 7, Ins. 1 – 2.

7. All of the plant (capital additions) encompassed in this rate request, and described in the findings of fact paragraphs 5 and 6 have been placed into service and are currently serving AmerenUE's customers. *Weiss Direct Testimony (Interim Rate)*, Ex. D, p. 3, Ins. 3 – 5; *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 7, Ins 8 – 9.

8. The Company has been earning below its allowed ROE every month since June 2008, and from January 2009, to May 2009, the Company's actual earned ROE was under 7 percent. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 3, Ins 4 – 5. In April 2009, and May 2009, the actual earned ROE was under 6 percent. Over the past 12 months, the average earned return was 6.32 percent -- 416 basis points below the allowed ROE. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 2, In. 22; p. 3, Ins. 1 – 2.

9. This persistent lack of the ability to earn its allowed ROE has adversely affected the cash flow of the Company. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 3, Ins. 7 – 11. Since January 1,

UNION ELECTRIC COMPANY, D/B/A AMERENUE

186

19 Mo. P.S.C. 3d

2007, the Company has experienced negative free cash flow of approximately \$1.6 billion through June 30, 2009. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 5, Ins. 1 – 13.

10. As a result of this negative free cash flow, the Company must either borrow against its existing credit facilities or access the debt and equity markets to fund its operations. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 4, Ins. 1 – 2. Among other things, this situation drives the Company's financing costs up meaningfully, especially where the capital markets have been challenging. *Id.* Ins. 3 – 5. These increased costs are eventually borne by the ratepayers. *Baxter, Direct Testimony (Interim Rate)*, Ex. A, p. 13, Ins. 15 – 16.

11. Since the fall of 2008, our country has been involved in what has been characterized as a Global Financial Crisis ("GFC"). *Transcript*, Vol. 3, p. 358, Ins. 1 – 13; p. 405, Ins. 23 – 25, p. 406, Ins. 1 – 9. Credit markets have been tight, leading to a much higher cost of capital for the Company. *Baxter, Direct Testimony (Interim Rate)*, Ex. A, p. 4, Ins. 3 – 4; *Transcript*, Vol. 3, p. 390, Ins. 5 – 10; p. 405, Ins. 15 – 25, p. 407, Ins. 1 – 5.

12. The economic situation currently facing AmerenUE is unprecedented in recent times. *Id.*; *Transcript*, Vol. 3, *passim*.

13. AmerenUE lost several million dollars in capacity for credit facilities due to the liquidation of Lehman Brothers. *Transcript*, Vol. 3, p. 383, Ins. 3 – 10. Access to capital was seriously impacted by the reduced number of financial institutions which remained in the marketplace. *Id.* Ins. 5 – 10.

14. The global financial crisis and regulatory lag together support the interim rate relief requested. *Transcript*, Vol. 3, p. 358, Ins. 1 – 17. What happened in the economy is causal to AmerenUE's failure to earn its allowed ROE. *Id.*

15. When circumstances are beyond the control of the utility it is appropriate to grant interim rates which serve as a financial safety net. *Transcript*, Vol. 3, p. 540, Ins. 20 – 25, p. 541, Ins. 1 – 7.

16. In Missouri, there is a history of "regulatory lag" approaching eleven months from the date a utility files its proposed rate increase and the Commission order allowing it to put any increased rate into effect. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 5, Ins. 13 – 23; *Baxter, Rebuttal Testimony (Interim Rate)*, Ex. B, p. 3, Ins. 21 – 23; *Pfeifenberger, Direct Testimony (Interim Rate)*, Ex. I, p. 3, Ins. 12 – 13.



Regulatory lag represents a mismatch of costs and revenues, meaning that the Company's rates are not reflective of, nor do they provide for recovery of, the Company's current level of operations and maintenance expenditures and cost of capital investment. *Weiss, Direct Testimony (Interim Rates)*, Ex. D, p. 2, Ins. 20 – 21; p. 3, In. 1.

17. Several factors drive regulatory lag in Missouri, including the length of the regulatory process, use of historical costs to set rates, Missouri statutes do not permit utilities to reflect construction work in progress in rate base, and lack of a mechanism to periodically adjust rates for changes in rate base for plant in service between rate cases to reflect the return, property taxes, and depreciation associated with increases in net plant in service. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 5, Ins. 13 – 23.

18. The \$37.3 million interim rate request reflects the cost of net plant placed in service from October 1, 2008, through May 31, 2009. *Baxter Direct Testimony (Interim Rate)* Ex. A, p. 7, Ins. 13 – 15.

### III. Analysis

AmerenUE filed, and this Commission suspended, a tariff seeking a rate increase.<sup>5</sup> That tariff is not unique under Missouri law, nor should it be treated any differently. Missouri law states that this Commission must use the “just and reasonable” standard when suspension has occurred and any hearing is held.<sup>6</sup> Yet here, the majority concocted, out of thin air, a threshold *discretionary* standard to be used prior to reaching an analysis as to whether the tariff is “just and reasonable.” The majority’s decision, while paying lip service to what constitutes “just and reasonable” rates, instead required this utility to show that it “is facing extraordinary circumstances”<sup>7</sup> while also showing a “compelling reason to implement an interim rate increase.”<sup>8</sup> Whatever standard this is, it is not the just and reasonable standard, and is wholly unsupported by law.

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<sup>5</sup> The tariff has been titled by AmerenUE as an Interim Rate Adjustment Tariff. Nothing in Missouri statute designates what constitutes an “interim” rate. Arguably all rates, because they are subject to later change, are by their very nature interim in nature.

<sup>6</sup> Section 393.150(1) and (2).

<sup>7</sup> Report and Order Regarding Interim Rates, Case No ER – 2010 – 0036, p. 12.

<sup>8</sup> *Id.*

UNION ELECTRIC COMPANY, D/B/A AMERENUE

188

19 Mo. P.S.C. 3d

The creation of an unlawful threshold of *discretionary* review, prior to applying the standard of “just and reasonable” rate setting required under Section 393.150(2), may now unwittingly allow the majority of this Commission to operate with impunity in addressing any rate increase request. This Commission does not have the legal authority to apply a *discretionary* standard as a threshold prior to determining whether a filed rate is just and reasonable, and as such, I disagree with the majority’s legal analysis, application of law to facts, as well as its final conclusion.

A. The Law

Missouri utilizes the file and suspend method of rate making.<sup>9</sup> There is nothing in the statutory scheme for rate setting in Missouri that differentiates between the style of a particular rate.<sup>10</sup> Rather, Missouri law refers to a rate or charge set forth in a schedule<sup>11</sup> with nothing segregating any particular rate, charge or even schedule into categories such as interim, temporary, expedited, permanent, and otherwise requiring different legal treatment. Similarly, familiar terminologies such as permanent rate case and full rate case process<sup>12</sup> are also legally

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<sup>9</sup> The “file” provision is set out in Section 393.140(11) and the “suspend” provision is set out in Section 393.150; See generally *State ex re. Jackson County, et. al v. Public Service Comm’n, et. al*, 532 S.W.2d 20 (Mo. banc 1975) (discussing the “file and suspend” method of ratemaking).

<sup>10</sup> See *Transcript* Vol. 3, p. 226, Ins. 4 – 25, p. 227, Ins. 1 – 25 (wherein Staff counsel offers by way of explanation that a limited number of witnesses, only two, provides evidence that this case is not governed by the “file and suspend” provisions of Section 393.150). I disagree, nothing in Section 393.150 limits or constrains the evidentiary process, rather both Section 303.140(11) and 393.150 simply outline the time within which a rate increase may be set.

<sup>11</sup> The specific term “tariff” is not used in Sections 393.140(11) or Section 393.150, but is referenced in other sections of Chapter 393. Section 393.140(11) states that “no change shall be made in any *rate or charge*, or in any form of contract or agreement, or any rule or regulation relating to any *rate, charge or regulation* relating to any *rate, charge or service* ... which shall have been filed and published by a [ ] electrical corporation ...” (Emphasis added). Section 393.150 states that “whenever there shall be filed with the commission by any [ ] electrical corporation [ ] any *schedule stating a new rate or charge*, or any new form of contract or agreement, or any *new rule, regulation or practice relating to any rate, charge or service* or to any general privilege or facility ...” and later stating in the same subsection “the commission [ ] may suspend the operation of such *schedule and defer the use of such rate, charge, form of contract or agreement, rule regulation or practice* ...” (Emphasis added).

<sup>12</sup> Missouri statutes make the following references (without regard to explanation, definition or meaning); “regular rate case” Section 393.1030.2(4) RSMo Cum. Supp. 2009, “general

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

189

irrelevant because a filing seeking a change in a rate, charge or schedule is also not segregated in law in any manner except case status—noncontested or contested.<sup>13</sup> The tendency of the parties and the majority to rest on colloquial terminology that may have woven its way over time into practice, does not reflect the very laws designed for the fair administration of the Public Service Act which was created to provide fairness to both the public and utility investors.

The interplay between Sections 393.140(11) and 393.150, and the numerous cases applying these specific sections provide the lawful roadmap for rate setting in Missouri. A careful reading of the plain meaning of the statutes, and an attention to detail in reviewing and analyzing applicable case law (and the cases upon which those cases rely) is determinative. The majority seems to have gotten caught up in the “outcome” rather than applying the law to the facts. However, the foundation of administrative law requires this Commission to apply the law as it is written.

The fundamental element that sets an interim rate request apart from what are generally considered permanent rate requests, is not *why* the request is made, but *when* the rate is needed to go into effect. This is the framework of the two statutory provisions considered in this case. By placing the analytical focus on the *why* continues to cause acrobatic maneuvering by both the majority and the advocates for the parties, which I find unnecessary. If the questions are answered in the order I have suggested, *when* before *why*, not only does the law fall into place, but so does the proper legal standard which must be applied to the filing.

The distinction drawn between Section 393.140(11) and 393.150 with regard to the *when* (effective dates and timing of rates) is lost on the majority in their analysis; instead they focus on the *why*. One of the reasons the *why* is so important to the majority is their reliance on the holding in *Fischer* to support the idea that in some way “interim rate” filings and “permanent rates” are not only distinguishable, but are married to each other for the purposes of rate setting; in truth, they are not. ***State ex. rel. Fischer v. Pub. Serv. Comm’n***, 670 S.W.2d 24, 27

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rate case,” Section 393.1000(1)(d) RSMo Cum. Supp. 2009, and Section 393.1009(3)(c) RSMo Cum. Supp. 2009, and “small company rate case,” Section 393.146.1.11 RSMo Cum. Supp. 2009. All of the *rate case* references are relative new additions to Missouri law.

<sup>13</sup> See ***State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm’n***, 585 S.W.2d 41 (Mo. Banc 1979), denoting “permanent rate” increases.

(Mo. App. W.D. 1984). **Fischer** does not stand for the proposition that two rate filings are inexorably tied together for rate making purposes; rather, **Fischer** was a case dealing with the standard for appellate review and appeal. **Fischer** makes no holding as to two separate rate filings with regard to Commission treatment for the purposes of rate setting, or the legal standard, or burden of proof in rate setting under such circumstances. Tying the two together in the analysis as to *why* a temporary or interim rate is requested exacerbates the flaw in the majority's analysis. Accordingly, the majority's reference in its present Order regarding **Fischer** fails to recognize this important distinction. **Fischer** does not control here.

#### B. Noncontested Case

Section 393.140(11) sets out a *discretionary* system for conducting rate setting in Missouri by granting the commission latitude with regard to *when* an increase in a rate shall become effective. This framework is generally referred to as a noncontested case. Subsection (11) essentially grants the Commission authority to provide expeditious rate treatment, allowing the Commission to implement rates without the benefit of a full and complete hearing, or under limited circumstances without the necessity of providing thirty days notice upon "good cause" shown. Good cause provides for *discretion* by the Commission when it makes its determination and may include such issues as application of a financial need test, establishment by the utility that an economic or other emergency exists, or some other unique situation which merits *discretionary* review under the circumstances of a proper case. An example of such a proper case would be where the Commission allows an interim rate request to go into effect at the time requested and without suspension of the tariff.

In this case, the majority stated that "AmerenUE did not meet its burden of proving that it is facing extraordinary circumstances and has not demonstrated a compelling reason to implement an interim rate increase[.]" Had this case been one where Section 393.140(11) was applicable, it is arguable that the majority's approach could have been tenable; but, this was not an uncontested case. The suspension of AmerenUE's filed rate legally requires consideration under Section 393.150, not 393.140(11).

### C. Contested Case

Section 393.150 controls this case. This Commission, by ordering the suspension of the filed tariff,<sup>14</sup> and holding a full hearing,<sup>15</sup> is bound by the law as described in Section 393.150, and as such, a contested case has occurred here.<sup>16</sup> Once the Commission suspends a rate under Section 393.150, constitutional protections are invoked and the Commission is bound by its *duty* in a Section 393.150 case to find that a rate is just and reasonable. For the regulator, it is the trigger of constitutional protections that mean the Commission is no longer afforded the *discretion* provided for under Section 393.140(11), but instead must apply Section 393.150 to administer its *duties*.

Missouri's statutory provisions not only authorize the Commission to prescribe just and reasonable rates, they also impose a specific *duty* to prescribe just and reasonable rates. When a tariff has been suspended, and any hearing is held in a rate increase proceeding, the Commission has a statutory *duty* to determine and prescribe "just and reasonable" rates.<sup>17</sup> Once rates are suspended and a hearing set, the provisions of a contested case are triggered.<sup>18</sup> And, once this *duty* is triggered it must be performed and it must be based upon the evidence of record.

### D. Just and Reasonable Rates

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<sup>14</sup> Section 393.150 allows the Commission to suspend the "operation of such schedule and defer the use of such rate..." after notifying the electrical corporation "of its reasons for such suspension..." No statutory standard for the exercise of suspension is stated in the law. The Commission thus has *discretion* in exercising this power. In this case, suspension is not at issue – nor the *discretion* with regard to suspension which is implied in the law.

<sup>15</sup> Section 393.150(1) states: "...after full hearing..."

<sup>16</sup> Section 536.010(4).

<sup>17</sup> In the case of a complaint the statute goes so far as to prescribe that the rates permit an electrical corporation to make a "reasonable average return upon capital actual expended..." Section 393.270(4).

<sup>18</sup> This can be contrasted to the provisions of Section 393.140(11) which follow a noncontested case standard, with the Commission granted the authority to exercise its *discretion* with regard to the time when a rate shall go into effect. Even though a rate may be suspended under 393.140(11) it is a suspension of a rate that exceeds the effective date that moves the rate increase request to the application of Section 393.150. At that point the interest and the rights of the utility are affected, resulting in the protections afforded through due process, including a timely hearing.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

192

19 Mo. P.S.C. 3d

The legal standard of just and reasonable rates is well settled in the law. The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,<sup>19</sup> subject to judicial review of the question of reasonableness. ***St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri***, 236 S.W. 852 (Mo. banc. 1922). A "just and reasonable" rate is one that is fair to both the utility and its customers ***St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n***, 515 S.W.2d 845 (Mo. App. 1974); it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." ***St. ex rel. Washington University et al. v. Pub. Serv. Comm'n***, 272 S.W. 971, 973 (Mo. banc 1925). In 1925, the Missouri Supreme Court stated:

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. \* \* \* These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

***Id.***

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. ***May Dep't Stores Co. v. Union Elec. Light & Power Co.***, 107 S.W.2d 41, 48 (Mo. App. 1937). [T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental." ***St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n***, 179 S.W.2d 123, 126 (1944). However, the Commission must also afford the utility an opportunity to

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<sup>19</sup> Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

193

recover a reasonable return on the assets it has devoted to the public service. **St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n**, 585 S.W.2d 41, 49 (Mo. Banc 1979). "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment." **St. ex rel. Missouri Public Service Co. v. Fraas**, 627 S.W.2d 882, 886 (Mo. App. 1981).

The Commission has exclusive jurisdiction to establish public utility rates, **May Dep't Stores**, 107 S.W.2d at 57, and the rates it sets have the force and effect of law, **Utility Consumers Council**, 585 S.W.2d at 49. A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission **Id.**; neither can a public utility change its rates without first seeking authority from the Commission. **Deaconess Manor Ass'n v. Pub. Serv. Comm'n**, 994 S.W.2d 602, 610 (Mo. App. 1999). A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's. **May Dep't Stores**, 107 S.W.2d at 50. Thus, "[r]atemaking is a balancing process." **St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n**, 765 S.W.2d 618, 622 (Mo. App. 1988).

IV. Conclusions

Approval of the proposed interim rates is supported by competent and substantial evidence upon the whole record. There is no credible evidence in the record on behalf of the staff, public counsel, or the intervenors that the company is not entitled to the rate increase requested.

The Company has met its burden of proof under section 393.150. The Company has plant in service that is used and useful, benefitting the ratepayers. The Company is not recovering its costs for this plant in service, and is seriously under-earning due to unreasonable regulatory lag and the Global Financial Crisis which drives up its cost of capital. The rate increase request, which is interim, is just and reasonable given the facts in this case.

Despite the facts in the record, the majority failed to prescribe the just and reasonable rates which the evidence clearly showed to be justified. The majority here has simply rejected the rate put forth by

UNION ELECTRIC COMPANY, D/B/A AMERENUE

194

19 Mo. P.S.C. 3d

AmerenUE without making a single finding of fact to support that the rate was not “just and reasonable” or how it reached such a conclusion. The majority reasoned that “in its discretion” the rate was not supported by the evidence. This is insufficient under the law. By applying a standard of *discretion* in a 393.150 case, the majority has ascribed itself to an arbitrary standard for rate setting here, one which is clearly not permitted under the law. The *discretionary* threshold applied by the majority has in essence created a barrier to a just and reasonable rate.

What the majority has done, in my opinion, is to have morphed the *discretion* afforded the Commission under Section 393.140(11) regarding the implementation of rates which may go into effect immediately or on a date sooner than that required for a full hearing, with the provisions of Section 393.150(2) which requires “just and reasonable” rates, to reach its ultimate conclusion. These two statutory sections are different, and while they can be harmonized they cannot be conjoined to transform the law. The majority’s approach here essentially has rewritten years of law and jurisprudence with regard to the setting of rates under the guise that in some way the rate filed by AmerenUE is different, unique or merits special treatment. In this case, AmerenUE’s rate was suspended and a hearing held, so there can be no dispute that the standard which applies is that the rate be “just and reasonable” and that the *duty* of the Commission is set by Section 393.150.

In my view, the rate case review process in this case has been completed – a rate was filed by AmerenUE, the rate suspended and a full hearing held. The party seeking the rate increase bears the burden of proof to demonstrate that the rate is just and reasonable. This is a straight forward filing by a utility requesting an increase in rates. And, while that increase request included caveats, such as the increase being temporary and subject to a refund pending the outcome in a different, but simultaneously filed rate increase request, makes no difference in what should have been this Commission’s application of law to facts and legal conclusions in this case. The Commission’s exercise of *discretion* in a Section 393.150 case is simply not the type of *discretion* analogized in the **Laclede** case, as the **Laclede** court most certainly would not have been advocating for unconstitutional action such as confiscation of utility property, in my opinion. **State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n**, 535 S.W.2d 561 (Mo. App. K.C. Dist. 1976). The reference was, in my view, meant to encompass the *discretionary* latitude the



Commission does possess as to the suspension of a rate, schedule or charge under Section 393.150 and the *discretion* the Commission possesses by allowing rates to go into effect by operation of law (without a hearing), or within a shortened timeframe under Section 393.140(11).<sup>20</sup>

To further understand my opinion here, it is important to acknowledge that I agree with the Public Counsel's cautioning against reliance on the **Laclede** case, in that the court by its own admission stated that the decision was advisory. Also, to the extent that **Laclede** seems to suggest that this Commission has adopted a rule regarding "interim" rate relief and an applicable standard (which essentially is the genesis for much of the analysis on interim relief), I would point out that the Court only acknowledged that this Commission had "point[ed] out" that it had "adopted a rule" in **Re Southwestern Bell Tel. Co.**, 2 Mo. P.S.C., (N.S.) 131, 535 S.W.2d 561, 566. To the extent the interim rate "standard" has as its genesis **Southwestern Bell**, I am skeptical that what was argued by the Commission's counsel in **Laclede** is as much a rule as it is nothing more than a general recitation of Commission findings without any indication that a rule of general applicability was intended by the Commission's Order.<sup>21</sup>

The statutory *duty* of the Commission in this rate case, where hearings have been held and the rate suspended, is to determine and prescribe the just and reasonable rates to be in force and effect thereafter. Here, a hearing was held and evidence adduced. The Commission's Order denying AmerenUE's rate tariff, described by AmerenUE as an interim rate tariff, is unlawful because the Commission failed to find that the rate proposed was not *just and reasonable* but instead, simply rejected out of hand, AmerenUE's tariff for *discretionary* reasons.

The Commission's Order fails to recognize the constitutional and statutory *duty* of the Commission to grant expeditious relief when the

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<sup>20</sup> The **Laclede** Court recognized that "[T]he 'file and suspend' provisions of [Sections 393.140(11) and 393.150] lead inexorably to the conclusion that the Commission does have *discretionary* power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing ..." This passage demonstrates that the focus of the Court was not on the type of rate proposed but rather by the time when the rate would become effective.

<sup>21</sup> Because Commission decisions have no precedential value, absent a rule of general applicability being established, the finding announced in **Southwestern Bell** has no binding effect on this Commission.

utility meets its burden of proof. The notion of due process and equal protection under the Missouri and U.S. Constitutions, and the statutory requirement that rate regulation shall provide "just and reasonable" rates have been turned on their head here where the Order erroneously applies a standard not recognized under law for the denial of a rate increase request. Here, the majority seems to be suggesting that its denial is only temporary because another rate increase is following this very case. Denying a just and reasonable rate, even for a little while, does not make it lawful. Limited or temporary confiscation is just as prohibited by law as total and permanent confiscation. The majority's inference that AmerenUE can wait until its next rate increase request proceeding (which was filed simultaneously with this rate increase request) amounts to saying that some confiscation is permissible, or that confiscation can be required if it is only temporary until a later rate case can be decided.

When a commission prescribes rates which do not provide the opportunity to earn the cost of service, or as generally stated to earn a reasonable return on the value of the property devoted to public service, such rates are confiscatory. The Supreme Court of the United States in ***Bluefield Waterworks v. West Virginia Pub. Serv. Comm'n. et al.***, 262 U.S. 679, 690 (1923) considered this so well settled that citation of cases was unnecessary.

***"The question in the case is whether the rates prescribed in the commission's order are confiscatory, and therefore beyond legislative power.*** Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary [:] ..."

(Emphasis added).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

197

The evidence in this case was uncontroverted that plant is in the service of the public, that the public is benefiting, that AmerenUE has asked for recovery of those costs, and this Commission has said no. Denial of the request however is not enough; it is that denial along with the evidence which was presented by AmerenUE that it has been consistently unable to earn even close to its rate of return that has convinced me that denial of the rate now is confiscatory of AmerenUE's property for the benefit of the public without just compensation.

Despite the majority acknowledging that "any rate, including an interim rate, the Commission approves must be just and reasonable ..." it wholly failed to make any finding that the rate filed by AmerenUE was not just or reasonable. Instead, the majority made its findings for denial on *discretionary* terms, which is only appropriate for consideration under Section 393.140(11).

The bad economic conditions today are unprecedented, and while they impact upon ratepayers as well as utilities, that does not negate the utilities duty to provide safe and reliable service at just and reasonable rates. As such, the GFC and its impact on utilities is a factor that merits consideration by the Commission in determining whether a rate is just and reasonable. To suggest that such a crisis is merely a part of general economic conditions that a utility is expected to navigate totally overlooks the severity of the situation and the direct impact it has on a utility's ability to not only attract capital, but to do so at a reasonable rate.

Externalities encompassing the magnitude of this crisis cannot be ignored. Accelerated rate implementation or interim rates should be available to a utility. Circumstances beyond the direct control of the utility, such as the GFC, support the reasonableness of such a rate request. The GFC has demonstrated that forces beyond the control of a utility may be so great in magnitude that without a rate increase, provision of utility service may be jeopardized (whether immediately or in the long term). Access to credit is one element, but when banks close and no longer exist, access is completely forestalled.

Much focus was placed by the majority on AmerenUE's admission that it was not experiencing an emergency<sup>22</sup> in its analysis. From my point of view even if AmerenUE stated that no emergency

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<sup>22</sup> *Report and Order*, p. 9.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

198

19 Mo. P.S.C. 3d

existed,<sup>23</sup> it is incumbent upon this Commission to review the facts and make that determination itself. It is not the role of this Commission to defer to the parties "conclusions" regarding matters of law, and as such, the majorities' apparent comfort in reliance on AmerenUE's admission is of no consequence here. The regulatory responsibility of this Commission is to review the matter at hand, which can include reaching a conclusion based upon the facts different than that which is suggested by a party to the case.

I acknowledge that there is a cost associated with utility service and that denial of a rate increase request which is temporary or interim in nature can have the unintended consequence of not only costing the ratepayer more, but exacerbating any later possible rate shock. While I offer no opinion or make any judgment with regard to the AmerenUE rate case which remains pending before the Commission, in this case I believe it is important to point out that the Commission clearly demonstrated that it is capable of acting expeditiously in compliance with Section 393.150(2)'s requirement that the "commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible[.]" and not stretch a rate increase request (such as this interim request) out to a full eleven months. The result reached, however, was even in that shortened time frame legally wrong.

Based on the foregoing, I would have granted AmerenUE's request for the interim rate Increase.

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<sup>23</sup> Had AmerenUE declared in a statement to this Commission that it was experiencing an emergency, **of any type or nature**, even if it had not been experiencing one before making such a statement, it most certainly would have found itself experiencing one after, as the financial markets would in all likelihood have reacted in response to such admissions, regardless of the "legal standard" being applied or used by this Commission. This Commission must be mindful of market reaction and the associated seriousness when it undertakes examination of a utility's witnesses, and the unintended consequences which can flow.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

199

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Decided January 13, 2010*

**Evidence, Practice and Procedure §23.** The Commission will not render an advisory opinion on whether public information and advocacy activities of certain parties would violate the Commission's rules of conduct.

**ORDER DENYING AMERENUE'S REQUEST FOR CLARIFICATION  
REGARDING APPLICATION OF STATUTES AND RULES**

On December 18, 2009, Union Electric Company, d/b/a AmerenUE, filed a request asking the Commission to clarify the application of statutes and Commission rules regarding the activities of parties to this rate case. In particular, AmerenUE is concerned that certain entities, including some that are parties to this case, have undertaken a public relations or advertising campaign to raise awareness about the rate case and, at least impliedly, to oppose AmerenUE's request for a rate increase. Specifically, AmerenUE asks the Commission to indicate whether the Commission believes such activities would violate Commission rule 4 CSR 240-4.020(4), which states:

It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding.

A group of consumer parties, specifically, AARP, Missouri Industrial Energy Consumers, Office of the Public Counsel, Consumers Council of Missouri, Missouri Energy Users' Association, and the Missouri Retailers Association, filed a joint response to AmerenUE's request on December 30, 2009.

The Commission is concerned that the hearings, particularly the local public hearings, proceed in an efficient and courteous manner. For that reason, on September 2, 2009, the Commission issued a Notice Regarding Conduct During Proceedings that reminded the parties of the existence of the rules regarding such conduct. No further statement

UNION ELECTRIC COMPANY, D/B/A AMERENUE

200

19 Mo. P.S.C. 3d

should be necessary.

AmerenUE, however, asks the Commission to render a sort of advisory opinion on whether certain activities of other parties would violate those rules of conduct. The Commission will not do so. The rules speak for themselves and the Commission has no authority to issue an order of general applicability that would expand upon them outside the established rule-making process.

If AmerenUE believes a specific party has violated a specific rule it may file an appropriate motion or complaint to bring that matter to the Commission's attention. Unless such a motion or complaint is filed, there is nothing before the Commission upon which the Commission can issue a ruling.

The Commission will, however, continue to monitor the activities of third-party organizations that are directly or indirectly affiliated with parties in this case. The Commission will not hesitate to issue an appropriate order if there is a violation of any statute, Commission rule, or order.

**THE COMMISSION ORDERS THAT:**

1. AmerenUE's Request for Clarification Respecting Application of the Commission's Statutes and Standard of Conduct Rules is denied.

2. This order shall become effective immediately upon issuance.

Clayton, Chm., Jarrett, Gunn, and Kenney, CC., concur;  
Davis, C., dissents with dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** At time of publication, no dissenting opinion has been filed.

**\*NOTE:** See pages 47, 48, 50, 52, 53, 55, 78, 80, 108, 169, 350, 358, and 376 for other orders in this case.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

201

**In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify Its Liability for Damages Occurring on Customer Piping and Equipment**

*File No. GT-2009-0056  
Decided January 13, 2010*

**Gas §5.** The Commission determined it was unreasonable to impose liability limitations for unregulated services where Laclede Gas Company's unregulated competitors were not afforded the same legal protections. Rejecting the tariff sheets, the Commission determined that although it had the legal authority to add liability limits in tariffs, it would decline if found to not be just and reasonable.

**Gas §7.** The Commission's authority over Laclede's unregulated HVAC services was limited under section 386.762 to ensure compliance with prohibitions against subsidization under HVA rules

**REPORT AND ORDER**

***Appearances***

**Rick Zucker**, Assistant General Counsel, and **Michael C. Pendergast**, Vice President and Associate General Counsel, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101, for Laclede Gas Company.

**Marc D. Poston**, Senior Public Counsel, Office of the Public Counsel, 200 Madison Street, P.O. Box 2230, Jefferson City, Missouri 65102, for the Office of Public Counsel and the public.

**Robert S. Berlin**, Senior Counsel, and **Lera Shemwell**, Deputy General Counsel, Missouri Public Service Commission, Governor Office Building, 200 Madison Street, Suite 800, Post Office Box 360, Jefferson City, Missouri 65102-0360, for the Staff of the Missouri Public Service Commission.

**Regulatory Law Judge:** Nancy Dippell, Deputy Chief.

## LACLEDE GAS COMPANY

202

19 Mo. P.S.C. 3d

**Syllabus:** This order rejects the tariff changes filed by Laclede Gas Company.

### **Procedural History**

On August 22, 2008, Laclede filed tariff sheets setting parameters for its liability in certain instances. Following the tariff filing, Laclede proceeded to meet and negotiate with the Staff of the Missouri Public Service Commission and the Office of Public Counsel over a number of months in an effort to produce reasonably acceptable positions on liability. During this period, Laclede and the Staff reached a basic agreement on the terms of the tariff. Public Counsel did not join in the agreement.

The tariff was suspended and the matter was set for hearing. Written direct, rebuttal, and surrebuttal testimony was filed. A hearing was held on October 7, 2009.

During the months prior to the hearing, additional negotiations among the parties resulted in numerous revisions to the tariff sheets proposed by Laclede. The final version, referred to as the "Amended Tariff," was attached as Schedule DPA-1 to the surrebuttal testimony of Laclede witness David Abernathy filed on September 29, 2009. Public Counsel also submitted proposed tariff language attached as Schedule 3 to the surrebuttal testimony of Barbara Meisenheimer.<sup>1</sup>

The Commission further suspended the tariff on December 9, 2009, until January 18, 2010, and on January 6, 2010, until February 17, 2010. The issue for Commission determination, as presented by the parties,<sup>2</sup> is whether the Amended Tariff is just and reasonable.

### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

1. Laclede is a natural gas local distribution company (LDC) under the jurisdiction of the Commission.
2. Laclede is a regulated monopoly provider of natural gas service in its distribution area.
3. Laclede provides its regulated services pursuant to a Commission-approved tariff.

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<sup>1</sup> Exhibit 12, p. 3.

<sup>2</sup> Issues List, Order Of Witnesses And Order Of Cross-Examination, (filed October 10, 2009).



## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

203

4. Laclede also provides unregulated services such as gas appliance sales, gas appliance delivery and installation, connecting gas appliances, residential appliance service, appliance and fuel running inspections, parts warranties, commercial and industrial appliance service, and residential gas leak repair.<sup>3</sup>

5. Because Laclede is a regulated entity the Commission imposes certain requirements through regulations regarding testing and inspections to ensure that gas service is provided in a safe manner.<sup>4</sup>

6. The Commission's gas safety regulation covers, among other things, metering, corrosion control, operation, maintenance, leak detection, and repair and replacement of gas pipelines.

7. The gas safety regulation is similar to the Minimum Federal Safety Standards contained in 49 CFR Part 192 ("federal regulation"). However, the Missouri regulation is, in certain circumstances, stricter than the federal rule. With respect to inspections, the federal safety rule requires an operator to inspect only its own facilities when physically turning on the flow of gas. Under the Missouri regulation, however, Laclede is required to perform a gas safe inspection of both its equipment (which generally ends at the meter) and the customer's equipment, at the time a Laclede representative physically turns on the flow of gas to a customer.<sup>5</sup>

8. Because Laclede is regulated by the Commission with regard to safety, it must follow the Commission's safety regulation in instances when it is performing an unregulated service.<sup>6</sup>

9. Gas utilities in most other states do not have an obligation to perform inspections of customer-owned equipment and piping at service initiation.<sup>7</sup>

10. To support its proposed change to the liability language Laclede presented the testimony of witness David P. Abernathy. Mr. Abernathy has been Vice President and Associate General Counsel for Laclede since 2004. He has experience at Laclede in supervising the Claims Department as well as litigation activities.<sup>8</sup>

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<sup>3</sup> Ex. 8, Sch. 1-3.

<sup>4</sup> 4 CSR 240-20-030 ("gas safety regulation").

<sup>5</sup> Ex. 1, pp. 8-9.

<sup>6</sup> Ex. 6, pp. 8-9.

<sup>7</sup> Ex. 1, pp. 8-9.

<sup>8</sup> Ex. 1, p. 1.

## LACLEDE GAS COMPANY

204

19 Mo. P.S.C. 3d

11. Mr. Abernathy identified four examples of claims that Laclede believes demonstrate that Laclede has had to defend frivolous lawsuits.<sup>9</sup> No lawsuit had been filed in the first claim and Laclede settled the other three before they went to trial.<sup>10</sup>

12. No jury has found Laclede liable for damages that resulted in Laclede altering its safety practices.<sup>11</sup>

13. One claim alleging that Laclede did not properly odorize gas was resolved under the current tariff language when Laclede responded to the claim and provided evidence that the odorizing was within the required standards.<sup>12</sup>

14. Laclede's litigation expenses regarding gas safety claims, including the settlement amounts, are traditionally recovered from the ratepayers through the cost of service.<sup>13</sup>

15. Laclede also recovers the costs of the liabilities caused by Laclede's unregulated services through rates for regulated services.<sup>14</sup> This recovery includes the hiring of outside legal counsel to defend claims for unregulated services and payments on claims for "injuries and damages."<sup>15</sup>

16. The revenues and expenses from the unregulated services, with the exception of merchandising revenues and expenses, are also included in rates.<sup>16</sup>

17. These revenues and expenses for unregulated services are included in the cost of service because Laclede does not separately track the regulated functions from the unregulated functions of a specific call.<sup>17</sup>

18. The ratepayers have been getting both the benefits (revenues) and the detriments (expenses) of the unregulated services included in rates.<sup>18</sup>

19. The liability limitation in Paragraph 8 of the Amended

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<sup>9</sup> Ex.1, p.2.

<sup>10</sup> Tr. 35-44.

<sup>11</sup> Tr. 56-57.

<sup>12</sup> Tr. 77.

<sup>13</sup> Tr. 51, 68-69, and 165.

<sup>14</sup> Ex. 9, pp. 3-4.

<sup>15</sup> Ex. 9, p. 4; Tr. 129.

<sup>16</sup> Ex. 9, p. 3; Tr. 129 – 130.

<sup>17</sup> Ex. 9, p. 3.

<sup>18</sup> Ex. 3, p. 9.

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

205

Tariff specifically applies to any activity of Laclede that is “considered in the ratemaking process.”

20. The unregulated activities listed in Schedule 1-3 of the Surrebuttal Testimony of Tom Imhoff are “considered in the ratemaking process” in that the revenues and expenses are included in the cost of service.<sup>19</sup>

21. This Amended Tariff language is intended to apply to both regulated and unregulated services provided by Laclede.<sup>20</sup>

22. It is possible that a customer may not use a gas appliance immediately after an inspection, test, or service initiation; or that customers will have used their gas appliances within 60 or 90 days.<sup>21</sup>

23. Damage caused by testing or inspection or other negligence on the part of Laclede may not be revealed within 48 hours following a test or inspection.<sup>22</sup>

24. Pointing to the service contracts of unregulated firms performing HVAC services, Laclede claims the 60-day and 90-day time limitation on a customer’s ability to file a liability claim against Laclede is common in service contracts for unregulated companies.<sup>23</sup>

25. Exhibit 3-HC is a complete list of the service contracts reviewed by Mr. Abernathy.

26. The service contracts in Exhibit 3-HC make no reference to liability for injuries and damages.<sup>24</sup>

27. The timeframes referenced in the service contracts Laclede presented are warranties on labor and parts.<sup>25</sup>

28. Laclede’s unregulated competitors do not have similar liability limitations for damage claims.<sup>26</sup>

### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

1. Laclede is a natural gas local distribution company

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<sup>19</sup> Tr. 129-130 and 142; Ex. 3, p. 3; and Ex. 8, p.3.

<sup>20</sup> Tr. 61.

<sup>21</sup> Ex. 1, pp. 6-7.

<sup>22</sup> Ex. 1, pp. 6-7.

<sup>23</sup> Ex. 1, p. 7.

<sup>24</sup> Tr. 54-56; and Exhibit 3-HC.

<sup>25</sup> Ex. 3-HC.

<sup>26</sup> Ex.3-HC.

## LACLEDE GAS COMPANY

206

19 Mo. P.S.C. 3d

(LDC) under the jurisdiction of the Commission.

2. The Commission's jurisdiction to regulate the services of Laclede extends to the "manufacture, sale or distribution of gas, natural and artificial . . . within the state, and to persons, or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same."<sup>27</sup>

3. Section 393.130, RSMo, requires that all charges made or services rendered by a gas corporation be "just and reasonable."

4. According to the Missouri Supreme Court the Commission has the authority to approve or reject tariffs limiting liability. The Missouri Supreme Court confirmed this concept in a case concerning telegraph tariffs. In ***State ex rel. Western Union Telegraph v. Public Service Commission***,<sup>28</sup> Western Union's tariffs limited its liability for mistakes, delays and even non-delivery of messages. The Court found that the limitation of liability was one of the terms of telegraph service, along with the rate charged for the service. Since the rates were deemed lawful, the limitations of liability included with the rates were lawful too. The Court stated that "the power to pass on the reasonableness and lawfulness of rates necessarily includes the power to determine the reasonableness and lawfulness of such limitations of liability as are integral parts of the rates."<sup>29</sup>

5. In ***Warner v. Southwestern Bell Telephone Co.***,<sup>30</sup> the Missouri Supreme Court upheld a liability tariff provision that was not directly connected to the rate itself. Southwestern Bell mistakenly failed to list a business customer in the correct directory two years in a row. The company's tariff limited its liability to the amount paid for service during the term of the directory. Nevertheless, the customer sued and won a large verdict, including punitive damages. The Court overturned the verdict, instead agreeing with the great weight of authority in this area, both in Missouri and elsewhere that, since the utility is regulated in its rights and privileges, it should likewise be regulated to some extent in

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<sup>27</sup> Section 386.250(1), RSMo.

<sup>28</sup> 264 S.W. 669 (Mo. 1924).

<sup>29</sup> *Id.* at 672.

<sup>30</sup> 428 S.W.2d 596 (Mo. 1968).

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

207

its liabilities.<sup>31</sup>

6. HVAC services are defined as “the warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning equipment[.]”<sup>32</sup>

7. Laclede provides unregulated HVAC services as authorized by the Commission and allowed under Section 386.756, RSMo.<sup>33</sup>

8. Subsection 386.756.4, RSMo, states that:

A utility may not engage in or assist any affiliate or utility contractor in engaging in HVAC services in a manner which subsidizes the activities of such utility, affiliate or utility contractor to the extent of changing the rates or charges for the utility's regulated services above or below the rates or charges that would be in effect if the utility were not engaged in or assisting any affiliate or utility contractor in engaging in such activities.

9. The Commission's authority over Laclede's unregulated HVAC services is limited under Section 386.762 to ensuring compliance with the prohibitions against subsidization found in the HVAC rules.<sup>34</sup>

10. HVAC services do not require Commission consent and authorization when establishing rates and conditions of service, and are therefore unregulated.<sup>35</sup>

11. Laclede's unregulated competitors do not have the privilege of having a tariff approved by a state commission that limits damage claims. This could put Laclede at a competitive advantage with regard to Laclede's unregulated services. The Commission concludes it is unreasonable to impose liability limitations for unregulated services where Laclede's unregulated competitors are not afforded the same legal protections.

**Decision**

The positions and arguments of all of the parties were

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<sup>31</sup> *Id.* at 601-02.

<sup>32</sup> Section 386.754(2), RSMo.

<sup>33</sup> In the Matter of Laclede Gas Company's Filing Pursuant to 4 CSR 240-40.017(8), Case No. GE-2000-0610, Order Granting Exemption (July 6, 2000).

<sup>34</sup> Sections 386.754 to 386.764, RSMo.

<sup>35</sup> Subsection 393.140(12), RSMo.

## LACLEDE GAS COMPANY

208

19 Mo. P.S.C. 3d

considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

The Commission has the authority to prescribe certain limits on the liabilities of its regulated entities when those liabilities affect just and reasonable rates. Laclede, however, has not shown that these limits would be just and reasonable or that the public interest would be served by their approval.

To show there is a need for such liability limitations, Laclede cites to several examples of what it considers frivolous lawsuits filed against it. However, Laclede provided no evidence other than these cases and could not quantify savings to it or the ratepayers that would result from the Amended Tariff. Further, in at least one example where an allegation of improper odorization was made, Laclede was able to resolve that issue without going to trial. Thus, Laclede's current tariff language is sufficient to avoid litigation in some instances.

Laclede and Staff also argued that Paragraph 10 of the proposed tariff language is similar to tariffs for other Missouri utilities that provide a limited guarantee on the availability of the natural gas commodity being sold. However, Paragraph 10 of the Amended Tariff goes further than the limitations found in those other utility tariffs because it states that Laclede would not be liable for "any damage or loss" resulting from an "order of any court or judge granted in any bonafide adverse legal proceedings or action." A customer with a legitimate claim for damages may not file such a claim after reading the Amended Tariff language, or after consulting an attorney who has read the Amended Tariff language.<sup>36</sup> Thus, Laclede's Amended Tariff may act to deter legitimate claims against it.<sup>37</sup>

In addition, this particular case is different from the other types of limitations that have been placed in utility tariffs. Laclede is unique in that it has been authorized to conduct unregulated activities

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<sup>36</sup> Tr. 72-79.

<sup>37</sup> Tr. 72-79.

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

209

and many of those expenses and revenues have traditionally been combined in rate base because of the difficulty in determining which part of the activity can be attributed specifically to the regulated activity. Laclede's litigation expenses involving these types of claims have not been separated into regulated and unregulated categories either. And, the evidence showed that, at least in recent history, Laclede has not fully litigated any of these cases. Rather, it has settled each one and included or expects to include the settlement amounts in rate base. It seems that Laclede has no incentive to proceed to trial in any case where the settlement costs will be fully recovered from the ratepayers instead of the shareholders. The Commission has concerns about this method of attributing expenses, and a closer examination and understanding of this policy may be necessary in Laclede's next rate case.

The Commission also has concerns about the co-mingling of regulated and unregulated activities. There is insufficient information in this case, however, to determine whether the method of ratemaking which includes the revenues and expenses from unregulated HVAC services is lawful. That concern is also more appropriately addressed in the context of a rate case where all factors affecting rates can be examined.

The Commission does have sufficient information to determine that it is unreasonable to impose liability limitations for unregulated services when Laclede's unregulated competitors are not afforded the same or substantially similar legal protections.<sup>38</sup> Laclede's evidence on this point consisted of service contracts of its competitors, but did not show that those competitors enjoyed liability limitation on anything more than their parts and labor. The Commission concludes that limitation of liability for unregulated activities as set out in the Amended Tariff is not appropriate.

Further, Laclede provided no sound basis for determining that damages caused by testing or inspection will be revealed within 48 hours. As Laclede stated in its testimony, a consumer may not even use a gas appliance for days or weeks following an inspection or test. This paragraph seeks to create a presumption in Laclede's favor to the detriment of its customers which could deter a customer from filing a

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<sup>38</sup> Ex.3-HC.

LACLEDE GAS COMPANY

210

19 Mo. P.S.C. 3d

legitimate claim. Laclede has not proven any reasonable basis for creating this presumption.

With regard to determining liability for negligent acts, Laclede did not persuade the Commission that the court system is not better able to assess the specific facts in determining negligence. A negligence claim involves many considerations which go to determine whether due care was exercised in the particular instance in which the question arises.<sup>39</sup> Determining whether Laclede was negligent in a particular situation depends on the surrounding circumstances. Actions or omissions which would be clearly negligent in some circumstances might not be negligent in other circumstances.<sup>40</sup> These important fact specific decisions regarding liability, especially with regard to unregulated services, should be left to the judicial system.

Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so in this case because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. Laclede has produced no convincing evidence that it would be in the public interest for the Commission to limit liability in the manner it proposes. The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede's tariffs as proposed in the Amended Tariff and rejects the tariffs.

**THE COMMISSION ORDERS THAT:**

1. The tariff sheets filed by Laclede Gas Company as Tariff File No. JG-2009-0145, are rejected. The specific tariff sheets are:

**P.S.C. MO. No. 5 Consolidated**

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**Original Sheet No. R-11-a, CANCELLING All Previous Schedules**  
**Original Sheet No. R-11-b, CANCELLING All Previous Schedules**  
**Original Sheet No. R-11-c, CANCELLING All Previous Schedules**  
**Original Sheet No. R-11-d, CANCELLING All Previous Schedules**

2. This Report and Order shall become effective on January 23, 2010.

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<sup>39</sup> Schiermeier v. Kroger Grocery & Baking Co., 167 S.W.2d 967 (Mo. App. 1943).

<sup>40</sup> Zuber v. Clarkson Const. Co., 251 S.W.2d 52 (Mo. 1952).



LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

211

Clayton, Chm., Gunn and Kenney, CC., concur;  
Jarrett, C., concurs; separate concurring opinion may follow;  
Davis, C., dissents; separate dissenting opinion may follow;  
and certify compliance with the provisions of  
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 13th day of January, 2010.

\*NOTE: At time of publication, no opinion of Commissioner Davis has been filed.

**CONCURRING OPINION OF COMMISSIONER TERRY M.  
JARRETT**

I concur in the Report and Order but write separately to clarify my understanding of the law regarding limitations on liability of utilities.

As I understand it, Laclede filed a tariff giving it a complete defense against damages for its acts so long as it complies with the Commission's gas safety regulation. This means that it would have no liability for negligent, willful and wanton conduct. I believe that such a blanket liability limitation is contrary to Missouri law.

The Report and Order correctly cites *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d 596 (Mo. 1968), for the proposition that this Commission has authority to regulate a utility's liability to some extent. *Id.* at 601-02. The *Warner* court further concludes "that the limitation of [the utility's] liability was and is effective if [the utility's] conduct was merely negligent, but that it does not constitute an exemption for willful and wanton conduct." *Id.* at

LACLEDE GAS COMPANY

212

19 Mo. P.S.C. 3d

603.<sup>1</sup> Limiting liability for willful and wanton conduct is against public policy in Missouri. *Id.* ("A bargain for exemption from liability for the consequences of a willful breach of duty is illegal".)

The purpose of the Commission's gas safety regulation is to provide minimum standards for safe and adequate service, not to establish a duty or standard of care for torts committed by a utility. During its promulgation, the regulation was not vetted with the additional purpose of creating a bar to civil liabilities.

As the cases recognize, reasonable limits on liability are acceptable, but what Laclede sought here was to have this Commission create an absolute bar to liability should Laclede be able to demonstrate that it has met the standards announced in the applicable rule. In my opinion, the cases do not allow this Commission to go as far as Laclede suggests. Laclede's proposal would create a "complete defense" to any action against Laclede, while also imposing a duty upon the customer to "indemnify, hold harmless and defend" Laclede in any such action.

I believe that Laclede could issue a lawful tariff limiting its liability for negligent conduct, but not for willful and wanton conduct. To the extent that the Report and Order seems to indicate that such a tariff would not be lawful or appropriate in any case<sup>2</sup>, I would respectfully disagree.

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<sup>1</sup> See also *Engman v. Southwestern Bell Tel. Co.*, 591 S.W.2d 78, 80-81 (Mo. App.W.D. 1979); *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 230 (Mo. App.W.D., 1995).

<sup>2</sup> Report and Order, pp. 12-13.

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

213

**In the Matter of The Empire District Gas Company of Joplin,  
Missouri for Authority to File Tariffs Increasing Rates for Gas  
Service Provided to Customers in the Missouri Service Area of the  
Company**

*File No. GR-2009-0434  
Decided January 20, 2010*

**Rates §93.** As part of Demand Side Management program, energy policies and additional funding found necessary by the Commission in a rate case to achieve savings significant to reduce wholesale price of natural gas as well as to generate direct cost savings to natural gas consumers.

**Gas §91.** As part of Empire District Gas Company's rate case, the Commission approved an initial rebate of \$75 for tank storage gas water heaters as part of program to improve energy efficiency for customers.

**ORDER APPROVING PARTIAL STIPULATION AND AGREEMENT  
AND PARTIAL STIPULATION AND AGREEMENT ON  
TRANSPORTATION TARIFF ISSUES**

**Syllabus**

This order approves the Partial Stipulation and Agreement (Main Agreement) executed by The Empire District Gas Company, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel.<sup>1</sup> The Main Agreement resolves all issues in this case with the exception of the funding level of Demand Side Management (DSM) programs and the Transportation Tariff issues. This order also approves the Partial Stipulation and Agreement on Transportation Tariff Issues (Transportation Agreement) executed by Empire and Constellation.<sup>2</sup> The order also rejects Empire's initial tariff filing and authorizes Empire to file tariffs in compliance with the Main Agreement and the Transportation Agreement.

The issue regarding DSM funding remains outstanding and will be decided in a separate order.

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<sup>1</sup> The parties who are non-signatories to the Main Agreement are the Missouri Department of Natural Resources, Constellation NewEnergy-Gas Division, LLC, and Pittsburgh Corning Corporation.

<sup>2</sup> The parties who are non-signatories to the Transportation Agreement are DNR, Pittsburgh Corning, Staff, and Public Counsel.

## THE EMPIRE DISTRICT GAS COMPANY

214

19 Mo. P.S.C. 3d

### **I. Procedural History**

On June 5, 2009, Empire submitted revised rate schedules designed to increase its gross annual gas revenues by approximately \$2.9 million, exclusive of applicable gross receipts, sales, franchise or occupational fees, and taxes. The proposed tariff sheets carried an effective date of July 5, 2009.

The Commission suspended the tariff sheets until May 2, 2010, issued notice, and set a deadline for intervention requests. The Commission granted requests for intervention to DNR, Constellation, and Pittsburgh Corning.

On December 18, 2009, the Main Agreement was filed. On January 8, 2010, the Transportation Agreement was filed. No party objected to either of the agreements and no party requested a hearing on any issue other than DSM funding. The agreements were presented to the Commission during the January 9, 2010 hearing on the remaining contested issue.

A true-up hearing on the matters contained in the agreements is scheduled for February 8-9, 2010. Because all issues related to the true-up are settled by means of the Main Agreement and the Transportation Agreement, that hearing is canceled.

### **II. The Agreements**

The Main Agreement, when combined with the Transportation Agreement, resolves all issues in this matter except for the level of DSM funding.<sup>3</sup> The Main Agreement addresses the following topics: (1) Tariffs; (2) Depreciation; (3) Pensions/OPEB; (4) Kansas Accounting Authority Order; (5) Tracking of Disconnects/Reconnects; (6) Demand Side Management (including the advisory group, programs, regulatory asset accounting, and annual reports); (7) accounting for Plant in Service; and (8) combining rates for Empire's North/South and Northwest Systems for all purposes except PGA/ACA.

Among other provisions, the Main Agreement provides that Empire should be authorized to file revised tariff sheets containing new rate schedules for gas service. The new rate schedules will be designed to produce overall Missouri jurisdictional gross annual gas revenues, exclusive of any applicable license, occupation, franchise, gross receipts

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<sup>3</sup> *Partial Stipulation and Agreement*, filed on December 18, 2009; *Partial Stipulation and Agreement on Transportation Issues*, filed January 9, 2010. The agreements are attached to this order as Attachment 1 and Attachment 2.

## THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

215

taxes or other similar fees or taxes, in the amount of \$22,189,218 annually, an increase of \$2,600,000. The Main Agreement provides that these revenues shall be for gas service rendered on and after April 1, 2010.

The Transportation Agreement resolves the issues of telemetry equipment and balancing services and the charges for each. The Transportation Agreement also sets out specific language for the tariffs.

Both agreements include a contingent waiver of rights indicating that if the Commission approves in whole the agreements, the signatories agree to waive their rights to call and cross-examine witnesses,<sup>4</sup> to present oral argument and written briefs,<sup>5</sup> and to judicial review.<sup>6</sup>

By submitting the agreements for consideration by the Commission, the signatories jointly recommend that the Commission accept the agreements as a fair compromise of their respective positions on the issues in this matter. The signatories negotiated the various terms of these provisions and no other party has objected or sought a hearing with respect to any of these provisions. There are no disputed issues between the parties with regard to the provisions of the agreements.

### **III. Relevant Legal Standards Jurisdiction**

Empire is a “gas corporation” and a “public utility,” as defined in Sections 386.020(18) and (43), respectively, and is subject to the personal jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes as currently supplemented. Empire’s rate increase request falls under the Commission’s subject matter jurisdiction pursuant to Section 393.150.

#### **Standards for Approving Stipulations and Agreements**

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case.<sup>7</sup>

In reviewing the agreements, the Commission notes:

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<sup>4</sup> Section 536.070(2).

<sup>5</sup> Section 536.080.1.

<sup>6</sup> Section 386.510.

<sup>7</sup>Section 536.060, RSMo; and 4 CSR 240-2.115(1)(B).

## THE EMPIRE DISTRICT GAS COMPANY

216

19 Mo. P.S.C. 3d

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.<sup>8</sup>

A stipulation and agreement that is entered into by fewer than all parties to a case is deemed to be a nonunanimous stipulation and agreement.<sup>9</sup> Each party is given seven days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement, and failure to file a timely objection constitutes a full waiver of that party's right to a hearing.<sup>10</sup>

No party objected to the agreements within the deadlines.<sup>11</sup> Consequently, pursuant to the Commission's rules, the Main Agreement and the Transportation Agreement shall be treated as though they are unanimous and the non-signatory parties are deemed to have waived their right to a hearing on any issue contained in the agreements.

#### **IV. Decision**

The Commission recognizes that the recommended revenue requirement increase presented in the agreements is not a trivial increase in rates to customers like those who testified at the public hearings. The increased cost of all utilities along with the recent rise in food costs, gasoline prices, and healthcare costs have had an effect on customers' ability to keep current on their bills. That being said, the Commission also recognizes that the agreements before the Commission resulted from extensive negotiations between parties with diverse interests and the Commission's Staff. Local Public Hearings were held to receive public comment on the proposed rate increase and Public Counsel was an active party to ensure the rights of the ratepaying public.

Subject matter experts, including accountants, economists and engineers, filed extensive testimony outlining their respective analyses and positions prior to the signatories reaching a consensus as

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<sup>8</sup>Section 536.090, RSMo. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App. 1998).

<sup>9</sup> 4 CSR-240-2.115(2)(A).

<sup>10</sup> 4 CSR 240-2.115(2)(B).

<sup>11</sup> 4 CSR 240-2.115(2)(D).

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

217

to the reasonableness of the agreements and all of their elements. The signatories agree, and the non-signatories did not object, to the conclusion that the proposed revenue and rate design set out in the agreements are just and reasonable. And finally, no party requested a hearing on any issue related to the determination of the proposed annual revenue requirement, rate design, or any other provision set forth in either of the agreements.

The Commission determines that the proposed increase in overall Missouri gross annual gas revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or similar fees or taxes, of \$22,189,218 for service rendered on and after April 1, 2010, is just and reasonable. The Commission approves the Main Agreement and the Transportation Agreement.

Accordingly, the Commission shall reject the tariffs filed on June 5, 2009, and authorize Empire to file tariffs in compliance with the agreements. The parties shall be directed to comply with the terms of the Main Agreement and the Transportation Agreement.

**THE COMMISSION ORDERS THAT:**

1. The Partial Stipulation and Agreement filed on December 18, 2009, is hereby approved as the resolution of all factual issues encompassed within that agreement. A copy of the Partial Stipulation and Agreement is attached to this order as Attachment 1.

2. The signatories to the Partial Stipulation and Agreement are ordered to comply with the terms of the agreement.

3. The Partial Stipulation and Agreement on Transportation Tariff Issues filed on January 8, 2010, is hereby approved as the resolution of all factual issues encompassed within that agreement. A copy of the Partial Stipulation and Agreement on Transportation Tariff Issues is attached to this order as Attachment 2.

4. The Signatories to the Partial Stipulation and Agreement on Transportation Tariff Issues are ordered to comply with the terms of the agreement.

5. The proposed gas service tariff sheets (YG-2009-0855) submitted on June 5, 2009, by The Empire District Gas Company for the purpose of increasing rates for gas service to retail customers are hereby rejected.

6. The specific tariff sheets rejected are:

**P.S.C. MO. No. 2**

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THE EMPIRE DISTRICT GAS COMPANY

218

19 Mo. P.S.C. 3d

**P.S.C. MO. No. 2**

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- 1st Revised Sheet No. 2, Cancelling Original Sheet No. 2
- 1st Revised Sheet No. 9, Cancelling Original Sheet No. 9
- 1st Revised Sheet No. 10, Cancelling Original Sheet No. 10
- 1st Revised Sheet No. 11, Cancelling Original Sheet No. 11  
Original Sheet No. 11.a
- 1st Revised Sheet No. 12, Cancelling Original Sheet No. 12
- 1st Revised Sheet No. 13, Cancelling Original Sheet No. 13
- 1st Revised Sheet No. 14, Cancelling Original Sheet No. 14
- 1st Revised Sheet No. 15, Cancelling Original Sheet No. 15
- 1st Revised Sheet No. 16, Cancelling Original Sheet No. 16
- 1st Revised Sheet No. 17, Cancelling Original Sheet No. 17
- 1st Revised Sheet No. 18, Cancelling Original Sheet No. 18
- 1st Revised Sheet No. 19, Cancelling Original Sheet No. 19
- 1st Revised Sheet No. 20, Cancelling Original Sheet No. 20
- 1st Revised Sheet No. 21, Cancelling Original Sheet No. 21
- 1st Revised Sheet No. 22, Cancelling Original Sheet No. 22
- 1st Revised Sheet No. 23, Cancelling Original Sheet No. 23
- 1st Revised Sheet No. 24, Cancelling Original Sheet No. 24
- 1st Revised Sheet No. 25, Cancelling Original Sheet No. 25
- 1st Revised Sheet No. 26, Cancelling Original Sheet No. 26
- 1st Revised Sheet No. 27, Cancelling Original Sheet No. 27
- 1st Revised Sheet No. 28, Cancelling Original Sheet No. 28
- 1st Revised Sheet No. 29, Cancelling Original Sheet No. 29
- 1st Revised Sheet No. 30, Cancelling Original Sheet No. 30
- 1st Revised Sheet No. 31, Cancelling Original Sheet No. 31
- 1st Revised Sheet No. 32, Cancelling Original Sheet No. 32
- 1st Revised Sheet No. 33, Cancelling Original Sheet No. 33
- 1st Revised Sheet No. 34, Cancelling Original Sheet No. 34
- 1st Revised Sheet No. 35, Cancelling Original Sheet No. 35
- 1st Revised Sheet No. 36, Cancelling Original Sheet No. 36
- 1st Revised Sheet No. 37, Cancelling Original Sheet No. 37
- 1st Revised Sheet No. 38, Cancelling Original Sheet No. 38
- 1st Revised Sheet No. 39, Cancelling Original Sheet No. 39
- 1st Revised Sheet No. 40, Cancelling Original Sheet No. 40
- 1st Revised Sheet No. 41, Cancelling Original Sheet No. 41
- 1st Revised Sheet No. 42, Cancelling Original Sheet No. 42
- 1st Revised Sheet No. 43, Cancelling Original Sheet No. 43



THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

219

**P.S.C. MO. No. 2**

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**1st Revised Sheet No. 44, Cancelling Original Sheet No. 44**  
**1st Revised Sheet No. 45, Cancelling Original Sheet No. 45**  
**1st Revised Sheet No. 46, Cancelling Original Sheet No. 46**  
**1st Revised Sheet No. 47, Cancelling Original Sheet No. 47**  
**1st Revised Sheet No. 48, Cancelling Original Sheet No. 48**  
**1st Revised Sheet No. 49, Cancelling Original Sheet No. 49**  
**1st Revised Sheet No. 50, Cancelling Original Sheet No. 50**  
**1st Revised Sheet No. 51, Cancelling Original Sheet No. 51**  
**1st Revised Sheet No. 52, Cancelling Original Sheet No. 52**  
**1st Revised Sheet No. 53, Cancelling Original Sheet No. 53**  
**1st Revised Sheet No. 68, Cancelling Original Sheet No. 68**  
**1st Revised Sheet No. 69, Cancelling Original Sheet No. 69**  
**1st Revised Sheet No. 70, Cancelling Original Sheet No. 70**  
**1st Revised Sheet No. 71, Cancelling Original Sheet No. 71**

**Original Sheet No. 71c**

**Original Sheet No. 71d**

**Original Sheet No. 71e**

**Original Sheet No. 71f**

**Original Sheet No. 71g**

**Original Sheet No. 71h**

**Original Sheet No. 72**

**1st Revised Sheet No. R-1, Cancelling Original Sheet No. R-1**  
**1st Revised Sheet No. R-2, Cancelling Original Sheet No. R-2**  
**1st Revised Sheet No. R-8, Cancelling Original Sheet No. R-8**  
**1st Revised Sheet No. R-22, Cancelling Original Sheet No. R-22**  
**1st Revised Sheet No. R-27, Cancelling Original Sheet No. R-27**  
**1st Revised Sheet No. R-29, Cancelling Original Sheet No. R-29**  
**1st Revised Sheet No. R-41, Cancelling Original Sheet No. R-41**  
**1st Revised Sheet No. R-52, Cancelling Original Sheet No. R-52**  
**1st Revised Sheet No. R-53, Cancelling Original Sheet No. R-53**

7. The Empire District Gas Company is authorized to file tariffs in compliance with the terms of the Partial Stipulation and Agreement and the Partial Stipulation and Agreement on Transportation Tariff Issues.

8. Tariffs filed in accordance with Ordered Paragraph No. 7 shall be filed with an effective date of April 1, 2010.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

220

19 Mo. P.S.C. 3d

9. The true-up hearing scheduled for February 8-9, 2010, is canceled.

10. This order shall become effective on January 30, 2010.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.  
Dippell, Deputy Chief Regulatory Law Judge

\*NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

\*NOTE: See pages 308 and 336 for other orders in this case.

**In Re: Union Electric Company d/b/a AmerenUE's Filing to Adjust Rates under its Approved Fuel and Purchased Power Cost Recovery Mechanism Pursuant to 4 CSR 240-20.090(4)**

*File No. ER-2010-0165  
Decided January 22, 2010*

**Rates §101.** The Commission approved a tariff implementing an interim rate adjustment under the company's fuel adjustment clause and directed the company to provide its Staff with workpapers in future filings.

**ORDER APPROVING TARIFF TO ADJUST RATE SCHEDULES FOR FUEL ADJUSTMENT CLAUSE**

On November 25, 2009 Union Electric Company, d/b/a AmerenUE ("AmerenUE"), submitted an application and tariff designed to implement an adjustment to its Fuel and Purchased Power Adjustment Clause ("FAC"). Concurrent with its application AmerenUE filed a revised tariff to implement the adjustment, bearing an effective date of January 27, 2010.

A review, from AmerenUE's original request and supporting testimony, indicates that Ameren's actual fuel cost from June 1st to September 30th was \$19,806,975 above the amount included in its current rates. After applying the 95/5% factor, AmerenUE would be

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

221

authorized to collect \$18,953,587 from its customers through a FAC rider. The proposed FAC rider would be approximately fifteen cents (\$.15) on the average residential customer's bill from February 2010 through January 2011.<sup>1</sup>

The Commission's rule regarding FACs requires the Commission to issue an order approving or rejecting the company's tariff within 60 days of its filing.<sup>2</sup> The rule further requires the Commission's Staff to submit a recommendation within 30 days indicating whether the proposed FAC tariff complies with Section 386.266, 4 CSR 240-20.090, and the company's FAC mechanism.<sup>3</sup>

On December 23, 2009, Staff filed its recommendation indicating AmerenUE's tariff complies with the Commission's order that established the company's FAC and with all applicable statutes and regulations. Staff advises the Commission to approve AmerenUE's tariff as an interim rate adjustment, subject to true-up and prudence reviews. Staff further requests that the Commission direct AmerenUE to provide workpapers in future FAC filings to meet the following requirements:

- 1) Workpapers shall have the same level of detail as the final version of workpapers provided in this case;
- 2) Workpapers, when spreadsheets, shall be submitted electronically as Excel spreadsheets with all formulas, columns and rows intact; and
- 3) Workpapers shall be provided to all parties at the same time direct testimony is filed.

No other party has opposed Staff's recommendation, objected to the tariff, or requested a hearing.

The Commission has reviewed AmerenUE's tariff filings, and Staff's verified recommendation, and considering all relevant factors finds that the tariff sheet is in compliance with the Commission's order establishing the FAC and with all applicable statutes and regulations. Consequently, 4 CSR 240-20.090(4) requires the Commission to

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<sup>1</sup> This is AmerenUE's second filing changing its FPA. AmrenUE's present FPA is a negative amount per kWh of \$0.00036, \$.00035, and \$.00033 for customers receiving service at secondary, primary, and transmission voltage levels, respectively. The proposed change to the FPA results in a positive FPA of \$0.00014 for the customers receiving service at secondary and primary voltage levels, and a FPA of \$0.00013 for customers receiving service at the transmission voltage level.

<sup>2</sup> Commission Rule 4 CSR 240-20.090(4).

<sup>3</sup> *Id.*

UNION ELECTRIC COMPANY, D/B/A AMERENUE

222

19 Mo. P.S.C. 3d

approve AmerenUE's tariff or allow it to go into effect by operation of law. The Commission further finds Staff's request to require AmerenUE to file the above described workpapers to be reasonable and will direct AmerenUE to comply.

**THE COMMISSION ORDERS THAT:**

1. The tariff issued on November 25, 2009, by Union Electric Company, d/b/a AmerenUE, and assigned Tariff No. YE-2010-0356, is approved, to be effective January 27, 2010, as an interim rate adjustment, subject to true-up and prudence reviews. The tariff approved is:

*MO. P.S.C. SCHEDULE No. 5*

***2nd Revised Sheet No. 98.7, Canceling 1<sup>st</sup> Revised Sheet No. 98.7***

2. Union Electric Company, d/b/a AmerenUE, is directed to comply with the Staff of the Missouri Public Service Commission's request for production of the workpapers, delineated in the body of this order, with its next Fuel and Purchased Power Adjustment filing.

3. This order shall become effective on January 27, 2010.

4. This file shall be closed on January 28, 2010.

Harold Stearley, Senior Regulatory Law Judge,  
by delegation of authority under  
Section 386.240, RSMo 2000.

**CONCURRING OPINION OF COMMISSIONER KEVIN D. GUNN**

Although this Commissioner dissented from the Report and Order in Commission Case No. ER-2008-0318 wherein the Commission authorized AmerenUE's current fuel adjustment clause (FAC), I must concur in the approval of the tariff adjusting AmerenUE's FAC rate schedules. As set out in the body of the order, Staff reviewed AmerenUE's tariff filing. Staff advised the Commission that the tariff complied with Section 386.266,<sup>1</sup> 4 CSR 240-20.090, 4 CSR 240-20.090 and AmerenUE's FAC mechanism, and recommended the tariff be approved. No party opposed Staff's recommendation, objected to the

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<sup>1</sup> 386.266 RSMo (Cum. Supp. 2009)

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

223

tariff, or requested a hearing. Accordingly, the Commission and this Commissioner are required by 4 CSR 240-20.090(4) to approve AmerenUE's tariff or allow it to go into effect by operation of law.

Therefore, although this Commissioner continues to believe AmerenUE's current FAC shifts an inappropriately high percentage of the risk of rising fuel costs upon the rate payers, I must concur in the approval of the tariff.

**STATEMENT IN OPPOSITION OF DELEGATION ORDER OF  
CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner issues this Statement in Opposition of the Delegation Order issued on January 22, 2010, authorizing the recalculation of AmerenUE's Fuel and Purchase Power Adjustment Clause (FAC). Because of the regulation deadline requiring approval or rejection of the FAC request within a 60 day period of the electric utility filing of the request, the Commission must make its decision by this day despite the fact that the corresponding tariff does not take effect until January 27, 2010.

This Commissioner has raised concerns regarding FACs since they became statutorily authorized by the General Assembly in 2005 with SB 179. Concerns were raised at the time of its enactment into law by this Commissioner regarding the scope and nature of the change in the balance of the ratemaking compact among various stakeholders.<sup>1</sup> Additionally, this Commissioner opposed the drafting of the regulation which implemented surcharges such as Fuel Adjustment Clauses, in Case No. EX-2006-0472.<sup>2</sup> This Commissioner has opposed each incident of the Commission awarding a FAC in a general rate case because of either the construction of the FAC or other issues existing in

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<sup>1</sup> Letter to Governor Matt Blunt from Commissioners Robert Clayton and Steve Gaw, dated May 20, 2005.

<sup>2</sup> Minutes of September 21, 2006 PSC Agenda meeting in which the Final Order of Rulemaking in Case No. EX-2006-0472, was approved by a vote of 3-2, with Commissioner Clayton voting NO.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

224

19 Mo. P.S.C. 3d

the case.<sup>3</sup> Further, this Commissioner specifically opposed the FAC awarded to AmerenUE in its most recent rate case.<sup>4</sup> FACs change the nature of the regulatory compact among stakeholders. By creating separate rate surcharges to address single issues and avoid review or audit of “all relevant factors,” when addressing a partial rate increase, the utility may be relieved of the implied incentive of cost control and making prudent fuel purchases. The threat to fair rate making from such a surcharge is that the Commission may have lost its ability to enforce “best practices,” mandate “least cost alternatives” or to have the ability to make an effective review of prudence in utility actions. The fuel adjustment clause in the most recent AmerenUE general rate case<sup>5</sup> permits a pass-through of 95% of fuel costs, with a brief prudence review. Parties to the case have suggested alternatives to such a FAC with a split of 50% pass through,<sup>6</sup> or 80% pass through<sup>7</sup>, which are mechanisms that insure that the utility has “skin in the game” when making its fuel purchases. A modified FAC with a more reasonable split or more built-in incentives would be a more appropriate alternative.

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<sup>3</sup> In the matter of Aquila, Inc. d/b/a Aquila Networks-MPS and Aquila Networks-L&P, for authority to file tariffs increasing electric rates for the service provided to customers in the Aquila Networks-MPS and Aquila Networks-L&P service area. Case No. ER-2007-0004; In the Matter of The Empire District Electric Company of Joplin, Missouri's Application for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company, Case No. ER-2008-0093; and In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area, Case No. ER-2008-0318.

<sup>4</sup> Dissent by Chairman Clayton and Commissioner Gunn, Case No. ER-2008-0318, dated January 27, 2009.

<sup>5</sup> Case No. ER-2008-0318.

<sup>6</sup> See Direct Testimony of Ryan Kind, Case No. ER-2008-0318.

<sup>7</sup> See Direct Testimony of Maurice Bruebaker, Case No. ER-2008-0318.

TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

225

This Statement in Opposition does not question the interpretation of AmerenUE's tariff or that the filing is compliant with the former majority's Report and Order in the case. It should be noted that no party has filed any opposition to the amendment, I believe the math is correct, Staff has recommended approval with certain conditions, which are incorporated in the Delegation Order and Public Counsel has filed nothing to suggest that the tariff should be rejected. It should also be noted that, until the approval of this tariff, the FAC has actually reduced consumers' bills with a "negative" FAC factor because of decreasing fuel costs.<sup>1</sup> Finally, no party has suggested any lawful reason for its rejection.

This Commissioner issues this Statement in Opposition because of philosophical disagreement and concerns with the FAC's adjustment at this time. This Commissioner urges his colleagues in future cases to implement more equitable manners of recovering prudently incurred fuel costs.

Based on the foregoing, this Commissioner issues this Statement in Opposition.

**In the Matter of the Application of Timber Creek Sewer Company, for Permission, Approval and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public, Located in an Unincorporated Area in Clinton County, Missouri**

*File No. SA-2010-0100  
Decided February 2, 2010*

**Certificates §34.** The Commission rescinds a certificate of convenience and necessity, issued on the condition that the homeowners' association would vote for the service, and association did not vote in favor of that service.

**Sewer §2.** The Commission rescinds a certificate of convenience and necessity, issued on the condition that the homeowners' association would vote for the service, and association did not vote in favor of that service.

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<sup>1</sup> Case No. ER-2010-0044.

TIMBER CREEK SEWER COMPANY

226

19 Mo. P.S.C. 3d

**ORDER ACKNOWLEDGING DISMISSAL AND  
RESCINDING CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Missouri Public Service Commission is granting the Motion for Dismissal of Application and for Rescission of Conditional Grant of Certificate of Convenience and Necessity ("motion") that Timber Creek Sewer Company, ("the company") filed on January 29, 2010.

In the motion, Timber Creek cites the Commission's order issued on December 2, 2009. In that order, the Commission granted the application described in the name of this action, and ordered the issuance of a certificate of convenience and necessity ("certificate"), subject to certain conditions, including the following ("the conditions"):

2. . . .

a. The contract to transfer the collection system and wastewater treatment plant, now owned by Timber Springs Homes Association ("the association"), to the company shall be finalized.

\* \* \*

e. The company shall file the finalized contract transferring the collection system and wastewater treatment plant, now owned by [the association], to the company.

f. The company shall file proof that it holds clear title to the wastewater treatment facility and the land on which such facility is located, and easements for access to and maintenance of the collection system, now owned by [the association.]



TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

227

To meet the conditions, the company reached an agreement with the association's governing body.

But the association's membership did not approve the agreement, so the company will not be able to meet the conditions. For that reason, the company seeks rescission of the certificate, and the Commission will grant that relief. The company also seeks dismissal of this action. The Commission's regulations provide:

An applicant . . . may voluntarily dismiss an application . . . without an order of the commission at any time before prepared testimony has been filed or oral evidence has been offered, by filing a notice of dismissal with the commission and serving a copy on all parties. [<sup>2</sup>]

No party has filed prepared testimony or offered oral evidence, so the dismissal was effective on January 29, 2010.

**THE COMMISSION ORDERS THAT:**

1. The certificate of convenience and necessity granted by the Commission's order dated December 2, 2009, is rescinded.
2. This action is dismissed.
3. This order shall become effective immediately upon issuance.
4. This file shall close on February 3, 2010.

Daniel Jordan, Regulatory Law Judge,  
by delegation of authority pursuant  
to Section 386.240, RSMo 2000.

\*NOTE: See page 121 for another order in this case.

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<sup>2</sup> 4 CSR 240-2.116(1).

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

228

19 Mo. P.S.C. 3d

**In the Matter of the Transfer of Assets of Swiss Villa Utilities, Inc., to  
the Black Oak Mountain Resort Property Owners Association**

*File No. WO-2007-0410  
Decided February 3, 2010*

**Water §4.** The Commission determined that the transfer of utility assets to a nonprofit corporation controlled by the homeowners association was in the public interest.

**ORDER APPROVING TRANSFER OF ASSETS  
AND CANCELING CERTIFICATES AND TARIFFS**

This order approves the transfer of utility assets from Swiss Villa Utilities, Inc., Quanah Corporation, S.V. Holding, Inc., and Stone County to the Black Oak Mountain Water Company and the Black Oak Mountain Sewer Company. It also cancels the certificates of convenience and necessity previously issued by the Commission to Swiss Villa Utilities, Inc., cancels the tariffs of Swiss Villa Utilities, Inc., and relieves Staff of the obligation to file monthly status reports.

**Procedural History**

On April 20, 2007, the Staff of the Missouri Public Service Commission filed its *Motion to Approve Transfer of Assets of Swiss Villa Utilities, Inc. to the Black Oak Mountain Resort Property Owners Association* (“original motion”) requesting that the Commission approve a transfer of the assets of Swiss Villa Utilities, Inc., to the Black Oak Mountain Resort Property Owners Association (“Black Oak POA”). In the alternative, Staff requested permission to appoint a system receiver. The Commission issued notice and set a date for intervention requests. The Commission also joined as necessary parties Swiss Villa, Black Oak POA, S.V. Holding, Inc., Quanah Corporation, and the County Commission of Stone County, all of which had some interest in the matter. There were no requests for a hearing or to intervene.

In its original motion, Staff related that some of the essential requirements supporting the asset transfer were not in place and that it was working with Black Oak POA to remedy those deficiencies. Thus, the Commission directed Staff to file monthly status reports of its progress and notify the Commission when all the necessary requirements had been met. Staff subsequently filed numerous status

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

19 Mo. P.S.C. 3d

229

reports. In addition, on October 1, 2009, the Commission joined Black Oak Mountain Water Company ("Black Oak Water") and Black Oak Mountain Sewer Company ("Black Oak Sewer") as parties.

On December 30, 2009, Staff filed the current motion in this matter, *Motion to Approve a Transfer of Utility Assets from Quanah Corporation, S.V. Holding, Inc., Swiss Villa Utilities, Inc., and the County Commission of Stone County to the Black Oak Mountain Water Company and the Black Oak Mountain Sewer Company*. As the title suggests, Staff's motion requests that any interest the listed parties may have in Swiss Villa be transferred to the newly created Black Oak Water and Black Oak Sewer.

**Corporate Entities**

1. Swiss Villa Utilities, Inc. was a "public utility," a "water corporation," and a "sewer corporation," as those terms are defined in Section 386.020, RSMo 2000.<sup>1</sup>

2. On June 28, 1983, the Commission granted Swiss Villa certificates of public convenience and necessity to provide water and sewer services in a portion of Stone County, Missouri.<sup>2</sup>

3. Swiss Villa was formerly owned by Capital Services and Investments, Inc., which entered Chapter 11 Bankruptcy proceedings.

4. In July 1994, Quanah obtained the assets of Swiss Villa, including those related to providing utility service.

5. Subsequently, the stock of Swiss Villa was transferred to S.V. Holding (a not-for-profit corporation), as assignee of Quanah, with Quanah retaining some interest in the real property associated with the system.

6. In February 2004, the Board of Directors of Swiss Villa ("the Board") resigned without replacement. At that time, the Board incorrectly and independently determined that because Swiss Villa was owned by a not-for-profit corporation, it was no longer regulated by the Commission.

7. Since the Board resigned, Deal & Associates of Springfield, Missouri, has collected system revenues, though indicating that it is largely operating "without direction." An operator has continued

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<sup>1</sup> All statutory references are to the Missouri Revised Statutes 2000, unless otherwise noted.

<sup>2</sup> See File Nos. WA-83-75 and SA-83-76.

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

230

19 Mo. P.S.C. 3d

to do basic maintenance on the system, but is similarly proceeding without guidance.<sup>3</sup>

8. On September 9, 2005, Swiss Villa was administratively dissolved by the Office of the Missouri Secretary of State for failure to file its annual report.

9. On January 5, 2006, S.V. Holding was administratively dissolved by the Office of the Missouri Secretary of State for failure to file its annual report.

10. Quannah is currently listed as in “Good Standing” with the Office of the Missouri Secretary of State.

11. The Commission currently has an outstanding judgment against Swiss Villa in the amount of \$84,600, related to its failure to file annual reports with this Commission and to submit its Commission assessments.

12. The system is currently operating with a Missouri Department of Natural Resources (“DNR”) discharge permit which expired in 2008. DNR is in the process of mandating system improvements, which will likely result in an upgrade to the sewage treatment plant.

13. In October 2006, Staff was informed by the members of the Black Oak POA that it had voted to “take over” the utility system. Staff filed its original motion to assist with that objective.

14. Over the course of completing the necessary steps to transfer the utility assets to the Black Oak POA, the concept of creating nonprofit corporations under the control of the Black Oak POA emerged. Thus, individuals involved with Black Oak POA initiated an effort to form separate nonprofit water and sewer entities to be operated under the authority of the Black Oak POA, with the intent to have the resulting entity serve as the transferee of the system assets.

15. On July 10, 2009, the incorporators of Black Oak Water and Black Oak Sewer filed with the Office of the Missouri Secretary of State the documents necessary to incorporate Black Oak Water and Black Oak Sewer.

16. Both corporations are currently listed as in “Good Standing” with the Office of the Missouri Secretary of State.

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<sup>3</sup> Staff includes greater detail about the operations of the company in Appendix A to the current motion.

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

19 Mo. P.S.C. 3d

231

17. Staff recommended in its current motion that the Commission approve the transfer to Black Oak Water and Black Oak Sewer.

18. Prior to and including the time in which the not-for-profit corporations were formed, Stone County established a neighborhood improvement district (“NID”) and constructed publicly-funded improvements to the water and sewer systems in the Swiss Villa service territory. In exchange for these improvements, a Quit Claim deed was executed on December 18, 2003, purporting to transfer the real estate used in providing water and sewer service from Quanah to Stone County to hold in trust until the bonds issued to pay for the improvements are retired, and as trustee for the property owners within the NID itself.<sup>4</sup>

19. On July 21, 2007, Quanah also executed a Quit Claim Deed to “Black Oak Mountain Utility Board” purporting to grant any remaining interest in the utility system property.

20. Due to the nature of the NID, and the conveyance of interests resulting from its establishment, Staff had concerns about the ability of any entity receiving the assets to demonstrate it had access to the real property. For this reason, the Black Oak POA and Stone County entered into a Non-Exclusive Lease of Real Property, Sanitary Sewer Collection and Treatment System, and Water Supply System (“lease”). The lease was approved by Stone County on April 4, 2007, and executed by Black Oak POA on May 26, 2007.

21. After formation and incorporation of Black Oak Water and Black Oak Sewer, a sublease from Black Oak POA to Black Oak Water and Black Oak Sewer was approved by Stone County on October 6, 2009, and executed by Black Oak POA and the water and sewer Companies on October 31, 2009.

22. Although Staff included in its current motion a request for authority to transfer the assets of Stone County to Black Oak Water and Black Oak Sewer, it is unclear what Stone County’s interests are. As contained in the lease, drafted by Stone County, “[t]he County’s interests in some of the Systems were conveyed to it, and the County

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<sup>4</sup> Although the Quit Claim deed executed by Quanah to Stone County purports to release any interest in the utility systems previously held by Quanah, Staff included Quanah in its current motion, and the Commission includes it in this order, as a named asset transferor in order to be certain that all necessary approvals for the transfer of this system are granted.

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

232

19 Mo. P.S.C. 3d

does not know the nature or quality of those interests[.]”<sup>5</sup> Under the terms of the lease and the sublease, however, Stone County will convey its interests to Black Oak Water and Black Oak Sewer upon discharge of the NID debt. Therefore, included in this order is authority to transfer any interest held from Stone County to the water and sewer companies.

23. Staff has recommended from the beginning of this case that a capable entity be placed in charge of this water and sewer system. As stated in the Memorandum attached to the current motion, “[u]nder the facts presented in this case, Staff believed, and continues to believe, that some action needs to be taken in an attempt to reach a solution to the problems facing the [water and sewer] systems, and more importantly, [their] customers.”

24. Staff further stated that it believes the transfer of assets from Swiss Villa, Quannah, S.V. Holding, and Stone County to Black Oak Water and Black Oak Sewer would not be detrimental to the public interest. In addition, Staff believes that Black Oak Water and Black Oak Sewer are in a “position to modify customer rates in an equitable manner, as may be required in the future.”

**Applicable Law**

1. Section 393.190.1. provides in relevant part as follows:  
No . . . 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 . . . .
2. Relevant case law provides that the Commission may approve an asset transfer if it is “not detrimental to the public interest.”<sup>6</sup>
3. Section 393.900 provides that certain nonprofit, membership corporations may be organized only for the purpose of

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<sup>5</sup> Attachment H to Appendix A of the Motion to Approve a Transfer of Utility Assets from Quannah Corporation, S.V. Holding, Inc., Swiss Villa Utilities, Inc., and the County Commission of Stone County to the Black Oak Mountain Water Company and the Black Oak Mountain Sewer Company, filed December 30, 2009.

<sup>6</sup> See *State ex Rel Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

19 Mo. P.S.C. 3d

233

supplying water for distribution, for wholesale, and for treatment services within the State of Missouri. Section 393.933.2 provides that “[t]he public service commission shall not have jurisdiction over the construction, maintenance or operation of the water facilities, service, rates, financing, accounting or management of any nonprofit water company . . .”

4. Similarly, Section 393.825.1 provides that certain nonprofit, membership corporations may be organized only for the purpose of supplying wastewater disposal and treatment services within the State of Missouri. Section 393.847.2 provides that “[t]he public service commission shall not have jurisdiction over the construction, maintenance or operation of the wastewater facilities, service, rates, financing, accounting or management of any nonprofit sewer company.”

5. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.<sup>7</sup> Therefore, the Commission may grant the request based on the verified motions after affording notice and an opportunity to be heard.

**Decision**

After considering the verified motions of Staff and their attachments, including the recommendation of Staff, and the lack of opposition from any of the parties, the Commission concludes that the proposed transfers will “not [be] detrimental to the public interest.”<sup>8</sup> In fact, the Commission determines that having a stable and concerned nonprofit corporation controlled by the homeowners association is in the public interest. The transfers are approved.

The Commission also orders that the certificates of service authority held by Swiss Villa along with the tariffs on file pertaining to that system shall be canceled. In addition, Staff is relieved of its obligation to file monthly status reports.

Finally, because this system has a history of issues with DNR, the Commission will direct that a courtesy copy of this order be sent to DNR.

**THE COMMISSION ORDERS THAT:**

1. The *Motion to Approve a Transfer of Utility Assets*

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<sup>7</sup> See State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989).

<sup>8</sup> State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

BLACK OAK MOUNTAIN WATER COMPANY AND  
BLACK OAK MOUNTAIN SEWER COMPANY

234

19 Mo. P.S.C. 3d

*from Quannah Corporation, S.V. Holding, Inc., Swiss Villa Utilities, Inc., and the County Commission of Stone County to the Black Oak Mountain Water Company and the Black Oak Mountain Sewer Company* filed by the Staff of the Missouri Public Service Commission on December 30, 2009, is granted.

2. The transfer of utility assets from Swiss Villa Utilities, Inc., Quannah Corporation, S.V. Holding, Inc., and Stone County to the Black Oak Mountain Water Company and the Black Oak Mountain Sewer Company is approved.

3. All parties are authorized to execute, enter into, deliver and perform any agreements, and to do any and all other things not contrary to law or the rules and regulations of the Commission incidental, necessary or appropriate to consummate these transactions.

4. The certificates of convenience and necessity previously issued by the Commission to Swiss Villa Utilities, Inc., in Case Nos. WA-83-75 and SA-83-76 are canceled.

5. The tariffs of Swiss Villa Utilities, Inc., are canceled. Those tariffs are: P.S.C.MO. No. 1 (Water), Tariff File No. JW-2002-0089; and P.S.C.MO. No. 1 (Sewer), Tariff File No. JS-2002-0090.

6. The Staff of the Missouri Public Service Commission is relieved of its obligation to file monthly status reports.

7. The Data Center of the Missouri Public Service Commission shall send a courtesy copy of this order to the Missouri Department of Natural Resources.

8. This order shall become effective on February 13, 2010.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge



ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

235

**In the Matter of Atmos Energy Corporation's Tariff Revision Designed to Consolidate Rates and Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of Atmos**

**In the Matter of Atmos Energy Corporation's Tariff Revision Designed to Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of the Company**

*GR-2006-0387 and GR-2010-0192  
Decided February 3, 2010*

**Evidence, Practice and Procedure §24.** The Commission decided to consolidate a case on remand from the court of appeals and a pending rate case involving the same company where the issues for determination were identical and the evidentiary hearings were scheduled to occur at approximately the same time. The Commission concluded that consolidation was appropriate to prevent the possibility of inconsistent decisions and ratepayer confusion and to promote the interests of judicial and administrative economy.

**ORDER CONSOLIDATING CASES**

**Procedural History**

The Commission issued its Report and Order ("Order") in GR-2006-0387 on February 22, 2007, with an effective date of March 4, 2007. When addressing the issue of rate design the Commission concluded:

The Commission has thoroughly considered the facts of this case and the arguments of all the parties. The Commission has found that the status quo rate design is just and reasonable and that the volumetric rates encourage conservation. The Commission agrees with its Staff that the facts of this case present an opportunity to implement just and reasonable rates under a rate design that is quite novel in the state of Missouri. However, the Commission has determined that it is not just and reasonable to relinquish the conservation measures

ATMOS ENERGY CORPORATION

236

19 Mo. P.S.C. 3d

currently in place in the form of volumetric rates without also implementing a significant efficiency and conservation program to offset the loss of conservation encouraged by the volumetric portion of the rate. Therefore, the Commission has determined that Atmos shall maintain the status quo rate design unless it proceeds with a significant energy efficiency and conservation program as set out in the body of this order. If Atmos chooses to go forward with such a program, it may file new tariffs designed to implement not only that program, but also a fixed delivery charge rate design.

Atmos Energy Corporation subsequently filed compliance tariffs to implement a straight fixed variable rate design and tariffs complying with the condition of developing and implementing a significant energy efficiency and conservation program. The Commission approved the tariffs implementing the new rate design on March 27, 2007 to become effective April 1, 2007. These tariffs replaced Atmos' prior tariff (JG-2003-0046) in its entirety. Compliance tariffs to effectuate the Energy Conservation and Efficiency Program (YG-2007-0957) were approved to become effective on August 31, 2007.

The Office of the Public Counsel pursued a Writ of Review with the Cole County Circuit Court, which ultimately reversed and remanded the Order on August 27, 2008, finding six points of error. The case was appealed to the Missouri Court of Appeals for the Western District. On June 23, 2009, the Western District reversed the Commission's Order and remanded the case to the circuit court with instructions to remand to Commission. The Western District's opinion, which totally subsumes the circuit court's judgment, found two points of error. The Western District's mandate issued July 15, 2009; however, jurisdiction was not restored to the Commission by the circuit court until September 17, 2009.

Since jurisdiction has been restored, the Commission has not sat idly, rather it has: (1) reviewed the voluminous evidentiary record in its entirety, (2) entertained multiple pleadings and cross-pleadings propounding legal arguments from the parties, (3) held an on-the-record proceeding to allow for oral argument on the legal positions of the parties; and (4) reviewed and analyzed the statutory, regulatory and case law controlling the issues upon which the remand was based. Complicating this review of File No. GR-2006-0387 was Atmos' filing of a new rate case on December 28, 2009 (File No. GR-2010-0192); a case that brings many of the same issues back to the Commission for an identical review.

**Western District Opinion in GR-2006-0387**

The Western District held:

Due to the absence of competent and substantial evidence to support the Commission's findings regarding subsidization and Atmos's cost of service, we reverse the Commission's decisions adopting the SFV rate design and approving consolidation of Atmos's districts and remand those matters to the Commission for further proceedings. In light of our reversal of the Commission's adoption of the SFV rate design, we do not address OPC's arguments regarding Atmos's ROE, revenue requirement, the creation of new SGS and MGS classes, or the amount or structure of any seasonal reconnection proposals. Finally, we affirm the Commission's order adopting Staff's negative amortization proposal.<sup>1</sup>

The Western District reversed and remanded on two issues: (1) adopting the Straight Fixed Variable ("SFV") rate design and (2)

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<sup>1</sup> *State ex rel. Public Counsel v. Missouri Public Service Com'n*, 289 S.W.3d 240, 256 (Mo. App. W.D. 2009).

ATMOS ENERGY CORPORATION

238

19 Mo. P.S.C. 3d

approving consolidation of Atmos' districts. Consequently, the Commission must reconsider its decision on those two matters.

With regard to the inter-related issues of rate design and revenue requirement, the Western District elucidated:

The Commission relied, in part, on Atmos's abandonment of its request for a \$3.4 million rate increase as a basis to find Atmos's existing revenues to be just and reasonable. But Atmos's abandonment of the rate increase request seems to have been dependent on the Commission's acceptance of the SFV rate design. If, on remand, the parties decide to abandon their advocacy of the SFV rate structure, Atmos could well revert to seeking the rate increase.

There is a clear linkage between the adoption of a particular rate design and the considerations regarding Atmos's revenue requirement. Because we have reversed the Commission's decision to adopt the SFV rate design, the Commission's findings and conclusions regarding Atmos's overall revenue requirements are not ripe for review.<sup>2</sup>

Because of the clear linkage between revenue requirement and rate design, the Commission must reconsider revenue requirement as it re-examines the rate design issue. The parties are all in agreement with the Western District on this issue.<sup>3</sup> And as earlier noted, the Commission will have to examine these identical issues in the new rate case docket, GR-2010-0192. Additionally, Atmos' continued shareholder funding of its Energy

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<sup>2</sup> *Id.* at 253.

<sup>3</sup> See Transcript Volume 10, On-the-Record Presentation, December 15, 2009, pp. 762-763, 765, 772, 819, 832-834. Public Counsel distinguishes its position; however, by arguing the Commission would not have to look at updated information on revenue requirement. In essence, Public Counsel argues it would just and reasonable to set current rates based upon data from 2005.

## ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

239

Efficiency and Conservation Program on an annual basis, a specific condition precedent to the Commission's adoption of the SFV rate design, will also require re-examination.

### **Tariff Status**

Once the Commission approves a tariff, it becomes Missouri law,<sup>4</sup> and it has "the same force and effect as a statute directly prescribed from the legislature."<sup>5</sup> Section 386.270 provides:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Consequently, once a tariff is approved and has become effective, it is valid until found otherwise invalid in a lawsuit litigating that issue; either by an appeal of the Commission's decision in a court of competent jurisdiction pursuant to Section 386.510, or in a complaint action before the Commission pursuant to Section 386.390.<sup>6</sup> In both of these litigation choices, the burden of proof

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<sup>4</sup> Sections 393.130, 393.140(11), and 393.150, RSMo 2000; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. App. 2005); *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000); *Southwestern Bell Yellow Pages, Inc. v. Wilkins* 920 S.W.2d 544, 548 (Mo. App. 1996). *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8<sup>th</sup> Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8<sup>th</sup> Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

<sup>5</sup> *Id.*; *Laclede Gas Co.*, 156 S.W.3d at 521; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996); *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988); *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987).

<sup>6</sup> Sections 386.510 and 386.390, RSMo 2000; *State ex rel. Public Counsel v. Public Service Com'n*, 210 S.W.3d 344, 360 (Mo. App. 2006); *Union Elec. Co.*, 17 S.W.3d at 583; *State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 367 (Mo.

ATMOS ENERGY CORPORATION

240

19 Mo. P.S.C. 3d

lies with the petitioner challenging the lawfulness of the order approving the tariff.<sup>7</sup>

It is important to note that the Western District did not expressly find the current tariff implementing the straight fixed variable rate design to be unlawful. That determination is essentially on hold while the Commission reconsiders the issues pursuant to the Western District's instructions. The tariff remains operational until the Commission makes its decision on remand and new compliance tariffs become effective in conformity with that subsequent order.

**Timing Considerations**

Because the Commission must re-examine revenue requirement along with its re-examination of rate design it must re-open the evidentiary record in GR-2006-0387. And because the Commission will be hearing identical evidence on many of the identical issues in the pending rate case, the Commission must decide whether it will have two concurrently running cases to address many of the same issues or whether the two cases should be consolidated. This issue has weighed heavily on the Commission and the general public interest must be balanced with the interests of multiple rate classes' and with the company's and shareholders' interests.

Public Counsel asserts that the Commission must resolve the remand case expeditiously, and that failure to do so would violate its due process rights and its right to appeal

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App. 1992); *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.*, 765 S.W.2d 618, 621 (Mo. App. 1988). See also *In the Matter of the Filing of Proposed Tariffs by The Empire District Electric Company to Comply with the Commission's Report and Order in Case No. ER-2001-299 and to Correct a Recently Discovered Error in the Calculation of the Revenue Requirement*, Case No. ET-2002-210, Tariff No. 200200321, Order Rejecting Tariff, issued November 19, 2001, effective date November 24, 2001.

<sup>7</sup> David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), citing to, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968). See also Section 386.430, RSMo 2000; *Union Elec. Co.*, 765 S.W.2d at 621.

ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

241

pursuant to Section 386.540, RSMo 2000.<sup>8</sup> Public Counsel has also argued that any decision regarding reversion to the status quo rate design should be held up until April of this year so that the ratepayers can take advantage of the benefits of the SFV rate design, the rate design it opposes.<sup>9</sup>

The Commission's Staff and Atmos point out that it would better serve all of the parties, the ratepayers and company alike, to consolidate GR-2006-0387 with GR-2010-0192. Further, the court of appeals has made abundantly clear:

Upon remand, an administrative tribunal is bound to enter judgment in conformity with the appellate court's mandate. A mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used in interpreting the mandate. Accordingly, proceedings on remand should be in accordance with the mandate and the result contemplated in the appellate court's opinion. (Internal citations omitted).<sup>10</sup>

At the on-the-record proceeding held on December 15, 2009, Atmos outlined the probable timeline that GR-2006-0387 would follow once the record was reopened. Given the time it will take for the parties to prepare and present their evidence, any final order following a separate evidentiary hearing for GR-2006-0387 will end up being issued at approximately the same time as when the evidentiary hearings in the pending rate case, GR-2010-

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<sup>8</sup> See EFIS Docket Entries Numbers 248 and 249. EFIS is the Commission's Electronic Information and Filing System. The case law Public Counsel referenced for support of its due process argument holds that due process requires an opportunity to be heard in a timely and meaningful manner, and that due process is flexible and calls for procedures that fit the situational demands. Transcript, Volume 10, On-the Record Presentation, December 15, 2009, pp. 742-743.

<sup>9</sup> Transcript, Volume 10, On-the Record Presentation, December 15, 2009, pp. 741, 745-747.

<sup>10</sup> *Roberts v. City of St. Louis*, 292 S.W.3d 566, 570 (Mo. App. 2009).

ATMOS ENERGY CORPORATION

242

19 Mo. P.S.C. 3d

0192, are concluding and briefs are being filed. Unfortunately, to proceed in this fashion, to obtain the most expeditious decision in GR-2006-0387, places the Commission in the position of having concurrent evidentiary hearings encompassing identical issues. There is potential that one decision will moot out the other, or parts of the other. Issuing a decision in GR-2006-0387 earlier than the final decision in GR-2010-0192 could also force premature decisions in GR-2010-0192. There is also the possibility that inconsistent decisions could occur creating flip-flopping of rate designs and producing radical changes in charges between rate classes within a couple of months. This problem is exponentially magnified if using 2005 data for one case and 2009-2010 data for the other.<sup>11</sup> There is also potential for unnecessarily forcing further litigation as the parties' and various rate classes' interests may collide within mere weeks between the two Commission rulings in the separate actions.

The great potential for confusion and disruption for the ratepayers, coupled with the unnecessary exhaustion of legal and administrative resources weighs in favor of consolidation. When considering the Western District's opinion in conjunction with its mandate, as is required, consolidation satisfies the Commission's obligations to follow the Western District's instructions on the remand of GR-2006-0387. Consolidation satisfies the requirements of due process to allow for a timely and meaningful opportunity to be heard in a flexible manner consistent with what the situation demands.<sup>12</sup> Consolidation also promotes the interests of judicial and administrative economy. Consolidation of GR-2006-0387 with GR-2010-0192 is lawful,

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<sup>11</sup> Moreover, relying on 2005 data to set rates this year would challenge the just and reasonable standard.

<sup>12</sup> *Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008).



ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

243

prudent, and reasonable.

**THE COMMISSION ORDERS THAT:**

1. The evidentiary record in File Number GR-2006-0387 is re-opened.
2. File numbers GR-2006-0387 and GR-2010-0192 are consolidated. File No. GR-2010-0192 is designated as the lead case.
3. File number GR-2006-0387 shall be closed.
4. This order shall be effective February 13, 2010.

Davis, Jarrett, Gunn, and Kenney, CC., concur;  
Clayton, Chm., dissents with dissenting opinion to follow.

Stearley, Senior Regulatory Law Judge

\*NOTE: See page 634 for another order in this case.

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner concurs in the Commission's Report and Order addressing a rate increase request of The Empire District Gas Company of Joplin (Empire).

First of all, the Commission is making a strong stand on funding of Energy Efficiency (EE). As part of the Commission's recent shift of policy on EE, this rate case is the second time the Commission is pegging its goal of EE funding at .5% of gross operating revenues of the company, which amounts to approximately \$325,000. This figure compares with an amount of less than \$100,000, which has been spent annually for the last several years. The Energy Office of the Missouri Department of Natural Resources (DNR) has advocated for spending targets between .5% and 1.5% of gross operating revenues, in accordance with the National Action Plan for Energy Efficiency. The Commission is mandating expenditures of approximately \$231,000 per year, which most parties have agreed can be spent effectively and efficiently in 2010, while the Energy Efficiency Collaborative

## ATMOS ENERGY CORPORATION

244

19 Mo. P.S.C. 3d

(Collaborative)<sup>1</sup> will work towards the .5% goal in future years. The goal of increased EE funding will be addressed regularly through on-going Commission involvement should the Collaborative fail to reach agreement or run into policy differences. While the Commission should continue to monitor and increase that funding level based on feedback from the Collaborative, this Commissioner believes this steady increase is the most responsible manner of stepping up efforts at empowering customers to reduce their energy usage.

Secondly, customers will not be responsible for funding EE programs through rates. The rates stemming from this order will not include an EE component, but rather, Empire will be required to fund the EE programs in advance. Those expenditures will be tracked in a regulatory asset for potential recovery in the next rate case. The Commission will be watching closely as programs are created, implemented and tracked for their cost-effectiveness.

Thirdly, the Commission in this case is sending the message that it intends to stay involved as the Collaborative works through implementation of its programs. It is this Commissioner's hope that the Collaborative can continue to operate in a consensus and advisory fashion and, if any dispute or roadblock occurs, that the Commission can address differences in policy determinations. Expenditure levels, program types and funding as well as feedback from rate payer experiences are items that the Commission will have the ability to monitor and contribute to the dialogue.

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<sup>1</sup> The Energy Efficiency Collaborative is a group of stakeholders charged with the task of formulating detailed programs to effectuate the intent of the Commissions Report and Order in regard to planning and implementing cost effective energy efficiency programs within the utility's service area.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

245

In conclusion, this Commissioner is compelled to commend the parties involved in this case who have effectively settled the vast majority of issues relating to rates, rate design and many other issues. While the Commission is prepared to make the challenging decisions on controversial and complicated matters, the public can take solace that each of the stipulating parties have placed their names on the line to responsibly reach a compromise on an appropriate level of rates. While rate increases are never easy or welcome, the evidence in this case demonstrates that higher rates have been necessitated by prudent infrastructure investments and increases in general operating costs. The Commission has approved this increase unanimously and will engage in future filings to insure that the Commission directives are implemented. The Commission has a responsibility to insure that the utility offers safe and adequate service at "just and reasonable" rates. Following staff audit, evidentiary hearing, partial settlement and transparent Commissioner deliberations, the Commission finds that these new rates to be appropriate.

For the foregoing reasons, this Commission concurs.

### **In the Matter of Missouri Gas Energy and its Tariff Filing to Implement a General Rate Increase for Natural Gas Service\***

*File No. GR-2009-0355  
Decided February 10, 2010*

**Rates §8.** The Commission cannot simply find a rate of return on equity that is "correct"; a "correct" rate does not exist. However, there are some numbers that the Commission can use as guideposts in establishing an appropriate return on equity. In a recent Report and Order concerning MGE itself, the Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average." Nevertheless, the national average is an indicator of the capital market in which MGE will have to compete for necessary capital. That "zone of reasonableness" extends from 100 basis points above to 100 basis points below the recent national average of awarded ROEs.

**Rates §12.** There are at least two instances in which the Commission has the discretion to impose a hypothetical capital structure: when the actual debt-equity ratio is inefficient and

\*This case was appealed to the Missouri Court of Appeals (SD) and affirmed. See 367 S.W. 3d 91 (Mo. App. S.D. 2012).

## MISSOURI GAS ENERGY

246

19 Mo. P.S.C. 3d

unreasonable because it has too much equity and not enough debt, thereby giving the utility an inflated rate of return, or when the utility is part of a holding company.

**Rates §118.** Just because a company derives a higher rate of return from one class than another does not necessarily render those rates unjust or unreasonable. Class cost of service is often considered but a starting point in quantifying what part of the revenue responsibility is afforded to each customer class. Indeed, class costs of service studies are often considered more art than science. Other factors should be considered when establishing rates. It is up to the Commission to evaluate the testimony of expert witnesses and accept or reject any or all of any witness's testimony.

**Rates §120.** In deciding whether to approve a Straight Fixed Variable rate design, some factors the Commission should consider are: 1) whether high-use consumers will stop paying a disproportionate share of the operating expenses; 2) month-to-month volatility of bills will be reduced; 3) consumers will still retain control over a majority of their monthly natural gas costs; 4) ratepayers' interests will be aligned with the utility's shareholders because of the removal of the disincentive for the utility to encourage natural gas conservation.

### REPORT AND ORDER

#### **APPEARANCES**

**James C. Swearingen and Dean L. Cooper, Esq.**, Brydon, Swearingen & England, 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri Gas Energy, a division of Southern Union Company.

**Mark W. Comley, Esq.**, Newman, Comley & Ruth, P.C., 601 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102-0537, for the City of Kansas City, Missouri.

**Stuart W. Conrad, Esq. and David L. Woodsmall, Esq.**, Finnegan Conrad & Peterson, L.C., 1209 Penntower Building, 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, and 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65101, for Midwest Gas Users Association.

**Jeremiah D. Finnegan, Esq.**, Finnegan Conrad & Peterson, L.C., 1209 Penntower Building, 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, for The University of Missouri - Kansas City, Central Missouri

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

247

State University, and Superior Bowen Asphalt Company, LLC.

**Mary Ann Young and William D. Steinmeier, Esq.**, William D. Steinmeier, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110, for Constellation NewEnergy-Gas Division, LLC.

**Shelley A. Woods and Sarah B. Callier, Esq.**, Assistant Attorneys General, Office of the Attorney General, Post Office Box 899, Jefferson City, Missouri 65102-0899, for the Missouri Department of Natural Resources.

**Charles W. Hatfield, Esq.**, Stinson Morrison Hecker LLP, 230 West McCarty Street, Jefferson City, Missouri 65101-1553, for ONEOK Energy Marketing Company.

**Marc Poston, Esq.**, Senior Deputy Public Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

**Lera Shemwell, Esq.**, Deputy General Counsel, and **Bob Berlin, Esq., Eric Dearmont, Jaime Ott and Samuel Ritchie, Esq.**, Assistant General Counsels, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

**SENIOR REGULATORY LAW JUDGE: Ronald D. Pridgin**

### **Procedural History**

On April 2, 2009, Missouri Gas Energy (hereafter “MGE”), a division of Southern Union Company (hereafter “SUG”) submitted to the Commission proposed tariff sheets, effective for service on and after May 2, 2009, that are intended to implement a general rate increase for natural gas service provided in its Missouri service area.<sup>1</sup> MGE’s proposed tariffs would increase its Missouri jurisdictional revenues by approximately \$32.4 million, or by 4.7%. The Commission suspended the tariffs until February 28, 2010. Furthermore, the Commission gave

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<sup>1</sup> Unless otherwise stated, all dates are in 2009.

## MISSOURI GAS ENERGY

248

19 Mo. P.S.C. 3d

interested parties until April 27 to request intervention.

The Commission received timely intervention requests from: ONEOK Energy Marketing Company (hereafter "ONEOK"); the Missouri Department of Natural Resources (hereafter "DNR"); Constellation NewEnergy-Gas Division, LLC (hereafter "Constellation"); Midwest Gas Users Association (hereafter "MGUA"), the University of Missouri-Kansas City (hereafter "UMKC"), Central Missouri State University (hereafter "CMSU"), and Superior Bowen Asphalt Company (hereafter "Superior Bowen"). In addition, the Commission received an untimely intervention request from the City of Kansas City, Missouri (hereafter "Kansas City"). The Commission granted these requests.

At the request of the Office of The Public Counsel (hereafter "OPC") and the Staff of the Commission (hereafter "Staff"), and with the consent of MGE, the Commission changed the end of the update period from June 30 to April 30. No parties objected to the remainder of the true-up dates, and the Commission adopted them. The Commission held local public hearings in Joplin, Warrensburg, St. Joseph, Kansas City and Lee's Summit. Further, the Commission held an evidentiary hearing on October 26 through October 30, November 2, December 23, and a true-up hearing on December 8-9.

### **Partial Stipulation and Agreement**

On November 5, MGE, Staff, OPC, MGUA, UMKC, UCM, Superior Bowen, Constellation and ONEOK filed a Partial Stipulation and Agreement (hereafter "Stipulation"). The Stipulation purported to resolve all of the disputed issues among the parties except for issues relating to cost of capital, rate design, and energy efficiency.

Neither DNR nor Kansas City signed the Stipulation. However, both DNR and Kansas City stated that neither supported nor opposed the Stipulation, and that neither DNR nor Kansas City requested a hearing on any issue covered by the Stipulation.

Because no party objects to the Stipulation, Commission Rule 4 CSR 240-2.115 allows the Commission to treat it as if it were unanimous. The Commission will do so. The Stipulation, affixed to this Report and Order as Attachment A, is reasonable, and the Commission approves it.

### **Conclusions of Law**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record,

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

249

makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision.

Failure to specifically address a piece of evidence, position or argument of any party does not indicate the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission assigned the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.<sup>2</sup>

### **Conclusions of Law Regarding Jurisdiction**

MGE is a gas utility and a public utility subject to Commission jurisdiction.<sup>3</sup> The Commission has authority to regulate the rates MGE may charge for gas.<sup>4</sup>

The Staff of the Commission is represented by the Commission's Staff Counsel, an employee of the Commission who has been delegated the authority to "represent and appear for the commission in all actions and proceedings involving this or any other law [involving the commission.]" by the General Counsel, who is authorized by statute to perform such duties.<sup>5</sup> The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"<sup>6</sup> The remaining parties include governmental entities and industrial and commercial consumers.

### **Burden of Proof**

"At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . gas corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the

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<sup>2</sup> Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo.App. 2005).

<sup>3</sup> Section 386.020(18), (43) RSMo (Supp. 2009) (all statutory cites to RSMo 2000 unless otherwise indicated).

<sup>4</sup> Section 393.140(11).

<sup>5</sup> Section 386.071.

<sup>6</sup> Sections 386.700 and 386.710.

same as speedily as possible . . .”<sup>7</sup>

#### **Ratemaking Standards and Practices**

The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,<sup>8</sup> subject to judicial review of the question of reasonableness.<sup>9</sup> A "just and reasonable" rate is one that is fair to both the utility and its customers;<sup>10</sup> it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."<sup>11</sup> In 1925, the Missouri Supreme Court stated:<sup>12</sup>

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. \* \* \* These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.<sup>13</sup> "[T]he dominant

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<sup>7</sup> Section 393.150.2.

<sup>8</sup> Section 393.130 RSMo (Supp. 2009) requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

<sup>9</sup> *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (Mo. banc. 1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (Mo. banc. 1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

<sup>10</sup> *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App. 1974).

<sup>11</sup> *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

<sup>12</sup> *Id.*

<sup>13</sup> *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

251

thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental.”<sup>14</sup> However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.<sup>15</sup> “There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment.”<sup>16</sup>

The Commission has exclusive jurisdiction to establish public utility rates,<sup>17</sup> and the rates it sets have the force and effect of law.<sup>18</sup> A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;<sup>19</sup> neither can a public utility change its rates without first seeking authority from the Commission.<sup>20</sup> A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission’s.<sup>21</sup> Thus, “[r]atemaking is a balancing process.”<sup>22</sup>

Ratemaking involves two successive processes: first, the determination of the “revenue requirement,” that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.<sup>23</sup> The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year that focuses on four factors:<sup>24</sup> (1) the rate of return the utility has an

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(Mo. App. 1937).

<sup>14</sup> St. ex rel. Crown Coach Co. v. Pub. Serv. Comm’n, 179 S.W.2d 123, 126 (1944).

<sup>15</sup> St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm’n, 585 S.W.2d 41, 49 (Mo. banc 1979).

<sup>16</sup> St. ex rel. Missouri Public Service Co. v. Fraas, 627 S.W.2d 882, 886 (Mo. App. 1981).

<sup>17</sup> *May Dep’t Stores*, 107 S.W.2d at 57.

<sup>18</sup> Utility Consumers Council, 585 S.W.2d at 49.

<sup>19</sup> *Id.*

<sup>20</sup> *Deaconess Manor Ass’n v. Pub. Serv. Comm’n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

<sup>21</sup> *May Dep’t Stores*, 107 S.W.2d at 50.

<sup>22</sup> St. ex rel. Union Elec. Co. v. Pub. Serv. Comm’n, 765 S.W.2d 618, 622 (Mo. App. 1988).

<sup>23</sup> St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm’n, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

<sup>24</sup> In the present case, the test year was established as the twelve months ending December 31, 2008, updated for known and measurable changes through September 30, 2009.

## MISSOURI GAS ENERGY

252

19 Mo. P.S.C. 3d

opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. The calculation of revenue requirement from these four factors is expressed in the following formula:

$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;  
C = Prudent Operating Costs,  
including Depreciation Expense and Taxes;  
V = Gross Value of Utility Plant in  
Service;  
D = Accumulated Depreciation;  
and  
R = Overall Rate of Return or  
Weighted Cost of Capital.

The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.<sup>25</sup> The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. The Commission can prescribe uniform methods of accounting for utilities, and can examine a utility's books and records and, after hearing, can determine the accounting treatment of any particular transaction.<sup>26</sup> In this way, the Commission can determine the utility's prudent operating costs. Finally, the Commission can set depreciation rates and adjust a utility's depreciation reserve from time to time as may be necessary.<sup>27</sup>

The Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a rate of return. For any utility, its fair rate of return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

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<sup>25</sup> See State ex rel. Union Elec. Co., 765 S.W.2d at 622.

<sup>26</sup> Section 393.140.

<sup>27</sup> Section 393.240.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

253

### **The Issues**

On October 21, a list of issues was filed. Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings. No party objected to the list. Therefore, the only issues to be determined are the issues from the October 21 list not resolved by stipulation. The Commission will address the unresolved issues below.

In summary, before the Commission are many rate of return issues; that is, what revenue should be built into rates to cover the cost of paying bondholders and shareholders? Those issues include what capital structure should be imputed to MGE (as MGE does not issue its own stock), what MGE's cost of long-term and short-term debt is, and what return on equity should shareholders have the opportunity to earn.

OPC contests the Straight Fixed Variable rate design supported by MGE and Staff; no other party opposes Straight Fixed Variable. OPC prefers a volumetric rate design. Intertwined with this rate design issue is energy efficiency, including what sort of programs should MGE implement, and how much should MGE spend on those programs.

Finally, Staff contests two "true-up" issues; that is, issues updated for known and measurable changes that have occurred during the pendency of the case. Staff contests Prepaid Pension Assets and Land Rights Depreciation. In addition, OPC contests rate case expense.

### **Rate of Return**

*Capital Structure: What capital structure should be used for determining MGE's rate of return?*

### **Discussion**

A company funds its assets generally in one of two ways; namely, it must borrow the money (debt), or it must receive an investment from its owners (equity). The percentage of money that company receives from lenders and from shareholders can be expressed as a "capital structure". For example, if a company has \$1000 cash, and obtained that \$1000 by borrowing \$600 and receiving \$400 in investments, its capital structure would consist of 60% debt and 40% equity.

The actual capital structure, recommended by OPC, contains less equity than does the structures recommended by MGE and Staff. It costs a company more to issue equity than it does to incur debt. Therefore, a capital structure that uses a lot of debt with relatively low

## MISSOURI GAS ENERGY

254

19 Mo. P.S.C. 3d

levels of equity is less expensive for the company. That means that, all else being equal, a capital structure that includes a low percentage of equity and a large percentage of debt will be less costly, resulting in a lower rate of return, and consequently a lower revenue requirement and lower rates to customers.

However, all else is not equal. Including a high percentage of debt in a capital structure has an effect on the cost of equity. The shareholders in a company – the holders of equity – are subordinate to bondholders. Generally, the company must pay the interest on debt, such as bonds issued by the company, before it can pay dividends to its shareholders, or before it can invest profits in other ways that benefit shareholders. If a company's income goes down, the risk is borne by the shareholders. The holders of debt get paid first in the unlikely event the company is liquidated. The shareholders get only what, if anything, is left over. Therefore, a company with a capital structure that includes a high percentage of debt is more risky for shareholders. The shareholders will consequently demand a higher rate of return to compensate them for the increased risk caused by the high level of debt.

MGE requests a hypothetical capital structure of 52% debt and 48% equity.<sup>28</sup> MGE does so based on the theory that MGE is riskier than the average LDC because it's so small.<sup>29</sup> SUG isn't representative of an LDC, so SUG's capital structure isn't appropriate.<sup>30</sup> MGE looked at market evidence of common equity cost of a proxy group of nine to determine its proposed hypothetical capital structure.<sup>31</sup>

Staff proposes a hypothetical capital structure of 51.06% equity, 40.47% long-term debt and 8.47% short-term debt.<sup>32</sup> Staff based this structure on proxy group's average structure for the most recently reported fiscal quarter, except for short-term debt.<sup>33</sup> Staff averaged the last 4 quarters of short-term debt and the deducted CWIP (Construction Work in Progress) balance.<sup>34</sup>

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<sup>28</sup> Hanley Direct, Ex. 13, p. 2.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* Because MGE is a division of Southern Union that supplies natural gas to Missouri customers, and MGE has no separate existence from Southern Union, the Commission reminds the reader that any use of MGE or SUG refers to the same entity.

<sup>31</sup> *Id.*

<sup>32</sup> Staff Cost of Service Report, Ex. 39, pp. 7, and 24.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.*

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

255

OPC argues that SUG's actual capital structure should be used.<sup>35</sup> OPC reminds the Commission that in the last two MGE rate cases, the Commission ordered actual, and not hypothetical, capital structure.<sup>36</sup>

### **Findings of Fact**

1. The Commission finds the testimony of OPC witness Lawton to be the most credible for this issue.

2. The overall cost of capital is the sum of the weighted average cost rates of various sources of capital.<sup>37</sup>

3. The most significant relationship in any capital structure is the debt to equity ratio.<sup>38</sup>

4. The advantage of debt in the capital structure is that debt costs less than equity.<sup>39</sup>

5. Thus, the more debt in the capital structure the lower the cost of capital will be.<sup>40</sup>

6. MGE is an operating division of SUG and has no separate existence from SUG.<sup>41</sup>

7. SUG's management decisions determined SUG's capital structure.<sup>42</sup>

8. MGE and Staff are asking the Commission to base rates on a hypothetical capital structure that has more equity and less debt than SUG's actual capital structure.<sup>43</sup>

9. Potential investors in MGE must invest in SUG, since SUG funds all of MGE's activities.<sup>44</sup>

10. Actual capital structure is appropriate as long as the utility is still investment grade, which SUG is.<sup>45</sup>

11. Using a hypothetical capital structure would allow MGE

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<sup>35</sup> Lawton Direct, Ex. 69, p. 5.

<sup>36</sup> *Id.* at 50.

<sup>37</sup> Lawton Direct, Ex. 69, p. 47.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 19; Staff Cost of Service Report, Ex. 39, p. 63; Tr. Vol. 9, p. 319.

<sup>42</sup> Lawton Direct, Ex. 69, p. 50.

<sup>43</sup> Hanley Direct, Ex. 13, p. 2; Staff Cost of Service Report, Ex. 39, pp. 7, 24; Lawton Direct, Ex. 69, p. 5.

<sup>44</sup> Hanley, Tr. Vol. 9, p. 127; Lawton, Tr. Vol. 9, p. 358.

<sup>45</sup> Murray, Tr. Vol. 9, p. 253.

## MISSOURI GAS ENERGY

256

19 Mo. P.S.C. 3d

to recover revenues in excess of costs.<sup>46</sup>

12. SUG's capital structure is the result of management decisions, including using a higher percentage of lower cost debt.<sup>47</sup>

13. Using rate base of \$609 million, MGE would have a return requirement of \$71.4 million under a hypothetical capital structure and \$66.6 under actual capital structure.<sup>48</sup>

14. Employing MGE's proposed hypothetical capital structure would allow MGE to earn an equity return on some capital that was financed by debt.<sup>49</sup>

15. The difference between the \$71.4 million revenue requirement under a hypothetical capital structure and a \$66.6 million under an actual capital structure would be added earnings.<sup>50</sup>

### **Conclusions of Law**

As pointed out by the Court of Appeals, "(p)erhaps the ultimate authority for imputing debt and equity financing . . . is the Supreme Court's statement in *Hope Natural Gas*: "The rate-making process under the Act, *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."<sup>51</sup>

The Commission has repeatedly determined that SUG's management decisions necessitate the use of a capital structure that properly recognizes those decisions. In MGE's 2004 rate case, the Commission rejected MGE's attempt to utilize a hypothetical capital structure and concluded:

Although Southern Union describes its proposed capital structure as an adjusted actual consolidated capital structure, what it is proposing may more accurately be described as a hypothetical capital structure in that its proposed capital structure clearly does not exist in the real world.

Furthermore, Southern Union's unadjusted consolidated

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<sup>46</sup> Lawton Direct, Ex. 69, p. 50.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 51.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> State ex. rel. Associated Natural Gas Co. v. Public Service Comm'n of Missouri, 706 S.W.2d 870, 879 (Mo. App. 1985)(citing *Hope Natural Gas*, 320 U.S. at 603, 64 S.Ct. at 288).

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

257

capital structure, with its heavy reliance on debt, results directly from Southern Union's management decision to become highly leveraged to finance the purchase of Panhandle Eastern, as well as earlier acquisitions. Southern Union decided to take on that additional debt because it saw an opportunity to earn greater returns to the benefit of its shareholders. That decision is clearly within Southern Union's management prerogative and the Commission does not wish to criticize or punish Southern Union for that decision. However, Southern Union must operate with the results of its investment decisions and one result of those investment decisions is a capital structure that includes a large amount of debt and relatively low amounts of equity.<sup>52</sup>

In MGE's next rate case, the Commission again rejected MGE's attempt to utilize a hypothetical capital structure. The Commission concluded:

This issue was discussed by the Commission in MGE's last rate case. As discussed in that case, the capital structure of Southern Union is the result of its management decisions. Hence, Southern Union, and ultimately MGE, must operate with the result of its decisions. MGE stresses that the make-up of Southern Union has changed so dramatically, that use of a hypothetical capital structure is warranted. This premise, however, does not change the Commission's reasoning in MGE's last rate case. Therefore, the capital structure, as proposed by Staff, shall be used.<sup>53</sup>

Indeed, there are at least two instances in which the Commission has the *discretion* to impose a hypothetical capital structure: when the

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<sup>52</sup> *In re MGE*, Commission File No. GR-2004-0209, Report and Order, pp. 12-13 (September 21, 2004); *aff'd, State ex. rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 386 (Mo.App. W.D. 2005).

<sup>53</sup> *In re MGE*, Commission File No. GR-2006-0422, Report and Order, p. 9 (March 22, 2007), *aff'd, State ex. rel. Office of the Public Counsel v. Public Service Commission*, 293 S.W. 3d 63 (Mo.App. S.D. 2009).

## MISSOURI GAS ENERGY

258

19 Mo. P.S.C. 3d

actual debt-equity ratio is inefficient and unreasonable because it has too much equity and not enough debt, thereby giving the utility an inflated rate of return, or when the utility is part of a holding company system.<sup>54</sup>

### **Decision**

The Commission finds that it should use Southern Union Gas Company's actual capital structure.

*What long term and short term cost of debt should be used for determining MGE's rate of return?*

MGE witness Hanley proposes a long-term cost of debt of 6.08%.<sup>55</sup> He arrived at that by looking at Securities and Exchange Commission filings of the proxy group companies, and calculating a composite interest rate of 5.93%.<sup>56</sup> He then added 15 basis points for cost of issuance.<sup>57</sup>

Hanley estimated a short-term debt cost of 4.92% for the proxy group.<sup>58</sup> He did so by using an average for the forecast rates for the three-month LIBOR (London Inter-Bank Offer Rate) from Blue Chip Financial Forecasts for the six quarters ending with the second quarter of 2010. That rate is 1.42%. Then, he added 250 basis points plus an up front fee of 100 basis points to arrive at 4.92%.<sup>59</sup> To estimate MGE's cost of short-term debt, Hanley added yet another 100 basis points, due to MGE being at the bottom of investment grade.<sup>60</sup> According to Standard and Poor's, MGE's BBB minus credit rating is one notch lower than the average credit rating of Hanley's proxy group, as well as that of the other two rate of return analysts in this case.<sup>61</sup> Hanley later updated his projection of MGE's short-term interest rate to be 5.492%.<sup>62</sup>

Staff used the average long-term debt cost of its proxy group in calculating the hypothetical cost of long-term debt and included a 10%

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<sup>54</sup> See *OPC v. PSC*, 293 S.W. 3d at 84.

<sup>55</sup> Hanley Direct, Ex. 13, p. 23.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id. at 24.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Hanley Rebuttal, Ex. 14, Sch. FJH-21, pp. 16, 35; Staff Cost of Service Report, Ex. 39, p. 31; Murray Rebuttal, Ex. 57, p. 13; Lawton Surrebuttal, Ex. 71, p. 7 (stating that removing the three companies in Lawton's proxy group that are not in Hanley's proxy group would not change Lawton's analysis).

<sup>62</sup> Hanley Surrebuttal, Ex. 15, p. 12.



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

259

gross-up to reflect issuance costs.<sup>63</sup> Staff's trued-up figure is 5.89%, which is not very far removed from MGE's figure of 6.00% and OPC's figure of 6.25%.<sup>64</sup> For short-term debt, information from all of the proxies was not readily available. Consequently, Staff used figures for two of the comparable companies which had credit ratings equal to the average credit ratings of the proxy group as a whole.<sup>65</sup> Staff's trued-up result, 0.94%, is significantly different from the figures endorsed by MGE and OPC, which are 5.42% and 4.367%, respectively.

OPC witness Lawton proposes using actual costs of debt, which are 6.258% for long-term, and 5.920 for short-term.<sup>66</sup>

### **Findings of Fact**

16. The Commission has already determined that MGE's actual capital structure should be used to set rates based upon the persuasive testimony of OPC witness Lawton.

17. Likewise, the Commission also finds Lawton's testimony of basing MGE's cost of debt upon actual capital structure to be the most persuasive.

18. The long-term cost of debt is 6.258%, and the short-term cost of debt is 5.92%.<sup>67</sup>

19. MGE's actual long-term debt of 6.258% is similar to the 6.08% recommended by MGE,<sup>68</sup> and the approximately 6% cost Staff said actual long-term debt cost should be.<sup>69</sup>

20. The actual short-term cost of debt is 5.92%, which is similar to the 5.492% figure sponsored by MGE.<sup>70</sup>

21. Staff's recommendation of short-term debt of approximately 1% is based upon the premise that MGE would continue to be able to issue commercial paper.<sup>71</sup>

22. This is not true, as MGE's credit facilities are about to expire, and Hanley's testimony that MGE will be unable to continue to issue commercial paper due to being at the bottom of the investment

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<sup>63</sup> Staff Cost of Service Report, Ex. 39, pp. 29-30.

<sup>64</sup> Murray True-Up Direct, Ex. 111, pp. 3-4.

<sup>65</sup> Staff Cost of Service Report, Ex. 39, pp. 30-31.

<sup>66</sup> Lawton Direct, Ex. 69, p. 47ff.

<sup>67</sup> Lawton Direct, Ex. 69, pp. 47, 51.

<sup>68</sup> Hanley Direct, Ex. 13, p. 23.

<sup>69</sup> Murray, Tr. Vol. 9, pp. 220-221.

<sup>70</sup> Hanley Surrebuttal, Ex. 15, p. 12.

<sup>71</sup> Murray True-Up Direct, Ex. 111, p. 4.

## MISSOURI GAS ENERGY

260

19 Mo. P.S.C. 3d

grade category is persuasive.<sup>72</sup>

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

The long-term cost of debt is 6.258%, and the short-term cost of debt is 5.92%, based on actual costs.

*Return on Common Equity: What return on common equity should be used for determining MGE's rate of return?*

### **Discussion**

Determining an appropriate return on equity is without a doubt the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine because their rate of return is specified within the instruments that create them. In contrast, determining a return on equity requires speculation about the desires and requirements of investors when they choose to invest their money in MGE rather than elsewhere.

For additional guidance on exactly where the Commission should set MGE's return on equity, the Commission must turn to the expert advice offered by financial analysts. This "is an area of ratemaking in which agencies welcome expert testimony and yet must often make difficult choices between conflicting testimony."<sup>73</sup>

MGE, Staff, and OPC sponsored financial analysts who recommended a return on equity in this case. Their recommended ROEs are: MGE – 10.5%, OPC – 9.50-10.50%, with a midpoint of 10%; Staff – 9.25-9.75%, with a midpoint of 9.50%.

Below is a summary of the testimony of the Return on Equity witnesses.

### **MGE**

Mr. Hanley began estimating an ROE for MGE by constructing a proxy group of similar companies. His criteria for inclusion in the proxy group was Local Distribution Companies that: 1) are in the ValueLine Natural Gas Utility Group (Standard Edition); 2) have Value Line five-year projections of growth rate in EPS; 3) have a Value Line beta; 4) have not cut or omitted their cash common stock dividends during the five calendar years ending in 2008; 5) derived 60% or more of

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<sup>72</sup> Hanley, Vol. 9, p. 192; see also Hanley Surrebuttal, Ex. 15, p. 11.

<sup>73</sup> L.S. Goodman, 1 The Process of Ratemaking, 606 (1998).

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

261

both net operating income and assets from regulated gas operations and 6) no public announcement of any merger or acquisition. Nine met the criteria.<sup>74</sup>

Before testifying about different models that can be applied to the proxy group to estimate the proper ROE for MGE, Mr. Hanley stated that all those models are based upon the Efficient Market Hypothesis (hereafter “EMH”). The components of the EMH are: 1) investors are rational and will invest in assets that give the highest expected return for a certain level of risk; 2) current market prices reflect all publicly available information; 3) today’s market returns are unrelated to yesterdays’, as that information has already been processed; 4) markets follow a random walk, that is, the probability distribution of expected returns approximates a bell curve.<sup>75</sup> Mr. Hanley then posited that no one method gives the necessary level of precision needed, but that each method gives useful evidence to facilitate the exercise of an informed judgment.<sup>76</sup>

One method Mr. Hanley used is the Discounted Cash Flow (hereafter “DCF”) method. It is based upon finding the present value of an expected future stream of net cash flows during the holding period discounted at the cost of capital. An investor buys stock for an expected total return rate to come from cash flows in the form of dividends plus appreciation in market price.<sup>77</sup> His analysis using DCF was a range of 7.93 to 11.62%.<sup>78</sup>

Mr. Hanley further used a Risk Premium Model (hereafter “RPM”). The RPM is based upon the theory that the cost of common equity is equal to the expected cost rate for long-term debt plus a premium to compensate shareholders for the added risk of being unsecured creditors and last in line to claim the corporation’s assets and earnings.<sup>79</sup>

Mr. Hanley concluded that the proxy group could expect bond yields of 6.89%, and that Southern Union Gas could expect bond

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<sup>74</sup> Hanley Direct, Ex. 13, p. 17.

<sup>75</sup> *Id.* at 25.

<sup>76</sup> *Id.* at 30.

<sup>77</sup> *Id.* at 32.

<sup>78</sup> *Id.* at 40.

<sup>79</sup> *Id.* at 44.

## MISSOURI GAS ENERGY

262

19 Mo. P.S.C. 3d

yields of 7.09%.<sup>80</sup> The average risk premiums, based on two different historical equity risk premium studies, would be 5.47% applicable to the proxy group and 7.41% applicable to Southern Union Gas.<sup>81</sup> Adding the two together, Mr. Hanley's RPM analysis is that the ROE should be 12.36% for the proxy group and 14.50% for Southern Union Gas.<sup>82</sup>

Mr. Hanley then uses a Capital Asset Pricing Model (hereafter "CAPM"). Briefly, that model applies a risk-free rate of return to a market risk premium.<sup>83</sup>

He selects a risk-free rate of return of 3.38%. His risk-free rate of return is based upon average consensus forecast of reporting economists in the February 1, 2009 issue of Blue Chip Financial Forecasts for the yields on 30-year U.S. Treasury notes for the six quarters ending with the second calendar quarter 2010.<sup>84</sup>

Mr. Hanley arrived at a 10.77% market equity risk premium, working with long-term historical return rates from Morningstar, Inc, and using projected market returns from Value Line.<sup>85</sup> His average median CAPM and ECAPM<sup>86</sup> ROE rates applicable to the proxy group are 11.33%, and for Southern Union Gas, is 15.10%.

Mr. Hanley used a Comparable Earnings Method (hereafter "CEM") as well.<sup>87</sup> However, since his results showed an ROE of 22%, he excluded those results as being unreasonably high.<sup>88</sup>

In conclusion, Mr. Hanley arrived at an 11.25% ROE, based upon the midpoint of the lowest ROE of 9.82% and the highest ROE of 12.36% from the above-described studies, plus a 15 basis point adder in recognition of MGE's smaller size, and thus, higher risk, in relation to the proxy group.<sup>89</sup> He later amended his recommended ROE down to 10.5% to reflect recent changes in capital markets.<sup>90</sup>

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<sup>80</sup> *Id.* at 46.

<sup>81</sup> *Id.* at 47.

<sup>82</sup> *Id.* at 59.

<sup>83</sup> *Id.* at 60.

<sup>84</sup> *Id.* at 63.

<sup>85</sup> *Id.* at 65.

<sup>86</sup> Empirical Capital Asset Pricing Model, which is a formal recognition that the observed risk/return tradeoff is flatter than predicted by the CAPM.

<sup>87</sup> *Id.* at 67.

<sup>88</sup> *Id.* at 73.

<sup>89</sup> *Id.* at 75.

<sup>90</sup> Hanley Rebuttal, Ex. 14, at 3.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

263

### **Staff**

Mr. Murray used seven companies in his proxy group.<sup>91</sup> His criteria: 1) Edward Jones classification as a natural gas distribution company; 2) stock publicly traded; 3) information printed in Value Line; 4) ten-year of Value Line historical data available; 5) no reduced dividend since 2006 (eliminated one company); 6) projected growth available from Value Line and IBES (eliminated three companies); 7) at least investment grade.<sup>92</sup>

Mr. Murray calculated a DCF and a CAPM cost of common equity for each of the comparable companies.<sup>93</sup> First, he estimated a growth rate.<sup>94</sup> Then, he calculated an expected yield for each company in the proxy group.<sup>95</sup> Staff concluded that the proxy group's cost of common equity would be 9.25% to 10.25%.<sup>96</sup> But MGE's proxy group companies all have some non-regulated operations affecting their risk profiles, and MGE's Straight Fixed Variable rate design provides MGE with more stable cash flows. Thus, Mr. Murray believes the lower half of Staff's estimated ROE range, 9.25% to 9.75%, is more appropriate. He verified the reasonableness of that result by using the CAPM (Capital Asset Pricing Model).<sup>97</sup>

### **OPC**

As a precursor, Mr. Lawton notes that OPC opposes MGE's SFV rate design. But his testimony states what MGE's revenue requirement should be, assuming the Commission continues with the SFV. Mr. Lawton states that the SFV is a risk reduction to MGE, because it removes the weather-sensitive sales risk away from MGE, and shifts it to its ratepayers. As such, the Commission should reduce ROE by 50 basis points to account for that lessened risk.<sup>98</sup>

Before Mr. Lawton applied his DCF analysis to determine his recommended ROE, he, like Messrs. Hanley and Murphy, had to construct a proxy group. For his group, consisting of 12 companies, Mr. Lawton used the same group Mr. Hanley did, plus an additional three

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<sup>91</sup> Staff Cost of Service Report, Ex. 39, p. 29.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 31.

<sup>94</sup> *Id.* at 34.

<sup>95</sup> *Id.* at 36.

<sup>96</sup> *Id.* at 36.

<sup>97</sup> *Id.* at 37.

<sup>98</sup> Lawton Direct, Ex. 98, p. 11.

## MISSOURI GAS ENERGY

264

19 Mo. P.S.C. 3d

companies.<sup>99</sup>

Mr. Lawton arrived at a dividend yield of 4.66%, and median growth rates for MGE and the proxy group of 4.3% to 6.3%.<sup>100</sup> But relying on a combination of forecasted Earnings Per Share (hereafter "EPS") estimates and internal growth estimates, Mr. Lawton narrowed the estimated growth rate to 4.9% to 5.4%.<sup>101</sup> Using two different methods of DCF, Mr. Lawton arrived at an ROE range of 9.51%-10.04%, with 9.8% being the midpoint.<sup>102</sup>

Mr. Lawton also used two risk premium analyses. He discarded one analysis that found an estimated 12.3% ROE as too high, instead using a 3.7% risk premium and a BBB bond rate estimate of 6.8% to arrive at an ROE of 10.5%.<sup>103</sup> His CAPM analysis was also discarded, as it arrived at ROEs that were too low.<sup>104</sup> In summary, his range of ROEs is from 9.5% to 10.5%, the midpoint of which is 10%.

### **Findings of Fact**

#### **Witness qualifications**

23. MGE's main witness on this issue was Frank Hanley. Mr. Hanley has a Bachelor of Science degree from the College of Business Administration at Drexel University. He is currently director of AUS Consultants, and has appeared as a rate-of-return witness in over 300 proceedings.<sup>105</sup>

24. Staff witness David Murray earned a Bachelor of Science Degree in Business Administration from The University of Missouri - Columbia in May, 1995, and an MBA from Lincoln University in December 2003. He is the Acting Utility Regulatory Manager for the Staff of the Commission, having been employed with the Commission since 2000.<sup>106</sup>

25. OPC's cost of capital witness, Daniel Lawton, received a Bachelor of Arts Degree in Economics from Merrimack College, and a Masters of Arts Degree in Economics from Tufts University.<sup>107</sup>

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<sup>99</sup> *Id.* at 27.

<sup>100</sup> *Id.* at 31, 33.

<sup>101</sup> *Id.* at 34.

<sup>102</sup> *Id.* at 36.

<sup>103</sup> *Id.* at 38.

<sup>104</sup> *Id.* at 43.

<sup>105</sup> Hanley Direct, Ex. 13, App. A, pp. 1-3.

<sup>106</sup> Staff Cost of Service Report, Ex. 41, App. 1, p. 10.

<sup>107</sup> Lawton Direct, Ex. 69, Sch. DJL-1.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

265

### **OPC witness Lawton**

26. The Commission finds OPC witness Lawton's testimony the most persuasive on this issue.

27. Mr. Lawton explains in detail in his testimony how he employed a twelve company comparable group as a proxy.<sup>108</sup>

28. Mr. Lawton's proxy group of twelve is larger than Mr. Murray's proxy group of seven and Mr. Hanley's proxy group of nine.<sup>109</sup> Lawton's proxy group is 70% larger than Murray's proxy group, and 33% larger than Hanley's proxy group. Lawton's use of the largest proxy group in this case means that his proxy group is less vulnerable to selection bias and the averages derived from his group should more closely approximate the average of the group.<sup>110</sup>

29. Mr. Lawton performed four separate analyses using a Constant Growth Discounted Cash Flow (DCF) model, a Two-Stage DCF model, a Risk Premium model, and a Capital Asset Pricing Model (CAPM).<sup>111</sup>

30. The result of Mr. Lawton's analysis is a range of ROE for the comparable group of 9.5% to 10.5% with 10.0% as a midpoint and a reasonable estimate of MGE's equity costs.<sup>112</sup>

31. Mr. Lawton proposed a 50 basis point reduction in his ROE recommendation if the Commission authorizes a straight fixed variable (SFV) rate design for MGE. However, a majority of the companies in Mr. Lawton's proxy group have significant portions of their revenues either wholly or partially decoupled.<sup>113</sup> The Commission finds the decreased risk associated with having a SFV rate design is already accounted for in Mr. Lawton's return on equity calculation, and no additional adjustment is necessary.<sup>114</sup>

32. Even if a 50 basis point reduction were made to Mr. Lawton's recommended ROE range of 9.5 to 10.5%, an ROE of 10.0% would still be within the range he recommended as reasonable and

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<sup>108</sup> Lawton Direct, Ex. 69, p. 26.

<sup>109</sup> Hanley Direct, Ex. 13, p. 17; Staff Cost of Service Report, Ex. 39, p. 29; Lawton Direct, Ex. 69, p. 27.

<sup>110</sup> Lawton, Tr. Vol. 9, p. 340.

<sup>111</sup> Lawton Direct, Ex. 69, at 26-45.

<sup>112</sup> Lawton Direct, Ex. 69, p. 6.

<sup>113</sup> Hanley Rebuttal, Ex. 14, p. 10; Hanley Surrebuttal, Ex. 15, p. 4.

<sup>114</sup> *Id.*

MISSOURI GAS ENERGY

266

19 Mo. P.S.C. 3d

appropriate for MGE in this case.<sup>115</sup>

**MGE witness Hanley**

33. Mr. Hanley used three equity return models, and then eliminated one result and estimated a midpoint between the remaining results.<sup>116</sup>

34. Mr. Hanley's DCF analysis is consistent with Mr. Lawton's 10.0% recommendation.<sup>117</sup> However, Mr. Hanley applied an arbitrary adjustment to his Risk Premium Analysis. First, Mr. Hanley concluded that stockholders can expect to earn in each of the next three to five years an incredible 28.85%.<sup>118</sup> He then subtracts an estimate for corporate bond yields to conclude that the premium an equity investor demands to purchase equity rather than debt is an astounding 23.77%.<sup>119</sup> Rather than eliminate this obvious unreliable result, Mr. Hanley simply assigns an arbitrary weighting of 20% and includes 20% of the outlier in his analysis.<sup>120</sup>

35. Mr. Lawton testified in response to Mr. Hanley's Direct Testimony analysis that he is not aware of any regulatory authority in the United States that has relied on an equity risk premium at the levels proposed by Mr. Hanley.<sup>121</sup> Furthermore, Mr. Lawton is not aware of any investor services, analyst estimates, or any credible forecasting entity that is suggesting that investors will earn equity returns of 28.85% over the next three to five years.<sup>122</sup>

36. Mr. Hanley relies on his 28.85% estimate despite concluding in his CEM analysis that a 22.0% ROE result is beyond reasonable and must be excluded.<sup>123</sup> The result is that Mr. Hanley's risk premium analysis is substantially overstated and cannot be relied upon for establishing ROE for MGE.<sup>124</sup>

37. MGE's analysis cannot be supported as a sound basis

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<sup>115</sup> Lawton, Tr. Vol. 9, p. 320.

<sup>116</sup> Lawton Rebuttal, Ex. 70, p. 8.

<sup>117</sup> *Id.*

<sup>118</sup> Hanley Direct, Ex. 13, Sch. FJH-15, p. 6.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Lawton Rebuttal, Ex. 70, p. 10.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 10-11.

<sup>124</sup> *Id.*



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

267

for setting just and reasonable rates.<sup>125</sup>

38. Mr. Lawton corrected Mr. Hanley's analysis by removing the forecasted returns and the results explain why Mr. Hanley felt the need to apply arbitrary adjustments. Without the inflated forecasted returns, Mr. Hanley's DCF analysis yields a 9.20% ROE, his Risk Premium analysis yields a 10.18% ROE, and his CAPM analysis yields a 9.0%-9.5% ROE.<sup>126</sup>

39. The average of these three models is 9.5%, which is consistent with Mr. Lawton's analysis and the analysis performed by Staff witness Mr. David Murray.<sup>127</sup>

### **Staff witness Murray**

40. Mr. Murray recommends an ROE of 9.5%.<sup>128</sup>

41. Staff's study, based on a seven company proxy group, supports a common equity range of 9.25 to 10.25,<sup>129</sup> with a true midpoint of 9.75 percent.

42. While admitting that his comparable companies have decoupled rate designs, Mr. Murray nonetheless adopts the lower half of his ROE range for the stated reason that his proxy companies "all have at least some degree of non-regulated operations."<sup>130</sup>

43. Bond ratings are an excellent way to estimate equity risk between companies, because they are the result of a comprehensive analysis of all diversifiable investment risks.<sup>131</sup>

44. SUG's bond rating is Moody's Baa3, which is the bottom of investment grade.<sup>132</sup>

45. The proxy group bond rating is Baa1.<sup>133</sup>

46. The Commission finds that investing in SUG is thus riskier than investing in the proxy group, and investors in SUG would require a higher rate of return to compensate them for that increased risk. Ignoring the upper half of Staff's ROE range, as Staff proposed, runs counter to that increased risk.

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *Id.* at 7.

<sup>128</sup> Staff Cost of Service Report, Ex. 39, p. 36.

<sup>129</sup> *Id.* at 29, 31, 36.

<sup>130</sup> Hanley Rebuttal, Ex. 14, p. 39; Staff Report, Ex. 40, p. 36.

<sup>131</sup> Hanley Direct, Ex. 13, p. 15.

<sup>132</sup> *Id.* at 25, 46.

<sup>133</sup> *Id.* at 28, 45.

## MISSOURI GAS ENERGY

268

19 Mo. P.S.C. 3d

47. Further, MGE also engages in unrelated operations, with significant earnings in 2007 and 2008 coming from capacity release and off-system sales transactions. The average of Staff's seven proxy companies had 73.45% of net operating income in 2008 derived from gas distribution operations, with an average of 82.87% of total assets being devoted to gas distribution operations. It is clear that investors consider these companies to be gas distribution utilities and that the use of the lower half of Mr. Murray's recommended ROE range is without justification.<sup>134</sup>

### **Discounted Cash Flow**

48. Both MGE witness Hanley and OPC witness Lawton used semi-annual DCF calculations.<sup>135</sup>

49. Murray used annual DCF calculations.<sup>136</sup>

50. Utilities pay dividends quarterly, and MGE is no exception.<sup>137</sup>

51. The Commission finds that the semi-annual DCF model recommended by Hanley and Lawton more closely approximates the returns actually expected by utility investors than the annual DCF calculation of Murray.

### **Concentration of Return on Equity evidence near 10.0%**

52. Hanley's DCF rates have a median of 9.82%, which Staff conceded is a reasonable ROE estimate.<sup>138</sup> His total market equity risk premium was 9.71%.<sup>139</sup> His median CAPM result is 10.44%.<sup>140</sup>

53. Correcting Murray's growth rates by using the range of growth rates indicated in Staff's schedules, Murray's DCF would be 10.07%.<sup>141</sup>

54. If Staff's theory of the proxy group's ROE needing reduction due to the group's non-regulated operations is ignored, and the upper half of Staff's ROE range is included, then Staff's recommended

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<sup>134</sup> Hanley Rebuttal, Ex. 14, pp. 39-40.

<sup>135</sup> Hanley Direct, Ex. 13, p. 41; Hanley, Tr. Vol. 9, p. 179; Lawton Direct, Ex. 69, p. 33; Sch. DJL-7.

<sup>136</sup> Staff Cost of Service Report, Ex. 39, p. 35; Murray, Tr. Vol. 9, pp. 297-98.

<sup>137</sup> Hanley, Tr. Vol. 9, p. 179; Murray, Tr. Vol. 9, pp. 296-98.

<sup>138</sup> Hanley Direct, Ex. 13, p. 40; Murray Rebuttal, Ex. 57, p. 2, 19.

<sup>139</sup> Hanley Direct, Ex. 13, p. 49.

<sup>140</sup> Hanley Rebuttal, Ex. 14, p. 44.

<sup>141</sup> *Id.*; Ex. 41, Staff Cost of Service Report Appendices, Sch. 11-1, 11-2, 11-3, 12 and 13 of App. 2.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

269

ROE range is 9.25-10.25%, with a midpoint of 9.75%.<sup>142</sup>

55. Lawton's constant growth DCF has a range of 9.82-10.04%, his non-constant growth has a range of 9.51-9.53%, and the total range of 9.51-10.04% has a midpoint of 9.8%.<sup>143</sup>

56. Using a risk premium of 3.89% based on historical risk premium calculations, instead of Hanley's 4.66% based on a less reliable estimated risk premium calculations, Lawton arrived at an ROE of 10.17%.<sup>144</sup>

57. A Goldman Sachs report, which Staff said the Commission could rely upon, estimated an ROE of 10-10.5%.<sup>145</sup>

58. Without the inflated forecasted returns, Mr. Hanley's Risk Premium analysis yields a 10.18% ROE.<sup>146</sup>

59. If the Commission were to average Mr. Murray's 9.5% recommendation, Lawton's 10.0% recommendation, and Hanley's revised 10.5% recommendation, the average of these recommendations would be 10.0%.

60. The average ROE for natural gas companies for the most recent three-month period for which data was available was 10.11%.<sup>147</sup>

61. The Commission finds the zone of reasonableness is from 9.11 to 11.11%, with 10.11% being the midpoint.

### **Conclusions of Law**

The Commission must estimate the cost of common equity capital. This is a difficult task, as academic commentators have recognized.<sup>148</sup> The United States Supreme Court, in two frequently cited decisions, has established the constitutional parameters that must guide the Commission in its task.<sup>149</sup> In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

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<sup>142</sup> Staff Cost of Service Report, Ex. 39, p. 36.

<sup>143</sup> Lawton Direct, Ex. 69, p. 36.

<sup>144</sup> Lawton Surrebuttal, Ex. 71, p. 6.

<sup>145</sup> Murray, Tr. Vol. 9, pp. 226-28.

<sup>146</sup> Lawton Surrebuttal, Ex. 71, p. 6; Sch. DJL-2SR.

<sup>147</sup> Regulatory Research Associates Regulatory Focus, Ex. 96, p. 2.

<sup>148</sup> C.F. Phillips, Jr., *The Regulation of Public Utilities*, 390 (1993); Goodman, 1 *The Process of Ratemaking*, supra, at 606.

<sup>149</sup> *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

## MISSOURI GAS ENERGY

270

19 Mo. P.S.C. 3d

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>150</sup>

In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.<sup>151</sup>

The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.<sup>152</sup>

The Commission must draw primary guidance in the

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<sup>150</sup> *Bluefield, supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

<sup>151</sup> *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

<sup>152</sup> *Hope Nat. Gas Co., supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

271

evaluation of the expert testimony from the Supreme Court's *Hope* and *Bluefield* decisions. Pursuant to those decisions, returns for MGE's shareholders must be commensurate with returns in other enterprises with corresponding risks. Just and reasonable rates must include revenue sufficient to cover operating expenses, service debt and pay a dividend commensurate with the risk involved. The language of *Hope* and *Bluefield* unmistakably requires a *comparative method*, based on a quantification of risk.

Investor expectations of MGE are not the sole determiners of ROE under *Hope* and *Bluefield*; we must also look to the performance of other companies that are similar to MGE in terms of risk. *Hope* and *Bluefield* also expressly refer to objective measures. The allowed return must be sufficient to ensure confidence in the financial integrity of the company in order to maintain its credit and attract necessary capital. By referring to confidence, the Court again emphasized risk.

The Commission cannot simply find a rate of return on equity that is "correct"; a "correct" rate does not exist. However, there are some numbers that the Commission can use as guideposts in establishing an appropriate return on equity. In a recent Report and Order concerning MGE itself, the Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average."<sup>153</sup> Nevertheless, the national average is an indicator of the capital market in which MGE will have to compete for necessary capital.

That "zone of reasonableness" extends from 100 basis points above to 100 basis points below the recent national average of awarded ROEs. Because the evidence shows the recent national average ROE for gas utilities is 10.11%, that "zone of reasonableness" for this case is 9.11% to 11.11%. The Commission has wide latitude in setting an ROE within the zone of reasonableness.<sup>154</sup> The zone of reasonableness is simply a tool to help the Commission to evaluate the recommendations offered by various rate of return experts. It should not be taken as an absolute rule that would preclude consideration of recommendations that

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<sup>153</sup> *In re Missouri Gas Energy*, 12 Mo.P.S.C.3d 581, 593 (Report and Order issued September 21, 2004).

<sup>154</sup> *State ex. rel. Public Counsel*, 274 S.W.3d at 574 (citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968))("courts are without authority to set aside any rate selected by the Commission [that] is within a 'zone of reasonableness'")(emphasis supplied).

## MISSOURI GAS ENERGY

272

19 Mo. P.S.C. 3d

fall outside that zone.

### **Decision**

The Commission finds that the appropriate return on common equity is 10.0%.

### **Rate Design**

*What rate design should the Commission adopt for the residential customer class?*

*What rate design should the Commission adopt for the small general service customer class?*

The rates that MGE will be allowed to charge its customers are based on a determination of the company's revenue requirement. The Commission has resolved issues regarding revenue requirement. Now, what remains is what class of customers must pay what share of that revenue requirement.

This is a zero-sum game. If the Commission wants to remove a dollar's worth of revenue requirement responsibility from one customer class, it must assign that dollar to another customer class to keep revenue requirement the same.

### **Straight Fixed Variable**

Under a traditional ratemaking scheme, a customer's bill would have two main components: a "fixed" charge, which a customer must pay even if he or she uses none of the utility's commodity; and a "volumetric" charge, which varies with the use of the commodity.

MGE and Staff wish to continue the SFV for the residential class, expand the Small General Service (SGS) class to include more customers, and also have a SFV for the SGS class. OPC opposes SFV, wanting the Commission to return to a more traditional, volumetric rate design. In particular, OPC proposed for MGE to collect 55% of residential revenue through a monthly customer charge, and for MGE to collect 45% of residential revenue through a uniform volumetric rate.<sup>155</sup>

### **Findings of Fact**

#### **Witness qualifications**

62. Dr. Thompson holds a Ph.D. in economics from The

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<sup>155</sup> Meisenheimer Rebuttal, Ex. 73, p. 7.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

273

University of Arizona.<sup>156</sup> He was a public utility economist with The Office of Public Counsel. Dr. Thompson has been a professor of economics at The University of Missouri-Rolla, Central Michigan University, and, currently, is an Assistant Professor of Economics at Western Washington University.<sup>157</sup>

63. Mr. Feingold holds a baccalaureate degree in electrical engineering from Washington University in St. Louis, and a Master of Science degree in financial management from Polytechnic University of New York.<sup>158</sup> Mr. Feingold has over 33 years' experience in the utility industry, and is currently a Vice President at Black & Veatch, an engineering firm.<sup>159</sup>

64. Ms. Meisenheimer holds a Bachelor of Science degree in mathematics from The University of Missouri-Columbia, and has completed the comprehensive exams for a Ph.D. in economics, also at The University of Missouri-Columbia.<sup>160</sup> In addition to being employed as an economist for The Office of The Public Counsel, she also has taught at The University of Missouri-Columbia, William Woods University, and Lincoln University.<sup>161</sup>

65. Ms. Ross holds both a Bachelor of Science and Master of Science degree in business administration from The University of Missouri-Columbia. She has been a regulatory economist for the Commission's Staff for 20 years.<sup>162</sup>

66. Mr. Kind holds both bachelor and master's degrees in economics from The University of Missouri-Columbia.<sup>163</sup>

67. Mr. Buchanan holds a baccalaureate degree in political science from Columbia College, and a master of science in public administration from The University of Missouri.<sup>164</sup> He has worked for DNR for almost 30 years, and is currently a Senior Planner in DNR's Energy Policy and Planning Program.<sup>165</sup>

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<sup>156</sup> Thompson Rebuttal, Ex. 36, p. 1.

<sup>157</sup> *Id.*

<sup>158</sup> Feingold Direct, Ex. 7, Sch. RAF-1.

<sup>159</sup> *Id.* at 1.

<sup>160</sup> Meisenheimer Direct, Ex. 72, p. 2.

<sup>161</sup> *Id.*

<sup>162</sup> Staff's Cost of Service Report, Ex. 41, App. 1, p. 19.

<sup>163</sup> Kind Direct, Ex. 75, p. 1.

<sup>164</sup> Buchanan Direct, Ex. 87, p. 3.

<sup>165</sup> *Id.* at 2.

## MISSOURI GAS ENERGY

274

19 Mo. P.S.C. 3d

68. Dr. Warren has a bachelor of arts and a master of arts in economics from The University of Missouri-Columbia. He also holds a Ph.D. in economics from Texas A&M University.<sup>166</sup> Dr. Warren has been an economist for the Commission's Staff since 1992.<sup>167</sup>

### **Straight Fixed Variable Rate Design**

69. The Commission finds that it should adopt the Straight Fixed Variable rate design for both the Residential and the Small General Service (SGS) customer classes. This finding is based upon the Commission's determination regarding Energy Efficiency issues addressed *infra*.

70. The term Straight Fixed Variable (or SFV) rate design applies to the customer's total bill. The fixed component of SFV is the non-gas, or margin costs. They are collected in a flat delivery charge, and customers pay for each unit of gas they use through the PGA (Purchased Gas Adjustment) charge. The variable component of SFV is the charge for the gas itself.<sup>168</sup>

71. There is only one level of service for residential customers – access to the natural gas distribution system. This service allows a residential customer to consume the amount of natural gas they wish and to consume it whenever they wish. With access to the system comes the billing and customer service for the commodity. The factor that differs among Residential customers is the actual amount of gas used, and the charge for that is collected in the variable portion (V) of SFV, which is the amount of gas the customer consumes.<sup>169</sup>

**Straight Fixed Variable rate design best reflects the actual costs customers impose upon MGE's system.**

72. The cost to provide distribution service to customers within these homogeneous customer classes does not vary based on the size of the customer's load.<sup>170</sup>

73. To the contrary, the minimum installed size of distribution main will serve over 99 percent of the Company's residential customers taking into account the average density of the Company's gas distribution system, its standard operating pressures, and the design day

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<sup>166</sup> Staff's Cost of Service Report, Ex. 41, App. 1, p. 25.

<sup>167</sup> *Id.*

<sup>168</sup> Ross Rebuttal, Ex. 63, p. 3.

<sup>169</sup> *Id.*

<sup>170</sup> Staff Class Cost of Service Report, Ex. 43, p. 10.



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

275

load characteristics of the customers served under the RS rate class.<sup>171</sup>

74. MGE's costs to serve any two Residential customers are driven by factors other than customer size, such as distance from the transmission pipeline, customer density in the area, terrain in the customers' geographical area, or the exact age and depreciated cost of the equipment serving the customer.<sup>172</sup>

75. A major goal in establishing reasonably homogenous classes is to limit both inter and intra-class subsidies.<sup>173</sup>

76. Similarly, the Company's cost of gas delivery service is the same for customers in the SGS class.<sup>174</sup>

77. A two-inch main, the smallest size of main used by MGE, will serve 99 percent of the customers served under its new SGS rate class.<sup>175</sup>

78. SFV rates are intended to recover fixed costs through fixed charges and variable costs (i.e., the cost of the gas commodity) through variable charges. Accordingly, SFV rates properly reflect the nature of the costs incurred by MGE to serve its RS and SGS customers. Very simply, if a customer uses one cubic foot of gas or 13.2 Mcf per day (the design day capacity per customer for a two inch main on the Company's gas system), there is no difference in the cost of delivery service, on average, within the Residential or SGS rate classes.<sup>176</sup>

### **SFV Rate Design Reduces Spikes in Winter Bills and Moderates Bill Fluctuations Throughout the Year.**

79. Under the traditional rate design advocated by OPC, when the weather is colder, two components of a customer's bill – the margin piece and the cost of the gas itself – will combine to sharply increase a residential customer's bill. Conversely when it is warmer than expected, a customer can expect a lower bill.<sup>177</sup>

80. In support of how SFV rate design stabilizes both customers' bills and Residential class revenue, Staff witness Ross persuasively cites the example of calendar year 2008. Because the

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<sup>171</sup> Feingold Rebuttal, Ex. 8, p. 5.

<sup>172</sup> Staff Class Cost of Service Report, Ex. 43, p. 10.

<sup>173</sup> Ross Surrebuttal, Ex. 64, p. 2.

<sup>174</sup> Staff Class Cost of Service Report, Ex. 43, p. 14.

<sup>175</sup> Feingold Direct, Ex. 7, p. 21.

<sup>176</sup> Feingold Surrebuttal, Ex. 9, pp. 5-6; Meisenheimer, Tr. Vol. 9, pp. 441-445.

<sup>177</sup> Ross Rebuttal, Ex. 63, p. 8.

## MISSOURI GAS ENERGY

276

19 Mo. P.S.C. 3d

weather was colder than normal in calendar year 2008, the aggregate group of MGE residential customers paid nearly \$2,205,000 less with SFV than they would have paid under traditional rate design.<sup>178</sup>

81. While OPC used the table to support a claim that customers paid \$18,000,000 more under the SFV rate design, that number was calculated by including 14 non-winter months and only 7 winter months in OPC's analysis.<sup>179</sup> Thus, the analysis was skewed to include two heating seasons by covering 21 months.<sup>180</sup>

82. The \$2.2 million savings referenced in Ross' rebuttal testimony reflects the 12-month test year.<sup>181</sup>

83. During colder than normal weather, the customers would have overpaid the utility's cost of service under OPC's traditional rate design because they would have paid an additional charge for each unit of gas.<sup>182</sup>

84. The other component of the customer's bill – the charge for actual gas used – was the same for Residential customers under the SFV rate design as it would have been under the traditional rate design.<sup>183</sup>

85. To demonstrate the benefits of its levelized fixed-delivery charge, MGE conducted a study of revenues over the past nine (9) winter months (November 2007 through March 2008 and November 2008 through February 2009).<sup>184</sup>

86. That study compares the monthly gas bills of residential customers under the SFV rate design to bills that would have been collected under the previous volumetric rate design recomputed at MGE's revenue level approved in its last rate case.<sup>185</sup>

87. Over the last nine (9) month winter periods, each residential customer saved on average about \$81.00 under the SFV rate design compared to the amount they would have been billed under a volumetric rate design proposed by Public Counsel.<sup>186</sup>

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<sup>178</sup> Ross Rebuttal, Ex. 63, p. 9.

<sup>179</sup> Id.

<sup>180</sup> Id.

<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Id.

<sup>184</sup> Feingold Direct, Ex. 7, pp. 16-17; Sch. RAF-6.

<sup>185</sup> Id.

<sup>186</sup> Id.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

277

88. In short, the SFV rate design provides revenue stability for both customers and the company.<sup>187</sup>

89. What is more, with SFV, roughly 57% of MGE's residential ratepayers should have bills that are as low, or even lower, than they would have been under a traditional rate design.<sup>188</sup> In other words, the majority of MGE's residential ratepayers will be either no worse off or better off under SFV.

### **SFV Rates Represent Economically Efficient Pricing.**

90. When customers lower gas usage, they directly lower the largest portion of their gas bill because 70 to 75% of the customer's bill is for the amount of gas used.<sup>189</sup>

91. With an SFV rate design, the fixed cost component of the rate structure does not change with use.<sup>190</sup>

92. The variable cost component of the rate structure consists of MGE's commodity charge that comprises over 70% of the typical residential bill.<sup>191</sup>

93. This component of the SFV rate design causes bills to increase as use increases.<sup>192</sup>

94. Therefore, it is simply incorrect to conclude that more gas use does not collect more revenue from a customer under an SFV rate design. Customers' bills increase with use based on the variable cost component, which is the cost of gas. Straight Fixed Variable has exactly the efficiency properties required by economic theory since fixed costs have no impact on marginal costs.<sup>193</sup>

### **SFV Rate Design Simplifies Customers' Bills.**

95. The gas bill contains only two parts: (1) the fixed monthly delivery charge and (2) the amount charged for the cost of gas used.<sup>194</sup>

96. The fixed monthly delivery charge component informs the customer of the fixed costs associated with connecting them to the

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<sup>187</sup> *Id.*

<sup>188</sup> Noack, Tr. Vol. 15, pp. 1162-1167.

<sup>189</sup> Ross Rebuttal, Ex. 63, p. 4.; Noack, Tr. Vol. 12, p. 729.

<sup>190</sup> Feingold Surrebuttal, Ex. 9, p. 4.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 4-5.

<sup>194</sup> Staff Class Cost of Service and Rate Design Report, Ex. 43, p. 10.

## MISSOURI GAS ENERGY

278

19 Mo. P.S.C. 3d

distribution network to receive natural gas service.<sup>195</sup>

97. The PGA (Purchased Gas Adjustment), on the other hand, which represents the great majority of a typical residential customer's annual gas bill, is a direct dollar-for-dollar pass-through of the cost of the gas consumed by the customer.<sup>196</sup>

98. A pricing structure of this nature is simple, direct and easy for the Company and the Commission's Customer Service Department to explain.<sup>197</sup>

### **SFV Rate Design Stabilizes MGE's Revenues.**

99. SFV rates provide the Company with a more predictable and reliable revenue stream. Fixed distribution costs are recovered evenly throughout the year and recovery of those costs are not subject to the vagaries of weather.<sup>198</sup>

100. This allows the Company to better position itself to cover its costs of operation and to earn its authorized rate of return.<sup>199</sup>

101. But even with SFV rates, there is no certainty of revenue for the utility. For example, there is no guarantee under SFV that MGE's customer numbers will not decline, or that bad debts will not increase during a time of economic hardship. Moreover, MGE will continue to face pressure on earnings in the form of cost increases, infrastructure investments and an aging workforce.<sup>200</sup>

102. Public Counsel's position of wanting a more traditional rate design is grounded on the assumption that higher income households are, on average, higher users of natural gas.<sup>201</sup>

103. But the income-consumption relationship for MGE's customers is "U"-shaped; that is, usage may be high at low income levels and fall as income increases, but then reaches a minimum and begins to climb again after a certain income level. Imagining a graph with income on the horizontal axis and monthly usage per customer on the vertical, the relationship described would have a "U"-shape.<sup>202</sup>

104. The income-consumption relationship becomes

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<sup>195</sup> *Id.* at 11-13.

<sup>196</sup> *Id.* at 4.

<sup>197</sup> Ross, Tr. Vol. 13, p. 900.

<sup>198</sup> Ross Rebuttal, Ex. 63, pp. 8-9.

<sup>199</sup> Hack Rebuttal, Ex. 11, p. 2.

<sup>200</sup> Feingold Rebuttal Ex. 8, p. 11.

<sup>201</sup> Meisenheimer, Tr. Vol. 10, pp. 464-65.

<sup>202</sup> Thompson Rebuttal, Ex. 36, p. 5, 13.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

279

positively correlated at higher income levels, but usage at the lowest income levels is greater than the overall average usage.<sup>203</sup>

105. Nothing indicates that low-income customers as a group use a lower than average quantity of natural gas.<sup>204</sup>

106. A volumetric charge would likely have a regressive impact on low income customers because low income customers in MGE's service territory consume higher than average volumes.<sup>205</sup>

107. Such a volumetric charge would not reflect the true costs of serving that class, and would also recreate intra-class subsidies that existed within the residential class.<sup>206</sup>

108. This conclusion is supported by an analysis of those MGE customers who receive low income energy assistance. Approximately 82 percent of the MGE customers who received energy assistance would experience higher winter bills under Public Counsel's volumetric-based rate design proposal than they would under the current SFV charges.<sup>207</sup>

109. This is in line with the theory that traditional rate design harms those unable, as opposed to unwilling, to make their residences more energy efficient, such as the elderly, disabled, and those unable to afford their own homes.<sup>208</sup>

110. Public Counsel's reliance on nationally and regionally aggregated data is less persuasive than MGE's reliance on a study of its own service territory.

111. The U.S. Department of Energy Residential Energy Consumption Surveys are compilations of nationwide household usage data.<sup>209</sup> So, too, is the LIHEAP Home Energy Notebook.<sup>210</sup>

112. Even the regionally aggregated data has Missouri lumped together with much more northern states, including North Dakota.<sup>211</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> Thompson Rebuttal, Ex. 36, Sch. PBT-3, p. 8.

<sup>205</sup> *Id.* at 16.

<sup>206</sup> Feingold Rebuttal, Ex. 8, p. 3, 24; Staff Report - Class Cost of Service and Rate Design, Ex. 43, p. 13.

<sup>207</sup> Thompson Rebuttal, Ex. 36, pp. 16-17.

<sup>208</sup> Ross Rebuttal, Ex. 63, p. 12.

<sup>209</sup> Meisenheimer, Tr. Vol. 9, p. 471.

<sup>210</sup> *Id.* at 472.

<sup>211</sup> *Id.* at 473.

**State Energy Policy Strongly Favors Revenue Decoupling Rate Designs.**

113. In 2001, the Commission established a Natural Gas Commodity Price Task Force to investigate the process for recovery of natural gas commodity cost increases by LDCs.<sup>212</sup>

114. The members of the 2001 Task Force, *which included Public Counsel*, issued a Final Report in August of 2001 including a recommendation that there be a “redesign of base rates for fixed (non-commodity related) distribution charges placing more or all costs in a monthly service charge and less or none in the commodity charge.”<sup>213</sup>

115. The Final Report also observed that an LDC “may have little incentive to facilitate programs designed to reduce energy use because in doing so the LDC may be reducing its revenue base.”<sup>214</sup>

116. Thus, the Task Force recognized that a revenue decoupling rate design is an essential component of meaningful natural gas conservation policy.<sup>215</sup>

117. Again, in 2004, the Commission established a Cold Weather Rule and Long-Term Energy Affordability Task Force to examine “possible programs to improve long-term energy affordability for persons who need help with their utility bills.”<sup>216</sup>

118. Members of the Task Force, *which included Public Counsel*, issued a Final Report that included the recommendation that the Commission consider implementing “rate designs that remove disincentives for utilities to pursue programs aimed at reducing usage” as part of the objective to improve long-term energy affordability.<sup>217</sup>

**MGE’s Proposed SGS and LGS Class Restructuring**

119. MGE will restructure the SGS class from customers whose usage does not exceed 10K Ccfs in any one month to a new SGS class where usage is less than 10K Ccfs annually.<sup>218</sup>

120. The proposed SGS class requirements provide a more homogenous customer class. Load size is not the cost driver in the

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<sup>212</sup> Commission File No. GW-2001-398.

<sup>213</sup> Hack Rebuttal, Ex. 11, p. 4.

<sup>214</sup> *Id.* at 4-5.

<sup>215</sup> Hack Rebuttal, Ex. 11, p. 3, at Sch. RJH-2.

<sup>216</sup> Commission File No. GW-2004-0452.

<sup>217</sup> Hack Rebuttal, Ex. 11, p. 4, Sch. RJH-3.

<sup>218</sup> Staff Class Cost of Service Report, Ex. 43, p. 13.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

281

restructured SGS class.<sup>219</sup>

121. The average residential customer buys approximately 800-825 Ccf/year and the average new SGS class customer buys 114 Ccf/month or 1362 Ccf/year.<sup>220</sup>

122. Residential and new SGS customer class usage levels, in contrast to the LGS class, are far below the LGS usage levels of 22,118 Ccf/year or 1.843 Ccf/month.<sup>221</sup>

123. MGE installs the same size meter, regulator service line, and distribution main to serve virtually all SGS customers regardless of the monthly or annual volume of gas they use. The same situation exists for the Company's residential customers. This means that the size of the delivery service facilities is independent of gas volume and should, by Public Counsel's own standard, be recovered through an SFV rate structure.<sup>222</sup>

### **Conclusions of Law**

MGE has the burden of proof to show that its proposed tariffs are just and reasonable, *including* the reasonableness of its rate design.<sup>223</sup> Just because a company derives a higher rate of return from one class than another does not necessarily render those rates unjust or unreasonable.<sup>224</sup>

Class cost of service is often considered but a starting point in quantifying what part of the revenue responsibility is afforded to each customer class.<sup>225</sup> Indeed, class costs of service studies are often considered more art than science.<sup>226</sup> Other factors should be considered

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<sup>219</sup> *Id.* at p. 14.

<sup>220</sup> Feingold Direct, Ex. 7, Sch. RAF-1, pp. 1-4; Noack cross, Tr. Vol. 15, pp. 1162-67.

<sup>221</sup> Feingold Direct, Ex. 7, Sch. RAF-7, pp. 7-8.

<sup>222</sup> Feingold Rebuttal, Ex. 8, p.7.

<sup>223</sup> See, e.g., *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791 (Mo. 1986) "Laclede filed the tariffs here in question using the existing rate design. In the suspension order and notice of proceedings dated January 18, 1983, the Commission noted that the Company bore the burden of proof before the Commission and ordered the Company 'to provide evidence and argument sufficient for the Commission to determine . . . the reasonableness of the Company's rate design.'" *Id.* at 795. See also *In re Empire District Electric Company*, Commission Case No. ER-2004-0570, Report and Order (March 10, 2005).

<sup>224</sup> *Midwest Gas Users Ass'n v. Kansas SCC*, 595 P.2d 735, 747 (Kan. App. 1979).

<sup>225</sup> *Shepherd v. City of Wentzville*, 645 S.W.2d 130, 133 (Mo. App. 1982)

<sup>226</sup> *Associated Natural Gas Co.*, 706 S.W.2d at 880 (*citing United States v. Federal Communications Commission*, 707 F.2d 610, 618 (D.C.Cir. 1983).

## MISSOURI GAS ENERGY

282

19 Mo. P.S.C. 3d

when establishing rates.<sup>227</sup> It is up to the Commission to evaluate the testimony of expert witnesses and accept or reject any or all of any witness's testimony.<sup>228</sup>

The Energy Independence and Security Act of 2007 addresses revenue decoupling in conjunction with its directive that utilities develop energy efficiency programs. Section 532(b)(6)(A) of that law states that "the rates allowed to be charged by a natural gas utility shall align utility incentives with the deployment of cost-effective energy efficiency."<sup>229</sup>

In addition, the Act further directs each state utility regulatory authority to consider "separating fixed cost recovery from the volume of transportation or sales service provided to the customer."<sup>230</sup> Also, the Act orders the authority to consider providing utilities incentives for the success management of energy efficiency, and to consider adopting rate designs that encourage energy efficiency.<sup>231</sup>

In deciding whether to approve a Straight Fixed Variable rate design, some factors the Commission should consider are: 1) whether high-use consumers will stop paying a disproportionate share of the operating expenses; 2) month-to-month volatility of bills will be reduced; 3) consumers will still retain control over a majority of their monthly natural gas costs; 4) ratepayers' interests will be aligned with the utility's shareholders because of the removal of the disincentive for the utility to encourage natural gas conservation.<sup>232</sup>

### **Decision**

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<sup>227</sup> *State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri*, 706 S.W.2d 870, 879 (Mo. App. 1985) (citing *Southwestern Bell Telephone Company v. Arkansas Public Service Commission*, 593 S.W.2d 434, 445 (Ark. 1980); *Shepherd v. Wentzville*, 645 S.W.2d 130 (Mo. App. 1982); *State ex rel. City of Cape Girardeau v. Public Service Commission*, 567 S.W.2d 450 (Mo. App. 1978); *Midwest Gas Users' Ass'n v. State Corp. Com'n*, 595 P.2d 735 (Kan. App. 1979); *Central Maine Power Company v. Public Utilities Commission*, 382 A.2d 302 (Me. 1978); *St. Paul Area Chamber of Commerce v. Minn. Public Service Commission*, 251 N.W.2d 350 (Minn. 1977); and *American Hoechst Corporation v. Department of Public Utilities*, 399 N.E.2d 1 (Ma.1980).

<sup>228</sup> *Id.* (citing *In Re Permian Basin Area Rate Cases*, 390 U.S. 747,800, 88 S.Ct.1344,1377, 20 L.Ed.2d 312, (1968)).

<sup>229</sup> 15 U.S.C. § 3203(b)(6)(A).

<sup>230</sup> *Id.* at (b)(6)(B)(i).

<sup>231</sup> *Id.* at (b)(6)(B)(ii), (iv).

<sup>232</sup> *State ex. rel. Missouri Office of Public Counsel v. Public Service Commission of Missouri*, 293 S.W.2d 3d 63, 72ff (Mo.App. S.D. 2009).



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

283

The Commission finds this issue in favor of MGE. With SFV, high-use consumers will stop paying a disproportionate share of MGE's operating expenses. Month-to-month volatility of bills will be reduced. Consumers still retain control over a majority of their monthly natural gas costs. Ratepayers' interests will be aligned with the interests of the shareholders because of the removal of the disincentive for the utility to encourage natural gas conservation. MGE shall continue administering its Straight Fixed Variable rate design to its residential customers, and shall administer it to its Small General Service customers.

### *Energy Efficiency – Relationship to rate design*

*Should the continuation (for residential customers) or implementation (for small general service customers) of energy efficiency programs be contingent on the adoption of a rate design that recovers all non-gas costs through a fixed customer charge?*

### **Findings of Fact**

The Findings of Fact supporting the Commission's decision are under the Rate Design section of this Report and Order.

### **Conclusions of Law**

There are no additional Conclusions of Law.

### **Decision**

The continuation (for residential customers) and implementation (for small general service customers) of energy efficiency programs should be contingent on the adoption of a rate design that recovers all non-gas costs through a fixed customer charge.

### *Energy efficiency -Funding*

*Should funding for energy efficiency programs be included as an ongoing expense in rates, or should the Company provide upfront funding with such expenditures to be deferred (after expenditure of the surplus unspent funds for residential energy efficiency programs (expected to be approximately \$1 million) that still remain at the time new rates from this case become effective) and included in rate base (with a 10-year amortization period) in subsequent rate cases?*

*What should the annual funding level be and how should the funding level be determined?*

*Should interest be applied to unspent residential energy efficiency funds and, if so, at what rate?*

## MISSOURI GAS ENERGY

284

19 Mo. P.S.C. 3d

### **Findings of Fact**

124. MGE has agreed to initially fund an annual amount of \$1 million per year for its EE programs, beginning when rates go into effect in this case. This annual funding amount would initially not be included in MGE's rates. This amount would be subject to increase if warranted by the programs' continued growth and success. This would be a topic to be addressed by the EEC.<sup>233</sup>

125. MGE's annual funding amount would be deferred and treated as a regulatory asset with a ten year amortization period. The amortization would begin with the effective date or any rates resulting from the next general rate case. Any amounts would be included in MGE's rate base in the next general rate case.<sup>234</sup>

126. Funds will be divided proportionally between classes (the new SGS class would receive up to 10% of the funding, Residential will receive up to 90%).<sup>235</sup>

127. MGE would assign the same short term interest rate determined in this case to any unspent amounts previously collected in rates on a going forward basis.<sup>236</sup>

128. MGE wishes to retain the EEC, but modify its structure to an advisory capacity.<sup>237</sup>

129. MGE will spend currently unspent energy efficiency funds prior to contributing additional amounts to Residential programs.<sup>238</sup>

130. EE programs would be set forth in a tariff.<sup>239</sup>

131. The SGS Energy Efficient Natural Gas Equipment Incentive Program would be designed to encourage more effective utilization of natural gas by encouraging energy efficiency improvements through the replacement of less efficient natural gas equipment with high efficiency Energy Star qualified natural gas equipment and other high efficiency equipment and measures. MGE would solicit input from the EEC on specific programs and incentive levels. Depending on the results of the programs MGE may in the future request permission from

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<sup>233</sup> Initial Post-Hearing Brief of Missouri Gas Energy, pp. 28-30 (filed December 18, 2009). See also Boudreau, Tr. Vol. 12, pp. 680-81.

<sup>234</sup> Id.

<sup>235</sup> Id.

<sup>236</sup> Id.

<sup>237</sup> Id.

<sup>238</sup> Id.

<sup>239</sup> Id.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

285

the Commission to expand the program to include other program options after dialogue with the EEC. The incentive could include but would not be limited to the following Energy Star qualified appliances:

- Natural gas forced air furnaces
- Natural gas water heater
- Natural gas boiler systems
- Natural gas combination systems
- Commercial natural gas utilization equipment, such as
  - Modulating burners
  - Venturi steam traps
  - Kitchen exhaust hoods
  - Waste heat recovery
  - Heat exchangers.<sup>240</sup>

132. The EEC will continue to provide input and suggestions on MGE's EE programs. MGE will continue to provide quarterly report on its EE programs.<sup>241</sup>

133. Unless otherwise ordered by the Commission, on an annual basis, the EEC will review MGE's annual funding amount to and expenditures for its EE programs. The EEC (or the members, if agreement cannot be reached) may submit a recommendation to the Commission to increase or decrease MGE's annual funding amount. The recommended increase or decrease to the annual amount of funding may be contested by any member of the EEC.<sup>242</sup>

134. Energy efficiency programs that are designed to reduce natural gas consumption by its customers can lead to the reduction of wholesale natural gas prices as well as generating direct cost savings to natural gas customers, which will be reflected in rates.<sup>243</sup>

135. According to a recent study completed by the American Council for an Energy- Efficient Economy (ACEEE), reductions in natural gas consumption could result in wholesale natural gas price reductions.<sup>244</sup>

136. Because of the very tight and volatile U.S. natural gas

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<sup>240</sup> Id.

<sup>241</sup> Id.

<sup>242</sup> Id.

<sup>243</sup> Buchanan Direct, Ex. 87, p. 6.

<sup>244</sup> Id.

## MISSOURI GAS ENERGY

286

19 Mo. P.S.C. 3d

market, a reduction of about 1 percent per year in total U.S. gas demand could potentially result in wholesale natural gas price reductions of 10 to 20 percent.<sup>245</sup>

137. The study identifies new energy policies and additional funding for energy efficiency programs necessary to achieve savings significant enough to reduce the wholesale price of natural gas as well as to generate direct cost savings to natural gas consumers.<sup>246</sup>

138. The study estimated an annual energy efficiency investment by each of the 8 Midwest states, including Missouri, based on each state's proportional allocation of total projected regional natural gas savings in 2010.<sup>247</sup>

139. From a regional perspective, in order to reduce natural gas demand sufficiently to pressure wholesale prices downward, the study roughly estimated that Missouri would be required to expend approximately \$12 million per year for natural gas related energy efficiency programs through the year 2020.<sup>248</sup>

140. The study estimates that the dollar savings impact of the associated natural gas price reductions from this level of investment would be approximately \$921 million for Missouri by 2015 and an additional \$847 million by the year 2020.<sup>249</sup>

141. While MGE should be commended for addressing and responding to the energy efficiency needs of its residential and Small General Service natural gas customers, MGE's current energy efficiency funding levels will not result in sufficient savings to contribute to lower wholesale natural gas prices. A more significant level of investment in energy efficiency is required to potentially pressure natural gas wholesale prices lower.<sup>250</sup>

142. The Commission recognizes that MGE alone cannot have a significant impact on wholesale prices through its energy efficiency programs. But MGE can and should contribute in a more meaningful way toward a regional reduction in natural gas

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<sup>245</sup> Id.

<sup>246</sup> Id.

<sup>247</sup> Id.

<sup>248</sup> Id.

<sup>249</sup> Id.

<sup>250</sup> Id.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

287

consumption.<sup>251</sup>

143. In addition to the American Council on an Energy-Efficient Economy study, the National Action Plan for Energy Efficiency sponsored by the USDOE and the United States Environmental Protection Agency and prepared by 50 leading organizations, including a variety of natural gas companies, noted the most effective energy efficiency projects were funded at a level equal to a minimum range of 0.5 to 1.5 percent of a natural gas utility's annual operating revenue.<sup>252</sup>

144. Based on the 2008 annual operating revenues reported by MGE, the minimum goal of annual energy efficiency program investments should be approximately \$4 million, using MGE 2008 annual gross operating revenue.<sup>253</sup>

145. MGE has not expended the amount it has collected in rates on energy efficiency programs.<sup>254</sup>

146. However, MGE has not been implementing a variety of programs, and the programs it currently is implementing are all relatively new.<sup>255</sup>

147. Once MGE's energy efficiency programs become established, and it initiates additional, cost-effective programs, it will be possible for MGE to spend significantly more.<sup>256</sup>

148. Mr. Buchanan, DNR's witness, persuasively explained how.<sup>257</sup>

149. An initial target for annual energy efficiency program expenditures (so long as this level of expenditure is expected to be cost-effective) is necessary to assist MGE in identifying and adopting a series of cost-effective energy efficiency programs.<sup>258</sup>

150. A prescribed budget would help facilitate the evaluation of energy programs as well as assist in the design and implementation of the number and type of cost-effective programs that

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<sup>251</sup> Buchanan Direct, Ex. 87, pp. 6-7.

<sup>252</sup> *Id.* at 7.

<sup>253</sup> *Id.* at 8.

<sup>254</sup> Hack, Tr. Vol. 8, p. 66; Kind, Tr. Vol. 13, p. 850.

<sup>255</sup> Hendershot, Tr. Vol. 12, pp. 690-92.

<sup>256</sup> Buchanan Surrebuttal, Ex. 89, p. 4; Tr. Vol. 12, pp. 709-710.

<sup>257</sup> Buchanan Surrebuttal, Ex. 89, p. 4.

<sup>258</sup> Buchanan Rebuttal, Ex. 88, p. 12.

## MISSOURI GAS ENERGY

288

19 Mo. P.S.C. 3d

could be offered by MGE.<sup>259</sup>

151. That target level of energy efficiency funding based on MGE's annual gross operating revenues, and established as a condition for allowing a higher fixed customer charge, would assure that MGE would implement a slate of cost effective energy efficiency programs considered to be significant in size and sufficient to help customers reduce the most substantial component of their monthly utility bill.<sup>260</sup>

152. Ratepayers should be properly compensated when they supply monies to the utility via the regulatory process. The overall cost of capital is the appropriate rate to use when calculating interest on the energy efficiency funds so that all ratepayer supplied funds are treated consistently with all other monies supplied by ratepayers in the regulatory process.<sup>261</sup>

153. MGE proposes to compensate ratepayers by an interest amount equal to the short-term debt rate which traditionally has the lowest cost of any component of the capital structure.<sup>262</sup> Allowing compensation at this low rate would allow MGE to leverage this process by using these funds to replace short-term debt, thus improperly increasing MGE's earnings.<sup>263</sup> As OPC witness Russell Trippensee persuasively explained:

Furthermore, short-term debt is also assumed to be used for construction work in progress (CWIP) on which the utility is allowed to record an earnings rate referred to as the Allowance for Funds Used During Construction (AFUDC). The AFUDC rate includes not only short-term costs but also other higher cost capital to the extent short-term debt is less than the needed capital to support the construction projects. Therefore, [MGE's] proposal would allow MGE to leverage this process by using these [energy efficiency] funds to replace short-term debt thus reducing balances of short-term debt in the AFUDC

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 12-13.

<sup>261</sup> Trippensee Surrebuttal, Ex. 80, pp. 5-7.

<sup>262</sup> *Id.* at 6.

<sup>263</sup> *Id.*

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

289

calculation. The result would be that the monies invested in CWIP would earn an AFUDC rate that was higher than the short-term debt rate, thus increasing the Company's earnings.

All other monies supplied by ratepayers in the regulatory process are recognized in the determination of cash working capital and its related components and included in the rate base. To the extent ratepayers provide this money before the utility uses the monies, and average balance is used to reduce rate base. Thus the ratepayers effectively are compensated at the overall cost of capital on the monies the ratepayers supplied. The inclusion of monies as a reduction to rate base would have the same impact as not recognizing the EEF monies as a rate base offset and paying interest on those monies equal to the overall cost of capital.<sup>264</sup>

154. The break-even point for residential customers who benefit from Straight Fixed Variable versus customers who benefit from traditional rate design is approximately 824 Ccf annually.<sup>265</sup>

155. Regardless of which rate design MGE has, different customers will fare better under different designs, as it is not cost effective or practical to determine cost of service for every individual customer.<sup>266</sup>

156. 824 Ccf usage annually is average for an MGE residential customer.<sup>267</sup>

157. Approximately 43% of MGE's residential customers use less than the average amount of 824 Ccf.<sup>268</sup>

158. Approximately 6-7% of those 43% of MGE residential

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<sup>264</sup> *Id.* at 6-7.

<sup>265</sup> Noack, Tr. Vol. 15, pp. 1163-64, 67. See also MGE Chart, Ex. 120.

<sup>266</sup> Meisenheimer, Vol. 10, pp. 439-41.

<sup>267</sup> *Id.*

<sup>268</sup> Noack, Tr. Vol. 15, p. 1164.

## MISSOURI GAS ENERGY

290

19 Mo. P.S.C. 3d

customers who have below 824 Ccf annual usage are not space heating customers.<sup>269</sup>

159. Therefore, approximately 36-37% of MGE's residential customers who have below 824 Ccf annual usage are space heating customers, and fall within a usage range of 400-824 CCf annually.<sup>270</sup>

160. Possible explanations for residential customers' higher usage include poorly insulated homes or inefficient appliances.<sup>271</sup>

161. MGE is willing to try alternative energy efficiency methods.<sup>272</sup>

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

#### **Funding Level and Distribution of Energy Efficiency Resources**

The Commission finds that DNR's position is persuasive in that energy efficiency funding should be tied to MGE's annual gross operating revenues. The Commission further finds that DNR's request that .5% of MGE's annual gross operating revenues should be allocated for energy efficiency funding and that it is an appropriate goal or benchmark in expenditures for natural gas utilities. The Commission finds that the EEC should take all steps necessary to work toward implementation of cost-effective energy efficiency programs to reach this goal to maximize benefits. However, immediately increasing annual energy efficiency expenditures from today's allocation of \$1.5 million to .5% or approximately \$4 million is too ambitious at this time. The Commission expects that EEC keep the Commission informed of steps taken to reach this goal or to bring before the Commission disputes among parties in the EEC.

MGE will initially fund an annual amount of a minimum of \$1.5 million per year for its energy efficiency program. This amount shall be subject to increase toward the goal of .5% of gross operating revenues at the time the EEC has a comprehensive plan for the increased expenditure level. Increased expenditures shall be dependent upon programs' continued growth and success. If the EEC is unable to reach consensus or agreement for increased expenditures, any party

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<sup>269</sup> *Id.* at 1162.

<sup>270</sup> *Id.*

<sup>271</sup> Meisenheimer, Tr. Vol. 10, p. 466.

<sup>272</sup> Hendershot, Tr. Vol. 12, p. 716; Warren, Tr. Vol. 12, p. 737.



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

291

may petition the Commission for further direction toward that goal. The Commission expects all programs to be tracked for cost effectiveness and prudence. Further, MGE shall continue to provide quarterly reports on its EE programs.

Funds shall be divided proportionally between classes (the new SGS class would receive up to 10% of the funding, Residential will receive up to 90%) MGE will assign an interest rate equivalent to the overall cost of capital determined in this case to any unspent amounts previously collected in rates on a going forward basis. EE programs would be set forth in a tariff.

The Commission orders that MGE's annual funding amount shall not be included as an ongoing expense in rates. MGE shall provide upfront funding using approximately \$1 million of surplus, unspent funds for residential energy efficiency programs included in past rates. Expenditures above the initial investment of \$1 million shall be deferred in a regulatory asset account for potential recovery in a future case.

### Energy Efficiency Collaborative

The EEC shall continue to provide input and suggestions on MGE's EE programs. On an annual basis, the EEC shall review MGE's annual funding amount to and expenditures for its EE programs. The EEC (or the members, if agreement cannot be reached) may submit a recommendation to the Commission to increase or decrease MGE's annual funding amount. The recommended increase or decrease to the annual amount of funding may be contested by any member of the EEC.

MGE and the EEC shall develop a plan that will annually increase the amount of funding from the base level of \$1.5 million towards the goal of .5% of gross operating revenues. As discussed *supra*, the Commission is not mandating .5% of annual gross operating revenues be expended immediately on EE programs. However, the Commission believes that MGE and the EEC should work towards reaching that goal in the near future.

### SGS Energy Efficient Natural Gas Equipment Incentive Program

The SGS Energy Efficient Natural Gas Equipment Incentive Program shall be designed to encourage more effective utilization of natural gas by encouraging energy efficiency improvements through the replacement of less efficient natural gas equipment with high efficiency Energy Star qualified natural gas equipment and other high efficiency

## MISSOURI GAS ENERGY

292

19 Mo. P.S.C. 3d

equipment and measures. MGE shall solicit input from the EEC on specific programs and incentive levels. Depending on the results of the programs MGE may in the future request permission from the Commission to expand the program to include other program options after dialogue with the EEC. The incentive could include but would not be limited to the following Energy Star qualified appliances:

- Natural gas forced air furnaces
- Natural gas water heater
- Natural gas boiler systems
- Natural gas combination systems
- Commercial natural gas utilization equipment, such as
  - Modulating burners
  - Venturi steam traps
  - Kitchen exhaust hoods
  - Waste heat recovery
  - Heat exchangers.

### Residential Space Heating Customers

The EEC shall design a program for MGE's residential space heating customers that are negatively impacted by the Straight Fixed Variable rate design, which are customers who annually use between approximately 400 and 824 Ccf. MGE shall identify such customers and the EEC shall determine appropriate funding levels and program terms to: 1) address the adverse impact of the rate design, and 2) address specific energy efficiency programs that apply to this group of customers. In addition, OPC shall propose specific EE programs or other programs to assist these customers. MGE shall provide quarterly reports detailing its progress on reaching consensus with the EEC in this regard.

### Green Impact Zone & Stimulus Funds

The EEC shall detail in the quarterly report how it plans to budget financial resources and how it will work to support the objectives of the "Green Impact Zone." As part of MGE's quarterly reports, MGE shall report its stimulus<sup>273</sup> investment information to the Commission.

#### *Energy Efficiency Collaborative*

*Should the energy efficiency collaborative formed after MGE's most recently concluded rate case as a result of the Commission's approval of the Unanimous Stipulation and*

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<sup>273</sup> Funds received as authorized by the American Recovery and Reinvestment Act of 2009.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

293

*Agreement in Case No. GT-2008-0005 be modified to an advisory group rather than a consensus decision making collaborative?*

### **Findings of Fact**

162. MGE wishes to have complete control over all decision-making of the collaborative, despite MGE having the least amount of experience in energy efficiency programs of any of the collaborative members.<sup>274</sup>

163. MGE benefited greatly from the experience of Staff, DNR and OPC during the collaborative process.<sup>275</sup>

164. Without the collaborative that resulted from MGE's last rate case, MGE would have had a much smaller offering of residential energy efficiency programs without the support and guidance it received from the other experienced collaborative members.<sup>276</sup>

### **Conclusions of Law**

There are no additional Conclusions of Law for this issue.

### **Decision**

The energy efficiency collaborative formed after MGE's most recently concluded rate case should remain a consensus group, and should not be modified to an advisory group.

### **Rate of Return Conclusion**

*Would the Commission's adoption of MGE's proposed rate design that recovers all non-gas costs in a fixed customer charge for Residential and SGS customers reduce MGE's business risks? If the answer is "yes", should that reduced risk be recognized in the determination of either cost of capital or the revenue requirement?*

### **Findings of Fact**

There are no additional findings of fact for this issue.

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

The Commission's adoption of MGE's proposed rate design would reduce MGE's business risks. The Commission has already addressed to what extent the rate design would reduce MGE's business risks in the Findings of Fact and Conclusions of Law of the Return on

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<sup>274</sup> Warren, Tr. Vol. 12, pp. 734-735.

<sup>275</sup> Kind Rebuttal, Ex. 76, p. 2.

<sup>276</sup> *Id.*

Equity section of this Report and Order.

**True-Up Issues**

The Commission sets rates based upon a “test year”, either ordered by the Commission or agreed to by the parties. That “test year” is normally a recent calendar year for the parties to refer to so that in planning their cases, they may match revenue requirement items for the same period. A “true-up” of revenues and expenses often occurs in rate cases, which reflects known and measurable events after the conclusion of the test year, but during the pendency of the rate case.

*Prepaid Pension Asset*

Two prepaid pension asset issues are before the Commission. The first is a timing issue. That is, whether the amortizations of the prepaid pension assets created in Files Nos. GR-2004-0209 and GR-2006-0422 should begin the month after the true-up date in those cases, or with the effective date of the Report and Order in each case. The second issue concerns Staffs proposed application of a capitalization ratio. This question is whether a capitalization ratio should be applied to the prepaid pension asset, which would reduce the amount of that asset included in rate case. Also, the issue concerns whether to apply the capitalization ratio to the prepaid asset expense.

**Findings of Fact**

165. The Order Establishing True-Up<sup>277</sup> indicates that the rate base will be trued-up for “prepaid pension asset and pension tracker assets” “pensions and OPEBs” and “depreciation and amortization expense.”

166. Also, the Partial Stipulation and Agreement states that “prepaid pensions” will be a part of the true-up in this case in regard to rate base” and that “depreciation expense” will be a part of the true-up in this case in regard to total operating expenses.”<sup>278</sup>

167. The prepaid pension asset reflects the difference between the amount of pension expense included in the cost of service and the actual level of pension expense incurred.<sup>279</sup>

168. That is, it is the difference between the pension expense included in rates and the amount funded by the company.<sup>280</sup>

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<sup>277</sup> Order Establishing True-Up, File No. GR-2009-0355 (September 15, 2009).

<sup>278</sup> Partial Stipulation and Agreement, pp. 3-4, File No. GR-2009-0355 (November 5, 2009).

<sup>279</sup> Noack True-Up Rebuttal, Ex. 108, p. 6.

<sup>280</sup> Partial Stipulation and Agreement at 10.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

295

169. If the actual pension expense exceeds the amount included in rates, MGE records the difference as a regulatory asset. The asset is included in rate base, and the difference will be recovered through amortization of the asset in subsequent rate cases.<sup>281</sup>

170. If the actual pension expense is less than the amount included in rates, MGE records a regulatory liability. That difference would be booked as regulatory liability that is deducted from rate base, and that will be refunded to customers through amortization of the liability in subsequent rate cases.<sup>282</sup>

171. Determining the amount of the prepaid pension assets created in Files Nos. GR-2004-0209 and GR-2006-0422 requires a calculation that depends, in part, upon when the amortization of the asset is deemed to have started. Staff states that the amortization should have started the month after the true-up period in those cases.<sup>283</sup>

172. Under Staff's approach, amortization would begin before the effective date of the Report and Order. But on its books, MGE began amortizing the prepaid assets on the effective date of the respective Commission Orders in those cases.<sup>284</sup>

173. The true-up period in this case ended on September 30, 2009.<sup>285</sup> For ratemaking purposes, Staff suggests that the amortization of this asset should start the month after the balance has been established, which is October, 2009.<sup>286</sup> Thus, using Staff's theory, MGE should already be amortizing the asset created by a case that will not conclude for another two months.

174. In October, November, December of 2009 and, in all likelihood, January and February of 2010, MGE charged, and will continue to charge, the rates that were set by the Commission in File No. GR-2006-0422.<sup>287</sup> Those rates have no provision or consideration of the prepaid pension expense associated with this case.<sup>288</sup>

175. Only after the effective date of the Commission's Report and Order will MGE be able to charge rates that provide recovery

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Foster True-Up Rebuttal, Ex. 113, p. 2.

<sup>284</sup> Noack True-Up Rebuttal, Ex. 108, p. 7.

<sup>285</sup> Foster, Tr. Vol. 14, p. 973.

<sup>286</sup> *Id.* at 975.

<sup>287</sup> *Id.* at 974.

<sup>288</sup> *Id.* at 975.

MISSOURI GAS ENERGY

296

19 Mo. P.S.C. 3d

for this amortization. Staff's approach would require MGE to amortize this asset for five months, even though, as Staff admits, there is no consideration in MGE's rates related to this amortization expense.<sup>289</sup>

176. Staff has reduced the balance of the prepaid pension assets created in File No. GR-2006-0422 and this case by applying an expense capitalization ratio to the balance.<sup>290</sup>

177. A capitalization ratio is generally applied to expenses in the income statement to reflect that some payroll and benefit costs relate to construction work, and therefore should be capitalized.<sup>291</sup>

178. The ratio should not be applied to the asset itself, which is a rate base item.<sup>292</sup> Reducing the prepaid pension assets in this fashion would be inconsistent with the history of the process, and with the amortization that have been established in this case.

179. The Partial Stipulation and Agreement also provides compelling evidence of the parties' intent regarding the prepaid pension asset. The Partial Stipulation and Agreement provides that "the rates established in this case include recovery of the amortization of prepaid pension assets established in prior cases and the amortization of the prepaid pension asset established in this case as follows:

- a. \$1,139,310 – GR-2004-0209;
- b. \$803,300 – GR-2006-0422;
- c. \$2,828,673 – GR-2009-0355.<sup>293</sup>

180. Simple multiplication of these annual amortizations shows that there could be no intent to reduce the asset by a capitalization ratio. The asset for File No. GR-2004-0209 was to be amortized over seven years. \$1,139,310 times seven equals about \$7,975,181.<sup>294</sup>

181. The asset from File No. GR-2006-0422 was to be amortized over five years. \$803,300 times five equals \$4,016,500.<sup>295</sup>

182. The asset for this case is also to be amortized over five years. \$2,828,673 times five equals about \$14,143,364.<sup>296</sup>

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<sup>289</sup> *Id.*

<sup>290</sup> Noack True-Up Rebuttal, Ex. 108, p. 8.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Partial Stipulation and Agreement, p. 10.

<sup>294</sup> Noack, Tr. Vol. 14, p. 965.

<sup>295</sup> *Id.* at 965-66.

<sup>296</sup> *Id.* at 966.

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

297

183. These numbers track the base asset amounts used by MGE.<sup>297</sup>

184. They also track the base asset amounts used by Staff for Files Nos. GR-2004-0209 and GR-2006-0422.<sup>298</sup>

185. Further, if the prepaid pension asset is reduced by a capitalization ratio as suggested by Staff, the amortization would far exceed the value of the asset. Accordingly, the prepaid pension asset should reflect the calculation of that asset without the application of a capitalization ratio.<sup>299</sup>

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

The Commission decides this issue in favor of MGE. To avoid any further confusion in these matters, the Commission encourages the signatory parties to this Stipulation to specify the start date for such amortizations when negotiating such agreements in the future, especially if they believe the amortizations should begin prior to the effective date of the Report and Order.

### ***Land Rights Depreciation***

The true-up depreciation issue concerns the proper depreciation rate for a single depreciation account, which is Account 374.2 (Land Rights). Staff suggests that the rate for this account should be zero percent. MGE believes that the rates should be equal to the rate that has been ordered by this Commission in past cases, which is 2.09%.

### **Findings of Fact**

186. The second ordered paragraph in the Commission's Order Granting Waiver in File No. GE-2010-0030 states:

Missouri Gas Energy, a division of Southern Union Company, shall retain the current depreciation rates, as listed in Schedule A to Staff's Recommendation, and as agreed upon in the Partial Nonunanimous Stipulation and Agreement in Commission Case

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<sup>297</sup> Noack True-Up Rebuttal, Ex. 108, Sch. MRN-4.

<sup>298</sup> Foster True-Up Rebuttal, Ex. 113, p. 4.

<sup>299</sup> Noack True-Up Direct, Ex. 107, Sch. MRN-2.

## MISSOURI GAS ENERGY

298

19 Mo. P.S.C. 3d

No. GR-2006-0422.<sup>300</sup>

187. Thus, the Order sought to “retain the current depreciation rates” as described in the Schedule of Rates and as “agreed upon in the Partial Nonunanimous Stipulation and Agreement in Commission File No. GR-2006-0422.”<sup>301</sup>

188. The Partial Nonunanimous Stipulation and Agreement in File No. GR-2006-0422 stated in part “the depreciation rate for Land Rights (Account 374.2) shall be 2.09%”<sup>302</sup>

189. Also, the Partial Stipulation and Agreement in this case maintains the results of File No. GE-2010-0030. It states in relevant part:

The conditions ordered by the Commission in Case No. GE-2010-0030 shall also remain in effect, as well, for purposes of this Stipulation and Agreement.<sup>303</sup>

190. MGE has consistently used 2.09% as the depreciation rate for its filings in this case.<sup>304</sup>

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

The Commission finds this issue in favor of MGE. To avoid any further confusion in matters of this nature, the Commission encourages the signatory parties to the Stipulation to specifically include any changes in depreciation rates or similar schedules when negotiating such agreements in the future. Hopefully, this will encourage the parties to have a true meeting of the minds and not to just assume the absence of a specific rate or number means that rate or number should be changed to zero.

### ***Rate Case Expense***

This issue is what amount of additional expert fees and legal

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<sup>300</sup> Noack True-Up Rebuttal, Ex. 108, Sch. MRN-2.

<sup>301</sup> The Partial Nonunanimous Stipulation and Agreement in Commission File No. GR-2006-0422 was approved by the Commissioner’s Order Approving Stipulation and Agreement, issued January 30, 2007.

<sup>302</sup> Noack True-Up Rebuttal, Ex. 108, Sch. MRN-3.

<sup>303</sup> Partial Stipulation and Agreement, File No. GR-2009-0355, p. 8.

<sup>304</sup> Noack Direct, Ex. 30, Sch. MRN-1; Noack Updated Test Year Direct, Ex. 31, Sch. MRN-1; Noack True-Up Direct, Ex. 107, Sch. MRN-6; Tr. Vol. 14, p. 953.



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

299

fees accrued during the true-up period, if any, should be included in rates.

### **Findings of Fact**

191. The Partial Stipulation and Agreement also contemplates a true-up of rate case expense (to be updated through September 30, 2009, to include an estimate for the remainder of the case) and establishes that the base amount of rate case expense from which to measure the true-up adjustment is \$72,382.<sup>305</sup>

192. MGE strives to hire outside consultants and experts at competitive rates.<sup>306</sup>

193. It also conducts a competitive request-for-proposal (“RFP”) process in which it evaluates both the estimated fees along with the experience of outside experts for each rate case.<sup>307</sup>

194. MGE has determined that contracting with additional counsel on an as-needed basis and for peak periods is less expensive for MGE and its customers.<sup>308</sup>

195. MGE has made a management decision to use its legal representation and consultants on an “as needed” basis, and only pay them when needed, rather than hiring persons that would necessarily receive a salary and benefits each and every year.<sup>309</sup>

196. Since MGE’s personnel already have full-time jobs, OPC’s position would encourage MGE to staff for “peak” periods, an approach that would be more expensive for both MGE and its customers.<sup>310</sup>

197. In addition to cost savings associated with MGE’s approach, MGE is generally able to take advantage of personnel with a wider range of both technical and practical rate case experience than in-house employees would have.<sup>311</sup>

198. The history of MGE’s rate case expense shows that it has decreased over the last three cases.<sup>312</sup>

199. In this very case, OPC engaged two consultants to

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<sup>305</sup> Partial Stipulation and Agreement at 9.

<sup>306</sup> Noack Rebuttal, Ex. 32, p. 20.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 16-22.

<sup>309</sup> *Id.* at 18-19.

<sup>310</sup> *Id.* at 18, 22.

<sup>311</sup> *Id.*

<sup>312</sup> Foster Rebuttal, Ex. 49, p. 4.

## MISSOURI GAS ENERGY

300

19 Mo. P.S.C. 3d

review and address issues related to cost of capital and depreciation.<sup>313</sup>

200. But for the regulatory framework, a utility, like the seller of any unregulated commodity, would have the right to change its rates without government approval.<sup>314</sup>

201. It is only the existence of the regulatory scheme itself that requires MGE to incur a rate case expense in the first place.<sup>315</sup>

### **Conclusions of Law**

While a utility has the burden of proof, there is initially a presumption that its expenditures are prudent. The Commission has previously cited the following description of this process as found to apply to the Federal Energy Regulatory Commission:

The Federal Power Act imposes on the Company the “burden of proof to show that the increased rate or charge is just and reasonable.” Edison relies on Supreme Court precedent for the proposition that a utility’s cost are [sic] presumed to be prudently incurred. However, the presumption does not survive “a showing of inefficiency or improvidence.” As the Commission has explained, “utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.”<sup>316</sup>

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<sup>313</sup> Noack Rebuttal, Ex. 32, p. 19.

<sup>314</sup> Noack Rebuttal, Ex. 32, p. 21.

<sup>315</sup> Id.

<sup>316</sup> *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

301

The Commission has interpreted this process as follows:

"In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public."<sup>317</sup>

The Commission has also previously stated as follows concerning attacks on the recovery of rate case expense:

The Commission does not want to put itself in the position of discouraging necessary rate cases by discouraging rate case expense. This is a particularly treacherous area for the Commission to be addressing in that the Commission cannot be viewed as having a dampening effect up on a regulated company's statutory procedural rights to

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<sup>317</sup> *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930)." *In the Matter of Missouri-American Water Company's Tariff Sheets*, Report and Order, Case No. WR-2000-281 (August 31, 2000).

## MISSOURI GAS ENERGY

302

19 Mo. P.S.C. 3d

seek out a rate increase when it believes that facts so justify it. Disallowing prudently incurred rate case expense can be viewed as violating the company's procedural rights.<sup>318</sup>

### **Decision**

In this case, we are inclined to deem MGE's rate case expense to be prudent. The record supports this determination. Having made this determination, however, there are several additional points that need to be considered.

OPC's assertion that both the company and the ratepayers benefit from rate case expense has merit in that shareholders do receive a portion of the benefits and should be willing to pay for a portion of the company's rate case expense. The record is not developed on the issue, but there is a strong public policy argument that requiring the company to bear some portion of the rate case expense would incentivize the company to more aggressively manage its rate case expenses.

The ratemaking process necessarily and appropriately requires the regulator to make decisions as to expenses that are appropriately borne by the utility's shareholders and those that are appropriately borne by the ratepayer. Rate case expense is no exception. MGE posits that, but for the regulatory process, the utility would be free to change rates without Commission permission, just as any seller of unregulated commodities. But this misses the point and mischaracterizes the nature of the relationship between monopolies and their regulators. Rather than viewing the regulatory process as a burden that the utility must bear, the utility would do well to remember that it is not like any ordinary seller of unregulated commodities. It is not selling ordinary widgets. And the consumer, in this instance, has nowhere else to go for this essential commodity.

Unfortunately, in this case, the parties have not fully developed the record on this point. More detailed cost study, comparisons to other jurisdictions, and other testimony on the nature and propriety of certain rate case expenses may be helpful in determining how to apportion rate case expense. Such information is encouraged

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<sup>318</sup> In re St. Joseph Light & Power Company, 2 Mo. P.S.C. 3d 248, 260 (1993); see also In re St. Joseph Light & Power Company, 3 Mo. P.S.C. 3d 207, 214 (1994).

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

303

and would be welcomed by this Commission.

In conclusion, this Commission wants to make clear to MGE and other utilities that rate case expense is not simply a blank check and if certain rate case duties can be performed "in-house" by existing personnel more cheaply, we expect the utility to do so. On the issue of rate case expense, we urge MGE and other utilities to recognize that rate case expense may not be reflexively and automatically passed on to the ratepayers in the future. This Commission disallowed certain rate case expenses (attorney fees) in the 2006 MGE rate case and the Commission will not hesitate to do so again should the evidence support such a decision.

The Commission finds this issue in favor of MGE.

### **THE COMMISSION ORDERS THAT:**

1. All pending motions and requests for relief not otherwise granted herein are denied.
2. The Partial Stipulation and Agreement is approved.
3. All signatories to the Partial Stipulation and Agreement shall comply with its terms.
4. The proposed tariff sheets filed by Missouri Gas Energy, a division of Southern Union Company, on April 2, 2009, Tariff No. YG-2009-0714, are rejected.
5. Missouri Gas Energy, a division of Southern Union Company, shall file tariffs that comport with this Report and Order no later than February 17, 2010.
6. The Staff of the Commission shall file a recommendation regarding the tariffs ordered in paragraph 5 no later than February 18, 2010. Any party that wishes to object to the tariffs ordered in paragraph 3 shall do so no later than February 22, 2010.
7. This Report and Order shall become effective on February 20, 2010.

Clayton, Chm., concurs, with separate concurring opinion attached;  
Davis, C., concurs, with separate concurring opinion to follow;  
Jarrett, Gunn, and Kenney, CC., concur;  
and certify compliance with the provisions

## MISSOURI GAS ENERGY

304

19 Mo. P.S.C. 3d

of Section 536.080, RSMo.

\*NOTE: See page 110 for another order in this case.

\*NOTE: At the time of publication, no opinion of Commissioner Davis has been filed.

### **CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner concurs in the Commission's Report and Order addressing a rate increase request of Missouri Gas Energy (MGE). For the reasons set out below, this Commissioner believes that the Commission has moved toward a much more reasonable and acceptable approach since MGE's last rate increase granted in 2007, in Case No. GR-2006-0422. In that case, this Commissioner dissented based on a number of concerns in the decision including the shift to a rate design known as the Straight Fixed Variable (SFV) rate design, the award of an inappropriately high Return on Equity (ROE) and a failure to adequately address customer energy efficiency (EE) programs in funding, in program implementation and in comprehensive planning. Today, this Commission has addressed each of the latter points which make the SFV an appropriate rate design that benefits a majority of consumers.

As referenced in my Dissent in 2007, the SFV is a significant shift in policy away from the standard rate designs utilized for many years. Prior to 2007, natural gas customers paid rates that included a fixed charge component, amounting to approximately 55% of distribution costs, with the remaining 45% paid through a volumetric charge based on usage. Lower usage customers had lower bills. If a winter was warmer than normal, customers would benefit from their own lower usage. Further, if a customer invested in energy efficiency improvements, that customer would recognize lower bills based on that lower usage. Higher usage customers tended to subsidize lower usage customers. Utility revenues and profits tended to fluctuate, sometimes wildly, because of the dependence on weather patterns and the accompanying usage. Under the traditional rate design, utilities tend to make more money during colder winters. Volumetric rates had a time-tested validity in that customers tended to have greater control of their bills and the utility tended to face greater risks.

It was this Commissioner's opinion then, and it continues to be this Commissioner's opinion now, that any shift to the SFV is inherently

## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

305

beneficial to the utility in that its revenues are stabilized and the company faces less risk. The difference between this Order and the Order issued in 2007, is that while the SFV is maintained, there is now an emphasis on addressing the inequities that are built into the system.

First of all, the Commission is making a strong stand on funding of energy efficiency. For the first time ever, the Commission is pegging its goal of funding at .5% of gross revenues of the company, which amounts to approximately \$4 million. This figure compares with the sum of \$750,000 from the last case. The Energy Office of the Missouri Department of Natural Resources (DNR) has advocated for spending targets between .5% and 1.5% of gross operating revenues, in accordance with the National Action Plan for Energy Efficiency. The Commission is mandating expenditures over and above \$1.5 million per year, and the goal of increased funding will be addressed regularly through on-going Commission involvement. While the Commission should continue to monitor and increase that funding level based on feedback from the Energy Efficiency Collaborative,<sup>1</sup> this Commissioner believes this steady increase is the most responsible manner of stepping up efforts at empowering customers to reduce their energy usage.

Secondly, the funding of EE programs will not be built into rates as they were in 2007. Even after the Commission majority attempted to make EE a priority in the last case, MGE failed to fully spend the funds that were advanced by rate payers in the amount of approximately \$1 million. MGE will be expected to pay for EE programs first using this unspent \$1 million. Additional expenditures will be advanced by the utility, not by the rate payer, and tracked in a regulatory asset for potential recovery in the next rate case. The Commission will be watching closely as programs are created, implemented and tracked for their cost-effectiveness.

Thirdly, the Commission in this case is sending the message that it intends to stay involved as the Collaborative works through implementation of its programs. It is this Commissioner's hope that the Collaborative can continue to operate in a consensus and advisory fashion and, if any dispute or roadblock occurs, that the Commission can

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<sup>1</sup> The Energy Efficiency Collaborative is a group of stakeholders charged with the task of formulating detailed programs to effectuate the intent of the Commissions Report and Oder in regard to planning and implementing cost effective energy efficiency programs within MGE's service area.

## MISSOURI GAS ENERGY

306

19 Mo. P.S.C. 3d

address differences in policy determinations. Expenditure levels, program types and funding as well as feedback from rate payer experiences are items that the Commission will have the ability to monitor and contribute to the dialogue.

Lastly, the Commission is taking a strong step in address inequities in the SFV rate design. Low usage customers are adversely affected by the SFV because 100% of costs are transferred to the fixed monthly charge and none of the costs are recovered through a volumetric charge. The only volumetric charge on the bill is for the actual commodity used by the consumer. This means that all residential customers are charged the same amount for the distribution system costs regardless of usage and regardless of income. In theory, the increased fixed monthly charge means that customers pay a higher amount during low usage periods of the year, like during summer months while they pay a lower amount during higher usage periods during the winter. Customers who use lesser amounts of gas, therefore, are paying a slightly higher cost than under the traditional rate design, while higher usage customers have a slight reduction.

Testimony during the evidentiary hearing established the “break-even” point of where customers are better or worse off with the new rate design at annual usage of approximately 824 ccf. Customers that use less than 824 ccf pay more with the SFV than with the traditional rate design while customers over the 824 ccf, pay less with the SFV. Generally, all customers do better during colder than normal winters because there is less volumetric charge on the bill. Some customers may do worse during warmer than normal winters because of the absence of the volumetric charge and all costs assessed in the fixed monthly charge. Testimony also established that customers who use natural gas to space heat their homes generally can be categorized as using at least 400 ccf per year. These customers make up approximately 36% of the total population of MGE customers.

This Commissioner applauds the Commission for including the directive that the Energy Efficiency Collaborative work together to address this inequity and unfairness to low usage, space heating customers who use more than 400 ccf but less than 824 ccf. The Commission has directed that the Collaborative identify these customers and find a way to either offset the rate increase and/or find ways of further helping these customers reduce their usage. The Collaborative



## MISSOURI GAS ENERGY

19 Mo. P.S.C. 3d

307

may look at rate offsets, accelerated EE programs or allocate more of the funds within the .5% of gross revenues to address this inequity. It is expected that the Collaborative will report back with proposals for the Commission to consider. The Commission will benefit from further analysis of who makes up this group of customers, whether they are low income, whether they are senior citizens or disable citizens or whether they need additional assistance with weatherization or EE programs.

In conclusion, this Commission is compelled to identify the difference in the Return on Equity (ROE) award to the company. While this Commissioner found staff's testimony compelling in an even lower ROE, the Commission majority was within 25 basis points of staff's high end range. The ROE award of 10 % is reasonable and appropriate under the circumstances. It is certainly an improvement from the 2007 award of 10.5%, and it recognizes the reduced risk that the SFV offers to the utility's risk profile. With this reduction, the rate payers receive an identifiable benefit to the change in rate design and the change in risk that goes with it.

While rate increases are never easy or welcome, the evidence in this case demonstrates that higher rates have been necessitated by prudent infrastructure investments and increases in general operating costs. The Commission has approved this increase unanimously and will engage in future filings to insure that the Commission directives are implemented. The Commission has a responsibility to insure that the utility offers safe and adequate service at "just and reasonable" rates. Following staff audit, evidentiary hearing, partial settlement and transparent Commissioner deliberations, the Commission finds that these new rates to be appropriate.

For the foregoing reasons, this Commission concurs.

THE EMPIRE DISTRICT GAS COMPANY

308

19 Mo. P.S.C. 3d

**In the Matter of The Empire District Gas Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Gas Service Provided to Customers in the Missouri Service Area of the Company.**

*File No. GR-2009-0434  
Decided February 24, 2010*

**Rates §93.** As part of Demand Side Management program, energy policies and additional funding found necessary by the Commission in a rate case to achieve savings significant to reduce wholesale price of natural gas as well as to generate direct cost savings to natural gas consumers.

**Gas §91.** As part of Empire District Gas Company's rate case, the Commission approved an initial rebate of \$75 for tank storage gas water heaters as part of program to improve energy efficiency for customers.

**REPORT AND ORDER ON DSM FUNDING**

***Appearances***

**Dean L. Cooper, Esq.** and **Diana C. Carter, Esq.**, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for The Empire District Gas Company.

**Sarah Mangelsdorf, Esq.**, Assistant Attorney General, Office of the Attorney General, Supreme Court Building, Post Office Box 899, Jefferson City, Missouri 65102, for the Missouri Department of Natural Resources.

**Stuart W. Conrad, Esq.**, Finnegan, Conrad & Peterson, 1209 Penntower Building, 3100 Broadway, Kansas City, Missouri 64111, and

**David Woodsmall, Esq.**, Finnegan, Conrad & Peterson, 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65101, for Pittsburgh Corning Corporation.

**William D. Steinmeier, Esq.**, William D. Steinmeier, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110, for Constellation New Energy-Gas Division, LLC.

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

309

**Marc D. Poston, Esq.**, Senior Public Counsel, and **Lewis R. Mills, Jr., Esq.**, Public Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

**Sarah Kliethermes, Esq.**, Legal Counsel, **Lera Shemwell, Esq.**, Deputy General Counsel, and **Eric Dearmont, Esq.**, Assistant General Counsel, Missouri Public Service Commission, 200 Madison Street, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

**Deputy Chief Regulatory Law Judge:** Nancy Dippell.

**Syllabus:** This order defines a funding level to be budgeted by The Empire District Gas Company (Empire) for its portfolio of Demand Side Management (DSM) programs. The order also directs that the tank storage gas water heater rebate amount to initially be \$75 with any future adjustments set by Empire with the advice of the Demand Side Management and Energy Efficiency Advisory Group ("Energy Efficiency Collaborative" or "EEC").

**Procedural History**

On June 5, 2009, Empire filed proposed tariff sheets designed to produce a gross annual revenue increase of approximately \$2.9 million for natural gas service. The proposed tariff sheets bore an effective date of July 5, 2009. The Commission suspended the tariff sheets until May 2, 2010.<sup>1</sup> The Parties to this proceeding are: the Staff of the Missouri Public Service Commission; Empire; the Office of the Public Counsel; the Missouri Department of Natural Resources; Constellation NewEnergy–Gas Division, LLC; and Pittsburgh Corning Corporation.

Staff, Empire, and Public Counsel filed a *Partial Stipulation and Agreement* (General Agreement) on December 18, 2009. The General Agreement was not opposed by any party, and was approved by the Commission on January 20, 2010.<sup>2</sup>

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<sup>1</sup> Suspension Order and Notice, issued June 12, 2009.

<sup>2</sup> Order Approving Partial Stipulation and Agreement and Partial Stipulation and Agreement on Transportation Tariff Issues, issued January 20, 2010.

## THE EMPIRE DISTRICT GAS COMPANY

310

19 Mo. P.S.C. 3d

Among other things, the General Agreement established an EEC and provided that the signatories would support the recovery in a future rate case of prudent costs for DSM and energy efficiency programs with those costs accumulating in certain regulatory asset accounts. The signatories also agreed to support the DSM regulatory asset accounts being eligible for rate base treatment and the amounts accumulated in the regulatory asset accounts that have not been included in rate base being allowed to earn a return equivalent to Empire's AFUDC rate. The General Agreement resolved all issues associated with this case except for certain transportation tariff issues and the funding level for Empire's DSM programs and the amount for rebates for tank storage gas water heaters.

Staff, Empire, and Public Counsel also filed the *Partial Stipulation and Agreement on DSM Funding and Implementation* (Partial Stipulation on DSM) on December 18, 2009. The Partial Stipulation on DSM set out the positions of Staff, Public Counsel, and Empire with regard to the remaining DSM issues. DNR objected to the Partial Stipulation on DSM and requested a hearing on the DSM funding issue. With regard to the High Energy Efficiency Water Heating program, no party disputed that the program should be implemented as described in Sherrill McCormack's Direct Testimony with the exception that the amount of the rebate for tank storage water heaters was disputed.

On January 8, 2010, Empire and Constellation filed a *Partial Stipulation and Agreement on Transportation Tariff* (Transportation Agreement). The Transportation Agreement was not opposed by any party, resolved all items on the issues list related to transportation, and was approved by the Commission.<sup>3</sup>

The Commission held a hearing regarding the uncontested agreements and the DSM funding issue on January 8, 2010. The parties, with the exception of DNR, submitted briefs on January 22, 2010.

DNR filed its brief on Monday, January 25, 2010, along with a motion requesting permission to file that brief one business day out of time. DNR explained that it had mistakenly filed its brief in the wrong case on Friday, January 22, 2010, and was unable to correct its mistake

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<sup>3</sup> Order Approving Partial Stipulation and Agreement and Partial Stipulation and Agreement on Transportation Tariff Issues, issued January 20, 2010.

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

311

until after the deadline had passed, in part due to the Commission's Electronic Filing and Information System (EFIS) being off line for routine maintenance. No party is prejudiced by the late-filing and the Commission grants the motion and accepts the brief.

**Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

1. The General Agreement provides for an EEC consisting of Staff, Public Counsel, DNR, and industrial customer representative, and Empire.<sup>4</sup>

2. The EEC will monitor the DSM programs' funding and participation levels and will provide input to Empire on a regular basis.<sup>5</sup>

3. Under the terms of the General Agreement approved by the Commission, the energy efficiency programs that Empire will be implementing are: Low Income Weatherization; High Efficiency Water Heating; High Efficiency Space Heating; Home Performance of Energy Star; Large Commercial Audit and Rebate; Apogee; and Building Operator Certification.

**Water Heater Rebates**

4. Empire originally proposed a \$75 rebate for Energy Star rated tank storage water heaters (.62 Energy Factor or higher)<sup>6</sup> and DNR concurred with this proposal.<sup>7</sup>

5. Empire worked with a consultant, Applied Energy Group, which conducted a study to determine the amount of the recommended rebate.<sup>8</sup>

6. During the course of the case, the positions of Empire and DNR changed.

7. Empire currently supports the position set forth in the Partial Stipulation on DSM that the rebate should be \$50 per water heater until this amount is adjusted to reflect the higher incremental costs of the tank storage water heaters with an Energy Factor of .67.<sup>9</sup>

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<sup>4</sup> General Agreement, para. 8.

<sup>5</sup> General Agreement, para. 8.

<sup>6</sup> Direct Testimony of Sherrill L. McCormack, Ex. 15, p. 6, and Schedule SLM-1, p. 8.

<sup>7</sup> Direct Testimony of Laura Wolfe, Ex. 17, p. 6.

<sup>8</sup> Tr. pp. 51, 56, 64, and 74.

<sup>9</sup> Rebuttal Testimony of Sherrill L. McCormack, Ex. 16, p. 2; Tr. pp. 64-65

THE EMPIRE DISTRICT GAS COMPANY

312

19 Mo. P.S.C. 3d

8. An Energy Factor of .67 is scheduled to become the new Energy Star tank storage water heater Energy Factor criteria on September 1, 2010.

9. DNR now advocates for the rebate amount to be set by Empire with input from the EEC.<sup>10</sup>

10. The amount of the rebate may affect the number of customers who want to participate in the program or the number of customers for which funding will be available to participate in the program.<sup>11</sup>

11. The amount of the rebate could affect the program's cost-effectiveness.<sup>12</sup>

12. One general rule of thumb with incentive programs like the water heater rebate is that the incentive should represent "about 50 percent of the incremental cost of [the] energy efficiency measures you are trying to promote."<sup>13</sup>

DSM Funding

13. Empire currently provides funding for weatherization through low income weatherization funding to all of its territory, an experimental low income program available only in Sedalia, and a one-time distribution of weatherization kits to the public. Empire also offers an Experimental Commercial Energy Audit Program and two on-line energy calculators.<sup>14</sup>

14. No customers have used the Experimental Commercial Energy Audit Program and the budgeted amounts for the other programs were not completely utilized.<sup>15</sup>

15. Empire conducted a study to determine what participation level to expect for the new programs.<sup>16</sup>

16. DNR did not do a study of its own to assess the level of participation in Empire's energy efficiency programs<sup>17</sup> or directed

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<sup>10</sup> Missouri Department of Natural Resources' Statement of Position, (filed Dec. 31, 2009), p. 2; and, Missouri Department of Natural Resources' Brief, (filed Jan. 25, 2010), p. 7.

<sup>11</sup> Tr. pp. 65-68 and 121.

<sup>12</sup> Tr. p. 121

<sup>13</sup> Tr. pp. 126-127.

<sup>14</sup> Ex. 15, pp. 2-4.

<sup>15</sup> Ex. 15, pp. 4-7.

<sup>16</sup> Ex. 15, pp. 4-5 and Schedule SLM-1.

<sup>17</sup> Tr. p. 141.

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

313

specifically at Empire's customers and their particular needs.<sup>18</sup>

17. DNR relies on a study from the American Council for an Energy-Efficient Economy (ACEEE) and the National Action Plan for Energy Efficiency sponsored by the USDOE and the United States Environmental Protection Agency and prepared by 50 organizations, including a variety of natural gas companies.

18. Empire, Staff, and Public Counsel's proposed budget for Empire's total energy efficiency portfolio, including Apogee and BOC, is \$231,200 for the first year (2010), \$231,228 for the second year (2011), and \$242,430 for the third year (2012).<sup>19</sup>

19. DNR's position on DSM funding is that the amount Empire spends on energy efficiency initiatives must be increased in order to attain true energy savings and conservation. According to DNR, that increase should begin at 0.332 percent of Empire's annual gross operating revenues in 2010, increase to 0.5 percent for 2011, and increase to 1.0 percent for 2012.<sup>20</sup> Thus, DNR believes that the minimum level of annual investments should be \$217,000 for 2010, \$327,000 for 2011, and \$655,000 for 2012.

20. Empire's annual total operating revenue, including the cost of gas, for 2008 was \$65,437,938.<sup>21</sup>

21. Spending by Empire in excess of the budgeted amount may be scrutinized more closely by Staff when reviewed for prudence for inclusion in the rate case.<sup>22</sup>

22. When considered on a regional or national scale, energy efficiency programs that are designed to reduce natural gas consumption by customers can lead to the reduction of wholesale natural gas prices as well as generating direct cost savings to those customers.<sup>23</sup>

23. A reduction of about one percent per year in total U.S. natural gas demand could result in wholesale natural gas price reductions of 10 to 20 percent.<sup>24</sup>

24. Both new energy policies and additional funding for

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<sup>18</sup> Tr. pp. 143-144.

<sup>19</sup> Tr. pp. 50-51, and pp. 54-55; Ex. 16, pp. 2-3.

<sup>20</sup> Ex. 17, p. 12.

<sup>21</sup> Ex. 17, p.12.

<sup>22</sup> Tr. pp. 96.

<sup>23</sup> Direct Testimony of Laura Wolfe, Ex. 17, p. 10-12; citing to the American Council for an Energy Efficient Economy (ACEEE), Report No. U051 issued in January 2005.

<sup>24</sup> Ex. 17, p. 10.

THE EMPIRE DISTRICT GAS COMPANY

314

19 Mo. P.S.C. 3d

energy efficiency programs are necessary to achieve savings significant enough to reduce the wholesale price of natural gas as well as to generate direct cost savings to natural gas consumers.<sup>25</sup>

25. The ACEEE study includes data from the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin.

26. The ACEEE study estimated an annual energy efficiency investment needed to affect natural gas prices by each of the eight states based on each state's proportional allocation of total projected regional natural gas savings in 2010.<sup>26</sup>

27. The ACEEE study relies on data from calendar year 2002.<sup>27</sup>

28. From a regional perspective, in order to reduce natural gas demand sufficiently to put downward pressure on wholesale prices Missouri would need to spend approximately \$12 million per year statewide for natural gas-related energy efficiency programs through the year 2020.<sup>28</sup>

29. The dollar savings impact of the associated natural gas price reductions from this level of investment would be approximately \$921 million for Missouri by 2015 and an additional \$847 million by the year 2020.<sup>29</sup>

30. The most effective energy efficiency projects studied in the National Action Plan for Energy Efficiency were funded at a level equal to a minimum range of 0.5 to 1.5 percent of a natural gas utility's annual operating revenue.<sup>30</sup>

31. Empire's current energy efficiency funding levels will not result in sufficient natural gas savings to contribute to lower wholesale natural gas prices. A more significant level of investment in energy efficiency is required to potentially pressure natural gas wholesale prices lower.<sup>31</sup>

32. The portfolio of energy efficiency programs that are

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<sup>25</sup> Ex. 17, p. 10.

<sup>26</sup> Ex. 17, p. 10.

<sup>27</sup> Tr. p. 135.

<sup>28</sup> Ex. 17, p. 10.

<sup>29</sup> Ex. 17, pp. 10-11; Surrebuttal Testimony of Laura Wolfe, Ex. 18, pp. 5-6.

<sup>30</sup> Ex. 17, p. 11.

<sup>31</sup> Ex. 17, pp. 8 and 12.



## THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

315

contained in the General Agreement will provide opportunities for improved energy efficiency for every class of customer.<sup>32</sup>

33. The DSM programs set out in the General Agreement cover the limited array of opportunities that natural gas companies have for energy efficiency improvements: low income weatherization, water heating, space heating, home energy audits, building-shell improvements, commercial energy audit, and commercial equipment improvements.<sup>33</sup>

34. Setting a challenging goal for Empire's energy efficiency programs will encourage Empire to seek out and aggressively implement all possible cost effective energy efficiency programs with the goal of spending the proposed levels.<sup>34</sup>

35. Some weatherization of homes has occurred in the Empire service area since 2002.<sup>35</sup>

36. More state, federal, and charitable energy efficiency programs and funding exist in the state now than existed in 2002.<sup>36</sup>

37. The State of Missouri has received or will receive through the stimulus package, the American Recovery and Reinvestment Act (ARRA), approximately \$200 million for use over the next two to three years.<sup>37</sup>

38. More federal funding, including the stimulus funding,<sup>38</sup> is available for Empire's low income weatherization customers than was available in 2002.<sup>39</sup>

39. New energy efficiency programs need time to get established and become successful and cost-effective.<sup>40</sup>

40. Once Empire's energy efficiency programs become established, and it initiates additional, cost-effective programs, it will be possible for Empire to spend significantly more.<sup>41</sup>

### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the

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<sup>32</sup> Ex. 17, p. 8.

<sup>33</sup> Ex. 17, p. 8.

<sup>34</sup> Tr. pp. 154 and 141-142.

<sup>35</sup> Tr. pp. 135-136.

<sup>36</sup> Tr. pp. 62-63 and 136.

<sup>37</sup> Tr. pp. 136; 140.

<sup>38</sup> Tr. pp. 140, 150-152.

<sup>39</sup> Tr. pp. 135-136.

<sup>40</sup> Ex. 17, p. 12; Tr. p. 116.

<sup>41</sup> Tr. pp. 56 and 58

## THE EMPIRE DISTRICT GAS COMPANY

316

19 Mo. P.S.C. 3d

following conclusions of law.

1. Empire is a gas utility and a public utility subject to the Commission's jurisdiction.<sup>42</sup>
2. The Commission has authority to regulate the rates and services of Empire.<sup>43</sup>
3. An initial rebate of \$75 for tank storage gas water heaters with Empire making any necessary adjustments with advice from the EEC results in just and reasonable services and rates.
4. Setting a challenging budget goal for Empire's DSM programs beginning in 2010 with \$231,200 and increasing to 0.5 percent of annual operating revenues including gas costs in 2010 results in just and reasonable services and rates.

### **Decision**

The Commission previously approved a stipulation and agreement in this matter which set out how Empire shall structure its energy efficiency programs. The agreement includes accounting for all monies spent by Empire on these programs through a regulatory asset account rather than including those amounts in rates. The main issue for Commission decision is: at what level should the programs be funded? Another issue is determining a specific amount for the tank storage gas water heater rebate. Finally, the Commission provides some guidance as to the role and expectations for the EEC.

#### DSM Funding Level

All the parties agree that the portfolio of programs proposed by Empire will provide opportunities for improved energy efficiency for Empire's customers. The parties also agree that through this added energy efficiency, customers will directly benefit from savings on their monthly energy bills. In addition, the studies show that wholesale prices of natural gas can also be affected through energy efficiency programs thus affording another opportunity for customers to benefit from reduced gas costs.

The Commission recognizes that Empire alone cannot have a significant impact on wholesale prices of natural gas through its energy efficiency programs. Energy efficiency is, however, critically important to empower customers to take control of their energy bills. And, Empire

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<sup>42</sup> Subsections 386.020(18) and (43), RSMo Cum. Supp. 2009.

<sup>43</sup> Section 393.130, RSMo Cum. Supp. 2009, and Section 393.140, RSMo 2000.

## THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

317

can and should contribute in a more meaningful way toward a regional reduction in natural gas consumption by aiding its customers in becoming more energy efficient. Increased expenditures are necessary to accomplish these goals.

The ACEEE study pointed to the most successful programs in the Midwest as having spent .5 to 1.0 percent of total annual operating revenues. And the studies show that 1.0 percent spending statewide is necessary to bring downward pressure on natural gas prices. The studies did not, however, take into account the additional \$200 million in stimulus funding that will be available for energy efficiency programs in the state in addition to the funds available from the various utilities. Even so, DNR made a strong argument that the Commission should set a challenging goal for energy efficiency programs in order to make a difference in the overall cost of gas. The various studies were persuasive that energy efficiency funding should be tied to Empire's annual gross operating revenues. Further, taking into consideration the proposed funding levels, the stimulus funding, and the studies by national organizations and Empire's own consultant, the Commission determines that a challenging, yet reasonable and attainable goal for Empire's energy efficiency programs is to reach .5 percent of annual operating revenues, including the cost of gas, in 2011 and 2012.<sup>44</sup>

Any new energy efficiency programs will need time to get started and to "ramp up" before they are effective. Thus, there is no need to budget for the full .5 percent in the first year. Empire has proposed beginning funding at \$231,200 in 2010 and increasing that funding in the following two years. In addition, Empire's witness made it clear that Empire is not opposed to increasing the amounts even further if the programs are successful and the need for additional funding is warranted. Thus, Empire shall initially fund energy efficiency programs at \$231,200 in 2010. If the EEC or Empire finds that any year's energy efficiency expenditure is unattainable or will be subject to waste, abuse or fraud, then Empire or the EEC can petition the Commission to amend that amount.

### Water Heater Rebate

The Commission also determines that it should not set a

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<sup>44</sup> This is also consistent with goals that the Commission is setting for other utilities and will amount to approximately \$325,000 under current projections.

## THE EMPIRE DISTRICT GAS COMPANY

318

19 Mo. P.S.C. 3d

specific permanent rebate amount for water heaters. The evidence showed that even Empire's position on how much the rebate should be has changed from \$75 as recommended by its consultant, to \$50 as recommended by Public Counsel. The amount of the rebate will affect both the number of customers who decide to participate and the number of customers for which there will be sufficient funds to participate. While Public Counsel's witness testified that \$50 was a more cost-effective rebate amount and more in line with the general rule of thumb, it was unclear what data Public Counsel relied on to reach this conclusion. Furthermore, even Public Counsel's position includes an adjustment upward for the rebate amount in September 2010 only five months after new tariffs become effective.

Recognizing that Empire may need guidance on what specific amount to include immediately in its tariffs effective on April 1, 2010, the Commission determines that the \$75 rebate is the most reasonable. Staff, Public Counsel, Empire, and DNR all agree that some adjustment to the rebate amount will be needed in September when the new Energy Star standards are established. In addition, the rebate amounts are not large when compared with the total budget for energy efficiency programs. Further, Empire's energy efficiency programs have a history of low participation and a higher rebate amount may encourage more participation. Indeed, this was the amount Empire's consultant recommended after completing a study of this question specific to Empire. These are also the kinds of factors that the EEC will be examining and will be in the best position to give advice on a going forward basis. Therefore, the Commission concludes that the tank storage gas water heater rebate amount should initially be \$75 and any adjustments to it should be set by Empire after input from EEC.

### The Energy Efficiency Collaborative

On an annual basis, the EEC shall review Empire's annual funding amount and expenditures for its energy efficiency programs. The EEC shall provide input and suggestions on Empire's energy efficiency programs. The Commission finds that the EEC should take all steps necessary to work toward implementation of cost-effective energy efficiency programs at the spending levels set out in this order.

The energy efficiency programs shall be designed to encourage more efficient use of natural gas by encouraging energy efficiency improvements through the replacement of less efficient natural

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

319

gas equipment with high efficiency Energy Star qualified natural gas equipment and other high efficiency equipment and measures. Empire shall solicit input from the EEC on specific programs and incentive levels.

The Commission is not mandating immediately spending .5 percent of annual gross operating revenues on energy efficiency programs. The Commission believes that Empire and the EEC should, however, work toward reaching that goal in 2011 and 2012. Empire shall initially fund an annual amount of a minimum of \$231,200 for its energy efficiency programs. The EEC shall develop a plan that will increase this amount toward the goal of .5 percent of gross operating revenues. Increases in expenditures shall be dependent upon the programs' continued growth and success.

The Commission expects the EEC to inform the Commission of the steps taken to reach this goal or to bring before the Commission disputes among the parties in the EEC. The recommended increase or decrease to the annual amount of funding may be contested by any member of the EEC. In addition, if the EEC is unable to reach consensus for any reason related to the energy efficiency programs (e.g. increased expenditures, rebate amounts, types of programs to be implemented) any party may petition the Commission for further direction.

**THE COMMISSION ORDERS THAT:**

1. The Missouri Department of Natural Resources' Motion to Late File Brief filed on January 25, 2010, is granted.

2. The Empire District Gas Company is directed to budget for energy efficiency programs previously approved in the *Partial Stipulation and Agreement* at levels that will begin at \$231,200 in 2010; and to take all reasonable actions toward the goal of increasing expenditures for those programs to .5 percent of annual operating revenues, including gas costs, for 2011 and 2012.

3. The gas rebate amount for tank storage water heater shall initially be \$75, with any adjustments to be set by Empire with the advice of the Demand Side Management and Energy Efficiency Advisory Group.

4. The Empire District Gas Company shall provide quarterly reports regarding its energy efficiency programs to the Commission.

5. The Empire District Gas Company shall file the

THE EMPIRE DISTRICT GAS COMPANY

320

19 Mo. P.S.C. 3d

necessary tariff amendments to implement the terms of this Report and Order on DSM Funding.

6. This Report and Order on DSM Funding shall become effective on March 1, 2010.

Clayton, Chm., concurs, with separate concurring opinion attached;  
Davis, Jarrett, Gunn, and Kenney, CC., concur;  
and certify compliance with the provisions of Section 536.080, RSMo 2000.

\*NOTE: See pages 213 and 336 for other orders in this case.

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner concurs in the Commission's Report and Order addressing a rate increase request of The Empire District Gas Company of Joplin (Empire).

First of all, the Commission is making a strong stand on funding of Energy Efficiency (EE). As part of the Commission's recent shift of policy on EE, this rate case is the second time the Commission is pegging its goal of EE funding at .5% of gross operating revenues of the company, which amounts to approximately \$325,000. This figure compares with an amount of less than \$100,000, which has been spent annually for the last several years. The Energy Office of the Missouri Department of Natural Resources (DNR) has advocated for spending targets between .5% and 1.5% of gross operating revenues, in accordance with the National Action Plan for Energy Efficiency. The Commission is mandating expenditures of approximately \$231,000 per year, which most parties have agreed can be spent effectively and efficiently in 2010, while the Energy Efficiency Collaborative (Collaborative)<sup>1</sup> will work towards the .5% goal in future years. The goal

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<sup>1</sup> The Energy Efficiency Collaborative is a group of stakeholders charged with the task of formulating detailed programs to effectuate the intent of the Commissions Report and Oder in regard to planning and implementing cost effective energy efficiency programs within the

THE EMPIRE DISTRICT GAS COMPANY

19 Mo. P.S.C. 3d

321

of increased EE funding will be addressed regularly through on-going Commission involvement should the Collaborative fail to reach agreement or run into policy differences. While the Commission should continue to monitor and increase that funding level based on feedback from the Collaborative, this Commissioner believes this steady increase is the most responsible manner of stepping up efforts at empowering customers to reduce their energy usage.

Secondly, customers will not be responsible for funding EE programs through rates. The rates stemming from this order will not include an EE component, but rather, Empire will be required to fund the EE programs in advance. Those expenditures will be tracked in a regulatory asset for potential recovery in the next rate case. The Commission will be watching closely as programs are created, implemented and tracked for their cost-effectiveness.

Thirdly, the Commission in this case is sending the message that it intends to stay involved as the Collaborative works through implementation of its programs. It is this Commissioner's hope that the Collaborative can continue to operate in a consensus and advisory fashion and, if any dispute or roadblock occurs, that the Commission can address differences in policy determinations. Expenditure levels, program types and funding as well as feedback from rate payer experiences are items that the Commission will have the ability to monitor and contribute to the dialogue.

THE EMPIRE DISTRICT ELECTRIC COMPANY

322

19 Mo. P.S.C. 3d

In conclusion, this Commissioner is compelled to commend the parties involved in this case who have effectively settled the vast majority of issues relating to rates, rate design and many other issues. While the Commission is prepared to make the challenging decisions on controversial and complicated matters, the public can take solace that each of the stipulating parties have placed their names on the line to responsibly reach a compromise on an appropriate level of rates. While rate increases are never easy or welcome, the evidence in this case demonstrates that higher rates have been necessitated by prudent infrastructure investments and increases in general operating costs. The Commission has approved this increase unanimously and will engage in future filings to insure that the Commission directives are implemented. The Commission has a responsibility to insure that the utility offers safe and adequate service at "just and reasonable" rates. Following staff audit, evidentiary hearing, partial settlement and transparent Commissioner deliberations, the Commission finds that these new rates to be appropriate.

For the foregoing reasons, this Commission concurs.

**In the Matter of The Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company**

*File No. ER-2010-0130*

*Decided March 3, 2010*

**Electric §20.** The parties agreed, through partial stipulation and agreement that The Empire District Electric Company would not seek to recover through rates, the costs associated with its investment in the Iatan 2 generating unit

**Electric §27.** The parties agreed, through partial stipulation and agreement, to support "Construction Accounting" for certain investments by the Empire District Electric Company in Iatan 1 generating unit environmental upgrades/air quality control systems, Iatan 2, Iatan common plant, and Plum Point for specified periods.

**ORDER APPROVING STIPULATION AND AGREEMENT  
AND APPROVING PROPOSED PROCEDURAL SCHEDULE**

On February 25, 2010, the parties in this general rate case



THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

323

filed both a procedural schedule and a Stipulation and Agreement. Through this Stipulation and Agreement, the parties<sup>1</sup> address concerns surrounding Iatan 1, Iatan 2 and the Plum Point generating units and attempt to address those concerns through agreements having to do with: accounting treatment; the prudence of capital expenditures; and, the relationship between this Agreement and Empire's Experimental Regulatory Plan in Commission File No. EO-2005-0263. The parties point out that the Agreement, among other things:

- Acknowledges that Empire does not seek to recover in the rates resulting from this case, the costs associated with its investment in Iatan 2.
- Acknowledges that this case is not the "Rate Filing" called for in Section III.D.7 of the Empire Experimental Regulatory Plan Stipulation and Agreement in File No. EO-2005-0263.
- Provides that the signatory parties will support "Construction Accounting"<sup>2</sup> for certain of Empire's investment in Iatan 1 environmental upgrades/air quality control systems, Iatan 2, Iatan common plant, and Plum Point for the periods and as specified in the Stipulation and Agreement.
- Provides that questions of prudence related to Iatan 1 Environmental Upgrades, Iatan 2, Iatan common plant and Plum Point will be addressed in Empire's next general rate case proceeding.

Finally, the signatories represent that the only parties not participating in the Agreement, and who do not oppose the Agreement or the procedural schedule, are the Missouri Department of Natural Resources and Kansas City Power & Light Company.

As a result of the agreements, the parties propose the following procedural schedule:

Empire Direct Testimony	October 29, 2009
Direct Case - Revenue Requirement	
All parties except Empire	February 26, 2010

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<sup>1</sup> The parties to the Agreement are: The Empire District Electric Company; The Staff of the Missouri Public Service Commission; the Office of the Public Counsel; the Missouri Energy Users' Association; and the City of Joplin, Missouri. The Missouri Department of Natural Resources and Kansas City Power & Light did not enter into the Agreement but do not oppose it.

<sup>2</sup> Defined in the Stipulation and Agreement at page 1.

THE EMPIRE DISTRICT ELECTRIC COMPANY

324

19 Mo. P.S.C. 3d

Direct Case – Class Cost of Service and Rate Design	
All parties except Empire	March 9
Case Reconciliation (not filed)	March 10
Prehearing Conference	March 10 - 12, 15 & 16
List of Issues (Preliminary, not filed)	March 22
Local Public Hearings	
Joplin	March 22 & 23
Reed Springs	March 23
Rebuttal Testimony	April 2
Surrebuttal Testimony	April 23
Joint List of Issues, List and Order of Witnesses	
Order of Cross Examination	April 26
Reconciliation of Issues Heard	April 28
Statements of Position	April 28
Evidentiary Hearing	May 3-7 and 10-14
True-Up Direct Testimony	June 3
True-Up Rebuttal	June 17
Initial Briefs	June 22
True-Up Hearings	June 28 – July 2 (28 <sup>th</sup> – 30 <sup>th</sup> in Room 310) (1 <sup>st</sup> and 2 <sup>nd</sup> in Room 305)
Reply Briefs and True-Up Briefs	July 20
Hearing Regarding Plum Point In-Service (Room 305)	August 20
Report and Order	August 27
Operation of Law Date	September 28

Additionally, the parties propose that the test year be the 12 months ending June 30, 2009, as updated through December 31, 2009. Further, that the true-up period end on March 31, 2010. Finally, the Commission directs the parties to abide by the following proposed procedural considerations:

1) All parties shall provide copies of testimony (including schedules), exhibits and pleadings to other counsel by electronic means and in electronic form essentially concurrently with the filing of such testimony, exhibits or pleadings where the information is available in electronic format. Parties shall not be required to put information that does not exist in electronic format into electronic format for purposes of exchanging it.

THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

325

2) An effort should be made to not include in data requests questions requiring either highly confidential or proprietary information. If either highly confidential or proprietary information must be included in data request questions, the highly confidential or proprietary information should be appropriately designated as such pursuant to 4 CSR 240-2.135.

3) Counsel for each party shall receive electronically from each other party, an electronic copy of the text of all data requests “descriptions” served by that party on another party in the case contemporaneously with service of the request. If the description contains highly confidential or proprietary information, or is voluminous, a hyperlink to the EFIS record of that data request shall be considered a sufficient copy. If a party desires the response to a data request that has been served on another party, the party desiring a copy of the response must request a copy of the response from the party answering the data request – in this manner the party providing a response to a data request has the opportunity to object to providing the response to another party and is responsible for copying information purported to be highly confidential or proprietary – thus, if a party wants a copy of a data request response by Empire to a Staff data request, the party should ask Empire, not the Staff, for a copy of the data request response unless there are appropriate reasons to direct the discovery to the party originally requesting the material. Data requests, objections, or notifications respecting the need for additional time to respond shall be sent via e-mail to counsel for the other parties. Counsel may designate other personnel to be added to the service list but shall assume responsibility for compliance with any restrictions on confidentiality. Data request responses will be served on counsel for the requesting party and on the requesting party’s employee or representative who submitted the data request and shall be served electronically, if feasible and not voluminous as defined by Commission rule.

4) Until the filing of direct testimony on rate design pertinent issues, the response time for all data requests shall be 20 calendar days, and 10 calendar days to object or notify that more than 20 calendar days will be needed to provide the requested information. After direct filing and until the filing of rebuttal testimony, the response time for data requests shall be 10 business days to provide the requested information, and 5 business days to object or notify that more than 10 business day

THE EMPIRE DISTRICT ELECTRIC COMPANY

326

19 Mo. P.S.C. 3d

will be needed to provide the requested information. After the filing of rebuttal testimony, the response time for data requests shall be 10 calendar days to provide the requested information, and 5 calendar days to object or notify that more than 10 calendar days will be needed to provide the requested information.

5) Workpapers that were prepared in the course of developing a witness' testimony should not be filed with the Commission but should be submitted to each party within 2 business days following the filing of the particular testimony without further request. Workpapers containing highly confidential or proprietary information should be appropriately marked. Since workpapers for certain parties may be voluminous and generally not all parties are interested in receiving workpapers or a complete set of workpapers, a party shall be relieved of providing workpapers to those parties indicating that they are not interested in receiving workpapers or a complete set of workpapers. Counsel shall undertake to advise other counsel if the sponsored witness has no workpapers related to the round of testimony.

6) Where workpapers or data request responses include models or spreadsheets or similar information originally in a commonly available format where inputs or parameters may be changed to observe changes in inputs, if available in that original format, the party providing the workpapers or responses shall provide this type of information in that original format.

7) For purposes of this case, the Staff requests the Commission waive 4 CSR 240-2.045(2) and 2.080(11) with respect to prefiled testimony and other pleadings, and treat filings made through the Commission's Electronic Filing and Information System (EFIS) as timely filed if filed before midnight on the date the filing is due.

8) The Staff requests that documents filed in EFIS be considered properly served by serving the same on counsel of record for all other parties via e-mail essentially contemporaneously with the EFIS filing.

The Commission has reviewed the agreements regarding the Iatan 1, Iatan 2 and Plum Point generating units reached by the parties and will approve the Stipulation and Agreement and the resulting procedural schedule. Additionally, the Commission finds that it is reasonable and that good cause exist to waive 4 CSR 240-2.045(2) and 2.080(11) in order to accommodate the parties in filing pleadings and

MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

327

testimony in this case.

**THE COMMISSION ORDERS THAT:**

1. The Stipulation and Agreement entered into by all of the parties except the Missouri Department of Natural Resources and Kansas City Power & Light Company, who do not oppose the Agreement, is approved and the parties shall abide by its terms.
2. The proposed procedural schedule is approved and the parties shall abide by the procedural considerations set out in the body of this order.
3. Commission rule 4 CSR 240-2.045(20 and 2.080(11) are waived.
4. This order shall become effective upon issuance.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Jones, Senior Regulatory Law Judge

**\*NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**\*NOTE:** See pages 368 and 619 for other orders in this case.

**In the Matter of Missouri-American Water Company's Request for a  
Variance from Certain Requirements Set Forth in 4 CSR 240-2.050**

*File No. WE-2010-0136  
Decided March 3, 2010*

**Service §4.** The Commission grants a variance from its regulations on disconnecting service, for a territory for which the applicant bills on a quarterly basis, because the regulation does not give the utility enough time after sending out notices of disconnection to complete all disconnections noticed in the quarter.

## MISSOURI-AMERICAN WATER COMPANY

328

19 Mo. P.S.C. 3d

**Service §43.** The Commission grants a variance from its regulations on disconnecting service, for a territory for which the applicant bills on a quarterly basis, because the regulation does not give the utility enough time after sending out notices of disconnection to complete all disconnections noticed in the quarter.

**Water §26.** The Commission grants a variance from its regulations on disconnecting service, for a territory for which the applicant bills on a quarterly basis, because the regulation does not give the utility enough time after sending out notices of disconnection to complete all disconnections noticed in the quarter.

### **ORDER GRANTING VARIANCE FOR DISCONTINUANCE OF SERVICE IN ST. LOUIS COUNTY**

The Missouri Public Service Commission is approving Missouri-American Water Company's ("MAWC") application as amended ("application"). The application seeks a variance from the Commission's regulations on discontinuance of service in St. Louis County only. A tariff implementing the variance is pending in File No. WR-2010-0131.

#### Procedure

On October 30, 2009, MAWC filed the application. The application included an affidavit and an illustrative tariff. The Commission granted leave to amend the application with a substitute illustrative tariff by order issued December 1, 2009. On January 19, 2010, the Commission's Staff ("Staff") *Recommendation*, which also included an affidavit, supporting the application. The Commission has received no application for intervention, no response to the recommendation, and no request for a local public hearing. Because no party opposes the application, the Commission convened no evidentiary hearing, and bases this order on the affidavits supporting the application and recommendation.<sup>1</sup>

#### Merits

The application is subject to a standard of "good cause."<sup>2</sup> Good cause means a remedy that prevents manifest injustice<sup>3</sup> based on reasonableness and good faith.<sup>4</sup> MAWC has met that standard as follows.

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<sup>1</sup> State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com'n, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

<sup>2</sup> 4 CSR 240-13.065(1).

<sup>3</sup> *Bennett v. Bennett*, 938 S.W.2d 952 (Mo. App., S.D. 1997).

<sup>4</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. W.D. 1996).

MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

329

The Commission's regulations on discontinuance of residential service restrict disconnection to certain hours on certain days. Disconnection must occur between 8:00 a.m. and 4:00 p.m. on a day when utility personnel are available to reconnect service.<sup>5</sup> Further, disconnection can only occur during a certain period:

On the date specified on the notice of discontinuance or within eleven (11) business days after that . . . . After the eleven (11) business day effective period of the notice, all notice procedures required by this rule shall again be followed before the utility may discontinue service.<sup>6</sup>

That provision ("11-day period") is the subject of the application. MAWC seeks no variance as to territories where MAWC bills customers monthly. But where MAWC bills customers quarterly—St. Louis County—MAWC seeks to substitute a 20-day period for the 11-day period.

The reason is that the 11-day period is sometimes too short a time for MAWC to make all the disconnections accrued in a quarter. For those disconnections not made in the 11-day period, MAWC must follow "all notice procedures required by this rule . . . again . . . before the utility may discontinue service."<sup>7</sup> MAWC must print another notice to send with the next bill. Disconnection cannot occur except during the next 11-day period. Meanwhile, charges that increase uncollectable accounts continue to accrue. And the next 11-day period may also be too short, causing the cycle to continue. The resulting extra printing costs, and accrual of bad debt, harm paying customers.

MAWC seeks to add nine days to the 11-day period for quarterly-billed customers. That variance will reduce the disconnections not made under the first notice by 50 percent. Tariff language to effect the variance is part of Staff's *Recommendation*, Memorandum, Attachment A, to which MAWC made no objection.

On reviewing the application and recommendation, the Commission independently finds and concludes that MAWC has shown good cause for a variance. Therefore, the Commission will grant the

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<sup>5</sup> 4 CSR 240-13.050(3).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

MISSOURI-AMERICAN WATER COMPANY

330

19 Mo. P.S.C. 3d

application. The Commission will also order MAWC to file a tariff that reflects the variance.<sup>8</sup> The Commission will allow such filing in either this file or File No. WR-2010-0131. Upon such filing, the Commission will issue an order closing this file.

**THE COMMISSION ORDERS THAT:**

1. The application is granted.
2. Missouri-American Water Company ("MAWC") shall file—either in this file or in File No. WR-2010-0131—a tariff that conforms to the language set forth in the *Recommendation*, Memorandum, Attachment A.
3. This order shall become effective on March 15, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Jordan, Regulatory Law Judge

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<sup>8</sup> 4 CSR 240-13.065(3).



MILL CREEK SEWERS, INC.

19 Mo. P.S.C. 3d

331

**In the Matter of the Petition for an Interim Receiver and for an Order Directing the General Counsel to Petition the Circuit Court for the Appointment of a Receiver for Mill Creek Sewers, Inc.**

*File No. SO-2010-0237*

*Decided March 3, 2010*

**Sewer §24.** The Commission determined Mill Creek Sewers, Inc. demonstrated a continued inability and/or unwillingness to provide safe and adequate service to its customers, thereby effectively abandoning the sewer system. The Commission appointed an interim receiver and ordered the general counsel to petition the circuit court for an order attaching the assets of the company and placing it under the control and responsibility of a receiver.

**REPORT AND ORDER APPOINTING INTERIM RECEIVER AND DIRECTING ACTION FOR COURT-APPOINTED RECEIVER**

The Missouri Public Service Commission is granting the relief sought in the petition of the Commission's staff ("Staff"). Staff asks the Commission to appoint an interim receiver, and seeks authority to petition for a court-appointed receiver, for Mill Creek Sewers, Inc., ("Mill Creek"). Staff also seeks expedited treatment, which the Commission has granted. Staff filed the petition on February 11, 2010. On February 25, 2010, the Commission convened a hearing. Legal Counsel Jennifer Hernandez represented Staff. Though notified of the time, place, and matter involved, Mill Creek made no appearance.

**Findings of Fact**

1. Mill Creek is a Missouri general business corporation. Mill Creek's principal place of business was 1208 Mead Drive, St. Louis, MO 63137. Since 1973, Mill Creek has held a certificate of convenience and necessity to operate a sewer system in St. Louis County, Missouri.

2. In March 2009, Charles L. Stroud bought Mill Creek and has since been Mill Creek's sole shareholder and president.

3. Mill Creek owns a sewer system ("system"). The system provides sewer service to approximately 76 residential customers in Castlereagh Estates subdivision, St. Louis County, Missouri. To operate the system, Mill Creek has contracted with Testing-Analysis & Control, Inc. ("TAC").

MILL CREEK SEWERS, INC.

332

19 Mo. P.S.C. 3d

Earlier Commission Action

4. In Case No. SR-2005-0116 (“the earlier action”), Staff monitored Mill Creek for continued inability or unwillingness, or both, to provide safe and adequate service to its customers, and for effective abandonment of the sewer system.

5. Since March 2008—a year before Stroud bought Mill Creek—Staff has been discussing the system’s needs with Stroud. Staff has offered advice on billing and guidance on providing safe and adequate service. In March, June, July and August, Stroud failed to produce records as requested by Staff. On July 31, 2009, Stroud stated that receivership was the appropriate disposition for Mill Creek.

6. Counsel for Staff sent a letter by certified mail on October 23, 2009, to Mill Creek and Mr. Stroud. The letter asked mill Creek and Staff to discuss Mill Creek’s issues and gave until November 13, 2009, before Staff sought receivership. That date passed with no response.

7. On December 8, 2009, Staff filed a petition and motion seeking the same relief as in this action. On December 9, 2009, the Commission granted expedited treatment and set a hearing date. On December 31, 2009—five days before the evidentiary hearing—Stroud contacted Staff’s counsel seeking resolution of Mill Creek’s issues without litigation.

8. On January 4, 2010—the day before the evidentiary hearing—Stroud and Staff met. Stroud stated that he had quit managing Mill Creek in the spring of 2009 out of frustration. On that same day, Stroud and Staff reached an agreement and, based on the agreement, Staff filed a *Motion to Stay Evidentiary Hearing* on behalf of itself and Mill Creek. The Commission granted that motion.

9. The agreement included paying certain creditors. At the January 4, 2010 meeting, Stroud said he was mailing Mill Creek’s payment to TAC. TAC received no such payment.

10. The agreement included Mill Creek producing certain financial documents by January 19, 2010, but Mill Creek did not to produce the requested documents on that date.

11. Mill Creek did not comply with other terms of the agreement.

12. Mill Creek’s communication with the Staff has again ceased. Staff’s recent certified correspondence to Mill Creek was returned unclaimed. Mill Creek has also ceased communication with

MILL CREEK SEWERS, INC.

19 Mo. P.S.C. 3d

333

customers.

Operations

13. In July 2008, Mill Creek's operating permit from the Missouri Department of Natural Resources (DNR) expired.

14. In calendar year 2009, for the service months of February, March, April, September, October, November, and December, Mill Creek failed to bill its customers. As a result, Mill Creek received no income for those periods. Consequently, Mill Creek's revenues fell short of its operating expenses.

15. The system includes pumps and a treatment facility that run on electricity. Operation includes electrical repairs, pump motor maintenance, clearing clogs, sludge removal, and oxygenation to support the aerobic treatment. Unless someone performs those tasks, the pumps could cease and the treatment plant could stagnate and overflow, polluting the waters of the state. Mill Creek has not paid TAC to operate the system since September 2009.

16. The treatment facility is aerobic, requiring a continuous feed of oxygen. If Union Electric Company d/b/a AmerenUE ("AmerenUE") disconnects Mill Creek, as it may for failure to pay, the treatment facility will cease to function. If that happens, sewage collected from the customers will stand untreated. Mill Creek's electric service account with AmerenUE is past due.

17. Mill Creek has closed its office and its customer service number is disconnected. Without such contacts, customers cannot notify Mill Creek of service issues like sewage back-ups. Sewage back-ups require attention within a few hours to prevent property damage and pollution to the waters of the state.

18. Mill Creek is also past due on DNR permit fees, property taxes, its telephone bill, and the Commission's fiscal year 2010 assessment.

19. Mill Creek's failure to meet its obligations and maintain its system constitutes a threat to safe and adequate service.

Interim Receiver and Compensation

20. If Mill Creek can begin collecting the revenues, it can pay its bills and provide safe and adequate service.

21. Heartland Utilities, LLC ("Heartland") is a Missouri limited liability company. Heartland's president, Jason Williamson, has 16 years of experience in the operation of sewer systems. Since March 2009

MILL CREEK SEWERS, INC.

334

19 Mo. P.S.C. 3d

Heartland has provided safe and adequate sewer service as receiver for Gladlo Water & Sewer Co., Inc.

22. A monthly fee of \$800 is just and reasonable compensation for Heartland to operate the system.

**Conclusions of Law**

The Commission has jurisdiction over public utilities generally<sup>1</sup> and sewer corporations specifically.<sup>2</sup> Those terms include Mill Creek.<sup>3</sup> Staff has the burden of proof because it asks the Commission to take control of the system from Mill Creek.<sup>4</sup>

A. Court-Appointed Receiver

Staff cites the receivership provisions applicable to:

. . . any sewer . . . corporation that regularly provides service to eight thousand or fewer customer connections[.<sup>5</sup>]

That provision includes Mill Creek because Mill Creek regularly provides service to 75 customer connections.

Under that provision, Staff asks the Commission for authority to:

. . . petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver[.<sup>6</sup>]

Such authority is available if Mill Creek:

. . . is unable or unwilling to provide safe and adequate service [or] has been actually or effectively abandoned by its owners[.<sup>7</sup>]

Under that standard, Staff has carried its burden of proof as follows.

Staff has shown that Mill Creek has failed to conduct operations fundamental to conducting business. Such operations include keeping records, collecting revenue, and paying bills. Also, such bills include

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<sup>1</sup> Section 386.250(5), RSMo 2000; Section 386.020(43), RSMo Supp. 2009.

<sup>2</sup> Sections 386.250(4) and 393.140(1), RSMo 2000.

<sup>3</sup> Sections 393.120, RSMo 2000; and 386.020(48) and (49), RSMo Supp. 2009.

<sup>4</sup> *Heidebur v. Parker*, 505 S.W.2d 440, 444 (Mo. App., St.L.D. 1974).

<sup>5</sup> Section 393.145.1. All citations to Section 393.145 are in the 2009 Supplement to the 2000 Revised Statutes of Missouri.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

MILL CREEK SEWERS, INC.

19 Mo. P.S.C. 3d

335

services essential to operation like its DNR permit, electricity bills, telephone bills, the Commission's assessment, and a DNR operation permit. Further, such matters were the subject of the earlier action, which sought the same relief. Mill Creek delayed that action but did not remedy its failures.

Mill Creek's cessation of business—and Stroud's own words—show unwillingness to provide safe and adequate service, constitute abandonment of the system, and threaten the public health and safety. For example, without billing, Mill Creek cannot collect revenue. Without revenue, Mill Creek cannot pay for electricity. Without electricity, Mill Creek's pumps and treatment plant will shut down.

Therefore, the Commission will order its General Counsel to file an action in circuit court for a court-appointed receiver.

B. Interim Receiver

Staff also seeks an order appointing an interim receiver. Such relief is within the Commission's authority as follows:

If the commission orders its general counsel to petition the circuit court for the appointment of a receiver under subsection 1 of this section, it may in the same order appoint an interim receiver for the sewer . . . corporation. [<sup>8</sup>]

Staff has shown that safe and adequate sewer service to the residence of Castlereagh Estates is in jeopardy, which threatens the public health and safety. Therefore, the Commission will appoint an interim receiver.

An interim receiver's authority includes control of, and responsibility for, Mill Creek's assets.<sup>9</sup> A receiver must be responsible and knowledgeable in the operation of utilities<sup>10</sup> and must operate the utility in its customers' best interests.<sup>11</sup> Staff showed that Heartland has those qualifications.

Therefore, the Commission will appoint Heartland as interim receiver.

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<sup>8</sup> Section 393.145.2.

<sup>9</sup> *Id.* and Section 393.145.3.

<sup>10</sup> Section 393.145.2 and .5.

<sup>11</sup> Section 393.145.2 and .6.

THE EMPIRE DISTRICT ELECTRIC COMPANY

336

19 Mo. P.S.C. 3d

C. Interim Receiver's Compensation

The Commission must also set the interim receiver's compensation.<sup>1</sup> Staff showed that a monthly fee of \$800 is a just and reasonable amount for operating the system. Therefore, the Commission will order compensation in that amount.

**THE COMMISSION ORDERS THAT:**

1. Heartland Utilities, LLC, is appointed interim receiver of Mill Creek Sewers, Inc., with compensation of \$800.00 per month.
2. The Commission's General Counsel shall petition the circuit court for an order attaching the assets of Mill Creek Sewers, Inc., and placing Mill Creek Sewers, Inc., under the control and responsibility of a receiver.
3. This order shall become effective ten days from issuance.

Clayton, CC., Davis, Jarrett, Gunn,  
and Kenney, CC., concur;  
and certify compliance with the  
provisions of Section 536.080, RSMo.

Jordan, Regulatory Law Judge

**In the Matter of The Empire District Gas Company of Joplin,  
Missouri for Authority to File Tariffs Increasing Rates for Gas  
Service Provided to Customers in the Missouri Service Area of the  
Company.**

*File No. GR-2009-0434  
Decided March 10, 2010*

**Gas §18.** The Commission clarifies its findings of fact as to energy efficiency, programs, prices, savings, and rebates, but does not change its conclusions of law.

**Rates §108.** The Commission clarifies its findings of fact as to energy efficiency, programs, prices, savings, and rebates, but does not change its conclusions of law.

**ORDER CLARIFYING REPORT AND ORDER ON DSM FUNDING**

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<sup>1</sup> Section 393.145.2.

On February 24, 2010, the Commission issued its Report and Order on DSM Funding in this matter. The Office of the Public Counsel filed a Motion for Reconsideration on March 3, 2010. The Commission issued an Order of Correction on March 4, 2010, correcting the effective date of the Report and Order.

In addition to the effective date error, Public Counsel makes arguments for the Commission to reconsider portions of its decision. The Commission determines that some additional clarification will be helpful.

**Finding of Fact 29**

The Commission is clarifying Finding of Fact 29 in accordance with the Surrebuttal Testimony of Laura Wolfe.<sup>2</sup> In her Surrebuttal Testimony, Ms. Wolfe clarified that the \$921 million and \$847 million savings effect included reductions from energy efficiency investments for electricity and natural gas. The dollar savings in the American Council for an Energy-Efficient Economy (ACEEE) study that are attributed solely to natural gas are \$60 million by 2015 and \$97 million by 2020. Although Finding of Fact 29 should include these figures, the Commission's decision remains the same.

**Finding of Fact 30**

Finding of Fact 30 currently states: "The most effective energy efficiency projects studied in the National Action Plan for Energy Efficiency were funded at a level equal to a minimum range of 0.5 to 1.5 percent of a natural gas utility's annual operating revenue." This "most effective" language is how Ms. Wolfe interpreted the National Action Plan for Energy Efficiency. Mr. Kind, for the Office of the Public Counsel, took exception to this interpretation and pointed out that the National Action Plan for Energy Efficiency only cites to "effective projects" not "the most effective projects."

The Commission clarifies that Finding of Fact 30 should read: "Energy efficiency projects studied in the National Action Plan for Energy Efficiency were found to be effective when funded at a level equal to a minimum range of 0.5 to 1.5 percent of a natural gas utility's annual operating revenue." In addition, the Commission will strike the words "the most" in the first sentence of the second full paragraph of

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<sup>2</sup> Ex. 18, pp. 5-6.

## THE EMPIRE DISTRICT ELECTRIC COMPANY

338

19 Mo. P.S.C. 3d

page 12 of the Report and Order. Even with these clarifications, the Commission's ultimate decision remains unchanged.

### **One Percent Spending Level**

Public Counsel also asks the Commission to reconsider its conclusion that "the studies show that 1.0 percent spending statewide is necessary to bring downward pressure on natural gas prices." Ms. Wolfe stated in her Direct Testimony<sup>3</sup> that nationwide the ACEEE study showed that 1.0 percent could have this effect. This statement was not challenged. The Commission clarifies that the study indicated this funding level was needed "nationwide" and not just "statewide." However, the Commission did not find that Empire should be spending at the 1.0 percent level, but rather the .5 percent level. This reduction takes into consideration the other energy efficiency funds that will be available in the state and for differences among all the states in spending levels. The Commission clarifies its decision, but this clarification does not alter its determination of funding levels.

### **Water Heater Rebates**

Another request for reconsideration is the Commission's determination that initially, the energy efficient water heater rebate should be \$75. The Commission cited to one rule of thumb regarding incentives that Mr. Kind put forward at the hearing.<sup>4</sup> The Commission decided, however, not to follow that rule of thumb, in part because the rebate amount may need to be adjusted in September.

The Commission encourages cost effective spending on incentives. But there was no evidence that \$75 rebate amount was not cost-effective, only that it may not be the most cost-effective. Further, the Energy Efficiency Collaborative can suggest changes to Empire in a few months and the Commission made provisions for the members of the Energy Efficiency Collaborative to present any disagreements to the Commission.

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<sup>3</sup> Ex. 17, p. 10.

<sup>4</sup> Finding of Fact 12.



MILL CREEK SEWERS, INC.

19 Mo. P.S.C. 3d

339

As to the weight given to the data examined by Empire's consultant versus that examined by Mr. Kind, the evidence presented by Empire was based on Empire-specific data. There was no reference to the scope of the data examined by Mr. Kind and this also contributed to the Commission's determination that \$75 was a more reasonable rebate amount with which to begin the program. The Commission's decision is clarified to include these considerations but its decision is the same.

**THE COMMISSION ORDERS THAT:**

1. The Commission clarifies its order as set out above.
2. This order shall become effective on March 20, 2010.

Davis, Jarrett, Gunn, and Kenney, CC., concur.  
Clayton, Chm., absent.

Dippell, Deputy Chief Regulatory Law Judge

\*NOTE: See pages 213 and 308 for other orders in this case.

**In the Matter of the Petition for an Interim Receiver and for an Order Directing the General Counsel to Petition the Circuit Court for the Appointment of a Receiver for Mill Creek Sewers, Inc.**

*File No. SO-2010-0237  
Decided March 12, 2010*

**Sewer §24.** The Commission determined Mill Creek Sewers, Inc. demonstrated a continued inability and/or unwillingness to provide safe and adequate service to its customers, thereby effectively abandoning the sewer system. The Commission appointed an interim receiver and ordered the general counsel to petition the circuit court for an order attaching the assets of the company and placing it under the control and responsibility of a receiver.

**ORDER GRANTING MOTION FOR CLARIFICATION**

The Missouri Public Service Commission is granting the Motion for Clarification ("motion") of the Commission's staff ("Staff") as set forth below.

The Commission issued the report and order on March 3, 2010.

MILL CREEK SEWERS, INC.

340

19 Mo. P.S.C. 3d

Staff filed the motion on March 8, 2010. On March 9, 2010, the reporter filed the transcript. Staff filed a supplement to the motion with citations to the record on March 12, 2010. In the motion and supplement, Staff asks to amend three findings of fact, arguing that such amendments will better reflect the transcript.

The transcript supports the amendments not precisely, but substantially, as Staff propounded them. Therefore, the Commission will grant the motion as follows, with bold material replacing bracketed material.

5. Since *[March 2008—a year before Stroud bought Mill Creek—]* **December 2008**, Staff has been discussing the system's needs with Stroud. Staff has offered advice on billing and guidance on providing safe and adequate service. In **March of 2009, during a Staff visit, Staff requested records but Stroud failed to produce them until two weeks after the visit. In** June, July and August **of 2009**, Stroud **entirely** failed to produce records as requested by Staff. On July 31, 2009, Stroud stated that receivership was the appropriate disposition for Mill Creek.

\* \* \*

12. Mill Creek's communication with the Staff has again ceased. Staff's *[recent]* **October 23, 2009** certified correspondence to Mill Creek *[was returned unclaimed]* **went unanswered until December 31, 2009**. Mill Creek has also ceased communication with customers.

\* \* \*

17. Mill Creek has *[closed its]* **no customer service** office and its customer service number is

AQUA MISSOURI, INC.

19 Mo. P.S.C. 3d

341

disconnected. Without such contacts, customers cannot notify Mill Creek of service issues like sewage back-ups. Sewage back-ups require attention within a few hours to prevent property damage and pollution to the waters of the state.

None of those amendments affects the Commission's determination as to any element of Staff's claim, so the Commission will issue this order by delegation.

**THE COMMISSION ORDERS THAT:**

1. The Motion for Clarification is granted.
2. The report and order is amended as set forth in the body of this order.
3. This order shall become effective immediately on issuance.

Daniel Jordan, Regulatory Law Judge,  
by delegation of authority pursuant  
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 12<sup>th</sup> day of March 2010.

**In the Matter of the Application of Ozark Meadows, Aqua Development Company, d/b/a Aqua Missouri, Inc. Request for Increase in Annual Sewer System Operating Revenues MPSC Sewer Utility Small Company Rate Increase Procedures**

**In the Matter of Aqua RU, Inc. d/b/a Aqua Missouri Request for Increase in Annual Water System Operating Revenues MPSC Water Utility Small Company Rate Increase**

**In the Matter of Aqua Missouri, Inc. (CU) Request for Increase in Annual Sewer System Operating Revenue MPSC Sewer Utility Small**

AQUA MISSOURI, INC.

342

19 Mo. P.S.C. 3d

**Company Rate Increase Procedures**

**In the Matter of Aqua Missouri, Inc. (CU) Request for an Increase in the Annual Water System Operating Revenues MPSC Water Utility Small Company Rate Increase Procedures**

*File No. SR-2010-0023, WR-2010-0025, SR-2010-0026, & WR-2010-0027  
Decided March 24, 2010*

**Sewer §14.** The Commission approved disposition agreements and conforming tariffs implementing new rates schedules to provide sufficient funding for the companies to provide safe and adequate service.

**Water §16.** The Commission approved disposition agreements and conforming tariffs implementing new rates schedules to provide sufficient funding for the companies to provide safe and adequate service.

**ORDER APPROVING NON-UNANIMOUS DISPOSITION  
AGREEMENTS AND APPROVING TARIFFS**

On July 15, 2009, Aqua Development Company, d/b/a Aqua Missouri, Inc., Aqua RU, Inc. d/b/a Aqua Missouri and Aqua Missouri, Inc. (collectively "Aqua Missouri"), initiated four small company revenue increase requests involving multiple rate districts.<sup>1</sup> On December 16, 2009, the Commission's Staff filed Disposition Agreements ("Company/Staff Agreements") executed by it and Aqua Missouri, and on December 17, 2009, Aqua Missouri filed revised tariff sheets in conformity with the Agreements bearing an effective date of February 1, 2010. The following table summarizes the initial requests by rate district and the increases proposed in the Company/Staff Agreements:

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<sup>1</sup> The requests were filed pursuant to Commission Rule 4 CSR 240-3.050.

AQUA MISSOURI, INC.

19 Mo. P.S.C. 3d

343

NUMBER	RATE DISTRICT	CUSTOMERS SERVED	INITIAL INCREASE REQUESTED	STAFF/COMPANY AGREEMENT	AVERAGE RESIDENTIAL MONTHLY INCREASE	AVERAGE RESIDENTIAL BILL
<u>SR-2010-0023</u>	Ozark Meadows Morgan County	25 customers	\$13,200 (82.7%)	\$3,305 (26.56%)	\$14.16 (26.56%)	\$53.31 bill would increase to \$67.47
<u>WR-2010-0025</u>	Lakewood Manor Barry County	35 customers Shell Knob	\$20,000 (93.2%)	\$894 (4.29%)	\$3.02 (4.29%)	\$70.37 bill would increase to \$73.39
<u>WR-2010-0025</u>	LTA Division Taney County	97 customers Branson	\$14,900 (28.6%)	\$12,283 (23.69%)	\$10.08 (23.69%)	\$42.56 bill would increase to \$52.64
<u>WR-2010-0025</u>	Ozark Mountain Division Barry & Stone Counties	382 customers Shell Knob	\$71,600 (45.1%)	\$48,865 (29.97%)	\$14.87 (32.78%)	\$45.35 bill would increase to \$60.22
<u>WR-2010-0025</u>	Rankin Acres Division Greene County	86 customers Republic	\$2,500 (4.8%)	\$0.00	\$0.00	No increase
<u>WR-2010-0025</u>	Riverside Estates Division Taney County	281 customers Hollister	\$32,500 (37.4%)	\$21,695 (23.76%)	\$7.28 (24.55%)	\$29.64 bill would increase to \$36.92

AQUA MISSOURI, INC.

344

19 Mo. P.S.C. 3d

<b><u>WR-2010-0025</u></b>	Spring Valley Division  Christian County	106 customers  Ozark	\$19,100 (30.4%)	\$11,184 (18.43%)	\$11.26 (18.43%)	\$61.09 would increase to \$72.35
<b><u>WR-2010-0025</u></b>	White Branch Division  Benton County	152 customers  Warsaw	\$26,000 (43.8%)	\$30,404 (50.62%)	\$17.81 (50.62%)	\$35.19 bill would increase to \$53.00
<b><u>SR-2010-0026</u></b>	Jefferson City Division  Cole & Callaway Counties	1,800 customers  Jefferson City, Holts Summit, New Bloomfield and Eugene	\$284,300 (29.2%)	\$182,813 (18.83%)	\$8.43 (18.83%)	\$44.79 bill would increase to \$53.22
<b><u>SR-2010-0026</u></b>	Maplewood Division  Pettis County	385 customers  Sedalia	\$ 41,100 (34.6%)	\$18,669 (15.19%)	\$3.30 (15.19%)	\$21.73 bill would increase to \$25.03
<b><u>WR-2010-0027</u></b>	Maplewood Division  Pettis County  Lake Carmel Division  Cole County	435 customers  Sedalia  Eugene	\$ 40,900 (27.5%)	\$19,888 (13.10%)	\$2.65 (13.10%)	\$20.24 bill would increase to \$22.89

Between the dates of February 10 and 22, 2010, the Commission held six local public hearings at the request of the Office of the Public Counsel ("Public Counsel"). Public Counsel also requested the Commission to reserve dates for evidentiary hearings. Aqua Missouri's tariffs were suspended until June 15, 2010 to allow adequate

AQUA MISSOURI, INC.

19 Mo. P.S.C. 3d

345

time to conduct the hearings. On February 23, 2010, Public Counsel filed its position statement. Public Counsel stated that while it had concerns regarding certain quality of service issues and while it would not join the Company/Staff Agreements, it would not oppose the agreements.

On March 8, 2010, Staff filed an investigation report. Staff's report indicates that it followed up with the customers raising the service quality issues at the local public hearings, independently investigated those issues and found no violations of any statute, tariff provision or Commission regulation. Staff indicates that Aqua Missouri is engaged in some remedial measures to improve the quality of its services and plans additional follow up with the company.

On March 12, 2010, because of the service quality issues raised and the requested rate increase, the Commission convened an On-the-Record Proceeding to inquire into the terms and conditions of the Company/Staff Agreements. At that proceeding, the Commission's auditors and accountants assured the Commission that the rates being proposed were just and reasonable and would be sufficient to allow Aqua Missouri to provide safe and adequate service. Aqua Missouri asserted its commitment to improving its service quality. And Public Counsel did not contest Staff's accounting, the disposition agreements or raise any additional concerns in relation to service quality.

The Commission has extensively reviewed Aqua's applications, the disposition agreements, the transcripts from the public hearings, Staff's investigation report and the recording of the On-the-Record Proceeding. The Commission finds the disposition agreements and their conditions strike the appropriate balance in providing sufficient funding for Aqua Missouri to provide safe and adequate service. The Commission finds the Company/Staff Agreements reasonable and will approve them.<sup>2</sup> The Commission will also approve Aqua Missouri's tariff filings implementing the terms of the agreements.

**THE COMMISSION ORDERS THAT:**

1. The Company/Staff Disposition Agreements in File Nos. SR-2010-0023, WR-2010-0025, SR-2010-0026 and WR-2010-0027, entered

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<sup>2</sup> The Commission has the authority to accept stipulations and agreements as offered by the parties pursuant to Section 536.060, RSMo 2000. Since Public Counsel's request for an evidentiary hearing was abandoned, the Commission may grant the relief requested based on the unopposed Company/Staff Disposition Agreements.

AQUA MISSOURI, INC.

346

19 Mo. P.S.C. 3d

into by Aqua Development Company, d/b/a Aqua Missouri, Inc., Aqua RU, Inc. d/b/a Aqua Missouri, Aqua Missouri, Inc. and the Staff of the Missouri Public Service Commission, filed on December 16, 2009, are approved.

2. The signatories shall comply with the terms of the Company/Staff Disposition Agreements. A copy of each Agreement is attached to this order in Appendices A – D.

3. The sewer service tariff sheet submitted on December 17, 2009, in File No. SR-2010-0023 by Aqua Development Company, d/b/a Aqua Missouri, Inc., assigned Tariff No. YS-2010-0391, bearing an effective date of February 1, 2010, and suspended until June 15, 2010, is approved to become effective on April 1, 2010. The specific sheet approved is:

**PSC MO. No. 1**

**3rd Revised Sheet No. 4, Canceling 2nd Revised Sheet No. 4**

4. The water service tariff sheets submitted on December 17, 2009, in File No. WR-2010-0025 by Aqua RU, Inc., d/b/a Aqua Missouri, Inc., assigned Tariff No. YW-2010-0394, bearing an effective date of February 1, 2010, and suspended until June 15, 2010 are approved to become effective on April 1, 2010. The specific sheets approved are:

**PSC MO. No. 2**

- 4th Revised Sheet No. WR1, Canceling 3rd Revised Sheet No. WR1**
- 5th Revised Sheet No. WR2, Canceling 4th Revised Sheet No. WR2**
- 2nd Revised Sheet No. WR3, Canceling 1st Revised Sheet No. WR3**
- 4th Revised Sheet No. WR4, Canceling 3rd Revised Sheet No. WR4**
- 3rd Revised Sheet No. WR5, Canceling 2nd Revised Sheet No. WR5**
- 3rd Revised Sheet No. WR6, Canceling 2nd Revised Sheet No. WR6**
- 3rd Revised Sheet No. WR7, Canceling 2nd Revised Sheet No. WR7**
- 3rd Revised Sheet No. WR8, Canceling 2nd Revised Sheet No. WR8**
- 2nd Revised Sheet No. WRR14, Canceling 1st Revised Sheet No. WRR14**
- 2nd Revised Sheet No. WRR25, Canceling 1st Revised Sheet No. WRR25**
- 2nd Revised Sheet No. WSC-1, Canceling 1st Revised Sheet No. WSC-1**

5. The sewer service tariff sheets submitted on December 17, 2009, in File No. SR-2010-0026 by Aqua Missouri, Inc. (CU), assigned Tariff No. YS-2010-0392, bearing an effective date of February 1, 2010,



AQUA MISSOURI, INC.

19 Mo. P.S.C. 3d

347

and suspended until June 15, 2010 are approved to become on April 1, 2010. The specific sheets approved are:

**PSC MO. No. 2**

**4th Revised Sheet No. SR1, Canceling 3rd Revised Sheet No. SR1  
3rd Revised Sheet No. SR1, Canceling 2nd Revised Sheet No. SR2<sup>3</sup>  
1st Revised Sheet No. SR5, Canceling Original Sheet No. SR5  
1st Revised Sheet No. SRR29, Canceling Original Sheet No. SRR29  
1st Revised Sheet No. SRR33, Canceling Original Sheet No. SRR33  
1st Revised Sheet No. SRR35, Canceling Original Sheet No. SRR35  
2nd Revised Sheet No. SRR36, Canceling 1st Revised Sheet No.  
SRR36**

6. The water service tariff sheets submitted on December 17, 2009, in File No. WR-2010-0027 by Aqua Missouri, Inc. (CU), assigned Tariff No. YW-2010-0393, bearing an effective date of February 1, 2010, and suspended until June 15, 2010 are approved to become effective on April 1, 2010. The specific sheets approved are:

**PSC MO. No. 1**

**3rd Revised Sheet No. WR1, Canceling 2nd Revised Sheet No. WR1  
3rd Revised Sheet No. WR2, Canceling 2nd Revised Sheet No. WR2  
2nd Revised Sheet No. WRR14, Canceling 1st Revised Sheet No.  
WRR14**

7. This order shall become effective on April 1, 2010.
8. File numbers WR-2010-0025, SR-2010-0026 and WR-2010-0027 shall be closed on April 2, 2010.
9. File number SR-2010-0023 shall remain open to receive the filings that were directed by the Commission on March 15, 2010.

Clayton, Chm., concurs with separate concurring opinion to follow,  
Davis, Jarrett, Gunn, and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

**\*NOTE:** The Disposition Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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<sup>3</sup> This tariff sheet was originally incorrectly numbered and the company filed a substitute tariff sheet on March 11, 2010, correcting the number to SR2. No substantive changes were made to the tariff sheet.

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

While this Commissioner concurs in the Commission's Order Approving Non-Unanimous Disposition Agreements and Approving Tariffs, these matters are representative of the most difficult decisions that face this Commission. During a time of difficult economic circumstances, increasing energy costs and significant instances of unemployment and underemployment, it is not a good time for any rate increase. Additionally, the increases in this order raise rates for Aqua Missouri's customers to some of the highest rates in the state for water and sewer service. The Commission has before it a unanimous agreement addressing the appropriateness of these rate increases and no party, including the Public Counsel, has raised any objection to its approval. The Commission is without any real option but to approve the request. This opinion is an attempt to further explain why the Commission is approving the request and what steps the Commission may be taking with regard to improving service for customers.

Aqua Missouri has acquired many small water and sewer systems in Missouri. In 2003, Aqua Missouri acquired AquaSource, which maintained multiple systems around the state in various states of repair. Many of these systems were in desperate need of improvement and required significant capital investments to offer safe and adequate service. The systems are spread around the state of Missouri in various counties including Barry, Benton, Callaway, Christian, Cole, Green, Morgan, Pettis, Taney, and Stone. The system locations do not permit the consolidation of systems or attaining cost savings from synergies. A further complication is that each of the systems has few customers among whom costs can be shared and absorbed such that any significant investment in plant results in a correspondingly significant rate increase. The more customers a system has, the lower the rate increase for each customer.

The Commission is partly to blame for this circumstance in that over the years, the Commission has granted nearly every developer with an interest in opening a new subdivision a Certificate of Convenience and Necessity which is needed to operate a small water or sewer utility. Rather than require developers to engage or negotiate with adjoining utilities, municipal systems or rural associations, each developer or

AQUA MISSOURI, INC.

19 Mo. P.S.C. 3d

349

affiliate of a developer is given the right to act as a utility, earn a profit from the investment and use the systems to lure customers to buy lots with assurances of low utility rates. Customers purchase the lots and have low rates until the developer or utility operator makes significant, new system investments, is forced to upgrade the system due to environmental obligations or safety or health concerns simply “unloads” the system on another company once the subdivision is full. Customers face rate shock, occasionally poor service and in some cases public health hazards from substandard service.

The Commission has spent considerable amounts of time dealing with troubled small water and sewer utilities. The Commission has faced systems with exceedingly poor service, operators who have died without sufficient arrangements for the future of the systems, title and asset problems, significant investment needs and entities attempting to take advantage of stranded customers. The Commission must do better in enforcing its rules, in mandating quality service and in making sure companies are compliant with system investment needs.

In this case, the customers of Aqua Missouri should be aware that the increases are occurring after the PSC Staff's audit of the company. The disposition agreement reflects the staff's proposal of rates based on prudent expenses, least cost analysis and appropriate infrastructure investments. The agreement is structured to permit the rate increases, it requires additional improvements to the system and places a two-year moratorium on future rate increases. The customers' attorney, the Public Counsel, did not object to the increases.

Local Public Hearings in the service territories of Aqua Missouri suggested service quality concerns. The Commission's Staff has investigated all customer complaints and concerns that have been brought to their attention and the Commission will be continually monitoring the quality of Aqua Missouri's services. Formal complaints before the Commission are set for hearing on April 14-16, 2010, and will be addressed in the near future.

The Commission recognizes the difficult economic times that these customers face, but the alternatives in this situation are extremely limited. The Commission's mandate is to make sure that investor owned utilities offer “safe and adequate” service at “just and reasonable rates. While rates are increased in this case and are significantly high, they are

UNION ELECTRIC COMPANY, D/B/A AMERENUE

350

19 Mo. P.S.C. 3d

based on prudent expenses and investments in plant and the Commission believes that the new rates are "just and reasonable."

For the foregoing reasons, this Commissioner concurs.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service**

**Evidence, Practice and Procedure §8.** Stipulation and Agreement accepted as a resolution of the issues addressed.

*File No. ER-2010-0036  
Decided March 24, 2010*

**ORDER APPROVING FIRST STIPULATION AND AGREEMENT**

On March 10, 2010, before the start of the hearing of this case, several parties filed a nonunanimous stipulation and agreement concerning multiple matters. The following parties signed the stipulation and agreement: Union Electric Company, d/b/a AmerenUE; the Staff of the Commission; the Missouri Industrial Energy Consumers; the Missouri Department of Natural Resources; Charter Communications, Inc.; AARP and Consumers Council of Missouri; and the Missouri Retailers Association. The stipulation and agreement reflects the agreement of the signatory parties regarding several issues that would otherwise have been the subject of testimony presented to the Commission at the evidentiary hearing.

The stipulation and agreement is nonunanimous in that it was not signed by all parties. However, Commission rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a nonunanimous stipulation and agreement. If no party files a timely objection to the stipulation and agreement, the Commission may treat it as a unanimous stipulation and agreement. More than seven days have now passed since the stipulation and agreement was filed and no party has objected. Therefore, the Commission will treat the stipulation and agreement as a unanimous stipulation and agreement.

After reviewing the stipulation and agreement and having questioned the parties at an on-the-record proceeding held on March 22,

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

351

the Commission finds that the stipulation and agreement should be approved as a resolution of the issues addressed by that stipulation and agreement. In approving this stipulation and agreement, the Commission is accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position regarding these issues and its approval of this stipulation and agreement should not be interpreted as such an endorsement in any future case.

**THE COMMISSION ORDERS THAT:**

1. The First Nonunanimous Stipulation and Agreement, filed on March 10, 2010, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order.
2. The signatory parties are ordered to comply with the terms of the stipulation and agreement.
3. This order shall become effective on March 24, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**\*NOTE:** See pages 47, 48, 50, 52, 53, 55, 78, 80, 108, 169, 199, 358, and 376 for other orders in this case.

**In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Line and a Distribution System to Provide Gas Service in Greene, Polk and Dallas Counties, Missouri, as a New Certificated Area**

*File No. GA-2010-0189  
Decided March 31, 2010*

MISSOURI GAS UTILITY, INC.

352

19 Mo. P.S.C. 3d

**Gas §14.** The Commission approves an application for a certificate of convenience and necessity to extend service subject to conditions that include a prohibition on farm taps.

**ORDER GRANTING**  
**CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Missouri Public Service Commission is granting the application for permission and approval to construct gas facilities and provide gas service, as described in the title of this action, as amended.

Procedure

Missouri Gas Utility, Inc. (“MGU”) filed the application on December 22, 2009. The Commission allowed MGU to amend the application on February 1, 2010. On December 28, 2009, the Commission published notice of the application. In the same order, the Commission set a deadline for filing applications to intervene. On February 5, 2010, the Commission granted the application to intervene of Southern Union Company (“Southern Union”).

On February 5, 2010, the Commission’s staff (“Staff”) filed its *Staff Recommendation*. An affidavit supports the *Staff Recommendation*. On February 25, 2010, MGU filed *MGU’s Response to Staff Recommendation*. On March 11, 2010, Southern Union and MGU filed a *Stipulation and Agreement*. No party filed any response to the *Stipulation and Agreement* within the time set by regulation.<sup>1</sup>

The statutory provision for a “due hearing”<sup>2</sup> means that the Commission may grant an unopposed application without a hearing.<sup>3</sup> Such is the case here as follows. The *Staff Recommendation* favors the amended application, subject to certain conditions. *MGU’s Response to Staff Recommendation* agrees to those conditions. The *Stipulation and Agreement* also favor the amended application, subject to further conditions, to which MGU agrees and Staff does not object. Therefore, the Commission convened no hearing, and bases its findings and conclusions on the verified filings.

Standard

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<sup>1</sup> 4 CSR 240-2.080(15).

<sup>2</sup> Section 393.170.3, RSMo 2000.

<sup>3</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). For the same reason, the Commission need not separately state its findings of fact.

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

353

Gas facility construction<sup>4</sup> and service<sup>5</sup> require the Commission's prior permission and approval. Such permission and approval depend on MGU showing:

. . . that the granting of the application is required by the public convenience and necessity[;<sup>6</sup>]

and the Commission determining:

. . . that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service[.<sup>7</sup>]

Further, the Commission may condition its approval and permission as follows:

The commission may by its order impose such condition or conditions as it may deem reasonable and necessary [<sup>8</sup>]

"Necessary" and "necessity" relate to the regulation of competition, cost justification, and safe and adequate service.<sup>9</sup> On finding convenience and necessity, the Commission embodies its permission and approval in a certificate,<sup>10</sup> which the statutes call a certificate of convenience and necessity.<sup>11</sup>

Findings and Conclusions

The verified filings support the convenience and necessity of MGU's proposed construction and service because such filings show the following.

1. MGU has the operational capability to provide gas service in the area that is the subject of the amended application ("new service area").
2. Gas service for the new service area would not

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<sup>4</sup> Section 393.170.1, RSMo 2000.

<sup>5</sup> Section 393.170.2, RSMo 2000, first sentence.

<sup>6</sup> 4 CSR 240-3.205(1)(E).

<sup>7</sup> Section 393.170.3, RSMo 2000.

<sup>8</sup> Id.

<sup>9</sup> State ex rel. Intercon Gas, Inc. v. Public Serv. Com'n of Mo., 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

<sup>10</sup> Section 393.170.2, RSMo 2000, second sentence.

<sup>11</sup> 4 CSR 240-3.205.

MISSOURI GAS UTILITY, INC.

354

19 Mo. P.S.C. 3d

jeopardize natural gas service to the MGU's current existing customers.

3. MGU's provision of gas service in the new service area is in the public interest under the conditions set forth in the ordered paragraphs below.

On those grounds, the Commission independently finds and concludes that MGU's proposed construction and service are necessary and convenient for the public service, subject to reasonable and necessary conditions, as set forth below. Therefore, the Commission will grant the amended application.

**THE COMMISSION ORDERS THAT:**

1. The application described in the caption of this order is approved as amended and a certificate of convenience and necessity, reflecting the Missouri Public Service Commission's permission and approval for construction and service shall be issued to Missouri Gas Utility, Inc. ("MGU") in the area described in the amended application ("new service area"),

2. The provisions of paragraph 1 are subject to the following conditions.

- a. MGU's shareholders are totally responsible for the success of this project, with no liability or responsibility put on customers;
- b. MGU shall keep separate books and records for the new service area;
- c. MGU shall file separate class cost of service studies and revenue requirements for the new service area in its next rate case;
- d. MGU shall use the depreciation rates currently on file with the Commission;
- e. MGU shall submit to a rate review for the new service area 36 months after the effective date of this order; and
- f. MGU shall obtain adequate capacity on the pipeline to reliably serve all customers in the new service area, including capacity necessary to serve any future growth.
- g. MGU shall file revised tariff sheets for the new service area within 30 days of this order's effective date.

3. The provisions of paragraph 1 are subject to the following further conditions.



RDG DEVELOPMENT, LLC

19 Mo. P.S.C. 3d

355

- a. MGU shall be prohibited from utilizing farm taps along the line as described in paragraph 5.A of the *Stipulation and Agreement* filed on March 11, 2010.
  - b. If either MGU or Southern Union Company receives a leak or odor call originating from areas that are in close proximity to their service areas, the notified company will respond to that leak call as if the call involved its own facilities and secure the area. In the event the leak is emanating from the other company's facilities, the responding company will notify the other company and will provide assistance, if requested. The responding company may bill, and the other company will pay, reasonable costs associated with responding to such calls.
4. This order shall become effective on April 10, 2010.
  5. This file shall close on April 11, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Jordan, Regulatory Law Judge

**In the Matter of RDG Development, L.L.C. for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage a Sewer System in Callaway County, Missouri**

*File No. SA-2010-0096*

*Decided April 7, 2010*

**Sewer §2.** The Commission modified a conditional certificate of convenience and necessity previously granted because the company satisfied the requirement to provide a map showing manholes and sewer collection main lines and a certified operator was not mandated by Department of Natural Resources regulations.

**ORDER ACKNOWLEDGING SATISFACTION AND MODIFICATIONS  
OF CONDITIONS FOR THE GRANT OF A CERTIFICATE OF  
CONVENIENCE AND NECESSITY**

On September 14, 2009, RDG Development, L.L.C. ("RDG") filed an application requesting the Commission grant it authority to own, operate, maintain, control and manage an existing sewer system that it acquired in Callaway County, Missouri. The system serves approximately 33 residential customers in the Greenwood Hills Subdivision.

The Commission granted that certificate conditionally on December 9, 2010. The conditions imposed were requested by the Commission's Staff. One of those conditions was to have RDG satisfy the Department of Natural Resources' ("DNR") requirement of retaining a certified operator. Another was to have RDG submit a map of the Greenwood Hills Subdivision that shows, at a minimum, the location of the manholes and sewer collection main lines.

On March 24, 2010, Staff requested the Commission find that the condition of retaining a certified operator had been satisfied because it had discovered that RDG's DNR permit currently does not require one. Staff also requests a finding that the condition requiring the submission of a map showing the location of the manholes and sewer collection main lines has been satisfied in that the required information has been provided.

On March 25, 2010, the Commission directed its Staff to file a recommendation as to whether the Commission should maintain the requirement for RDG to retain a certified operator even in the absence of a requirement by the DNR. Further, Staff was to explain the nature and purpose of having operators of sewer systems obtain certification and describe the entities providing certification.

On March 30, 2010, Staff filed its recommendation. Staff states: DNR oversees both the certification of operating personnel, based upon operation experience, examination and continued education, and the determination of whether a wastewater treatment facility requires the services of certified personnel, and at what level of certification, based upon the number of customers served and the complexity of the treatment

RDG DEVELOPMENT, LLC

19 Mo. P.S.C. 3d

357

facility components. The purpose for the certification of operators, and the requirement that certain facilities must have certified personnel, is to ensure the waters of the state are protected from contamination from unsatisfactory wastewater treatment facility discharges.

Upon further review by Staff, it was determined that the DNR criteria requiring operation by certified personnel in Code of State Regulation 10 CSR 20-9.020 (2)(A) do not apply for this facility. Only those facilities serving population equivalents greater than two hundred (200) or with fifty (50) or more service connections are required by DNR to meet the requirement. The subject facility serves a population equivalent of fifty-nine (59) and currently has thirty-five (35) service connections. Although the Regulation does allow that DNR may determine certified personnel are necessary to protect the waters of the state and require such even in those situations normally exempt, DNR has not made such a determination in this case.

The operational, monitoring and reporting requirements outlined in the current DNR permit remain the same, and are not dependent upon whether a certified operator is required or not. Therefore it is reasonable to include compensation for the operation of the facility as proposed in Staff's original *Recommendation*, as the required duties have not changed.

Staff does not recommend that the Commission maintain the requirement of the subject facility to retain a certified operator. Staff feels that DNR's authority and requirements are sufficient to protect the waters of the state, and the customers of the utility are not being done a disservice by the Commission's withdrawal of the requirement.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

358

19 Mo. P.S.C. 3d

Based upon Staff's recommendation and report, the Commission finds that it is reasonable to modify its December 9, 2009 order granting the conditional CCN. The Commission will acknowledge that the condition for submitting the map showing the location of the manholes and sewer collection main lines has been satisfied based upon Staff's assertions. The Commission will also eliminate the requirement for RDG to retain a certified operator at this time, finding that DNR regulations will ensure the provision of safe services even in the absence of a certified operator, under these specific conditions. The Commission may, in the future, require RDG to hire a certified operator and will expect its Staff to monitor RDG's service.

**THE COMMISSION ORDERS THAT:**

1. The Commission acknowledges that RDG Development, L.L.C.'s requirement to submit a map of the Greenwood Hills Subdivision showing the location of the manholes and sewer collection main lines to the Manager of the Commission's Staff's Water and Sewer Department has been satisfied.
2. The Commission nullifies the requirement that RDG Development, L.L.C. retain a certified operator.
3. This order shall become effective on April 19, 2010.
4. This file shall close on April 20, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

\*NOTE: See page 146 for another order in this case.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs  
to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Decided April 14, 2010*

UNION ELECTRIC COMPANY, D/B/A AMERENUE

19 Mo. P.S.C. 3d

359

**Evidence, Practice and Procedure §8.** Stipulation and Agreements accepted as a resolution of the issues addressed.

**ORDER APPROVING SECOND STIPULATION AND AGREEMENT,  
THIRD STIPULATION AND AGREEMENT, AND MARKET ENERGY  
PRICES STIPULATION AND AGREEMENT**

On March 22, 2010, during the hearing of this case, Staff, Public Counsel, AmerenUE, and MIEC filed a second nonunanimous stipulation and agreement that would resolve multiple issues regarding AmerenUE's request for a rate increase. On March 24, Staff, Public Counsel, AmerenUE, MIEC, AARP/Consumers Council, and the Missouri Retailers Association filed a third nonunanimous stipulation and agreement that would resolve the issue regarding AmerenUE's low-income customers. On March 25, Staff, AmerenUE, and MIEC filed a market energy prices nonunanimous stipulation and agreement that establishes several inputs for the production cost modeling used in this case. Each stipulation and agreement reflects the agreement of the signatory parties regarding issues that would otherwise have been the subject of testimony presented to the Commission at the evidentiary hearing.

Each stipulation and agreement is nonunanimous in that none was signed by all parties. However, Commission rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a nonunanimous stipulation and agreement. If no party files a timely objection to a stipulation and agreement, the Commission may treat it as a unanimous stipulation and agreement. More than seven days have now passed since each stipulation and agreement was filed and no party has objected. Therefore, the Commission will treat each stipulation and agreement as a unanimous stipulation and agreement.

After reviewing the stipulations and agreements and having questioned the parties at an on-the-record proceeding held on April 12, the Commission finds that each stipulation and agreement should be approved as a resolution of the issues addressed by that stipulation and agreement. In approving these stipulations and agreements, the Commission is accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position regarding these issues and its approval

TIMBER CREEK SEWER COMPANY

360

19 Mo. P.S.C. 3d

of these stipulations and agreements should not be interpreted as such an endorsement in any future case.

**THE COMMISSION ORDERS THAT:**

1. The Second Nonunanimous Stipulation and Agreement, filed on March 22, 2010, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order.

2. The signatory parties are ordered to comply with the terms of the stipulation and agreement.

3. The Third Nonunanimous Stipulation and Agreement, filed on March 24, 2010, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order.

4. The signatory parties are ordered to comply with the terms of the stipulation and agreement.

5. The Market Energy Prices Nonunanimous Stipulation and Agreement, filed on March 25, 2010, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order.

6. The signatory parties are ordered to comply with the terms of the stipulation and agreement.

7. This order shall become effective on April 14, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

**\*NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**\*NOTE:** See pages 47, 48, 50, 52, 53, 55, 78, 80, 108, 169, 199, 350, and 376 for other orders in this case.

**In the Matter of the Application of Timber Creek Sewer Company for  
a Certificate of Convenience and Necessity**

*File No. SA-2010-0063  
Decided April 21, 2010*

TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

361

**Certificates §47.** When an intervenor opposed an application and the Commission issued a notice of contested case, but the intervenor withdrew its opposition, the Commission decided the application as a non-contested case and granted the application on the basis of verified filings.

**Evidence, Practice, And Procedure §24.** When an intervenor opposed an application and the Commission issued a notice of contested case, but the intervenor withdrew its opposition, the Commission decided the application as a non-contested case and granted the application on the basis of verified filings.

**Sewer §2.** When an intervenor opposed an application and the Commission issued a notice of contested case, but the intervenor withdrew its opposition, the Commission decided the application as a non-contested case and granted the application on the basis of verified filings.

**ORDER DISMISSING CONTESTED CASE AND  
GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Commission is granting the application (“application”) of Timber Creek Sewer Company (“Timber Creek”), and issuing a certificate of convenience and necessity for those purposes, for an area in Platte County, Missouri.

Procedure

On August 21, 2009, Timber Creek Sewer Company (“Timber Creek”) filed the application with a supporting affidavit. The application is subject to the following procedure:

The commission shall have the power to grant the permission and approval herein specified whenever it shall after **due hearing** determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service.<sup>1</sup>

Whether a hearing is “due” under that statute depends on opposition to the application.<sup>2</sup>

To determine whether any opposition to the application existed, the Commission gave notice of the application, solicited the Staff’s

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<sup>1</sup> Section 393.170.3, RSMo 2000.

<sup>2</sup> State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm’n, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

TIMBER CREEK SEWER COMPANY

362

19 Mo. P.S.C. 3d

recommendation, and set a deadline for motions to intervene on August 24, 2009. On October 30, 2009, Staff filed its recommendation with a supporting affidavit in favor of granting the application with conditions. On November 3, 2009, Timber Creek filed its response to the recommendation agreeing with the recommendation. On April 14, 2010, the Office of Public Counsel (“OPC”) filed a statement that OPC sought no hearing.<sup>3</sup> Thus, among those parties, there is no opposition to the application.

The only opposition to the application arose on September 9, 2009, when Platte County Regional Sewer District (“the District”) filed the only motion for intervention. On October 5, 2009, the Commission granted that motion.

The District’s intervention opposed the application. Therefore, on November 17, 2009, the Commission issued notice of a contested case and issued a procedural schedule on December 15, 2009. But on April 8, 2010, the District withdrew its intervention.

The statutory provision for a “due hearing”<sup>4</sup> means that the Commission may grant the unopposed application without a hearing.<sup>5</sup> Because the only opposition to the application is withdrawn, no hearing is due. Therefore, the Commission canceled the hearing. The Commission will dismiss the contested case “for good cause”<sup>6</sup> and decide the application as a non-contested case. The Commission bases its findings of fact on the verified filings.

Standard

The application seeks the Commission’s permission and approval to construct a sewer system and provide sewer service. Sewer facility construction<sup>7</sup> and service<sup>8</sup> require the Commission’s prior

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<sup>3</sup> Under 4 CSR 240-2.010(11), OPC is a party to this action unless it elects to “file a notice of their intention not to participate within the period of time established for interventions by commission rule or order.” That date was September 23, 2009 under the order dated August 24, 2009. As of the date of this order, no notice of intention not to participate is on file. Hence, the Commission’s order dated April 8, 2010, set a deadline for any request for a hearing from OPC.

<sup>4</sup> Section 393.170.3, RSMo 2000.

<sup>5</sup> *Defenderfer*, 776 S.W.2d at 496.

<sup>6</sup> 4 CSR 240-2.116(4). Unlike a complaint or an application, the Commission’s regulations do not provide for voluntary dismissal of a motion to intervene. For that reason, the District filed a *Withdrawal of Intervention* rather than a notice of voluntary dismissal.

<sup>7</sup> Section 393.170.1, RSMo 2000.

<sup>8</sup> Section 393.170.2, RSMo 2000, first sentence.



TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

363

permission and approval. Such permission and approval depend on Timber Creek showing:

. . . that the granting of the application is required by the public convenience and necessity[;<sup>9</sup>]

and the Commission determining:

. . . that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service[.<sup>10</sup>]

Further, the Commission may condition its approval and permission as follows:

The commission may by its order impose such condition or conditions as it may deem reasonable and necessary [<sup>11</sup>]

“Necessary” and “necessity” relate to the regulation of competition, cost justification, and safe and adequate service.<sup>12</sup> On finding convenience and necessity, the Commission embodies its permission and approval in a certificate,<sup>13</sup> to which the statutes refer as a certificate of convenience and necessity.<sup>14</sup>

Findings and Conclusions

The verified filings support the convenience and necessity of Timber Creek’s proposed construction and service as follows:

11. Timber Creek is a Missouri corporation in good standing authorized to do business as a sewer corporation in the counties of Clay and Platte. Timber Creek is not overdue on any annual report or assessment fees and Timber Creek has no other action pending before this Commission. Timber Creek has no final unsatisfied judgments, or decisions against it from any state or federal agency or court within the

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<sup>9</sup> 4 CSR 240-3.205(1)(E).

<sup>10</sup> Section 393.170.3, RSMo 2000.

<sup>11</sup> *Id.*

<sup>12</sup> State ex rel. Intercon Sewer, Inc. v. Public Serv. Comm’n of Mo., 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

<sup>13</sup> Section 393.170.2, RSMo 2000, second sentence.

<sup>14</sup> Section 393.170.3, RSMo 2000, third sentence.

TIMBER CREEK SEWER COMPANY

364

19 Mo. P.S.C. 3d

past three (3) years that involve customer service or rates.

12. The area in which Timber Creek proposes to install sewer facilities and provide sewer service (“proposed service area”) consists of unincorporated regions of Platte County, one northeast of Platte City and one southeast of Platte City.<sup>15</sup>

13. No sewer service is available in the proposed service area. The proposed service area’s future development requires sewer service. The proposed service area’s residents have requested sewer service.

14. The proposed service area is contiguous with Timber Creek’s existing service area. Timber Creek’s current facilities already meet part of the proposed service area’s needs. Timber Creek is experienced in sewer construction and service, capable of financing such construction and service, and has plans for meeting the proposed service area’s increasing needs.

15. Subjecting sewer construction and service to Commission regulation will benefit customers in the proposed service area, and economies of scale will benefit customers in Timber Creek’s existing service area and the proposed service area.

On those grounds, the Commission independently finds and concludes that, with the agreed conditions as set forth below, Timber Creek’s construction and service is necessary and convenient for the public service. Therefore, the Commission will grant the application subject to the conditions.

**THE COMMISSION ORDERS THAT:**

1. The contested case is dismissed.
2. The application is granted, and a certificate of convenience and necessity reflecting such permission and approval shall be issued to Timber Creek Sewer Company (“company”) for the service area proposed in the application (proposed service area”), subject to the following conditions.
  - a. The company’s existing monthly rate of \$34.74,

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<sup>15</sup> The proposed service area’s legal description is in the application’s Appendix 2. A depiction is in the application’s Exhibit A.

TIMBER CREEK SEWER COMPANY

19 Mo. P.S.C. 3d

365

general service charges, and depreciation rates shall apply to the proposed service area.

b. The company's contribution-in-aid-of-construction charge for the company's Platte County service area shall apply to the proposed service area.

c. No later than June 18, 2010, the company shall file new and revised tariff sheets, for its existing tariff, bearing an effective date not less than 30 days after filing.

d. In the company's annual reports, the company shall note the number of customers in each of its service areas separately.

e. The company shall maintain its books and records in a manner sufficient to allow the performance for area-specific cost-of-service analyses and area-specific rates for the proposed service areas separately from existing service areas.

f. The company shall file, under this file number, proof that it holds clear title to any new treatment facility and the land on which such facility is located, and easements for access to and maintenance of the collection system.

3. This file shall remain open for the filing of, Staff recommendation upon, and Commission decision as to, the tariff filings ordered.

4. Nothing in this order precludes the Commission from considering any ratemaking treatment of any future company expenditure, and any other matter, pertaining to the certificate of convenience and necessity.

5. This order shall become effective on May 3, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Jordan, Regulatory Law Judge

UNION ELECTRIC COMPANY, D/B/A AMERENUE

366

19 Mo. P.S.C. 3d

**In the Matter of the Application of Union Electric Company d/b/a AmerenUE for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage Electric Production and Related Facilities in or near the Village of Champ and the City of Maryland Heights, Missouri**

*File No. EA-2010-0216  
Decided May 12, 2010*

**Certificates §42.** The Commission issued a Certificate of Convenience and Necessity to AmerenUE (now Ameren Missouri) authorizing the company to construct and manage, in Maryland Heights, Missouri, electric production facilities fueled with renewable energy.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY**

On January 19, 2010, Union Electric Company d/b/a AmerenUE filed an application with the Missouri Public Service Commission seeking authority to acquire, construct, install, own, operate, maintain and otherwise control and manage electric production in facilities located in the Village of Champ, Missouri with a related substation in the City of Maryland Heights. The Commission issued notice of the application and set an intervention deadline. There were no requests to intervene and no party has requested a hearing.

**The Application**

Ameren explains that the facilities will be fueled with renewable energy from a landfill owned by Fred Weber, Inc. The facility will consist of three gas-fired combustion turbine generator units, each with a nameplate capacity of approximately 5 megawatts. In this regard, Ameren points out that the preferred resources plan in its most recently filed Integrated Resources Plan (IRP), as well as the contingency plans in that IRP, call for up to 30 megawatts of landfill gas-fired generation as early as 2010.

With regard to the time frame of this project, Ameren informs the Commission that when entering into a Landfill Gas Agreement with Weber, the parties to that agreement contemplated that Ameren would have all required authorizations for the project, including a certificate from this Commission, no later than May 31, 2010.

**Staff's Recommendation**

After Ameren provided Staff with all of the information required by Commission rules, Staff filed its recommendation on May 4, 2010. Staff states that it has reviewed the application, plans, specification and cost estimates and has had discussions with Ameren.

In determining whether a site for a power plant is reasonable, Staff has developed a 10-step process.<sup>1</sup> However, because the process stemmed from a case concerning a natural gas-fired simple cycle electric power plant, rather than one powered by a landfill, many of the steps were inapplicable. From those that were applicable, Staff considered the following general concepts: locating the facility near the fuel source; determining the best way to tie into the utility's distribution/transmission system; gaining the support of the landowner; and, gaining support of the local community.

Staff also states that "given the need for renewable energy credits due to Proposition C,<sup>2</sup> the limited number of sites on which a landfill gas generating facility can be located and the need to purchase this specific fuel from a specific landowner, the emphasis on this site evaluation has been on the viability of this specific site." Staff points out that Ameren has evaluated and addressed the connection of the facility to its transmission/distribution system in its plan and specifications. Ameren has also addressed the concerns of the local community and landowners. Further, Staff asserts that since this project is a relatively small generation project for a utility the size of Ameren, the company's plan to finance the plant by using its general funds appears reasonable. Staff finally emphasizes that the prudence of the cost of this project should be determined at the time the project is included in a rate base like other capital projects. Staff recommends approval of the application.

**Discussion**

Commission rule 4 CSR 240-3.105(1)(B) requires Ameren to file the plans and specification for the complete construction project and estimated costs, plans for financing, a statement that approval of a governmental body is not needed or documents showing such approval, and facts showing that the grant of the requested authority is required by the public convenience and necessity.

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<sup>1</sup> Case No. EA-2006-0309.

<sup>2</sup> See Renewable Energy Technology, Sections 393.1020 through 393.1050, RSMo.

THE EMPIRE DISTRICT ELECTRIC COMPANY

368

19 Mo. P.S.C. 3d

Ameren has submitted its plans to Staff and, although the company questions whether it must obtain approval from Maryland Heights, it nonetheless submitted documentation of such approval. With regard to the necessity of the project, Proposition C requires projects as such.

Based on Ameren's application and Staff's unopposed verified recommendation, the Commission finds that granting this application is necessary or convenient for the public service and will grant the requested relief.

**THE COMMISSION ORDERS THAT:**

1. Union Electric Company d/b/a AmerenUE is granted a certificate of convenience and necessity to acquire, construct, install, own, operate, maintain and otherwise control and manage electric production related facilities in or near the village of Champ and the City of Maryland Heights, Missouri.
2. Nothing in this order shall bind the Commission on any ratemaking issue in any future rate proceedings.
3. This order shall become effective on May 22, 2010.
4. This case shall be closed on May 23, 2010.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Jones, Senior Regulatory Law Judge

**In the Matter of The Empire District Electric Company of Joplin,  
Missouri for Authority to File Tariff Increasing Rates for Electric  
Service Provided to Customers in the Missouri Service Area of the  
Company**

*File No. ER-2010-0130  
Decided May 19, 2010*

**Electric §20.** The Commission approved a rate increase, reached by Stipulation and Agreement, facilitating The Empire District Electric Companies' environmental upgrades at the Iatan 1 power plant and requiring Empire to continue certain demand-side management programs designed to help consumers control their energy costs and to continue funding a program to assist low-income customers.

THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

369

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

**Background**

On October 29, 2009, The Empire District Electric Company filed tariffs designed to increase the company's annual electric revenues by approximately \$68,171,501 or 19.6%. If approved by the Commission, this would have resulted in a monthly increase of \$19.21 for a residential customer using 1,000 kilowatt hours of electricity.<sup>1</sup> With its letter, Empire filed direct testimony intended to support its request for a rate increase.

On November 4, the Commission issued an order suspending the company's tariff, gave notice of the proposed rate increase, and invited requests to intervene. The Commission received and granted requests to intervene from Midwest Energy Users' Association, Kansas City Power & Light Company, the City of Joplin and the Missouri Department of Natural Resources.

**The Agreement**

On May 12, Empire, the Staff of the Commission, the Missouri Department of Natural Resources and the City of Joplin filed a Non-unanimous Stipulation and Agreement. Although all of the parties did not join in the agreement, the signatories represent that those parties who did not join in the agreement have affirmatively stated that they do not oppose the agreement and waive their rights to a hearing.

With the exception of whether the Plum Point generating unit will be fully operational and used for service on or before August 15, 2010, the parties have resolved all of the issues and have submitted sample tariff sheets reflecting Plum Point as being either non-operational or, alternatively, operational.

If the parties later agree or it is later determined by the Commission that Plum Point is operational by August 15, then the agreed-upon increase in Empire revenue will be \$36,800,000. If Plum Point expenditures are not reflected in rates, then the revenue will be \$23,100,000. Comparatively, Empire's initial proposal resulted in the following residential rates:

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<sup>1</sup> Letter dated October 29, 2009 from The Empire District Electric Company to the Missouri Public Service Commission, initiating this rate case; Item No. 1 in the docket sheet

THE EMPIRE DISTRICT ELECTRIC COMPANY

370

19 Mo. P.S.C. 3d

	<u>Summer Season</u>	<u>Winter Season</u>
Customer Charge	\$13.21	\$13.21
First 600 kWh	0.1133	0.11133
Additional kWh	0.1133	0.0771

If Plum Point is operational and used for service by August 15, then the parties have agreed on the following residential rates:

	<u>Summer Season</u>	<u>Winter Season</u>
Customer Charge	\$12.52	\$12.52
First 600 kWh	0.1074	0.1074
Additional kWh	0.1074	0.0728

On the other hand, if Plum Point is not operational and used by August 15, then the parties have agreed on the following residential rates:

	<u>Summer Season</u>	<u>Winter Season</u>
Customer Charge	\$12.09	\$12.09
First 600 kWh	0.1037	0.1037
Additional kWh	0.1037	0.703

With regard to specific issues, the parties have agreed on the following: Meter Treater Program and Rate Case Rider; Pension/OPEB; Demand Side Management Programs; Fuel Adjustment Clause; Rate Design; and, Vegetation/Infrastructure trackers. The parties also agreed that the carrying cost to be applied to Plum Point, latan 1, and latan 2 shall reflect a 7.75% return on equity. Also, with regard to the pre-1994 state income tax flow-through regulatory asset, Empire will continue to amortize the asset over an additional 18 years. A copy of the agreement is attached to this order.

**Discussion**

The Commission has the authority to accept a stipulation and agreement as offered by the parties.<sup>2</sup> Notably, every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.<sup>3</sup> Consequently, because this case is being disposed of by stipulation and agreed

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<sup>2</sup> Section 536.060, RSMo.

<sup>3</sup> Section 536.090, RSMo.



THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

371

settlement, the Commission need not make findings of fact or conclusions of law.

Commission rules 4 CSR 240-2.115 (2)(B) and (C) state that if no party objects to a non-unanimous stipulation and agreement within 7 days, the Commission may treat the agreement as unanimous. Because no party has objected to this agreement, the Commission will therefore treat it as unanimous.

The Commission has reviewed the Stipulation and Agreement and finds it reasonable. The Agreement will therefore be approved and the parties will be directed to abide by its terms.

**THE COMMISSION ORDERS THAT:**

1. The following proposed electric tariff sheets submitted on October 29, 2009, by The Empire District Electric Company, Tariff File No. YE-2010-0303, are rejected:

**P.S.C. MO. No. 5**

**Section A, 25th Revised Sheet No. 1, canceling 24th Revised Sheet No. 1**  
**Section 1, 15th Revised Sheet No. 1, canceling 14th Revised Sheet No. 1**  
**Section 2, 14th Revised Sheet No. 1, canceling 13th Revised Sheet No. 1**  
**Section 2, 14th Revised Sheet No. 2, canceling 13th Revised Sheet No. 2**  
**Section 2, 14th Revised Sheet No. 3, canceling 13th Revised Sheet No. 3**  
**Section 2, 15th Revised Sheet No. 4, canceling 14th Revised Sheet No. 4**  
**Section 2, 14th Revised Sheet No. 6, canceling 13th Revised Sheet No. 6**  
**Section 2, 14th Revised Sheet No. 7, canceling 13th Revised Sheet No. 7**  
**Section 2, 10th Revised Sheet No. 9, canceling 9th Revised Sheet No. 9**  
**Section 2, 9th Revised Sheet No. 13, canceling 8th Revised Sheet No. 13**  
**Section 3, 15th Revised Sheet No. 1, canceling 14th Revised Sheet No. 1**  
**Section 3, 19th Revised Sheet No. 2, canceling 18th Revised Sheet No. 2**  
**Section 3, 14th Revised Sheet No. 3, canceling 13th Revised Sheet No. 3**  
**Section 3, 14th Revised Sheet No. 4, canceling 13th Revised Sheet No. 4**  
**Section 3, 3rd Revised Sheet No. 6, canceling 2nd Revised Sheet No. 6**  
**Section 3, 2nd Revised Sheet No. 7, canceling 1st Revised Sheet No. 7**  
**Section 3, 2nd Revised Sheet No. 8, canceling 1st Revised Sheet No. 8**  
**Section 3, 2nd Revised Sheet No. 9, canceling 1st Revised Sheet No. 9**  
**Section 4, 7th Revised Sheet No. 7, canceling 6th Revised Sheet No. 7**

2. The Stipulation and Agreement, filed by The Empire District Electric Company, the Staff of the Missouri Public Service Commission, the Missouri Department of Natural Resources and the City of Joplin is approved.

3. The parties shall abide by the terms of the Unanimous Stipulation and Agreement.

THE EMPIRE DISTRICT ELECTRIC COMPANY

372

19 Mo. P.S.C. 3d

4. The Empire District Electric Company shall file tariff sheets that reflect the specific terms of the Stipulation and Agreement.

5. This order shall become effective on May 29, 2010.

Davis, Gunn, and Kenney, CC., concur.

Clayton, Chm., concurs, with separate concurring opinion to follow.

Jarrett, C., concurs, with separate concurring opinion attached.

Jones, Senior Regulatory Law Judge

\*NOTE: The Stipulation and Agreement in this case has not been published. If needed, this documents is available in the official case files of the Public Service Commission.

\*NOTE: A notice of correction regarding this order has not been published. If needed, the Notice is available in the official case files of the Public Service Commission.

\*NOTE: See pages 322 and 619 for other orders in this case.

**CONCURRING OPINION OF CHAIRMAN ROBERT M.  
CLAYTON III**

This Commissioner concurs with the majority's Order Approving Unanimous Stipulation And Agreement in the rate increase request of The Empire District Electric Company. The settlement reached in this case resulted from extensive negotiations among nearly all stakeholders in an agreement that includes a rate increase that reflects the company's increased costs of providing electric service to its customers, including environmental upgrades at the latan 1 power plant. The agreement also calls for Empire to continue certain demand side management programs designed to help consumers control their energy costs as well as continuation of a company-funded program to assist low-income customers.

The Commission has little choice but to approve the agreement, which has not been opposed by any party including the Public Counsel, the PSC Staff, several government agencies, other diverse stakeholders and numerous industrial customers. Even though the agreement results in a rate increase, the process has culminated in a global settlement, supported by the rate payer advocate, suggesting reasonableness of the result. This rate increase is not simply raising the return or profit margin

THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

373

allowed to the company but instead represents significant investment in plant and environmental upgrades that will benefit the public.

The settlement leaves one remaining issue to be decided. If the Commission determines that the Plum Point generating unit is “fully operational and used for service” on or before August 15, 2010, Empire is authorized, under the agreement, to receive an electric rate increase of approximately \$46.8 million. For a residential customer using approximately 1,000 kilowatt-hours of electricity a month, the increase would be approximately \$13.03 per month (13.35%).

If the Commission finds that Plum Point generating unit is not “fully operational and used for service” on or before August 15, 2010, Empire is authorized, under the agreement, to receive an electric rate increase of approximately \$33.1 million. For a residential customer using approximately 1,000 kilowatt-hours of electricity a month, the increase would be approximately \$9.22 per month (9.44%).

It should be noted that this increase has been reduced from Empire’s original rate request seeking to increase annual electric operating revenues by approximately \$68.2 million. For a residential customer using approximately 1,000 kilowatt-hours of electricity a month, Empire’s request, if approved as filed, would have increased the monthly electric bill by approximately \$19.21. It should be further noted that much of the increase is based on whether needed infrastructure is in use to serve Empire’s customers.

Regardless of whether the Plum Point generating unit is in service on August 15, 2010, under either scenario, this is a significant rate increase that will certainly have an impact on customers, and the impact on those customers is not to be taken lightly. Any rate increase during challenging economic times may be difficult for customers to understand and rate payers should be aware that this increase is not likely to be the last in the foreseeable future. Additional costs associated with latan 1 as well as costs for Empire’s share of latan 2 also loom in the near future. However, rate payers should take solace that the PSC Staff and Public Counsel’s review of the expenditures have found these investments to be prudent, found the underlying costs reasonable and found the infrastructure necessary for the public interest.

Finally, the Commission must and will take additional steps at helping customers take control of their utility bills through aggressive energy efficiency programs, empower customers with information to

THE EMPIRE DISTRICT ELECTRIC COMPANY

374

19 Mo. P.S.C. 3d

make wise energy choices and embrace new technologies such as customer owned generation and smart grid improvements in a rapidly changing energy environment. Empire will be required to take a new look at energy efficiency programs through the Integrated Resource Planning process rather than simply rely on new power plant construction. This review and resulting programs will provide customers with new tools to save money.

Additionally, this Order will continue the Empire Experimental Low-Income Program (ELIP) which is funded solely by shareholders and provides necessary rate assistance to those customers receiving heating benefits through the Low-Income Home Energy Assistance Program (LIHEAP). ELIP delivered “fixed credits” to low-income customers in an effort to improve low-income home energy affordability. The Commission is aware that we must find new ways to help the most vulnerable among us.

Lastly, it should be noted that the rate increase will not take effect until September. Customers will not be burdened by higher costs during the summer cooling season.

This Commissioner commends the parties for reaching a settlement in this case and believes all parties best interests have been served by the stipulation in this case.

For the foregoing reasons, this Commissioner concurs.

**CONCURRING OPINION OF COMMISSIONER TERRY M.  
JARRETT**

I concur in the result of the Order Approving Unanimous Stipulation and Agreement. However, I once again find myself at odds with the Commission's failure to follow Missouri law regarding the required contents of a Commission Order approving a stipulation and agreement. While I applaud the parties for negotiating a settlement and saving the time and expense of holding weeks of evidentiary hearings, that does not excuse the Commission's failure to issue a legally sufficient order.

I wrote at length on this issue in my concurring opinions in File Nos. ER-2009-0089, ER2009-0090, and HR-2009-0092, and I will not repeat that discussion here. However, I will briefly set out the law concerning the approval of stipulations by an administrative body.

THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

375

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without separately stating findings of fact and conclusions of law. Nevertheless, this does not relieve the Commission of its statutory duty to evaluate the facts and make a conclusion that the agreement provides for just and reasonable rates, provides for safe and adequate service, and is in the public interest. The signatories to the agreement may believe that it does, but the Commission must decide if this is so based upon the factual record. Missouri Courts, interpreting Section 386.420, have held that in contested cases (proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing<sup>1</sup>) the Commission must include findings of fact in its written report.<sup>2</sup> Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18.<sup>3</sup> Consequently, the law requires the Commission to include separately stated findings of fact and conclusions of law supporting its decision in this matter.

The Commission in its Order not only ignores this law, it misstates the law. On page 3 of the Order, it states, absent citation to any legal authority: "Consequently, because the case is being disposed of by stipulation and agreed settlement, the Commission need not make findings of fact or conclusions of law." (Emphasis mine). That statement is not the law in Missouri. Accordingly, I believe that the Order is legally deficient.

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<sup>1</sup> Section 53.010(2), RSMo 2000.

<sup>2</sup> Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Servo Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. bane 1986); *State ex rel. Rice v. Public Serv. Comm'n.* 359 Mo. 109,220 S.W.2d 61, 65 (Mo. bane (949); *State ex rel. Fischer v. Public Serv. Comm'n.* 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article Y, Section 18; however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel V. Public Servo Comm'n.* 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffiman V. Public Servo Comm'n.* 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Servo Comm'n.* 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

<sup>3</sup> *Id.*

UNION ELECTRIC COMPANY, D/B/A AMERENUE

376

19 Mo. P.S.C. 3d

Because deciding whether rates are just and reasonable is a *conclusion of law*, the Commission must independently and impartially review the facts of any case, including one where a proposed stipulation and agreement has been submitted for approval. I do not believe that the Order in this case shows that the Commission made such an independent and impartial review. I am not implying that such an independent and impartial review did not take place; in fact, this Commissioner did perform an independent and impartial review of the facts in this case. Based upon my review, I have made an independent conclusion that the proposed agreement does provide just and reasonable rates that are in the public interest, while ensuring safe and adequate service.

Therefore, despite my serious concerns about the form of the Order, I concur.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service**

*File No. ER-2010-0036  
Decided May 28, 2010*

**Electric §29.** The Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for ratepayers.

**Electric §29.** The average return authorized by other state commissions provides a reasonableness test for the recommendations offered by return on equity experts.

**Electric §18.** Life span, not mass property, is the appropriate method to use in determining depreciation rates for power plant accounts.

**Electric §18.** Because of the effect of inflation, net salvage estimates must consider what is likely to occur in the future and properly reflect that information in the estimates.

**Electric §18.** Expensing is not a reasonable way to calculate net salvage costs and would ensure that the company would under-recover its net salvage costs to the detriment of future generations of ratepayers who would have to pay a disproportionate share of unrecovered net salvage costs when the plant is actually retired.

## UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

377

**Expense §19.** In normalizing a test year expense, the Commission must consider whether a proposed normalized test year expense is reasonably related to anticipated future expenses.

**Expense §24.** A test year is used to match income and expenses over the same period so that a true level of required revenue can be determined.

**Expense §24.** Reaching outside the test year to pull in an expense could violate the matching principle by allowing the company to recover excess revenue if that out-of-test-year expense would otherwise have been offset by some unconsidered item of out-of-test-year income.

**Expense §24.** The matching principle is important, but not absolute and may be disregarded for known and measurable future increased expenses. The ultimate purpose of a test year is to establish rates that will give a utility a reasonable opportunity to recover its prudent costs during the period when the rates are in effect.

**Expense §20.** Trackers should be used sparingly because they tend to limit a utility's incentive to prudently manage its costs

**Public Utilities §7.** The Commission does not have authority to manage the utility and cannot dictate whether it must use internal workforce rather than outside contractors to perform the work of the company

**Rates §101.** The 95/5 sharing mechanism in Ameren Missouri's fuel adjustment clause was left unchanged in the absence of any evidence showing that the mechanism was not working as designed.

**Rates §118.** The Peak and Average method of allocating costs proposed by Staff is inappropriate because it double counts the average system usage, and for that reason is unreliable.

**Rates §119.** Each customer class must carry its own weight by paying rates sufficient to cover the cost to serve that class as a matter of fairness and to encourage cost effective utilization of electricity by sending correct price signals to customers.

**Rates §119.** The Commission has a great deal of discretion to set just and reasonable rates and is not bound to a mathematical calculation of class costs of service.

### **REPORT AND ORDER**

#### **APPEARANCES**

**Thomas M. Byrne**, Managing Assoc. General Counsel, and **Wendy K. Tatro**, Asst. General Counsel, Ameren Services Company, P.O. Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63103;

UNION ELECTRIC COMPANY, D/B/A AMERENUE

378

19 Mo. P.S.C. 3d

**James B. Lowery**, Attorney at Law, Smith Lewis, LLP, P.O. Box 918, Suite 200, City Centre Building, 111 South Ninth St. Columbia, Missouri 65205-0918; and

**James M. Fischer**, Attorney at Law, Fischer & Dority, 101 Madison, Suite 400, Jefferson City, Missouri 65101.  
For Union Electric Company, d/b/a AmerenUE.

**Kevin Thompson**, General Counsel, **Steven Dotthiem**, Chief Deputy General Counsel, **Nathan Williams**, Deputy General Counsel, **Jennifer Hernandez**, Legal Counsel, **Sarah Kliethermes**, Assistant General Counsel, **Jaime Ott**, Legal Counsel, **Sam Ritchie**, Legal Counsel, and **Eric Dearmont**, Assistant General Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102  
For the Staff of the Missouri Public Service Commission.

**Lewis R. Mills, Jr.**, Public Counsel, and **Christina Baker**, Assistant Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102  
For the Office of the Public Counsel and the Public.

**Shelley Ann Woods**, Assistant Attorney General, and **Sarah Mangelsdorf**, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102  
For the Missouri Department of Natural Resources.

**David Woodsmall**, Attorney at Law, Finnegan, Conrad & Peterson, L.C., 428 East Capitol, Suite 300, Jefferson City, Missouri 65101  
For the Midwest Energy Users' Association.

**Michael C. Pendergast**, Vice President and Associate General Counsel, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101.  
For Laclede Gas Company.

**Diana Vuylsteke**, Attorney at Law, **Mark Leadlove**, Attorney at Law, **Brent Roam**, Attorney at Law, and **Carol Iles**, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, and



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

379

**Edward F. Downey**, Attorney at Law, Bryan Cave, LLP, 221 Bolivar Street, Suite 300, Jefferson City, Missouri 65101  
For Missouri Industrial Energy Consumers.

**Lisa C. Langeneckert**, Attorney at Law, Sandberg, Phoenix & Von Gontard, P.C., 515 N. 6<sup>th</sup> Street, St. Louis, Missouri 63101.  
For Missouri Energy Group.

**John B. Coffman**, Attorney at Law, John B. Coffman, LLC, 871 Tuxedo Blvd, St. Louis, Missouri 63119-2044.  
For AARP and the Consumers Council of Missouri.

**Sherrie A. Schroder**, Attorney at Law, Hammond and Shinnars, P.C. 7730 Carondelet Ave., Suite 200, St. Louis, Missouri 63105.  
For International Brotherhood of Electrical Workers Locals 2, 309, 649, 702, 1439, 1455, AFL-CIO and International Brotherhood of Operating Engineers Local 148, AFL-CIO.

**Mark W. Comley**, Attorney at Law, Newman, Comley & Ruth, 601 Monroe, Suite 301, Jefferson City, Missouri 65102.  
For Charter Communications, Inc..

**Leland B. Curtis**, Attorney at Law, Curtis, Oetting, Heinz, Garrett & O'Keefe, 130 S. Bemiston, Suite 200, St. Louis, Missouri 63105.  
For the City of O'Fallon, the City of University City, the City of Rock Hill, and the St. Louis County Municipal Group (The Municipal Group).

**Douglas L. Healy**, Attorney at Law, Healy & Healy, LLC, 939 Boonville, Suite A, Springfield, Missouri 65802.  
For the Missouri Joint Municipal Electric Utility Commission

**Thomas R. Schwarz**, Blitz, Bardgett & Deutsch, L.C. 308 East High Street, Suite 301, Jefferson City, Missouri 65101.  
For the Missouri Retailers Association.

**CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff**

## UNION ELECTRIC COMPANY, D/B/A AMERENUE

380

19 Mo. P.S.C. 3d

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

### **Summary**

This order allows AmerenUE to increase the revenue it may collect from its Missouri customers by approximately \$226.3 million based on the data contained in the Revised True-up Reconciliation filed by the Missouri Public Service Commission Staff on April 14, 2010.

### **Procedural History**

On July 24, 2009, Union Electric Company, d/b/a AmerenUE filed tariff sheets designed to implement a general rate increase for electric service. The tariff would have increased AmerenUE's annual electric revenues by approximately \$401.5 million. The tariff revisions carried an effective date of August 23, 2009. By a separate tariff also issued on July 24, AmerenUE sought to implement an interim rate adjustment that would have allowed it to recover \$37.3 million as an interim rate increase. The interim rate adjustment tariff carried an October 1, 2009 effective date.

By order issued on July 27, 2009, the Commission suspended AmerenUE's general rate increase tariff until June 21, 2010, the maximum amount of time allowed by the controlling statute.<sup>1</sup> In the same order, the Commission directed that notice of AmerenUE's tariff filing be provided to interested parties and the public. The Commission also established August 17, 2009, as the deadline for submission of applications to intervene. The following parties filed applications and were allowed to intervene: The International Brotherhood of Electrical Workers Locals 2, 309, 649, 702, 1439, and 1455, AFL-CIO and International Union of Operating Engineers Local 148 AFL-CIO (collectively the Unions); The Missouri Industrial Energy Consumers (MIEC);<sup>2</sup> The Missouri Energy Group (MEG);<sup>3</sup> The Missouri Department

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<sup>1</sup> Section 393.150, RSMo 2000.

<sup>2</sup> The following members of MIEC were allowed to intervene as individual entities and as an association: Anheuser-Busch Companies, Inc.; BioKyowa, Inc.; The Boeing Company;

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

381

of Natural Resources; Laclede Gas Company; The Consumers Council of Missouri; AARP; The Missouri Retailers Association; The Natural Resources Defense Council; the Missouri Association of Community Organizations for Reform Now (MO-ACORN); the City of O'Fallon, the City of University City, the City of Rock Hill, and the St. Louis County Municipal League (the Municipal Group); the Midwest Energy Users' Association (MEUA);<sup>4</sup> Charter Communications, Inc.; the Missouri Joint Municipal Electric Utility Commission; and Kansas City Power & Light Company.

On September 14, 2009, the Commission established the test year for this case as the 12-month period ending March 31, 2009, true-up as of January 31, 2010. In its September 14 order, the Commission established a procedural schedule leading to an evidentiary hearing regarding AmerenUE's general rate increase tariff.

The Commission addressed AmerenUE's interim rate increase tariff separately. The Commission suspended that tariff from its October 1, 2009 effective date until January 29, 2010. After accepting prefiled testimony and conducting an evidentiary hearing on December 7, 2009, the Commission rejected the interim rate increase tariff in a Report and Order issued on January 13, 2010.

In January and February, 2010, the Commission conducted seventeen local public hearings at various sites around AmerenUE's service area. At those hearings, the Commission heard comments from AmerenUE's customers and the public regarding AmerenUE's request for a rate increase.

In compliance with the established procedural schedule, the parties prefiled direct, rebuttal, and surrebuttal testimony. The evidentiary hearing began on March 15, 2010, and continued through March 26. The parties indicated they had no contested true-up issues and the Commission cancelled the true-up hearing scheduled for April 12 and 13, 2010. The parties filed post-hearing briefs on April 23, 2010,

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Doe Run; Enbridge; General Motors Corporation; GKN Aerospace; Hussmann Corporation; JW Aluminum; MEMC Electronic Materials; Monsanto; Pfizer; Precoat Metals; Proctor & Gamble Company; Nestlé Purina PetCare; Noranda Aluminum; Saint Gobain; Solutia; and U.S. Silica Company.

<sup>3</sup> The members of MEG are Barnes–Jewish Hospital; Buzzi Unicem USA, Inc.; and SSM HealthCare.

<sup>4</sup> The members of MEUA are Wal-Mart Stores and Best Buy Co. Inc.

with reply briefs following on April 30. Based on the revised true-up reconciliation filed by Staff on April 14, 2010, AmerenUE has reduced its rate increase request to \$286,930,749.

#### **Pending Motion**

Following the hearing, on April 22, Staff and AmerenUE filed a written motion offering certain true-up exhibits into evidence. The written motion was necessary because the true-up hearing was cancelled at the request of the parties. The Commission issued an order on April 23 that established April 26 as the deadline for the parties to object to the admission of any of the submitted exhibits. MIEC filed a response on April 26 entitled Objection to True-Up Reconciliation. Despite its title, MIEC's pleading did not object to the admission of the true-up reconciliation that had been submitted by Staff as exhibit 244. Rather, MIEC's pleading asked the Commission to modify that reconciliation to correctly reflect MIEC's position on steam production – net salvage. The Commission issued an order on April 27 that modified the reconciliation as requested by MIEC and admitted all the true-up exhibits into evidence.

On May 3, AmerenUE filed a motion asking the Commission to modify a portion of its April 27 order admitting the true-up exhibits into evidence by rejecting the modification to the reconciliation offered by MIEC. MIEC filed suggestions in opposition to that motion on May 3.

AmerenUE contends the reconciliation should not be modified to reflect MIEC's asserted position on depreciation because that position is not supported by the evidence in the record. MIEC responds by asserting that its adjustment is correct. The challenged exhibit is simply Staff's reconciliation that purports to evaluate the monetary value of the positions asserted by the various parties. At any rate, AmerenUE's motion indicates its motion will be moot if the Commission uses the life span approach to depreciation advocated by the company. This report and order does use the life span approach advocated by AmerenUE, so the motion is moot. On that basis, AmerenUE's Motion to Modify Order Admitting True-Up Exhibits is denied.

#### **The Partial Stipulations and Agreements**

During the course of the evidentiary hearing, various parties filed four nonunanimous partial stipulations and agreements resolving issues that would otherwise have been the subject of testimony at the hearing. No party opposed those partial stipulations and agreements. As

## UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

383

permitted by its regulations, the Commission treated the unopposed partial stipulations and agreements as unanimous.<sup>5</sup> After considering both stipulations and agreements, the Commission approved them as a resolution of the issues addressed in those agreements.<sup>6</sup> The issues resolved in those stipulations and agreements will not be further addressed in this report and order, except as they may relate to any unresolved issues.

On March 17, 2010, the Office of the Public Counsel, Noranda, MIEC, AARP and the Consumers Council of Missouri, and the Missouri Retailers Association filed an additional non-unanimous stipulation and agreement that would have resolved various class cost of service and rate design issues.<sup>7</sup> MEUA opposed that non-unanimous stipulation and agreement, and as provided in the Commission's rules, the Commission will consider that stipulation and agreement to be merely a position of the signatory parties to which no party is bound.<sup>8</sup> The issues that were the subject of that stipulation and agreement will be determined in this report and order.

### **Overview**

AmerenUE is an investor-owned integrated electric utility providing retail electric service to large portions of Missouri, including the St. Louis Metropolitan area. AmerenUE has approximately 1.2 million retail electric customers in Missouri, more than 1 million of whom are residential customers.<sup>9</sup> AmerenUE also operates a natural gas utility in Missouri but the rates it charges for natural gas are not at issue in this case.

AmerenUE began the rate case process when it filed its tariff on July 24, 2009. In doing so, AmerenUE asserted it was entitled to increase its retail rates by \$401.5 million per year, an increase of approximately 18 percent.<sup>10</sup> AmerenUE attributed approximately \$227

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<sup>5</sup> Commission Rule 4 CSR 240-2.115(C).

<sup>6</sup> The Commission issued an Order Approving First Stipulation and Agreement on March 24, 2010. The Commission issued an Order Approving Second Stipulation and Agreement, Third Stipulation and Agreement, and Market Energy Prices Stipulation and Agreement on April 14, 2010.

<sup>7</sup> The same parties filed an addendum to their stipulation and agreement on March 26, 2010. MEUA also opposed that addendum.

<sup>8</sup> Commission Rule 4 CSR 240-2.115(2)(D).

<sup>9</sup> Baxter Direct, Ex. 100, Page 4, Lines 14-15.

<sup>10</sup> Baxter Direct, Ex. 100, Page 5, Lines 7-8.

million of that increase to the rebasing of fuel costs that would otherwise be passed through to customers by operation of the company's existing fuel adjustment clause.<sup>11</sup> AmerenUE set out its rationale for increasing its rates in the direct testimony it filed along with its tariff on July 24. In addition to its filed testimony, AmerenUE provided work papers and other detailed information and records to the Staff of the Commission, Public Counsel, and to the intervening parties. Those parties then had the opportunity to review AmerenUE's testimony and records to determine whether the requested rate increase was justified.

Where the parties disagreed, they prefiled written testimony to raise those issues to the attention of the Commission. All parties were given an opportunity to prefile three rounds of testimony – direct, rebuttal, and surrebuttal. The process of filing testimony and responding to the testimony filed by other parties revealed areas of agreement that resolved some issues and areas of disagreement that revealed new issues. On March 8, the parties filed a list of the issues they asked the Commission to resolve.

As previously indicated, a number of the identified issues were resolved by the approved partial stipulations and agreements and will not be further addressed in this report and order. The remaining issues will be addressed in turn.

#### **Conclusions of Law Regarding Jurisdiction**

A. AmerenUE is a public utility, and an electrical corporation, as those terms are defined in Section 386.020(43) and (15), RSMo (Supp. 2009). As such, AmerenUE is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

B. Section 393.140(11), RSMo 2000, gives the Commission authority to regulate the rates AmerenUE may charge its customers for electricity. When AmerenUE filed a tariff designed to increase its rates, the Commission exercised its authority under Section 393.150, RSMo 2000, to suspend the effective date of that tariff for 120 days beyond the effective date of the tariff, plus an additional six months.

#### **Conclusions of Law Regarding the Determination of Just and Reasonable Rates**

A. In determining the rates AmerenUE may charge its customers, the Commission is required to determine that the proposed

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<sup>11</sup> Baxter Direct, Ex. 100, Page 5, Lines 8-11.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

385

rates are just and reasonable.<sup>12</sup> AmerenUE has the burden of proving its proposed rates are just and reasonable.<sup>13</sup>

B. In determining whether the rates proposed by AmerenUE are just and reasonable, the Commission must balance the interests of the investor and the consumer.<sup>14</sup> In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held as follows:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>15</sup>

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money

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<sup>12</sup> Section 393.150.2, RSMo 2000.

<sup>13</sup> Id.

<sup>14</sup> Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603, (1944).

<sup>15</sup> Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia, 262 U.S. 679, 690 (1923).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

386

19 Mo. P.S.C. 3d

market and business conditions generally.<sup>16</sup>

The Supreme Court has further indicated:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.<sup>17</sup>

C. In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>18</sup>

D. Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.<sup>19</sup>

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<sup>16</sup> *Id.* at 692-93.

<sup>17</sup> *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

<sup>18</sup> *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

<sup>19</sup> *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

387

**The Rate Making Process**

The rates AmerenUE will be allowed to charge its customers are based on a determination of the company's revenue requirement. AmerenUE's revenue requirement is calculated by adding the company's operating expenses, its depreciation on plant in rate base, taxes, and its rate of return multiplied by its rate base. The revenue requirement can be expressed as the following formula:

$$\text{Revenue Requirement} = E + D + T + R(V-AD+A)$$

Where: E = Operating expense requirement

D = Depreciation on plant in rate base

T = Taxes including income tax related to return

R = Return requirement

(V-AD+A) = Rate base

For the rate base calculation:

V = Gross Plant

AD = Accumulated depreciation

A = Other rate base items

All parties accept the basic formula. Disagreements arise over the amounts that should be included in the formula.

**The Issues**

**1. Rate of Return**

Findings of Fact:

Introduction:

1. This issue concerns the rate of return AmerenUE will be authorized to earn on its rate base. Rate base includes things like generating plants, electric meters, wires and poles, and the trucks driven by AmerenUE's repair crews. In order to determine a rate of return, the Commission must determine AmerenUE's cost of obtaining the capital it needs.

**a. Capital Structure**

2. The relative mixture of sources AmerenUE uses to obtain the capital it needs is its capital structure. All parties agree that AmerenUE's actual capital structure as of the true-up date, January 31, 2010, should be used for purposes of establishing its rates in this case. Staff's True-Up Accounting Schedules described AmerenUE's actual capital structure as of January 31, 2010 as:

Long-Term Debt	47.26%
Short-Term Debt	00.00%

UNION ELECTRIC COMPANY, D/B/A AMERENUE

388

19 Mo. P.S.C. 3d

Preferred Stock	01.48%
Common Equity	51.26% <sup>20</sup>

Since all parties accept this capital structure, the Commission will not further address this matter.

3. Similarly, AmerenUE's calculation of the cost of its long-term debt and preferred stock is not disputed by any party,<sup>21</sup> and will not be further addressed.

**b. Return on Equity**

Introduction:

4. Determining an appropriate return on equity is without a doubt the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine because their rate of return is specified within the instruments that create them.<sup>22</sup> In contrast, in determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in AmerenUE rather than in some other investment opportunity. As a result, the Commission cannot simply find a rate of return on equity that is unassailably scientifically, mathematically, or legally correct. Such a "correct" rate does not exist. Instead, the Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for AmerenUE's ratepayers. In order to obtain guidance about the appropriate rate of return on equity, the Commission considers the testimony of expert witnesses.

5. Four financial analysts offered recommendations regarding an appropriate return on equity in this case. Dr. Roger A. Morin testified on behalf of AmerenUE. Dr. Morin is Emeritus Professor of Finance at Robinson College of Business, Georgia State University, and Professor of Finance for Regulated Industry at the Center for the Study of Regulated Industry at Georgia State University. He holds a Bachelor of Engineering degree and an MBA in Finance from McGill University, as well as a Ph.D. in Finance and Econometrics from the

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<sup>20</sup> Staff True-Up Accounting Schedules, Ex. 243, Schedule 12.

<sup>21</sup> Transcript, Page 1953, Lines 3-5.

<sup>22</sup> Lawton Direct, Ex. 304, Page 9, Lines 4-5.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

389

Wharton School of Finance, University of Pennsylvania.<sup>23</sup> He recommends the Commission allow AmerenUE a return on equity of 10.8 percent.<sup>24</sup>

6. David Murray testified on behalf of Staff. Murray is the Acting Utility Regulatory Manager of the Financial Analysis Department for the Commission. He holds a Bachelor of Science degree in Business Administration from the University of Missouri – Columbia, and a MBA from Lincoln University. Murray has been employed by the Commission since 2000 and has offered testimony in many cases.<sup>25</sup> Murray recommends a return on equity within a range of 9.0 percent to 9.7 percent,<sup>26</sup> with a recommended midpoint of 9.35 percent.<sup>27</sup>

7. Stephen G. Hill also offered rate of return testimony on behalf of Staff. Hill is self-employed as a financial consultant, specializing in financial and economic issues in regulated industries. He earned a Bachelor of Science degree in Chemical Engineering from Auburn University, and a Masters degree in Business Administration from Tulane University.<sup>28</sup> Hill did not offer a recommended a return on equity for AmerenUE. Instead, he offered testimony to support Murray's recommended rate of return, and to rebut the testimony offered by the other testifying return-on-equity witnesses.<sup>29</sup>

8. Michael Gorman testified on behalf of MIEC. Gorman is a consultant in the field of public utility regulation.<sup>30</sup> He holds a Bachelors of Science degree in Electrical Engineering from Southern Illinois University and Masters Degree in Business Administration with a concentration in Finance from the University of Illinois at Springfield.<sup>31</sup> Gorman recommends the Commission allow AmerenUE a return on equity within a range of 9.5 percent to 10.5 percent, with a recommended midpoint of 10.0 percent.<sup>32</sup>

9. Finally, Daniel J. Lawton testified on behalf of Public

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<sup>23</sup> Morin Direct, Ex. 111, Page 1, Lines 6-16.

<sup>24</sup> Morin Rebuttal, Ex. 112, Page 52, Line 13.

<sup>25</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Appendix 1, Page 42.

<sup>26</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Page 37, Lines 24-26.

<sup>27</sup> Transcript, Page 2022, Lines 24-25.

<sup>28</sup> Hill Rebuttal, Ex. 212, Page 1, Lines 7-15.

<sup>29</sup> Hill Surrebuttal, Ex. 213, Pages 22-23, Lines 20-26, 1-23.

<sup>30</sup> Gorman Direct, Ex. 408, Page 1, Line 5.

<sup>31</sup> Gorman Direct, Ex. 408, Appendix A, Page 1, Lines 10-12.

<sup>32</sup> Gorman Direct, Ex. 408, Page 2, Lines 9-11.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

390

19 Mo. P.S.C. 3d

Counsel. Lawton is a consultant who holds a Bachelor of Arts degree in Economics from Merrimack College and a Master of Arts in Economics from Tufts University.<sup>33</sup> Lawton recommends the Commission allow AmerenUE a return on equity within a range of 9.3 percent to 10.9 percent,<sup>34</sup> with a recommended midpoint of 10.1 percent.<sup>35</sup>

Specific Findings of Fact:

10. A utility's cost of common equity is the return investors require on an investment in that company. Investors expect to achieve their return by receiving dividends and stock price appreciation<sup>36</sup> Financial analysts use variations on three generally accepted methods to estimate a company's fair rate of return on equity. The Discounted Cash Flow (DCF) method assumes the current market price of a firm's stock is equal to the discounted value of all expected future cash flows. The Risk Premium method assumes that all the investor's required return on an equity investment is equal to the interest rate on a long-term bond plus an additional equity risk premium to compensate the investor for the risks of investing in equities compared to bonds. The Capital Asset Pricing Method (CAPM) assumes the investor's required rate of return on equity is equal to a risk-free rate of interest plus the product of a company-specific risk factor, beta, and the expected risk premium on the market portfolio. No one method is any more "correct" than any other method in all circumstances. Analysts balance their use of all three methods to reach a recommended return on equity.

11. Before examining the analyst's use of these various methods to arrive at a recommended return on equity, it is important to look at another number. For 2009, the average return on equity awarded to integrated electric utilities by state commissions in this country was 10.59 percent, as reported by Regulatory Research Associates.<sup>37</sup>

12. The Commission mentions the average allowed return on equity not because the Commission should, or would slavishly follow the national average in awarding a return on equity to AmerenUE. However, AmerenUE must compete with other utilities all over the country for the same capital. Therefore, the average allowed return on

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<sup>33</sup> Lawton Direct, Ex. 304, Schedule DJL-1.

<sup>34</sup> Lawton Direct, Ex. 304, Page 5, Lines 11-12.

<sup>35</sup> Transcript, Page 2186, Lines 15-17.

<sup>36</sup> Gorman Direct, Ex. 408, Page 15, Lines 10-12.

<sup>37</sup> Morin Rebuttal, Ex. 112, Page 2, Lines 11-14.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

391

equity provides a reasonableness test for the recommendations offered by the return on equity experts.

13. In his direct testimony filed on behalf of AmerenUE, which he submitted in July 2009, Dr. Morin recommended AmerenUE be allowed a return on equity of 11.5 percent.<sup>38</sup> By February 11, 2010, when he submitted his rebuttal testimony, Dr. Morin had reduced this recommended return on equity to 10.8 percent.<sup>39</sup> Dr. Morin did not change his methodology, but his updated analysis used December 2009 stock prices that were higher than the prices he had used in his July 2009 testimony.<sup>40</sup> He testified that his rebuttal testimony was intended to supersede his direct testimony<sup>41</sup> and that a recommendation of 11.5 percent would be ludicrous at the time of the hearing.<sup>42</sup> The Commission will consider Dr. Morin's recommendation of 10.8 percent when deciding an appropriate return on equity for AmerenUE.

14. Three of the four return on equity experts offered recommendations between 10.0 percent and 10.8 percent. The fourth recommendation, the 9.35 percent recommended by Staff's witness David Murray, is lower than the other recommendations, and is substantially lower than the 2009 national average of allowed returns on equity of 10.59 percent.<sup>43</sup>

15. Murray's recommendation is low because the three stage DCF analysis he performed relies on an unreasonably low long-term growth estimate of 3.1 percent. Murray based his long-term growth rate on the Energy Information Administration's projection of long-term growth in the usage of electricity plus an inflation factor.<sup>44</sup> Murray's calculation of a long-term growth rate based on the anticipated growth of demand for electricity is inconsistent with the requirements of the DCF model, which relies on earnings/dividends growth.<sup>45</sup> If Murray had instead relied on the historical growth in real GDP for the United States from 1929 through 2008, plus an inflation factor, he would have derived a

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<sup>38</sup> Morin Direct, Ex. 111, Page 5, Lines 17-20.

<sup>39</sup> Morin Rebuttal, Ex. 112, Page 56, Lines 9-11.

<sup>40</sup> Morin Rebuttal, Ex. 112, Pages 52-53.

<sup>41</sup> Transcript, Page 1828, Lines 1-4.

<sup>42</sup> Transcript, Page 1898, Lines 19-20.

<sup>43</sup> Morin Rebuttal, Ex. 112, Page 6, Lines 22-28.

<sup>44</sup> Staff Report – Revenue Requirement/Cost of Service, Pages 26-27, Lines 6-28, 1-8.

<sup>45</sup> Morin Rebuttal, Ex. 112, Page 18, Lines 1-2.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

392

19 Mo. P.S.C. 3d

long-term growth forecast of 6.0 percent.<sup>46</sup>

16. Murray's DCF analysis also contrasts sharply with the DCF analysis performed by the other return on equity experts, who relied on forecasted growth rates published by reputable investment analysts. As Public Counsel's witness, Daniel Lawton, explained at the hearing, the growth in the use of electricity is not a good measure of the actual growth in an electric utilities earnings because earnings growth can come from more than just the growth in the demand for electricity.<sup>47</sup> Lawton also defended his, and other analyst's use of forecasted growth rates, testifying: "relying on published price, dividend and growth rate data and forecasts is not different or unique. ... this is what regulatory authorities typically consider to determine a reasonable return for setting fair and just rates for consumers."<sup>48</sup> Lawton testified that he would never use projected growth in electricity demand as a component in the growth rate in a DCF analysis so long as analyst forecasts were available<sup>49</sup> and that he has never seen another analyst use such a projection in the way Murray used it.<sup>50</sup>

17. In an attempt to support the reasonableness of his very low return on equity recommendation, Murray cites several analyst reports that suggest they anticipate AmerenUE will earn a return on equity of under 9 percent.<sup>51</sup> As further support, Murray points to information from the Missouri State Employees' Retirement System's website that would indicate the pension fund expects future returns on equities of only 8.5 percent.<sup>52</sup>

18. Murray's reliance on analyst reports to support his recommendation is misplaced. Most investors do not have access to the specific analyst reports that Murray examined and thus they cannot rely on them in deciding where to invest their money.<sup>53</sup> More fundamentally, the analyst reports upon which Murray relies are designed to project what the analyst expects a company to earn, not what would be a

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<sup>46</sup> Morin Rebuttal, Ex. 112, Page 18, Lines 6-22.

<sup>47</sup> Transcript, Page 2183, Lines 19-25.

<sup>48</sup> Lawton Surrebuttal, Ex. 306, Page 5, Lines 15-18.

<sup>49</sup> Transcript, Page 2211, Lines 8-15.

<sup>50</sup> Transcript, Pages 2210-2211, Lines 12-25, 1-7.

<sup>51</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Pages 31-35.

<sup>52</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Page 35, Lines 20-27.

<sup>53</sup> Transcript, Page 2213, Lines 4-24.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

393

reasonable return for the company to earn.<sup>54</sup> In other words, an analyst may conclude that AmerenUE will not earn a reasonable return and recommend that investors not invest in that company. That analyst's projection should not then be used to test the reasonableness of a recommendation of the amount a company will need to earn to attract investment.

19. Similarly, Murray's use of information about the investment expectations of a state pension fund to test the reasonableness of his recommendation is not appropriate. Murray indicated he is not aware of any other analyst who uses such information in that manner;<sup>55</sup> although Staff's other return on equity witness, Stephen Hill, recently had a similar argument rejected by the California PUC.<sup>56</sup> The problem with using a pension fund's expectations in this way is that pension funds have different investment goals and thus are not well suited to assessing the cost of equity capital in a rate proceeding.<sup>57</sup>

20 The Commission finds that Staff's recommended return on equity of 9.3 percent is not an appropriate return on equity for AmerenUE.

21. The other three witnesses who recommend rates of return used similar methods of analysis and achieved similar results.<sup>58</sup> The recommendations offered by Gorman for MIEC and Lawton for Public Counsel are very close to each other, with Gorman at 10.0 percent and Lawton at 10.1 percent. Dr. Morin is higher at 10.8 percent.

22. Part of the reason Dr. Morin's recommendation is higher than the other recommendations is that the only DCF model he relied on was a constant growth DCF model. As Gorman explained in describing why he did not rely on this own constant growth DCF results that showed a return on equity of 11.2 percent, "the constant growth DCF return is not reasonable and represents an overstated return for AmerenUE at this time."<sup>59</sup> He went on to explain that the constant growth DCF result is overstated because it is based on a unsustainably high dividend yield

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<sup>54</sup> Transcript, Page 2298, Lines 3-11.

<sup>55</sup> Transcript, Page 2058, Lines 2-8.

<sup>56</sup> Morin Rebuttal, Ex. 112, Page 26, Lines 1-30, *citing, In re S. Cal Edison Co.*, 262 P.U.R. 4<sup>th</sup> 53, 72 (Ca. Pub. Utils. Comm'n. 2007).

<sup>57</sup> Morin Rebuttal, Ex. 112, Pages 26-27, Lines 33-34, 1-5., *see also*, Transcript, Page 2212, Lines 4-19.

<sup>58</sup> Transcript, Page 1839, Lines 8-13.

<sup>59</sup> Gorman Direct, Ex. 408, Page 24, Lines 11-12.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

394

19 Mo. P.S.C. 3d

and median growth rate.<sup>60</sup> Morin's constant growth DCF suffers from the same deficiencies as Gorman described for his own constant growth analysis.<sup>61</sup>

23. Gorman and Lawton took those deficiencies into account and based their recommendations on additional sustainable growth DCF and multi-stage DCF models. Gorman's sustainable long-term growth rate resulted in a median DCF return of 10.2 percent,<sup>62</sup> while his multi-stage growth rate resulted in a DCF return of 10.16 percent.<sup>63</sup> Lawton's two-stage DCF analysis showed a cost of equity between 10.2 and 10.4 percent,<sup>64</sup> compared to the 10.9 to 11.1 percent cost of equity shown by his constant growth DCF analysis.<sup>65</sup>

24. In contrast, despite his belief that it is important to "use a whole bunch of techniques",<sup>66</sup> Morin relied on his constant growth DCF analysis and did not analyze any other form of DCF. However, in his rebuttal testimony, Gorman reworked Morin's constant growth DCF analysis as a multi-stage growth analysis, using updated stock price data, current dividends and recent analysts' growth rate estimates. Gorman arrived at a 10.0 percent cost of equity, which is 56 basis points lower than his similar reworking of Morin's constant growth DCF analysis.<sup>67</sup> All three analysts balanced the results of their DCF analysis with risk premium and CAPM analyses that ranged between the low to mid 9 percent and the low ten percent area. Thus, the chief difference between their recommendations is their non-constant growth analyses. Therefore, it is reasonable to believe that if Dr. Morin had performed a multi-stage DCF analysis, as he should have, his recommendation might be in the low 10 percent area along with Gorman and Lawton.

25. Based on its consideration of the testimony of all the experts, the Commission finds that a return on equity of 10.1 percent is a fair and reasonable return on equity for AmerenUE at this time. That is the return on equity recommended by Lawton and the Commission finds that Lawton was the most credible and reliable expert witness. However,

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<sup>60</sup> Gorman Direct, Ex. 408, Page 24, Lines 12-16.

<sup>61</sup> Gorman Rebuttal, Ex. 409, Page 10, Lines 1-6.

<sup>62</sup> Gorman Direct, Ex. 408, Page 31, Lines 13-14.

<sup>63</sup> Gorman Direct, Ex. 408, Page 34, Lines 5-8.

<sup>64</sup> Lawton Direct, Ex. 304, Page 25, Lines 19-21.

<sup>65</sup> Lawton Direct, Ex. 304, Page 24, Lines 15-16.

<sup>66</sup> Transcript, Page 1890, Lines 23-24.

<sup>67</sup> Gorman Rebuttal, Ex. 409, Page 12, Lines 1-8.



10.1 percent is a reasonable return on equity aside from the fact that it happens to match the recommendation of one of the witnesses. The Commission's decision to use the return on equity recommended by Lawton should not be taken to disparage the credibility of the other witnesses.

26. A return on equity of 10.1 percent is somewhat lower than the 10.59 percent 2009 average return on equity awarded to integrated electric utilities by state commissions. However, as Dr. Morin and the other expert witnesses indicated, economic facts have changed substantially since 2009. Dr. Morin's own recommendation dropped 70 basis points between July 2009 and February 2010 due to changes in the capital market.<sup>68</sup> Therefore, a slight reduction in allowed return on equity from the 2009 average is reasonable.

**Conclusions of Law:**

A. In assessing the Commission's ability to use different methodologies to determine just and reasonable rates, the Missouri Court of Appeals has said:

Because ratemaking is not an exact science, the utilization of different formulas is sometimes necessary. ... The Supreme Court of Arkansas, in dealing with this issue, stated that there is no 'judicial mandate requiring the Commission to take the same approach to every rate application or even to consecutive applications by the same utility, when the commission in its expertise, determines that its previous methods are unsound or inappropriate to the particular application' (quoting *Southwestern Bell Telephone Company v. Arkansas Public Service Commission*, 593 S.W. 2d 434 (Ark 1980)).<sup>69</sup>

Furthermore,

Not only can the Commission select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances, but it also may adopt or reject any or all of any witnesses' testimony.<sup>70</sup>

B. In another case, the Court of Appeals recognized that

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<sup>68</sup> Transcript, Page 1827, Lines 9-21.

<sup>69</sup> State ex rel. Assoc. Natural Gas Co. v. Public Service Commission, 706 S.W. 2d 870, 880 (Mo. App. W.D. 1985).

<sup>70</sup> Id.

the establishment of an appropriate rate of return is not a “precise science”:

While rate of return is the result of a straight forward mathematic calculation, the inputs, particularly regarding the cost of common equity, are not a matter of ‘precise science,’ because inferences must be made about the cost of equity, which involves an estimation of investor expectations. In other words, some amount of speculation is inherent in any ratemaking decision to the extent that it is based on capital structure, because such decisions are forward-looking and rely, in part, on the accuracy of financial and market forecasts.<sup>71</sup>

**Decision:**

Based on the evidence in the record, on its analysis of the expert testimony offered by the parties, and on its balancing of the interests of the company’s ratepayers and shareholders, as fully explained in its findings of fact and conclusions of law, the Commission finds that 10.1 percent is a fair and reasonable return on equity for AmerenUE. The Commission finds that this rate of return will allow AmerenUE to compete in the capital market for the funds needed to maintain its financial health.

2. Depreciation

**Findings of Fact:**

**Introduction to Depreciation Issues:**

1. Depreciation is the means by which a utility is able to recover the cost of its investment in its rate base by recognizing the reduction in value of that property over the estimated useful life of the property. Depreciation rates should be designed to allow the utility to recover, over the average service life of the assets in that account, the original cost of the assets, plus an estimate of any cost to remove the asset, less scrap value of the asset.<sup>72</sup>

2. The fundamental goal of depreciation is to ensure that the correct amount of depreciation is recovered from each generation of customers over the actual service life of the property.<sup>73</sup> If a depreciation rate is set too high, an excess amount will be recovered from current customers. If a depreciation rate is set too low, the cost of the asset will

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<sup>71</sup> State ex rel. Missouri Gas Energy v. Public Service Commission, 186 S.W.3d 376, 383 (Mo App. W.D. 2005).

<sup>72</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Page 96, Lines 9-11.

<sup>73</sup> Wiedmayer Rebuttal, Ex. 105, Page 15, Lines 2-5.

not be fully recovered during its life, and the unrecovered cost will be dumped on the customers receiving service at the time the asset is retired.

3. The parties disagreed about several aspects of depreciation. The most fundamental disagreement is about whether to use a life span or a mass property approach to determine an appropriate depreciation rate for AmerenUE's steam and hydraulic electric production plant accounts. That is the first depreciation issue the Commission will address.

**a. Use of Life Span Versus Mass Property Approach to Determine Depreciation Rates for Steam and Hydraulic Plant Accounts**

**Introduction:**

4. John Wiedmayer, a consultant with Gannet Fleming, Inc., sponsored the depreciation study submitted by AmerenUE<sup>74</sup>. His depreciation study uses a life span approach for determining appropriate depreciation rates for steam and hydraulic plant accounts. The steam and hydraulic plants to which these depreciation rates would apply, are AmerenUE's four coal-fired steam generating electric plants, the Meramec, Sioux, Labadie, and Rush Island stations, and hydraulic generating plants at Osage (Bagnall Dam), Keokuk, and Taum Sauk.

5. Arthur Rice, a Utility Regulatory Engineer I for the Commission sponsored a depreciation study submitted by Staff.<sup>75</sup> Staff's depreciation study treats all steam production and all hydraulic plant as mass property.

6. James Selecky, a consultant with Brubaker & Associates,<sup>76</sup> and William Dunkel, a consultant with William Dunkel and Associates,<sup>77</sup> offered testimony on behalf of MIEC that proposed adjustments to the depreciation studies of both AmerenUE and Staff. Selecky advocated the use of a mass property approach because this Commission has used that approach in the past. As an alternative, Selecky suggested modifications to AmerenUE's life span approach if the Commission decided to use that approach.

7. The life span approach to depreciation is premised on

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<sup>74</sup> Wiedmayer Direct, Ex. 104, Page 1, Lines 10-11.

<sup>75</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Appendix 1. Page 51.

<sup>76</sup> Selecky Direct, Ex. 404 NP, Page 1, Lines 5-6.

<sup>77</sup> Dunkel Rebuttal, Ex. 407, Page 1, Lines 6-7.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

398

19 Mo. P.S.C. 3d

the fact that the equipment in a power plant does not remain unchanged during the life of the plant. Instead, interim additions, replacements, and retirements occur regularly throughout the life of the plant.<sup>78</sup> For example, a particular valve on a boiler might have an estimated service life of 50 years. A depreciation rate for that valve would be set accordingly. In a power plant that went into service in 1960, that valve might be replaced in 2010 with a new valve that again has an estimated service life of 50 years. However, the valve installed into the plant in 2010 has been installed in a power plant that is already 50 years old. If it is assumed that the entire power plant will be retired when it is 60 years old, in 2020, the estimated service life of the valve installed in 2010 will have to be truncated at 10 years. Thus, the depreciation rate for that valve will need to be set to recover its cost over 10 years instead of 50. The life span approach reflects the unique average service lives that are experienced by each year of installation by recognizing the amount of time remaining between the year of installation and the anticipated final retirement of the power plant.

8. For purposes of its life span depreciation study, AmerenUE engaged the services of Black & Veatch Corporation to prepare a study to estimate the retirement dates for its steam powered electric plants.<sup>79</sup> Larry Loos, a Professional Engineer employed by Black & Veatch, sponsored that study through his testimony. The Black & Veatch study estimated the following retirement dates for AmerenUE's steam generating plants:

Meramec	2022
Sioux	2033
Labadie – Units 3 and 4	2038
Labadie – Units 1 and 2	2042
Rush Island	2046 <sup>80</sup>

9. To estimate retirement dates for the hydraulic plants, AmerenUE assumed that the plants would be retired when the operating licenses for the plants expire.<sup>81</sup> The resulting estimated retirement dates for the hydraulic plants are as follows:

Osage	2047
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<sup>78</sup> Wiedmayer Direct, Ex. 104, Page 5, Lines 9-10.

<sup>79</sup> Loos Direct, Ex. 107, Page 5, Lines 18-19.

<sup>80</sup> Loos Direct, Ex 107, Page 14, Lines 2-8.

<sup>81</sup> Wiedmayer Rebuttal, Ex. 105, Page 12, Lines 3-12.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

399

Keokuk 2055  
Taum Sauk 2049<sup>82</sup>

10. Staff contends that estimated retirement dates for power plants are inherently unreliable. For that reason, Staff advises the Commission to use a mass property approach to establish depreciation rates for those accounts. Under a mass property approach, all steam plant property from all the plants is examined in a single mortality study. That single study does not differentiate between interim and final retirements; all retirements are considered when determining an estimated service life for the property. Because final retirements that occur when an entire power plant is retired are included in the mix, Staff contends the early retirement of some property will be taken into account when depreciation rates are established.<sup>83</sup>

**Specific Findings of Fact:**

11. There is nothing wrong with the use of a mass property approach in theory. For some items of property it is perfectly appropriate and is properly used for many purposes in the depreciation studies of both AmerenUE and Staff. For example, the mass property approach is used to determine depreciation rates for items such as poles, meters, and line transformers. Every year AmerenUE adds thousands of poles, meters, and line transformers to its system. Those individual poles may be retired at any age, depending upon accidents, lightning strikes, road construction, insect damage, or any number of independent causes.<sup>84</sup> The key point is that the life of each pole is independent of other poles. One may be hit by a truck when it is only one year old, while another may still be in service 60 years later. But there are enough poles in service to allow for a meaningful study to determine how long an average pole will remain in service and establish a depreciation rate accordingly.

12. The problem with treating power plant equipment as mass property is that retirements of large electric power plants are rare events. When Staff's witness examined AmerenUE's property retirement data, that data included final retirement data from only four steam plants, Mound, Cahokia, Venice 1 and Venice 2.<sup>85</sup> The first three of those

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<sup>82</sup> Wiedmayer Direct, Ex. 104, Schedule JFW-E1, Page III-6.

<sup>83</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Page 104, lines 1-29.

<sup>84</sup> Wiedmayer Rebuttal, Ex. 105, Page 8, Lines 6-12.

<sup>85</sup> Transcript, Page 1384, Lines 11-16.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

400

19 Mo. P.S.C. 3d

retired plants were old, small, and inefficient plants retired in the 1970s.<sup>86</sup> Venice 2 was retired in 2002 after a fire.<sup>87</sup> Furthermore, there is very little retirement data available from even those plants because the dollars involved are very small compared to AmerenUE's investment in its current steam plants.<sup>88</sup> There is no final retirement data for the hydraulic plants, as AmerenUE has never shut down a hydraulic plant.<sup>89</sup>

13. Thus, the available retirement data for AmerenUE's steam and hydraulic plants is only indicative of interim retirements that occur during the life of the power plants and fails to provide any useful information about final retirements. As a result, a mass property analysis will overstate the average service life of the steam plant property.<sup>90</sup> Indeed, when cross-examined, Staff's witness agreed that he did not have enough data to obtain a true mass property result for the steam or hydraulic plants.<sup>91</sup>

14. The problem of a lack of reliable data is likely the reason all authority cited by the parties states that life span is the appropriate method to use in determining depreciation rates for power plant accounts. *Public Utility Depreciation Practices*, published in 1996 by the National Association of Regulatory Utility Commissioners (NARUC), specifically states that electric power plants are to be treated as life span property.<sup>92</sup> Similarly, the leading textbook on depreciation accounting, *Depreciation Systems*, written by Dr. Frank Wolf and Dr. Chester Finch, clearly indicates that electric generating equipment is to be depreciated using a life span approach instead of a mass property approach.<sup>93</sup> Even Staff's own depreciation manual, which Staff's witness relied upon in preparing his depreciation study,<sup>94</sup> indicates the life span approach is appropriately used to determine depreciation for electric power plants.<sup>95</sup>

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<sup>86</sup> Selecky Rebuttal, Ex. 405, Page 4, Lines 1-14. See also, Wiedmayer, Surrebuttal, Ex. 106, Page 4-5, lines 21-23, 1.

<sup>87</sup> Selecky Rebuttal, Ex. 405, Pages 4-5, Lines 15-24, 1-5.

<sup>88</sup> Transcript, Pages 1384-1385, Lines 21-25, 1-2.

<sup>89</sup> Transcript, Page 1385, Lines 3-8.

<sup>90</sup> Wiedmayer Surrebuttal, Ex. 106, Page 9, Lines 1-11.

<sup>91</sup> Transcript, Page 1385, Lines 9-16.

<sup>92</sup> Wiedmayer Rebuttal, Ex. 105, Pages 12-13, Lines 13-25, 1-4.

<sup>93</sup> Wiedmayer Rebuttal, Ex. 105, Page 13, Lines 6-25.

<sup>94</sup> Transcript, Page 1362, Lines 17-21.

<sup>95</sup> *Contents & Outline of a Depreciation Study*, Ex. 231, Pages 44-45. Specifically, that manual states: "Unlike mass utility property such as poles, mains, conductors, etc. there exists utility property that requires some forecast as to its date of retirement. Types of plant

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

401

15. Not surprisingly, given the support in the literature for the use of the life span approach when determining depreciation rates for electric power plant property, it appears that every other state commission around the country uses the life span approach for electrical production facilities.<sup>96</sup> Unfortunately, it appears that the only state commission that has used a mass property approach to determine depreciation rates for electric production facilities is this commission. In an earlier AmerenUE rate case, ER-2007-0002<sup>97</sup>, the Commission authorized the use of a mass property approach for electric production facilities. The Commission did so because of frustration over the inadequate evidence AmerenUE presented to establish reasonably likely retirement dates for its electric power plants.

16. In that earlier case, AmerenUE initially estimated that all its power plants would be retired in 2026. After the other parties criticized that retirement date as arbitrary, the company arbitrarily estimated that all its power plants would be retired 60 years after they went on line. In accepting Staff's proposed mass property proposal in that case, the Commission said "without better evidence of when those plants are likely to be retired, allowing the company to increase its depreciation expense based on what is little more than speculation about possible retirement dates would be inappropriate."<sup>98</sup> Thus, the Commission authorized the use of a mass property approach in that particular case, but did not reject the life span approach in general.

17. For this case, AmerenUE presented a detailed study by Black & Veatch that presented thoughtfully calculated retirement dates for each of its coal-fired steam production plants. Those estimated retirement dates would retire the steam production plants after between 61 and 72 years of service,<sup>99</sup> which is on the high-end of estimated retirement dates used for life span analysis for other utilities by other state commissions.<sup>100</sup>

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applicable to this type of analysis are buildings, *electric power plants*, telephone switching equipment, gas storage fields, etc." (emphasis added).

<sup>96</sup> Wiedmayer Direct, Ex.104, Pages 30-31, Lines 5-23, 1-10.

<sup>97</sup> In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area, Report and Order, Case No. ER-2007-0002, May 22, 2007.

<sup>98</sup> *Id.* at Page 84.

<sup>99</sup> Selecky Direct, Ex. 404 NP, Schedule JTS-2.

<sup>100</sup> Transcript, Page 1482, Lines 14-21.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

402

19 Mo. P.S.C. 3d

18. Aside from a proposal to extend the life span of the Meramec unit, which will be addressed in detail later in this Report and Order, MIEC's expert witness, James Selecky, agreed that the Black & Veatch study produced reasonable retirement dates that he used to develop his own life span depreciation rates. He also agreed that the Black & Veatch study was reasonable and logical, and substantially better than the approach AmerenUE used in ER-2007-0002.<sup>101</sup>

19. Staff's expert witness, Arthur Rice, agreed that the Black & Veatch study is "relatively complete and logical" and "well done".<sup>102</sup> He also agreed that the estimated retirement dates presented by AmerenUE are "reasonable."<sup>103</sup> Although Staff's brief claims that AmerenUE's estimated retirement dates are unreliable because AmerenUE did not perform an economic study regarding the retirement of those plants, the number of assumptions and the nature of the assumptions required to make such an economic analysis for events that will happen 12 to 37 years in the future, render such analysis impractical.<sup>104</sup>

20. The Black & Veatch study does not independently establish retirement dates for AmerenUE hydraulic production plants. Instead, AmerenUE's life span study assumes that those plants will be retired when their operating licenses expire.<sup>105</sup> That is the same assumption the Commission has previously used to estimate the retirement date of AmerenUE's Callaway nuclear production plant for purposes of a life span depreciation calculation.<sup>106</sup> AmerenUE's estimated retirement dates would have Taum Sauk retire after 86 years of service, Osage after 94 years of service, and Keokuk after 142 years of service.<sup>107</sup>

21. There is no way to know for sure when the hydraulic plants will be retired. The same can be said about the steam production plants. But it is unreasonable to assume that the plants will last forever. As previously indicated, a mass property approach is not appropriate

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<sup>101</sup> Transcript, Page 1483, Lines 3-23.

<sup>102</sup> Transcript, Page 1397, Lines 2-12.

<sup>103</sup> Exhibit 168.

<sup>104</sup> Loos Surrebuttal, Ex. 108, Page 8, Lines 9-11.

<sup>105</sup> Wiedmayer Rebuttal, Ex. 105, Page 12, Lines 3-12.

<sup>106</sup> In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area, Report and Order, Case No. ER-2007-0002, May 22, 2007, Pages 87-88.

<sup>107</sup> Selecky Direct, Ex. 404 NP, Schedule JTS-2.



because of the lack of available retirement data upon which such a study could be based. A life span depreciation study requires an estimated retirement date and the assumed retirement dates for the hydraulic plants are reasonable.

22. It is important to remember that the assumed retirement dates for purposes of a depreciation study are not fixed forever and certainly do not mean that the plant will actually be retired on the assumed retirement date. Future depreciation studies in future rate cases may rely on different estimated retirement dates as further information becomes available and circumstances change. Ultimately, depreciation rates will be adjusted to match the new information so that the correct amount of depreciation is recovered from each generation of customers over the actual service life of the property.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The Commission finds that it is appropriate to use a life span approach to determine depreciation rates for AmerenUE's steam and hydraulic electric production accounts. The Commission finds that the estimated retirement dates proposed by AmerenUE for that purpose are reasonable, with the exception of the retirement date for the Meramec steam production plant, which is addressed later in this order.

**b. Proposed Extension of the Lifespan of the Meramec Plant**

**Findings of Fact:**

**Introduction:**

23. AmerenUE currently operates the Meramec coal-fired steam production plant, located southeast of St. Louis, at the confluence of the Meramec and Mississippi Rivers. The Meramec Generating Station has four pulverized coal subcritical power generating units. Units 1 and 2 were built in 1953 and 1954 respectively; each has a capacity of 138 MW. Unit 3, which has a capacity of 289 MW, was built in 1959, while Unit 4, which has a capacity of 359 MW, was built in 1961.<sup>108</sup> The Black & Veatch study upon which AmerenUE relies to calculate depreciation rates for its steam production plant estimates that AmerenUE will retire its Meramec coal-fired steam production plant in

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<sup>108</sup> Loos Direct, Ex. 107, Schedule LWL-E1, Appendix B, Page B-2.

2022.<sup>109</sup> MIEC's witness, James Selecky, contends the estimated retirement date for the Meramec plant should be extended by five years to 2027.<sup>110</sup>

**Specific Findings of Fact:**

24 There are two reasons the estimated retirement date for the Meramec plant should be extended. First, AmerenUE forecasts an average life span for its other steam production units of approximately 69 years. AmerenUE's predicted life span for Meramec Unit 3 is only 63 years, with a predicted life span for Meramec Unit 4 of 61 years. Extending the predicted life span of Meramec by five years would bring it more in line with the predicted life span of the other coal-fired plants.<sup>111</sup>

25. Second, the Black & Veatch study, upon which AmerenUE based its predicted life spans, indicates that its choice of an expected retirement date for the Meramec plant is based, at least in part, on the assumptions of AmerenUE's Integrated Resource Plan.<sup>112</sup> That plan assumed that AmerenUE would build a second nuclear reactor at its Callaway plant to replace the capacity of the Meramec plant,<sup>113</sup> but AmerenUE is no longer planning to build Callaway 2,<sup>114</sup> and has no plans on how to replace the Meramec plant's capacity.<sup>115</sup> That implies that AmerenUE may keep Meramec in operation beyond 2022.

26. Indeed, the study prepared for AmerenUE by Burns & McDonnell Engineering Company indicates the Meramec plant could be kept in operation substantially past 2022 if its capacity is needed and if its operation is economically viable.<sup>116</sup>

27. Of course, no one can know for certain whether the continued operation of the Meramec plant beyond 2022 will be economically viable. As AmerenUE's own witness testified, the number of assumptions and the nature of the assumptions required make that

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<sup>109</sup> Loos Direct, Ex. 107, Page 14, Line 4.

<sup>110</sup> Selecky Direct, Ex. 404 NP, Page 22, Lines 1-15.

<sup>111</sup> Selecky Direct, Ex. 403HC, Page 22, Lines 3-8.

<sup>112</sup> Loos Direct, Ex. 107, Page 14, Lines 1-13. The Black & Veatch study is attached to Loos' direct as Schedule LWL-E1. The study's reference to the IRP filing is found at page 3-4 of the schedule.

<sup>113</sup> Transcript, Page 1286, Lines 14-18.

<sup>114</sup> Birk Rebuttal, Ex. 103, Page 12, Lines 16-.

<sup>115</sup> Transcript, Page 1286, Lines 19-22.

<sup>116</sup> Ex 434 HC, Page 5-2. The entire exhibit is highly confidential so the Commission will not disclose the details of the report.

sort of economic analysis impractical.<sup>117</sup> AmerenUE's estimated retirement dates are not set in stone and may change in a future depreciation study as more information becomes available. But based on the evidence presented, the Commission finds that it is reasonable to assume an additional five years of life for the Meramec plant. This adjustment will reduce AmerenUE's revenue requirement by approximately \$10 million.<sup>118</sup>

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

AmerenUE shall calculate depreciation for its steam production plant based on the assumption that the Meramec steam production plant will be retired in 2027.

**c. Net Salvage Percentage for Account 312 Boiler Equipment**

**Findings of Fact:**

**Introduction:**

28. Net salvage is the salvage value of property retired, less the cost of removal. Net salvage value is positive if the salvage value exceeds removal cost and negative if removal costs exceed the salvage value.<sup>119</sup> AmerenUE chose not to request depreciation recovery of terminal net salvage<sup>120</sup> for its power plants, so the net salvage percentages at issue are only for interim net salvage.<sup>121</sup> AmerenUE's depreciation witness, John Wiedmayer, testified that the historical net salvage indication for Account 312, Boiler Plant Equipment is negative 25 percent. He adjusted his net salvage estimate to 15 percent on the assumption that 60 percent of the retirements are interim retirements, based on an estimated interim survivor curve.<sup>122</sup> Presumably, the other 40 percent of retirements would be terminal, when the power plant is finally retired.

29. MIEC's depreciation witness, James Selecky,

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<sup>117</sup> Loos Surrebuttal, Ex. 108, Page 8, Lines 9-11.

<sup>118</sup> Transcript, Page 1523, Lines 14-19.

<sup>119</sup> Wiedmayer Rebuttal, Ex. 105, Page 60, Lines 5-9.

<sup>120</sup> Terminal net salvage relates to decommissioning and dismantlement costs associated with the final retirement of power plants.

<sup>121</sup> Wiedmayer, Rebuttal, Ex. 105, Page 47, Lines 16-19.

<sup>122</sup> Wiedmayer Rebuttal, Ex. 105, Page 47, Lines 19-23.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

406

19 Mo. P.S.C. 3d

recommended the net salvage ratio for this account be reduced from negative 15 percent to negative 10 percent.<sup>123</sup> Selecky recommends this reduction because of his contention that AmerenUE's current interim net salvage depreciation rates have allowed the company to collect more depreciation from customers than the depreciation expenses the company has actually experienced.<sup>124</sup> To avoid what he describes as an over collection, Selecky calculated the average amount of depreciation expense AmerenUE has experienced over the last five and ten years, adjusted that average for inflation to derive an annual amount AmerenUE could expect to recover over the next thirty years, and reduced the net salvage ratio to allow AmerenUE to recover only that amount.

**Specific Findings of Fact:**

30 Selecky's reliance on recent historical levels of interim net salvage expense to set future rates is misplaced. As Wiedmayer explains in his rebuttal testimony:

net salvage percents are likely to increase as plants age due to the increasing average age of retirements. As the average age of retirements increase, the price level change from the year of initial construction to the year the asset is retired becomes more pronounced and this has an impact on the historical net salvage percents due to the effect of inflation.<sup>125</sup>

For example, a valve that is on the company's books at a cost of \$100 when it was installed in 1960, might have cost \$125 to remove if it had been replaced in 1990. Because of inflation, to remove the same \$100 valve in 2010, might cost \$150. To remove it in 2020 might cost \$175. Thus, for each year that passes, the ratio of cost of removal to the cost of the valve will increase. For that reason, net salvage estimates need to consider what is likely to occur in the future and properly reflect that information in the estimates.

31. Selecky's proposed reduction to the net salvage ratio simply looks at recent historical depreciation expenses and inflates those number by a constant three percent per year.<sup>126</sup> This arbitrary approach contrasts with Wiedmayer's considered analysis to arrive at a conservative net salvage ratio of 15 percent. In fact, that analysis

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<sup>123</sup> Selecky Direct, Ex. 404 NP, Page 23, Lines 7-12.

<sup>124</sup> Selecky Direct, Ex. 404 NP, Page 24, Lines 1-7.

<sup>125</sup> Wiedmayer Rebuttal, Ex. 105, Page 48, Lines 8-12.

<sup>126</sup> Selecky Direct, Ex. 404 NP, Schedule JTS-6.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

407

revealed that a three-year moving average of net salvage percents is above negative 30 percent for every three-year period since 1998.<sup>127</sup>

32. Selecky's only response to Wiedmayer's detailed analysis was to criticize Wiedmayer's decision to reduce his net salvage estimate from negative 25 percent to negative 15 percent based on an assumption that 60 percent of the retirements will be interim retirements, meaning that the remaining 40 percent would be final retirements. Selecky points out that elsewhere in his testimony, Wiedmayer states that when the four coal plants currently in service retire nearly 50 to 80 percent of the retirements will be final retirements. Selecky implies that this supposed inconsistency makes Wiedmayer's study unreliable and justifies his simpler approach based on recent historical expenses.<sup>128</sup>

33. The supposedly inconsistent statement is in Wiedmayer's rebuttal testimony. When discussing the general mix of interim and final retirements and the difference between life span and mass property analysis, Wiedmayer said "a substantial portion, nearly 50 to 80 percent, of the retirements associated with life span property will occur on one date in the future when the plant is retired."<sup>129</sup> Wiedmayer's general statement applied to all of the numerous plant accounts for which the company used a life span approach to calculate depreciation rates. For Account 312, the account at issue, the actual data shows that 65 percent of the investment in that account will be retired by interim retirement.<sup>130</sup> Thus, a closer look at the supposed inconsistency in Wiedmayer study indicates there is no inconsistency.

34. The Commission finds that AmerenUE's use of a negative 15 percent net salvage ratio is well supported by the company's data on interim retirements. The Commission also finds that MIEC's proposed adjustment is not supported by the evidence. MIEC's proposed adjustment to require the use of a negative 10 percent net salvage ratio is rejected.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

AmerenUE's use of a negative 15 percent net salvage ratio for

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<sup>127</sup> Wiedmayer Rebuttal, Ex. 105, Page 48, Lines 14-19.

<sup>128</sup> Selecky Surrebuttal, Ex. 406, Pages 1-15, Lines 11-24, 1-10.

<sup>129</sup> Wiedmayer Rebuttal, Ex. 105, Page 20, Lines 3-5.

<sup>130</sup> Wiedmayer Direct, Ex. 104, Schedule JFW-E1, Page A-5.

Account 312 Boiler Equipment is appropriate. The adjustment to a negative 10 percent net salvage ratio proposed by MIEC is rejected.

**d. Inclusion of Retired Steam Generators in Depreciation Analysis for the Callaway Nuclear Plant**

**Findings of Fact:**

**Introduction:**

35. James Selecky, the witness for MIEC, proposed certain adjustments to AmerenUE's depreciation rates for the Callaway nuclear plant. Those adjustments are predicated on Selecky's adjustment to remove from the plant's retirement history a retirement of four steam generators in 2005.<sup>131</sup> Excluding this particular retirement from the plant's retirement history reduces the interim retirement activity, thereby increasing the average remaining life from 29.8 years to 32.6 years, and decreases the net salvage ratio from a negative 10 percent to a negative 1.2 percent.<sup>132</sup> These changes would reduce AmerenUE's depreciation expense by approximately \$5 million.<sup>133</sup> Both AmerenUE and Staff oppose Selecky's proposed adjustment.

**Specific Findings of Fact:**

36. In 2005, AmerenUE replaced the four, twenty-year old, steam generators at Callaway. Selecky contends the retirement of the steam generators should not be considered as part of the Callaway plant's retirement history because this retirement is not typical and dominates the retirement history. This single retirement represents approximately 46 percent of the total retirement in this account from 1986 through 2008. The net salvage expense associated with this retirement is approximately 80 percent of the total net salvage expense this account has incurred since 1986.<sup>134</sup>

37. While this single retirement is substantial compared to retirements that have occurred early in the life of the plant, AmerenUE plans further significant major component replacement projects in the next five years. The retirements associated with those projects will total approximately \$48 million.<sup>135</sup> Once these retirements occur, the dollars associated with the steam generator replacements will not be

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<sup>131</sup> Selecky Direct, Ex. 404 NP, Page 18, Lines 5-6.

<sup>132</sup> Selecky Direct, Ex. 404 NP, Page 19, Lines 7-8.

<sup>133</sup> Selecky Rebuttal, Ex. 405, Page 8, Lines 1-8.

<sup>134</sup> Selecky Direct, Ex. 404 NP, Page 18, Lines 8-12.

<sup>135</sup> Wiedmayer Rebuttal, Ex. 105, Page 39, Lines 12-14.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

409

extraordinary in relation to the dollars retired in the future.<sup>136</sup>

38. Also, it is not surprising that equipment retirement has been relatively rare early in the life of the plant. However, interim retirements of equipment will increase as the plant ages, meaning that if actual retirement experience from when the plant is young is excluded from the calculation, the calculation will not be representative of the retirement to be expected in the future when the plant is older.<sup>137</sup>

39. The retirement of the steam generators was also unusual in that while the expected design life of the steam generators was 40 years, the steam generators were only approximately 20-years old at the time of replacement.<sup>138</sup> That means their actual life was only half of what was expected.<sup>139</sup>

40. The shortened life of the generators was due to problems with deteriorating tubes.<sup>140</sup> Because of the problems with the generators, AmerenUE asserted a claim against the manufacturer that resulted in a settlement whereby Westinghouse paid AmerenUE \$10 million in cash. AmerenUE also received a fuel credit of \$20 million and a non-fuel related credit of \$5 million.<sup>141</sup>

41. Selecky asserts that the payments from Westinghouse are a further indication that the premature retirement of the steam generators is abnormal and should be excluded from the company's retirement history.<sup>142</sup> Indeed, Staff's witness agreed that retirements should be removed from the life analysis if they are found to be reimbursed retirements from insurance proceeds or third party payments.<sup>143</sup> However, the payments AmerenUE received from Westinghouse do not make this a reimbursed retirement because none of the payments were booked against accumulated depreciation.<sup>144</sup>

42. The weakness of Selecky's position is demonstrated by

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<sup>136</sup> Wiedmayer Rebuttal, Ex. 105, Page 39, Lines 6-9.

<sup>137</sup> Wiedmayer Rebuttal, Ex. 105, Page 41, lines 16-20.

<sup>138</sup> Wiedmayer Rebuttal, Ex. 105, Page 37, Lines 14-16.

<sup>139</sup> Selecky Rebuttal, Ex. 405, Page 6, Lines 13-16.

<sup>140</sup> Wiedmayer Rebuttal, Ex. 105, Page 38, Line 16.

<sup>141</sup> Selecky Rebuttal, Ex. 405, Page 6, Lines 17-20. The settlement agreement between Westinghouse and AmerenUE is Ex. 438 HC.

<sup>142</sup> Selecky Rebuttal, Ex. 405, Page 6, Lines 9-12.

<sup>143</sup> Rice Rebuttal, Ex. 216, Page 4, Lines 14-16.

<sup>144</sup> Transcript, Page 1421, Lines 7-12. Ex. 169 describes how AmerenUE accounted for the payment received from Westinghouse.

the very low net salvage ratio that he calculates. Selecky proposes a net salvage ratio of just negative 1.2 percent.<sup>145</sup> Using that ratio would allow AmerenUE to accumulated only \$8.9 million for net salvage for Account 322 over the next 36 years of the life of the Callaway plant. The company has already incurred \$32 million in net salvage in that account over the first 24 years of operation. That means Selecky's net salvage estimate would not allow AmerenUE to recover the amount it has already spent on removal costs, let alone the additional costs it will surely incur over the remaining life of the plant.<sup>146</sup>

43. The most important fact is that the steam generators have in fact been retired. That retirement occurred sooner than AmerenUE expected, but it is a part of the plant's retirement history and is not so unusual that it should be ignored. In fact, most nuclear plants have experienced problems with their steam generators and most have replaced or are planning to replace their steam generators.<sup>147</sup> The Commission will reject Selecky's proposed adjustments predicated on the exclusion of the steam generator retirement from the Callaway plant's retirement history.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The Commission rejects Selecky's adjustments to the proposed depreciation rates for the Callaway nuclear plant and accepts the depreciation rates proposed by AmerenUE and Staff.

**e. Transmission and Distribution Plant Depreciation**

**Findings of Fact:**

**Introduction:**

44. AmerenUE's transmission and distribution accounts include items such as poles and fixtures, overhead conductors and devices, and line transformers.<sup>148</sup> In other words, the equipment used to transmit and distribute electric power to the company's customers. MIEC's witness, James Selecky, asserts that AmerenUE is accruing too much net salvage expense in these accounts and would establish an

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<sup>145</sup> Selecky Direct, Ex. 404 NP, Schedule JTS-4.

<sup>146</sup> Wiedmayer Surrebuttal, Ex. 106, Pages 12-13, 16-26, 1-16.

<sup>147</sup> Wiedmayer Rebuttal, Ex. 105, Page 38, Lines 4-7.

<sup>148</sup> A list of the accounts included in Transmission and Distribution Plant may be found at Selecky Direct, Ex. 404 NP, Schedule JTS-8.



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

411

accrual offset of \$25 million to reduce the depreciation expense the company recognizes for these accounts.<sup>149</sup> Staff and AmerenUE oppose Selecky's proposal to establish an accrual offset.

**Specific Findings of Fact:**

45. The depreciation studies submitted by AmerenUE and Staff both calculated net salvage for these accounts using the accrual method that allows a utility to recover future net salvage over the life of plant through the use of current depreciation rates.<sup>150</sup> The Commission upheld the use of the accrual method in a 2005 decision involving Laclede Gas Company.<sup>151</sup> Subsequently, the Commission upheld AmerenUE's use of the accrual method in AmerenUE's 2007 rate case.<sup>152</sup>

46. Selecky does not oppose the continued use of the accrual method, but he contends AmerenUE is accruing what he describes as excessive amounts of net salvage expense that greatly exceed the level of net salvage expense the company actually incurs.<sup>153</sup> Indeed, AmerenUE's average actual annual net salvage expense over the last five years is \$15.1 million and over the last ten years, that average expense has been \$11.8 million.<sup>154</sup> Selecky contrasts those actual expenses with the \$55 million annual net salvage expense AmerenUE will accrue under the depreciation studies prepared by Staff and AmerenUE. Over the years, AmerenUE has accrued approximately \$582 million for future net salvage. This amount "seems excessive" to Selecky and he proposes a \$25 million offset to reduce that accrual.<sup>155</sup>

47. The amount of Selecky's proposed offset is arbitrary. In his direct testimony, he proposed a \$35 million offset,<sup>156</sup> based on his calculation showing that AmerenUE's proposed depreciation expense

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<sup>149</sup> Selecky Surrebuttal, Ex. 406, Page 16, Lines 1-7.

<sup>150</sup> Wiedmayer Rebuttal, Ex. 105, Page 49, Lines 15-18.

<sup>151</sup> In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules, Third Report and Order, 13 Mo. P.S.C. 3d 215 (2005).

<sup>152</sup> In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 92

<sup>153</sup> Selecky Direct, Ex 404 NP, Page 25, Lines 21-23.

<sup>154</sup> Selecky Direct, Ex. 404 NP, Page 27, Lines 8-11.

<sup>155</sup> Selecky Surrebuttal, Ex. 406, Page 16, Lines 12-23.

<sup>156</sup> Selecky Direct, Ex. 404 NP, Page 31, Lines 8-9.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

412

19 Mo. P.S.C. 3d

would include \$76.1 million for annual net salvage.<sup>157</sup> After acknowledging a calculation error in his direct testimony, Selecky agreed that AmerenUE's proposed depreciation expense would be only \$55 million, a reduction of \$21 million.<sup>158</sup> However, he reduced his recommended offset by only \$10 million, to \$25 million.<sup>159</sup> In fact, Selecky acknowledged the arbitrariness of the amount of his proposed offset when he described it as just a number that he ran up the flagpole.<sup>160</sup>

48. Although Selecky says he is not opposing the use of accrual accounting to calculate net salvage costs, his claim that an offset is needed is firmly based in the discredited method of expensing those costs that the Commission rejected in the *Laclede* decision.<sup>161</sup> His claim that AmerenUE is accruing too much net salvage expense makes sense only if it is accepted that the company's net salvage collections should be limited to something approaching its actual current expenses. As the Commission has held on numerous occasions, expensing is not a reasonable way to calculate net salvage costs and would ensure that the company would under-recover its net salvage costs to the detriment of future generations of ratepayers who would have to pay a disproportionate share of unrecovered net salvage costs when the plant is actually retired.

49. The fact that AmerenUE is currently accruing more than its actual net salvage expense is reasonable and necessary because the transmission and distribution systems are continuously growing and because inflation will make future removal costs more expensive than the cost to remove plant in the past.<sup>162</sup> The size of AmerenUE's system has nearly doubled in the last 50 years and the total distribution plant investment has increased by a factor of sixteen.<sup>163</sup> Current net salvage accruals are larger than current net salvage costs because AmerenUE is accruing dollars for a larger system than the system that existed 40 or 50

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<sup>157</sup> Selecky Direct, Ex. 404 NP, Page 27, Lines 7-8.

<sup>158</sup> Selecky Surrebuttal, Ex. 406, Page 15, Lines 18-22.

<sup>159</sup> Selecky Surrebuttal, Ex. 406, Page 16, Lines 8-18.

<sup>160</sup> Transcript, Page 1516, Lines 12-24.

<sup>161</sup> In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules, Third Report and Order, 13 Mo. P.S.C. 3d 215 (2005).

<sup>162</sup> Wiedmayer Rebuttal, Ex. 105, Page 69, Lines 9-12.

<sup>163</sup> Wiedmayer Rebuttal, Ex. 105, Page 69, Lines 16-18.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

413

years ago when the property currently being retired was added to the system. In addition, current accruals are for future net salvage costs and those future costs will be higher than current expenses due to the effect of inflation.<sup>164</sup> In fact, the theoretical reserve amount related to net salvage for transmission and distribution is \$720 million, and the company has thus far accrued only \$582 million for that purpose. Thus, far from over-accruing for net salvage, the company is behind in its recovery of net salvage.<sup>165</sup>

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

Selecky's proposed allocation offset of \$25 million is arbitrary, is based on a expensing method the Commission has previously rejected, and is unnecessary and inappropriate. That proposed allocation offset is rejected and the net salvage rates proposed by AmerenUE for its Transmission and Distribution accounts are accepted.

**3. Coal-Fired Plant Maintenance Expense**

**Findings of Fact:**

**Introduction:**

1. AmerenUE spends a large sum of money each year to maintain its coal-fired electric generating fleet. During the test year, the twelve months ending March 31, 2009, the company spent \$118,967,000 for that purpose.<sup>166</sup> Part of that maintenance expense is incurred for routine maintenance on the power plants, and part is associated with major overhauls of the production plant that occur during scheduled outages.<sup>167</sup> AmerenUE contends future maintenance expenses will be at or near that test-year level and would use that amount to establish rates in this case.<sup>168</sup>

2. Staff notes that the test-year maintenance expense was substantially higher than the expense for previous years, and, for that reason, proposes to normalize the test-year expense by averaging AmerenUE's maintenance expense over the last three years and using

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<sup>164</sup> Wiedmayer Surrebuttal, Ex. 106, Page 19, Lines 4-13.

<sup>165</sup> Wiedmayer Surrebuttal, Ex. 106, Page 20, Lines 1-12.

<sup>166</sup> Meyer Direct, Ex. 400, Page 4, Chart at Line 9.

<sup>167</sup> Transcript, Page 1075, Lines 11-21.

<sup>168</sup> Birk Rebuttal, Ex. 103, Page 17, Lines 3-8.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

414

19 Mo. P.S.C. 3d

that amount to set rates.<sup>169</sup> Specifically, Staff averaged AmerenUE's non-labor maintenance costs for the 36 months ending at the true-up date, January 31, 2010, and subtracted that amount from the non-labor portion of AmerenUE's test-year maintenance expense, to arrive at a negative adjustment in the amount of \$14,939,835.<sup>170</sup> Thus, Staff would subtract \$14,939,835 from the test-year expense of \$118,967,000, to arrive at an expense level of \$104,027,165.

3. MIEC's witness, Greg Meyer, also proposed to normalize AmerenUE's maintenance expense, but he used a more complex method than that proposed by Staff. For each of AmerenUE's four coal-fired production plants Meyer calculated a base level of maintenance expense. That is, a level of maintenance expense that will be incurred each year regardless of whether that power plant undergoes the extra maintenance associated with a scheduled outage. As a second step, Meyer calculated the amount of expense associated with a scheduled outage at each power plant. He then averaged those scheduled outage expenses based on the anticipated number of years between scheduled outages to derive an estimate of the annual expense associated with scheduled outages. He added the base level of maintenance expense to the annual expense associated with scheduled outages to arrive at a total annual steam production maintenance expense of \$104.6 million.<sup>171</sup> Meyer then rounded that number up and recommended \$105 million as a normalized level of expense for purposes of establishing rates.

**Specific Findings of Fact:**

4. Undeniably, AmerenUE's test-year coal plant maintenance expenses of \$119 million were significantly higher than they had been in previous years. In the 12 months ending March 31, 2006, those expenses totaled \$88.9 million, for the same period ending March 31, 2007, they totaled \$93.4 million, and for the twelve-month period ending March 31, 2008, they totaled \$91 million.<sup>172</sup> Furthermore, the level of expenses can vary from year to year depending upon how many scheduled outages are planned for that year. That situation requires the Commission to consider whether the test year expense is truly

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<sup>169</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Page 93, Lines 6-14.

<sup>170</sup> Grissum True-Up, Ex. 242, Page 2, Lines 1-11.

<sup>171</sup> Meyer Surrebuttal, Ex. 402 NP, Pages 4-7.

<sup>172</sup> Meyer Direct, Ex. 400, Page 4, Chart at Line 9.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

415

representative of the level of expense the company is likely to experience while the rates established in this case are in effect.

5. AmerenUE offered two reasons why the test-year level of expense is representative of future expense levels. First, in 2003, AmerenUE decided to approximately double the length of scheduled maintenance outage cycles for its coal-fired power plants. As a consequence, AmerenUE undertook fewer scheduled maintenance outages for those plants in the years immediately following 2003. The scheduled outages that would have been undertaken in those years were instead pushed back into later years, with the attendant costs also being pushed back.<sup>173</sup> A calculation of actual scheduled outages during the periods of 2001 – 2004 and 2005-2008, and planned outages for 2010 and 2011, was received in camera during the hearing.<sup>174</sup> Those numbers are considered highly confidential so they will not be stated in this order, but they confirm that the number of scheduled outages decreased during the period 2005 to 2008, and that the number of scheduled outages in 2010 and 2011 was expected to return to the level seen in 2001 to 2004.

6. Second, AmerenUE contends the test-year level of expense is representative of future expense levels because of the effects of the global financial crises of 2009. AmerenUE was concerned that it would not be able to obtain the financing needed to perform the maintenance work associated with scheduled outages, and therefore deferred the scheduled outages planned for 2009 into 2010.<sup>175</sup> That deferral has the effect of increasing the level of scheduled outage expense AmerenUE will incur in the future.

7. The Commission traditionally determines a representative future level of expense by looking at numbers in a historic test year. The goal is to establish rates that will give a utility a reasonable opportunity to recover its prudent costs during the period when the rates are in effect. The presumption is that test year expenses will be the best measure of future expenses. However, that presumption is not always correct and it may be appropriate to normalize certain expenses if it appears that a normalized level of expense will be more representative of future expenses.

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<sup>173</sup> Birk Rebuttal, Ex. 103, Page 14, Lines 1-23.

<sup>174</sup> Transcript, Pages 1132-1133, Lines 11-25, 1-9. See also, Ex. 162 HC.

<sup>175</sup> Transcript, Page 1049, Lines 6-16.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

416

19 Mo. P.S.C. 3d

8. It is, however, inappropriate to blindly “normalize” a test year expense by calculating an average expense from years of lower expense without considering whether the resulting expense level is truly representative of likely future costs. Yet, Staff never looked at the history of scheduled outages to consider whether the period it used to normalize maintenance expense was likely to be representative of future expenses.<sup>176</sup> In fact, Staff’s witness testified she ignored everything except the historical numbers.<sup>177</sup> Therefore, Staff’s purported normalization is unreliable.

9. MIEC’s proposed normalization is more carefully thought out to give appropriate consideration to whether the normalized expense level will be representative of future costs. It does that by taking into account the scheduled outages for each of the power plants and recognizing the effect those scheduled outages will have on the expenses the company will incur.

10. AmerenUE criticizes MIEC’s proposed normalization on two bases. First, it contends MIEC’s normalization uses expenses from five or six years ago that have not been adjusted to recognize the effect of inflation.<sup>178</sup> However, the Commission finds that MIEC’s numbers do not have to be adjusted for inflation because the base line for maintenance expense, excluding scheduled outage expense, remained essentially flat between 2005 and 2007, indicating that despite inflation, other techniques, technologies, or cost of materials have decreased enough to offset the cost of inflation.<sup>179</sup>

11. AmerenUE’s second criticism of MIEC’s normalization is that it fails to take into account the reduced number of scheduled outages that occurred during the period it used to normalize the maintenance expenses. That criticism is valid, but can be avoided if Meyer’s normalization technique is applied to the actual outages planned for the period when the rates established in this case will be in effect.

12. AmerenUE anticipates filing its next rate case sometime before the end of 2010, meaning the rates established in this case will likely remain in effect for only about 18 months.<sup>180</sup> During an in camera

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<sup>176</sup> Transcript, Page 1190, Lines 8-16.

<sup>177</sup> Transcript, Page 1212, Lines 9-21.

<sup>178</sup> Birk Supplemental Testimony, Ex. 158, Page 3, Lines 17-19.

<sup>179</sup> Transcript, Pages 1144-1145, Lines 9-25, 1-19.

<sup>180</sup> Transcript, Page 1098, Lines 7-12.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

417

cross examination of Mr. Birk, MIEC elicited testimony that took Meyer's estimation of a base level of annual maintenance expense and added his estimation of the expense associated with each scheduled outage AmerenUE plans to undertake in 2010.<sup>181</sup> That calculation resulted in an estimated expense for 2010 of \$110.2 million.<sup>182</sup>

13. MIEC offered that number to show that Meyer's normalization method would result in an estimate relatively close to the amount AmerenUE has budgeted for maintenance expense in 2010. However, using that number, which is based on the scheduled outages actually planned for 2010, as the basis for establishing rates also eliminates AmerenUE's criticism that the normalization fails to take into account the increasing number of scheduled outages that will occur while the rates established in this case are in effect. Therefore, the Commission finds that \$110.2 million is a reasonable normalization of AmerenUE's coal-plant maintenance expense.

**Conclusions of Law:**

A. In a 1984 case addressing a Commission rate case decision, the Missouri Court of Appeals described the concept of normalization of a test-year expense as follows:

The test year is a period past, but is employed as a vehicle upon which to project experience in a future period when the rates determined in the case will be in effect. Normalization of a test year cost by multi-year averaging of the cost based on experience assumes that the cost rises and falls, with the consequence that the actual cost incurred in the test year is not representative.<sup>183</sup>

That means that in normalizing a test year expense, the Commission is attempting to establish rates that will allow the utility a reasonable opportunity to recover its anticipated expenses. For that reason, the Commission must consider whether a proposed normalized test year expense is reasonably related to anticipated future expenses.

**Decision:**

The Commission concludes that \$110.2 million is a reasonable normalization of AmerenUE's annual coal-plant maintenance expense.

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<sup>181</sup> Transcript, Pages 1009-1013. See also Ex. 443.

<sup>182</sup> Ex. 443 HC.

<sup>183</sup> State ex rel. Missouri Power and Light Co. v. Public Service Com'n, 669 S.W.2d 941, 945, (Mo App. W.D. 1984).

#### **4. Nuclear Fuel Expense**

##### **Findings of Fact:**

##### **Introduction:**

1. AmerenUE's Callaway nuclear plant is refueled every 18 months. During each refueling, about half of the uranium fuel assemblies in the reactor core are removed and replaced with new assemblies.<sup>184</sup> AmerenUE refueled the Callaway plant beginning in April 2010, with fuel assemblies purchased and delivered to the plant before January 31, 2010.<sup>185</sup>

2. AmerenUE would include the increased cost of the fuel assemblies installed during the April 2010 refueling in the average nuclear fuel cost to be recovered in base rates resulting from this case.<sup>186</sup> Staff, supported by MIEC, would base AmerenUE's nuclear fuel cost on its average cost for fuel actually burned during the fifteen-month period beginning October 2008 and continuing through January 31, 2010, the true-up cut off date established for this case.<sup>187</sup> Under Staff and MIEC's proposal, AmerenUE would not be allowed to recover the increased cost of the nuclear fuel loaded into the Callaway plant in April 2010. The difference between the proposals amounts to approximately \$11 million.<sup>188</sup>

##### **Specific Findings of Fact:**

3. The facts surrounding this issue are not in dispute. AmerenUE has bought and paid for nuclear fuel assemblies to refuel the Callaway nuclear power plant beginning in April 2010. Those assemblies are highly engineered and specifically designed for use at Callaway.<sup>189</sup> The Callaway plant must be shut down to be refueled and a shut-down is costly, so AmerenUE must purchase those fuel assemblies and have them available on-site well in advance of the shut-down.<sup>190</sup>

4. The nuclear fuel assemblies are accounted for as construction work in progress until they are fully assembled; once assembled they are accounted as nuclear fuel assembly stock. The fuel

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<sup>184</sup> Irwin Rebuttal, Ex. 127, Page 3, Lines 13-15.

<sup>185</sup> Irwin Rebuttal, Ex. 127, Page 4, Lines 2-5.

<sup>186</sup> Finnell Direct, Ex. 130, Page 9, Lines 5-7.

<sup>187</sup> Grissum Surrebuttal, Ex. 224, Page 2, Lines 9-12. See also, Transcript, Page 2657, Lines 6-14.

<sup>188</sup> Revised True-Up Reconciliation, Ex. 242.

<sup>189</sup> Irwin Rebuttal, Ex. 127, Page 4, Lines 20-22.

<sup>190</sup> Transcript, Pages 2665-2666, Lines 21-25, 1-7.



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

419

assemblies were completed and accounted for as stock in October 2009.<sup>191</sup> When burned in the reactor, the assemblies are expensed as fuel expense.<sup>192</sup> During the time after the fuel assemblies are completed, until the time they are loaded and burned in the reactor, the company receives no carrying costs on those fuel assemblies.<sup>193</sup>

5. The nuclear fuel price is based on the amortization of the initial costs of the fuel assemblies. As such, the nuclear fuel price AmerenUE proposes to include in rates in this case has not and will not occur until the new fuel assemblies have been loaded into the Callaway reactor during refueling and the Callaway unit is placed back in-service sometime in June 2010.<sup>194</sup> This will be approximately four months after the January 31, 2010 true-up date.

6. If AmerenUE's increased nuclear fuel costs are not included in base rates, the company will be able to recover those costs through the operation of its fuel-adjustment clause, subject to the 95/5 sharing mechanism included in that fuel adjustment clause.<sup>195</sup> Because of the way the fuel adjustment clause works, AmerenUE would not be able to fully recover its 95 percent share of those increased costs until September 30, 2011.<sup>196</sup>

7. In AmerenUE's last rate case, ER-2008-0318, AmerenUE was allowed to recover the increased cost of nuclear fuel associated with a refueling that occurred approximately one month after the true-up cut off date for that case. No party in that case objected to AmerenUE's recovery of those costs.<sup>197</sup>

**Conclusions of Law:**

A. The disagreement between the parties concerns the application of the true-up cut-off date. The Commission employs a test-year concept to evaluate a utility's income and expenses for the purpose of setting just and reasonable rates. For this case, the test year was established as the twelve-month period ending March 31, 2009, with an additional true-up period extending through January 31, 2010. That

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<sup>191</sup> Transcript, Page 2665, Lines 12-15.

<sup>192</sup> Transcript, Page 2664, Lines 12-20.

<sup>193</sup> Transcript, Page 2665, Lines 16-20.

<sup>194</sup> Grissum Surrebuttal, Ex. 224, Page 3, Lines 17-22.

<sup>195</sup> Transcript, Page 2660, Lines 4-25.

<sup>196</sup> Transcript, Pages 2661-2662, Lines 1-25, 1-7.

<sup>197</sup> Transcript, Pages 2658-2659, Lines 21-25, 1-6.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

420

19 Mo. P.S.C. 3d

means that for that test-year period, extended through the true-up, the Commission has examined the company's income and expenses to determine the amount of revenue the company should be allowed to generate through the rates to be established as a result of this case. The goal is to match income and expenses over the same period so that a true level of required revenue can be determined.

B. The increased cost of the fuel assemblies loaded into the Callaway reactor during the April shut-down will not begin to be expensed until the reactor is back in operation, and thus will fall outside the test-year and the true-up period. In most situations, the Commission will not allow for out-of-period adjustments because to do so risks upsetting the matching principle. That is, reaching outside the test year to pull in an expense could allow the company to recover excess revenue if that out-of-test-year expense would otherwise have been offset by some unconsidered item of out-of-test-year income.

C. However, the matching principle is not an absolute bar to an appropriate out-of-period adjustment. When faced with this question in the past, the Commission has said "when such known and measurable increases in expenses occur it is more equitable to allow such an expense to be reflected in the revenue requirement than to disallow it for the sole reason that corresponding revenues may be lacking."<sup>198</sup> On that basis, the Commission has, for example, allowed a company to recover for a known postage rate increase that would occur outside the test year,<sup>199</sup> and a known wage increase and FICA withholding tax increase, again outside the test year.<sup>200</sup>

D. In this case, AmerenUE's cost to purchase the fuel assemblies is absolutely known and measurable, and has been known and measurable since October 2009. The fuel assemblies are presumably now in place and will be generating electricity at the time rates resulting from this case go into effect. Ultimately, AmerenUE would recover 95 percent of its increased nuclear fuel costs through operation

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<sup>198</sup> In the Matter of St. Louis County Water Company, St. Louis, Missouri, for Authority to File Tariffs to Increase Water Service Provided to Customers in the Missouri Service Area of the Company, Report and Order, 29 Mo. P.S.C. (N.S.) 425, 435 (1988).

<sup>199</sup> *Id.*

<sup>200</sup> In the Matter of Citizens Electric Corporation of Ste. Genevieve, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company, Report and Order, 24 Mo. P.S.C. (N.S.) 450, 457 (1981).

of its fuel adjustment clause, but it would have to wait many months to fully recover those costs.

E. The matching principle is important, but the ultimate purpose of a test year is to establish rates that will give a utility a reasonable opportunity to recover its prudent costs during the period when the rates are in effect. Allowing AmerenUE to recover its increased fuel costs in its base rates is necessary to allow the company a reasonable opportunity to recover its prudent costs.

**Decision:**

AmerenUE shall recover its increased nuclear fuel costs associated with the April 2010 refueling of the Callaway nuclear plant as part of its base fuel costs. The adjustments proposed by Staff and MIEC that would deny that recovery are rejected.

**5. Vegetation Management and Infrastructure Inspection Expense**

**Findings of Fact:**

**Introduction:**

1. AmerenUE's vegetation management and infrastructure inspection expense is closely associated with two Commission rules. Following extensive storm related service outages in 2006, the Commission promulgated new rules designed to compel Missouri's electric utilities to do a better job of maintaining their electric distribution systems. Those rules, entitled Electrical Corporation Infrastructure Standards<sup>201</sup> and Electrical Corporation Vegetation Management Standards and Reporting Requirements,<sup>202</sup> became effective on June 30, 2008.

2. The rules establish specific standards requiring electric utilities to inspect and replace old and damaged infrastructure, such as poles and transformers. In addition, electric utilities are required to more aggressively trim tree branches and other vegetation that encroaches on transmission lines. In promulgating the stricter standards, the Commission anticipated utilities would have to spend more money to comply. Therefore, both rules include provisions that allow a utility the means to recover the extra costs it incurs to comply with the requirements of the rule.

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<sup>201</sup> Commission Rule 4 CSR 240-23.020.

<sup>202</sup> Commission Rule 4 CSR 240-23.030.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

422

19 Mo. P.S.C. 3d

3. In ER-2008-0318, the Commission allowed AmerenUE to recover \$54.1 million in its base rates for vegetation management costs, and \$10.7 million for infrastructure inspection costs. However, since the rules were new, the Commission found that AmerenUE had too little experience to reasonably know how much it would need to spend to comply with the vegetation management and infrastructure inspection rules. Because of that uncertainty, the Commission established a two-way tracking mechanism to allow AmerenUE to track its vegetation management and infrastructure costs.

4. The base level for that tracker was set at \$64.8 million (\$54.1 million for vegetation management plus \$10.7 million for infrastructure inspection). The order required AmerenUE to track actual expenditures around that base level. In any year in which AmerenUE spent below that base level, a regulatory liability would be created. In any year in which AmerenUE's spending exceeded the base level, a regulatory asset would be created. The regulatory assets and liabilities would then be netted against each other and would be considered in AmerenUE's next rate case. The tracking mechanism contained a 10 percent cap so if AmerenUE's expenditures exceeded the base level by more than 10 percent it could not defer those costs under the tracking mechanism, but would need to apply for an additional accounting authority order. The Commission's order indicated that the tracking mechanism would operate until new rates were established in AmerenUE's next rate case.<sup>203</sup>

5. This is, of course, the next rate case, and AmerenUE asks that the tracker be continued. Staff, MIEC, and Public Counsel contend the Commission should eliminate the tracker and establish an allowance for vegetation management and infrastructure inspection expenses based on the company's expenditures during the test year.

**Specific Findings of Fact:**

6. The Commission must resolve two issues regarding these vegetation management and infrastructure expenses. First, the Commission must decide whether the existing tracker should be continued.

7. The Commission approved a tracker in the last rate case

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<sup>203</sup> In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service, Report and Order, Case No. ER-2008-0318, January 27, 2009, Pages 48-49.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

423

because the vegetation management and infrastructure rules were still very new. As a result, no one knew with any certainty how much AmerenUE would need to spend to comply with the rules' provisions.<sup>204</sup>

AmerenUE has now been operating under those rules for two years. Although the rule went into effect on June 30, 2008, AmerenUE began complying with the requirements of the rules on January 1, 2008.<sup>205</sup>

8. Staff and MIEC contend that experience is sufficient to allow the Commission to confidently set AmerenUE's rates without renewing the tracker. However, the new rules impose substantial new requirements for tree trimming<sup>206</sup> and infrastructure inspections. AmerenUE has not yet completed a full four/six year vegetation management cycle on its entire system. Over half of its circuits have not yet been trimmed to the new standards. That is important because every circuit is unique, with different amounts of vegetation that must be trimmed, and requires a different amount of work to meet the standards imposed by the rules.<sup>207</sup> Therefore, it is still difficult to predict what AmerenUE's normal level of vegetation management expenses will be.<sup>208</sup> The same is true for AmerenUE's efforts to comply with the infrastructure inspection rule.<sup>209</sup>

9. As the Commission said in the last rate case, the tracker serves to protect both the company and its ratepayers during this initial period of uncertainty about the cost to comply with the new rules. If the company spends less than the base level set in the tracker, the excess allowance will be tracked and returned to ratepayers in the next rate case. That is exactly what has happened in this case, and thus, ratepayers have already benefited from the existence of the tracker.

10. AmerenUE's system reliability has improved since the new rules went into effect,<sup>210</sup> and the Commission believes that vegetation management and infrastructure inspection is very important to

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<sup>204</sup> In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service, Report and Order, Case No. ER-2008-0318, January 27, 2009, Page 41.

<sup>205</sup> Meyer Rebuttal, Ex. 402NP, Page 11, Line 13.

<sup>206</sup> Transcript, Page 1759, Lines 8-13.

<sup>207</sup> Wakeman Rebuttal, Ex. 109, Page 8, Lines 7-8.

<sup>208</sup> Wakeman Rebuttal, Ex. 109, Page 7, Lines 1-23.

<sup>209</sup> Wakeman Rebuttal, Ex. 109, Pages 8-9, Lines 16-23, 1-11.

<sup>210</sup> Zdellar Direct, Ex. 157, Pages 3-15.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

424

19 Mo. P.S.C. 3d

that improved reliability. The Commission wants to encourage AmerenUE to continue to spend the money needed to improve reliability. Because there is still a great deal of uncertainty about the amount of spending needed to comply with the rules, the Commission finds that the tracker is still needed. That does not mean the tracker will become permanent. AmerenUE's witness suggests the company will have a level of experience needed to better predict costs in two to four years.<sup>211</sup> It may not take that long, and the Commission will certainly revisit this issue in AmerenUE's next rate case, but for this case, the Commission will renew the existing vegetation management and infrastructure inspection tracker.

11. Having renewed the tracker, the Commission must decide the dollar amount to be included as a base level for that tracker. AmerenUE spent \$50.4 million on vegetation management in the twelve-month period ending at the true-up date, January 31, 2010.<sup>212</sup> For the same period, AmerenUE spent \$7.6 million on infrastructure inspection expenses.<sup>213</sup> That is a total of \$58 million. The non-AmerenUE parties would use those actual expenditures to establish AmerenUE's rates for this case.

12. AmerenUE contends its forecasted expenditures for 2010 and 2011 should be used to set its new rates. The average forecasted expenditures for those two years are \$53.7 million for vegetation management and \$8.9 million for infrastructure inspections, for a total of \$62.6 million.<sup>214</sup> AmerenUE would use that amount as the base level for a renewed two-way tracker.

13. In general, the Commission prefers to use historical information rather than forecasts to establish rates. In the last rate case, the Commission used the company's forecasted budget amounts to set the base level of the tracker. It did so because at that time there was very little historical information upon which to base its decision. More information is available now and while there is still enough uncertainty to justify the continuation of the tracker, the additional historical information is sufficient to set a reasonable base level for that tracker. Therefore, the Commission will set the base level of the tracker at \$58 million,

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<sup>211</sup> Wakeman Rebuttal, Ex. 109, Page 7, Lines 20-21.

<sup>212</sup> Meyer Rebuttal, Ex. 402NP, Page 10, Lines 7-10.

<sup>213</sup> Meyer Rebuttal, Ex. 402NP, Page 14, Lines 1-5.

<sup>214</sup> Wakeman Rebuttal, Ex. 109, Page 10, Lines 14-20.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

425

14. One other matter remains to be resolved. Through February 28, 2010, AmerenUE has collected approximately \$5 million more than it actually incurred to comply with the Commission's vegetation management and infrastructure inspection rules.<sup>215</sup> Staff proposed to reduce that over-collection by \$2 million, which is the amount the company incurred from October 1, 2008 through February 28, 2009, in excess of the amount included in rates.<sup>216</sup> That would indicate a remaining over-collection of \$3 million, but Staff updated that number at the end of the hearing to \$3.4 million.<sup>217</sup>

15. Staff recommends that the \$3.4 million remain in the tracker as an addition or offset to any future amounts deferred. The Commission would then address ultimate disposition of any amounts deferred in the next rate case.<sup>218</sup> AmerenUE did not offer a proposal on how the \$3.4 million over-collection should be returned to its customers until its initial brief. At that time, the company recommended that the over-collection be returned to customers, amortized over three years.<sup>219</sup>

16. Staff's proposal would potentially offset an increase in AmerenUE's expenses for the next rate case and thereby decrease any rate increase that would result from that future case. AmerenUE's proposal has the advantage of decreasing the rate increase that will result from this decision. The Commission will accept AmerenUE's proposal and directs that the \$3.4 million over collection be returned to customers, amortized over three years.

**Conclusions of Law:**

A. Commission Rule 4 CSR 240-23.020 establishes standards requiring electrical corporations, including AmerenUE, to inspect its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.020(3)(A) establishes a four-year cycle for inspection of urban infrastructure and a six-year cycle for inspection of rural infrastructure.

B. Commission Rule 4 CSR 240-23.020(4) establishes a

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<sup>215</sup> Rackers Surrebuttal, Ex. 203, Page 4, Lines 11-12.

<sup>216</sup> Rackers Surrebuttal, Ex. 203, Page 4, Lines 19-21. In ER-2008-0318, the Commission allowed AmerenUE to accumulate and defer those expenses in an Accounting Authority Order for consideration in this rate case.

<sup>217</sup> Exhibit 240.

<sup>218</sup> Rackers Surrebuttal, Ex 203, Page 5, Lines 4-9.

<sup>219</sup> Post-Hearing Brief of AmerenUE, Pages 119-120.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

426

19 Mo. P.S.C. 3d

procedure by which an electric utility may recover expenses it incurs because of the rule. Specifically, that section states as follows:

In the event an electrical corporation incurs expenses as a result of this rule in excess of the costs included in current rates, the corporation may submit a request to the commission for accounting authorization to defer recognition and possible recovery of these excess expenses until the effective date of rates resulting from its next general rate case, filed after the effective date of this rule, using a tracking mechanism to record the difference between the actually incurred expenses as a result of this rule and the amount included in the corporation's rates ...

. C. Commission Rule 4 CSR 240-23.030 establishes standards requiring electrical corporations, including AmerenUE, to trim trees and otherwise manage the growth of vegetation around its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.030(9) establishes a four-year cycle for vegetation management of urban infrastructure and a six-year cycle for vegetation management of rural infrastructure. The vegetation management rule also includes a provision that would allow AmerenUE to ask the Commission for authority to accumulate and recover its cost of compliance in its next rate case.<sup>220</sup>

**Decision:**

AmerenUE shall establish a tracking mechanism to track future vegetation management and infrastructure costs. That tracking mechanism shall include a base level of \$58 million (\$50.4 million + \$7.6 million = \$58 million). Actual expenditures shall be tracked around that base level with the creation of a regulatory liability in any year where AmerenUE spends less than the base amount and a regulatory asset in any year where AmerenUE spends more than the base amount. The assets and liabilities shall be netted against each other and shall be considered in AmerenUE's next rate case. The tracking mechanism shall contain a ten percent cap so expenditures exceeding the base level by more than ten percent shall not be deferred under the tracking mechanism. If AmerenUE's vegetation management and infrastructure

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<sup>220</sup> Commission Rule 4 CSR 240-23.030(10).



inspection costs exceed the ten percent cap, it may request additional accounting authority from the Commission in a separate proceeding. The tracking mechanism shall operate until new rates are established in AmerenUE's next rate case.

The \$3.4 million AmerenUE over-collected from its ratepayers under its previous tracking mechanism shall be returned to its ratepayers, amortized over three years.

#### **6. Storm Restoration**

##### **Findings of Fact:**

##### **Introduction:**

1. AmerenUE must spend money each year to restore electric service after its electric system suffers damage as the result of storms. Each year some of that damage results from normal, routine storms. But occasionally, the electric system is struck by a truly extraordinary storm that can greatly increase restoration costs.

2. The Commission has generally allowed an electric utility to recover the Operations and Maintenance (O&M), excluding internal labor, costs to restore service after normal storms by including an amount in the cost of service based on some multiyear average level.<sup>221</sup> For the costs to restore service after an extraordinary storm, the Commission has usually allowed the utility to accumulate and defer those costs through an accounting authority order, an AAO.<sup>222</sup> The accumulated and deferred costs are then considered in the utility's next rate case. Generally, the Commission allows the utility to recover those costs amortized over a five-year period.<sup>223</sup>

3. Staff would use that same procedure in this case. Staff proposes to use a four-year average of AmerenUE's normal O&M, non-labor related, storm restoration costs to allow \$6.4 million in AmerenUE's cost of service for normal storm restoration costs. AmerenUE's actual storm restoration cost during the test year totaled \$10.4 million. Staff would remove \$4 million from that amount as related to extraordinary storms, and allow AmerenUE to recover that \$4 million amortized over

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<sup>221</sup> A utility may also incur substantial capital investment costs to replace things like power poles after a storm. Those investment costs are added to the company's rate base and recovered in that manner. This issue does not concern those capital costs.

<sup>222</sup> Rackers Rebuttal, Ex. 202, Page 2, Lines 21-24.

<sup>223</sup> Rackers Rebuttal, Ex. 202, Page 2, Lines 5-11.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

428

19 Mo. P.S.C. 3d

five years.<sup>224</sup> MIEC's witness, Greg Meyer advocates the same approach, although he would allow only \$5.2 million in AmerenUE's cost of service, as that was the amount allowed in the company's previous rate case, ER-2008-0318.<sup>225</sup>

4. AmerenUE proposes to use a new approach to the recovery of storm restoration expenses. It would have the Commission set the base level of storm restoration O&M costs at the actual amount incurred during the test year, which is \$10.4 million. AmerenUE then proposes that the Commission establish a tracking mechanism to track actual expenses against that base level. If AmerenUE spent less than the base level, the difference could be returned to rate payers in the next rate case. If expenses exceeded the base level, AmerenUE could seek to recover the difference in its next rate case.<sup>226</sup>

**Specific Findings of Fact:**

5. The O&M non-labor cost AmerenUE incurs can vary greatly from year to year depending upon whether the electric system is struck by a major storm. For 2004 and 2005, those costs were only \$1 million and \$2 million respectively. For 2006 and 2007, the costs jumped to \$26 million and \$33 million. For 2008 and 2009, they fell again to \$4 million and \$9 million.<sup>227</sup> Under the approach the Commission has used in past cases, the company may under recover in years when costs are high, but may over recover in years when costs are low. If the company incurs truly extraordinary storm restoration costs in a particular year, it is able to recover those costs through the accounting authority mechanism. In this case, AmerenUE is recovering amortized storm restoration costs from five different storm events.<sup>228</sup>

6. No party disputes that AmerenUE has provided good storm restoration service in recent years, and no one has alleged that any of its storm restoration expenses have been imprudent.

7. The Commission is unwilling to implement another tracker. As the Commission has previously indicated, trackers should be used sparingly because they tend to limit a utility's incentive to prudently

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<sup>224</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Pages 89-90, Lines 25-29, 1-16.

<sup>225</sup> Meyer Direct, Ex. 400, Pages 27-28, Lines 17-23, 1-2.

<sup>226</sup> Zdellar Direct, Ex. 157, Page 21, Lines 1-12.

<sup>227</sup> Rackers Surrebuttal, Ex. 203, Page 6, Chart at Line 6.

<sup>228</sup> Staff Report – Revenue Requirement/Cost of Service, Ex 200, Pages 90-91.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

429

manage its costs. If all such costs can simply be passed on to ratepayers, there is a natural incentive for the company to simply incur the cost. If the company must consider whether it will be able to recover a cost, it is more likely to think before it spends and maximize any possible cost savings.

8. The storm cost recovery method the Commission has used in the past has worked reasonably well. The company will ultimately recover its extraordinary costs resulting from unpredictable extraordinary storms through the accounting authority order mechanism, but the company still has a strong incentive to minimize its costs. Staff's proposal to include the four-year average of \$6.4 million for storm restoration costs, while amortizing the extra \$4 million in test year expense over five years is reasonable. MIEC's alternative proposal to include only \$5.2 million in the company's cost of service is based only on the amount allowed in the last rate case. As such it is arbitrary and unsupported by any evidence offered in this case.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

AmerenUE's request to establish a tracking mechanism is denied. AmerenUE shall include \$6.4 million in its cost of service for storm restoration costs. The remaining \$4 million in test year storm restoration expense shall be amortized and recovered over five years.

**7. Union Issues**

**Findings of Fact:**

**Introduction:**

1. The various unions that represent AmerenUE's employees appeared at the hearing to support the company's request for a rate increase. However, they asked the Commission to order AmerenUE to spend more money on employee training and to take specific steps to increase its internal workforce so that it will use fewer outside contractors. AmerenUE contends it is currently providing safe and adequate service and argues the Commission has no authority to manage the day-to-day affairs of the company.

**Findings of Fact:**

2. Michael Walter is the Business Manager of

UNION ELECTRIC COMPANY, D/B/A AMERENUE

430

19 Mo. P.S.C. 3d

International Brotherhood of Electrical Workers Local 1439, AFL-CIO.<sup>229</sup> He testified that AmerenUE has not spent enough on training new workers and as a result has over-relied on outside contractors to perform normal and sustained work.<sup>230</sup> In particular, Walter is concerned that AmerenUE's trained work force is aging and he sees a need for increased training of new workers capable of stepping in when the current workforce retires.<sup>231</sup> He asks the Commission to require AmerenUE to spend a portion of its rate increase to improve training and increase the portion of the workload performed by its internal workforce.<sup>232</sup> AmerenUE's witness replied that the company must rely on outside contractors to meet some of its normal workforce needs because of a shortage of qualified personnel.<sup>233</sup>

3. In response to those concerns, Commissioners Davis and Jarrett asked the AmerenUE witnesses how the company would spend extra money to training power plant operators if provided additional training funds as a result of this case.<sup>234</sup> In response to Commissioners Davis' and Jarrett's questions, AmerenUE filed an exhibit detailing how it would spend extra money on training. AmerenUE also agreed to assess the incremental value to customers of its additional training investments and to present those findings to Staff and Public Counsel by December 31, 2011.<sup>235</sup> AmerenUE's witness explained that these additional funds would be used to train AmerenUE's distribution employees.<sup>236</sup>

4. The Commission finds that the evidence presented by the union witnesses does not demonstrate that AmerenUE has failed to supply safe and adequate service to the public. Furthermore, for reasons fully explained in its Conclusions of Law, the Commission does not have the authority to dictate the manner in which AmerenUE

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<sup>229</sup> Walter Rebuttal, Ex. 650, Page 1, Lines 2-3.

<sup>230</sup> Walter Rebuttal, Ex. 650, Pages 2-7.

<sup>231</sup> Transcript, Page 2575, Lines 18-24.

<sup>232</sup> Walter Rebuttal, Ex.650, Pages 7-9.

<sup>233</sup> Wakeman Surrebuttal, Ex. 110, Page 10, Lines 5-15.

<sup>234</sup> Transcript, Page 2619, Lines 3-20, and Page 2621, Lines 5-9. The Commission allocated extra money for additional training in AmerenUE's last rate case, ER-2008-0318. AmerenUE explained how that money was spent in the direct testimony of Mark Birk, Ex. 102, Pages 15-16.

<sup>235</sup> Ex. 179.

<sup>236</sup> Transcript, Page 2783, Lines 21-24.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

431

conducts its business. Therefore, the Commission will not attempt to dictate to the company regarding its use of outside contractors.

5. However, the union witnesses and AmerenUE agree that there is a need for improved training to replace skilled workers nearing retirement age. It takes five to seven years of training to replace a skilled electrical worker.<sup>237</sup> For several job classifications, many workers are nearing retirement age and will soon be leaving the company.<sup>238</sup> Thus, the Commission finds that there is a need for additional training to attempt to meet that need.

6. Therefore, the Commission will add \$1.29 million to AmerenUE's cost of service to fund increased training staff. The Commission will also allow AmerenUE \$2.1 million for additional training equipment and materials, to be amortized over five years and recovered in rates. That would increase AmerenUE's cost of service by an additional \$420,000 per year, for a total annual increase of \$1,710,000.

**Conclusions of Law:**

A. The Commission has the authority to regulate AmerenUE, including the authority to ensure that the utility provides safe and adequate service. However, the Commission does not have authority to manage the company. In the words of the Missouri Court of Appeals,

The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare.<sup>239</sup>

Therefore, the Commission does not have the authority to dictate to the company whether it must use internal workforce rather than outside contractors to perform the work of the company.

**Decision:**

The evidence presented by the union witnesses does not demonstrate that AmerenUE has failed to provide safe and adequate

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<sup>237</sup> Transcript, Page 2576, Lines 21-25.

<sup>238</sup> Transcript, Page 2593, Lines 4-9.

<sup>239</sup> State ex rel. Harline v. Public Serv. Com'n, 343 S.W.2d 177, 182 (Mo. App. 1960)

service and the Commission will not dictate to the company whether it must use its internal workforce or outside contractors to perform the company's work. However, the Commission will add \$1,290,000 to AmerenUE's cost of service to fund increased training staff. The Commission will also allow AmerenUE \$2,100,000 for additional training equipment and materials, to be amortized over five years and recovered in rates. That increases AmerenUE's cost of service by \$1,710,000 per year. AmerenUE shall assess the incremental value to customers of these additional investments and provide that assessment to Staff and Public Counsel by December 31, 2011.

#### **8. Fuel Adjustment Clause**

##### **Findings of Fact:**

##### **Introduction:**

1. In AmerenUE's last rate case, ER-2008-0318, the Commission allowed AmerenUE to implement a fuel adjustment clause.<sup>240</sup> The approved fuel adjustment clause includes an incentive mechanism that requires AmerenUE to pass through to its customers 95 percent of any deviation in fuel and purchased power costs from the base level. The other 5 percent of any deviation is retained or absorbed by AmerenUE.<sup>241</sup>

2. In the direct testimony of its witness, Lynn Barnes, AmerenUE proposed that its existing fuel adjustment clause be continued, with a few minor refinements.<sup>242</sup> When it filed its direct testimony, Staff agreed that AmerenUE's existing fuel adjustment clause should be continued with the refinements proposed by AmerenUE and some additional modifications proposed by Staff.<sup>243</sup> The minor modifications to the fuel adjustment clause were resolved in the First Stipulation and Agreement that the Commission approved on March 24, 2010. Therefore, the Commission will not further address those modifications.

3. In an order issued on February 17, 2010, after the parties had filed rebuttal testimony, the Commission indicated it wanted

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<sup>240</sup> In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service, Report and Order, Case No. ER-2008-0318, January 27, 2009, Pages 69-70.

<sup>241</sup> *Id.* at Page 76.

<sup>242</sup> Barnes Direct, Ex. 121, Page 3, Lines 2-10.

<sup>243</sup> Staff Report – Revenue Requirement/Cost of Service, Ex. 200, Pages 105-111.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

433

to hear more evidence from the parties about the continued appropriateness of the 95 percent pass-through mechanism in AmerenUE's current fuel adjustment clause. To that end, the Commission offered the parties an opportunity to file additional direct, rebuttal, and surrebuttal testimony on an expedited schedule before the start of the hearing.<sup>244</sup>

4. AmerenUE responded by filing extensive additional testimony explaining why the company still needs a fuel adjustment clause that incorporates the current sharing mechanism. MIEC, Public Counsel, and Staff also filed additional testimony regarding the fuel adjustment clause.

5. MIEC refiled the testimony that its witness, Maurice Brubaker, offered regarding the fuel adjustment clause in AmerenUE's last rate case.<sup>245</sup> In that testimony, Brubaker advised the Commission to implement an 80/20 sharing mechanism that would allow the company to pass-through to customers only 80 percent of the changes in fuel cost and off-system sales.<sup>246</sup> Brubaker would, however, cap the impact of the sharing mechanism so that the sharing would have no more than a 50 basis point impact on AmerenUE's return on equity.<sup>247</sup>

6. Public Counsel also offered testimony supporting an 80/20 sharing mechanism. Ryan Kind offered his opinion that such a sharing percentage is necessary to ensure that AmerenUE continues to make its best efforts to minimize fuel costs and maximize its off-system sales margins.<sup>248</sup>

7. Staff filed supplemental testimony explaining that since little time has passed since AmerenUE's fuel adjustment clause went into effect, it has not compiled enough data to meaningfully analyze that fuel adjustment clause. As a result, Staff suggests the Commission leave the current fuel adjustment clause in place without changing the sharing mechanism.<sup>249</sup>

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<sup>244</sup> *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service*, Order Directing the Parties to Submit Testimony Concerning the Appropriateness of AmerenUE's Current Fuel Adjustment Clause, File No. ER-2010-0036, February 17, 2010.

<sup>245</sup> ER-2008-0318.

<sup>246</sup> Brubaker Additional Direct – FAC, Ex. 413, Attachment 2, Page 11 of 19.

<sup>247</sup> Brubaker Additional Direct – FAC, Ex. 413, Attachment 2, Page 11 of 19.

<sup>248</sup> Kind Additional Direct – FAC, Ex. 301, Page 2, Lines 3-18.

<sup>249</sup> Mantle Supp. Direct – FAC, Ex. 221, Pages 5-6, Lines 15-23, 1-7.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

434

19 Mo. P.S.C. 3d

**Specific Findings of Fact:**

8. In AmerenUE's last rate case, the Commission found that AmerenUE should be allowed to establish a fuel adjustment clause because its fuels costs were substantial, beyond the control of the company's management, and volatile in amount. The Commission also found that AmerenUE needed a fuel adjustment clause to have a sufficient opportunity to earn a fair return on equity and to be able to compete for capital with other utilities that have a fuel adjustment clause.<sup>250</sup> In the same rate case, the Commission found that a 95/5 sharing mechanism would give AmerenUE a sufficient opportunity to earn a fair return on equity, while protecting customers by preserving the company's incentive to be prudent.<sup>251</sup>

9. Nothing has changed in the months since the Commission established AmerenUE's fuel adjustment clause to cause the Commission to change that decision. The Commission finds that AmerenUE's fuel and purchased power costs are clearly substantial, comprising 47 percent of the company's total operations and maintenance expense. Furthermore, the revenue the company receives from off-system sales, which is also tracked through the fuel adjustment clause, is also substantial.<sup>252</sup> These fuel and purchased power costs continue to be dictated by national and international markets, and thus are outside the control of AmerenUE's management.<sup>253</sup> Finally, these costs and revenues continue to be volatile. For example, the price AmerenUE was able to obtain in the market for off-system electricity sales declined by nearly half from 2008 to 2009.<sup>254</sup>

10. Furthermore, the Commission finds that AmerenUE still needs a fuel adjustment clause to help alleviate the effects of regulatory lag as net fuel costs continue to rise. AmerenUE's regulatory lag problems have not improved since its last rate case. In recent years, the company has been unable to earn its allowed rate of return, and in large part, that problem is due to fuel-related issues.<sup>255</sup> Even with the fuel

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<sup>250</sup> In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service, Report and Order, Case No. ER-2008-0318, January 27, 2009, Pages 69-70.

<sup>251</sup> *Id.*, at Page 76.

<sup>252</sup> Barnes Direct, Ex. 121, Page 7, Lines 17-23.

<sup>253</sup> Barnes Direct, Ex. 121, Page 7, Lines 23-26.

<sup>254</sup> Haro Additional Rebuttal – FAC, Ex. 126, Page 13, Lines 13-19.

<sup>255</sup> Transcript, Page 2409, Lines 5-11.



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

435

adjustment clause in place, AmerenUE's return on equity for the year ending December 2009, was only 7.27 percent. Without a fuel adjustment clause, that return would have dropped to 6.69 percent, over 400 basis points below the company's authorized return on equity of 10.76 percent.<sup>256</sup> In addition, AmerenUE still must compete in the capital markets with other utilities and the vast majority of those utilities have fuel adjustment clauses.<sup>257</sup>

11. For the forgoing reasons, the Commission finds that AmerenUE should be allowed to continue to operate under a fuel adjustment clause. However, the Commission's chief concern about the existing fuel adjustment clause, and the reason it asked the parties to present additional testimony about this matter, is an uncertainty about the appropriate amount of sharing required to assure that AmerenUE continues to make its best efforts to control its fuel-related costs and to maximize its off-system sales.

12. The majority of electric utilities operate with a fuel adjustment clause that does not have any sort of sharing mechanism.<sup>258</sup> Yet, the Commission is concerned that allowing an uncontrolled pass-through of costs will reduce a utility's incentive to carefully examine and perhaps reduce those costs. In the last rate case, the Commission decided that a 95/5 sharing mechanism was appropriate to allow the company to recover its prudently incurred costs while still protecting ratepayers. But the Commission wanted to know how well that sharing mechanism was working in practice.

13. MIEC and Public Counsel advocated for a revised sharing mechanism that would require AmerenUE to absorb a larger percentage of increasing fuel costs to increase its incentive to properly manage those costs. However, the testimony those parties presented was based on little more than the opinions of their witnesses about an appropriate sharing percentage. No party presented any evidence that would indicate how the 95/5 sharing mechanism is working in practice for this company. Certainly, no evidence was produced to show that AmerenUE had acted imprudently with regard to its procurement of fuel and off system sales since the fuel adjustment clause went into effect in March 2009. On the contrary, the efficiency of AmerenUE's power plant

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<sup>256</sup> Barnes Additional Direct – FAC, Ex. 122, Page 5, Lines 16-19.

<sup>257</sup> Transcript, Page 2421, Lines 1-6.

<sup>258</sup> Transcript, Page 2421, Lines 7-14.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

436

19 Mo. P.S.C. 3d

performance as measured by equivalent availability improved in 2009, after the fuel adjustment clause was put into effect.<sup>259</sup>

14. As Staff explained in its testimony, the implementation of AmerenUE's fuel adjustment clause has only just begun. Staff will not complete its first prudence review of AmerenUE's operations under the existing fuel adjustment clause until August 2010.<sup>260</sup> The prudence review is very important to Staff in determining whether the fuel adjustment clause was working in the manner intended, as is seeing whether AmerenUE has changed its practices regarding their purchase and hedging of fuel and regarding off-system sales.<sup>261</sup> Until that review process is complete, Staff concluded it would not have sufficient data to meaningfully analyze the effectiveness of AmerenUE's fuel adjustment clause.<sup>262</sup>

15. Substantially changing the existing fuel adjustment clause without a meaningful analysis could have severe adverse consequences for AmerenUE and ultimately for ratepayers. Gary Rygh, a witness for AmerenUE explained that a significant modification to AmerenUE's fuel adjustment clause outside the context of a prudence review process could lead investors to conclude either that AmerenUE was improperly managing its net fuel costs, or that the Commission was acting rashly in overturning regulatory stability in Missouri.<sup>263</sup> Julie Cannell, another witness for AmerenUE, explained that investors value certainty, fairness, stability, and predictability. She indicated "a lack of consistency in a commission's actions or decisions serves to increase the investment risk associated with a utility."<sup>264</sup> Increased financial risk results in an increase in a company's cost of borrowing, ultimately increasing costs that will be passed on to ratepayers.<sup>265</sup>

**Conclusions of Law:**

A. Section 386.266.1, RSMo (Supp. 2009), the statute that allows the Commission to establish a fuel adjustment clause provides as

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<sup>259</sup> Barnes Additional Direct – FAC, Ex. 122, Page 8, Lines 10-11.

<sup>260</sup> Mantle Supplemental Direct – FAC, Ex. 221, Page 12, Lines 15-16.

<sup>261</sup> Transcript, Page 2517, Lines 17-23.

<sup>262</sup> Mantle Supplemental Direct – FAC, Ex. 221, Page 6, Lines 3-7.

<sup>263</sup> Rygh Rebuttal – FAC, Ex. 120, Pages 5-6, Lines 20-23, 1-5. Rygh is a Managing Director at Barclays Capital, Inc., an investment bank in New York.

<sup>264</sup> Cannell Rebuttal, Ex. 117, Pages 25-26, Lines 21, 1-2. Cannell is a securities analyst in New York.

<sup>265</sup> Cannell Rebuttal – FAC, Ex. 118, Page 5, Lines 2-3.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

437

follows:

Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim energy charge or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation. The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.

Subsection 4 of that statute sets out some of the provisions that must be included in a fuel adjustment clause as follows:

The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint. The commission may approve such rate schedule after considering all relevant factors which may affect the cost or overall rates and charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules:

(1) *Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity;*

(2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under-collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds;

(3) In the case of an adjustment mechanism submitted under subsections 1 and 2 of this section, includes provisions requiring that the utility file a general rate case with the effective date of new rates to be no later than four years after the effective date of the commission order implementing the adjustment mechanism. ...

(4) In the case of an adjustment mechanism submitted under subsections 1 or 2 of this section, includes provisions for prudence reviews of the costs subject to the

UNION ELECTRIC COMPANY, D/B/A AMERENUE

438

19 Mo. P.S.C. 3d

adjustment mechanism no less frequently than at eighteen-month intervals, and shall require refund of any imprudently incurred costs plus interest at the utility's short-term borrowing rate. (emphasis added)

Subsection 4(1) is emphasized because that is the key requirement of the statute. Any fuel adjustment clause the Commission allows AmerenUE to implement must be reasonably designed to allow the company a sufficient opportunity to earn a fair return on equity.

B. Subsection 7 of the fuel adjustment clause statute provides the Commission with further guidance, stating the Commission may:

take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

Finally, subsection 9 of that statute requires the Commission to promulgate rules to "govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments." In compliance with the requirements of the statute, the Commission promulgated Commission Rule 4 CSR 240-3.161, which establishes in detail the procedures for submission, approval, and implementation of a fuel adjustment clause.

C. Specifically, Commission Rule 4 CSR 240-3.161(3) establishes minimum filing requirements for an electric utility that wishes to continue its fuel adjustment clause in a rate case subsequent to the rate case in which the fuel adjustment clause was established. AmerenUE has met those filing requirements.

**Decision:**

The Commission concludes AmerenUE should be allowed to continue to implement the fuel adjustment clause the Commission approved in the company's last rate case. Given the short amount of time AmerenUE's fuel adjustment clause has operated and the resulting lack of information about how effective the current sharing mechanism has been, the Commission will not modify that clause, except as provided in the previously approved stipulation and agreement. The Commission expects to further review AmerenUE's fuel adjustment

clause and the appropriate sharing mechanism to be included in that clause as part of AmerenUE's next rate case.

**9. Rate Design and Class Cost of Service Issues**

**a. Rate Design**

**Findings of Fact:**

**Introduction:**

1. After the Commission determines the amount of rate increase that is necessary, it must decide how that rate increase will be spread among AmerenUE's customer classes. The basis principle guiding that decision is that the customer class that causes a cost should pay that cost.

2. During the course of the hearing, Public Counsel, MIEC, AARP and the Consumers Council of Missouri, and the Missouri Retailers Association filed a nonunanimous stipulation and agreement that reached an agreement on how the rate increase should be allocated to the customer classes. AmerenUE and Staff did not sign the stipulation and agreement but do not oppose the compromise agreement. MEUA, however, does oppose that agreement. Subsequently, the parties that signed the original stipulation and agreement submitted an addendum to that stipulation and agreement. MEUA also opposed the addendum.

3. Because the stipulation and agreement and the addendum to that stipulation and agreement are opposed, the Commission cannot approve the stipulation and agreement or the addendum. Nevertheless, the compromise described in the stipulation and agreement and addendum remains the position of the signatory parties and the Commission can consider that position as it decides this issue.

4. AmerenUE has seven customer classes.<sup>266</sup> The Residential class is comprised of residential households. The Small General Service and Large General Service classes are comprised of commercial operations of various sizes. The first three classes receive electric service at a low secondary voltage level. The Small Primary Service and the Large Primary Service are larger industrial operations that receive their electric service at a high voltage level. The Large Transmission Service class takes service at a transmission voltage level.

5. There is only one member of the Large Transmission

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<sup>266</sup> Cooper Direct, Ex. 134, Page 4, Lines 8-22.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

440

19 Mo. P.S.C. 3d

class, Noranda Aluminum, Inc.<sup>267</sup> Noranda operates an aluminum smelter in Southeast Missouri and purchases massive amounts of electricity from AmerenUE. When the smelter is at full production, Noranda pays AmerenUE approximately \$140 million per year for electricity.<sup>268</sup>

6. AmerenUE's last customer class is the Lighting class, which consists of both area and street lighting.<sup>269</sup> The Lighting class has a unique load pattern in that it is on at night and, for the most part, off during the day. For that reason, its class load is typically very low during periods of peak demand.<sup>270</sup>

**Specific Findings of Fact:**

7. To evaluate how best to allocate costs among these customer classes, four parties prepared and presented class cost of service studies. The studies presented by AmerenUE and MIEC used versions of the Average and Excess Demand Allocation method (A&E). An A&E allocation method considers both the maximum rate of use (demand) and the duration of use (energy). The A&E method conceptually splits the system into an average component and an excess component. The average demand is the total kWh usage divided by the total number of hours in the year. This is the amount of capacity that would be required to produce the energy if it were taken at the same demand rate each hour. The system excess demand is the difference between the system peak demand and the system average demand. The average demand is allocated to the various classes in proportion to their average demand (energy usage). The difference between the system average demand and the system peak or peaks is then allocated to customer classes on the basis of a measure that represents their peaking or variability in usage.<sup>271</sup>

8. Staff and Public Counsel also presented class cost of service studies, but they used a different allocation method known as a Peak and Average Demand Allocation method. Staff's allocation method is based on the assumption that an electric utility adds capacity to meet

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<sup>267</sup> Staff's Class Cost-Of-Service and Rate Design Report, Ex. 205, Page 27, Lines 17-18.

<sup>268</sup> Gregston Direct, Ex. 422, Page 3, Lines 5-14.

<sup>269</sup> Cooper Direct, Ex. 134, Page 4, Lines 15-16.

<sup>270</sup> Staff's Class Cost-Of-Service and Rate Design Report, Ex. 205, Page 12, Lines 15-16.

<sup>271</sup> Brubaker Direct, Ex. 429, Pages 23-24, Lines 15-22, 1-5.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

441

its entire load rather than to just meet its peak load demand.<sup>272</sup> Public Counsel also presented a second study using a time of use method.

9. The following chart compares the results of each of the class cost of service studies, indicating the percent change in class revenues required to equalize class rates of return, as well as the dollar amounts needed to bring a class to its indicated cost of service. A negative number means the class is paying more than its indicated share of costs. A positive number means the class is paying less than its indicated share. All dollar figures are in millions.

Study	Residential	Small General Service	Large General Service	Large Primary Service	Large Transmission Service
Staff - 4 CP A&P <sup>273</sup>	8.67% \$83.5	-4.24% \$(10.5)	-11.40% (\$73.7)	-0.55% (\$0.9)	3.57% \$5.0
AmerenUE <sup>274</sup>	7.99% \$78.0	-7.01% (\$17.6)	-9.74% (\$64.8)	1.21% \$2.1	1.63% \$2.3
OPC (TOU)	1.23% \$11.8	-9.40% (\$23.3)	-3.77% (\$24.4)	8.80% \$14.7	15.27% \$21.2
OPC (A&P) <sup>275</sup>	3.35% \$32.2	-7.60% (\$18.9)	-4.69% (\$30.3)	7.17% \$12.0	3.56% \$5.0
MEIC <sup>276</sup>	13.30% \$129.6	-4.30% (\$10.7)	-12.70% (\$84.6)	-7.40% (\$12.7)	-15.50% (\$21.6)

For example, Staff's study indicated the Residential class is currently paying \$83.5 million less than AmerenUE's cost to serve that class. In contrast, according to Staff's study, the Large General Service class is currently paying \$73.7 million more than AmerenUE's cost to serve that class. Although the exact numbers vary among the various studies, all the studies agree that the Residential class is currently paying substantially less than its cost of service and that the Large General Service class is currently paying substantially more than its cost of service.

10. In starting the process to develop just and reasonable rates, the first question the Commission must resolve is which of the submitted class cost of service studies best describes AmerenUE's cost

<sup>272</sup> Scheperle Rebuttal, Ex. 207, Page 2, Lines 13-19.

<sup>273</sup> Ex. 553.

<sup>274</sup> Ex. 551.

<sup>275</sup> Ex. 552.

<sup>276</sup> Brubaker Revised Direct, Ex. 429, Schedule MEB-COS-5.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

442

19 Mo. P.S.C. 3d

to serve its various customer classes. As a first step, the Commission will discard the Staff and Public Counsel studies that utilize a Peak and Average Demand production demand allocation method.

11. Staff asserts that its Peak and Average Demand allocation method is superior to the Average and Excess method because it considers each class' contribution to the system's total peak rather than each class' excess demand at peak.<sup>277</sup> However, what Staff describes as its method's strength is actually its downfall because the Peak and Average demand method double counts the average demand of the customer classes.

12. Some customer classes, such as large industrials, may run factories at a constant rate, 24 hours a day, 7 days a week. Therefore, their usage of electricity does not vary significantly by hour or by season. Thus, while they use a lot of electricity, that usage does not cause demand on the system to hit peaks for which the utility must build or acquire additional capacity. Another customer class, for example, the residential class, will contribute to the average amount of electricity used on the system, but it will also contribute a great deal to the peaks on system usage, as residential usage will tend to vary a great deal from season to season, day to day, and hour to hour.

13. To recognize that pattern of usage, the Average and Excess method separately allocates energy cost based on the average usage of the system by the various customer classes. It then allocates the excess of the system peaks to the various customer classes by a measure of that class' contribution to the peak. In other words, the average and excess costs are each allocated to the customer classes once.

14. The Peak and Average method, in contrast, initially allocates average costs to each class, but then, instead of allocating just the excess of the peak usage period to the various classes to the cost causing classes, the method reallocates the entire peak usage to the classes that contribute to the peak. Thus, the classes that contribute a large amount to the average usage of the system but add little to the peak, have their average usage allocated to them a second time. Thus, the Peak and Average method double counts the average system usage,

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<sup>277</sup> Schepeler Rebuttal, Ex. 207, Page 5, Lines 11-14.



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

443

and for that reason is unreliable.<sup>278</sup>

15. Public Counsel also offered a time of use study that assigns production costs to each hour of the year that the specific production occurs. The method then sums each class' share of hourly investments based on only those hours when the class actually uses the system.<sup>279</sup> Public Counsel's time of use method is also unreliable because it considers every hour in the year to be a demand peak. As a result, the actual peaks in usage are given no additional weight. This, of course, benefits the residential class, which tends to drive peaks, at the expense of industrial users of electricity that have high load factors and contribute little to the peaks in usage.<sup>280</sup>

16. Since the class cost of service studies offered by Staff and Public Counsel are unreliable, the Commission must choose between the Average and Excess method studies submitted by AmerenUE and MIEC. That task is difficult in this case because most of the testimony offered by AmerenUE and MIEC's witnesses criticize the methods used by Staff and Public Counsel and offer little criticism of each others studies. Yet, the studies do reach different results.

17. Significantly, MIEC's study tends to shift more cost causation from the Large General Service, Large Primary Service and especially the Large Transmission Service classes to the Residential class than does the AmerenUE study. AmerenUE's witness, William Warwick, explained those cost shifts in his rebuttal testimony.<sup>281</sup> In the allocation of transmission costs, non-fuel generation expenses, off-system sales revenue, and general plant, MIEC advocated modifications to AmerenUE's study that would tend to decrease the allocation of those costs to the large industrial customers who are the members of MIEC.<sup>282</sup> AmerenUE contends most of these adjustments are inappropriate.

18. However, AmerenUE's witness agrees that one of the adjustments proposed by MIEC's witness is credible. In his class cost of service study, MIEC's witness, Maurice Brubaker allocated revenues from off-system sales to customer classes on the basis of class energy

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<sup>278</sup> Brubaker Rebuttal, Ex. 430, Pages 12-14. See also, Transcript, Pages 3095-3096, Lines 24-25, 1-22.

<sup>279</sup> Meisenheimer Direct, Ex. 307, Page 7, Lines 5-7.

<sup>280</sup> Brubaker Rebuttal, Ex. 430, Page 18, Lines 12-19.

<sup>281</sup> Warwick Rebuttal, Ex. 147.

<sup>282</sup> Warwick Rebuttal, Ex. 147, Pages 2-8.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

444

19 Mo. P.S.C. 3d

(kWh) requirements.<sup>283</sup> Staff made a similar allocation of revenues in its class cost of service study, and AmerenUE's witness concedes that such an allocation could be appropriate.<sup>284</sup> In addition, Brubaker's allocation is consistent with the methodology the Commission approved in a slightly different context in a recent Kansas City Power & Light rate case, ER-2006-0314.<sup>285</sup>

19. If AmerenUE's class cost of service study is modified to allocate revenues from off-system sales on the basis of class energy requirements, then that study would show that the large transmission service class is currently paying approximately 8 percent more than its indicated revenue share. The revised study would also show that the large general service class is overpaying by 11 percent and the residential class is underpaying by 11 percent.

20. After carefully considering all the studies, the Commission finds that AmerenUE's class cost of service study, modified to allocate revenues from off-system sales on the basis of class energy requirements, is the most reliable of the submitted studies.

21. Evaluating the submitted class cost of service studies is only the Commission's first step in designing just and reasonable rates for AmerenUE. In general, it is important that each customer class carry its own weight by paying rates sufficient to cover the cost to serve that class. That is a matter of simple fairness in that one customer class should not be required to subsidize another. Requiring each customer class to cover its actual cost of service also encourages cost effective utilization of electricity by customers by sending correct price signals to those customers.<sup>286</sup> However, the Commission is not required to precisely set rates to match the indicated class cost of service. Instead, the Commission has a great deal of discretion to set just and reasonable rates, and can take into account other factors, such as public acceptance, rate stability, and revenue stability in setting rates.

22. AmerenUE and, initially, Public Counsel, proposed that any rate increase should be allotted equally to each customer class. In other words, each class would receive the system average percentage

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<sup>283</sup> Brubaker Direct, Ex. 429, Page 30, Lines 11-14.

<sup>284</sup> Warwick Rebuttal, Ex. 147, Pages 5-7.

<sup>285</sup> Brubaker Direct, Ex. 429, Page 30, Line 14.

<sup>286</sup> Cooper Direct, Ex. 134, Pages 16-17, Lines 13-22, 1-2.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

445

increase.<sup>287</sup> That would leave the existing disparities revealed in the class cost of service studies unchanged.

23. Staff proposed that a small adjustment be made to shift \$3 million in revenue responsibility from the large general service class to the residential class. Staff's adjustment would represent approximately a 0.3 percent increase in revenue responsibility to the residential class and a 0.5 percent decrease in revenue responsibility to the large general service class.<sup>288</sup>

24. MIEC proposed that each customer class be moved 20 percent toward its cost of service as shown in MIEC class cost of service study. That move would require a 2.6 percent revenue neutral increase from the residential class,<sup>289</sup> to collect \$25.9 million in additional revenue from the residential class.<sup>290</sup> However, MIEC would not stop there: Brubaker also advocated that the Large Transmission class, whose only member is Noranda, be moved entirely to its cost of service as shown in MIEC's class cost of service study. That extra movement would require an additional \$8.2 million from the residential class and would reduce the rate relief that would otherwise flow to the other rate classes.<sup>291</sup>

25. Finally, MEUA, whose members take electric service as part of the large general service class, recommended the Commission adopt MIEC's proposed 20 percent revenue neutral adjustment, but without the extra adjustment to move the large transmission class to its cost of service.<sup>292</sup>

26. The stipulation and agreement to which MEUA objected would shift revenue responsibility to the residential, small general service and large primary service classes from the large transmission class and to a lesser extent, the large general service and small primary service classes. The addendum to the stipulation and agreement, to which MEUA also objected, would allocate a slightly larger revenue responsibility reduction to the large general service class.

27. Specifically, for an overall rate increase of \$225 million,

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<sup>287</sup> Cooper Direct, Ex. 134, Page 18, Lines 12-13. See also, Kind Direct, Ex. 300, Page 8, Lines 7-11.

<sup>288</sup> Staff's Class Cost-of-Service and Rate Design Report, Ex. 205, Page 24, Lines 8-15.

<sup>289</sup> Brubaker Revised Direct, Ex. 429, Page 36, Lines 13-19.

<sup>290</sup> Brubaker Revised Direct, Ex. 429, Schedule MEB-COS-6.

<sup>291</sup> Brubaker Revised Direct, Ex. 429, Schedule MEB-COS-6.

<sup>292</sup> Chriss Rebuttal, Ex. 550, Page 11, Lines 3-12.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

446

19 Mo. P.S.C. 3d

which is approximately the rate increase that will result from this order, the addendum to the stipulation and agreement would impose a roughly 1.5 percent revenue-neutral increase on the residential and small general service classes. That amounts to a revenue neutral increase of \$14.5 million for the residential class and \$3.8 million for the small general service class. It would also impose a 1.25 percent revenue neutral increase, amounting to an additional \$2 million, on the large primary class.

28. On the other side of the coin, the large transmission class, whose only member is Noranda, would receive a revenue neutral reduction of 11.74 percent, which amounts to a reduction of approximately \$16.3 million. That means Noranda would receive an actual rate reduction of approximately \$2.1 million, or a 1.54 percent overall reduction. That would occur while the residential class received an 11.70 percent rate increase. The large general service/small primary service class would receive a smaller revenue neutral reduction of 0.7%, amounting to \$4.579 million. That means the large general service/small primary service class would receive an overall rate increase of 9.59 percent.

29. The reallocation of revenue responsibility the signatories agreed to in the stipulation and agreement, now their joint position, bears some resemblance to the results of AmerenUE's modified class cost of service study, which the Commission found to be the most reliable of the submitted studies. AmerenUE's study, and indeed, all the submitted studies, indicate that the residential class is paying substantially less than its actual revenue responsibility. The stipulated position would bring that revenue class closer to its actual cost of service. The stipulated position would also provide the large transmission service class, Noranda, with the largest rate reduction, even though AmerenUE's modified class cost of service study indicates the large general service class is currently overpaying its actual cost of service by a larger percentage.

30. MIEC, and in particular, Noranda, attempt to justify these results by claiming that Noranda needs special rate consideration to remain competitive with other aluminum smelters in the United States, lest it be forced to close, resulting in economic devastation to Missouri.

31. There is no doubt that the closure of Noranda's New Madrid aluminum smelter would have a severe impact on the economy

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

447

of Southeast Missouri. Noranda directly employs some 900 people at its smelter, at an annual payroll of \$60 million. Were the plant to close, the Southeast Missouri region could lose over 3,200 jobs from its economy and state and local governments would lose \$16 million per year in tax revenues.<sup>293</sup>

32. Noranda's aluminum smelter produces molten aluminum from aluminum oxide, known as alumina. The alumina is brought up the Mississippi river by barge for delivery to the smelter.<sup>294</sup> The processing of the alumina into aluminum requires a tremendous amount of electricity. When the smelter is at full production, at current electric rates, Noranda pays AmerenUE \$140 million for electricity each year. The cost of electricity represents a little less than one-third of the smelter's cost of producing aluminum.<sup>295</sup>

33. Electricity is not the only cost factor affecting the continued viability of the New Madrid smelter, and MEUA demonstrated that the New Madrid smelter appears to possess certain competitive advantages over other competing smelters apart from the cost of electricity. For example, the smelter's geographic location on the Mississippi river reduces its cost to transport supplies of alumina.<sup>296</sup> If the market price of aluminum rises, Noranda may also benefit from paying a fixed rate for electricity while many of its competitors pay a rate for electricity that varies with the market price of aluminum.<sup>297</sup> Noranda expects that aluminum prices will rise in the future.<sup>298</sup> Still, while there is no evidence to indicate that Noranda is on the verge of shutting down its smelter with or without an electric rate increase, the smelter's long-term viability is dependent upon maintaining reasonably competitive electric rates.

34. The large general service customer class is also currently paying more than its indicated revenue share and the stipulated position would provide that class with \$4,579,000 of rate relief. But no evidence was presented that would show that the members of the large general service customer class need rate relief to remain competitive in

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<sup>293</sup> Coomes Direct, Ex. 419, Page 2, Lines 4-12.

<sup>294</sup> Gregston Direct, Ex. 422, Page 1, Lines 12-17.

<sup>295</sup> Gregston Direct, Ex. 422, Page 3, Lines 5-14.

<sup>296</sup> Transcript, Page 2948, Lines 17-21.

<sup>297</sup> Transcript, Page 2948, Lines 2-7.

<sup>298</sup> Transcript, Page, 2959, Lines 1-5.

UNION ELECTRIC COMPANY, D/B/A AMERENUE

448

19 Mo. P.S.C. 3d

the same way that Noranda needs that relief.

35. Clearly, Noranda will be affected by the rate increase that will result from this case. But the same can be said about all the other businesses and families that must pay AmerenUE for the electricity they need. The reduction proposed by the stipulated position would give Noranda an actual rate decrease of \$2.147 million while all other customers have to absorb a rate increase. That result is inappropriate. While generally accepting the joint position, the Commission will modify that position to provide that the revenue neutral reduction in the large transmission service class's rate shall be set at a level that leaves that class' total revenue contribution unchanged. The joint position's revenue increase for the residential class shall be reduced by the amount taken from the large transmission class' revenue reduction. The lighting class' class revenue responsibility will be addressed in the next section of this report and order.

36. The objected to stipulation and agreement also purports to resolve certain issues regarding customer charges, Rider B voltage credits, and the Reactive Charge. No party, including MEUA, objects to that aspect of the stipulation and agreement.<sup>299</sup>

37. Specifically, the signatories agree that the residential customer charge should be set at \$8.00 per month, with the remaining revenue assigned to the residential class to be allocated to volumetric charges. AmerenUE proposed that the residential customer charge be increased to \$10.00 per month from its current level of \$7.25.<sup>300</sup> Staff recommended the residential customer charge be increased to \$8.50 per month.<sup>301</sup> However, neither Staff nor AmerenUE objects to a residential customer charge of \$8.00 per month. The Commission finds that \$8.00 per month is a reasonable residential customer charge.

38. The signatories also agree as follows:  
the Small Power Service (SPS), Large Primary Service (LPS) and Large Transmission Service (LTS) customer charges should be set to \$234.33, then those customer charges should be increased by the same percentage as the system average percentage increase, i.e., each will be increased by the same percentage and each will be the same. The signatories agree the rates for Rider B voltage credits (Tariff Sheet

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<sup>299</sup> See. Initial Posthearing Brief of Midwest Energy Users Association, Page 11.

<sup>300</sup> Cooper Direct, Ex. 134, Page 21, Lines 1-7.

<sup>301</sup> Staff's Class Cost-of-Service and Rate Design Report, Ex. 205, Page 24, Line 18.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

449

99) should remain the same for all applicable rate schedules. The existing Rider B voltage credits should be increased by the same percentage as the system average percentage increase. The particular Rider B voltage credits as they now exist follow:

- A monthly credit of \$0.90/kW of billing demand for customers taking service at 34.5 or 69kV.
- A monthly credit of \$1.06/kW of billing demand for customers taking service at 115kV or higher.

The Signatories agree the rate for the Reactive Charge should be the same for all applicable rate schedules and that the existing Reactive Charge should be increased by the same percentage as the system average percentage increase. The current Reactive Charge for SPS (Tariff Sheet 37), LPS (Tariff Sheet 67.1) and LTS (Tariff Sheet 68) classes are \$0.27 per kVar. The Signatories agree the customer charge associated with Time-of-Day rates should be the same for all applicable non-residential rate schedules and that the existing Time-of-Day customer charge should be increased by the same percentage as the system average percentage increase. The current Time-of-Day customer charge for the Large General Service class (LGS)(Tariff Sheet 34), SPS (Tariff Sheet 37, LPS (Tariff Sheet 67.1) and LTS (Tariff Sheet 68) is \$15.25. The Signatories agree the Small General Service class (SGS) customer charge should be \$9.28 for single-phase service and \$18.56 for three-phase service (Tariff Sheet 32). With the foregoing exceptions, all other rate elements within each rate schedule shall be increased by an equal percentage basis so that collectively all rate elements on that schedule are designed to collect the revenue assigned to the class to which that rate schedule applies.

The agreed upon positions are generally consistent with the positions taken by Staff and AmerenUE and neither party has objected to those positions. The Commission finds that the agreed upon positions stated in the stipulation and agreement are reasonable and the Commission adopts those positions.

39. The signatories also agreed to adopt Staff's position that the following features should be returned to uniformity:

- The value of the customer charge be uniform across rate schedules, with the customer charges on the SPS, LPS, and LTS rate schedules being the same.
- The rates for Rider B voltage credits be the same

UNION ELECTRIC COMPANY, D/B/A AMERENUE

450

19 Mo. P.S.C. 3d

under all applicable rate schedules.

- The rates for the Reactive Charge be the same for all applicable rate schedules.

- The rates associated with Time-of-Day meter charge be the same for all applicable non-residential rate schedules.<sup>302</sup>

Staff's testimony explained that these features had been uniform until implementation of the rate design in AmerenUE's last rate case. The Commission finds that the agreed upon position is reasonable and that position is adopted.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The Commission generally accepts the joint position, but will modify that position to provide that the revenue neutral reduction in the large transmission service class's rate shall be set at a level that leaves that class' total revenue contribution unchanged. The joint position's revenue increase for the residential class shall be reduced by the amount taken from the large transmission class' revenue reduction. The lighting class' class revenue responsibility will be addressed in the next section of this report and order.

**b. Street Lighting**

**Findings of Fact:**

**Introduction:**

40. The members of the lighting class of customers largely consists of municipalities that purchase electricity from AmerenUE to light their streets at night. The lighting class has a unique load pattern in that the street lights are generally on only at night. That means street lights are drawing power when demand from other users tends to be low, and as a result the lighting class does not contribute much to peak demand. As previously discussed, peak demand tends to drive costs, so the lighting class does not fit well into a general class cost of service study.<sup>303</sup> For that reason, the class cost of service studies submitted by Staff and AmerenUE did not separately calculate the cost of serving the lighting class. Instead, their cost of service studies allocated all direct

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<sup>302</sup> Staff's Class Cost-of-Service and Rate Design Report, Ex. 205, Page24, Lines 1-6.

<sup>303</sup> Staff's Class Cost-of-Service and Rate Design Report, Ex. 205, Page 12, Lines 15-21.



UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

451

lighting costs and revenues to the other classes based on each class' share of AmerenUE's total cost-of-service.<sup>304</sup> That allocation method assumes that the company's rates for lighting service have been established at or near their cost of service,<sup>305</sup> but it does not actually determine whether that assumption is correct.

41. The same allocation method was used in AmerenUE's last two rate cases, and no actual cost of service study has been done for the lighting class over that time.<sup>306</sup> AmerenUE may have last performed a comprehensive street lighting study sometime in the 1980's but it has been unable to locate that study.<sup>307</sup> Since AmerenUE's cost to serve the lighting class has not been studied since at least the 1980's, the lighting class has simply been allocated the same across the board rate adjustments allocated to the other rate classes. AmerenUE and Staff would continue that practice in this case.

42. The lighting class has not been represented in AmerenUE's previous rate cases, but the Municipal Group intervened in this case to bring the lighting class' issues to the Commission's attention. In the First Stipulation and Agreement, filed on March 10, before the start of the hearing, the signatory parties agreed that AmerenUE would cooperate with all interested parties in preparing a cost of service study regarding the lighting class for use in the company's next rate case.<sup>308</sup> The Municipal Group did not sign that stipulation and agreement, but it did not oppose it, and the Commission approved the stipulation and agreement on March 24.<sup>309</sup>

43. Despite the stipulation and agreement's provision for a future class cost of service study, the Municipal Group continues to seek immediate relief in this case. Specifically, the Municipal Group seeks:

1. A moratorium on any new street lighting rates under the 5M and 6M tariffs pending the outcome of the cost of service study and its introduction in AmerenUE's next rate case, or, in the alternative that

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<sup>304</sup> Staff's Class Cost-of-Service and Rate Design Report, Ex. 205, Page 12, Lines 21-25.

<sup>305</sup> Staff's Class Cost-of-Service and Rate Design Report, Ex. 205, Page 13, Lines 1-3. See also, Warwick Direct, Ex. 146, Page 4, Lines 1-15.

<sup>306</sup> Transcript, Page 2871, Lines 3-20.

<sup>307</sup> Transcript, Page 2872, Lines 1-4.

<sup>308</sup> First Nonunanimous Stipulation and Agreement, Page 7.

<sup>309</sup> In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service, File No. ER-2010-0036, Order Approving First Stipulation and Agreement (March 24, 2010).

UNION ELECTRIC COMPANY, D/B/A AMERENUE

452

19 Mo. P.S.C. 3d

AmerenUE hold in escrow any increase ordered for the 5M and 6M street lighting rates pending the review of the street lighting cost of service study in AmerenUE's next rate case; and

2. The elimination of any future pole installation charges from 5M customer bills until such pole installation charges can be justified in AmerenUE's next rate case; and

3. A credit for the 5M customers for all other revenues received by AmerenUE for itself and other entities for their use of these same poles for telephone, cable TV, electric distribution lines, etc.<sup>310</sup>

**Specific Findings of Fact:**

44. AmerenUE currently collects roughly \$31 million per year system-wide from the lighting class.<sup>311</sup> That represents about 1.4 percent of the company's total base rate revenues.<sup>312</sup> The company collects a part of that revenue from its 5M and 6M rates for street lighting, but the exact amount AmerenUE collects under those two particular rates is not revealed in the record.

45. The 5M classification is for street lights that are owned and maintained by AmerenUE. Those street lights are not metered. Instead, the 5M customer is billed by fixture and pole type according to the number of lights in each rate category.<sup>313</sup> The street lighting bill can be a significant expense for a municipality. For example, the City of University City budgets approximately \$640,000 per year for 5M street lighting.<sup>314</sup> The 6M classification covers metered and unmetered street lighting that is owned by the customer rather than AmerenUE.<sup>315</sup>

46. After comparing the 5M rate to the 6M rate, the Municipal Group contends it is being overcharged for maintenance portion of the 5M rate.<sup>316</sup> The Municipal Group also contends it is being overcharged under the 5M rate for pole installation charges for poles installed before 1988. The Municipal Group claims that having collected an installation charge for more than 20 years, AmerenUE should have recovered its installation costs by now.<sup>317</sup>

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<sup>310</sup> Initial Brief of the Municipal Group, Pages 10-11.

<sup>311</sup> Transcript, Page 2869, Lines 6-15.

<sup>312</sup> Warwick Direct, Ex. 146, Page 4, Lines 11-12.

<sup>313</sup> Eastman Rebuttal, Ex. 750, Page 4, Lines 3-13.

<sup>314</sup> Eastman Rebuttal, Ex. 750, Page 4, Lines 15-17.

<sup>315</sup> Eastman Rebuttal, Ex. 750, Page 6, Lines 11-14.

<sup>316</sup> Eastman Rebuttal, Ex. 750, Page 9-11.

<sup>317</sup> Eastman Rebuttal, Ex. 750, Page 14, Lines 5-18.

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

453

47. Finally, the Municipal Group notes that AmerenUE collects revenue from other entities for various installations added onto the street lighting poles, such as cable TV lines. The municipalities contend that since they are in effect renting the poles, they should receive a cut of that revenue.<sup>318</sup> AmerenUE explains that it accounts for that extra revenue as an offset to its base rate revenues in its rate cases. In other words, a dollar collected from a cable company for hanging a line on a light pole would be a dollar the company would not collect from its customers, including the lighting customers.<sup>319</sup> Thus, the Commission finds that those revenues do, at least indirectly benefit the lighting customers.

48. AmerenUE generally denies that it is overcharging its lighting customers, but concedes that there is no specific cost study to support those rates. That deficiency should be corrected by the completion of such a cost study for the development of rates in the company's next rate case. The Municipal Group claims that pole installation charges are unfair, but could offer nothing other than speculation to prove that contention. Since there is no basis at this time to conclude that the current rates are not justified, the Commission will not eliminate future pole installation charges at this time. But the fairness of those charges should become clearer after completion of the costs study and may be revisited in the next rate case.

49. The record does not indicate the amount of revenue AmerenUE collects from 5M and 6M rates apart from the general lighting revenue numbers. Therefore, the Commission cannot exempt just the 5M and 6M ratepayers from the increased rates that will result from this rate case. However, because no class cost of service study has examined the lighting class since at least the 1980s, the entire class has been given rates that may or may not bear any resemblance to the cost to serve that class. The lighting class is only a small part of AmerenUE's entire customer base, but street lighting is a significant cost for the municipalities that take that service. Under the circumstances, the Commission will exempt the entire lighting customer class from the rate increase that will result from this report and order.<sup>320</sup>

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<sup>318</sup> Transcript, Pages 2878-2880.

<sup>319</sup> Transcript, Page 2878, Lines 11-20.

<sup>320</sup> The Municipal Group's alternative proposal to have AmerenUE hold the rate increase collected from the lighting group in escrow, subject to refund, would not be fair to

UNION ELECTRIC COMPANY, D/B/A AMERENUE

454

19 Mo. P.S.C. 3d

50. The lighting class currently generates \$31.295 million in revenue for AmerenUE. The roughly 10.2 percent system average rate increase that will result from this case would generate an additional \$3.2 million in revenue from the lighting class. AmerenUE shall instead collect that \$3.2 million of revenue from the other rate classes on a pro rata basis.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The entire lighting class is exempted from the rate increase that will result from this report and order. The additional revenue that would have been collected from the lighting class under a system average rate increase shall instead be collected from the other rate classes on a pro rata basis. The adjustments necessary to exempt the lighting class shall be made after the general adjustments made pursuant to section 9a of this Report and Order.

**IT IS ORDERED THAT:**

1. The tariff sheets filed by Union Electric Company, d/b/a AmerenUE on July 24, 2009, and assigned tariff number YE-2010-0054, are rejected.
2. Union Electric Company, d/b/a AmerenUE is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order. AmerenUE shall file its compliance tariff no later than June 8, 2010.
3. This report and order shall become effective on June 7, 2010.

Davis, C., concurs, with concurring opinion to follow,  
Jarrett, Gunn, and Kenney, CC., concur,  
Clayton, Chm., dissents, with dissenting opinion to follow.  
and certify compliance with the provisions  
of Section 536.080, RSMo.

\*NOTE: See pages 47, 48, 50, 52, 53, 55, 78, 80, 108, 169, 199, 350, 358, and 376 for other orders in this case.

\*NOTE: At the time of publication, no opinion of Comm. Davis has been filed.

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AmerenUE because, if the lighting group's rates were found to be too high, the company would not be able to go back and collect any revenue shortfall after the fact from the other customer classes.

**DISSENTING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner dissents from the Report and Order granting AmerenUE a general rate increase. While there are a number of positive, constructive changes to the manner in which the Commission is addressing rate increases and the policies that support those increases, this Commissioner has a basic philosophical difference of opinion that prevents participation in the Report. This opinion is less of a dissent opposed to all aspects of the Report, than it is an attempt to describe the changes in policy adopted by the Commission that result in positive changes as well as identifying this Commissioner's disagreements over several complex depreciation and ratemaking philosophies.

First and foremost, in the eyes of rate payers, there is never a good time for a rate increase, especially during challenging economic times. Testimony at Local Public Hearings revealed that residential and commercial customers are struggling in the worst economic downturn since the Great Depression. Customers testified to increases in unemployment and those employed described the effects of underemployment. Many customers are living on a month-to-month basis without any cushion to absorb any unexpected or additional expenses. Business and governmental leaders have advised of cut-backs and layoffs, of reduced revenues and earnings and of uncertainties as the economy slowly recovers. Any increases in utility cost have an impact.

The testimony at Local Public Hearings held throughout the St. Louis region and Ameren's other service territories was generally consistent and painted a picture of great challenges. It suggested to this Commissioner that utilities must be mindful of the tough times many folks are facing and incorporate that awareness into action on a day-to-day basis. This is a fact that the Commission understands and has taken into consideration during deliberations. Missouri utilities also need to take into consideration the challenges faced by their customers when filing back-to-back rate increases and look for alternatives that will address the balance that needs to be found between rate payers and shareholders.

This Commissioner wants AmerenUE's ratepayers to be aware that their voices were heard during the extensive public hearings. In response, the Commission is responding with new concepts and

UNION ELECTRIC COMPANY, D/B/A AMERENUE

456

19 Mo. P.S.C. 3d

approaches as to how it reviews such rate increase requests. A few of those changes in approach and philosophy can be summarized as follows:

1. Ameren's request for an 18% increase has been reduced to a 10.2% increase.
2. The Commission has called for new ways of addressing affordability for low income customers setting aside over \$1 million to help the most vulnerable among us and re-evaluate how best to look at such issues.
3. This Report adopts multiple settlements among the parties which settled dozens of issues. Parties signing on to those agreements include the member companies of FERAF and the rate payer advocate, the Office of Public Counsel (OPC).
4. AmerenUE's Return on Equity or the "profit margin" has been reduced to less than the national average to 10.1%.
5. AmerenUE has changed the way it addresses energy efficiency by agreeing with the Missouri Department of Natural Resources to take further steps toward identifying ways to empower customers to reduce their energy bills through smarter usage.
6. The bulk of this rate increase represents increases that Ameren has experienced in fuel costs which were already approved to be recovered by the company through a previously-approved Fuel Adjustment Clause - a clause this Commissioner initially opposed and continues to oppose.
7. The Commission has re-evaluated how it conducts its Local Public Hearings to improve how education and information is provided to the public. Based on experiences with the new format utilized in AmerenUE's hearings, the Commission is continuing to undertake new efforts to make sure customers are aware of the work done by the Commission and its staff.
8. The Commission plans to take additional steps including outreach programs with community groups, neighborhood associations and not-for-profits on an "on-going" basis to give customers the opportunity to engage on utility concerns.

Having identified policy decisions from which customers should receive additional benefit from the Report, this Commissioner continues to have concerns regarding a number of matters which are not reconcilable with the Report. It is these irreconcilable differences that

UNION ELECTRIC COMPANY D/B/A AMERENUE

19 Mo. P.S.C. 3d

457

cause this Commissioner to dissent.

First, although not initially addressed by any party, the Commission requested new testimony to fully re-evaluate the implementation of the FAC authorized in AmerenUE's last rate case. This Commissioner opposed the adoption of that clause in Ameren's last rate case because of the lessened ability to incent prudent fuel purchasing practices by allowing a 95% pass-through of fuel expenses. Only slightly better than a 100% pass-through, a more equitable division of risk among rate payers and shareholders would have offered this Commissioner a greater degree of comfort.

In the first round of testimony, no party recommended or filed adequate testimony to support repealing or amending Ameren's Fuel Adjustment Clause or amend it any responsible way. The Commission by its order of February 17, 2010 asked for re-evaluation of the subject and invited new filings with supporting testimony. Unfortunately, few parties responded in a way to permit any amendment to the Fuel Adjustment Clause and the parties that did provide testimony only resuscitated old, stale testimony from prior cases. This Commissioner believes this issue deserves more thorough analysis and consideration to afford customers the certainty that utilities are being held to the highest standard of fuel purchases.

Second, this Commissioner has concerns with the issue of depreciation, which is the "return of" capital invested in the company's infrastructure and plant. Depreciation policy has the ability to encourage new investments and the Commission wants to ensure that customers receive safe, adequate and reliable service. However, the Commission also has a responsibility to ensure that rates remain "just and reasonable" under the circumstances. This Commissioner was not comfortable with the modification of the concept of depreciation from AmerenUE's previous rate cases. While the company was able to raise a number of inconsistencies in the Staff's case regarding this issue, now is not the time for changing a methodology, especially a methodology that results in higher utility rates. Staff's advocacy of the mass property methodology requires additional scrutiny, outside the confines of a general rate case. The Commission should be regularly reviewing depreciation policy and the rates that come from this concept.

Third, this Commissioner believes it is time to re-evaluate the concept of "Net Salvage—Cost of Removal," depreciation policy that

UNION ELECTRIC COMPANY, D/B/A AMERENUE

458

19 Mo. P.S.C. 3d

involves building into depreciation schedules an amount that will cover any cost of removing plant, once retired, at some point in the future. "Net Salvage" contemplates inflation, interest, cost estimates and assumptions of the salvage value of retired plant. The issue was resolved by a prior Commission in *In Re Laclede Gas Company*, 13 Mo.PSC 3d 215 (2005), a case which was appealed several times, only to be remanded for additional review. The prior Commission decided in favor of allowing an accrual of Net Salvage in rates and rejected the proposal to use a cash methodology.

Net Salvage is a significant issue and one that has implications for all Missouri utilities. This Commissioner believes that the Commission should be formulating this policy without the narrow focus of a general rate case. It would be more appropriate to open a docket, gather information and assess the impact and fairness for Missouri rate payers.

Lastly, this Commissioner must reiterate his concerns regarding AmerenUE's efforts at tree trimming, infrastructure investment and replacement as well as with overall storm restoration. While this case addresses issues associated with costs of each of the above items, the Commission should reconsider its rules relating to vegetation management and infrastructure replacement. As we approach the spring and summer storm seasons, memories of volatile weather and significant electric outages come to mind and remind this Commissioner to be vigilant in making sure that service is safe and reliable.

The issues as formed in this case regarding vegetation management, infrastructure inspection and replacement as well as with overall reliability miss the real point. The Commission needs to do more to make sure utilities are prepared for regularly volatile weather. The majority is correct in attributing an inverse relationship between preventative work and reductions in storm restoration costs. This Commissioner would be willing to support greater tree trimming and infrastructure expense if confident that adequate progress was being made in improving reliability.

Lastly, this Commissioner is compelled to comment on activities associated with this case but outside of a typical case procedure and outside of positions filed in the case. It is noteworthy that residential customers, who are represented by the OPC, which is a separate state agency, were only represented in a fraction of the issues in this case.



LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

459

Although dozens of issues were identified, OPC only filed testimony regarding a handful of those issues, including Return on Equity (ROE). In fact, the Commission adopted OPC's ROE position. Because OPC did not file testimony on other issues, it was forced to adopt positions advocated by others. OPC was unable to offer expert testimony on the Fuel Adjustment Clause or other issues because of lack of funding in the agency. Thus, on the majority of issues OPC's involvement was limited to cross examining witnesses. Although settlements resulted in some issues with OPC's endorsement, the majority of the issues were simply ignored by the residential customer advocate.

OPC has seen its funding cut year after year as it competes with all other General Revenue state agencies. When 7 of 8 major utilities having pending cases before the Commission, it is physically and financially impossible for the residential rate payer advocate to perform the work necessary to give customers confidence in any decision relating to rates. OPC's absence on many issues leaves the Commission without a full record and limits the alternatives from which the Commission may choose.

During the last legislative session, OPC sought changes in state law that would permit the agency to convert to utility assessment funding, which is identical to how the Commission is funded. OPC would be in a position to provide more public education and outreach, more advocacy in all cases and more analysis which would result in improved decisions. OPC support of difficult rate increase issues provides a greater degree of confidence in the outcome of the cases.

For the foregoing reasons, this Commissioner dissents.

**In the Matter of Laclede Gas Company's Verified Application for Authority to Issue and Sell First Mortgage Bonds, Unsecured Debt and Preferred Stock, in Connection with a Universal Shelf Registration Statement, to Issue Common Stock and Receive Capital Contributions, to issue or accept Private Placement Securities, and to Enter Into Capital Leases, all in a Total Amount Not to Exceed \$600 Million**

*File No. GF-2009-0450  
Decided June 16, 2010*

## LACLEDE GAS COMPANY

460

19 Mo. P.S.C. 3d

**Gas §32.** The Commission denies part of an application for long-term financing and grants the rest because the applicant proved that the latter amount was reasonable and necessary for statutorily authorized purposes.

**Security Issues §16.** The Commission denies part of an application for long-term financing and grants the rest because the applicant proved that the latter amount was reasonable and necessary for statutorily authorized purposes.

**Security Issues §40.** The Commission denies part of an application for long-term financing and grants the rest because the applicant proved that the latter amount was reasonable and necessary for statutorily authorized purposes.

**Security Issues §40.** Statute and regulation allow long-term financing of certain expenses made within five years before the filing of the pending application.

### **REPORT AND ORDER**

The Missouri Public Service Commission is granting the above-titled application of Laclede Gas Company ("Laclede") in the amount of \$518 million and denying the remainder. The Commission is conditioning such authorization on a long-term debt limit at the value of Laclede's rate base or 65% of Laclede's total capitalization, whichever is less. Such authorization shall last three years.

By separate order, the Commission is also extending Laclede's temporary financing authority to coincide with this report and order's effective date.

The Commission considered all allegations and arguments of each party, and the whole record, but does not address matters that are not dispositive. The Commission's findings reflect its resolutions of conflicting representations and determinations of credibility. On those grounds, the Commission independently finds and concludes as follows.

#### **Appearances**

**Michael C. Pendergast**, Vice President and Associate General Counsel, and **Rick Zucker**, 720 Olive Street, Room 1520 St. Louis, MO 63101, for applicant Laclede.

**Kevin A. Thompson**, Chief Staff Counsel, and **Robert S. Berlin**, Senior Counsel, 200 Madison Street, Suite 800 P.O. Box 360 Jefferson City, MO 65102 for the Commission's staff ("Staff").

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

461

**Marc D. Poston**, Deputy Public Counsel, P. O. Box 2230, Jefferson City MO 65102, for the Office of the Public Counsel (“OPC”).

**Daniel Jordan**, Regulatory Law Judge.

**Procedure**

Laclede filed the application on June 30, 2009, seeking authorization to issue stocks, bonds, notes or other evidences of indebtedness (“financing”) payable at periods of more than twelve months after the date of issuance (“long-term”) in an amount not to exceed \$600 million over the course of three years.

After filing monthly status reports, Staff filed its recommendation on December 29, 2009, proposing that the Commission grant the application subject to 12 conditions. The Commission granted and extended temporary long-term financing authorization to Laclede by orders dated February 3, 2010; April 7, 2010; April 28, 2010; and June 9, 2010. On April 20, 2010, the Commission convened an evidentiary hearing on the application.

This case was ready for decision when Laclede and Staff filed reply briefs<sup>1</sup> on May 28, 2010. As of that date, the parties agreed on ten of Staff’s proposed conditions. As to those ten conditions (“agreed conditions”), the Commission need not separately state its findings of fact because the agreement disposes of this action as to such agreed conditions.<sup>2</sup> But no agreement can, alone, determine whether Laclede meets the law’s standards.<sup>3</sup> That decision is solely the task of the Commission, and the Commission must set forth its decision in a report that includes the Commission’s conclusions and decision.<sup>4</sup>

Therefore, the Commission independently finds and concludes that substantial and competent evidence on the whole record weighs in favor of the agreed conditions, and incorporates the agreed conditions into the ordered paragraphs of this *Report and Order*.

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<sup>1</sup> OPC filed only an initial brief, and no reply brief, and did not otherwise participate in this action. OPC’s brief endorses the evidence and arguments of Staff. Therefore, references to Staff’s arguments include OPC.

<sup>2</sup> Section 536.090, RSMo 2000.

<sup>3</sup> *Weber v. Firemen’s Retirement System*, 872 S.W.2d 477, 480 (Mo. banc, 1994).

<sup>4</sup> Section 386.420.2, RSMo 2000.

## LACLEDE GAS COMPANY

462

19 Mo. P.S.C. 3d

As to the matters remaining in dispute, the Commission makes the following findings of fact.

### **Findings of Fact**

1. Laclede is a Missouri corporation authorized to do business as a gas corporation. The Commission's most recent report and order authorizing Laclede's long-term financing is in File No. GF-2007-0220. Such authorization expired on February 15, 2010.

2. Under the report and order in File No. GF-2007-0220, the Commission authorized Laclede to issue \$500 million in long-term financing. The Commission also set a debt limit related to the industry standard. The debt limit was the value of Laclede's regulated rate base.<sup>5</sup>

3. Laclede has issued \$50 million in equity and \$80 million in long-term debt. As of December 31, 2009, Laclede's long-term debt represented \$270 million less than the value of Laclede's regulated rate base and constituted 48.5 percent of Laclede's total capitalization. Laclede has not expended the proceeds of long-term financing on day-to-day operations.<sup>6</sup> Laclede has an "A" credit rating.

4. Over the next three years, \$50 million of Laclede's long-term bonds will expire.

5. Any business may need ready cash in large amounts on short notice because of events beyond such business's control. For Laclede, such events include rising wholesale gas prices and margin calls in connection with Laclede's hedging program. Margin calls alone may require \$300 million in nine months.<sup>7</sup> For that reason, it would be imprudent for Laclede to rely solely on income to fund all its property, plant, and system to the exclusion of long-term financing.

6. A business's capacity to quickly exercise business judgment about issuing long-term finance instruments ("instruments") in response to changing market conditions is called flexibility. Flexibility includes the type and timing of instruments issued. Flexibility is critical for procuring capital quickly and favorably, especially during market instability.

7. During periods of market instability in gas and credit, flexibility has helped Laclede secure favorable long-term financing. For example, in 2008 Laclede issued \$80 million in First Mortgage Bonds just before the interest rate on such instruments increased by approximately

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<sup>5</sup> File No. GF-2007-0220, page 6, paragraph 2(f).

<sup>6</sup> Transcript vol. 2, page 143 line 18, through page 144 line 2.

<sup>7</sup> Transcript vol. 2 page 240 lines 7-11.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

463

2.50 percent in less than a month.<sup>8</sup> In that instance, Laclede's flexibility saved \$2 million per year, which ultimately benefited Laclede's rate-payers.<sup>9</sup>

8. For the five-year period ending on March 31, 2009, Laclede spent money—not generated by long-term financing and not reimbursed—on property, plant, and system and on discharging obligations. The amount of such expenditures was over \$279 million.<sup>10</sup> Laclede's expenses, and amounts available from financing, included the following:

- a. \$832,965,000 in net utility plant costs;<sup>11</sup>
- b. \$37,882,000 in other property and investments;<sup>12</sup>
- c. \$201,441,000 from common stock and paid-in capital;<sup>13</sup> and
- d. \$389,211,000 from long-term debt.<sup>14</sup>

9. As of the date of the evidentiary hearing:

- a. the cost of debt was approximately 6.5% and such payments constituted an income tax deduction.
- b. Laclede's cost of common equity was 9.5%.<sup>15</sup>

**Conclusions of Law**

The Commission has jurisdiction to decide Laclede's application for long-term financing authorization.<sup>16</sup> Such authorization is necessary for Laclede to encumber any of its Missouri property.<sup>17</sup> That authorization is also necessary for Laclede to issue any long-term financing.<sup>18</sup> Such authorization constitutes, "a special privilege, the right of supervision, regulation, restriction and control ["conditions"] of which is and shall

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<sup>8</sup> Exhibit 2, page 10 line 11, through page 11, line 13.

<sup>9</sup> *Id.*

<sup>10</sup> Exh 1, twenty-fifth page, (the Application's Exhibit 3, page 1 of 3), bottom line.

<sup>11</sup> Exh 1, nineteenth page, (the Application's Exhibit 2, page 1 of 5), third line item.

<sup>12</sup> *Id.* at fourth line item.

<sup>13</sup> Exh 1, 20<sup>th</sup> page, (the Application's Exhibit 2, page 2 of 5), left column, first line item.

<sup>14</sup> *Id.* at sixteenth line item.

<sup>15</sup> Transcript vol. 2, page 255 line 16, to page 256 line 2.

<sup>16</sup> Section 393.200.1. All sections are in the 2000 Revised Statutes of Missouri unless otherwise stated.

<sup>17</sup> Section 393.190.1.

<sup>18</sup> Section 393.200.1 and .3.

LACLEDE GAS COMPANY

464

19 Mo. P.S.C. 3d

continue to be vested in the state [. <sup>19</sup>]" The state exercises that right through the Commission's order.<sup>20</sup>

The Statute

The Commission's order is subject to a statute that is simple in purpose but deceptively complex in construction: Section 393.200 ("the statute").<sup>21</sup> Within the statute, the controlling provision is subsection 1. Subsection 1 consists of a single 315-word sentence. Such drafting is the product of practices in use 97 years ago. Those practices included using many successive modifying clauses. Understanding the controlling law requires setting forth subsection 1 at length, parsing its content, and determining which clauses modify which other clauses.<sup>22</sup>

Subsection 1 sets forth its subject matter, which is long-term financing:

1. A gas corporation, electrical corporation, water corporation or sewer corporation organized or existing or hereafter incorporated under or by virtue of the laws of this state may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof . . .

then lists the allowable purposes for long-term financing:

. . . when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or . . .

which include outlays of cash for such purposes:

. . . for the reimbursement of moneys actually expended from income, or from

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<sup>19</sup> Section 393.180.

<sup>20</sup> Sections 393.180 and 393.200.1.

<sup>21</sup> All indented quotations are from Section 393.100.1 unless otherwise stated.

<sup>22</sup> For convenient reference, the Commission has also set forth the full text of Section 393.200 in the Appendix to this order.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

465

any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which such expenditure was made; . . .

and concludes with a description of the order under which such long-term financing occurs:

. . . provided, and not otherwise, that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

LACLEDE GAS COMPANY

466

19 Mo. P.S.C. 3d

For all subsection 1's convoluted digressions, its intent is simply to restrict long-term financing to allowable purposes. Subsection 1 accomplishes that intent by linking two matters: amount and purpose.

The statutory standard is whether Laclede supports the amount it seeks with statutorily allowed purposes:

A gas corporation . . . may issue [financing] when **necessary** for [allowed purposes only if] there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the [financing is] to be applied, and that, in the opinion of the commission, the [financing] is or has been **reasonably required** for the purposes specified in the order [<sup>23</sup>]

Purpose is the premise of any long-term financing authorization. The Commission must issue:

an order . . . **stating the purposes** to which the [financing is] to be applied, and that, in the opinion of the commission, the [financing] is or has been reasonably required for **the purposes specified** in the order [.]

The allowable purposes involve assets:

the acquisition of property, the construction, completion, extension or improvement of its plant or system[;]

service:

improvement or maintenance of its service[;]

paying off obligations:

discharge or lawful refinancing of its obligations[;]

subject to certain limits:

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<sup>23</sup> All emphasis in every quotation is the Commission's.



LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

467

such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.[]

Laclede may also finance cash outlays:

reimbursement of moneys actually expended . . . for any of the aforesaid purposes [;]

but that, too is subject to certain limitations including the following:

except maintenance of service and except replacements

In its reply brief, Laclede argues that such purposes support \$600 million in authorization.

Laclede's Claim

The burden of proof is with Laclede because Laclede seeks to change the status quo.<sup>24</sup> The status quo is that the authorization issued to Laclede in GF-2007-0220 expired on February 15, 2010, so Laclede has only the temporary authorization granted in the orders cited above. The quantum of proof is a preponderance of the evidence, because this case is an administrative action, which is civil in nature.<sup>25</sup>

In support of its claim for \$600 million in authorization, Laclede offers the following purposes:

<i>Purpose</i>	<i>Amount (\$million)</i>
the acquisition of property, the construction, completion, extension or improvement of its plant or system	189
improvement or maintenance of its service	0
discharge or lawful refinancing of its obligations	50
reimbursement of moneys actually expended for any of the aforesaid purposes	279
"[O]ther unknown amounts that may be needed for the purposes described above, including converting short-term debt into long-term debt and financing regulatory assets, etc." <sup>26</sup>	82

<sup>24</sup> *Tate v. Department of Social Services*, 18 S.W.3d 3, 8 (Mo. App., E.D. 2000).

<sup>25</sup> *Id.* and *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>26</sup> *Initial Brief of Laclede Gas Company*, Exhibit 1, second line item. Laclede rounds up the specified purposes and rounds down the \$82 million to show a total of \$600 million. The

LACLEDE GAS COMPANY

468

19 Mo. P.S.C. 3d

<i>Total Requested</i>	600
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Laclede asks to have \$82 million on hand in case one of the allowed purposes comes up.

In support of the \$82 million, Laclede cites flexibility. But flexibility is neither a purpose nor an amount. Flexibility is how fast Laclede uses its authorization to address market conditions. Staff argues that Laclede has not shown that such amount is, or has been, necessary or reasonably required for any of the allowed purposes. Staff reads the statute and the record correctly. Laclede has not carried its burden of proving that an allowed purpose supports the \$82 million. Therefore, the Commission will deny the application as \$82 million.

The parties agree on the \$50 million for discharge or lawful refinancing of Laclede's obligations. The Commission independently finds and concludes that such amount is necessary or reasonably required for that purpose, and that purposes are not in whole or in part reasonably chargeable to operating expenses or to income. Therefore, the Commission will grant the application as to discharge or lawful refinancing of its obligations in the amount that Laclede requests.

As to the remainder of Laclede's request, Staff argues that Laclede's purposes are not allowable.

A. Property, Plant, and System

As to the \$189 million for property, plant, or system, Staff argues that the Commission can reasonably charge certain amounts to income<sup>27</sup> and must, therefore, deny long-term financing of such amounts:

[T]here shall have been secured from the commission an order . . . stating the purposes to which the issue or proceeds thereof are to be applied, . . . and that except as otherwise permitted in the order in the case of [debt], such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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Commission rounds down the specified purposes and rounds down the \$82 million to be consistent with the burden of proof.

<sup>27</sup> In connection with these arguments, the parties cite evidence from highly confidential exhibits, which the Commission will not publish in this *Report and Order*.

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

469

If the Commission can reasonably charge amounts to income, the Commission may authorize long-term financing of that purpose only through debt. Staff seeks to offset Laclede's claimed amount with Laclede's projected income in the next three years.

Staff cites Laclede's statements about such income. Such statements include representations that Laclede's income was enough to fund all property, plant, or system expenses in 2008.<sup>28</sup> But for 2006 and 2007, Laclede notes, the same statements report Laclede's income as less than its property, plant, or system expenses.<sup>29</sup> Laclede also notes that the statements include qualifiers that income projections have limited use because of "various uncertainties and risks factors, many of which are beyond the control of [Laclede] including weather conditions, governmental and regulatory policy and action, the competitive environment and economic factors."<sup>30</sup> Further, Laclede's statements expressly include the Commission's decisions as factors influencing its actual income.<sup>31</sup>

Staff also argues that Laclede has no better use for its income. That depends, according to Laclede, on conditions in various markets. Laclede argues that income is appropriate for future maintenance and replacements, and for reducing the short-term debt that Staff itself criticizes. Such considerations are likely the policy behind the General Assembly's decision to allow long-term financing for property, plant, and system.

The Commission concludes that Laclede's arguments are the more persuasive. Events outside Laclede's control make projections of income and expenses insufficiently reliable to exclude the option of long-term financing for property, plant, and system. It is not reasonable to charge all Laclede's projected income against property, plant, and system expenses to the exclusion of long-term financing authorization.

Therefore, the Commission will grant the application as to property, plant, and system in the amount that Laclede requests.

### B. Reimbursement of Monies Expended

As to the \$279 million for reimbursement, Staff argues that Laclede's expenditures of monies at issue ("expenditures") are not

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<sup>28</sup> Exh 11, eighteenth page.

<sup>29</sup> *Id.*

<sup>30</sup> Exhibit 11, thirteenth page.

<sup>31</sup> Exhibit 7, last paragraph.

LACLEDE GAS COMPANY

470

19 Mo. P.S.C. 3d

allowable. Staff does not dispute that Laclede expended moneys on the "aforesaid purposes." Instead, Staff offers arguments based on such expenditure's source and timing and, on that basis, seeks a debt limit as a condition of Laclede's authorization.

But, as Laclede points out, Staff's premise does not support its conclusion. Staff's premise is that Laclede's purposes are not allowable. Allowable purposes are the same for debt as for equity so, if Laclede's purpose does not support debt, the statute denies any long-term financing for such purpose at all. This is true notwithstanding Commission discretion to set conditions<sup>32</sup> and Staff's insouciance toward equity.<sup>33</sup> Staff has simply misread the statute.

Thus, much of the parties' argument over a debt limit condition actually addresses an element of Laclede's claim for long-term financing authorization. Staff recommends that the Commission authorize amounts for equity, but not debt, without any basis in law for the distinction, thus impeaching its own allegations and arguments. Nevertheless, the Commission will address Staff's arguments as guidance for future applications.

*(i) Source*

In its brief, Staff argues that Laclede has already financed or received reimbursement for the expenditures at issue.

In that regard, Staff's reading of the law is correct. Laclede must show that the expenditures at issue came from monies not generated by long-term financing and remain unreimbursed. Otherwise, the statute bars long-term financing of such expenditures' reimbursement:

the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation **not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation**, within five years next prior to the filing of an application with the commission for the required authorization, for any of the

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<sup>32</sup> Section 393.180, RSMo 2000.

<sup>33</sup> Transcript vol. 2, page 271 line 18, to page 272 line 14.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

471

aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which such expenditure was made[.]

Staff's arguments begin with the expenditures' relation to Laclede's rate base.

Staff argues that Laclede receives depreciation on its rate base in the rates that consumers pay, so Laclede must already have received reimbursement through income. That argument assumes that reimbursement is reasonably chargeable to income. The Commission has already concluded that charging property, plant, and system expenditures entirely to income is not reasonable.

Staff also argues that Laclede paid for its rate base with previous long-term financing, so Laclede must have generated the moneys from long-term financing. But Laclede showed that it does not use its current long-term financing to reimburse its treasury for the expenditures. It has also shown that its property, plant, and system expenditures exceeded its long-term financing as follows.

At the end of a five-year period ending on March 31, 2009, Laclede had the following unreimbursed expenses, and amounts available from financing, as shown in Finding 8:

<i>Item</i>	<i>Amount (\$)</i>
common stock and paid-in capital	201,441,000
long-term debt	389,211,000
total long-term debt and equity	<u>590,652,000</u>
net utility plant costs	(832,965,000)
other property and investments	(37,882,000)
unfinanced expenses	<u>(280,195,000)</u>

Laclede asks to finance \$279 million in unreimbursed expenses and Laclede's evidence supports that amount.

*(ii) Timing: Past Expenditures*

Staff argues that reimbursement is allowable only as to future expenses. Staff's reading is contrary to the statute's plain language.

LACLEDE GAS COMPANY

472

19 Mo. P.S.C. 3d

Staff's citations do not support its argument. Staff cites subsection 1's five year provision:

within **five years next prior to** the filing of an application with the commission for the required authorization, for any of the aforesaid purposes . . . in cases where the applicant **shall** have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which such expenditure was made [.]

Staff emphasizes the word "shall" but, in this context of standards for granting an application, "shall" does not indicate a future event. "Shall" signifies a mandate and means "must" in the present tense.<sup>34</sup> And the "accounts and vouchers" are for "such expenditure," "money so expended," and "such expenditure . . . made,"<sup>35</sup> all of which are past events.

Also, Staff reads "five years next" as "the next five years," but that is not the statute's wording. "Five years next prior to an application" simply means "five years before an application." Which application does that mean? Staff argues the next application, and Laclede argues the pending application. The Commission agrees with Laclede.

As Laclede notes, the statute's wording specifically allows long-term financing of past events:

the money, property or labor **to be procured** or paid for by the issue of such [financing] is or **has been reasonably required**[.]

The long-term financing of past cash expenditures is specifically the subject of the five year provision—actually, two five year provisions.

The other is a provision obsolete since 1968, formerly applicable to long-term financing expenditures through debt, in subsection 2.

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<sup>34</sup> *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 164 (Mo. banc 1972).

<sup>35</sup> Section 393.200.1.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

473

Comparing the two provisions is helpful because the subsections share the relevant language:

<p>2. Nothing herein contained shall prohibit the commission from giving its consent to the issue of</p> <p>bonds, notes or other evidence of indebtedness</p> <p>for the reimbursement of moneys heretofore actually expended from income</p> <p>for any of the aforesaid purposes, except maintenance of service or replacements,</p> <p>* * *</p> <p>if in the judgment of the commission such consent should be granted [.]</p>	<p>1. A gas corporation . . . may issue stocks,</p> <p>bonds, notes or other evidences of indebtedness . . .</p> <p>for the reimbursement of moneys actually expended from income . . .</p> <p>* * *</p> <p>for any of the aforesaid purposes except maintenance of service and except replacements</p> <p>in cases where the applicant shall have kept [certain records.]</p>
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Those subsections include the same components. Both generally allow long-term financing of past expenditures for the same purposes; specifically bar long-term financing of past expenditures for replacements and maintenance; and set forth a standard.

And, at the asterisks above, both subsections set forth their respective five year provisions:

<p>2. . . . <b>prior to five years</b> next preceding the filing of an application therefor, by any sewer corporation [.]</p>	<p>1. . . . <b>within five years</b> next prior to the filing of an application with the commission for the required authorization [.]</p>
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Reading the five year provisions in context reveals that they simply address how far in the past long-term financing of expenditures may reach: long-term financing of expenditures is generally subject to a five year time limit under subsection 1, and subsection 2 provided an

LACLEDE GAS COMPANY

exception. That exception proves the rule: Subsection 1's five year provision looks backward from the filing of the pending application.

Laclede also cites the Commission's regulation requiring each application to include information on past expenditures. Regulation 4 CSR 240-3.220(1)(G) requires every application for financing authorization to include "A five (5)-year capitalization expenditure schedule as required by section 393.200, RSMo." Such schedule, the parties agree, reports expenditures from the past five years. Thus the regulation also includes long-term financing of past expenditures.

The Commission concludes that the statute allows long-term financing of past expenditures.

*(iii) Conclusion as to Reimbursement of Expenditures*

Therefore, the Commission will grant the application as to moneys actually expended in the amount that Laclede requests.

C. Total Long-Term Financing Authorization

The amounts that Laclede asks to procure or pay for by the issuance of stock, bonds, notes or other evidences of indebtedness are reasonably required for the purposes specified below; and are not in whole or in part reasonably chargeable to operating expenses or income; so the Commission will grant the application as to only the following purposes and amounts.

<i>Purpose</i>	<i>Amount (\$million)</i>
the acquisition of property, the construction, completion, extension or improvement of its plant or system	189
discharge or lawful refinancing of its obligations	50
reimbursement of moneys actually expended for any of the aforesaid purposes	279
<i>Total</i>	<i>518</i>

Staff's Conditions

Laclede's long-term financing authorization is subject to the Commission's "supervision, regulation, restriction and control"<sup>36</sup> ("conditions"). Staff proffers 12 conditions. In Laclede's position statement, Laclede agreed to seven conditions and, in Laclede's brief, Laclede agreed to three more ("agreed conditions"). As to the 10 agreed conditions, the Commission independently finds and concludes that they

<sup>36</sup> Section 393.180.



## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

475

help protect against public detriment and will order them without further discussion.

Laclede disputes the two remaining conditions. Conditions do not negate any element of Laclede's claim, but require evidence not described in those elements, so the Commission concludes that Laclede has no burden of proof as to conditions. The burden of proof as to whether such conditions help prevent a public detriment is, therefore, with Staff.<sup>37</sup>

Staff's expert witness endorsed Staff's proposed conditions. But the same witness opined that authorization, under only Laclede's proposed conditions, would not be imprudent.<sup>38</sup> In support of each condition, Staff suggested at hearing that Laclede might create a public detriment by diverting borrowed moneys to an affiliate. But such a transaction would violate state law, and Laclede's own by-laws, according to the uncontroverted evidence. No evidence shows that such event has occurred, is about to occur, or is any more likely to occur than any other violation. Staff's argument supports neither of its proposed conditions, which are as follows.

### A. Long-Term Debt Limit

The parties dispute the following language in proposed condition 1:

[T]he total amount of long-term debt issued and outstanding under such authority shall not, at any time during the period covered by this authorization exceed \$100 million [.]

The parties agree that a limit on a utility's long-term debt helps to prevent public detriment, which may result if excessive debt over-encumbers assets.

Laclede advocates the industry standard. The industry standard is the lesser of two amounts: (i) the value of the utility's rate base or (ii) 65 percent of the utility's total capitalization. Laclede cites its history of prudent management as shown in Findings 2 and 3, and the lower cost of debt than equity as shown in Finding 9.

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<sup>37</sup> State ex rel. City of St. Louis v. Public Service Com'n of Missouri, 73 S.W.2d 393, 400 (Mo.1934).

<sup>38</sup> Transcript vol. 2, page 245 line 21, to page 246 line 1. The Commission finds the witness commendably candid in that regard.

## LACLEDE GAS COMPANY

476

19 Mo. P.S.C. 3d

In its reply brief, Staff protests that the statute does not authorize the industry standard debt limit because the amount of Laclede's total capitalization "floats"—or changes—from day to day. Indeed, the statute does not mention a debt limit at all, it allows as much debt and equity as the purposes support. Also, subsection 1 is more generous with debt than equity, in that the Commission may authorize debt for purposes that are reasonably chargeable to income or operating expenses.<sup>39</sup>

Staff seeks a lower limit for Laclede's long-term debt at \$100 million. In support, Staff notes the differences between debt and equity as follows. The Commission sets the return on equity but does not control the contracted rate of interest on debt. Issuing equity does not create obligations the way that debt does. Laclede may forego paying dividends when it must still pay interest. Staff's arguments relate to the possibility that Laclede will over-encumber its assets with debt and use long-term debt to fund short-term operating needs. But, as with its diversion-of-proceeds scenario, Staff offered no evidence that such conduct has occurred, is imminent, or is even likely.

Staff has not shown that Laclede needs a limit other than the industry standard to avert public detriment. Staff offers no reason to restrict Laclede's flexibility in that regard. Therefore, the Commission will order a limit on long-term debt in accordance with the industry standard.

### B. Future Applications

The parties dispute the following proposed condition:

That in future finance cases, the Company shall be required to provide detailed evidence to the Commission showing the amounts of long-term capital investments that have not been financed under the prior financing authority, the type of long-term securities they intend to issue and when the Company intends to issue such securities.

That condition has two components.

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<sup>39</sup> Subsection 2's obsolete five-year provision took such generosity even further. It allowed long-term debt to finance reimbursement of money expenditures older, and under a standard far more lax, than under subsection 1.

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

477

First, Staff asks that Laclede show amounts of long-term capital investments already financed. Laclede has shown that its application already contained that information with enough clarity for the Commission to base a decision on it. The Commission will reject that component.

Second, Staff asks that Laclede file a plan of future issuances by type and timing. In support, Staff offers its arguments as to Laclede's purposes, which the Commission has already addressed. Also, the purpose and benefit of such plan is unclear. If merely informational, Staff has not shown the value of such a plan in this time of unstable markets. If mandatory, Staff has also not shown the benefit to ratepayers of holding Laclede to such plan when market conditions favor other actions. Findings 2 and 3 show that Laclede's business judgment has been cautious and prudent. That finding outweighs the need for requiring projections of limited use. The Commission will reject that component.

### **Order**

Based on the foregoing,

#### **THE COMMISSION ORDERS THAT:**

1. Laclede Gas Company ("Laclede") shall be authorized to issue stock, bonds, notes or other evidences of indebtedness in an aggregate amount not to exceed \$518 million at any time, or from time to time, through June 30, 2013 ("authorization"). Such authorization shall include authorization to issue debt securities, solicit and accept private placements, enter into capital leases, issue common stock and receive paid-in capital. The authorization issued under this File No. GF-2009-0450 supersedes the current Commission authorization under Case No. GF-2007-0220.

2. The total amount of the long-term debt, private placements, capital leases entered into, and preferred stock issued and outstanding under such authorization shall not, at any time during the period covered by this authorization, exceed the lesser of the value of Laclede's regulated rate base or 65 percent of its total capitalization, as such conditions are defined in Case Nos. GM-2001-342 and GF-2007-0220.

3. Laclede shall not use any portion of the \$518 million for any purpose other than for the exclusive benefit of Laclede's regulated operations as such purposes are specified in Section 393.200, RSMo. Laclede shall not use such authorization in a manner that would prevent Laclede from maintaining an investment grade credit rating.

## LACLEDE GAS COMPANY

478

19 Mo. P.S.C. 3d

4. If and when the individual debt securities are issued under this Application, Laclede shall submit a verified report to the Commission's Internal Accounting Department documenting such issuance, the use of any associated proceeds and the applicability and measure of fees under Section 386.300.2. Laclede shall also submit to the Commission's Internal Accounting Department by December 31<sup>st</sup> of each year an annual report stating the value of its new capital leases entered into in the immediately preceding fiscal year.

5. Laclede shall file with the Commission all final terms and conditions on these long-term financings including, but not limited to, the aggregate principal amount to be sold or borrowed, price information, estimated expenses, portion subject to the fee schedule and loan or indenture agreement concerning each issuance.

6. If debt securities are set at a fixed rate, the interest rate shall not exceed a rate equal to the greater of 300 basis points above the yield on a United States Treasury security with a comparable maturity at the time of the issuance of the debt or a rate that is consistent with similar securities of comparable credit quality and maturities issued by other issuers. If a variable rate is set, the basis for determining the interest rate shall be defined at the time of issuance, along with any maximum or minimum interest rates that may be specified for that series. The initial interest rate will not exceed a rate equal to the greater of 300 basis points above the yield on a United States Treasury security with a maturity comparable to the period that the initial interest rate would be in effect, or a rate that is consistent with similar securities of comparable credit quality and maturities issued by other issuers.

7. Laclede shall submit to the Commission's staff and Public Counsel any information concerning communications with credit rating agencies concerning individual debt securities issued under this Application.

8. Laclede shall file with the Commission any credit rating agency reports issued specifically on Laclede, Laclede's debt issuances, or on the Laclede Group if Laclede has received such report and Laclede has been able to obtain permission from the relevant agency to provide such report to the Commission.

9. Nothing in this *Report and Order* shall be considered a finding by the Commission of the value of these transactions for rate making purposes, and the Commission reserves the right to consider the

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

479

rate making treatment to be afforded these long-term financing transactions and their results in cost of capital, in any later proceeding.

10. In seeking further authorization such as is granted in this case, Laclede and Staff shall operate under the general time frames set forth for long-term financing cases in the 2004 case management roundtable project.

11. This *Report and Order* shall become effective on June 30, 2010.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC. concur;  
and certify compliance with the  
provisions of Section 536.080, RSMo.

**Appendix**

393.200. 1. A gas corporation, electrical corporation, water corporation or sewer corporation organized or existing or hereafter incorporated under or by virtue of the laws of this state may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or system, or for the improvement or maintenance of its service or for the discharge or lawful refinancing of its obligations or for the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which such expenditure was made; provided, and not otherwise, that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other

LACLEDE GAS COMPANY

480

19 Mo. P.S.C. 3d

evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

2. Nothing herein contained shall prohibit the commission from giving its consent to the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service or replacements, prior to five years next preceding the filing of an application therefor, by any sewer corporation, if in the judgment of the commission such consent should be granted, provided application for such consent shall be made prior to January 1, 1968. For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents and contracts as it may deem of importance in enabling it to reach a determination. Such sewer corporation shall not without the consent of the commission apply said issue or any proceeds thereof to any purpose not specified in such order.

3. Such gas corporation, electrical corporation, water corporation or sewer corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or any other law, payable at periods of not more than twelve months without such consent; but no such notes shall, in whole or in part, directly or indirectly, be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the commission; provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount, exclusive of any tax or annual charge, actually paid to the state or to any political subdivision thereof as the consideration for the grant of such franchise or right. Nor shall the capital stock of a corporation, formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations, so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of

MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

481

any corporation whatsoever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

**In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water Service Provided in Missouri Service Areas**

*File No. WR-2010-0131*

*Decided June 16, 2010*

**Rates §111.** The Commission rejects a proposed rate increase of \$48.5 million and concludes that an increase of \$28 million will support safe and adequate service at just and reasonable rates.

**Water §16.** The Commission rejects a proposed rate increase of \$48.5 million and concludes that an increase of \$28 million will support safe and adequate service at just and reasonable rates.

**REPORT AND ORDER**

The Missouri Public Service Commission is determining the terms of, and charges for, the water and sewer services of Missouri American Water Company ("MAWC") as set forth in the *Stipulation and Agreement* ("settlement") that the parties filed on May 25, 2010. Such terms include a revenue increase of approximately \$ 28 million. The Commission is rejecting the pending tariff assigned Tracking No. YW-2010-0310, and ordering MAWC to file a new tariff in compliance with this *Report and Order*. The Commission makes each ruling on consideration of all allegations and arguments of each party, and the substantial and competent evidence upon the whole record, but does not specifically address matters that are not dispositive. The Commission's findings reflect its determinations of credibility. On those grounds, the Commission independently finds and concludes as follows.

***I. Appearances***

**Dean L. Cooper** and **R. W. England**, Attorneys at Law with Brydon, Swearingen & England, PC, 312 East Capitol, P.O. Box 456, Jefferson

MISSOURI-AMERICAN WATER COMPANY

482

19 Mo. P.S.C. 3d

City, MO 65102; and **John J Reichart**, Corporate Counsel, American Water Company, 727 Craig Road, St. Louis, MO 63141; for Missouri-American Water Company.

**Jennifer Hernandez**, Legal Counsel with the Office of Staff Counsel, 200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, MO 65102, for the Staff of the Missouri Public Service Commission.

**Christina Baker**, Senior Public Counsel with the Office of the Public Counsel, 200 Madison Street, Suite 650 P.O. Box 2230, Jefferson City, MO 65102, for the Office of the Public Counsel.

**Sherrie A. Schroder** and **Michael A. Evans**, Attorneys at Law with Hammond & Shinnars, 7730 Carondelet Ave., Ste 200, St. Louis, MO 63105, for the Utility Workers Union of America Local 335.

**Stuart Conrad** and **David Woodsmall**, Attorneys at Law with Finnegan, Conrad & Peterson, LC, 3100 Broadway, Suite 1209, Kansas City, MO 64111, for AG Processing, Inc.

**Leland B. Curtis**, Attorney at Law with Curtis, Heinsz, Garrett & O'Keefe, PC, 130 S. Bemiston, Suite 200, St. Louis, MO 63105, for City of Warrensburg.<sup>1</sup>

**Terry C. Allen**, Attorney at Law with Allen Law Offices, LLC, 612 E. Capitol Ave, P.O. Box 1702, Jefferson City, MO 65102, for the St. Louis Fire Sprinkler Association.

**Stephanie S. Bell**, **Marc H. Ellinger** and **Thomas R. Schwarz**, Attorneys at Law with Blitz, Bardgett & Deutsch, LC, 308 E. High Street, Ste. 301, Jefferson City, MO 65101 for City of Joplin.

**Lisa C. Langeneckert**, Attorney at Law with Sandberg, Phoenix & von Gontard PC, One City Centre, Suite 1500, 515 North Sixth Street, St. Louis, MO 63101, for Missouri Energy Group.<sup>2</sup>

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<sup>1</sup> All cities, counties and districts are in Missouri.

<sup>2</sup> Missouri Energy Group is an association of the following entities: Barnes-Jewish Hospital and SSM HealthCare.



MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

483

**James M. Fischer** and **Larry W. Dority**, Attorneys at Law with Fischer & Dority, PC, 101 Madison Street, Suite 400, Jefferson City, MO 65101, for Public Water Supply District No. 1 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 2 of Andrew County.

**Byron E. Francis** and **J. Kent Lowry**, Attorneys at Law with Armstrong Teasdale LLP, One Metropolitan Square, Ste. 2600, St. Louis, MO 63102-2740 for Metropolitan St. Louis Sewer District.

**Joseph P. Bednar, Jr.**, Attorney at Law with Spencer Fane, Britt Browne LLP, 308 E High St Suite 222, Jefferson City, MO 65101, for City of Riverside.

**Lisa Robertson**, City Attorney with the City of St. Joseph, City Hall, Room 307, 1100 Frederick Ave. St. Joseph, MO 64501; and **William D. Steinmeier**, Attorney at Law with William D Steinmeier, PC, 2031 Tower Dr., P.O. Box 104595, Jefferson City, MO 65110-4595; for City of St. Joseph.

**Karl Zobrist** and **Roger W. Steiner**, Attorneys at Law with Sonnenschein, Nath & Rosenthal LLP, 4520 Main Street, Suite 1100, Kansas City, MO 64111, for Triumph Foods, LLC.

**Mark W. Comley**, Attorney at Law with Newman, Comley & Ruth, PC, 601 Monroe Street., Suite 301, P.O. Box 537, Jefferson City, MO 65102-0537; and **Nathan Nickolaus**, City Counselor with City of Jefferson, City Hall, 320 East McCarty Street, Jefferson City, MO 65101, for the City of Jefferson.

**Diana M. Vuylsteke**, Attorney at Law with Bryan Cave, LLP 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, for Missouri Industrial Energy Consumers.<sup>3</sup>

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<sup>3</sup> Missouri Industrial Energy Consumers is an association of the following entities: The Boeing Company, Hussmann Refrigeration, and Monsanto.

## MISSOURI-AMERICAN WATER COMPANY

484

19 Mo. P.S.C. 3d

**Daniel Jordan**, Regulatory Law Judge.

### ***II. Procedural History***

MAWC filed tariffs on October 30, 2009. On November 20, 2009, MAWC filed additional tariffs. The tariffs proposed uniform terms of service among MAWC's territories and a general rate increase of approximately \$ 48.5 million. The tariffs bore an effective date of November 29, 2009.

By orders dated November 18, 2009, and November 23, 2009, the Commission suspended the tariffs and the additional tariffs, respectively, until September 29, 2010, the maximum time allowed by statute.<sup>4</sup> The suspension of the tariffs initiated a contested case.<sup>5</sup> A contested case is a formal hearing procedure, but it allows for waiver of procedural formalities<sup>6</sup> and a decision without a hearing,<sup>7</sup> including by stipulation and agreement.<sup>8</sup>

In the November 18, 2009 order, the Commission directed that notice of this action be provided to the public and to certain parties and set a deadline for filing applications to intervene. At the early pre-hearing conference, the Commission granted applications to intervene from all persons filing them:

- Utility Workers Union of America Local 335
- AG Processing, Inc.
- City of Warrensburg
- St. Louis Fire Sprinkler Association
- City of Joplin
- Missouri Energy Group<sup>9</sup>
- Public Water Supply District No. 1 of Andrew County;
- Public Water Supply District No. 1 of DeKalb County; and
- Public Water Supply District No. 2 of Andrew County
- Metropolitan St. Louis Sewer District
- City of Riverside

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<sup>4</sup> Section 393.150, RSMo 2000.

<sup>5</sup> Section 393.150.1, RSMo 2000; and Section 536.010(4), RSMo Supp. 2009.

<sup>6</sup> Sections 536.060(3) and 536.063(3), RSMo 2000.

<sup>7</sup> Sections 536.060, RSMo 2000.

<sup>8</sup> *Id.* and 4 CSR 240-2.115.

<sup>9</sup> Missouri Energy Group is an association of the following entities: Barnes-Jewish Hospital and SSM HealthCare.

## MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

485

- City of St. Joseph
- Triumph Foods, LLC
- City of Jefferson and
- Missouri Industrial Energy Consumers.<sup>10</sup>

Also at the early pre-hearing conference, the Commission consolidated the sewer action with the water action. Further, the Commission established the test year relevant to MAWC's rates. The Commission memorialized those ruling by notice dated December 14, 2009.

By order dated January 13, 2010, the Commission ruled on which known and measurable changes were relevant to update the test year. In that same order, the Commission established a procedural schedule. In March and April, 2010, the Commission conducted nine local public hearings in MAWC's service territories to take comments from MAWC's customers and the public regarding this action. By order dated April 12, 2010, the Commission established the true-up period and accounts for other significant items relevant to MAWC's rates. By May 6, 2010, the parties pre-filed all direct, rebuttal, and sur-rebuttal testimony, except as to the true-up period. On May 11, 2010, the parties filed a Joint Statement of Issues. On May 15, 2010, the Commission had received all position statements filed.

The Commission scheduled a hearing for May 17-21 and May 24-28, 2010. On May 17, 2010, the Commission convened an evidentiary hearing as scheduled. On that date, MAWC moved to suspend the hearing to discuss settlement.

The parties filed a comprehensive *Stipulation and Agreement* ("settlement") on May 25, 2010. The settlement supersedes an earlier partial stipulation and agreement and resolves all issues between the signatory parties, which includes all parties except the following non-signatory parties:

- City of Warrensburg,
- City of Jefferson,
- City of Joplin, and
- Utility Workers of America Local 335.

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<sup>10</sup> Missouri Industrial Energy Consumers is an association of the following entities: The Boeing Company, Hussmann Refrigeration, and Monsanto.

## MISSOURI-AMERICAN WATER COMPANY

486

19 Mo. P.S.C. 3d

The signatory parties represented that the non-signatory parties do not object to the settlement. No party filed any opposition to the settlement by the seven-day deadline that the Commission's regulations set,<sup>11</sup> so the Commission will deem the settlement to be unanimous.<sup>12</sup>

On June 11, 2010, Staff filed Exhibit No. 227, a synopsis comparing the settlement's proposed rate changes with the record. No party objected within the time set.<sup>13</sup> Therefore, the Commission will enter Exhibit No. 227 into the record.

### **III. Settlement**

The settlement provides that the parties will either separately reach agreement, or seek this Commission's decision, at a later date as to certain matters ("deferred matters"). Deferred matters appear in the settlement at paragraphs:

14. City of Riverside.
15. Triumph Foods, LLC.
16. Consolidation of Tariff.
17. Main Extensions.
18. Residential Fire Sprinkler Service.

This *Report and Order* includes no determination on the deferred matters in those paragraphs.

As to matters settled in those and other paragraphs, the Commission granted the parties' request to enter all pre-filed testimony into the record. The record thus contains substantial and competent evidence weighing in favor of the settlement's provisions.

The settlement waives procedural requirements that would otherwise be necessary before final decision,<sup>14</sup> including each commissioner's duty to either hear all the evidence or read the full record.<sup>15</sup> Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.<sup>16</sup> Therefore, the Commission incorporates the terms of the settlement into this *Report and Order*.

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<sup>11</sup> 4 CSR 240-2.115(2)(B).

<sup>12</sup> 4 CSR 240-2.115(2)(C).

<sup>13</sup> Order dated June 2, 2010.

<sup>14</sup> Section 536.060, RSMo 2000.

<sup>15</sup> Section 536.080.2, RSMo 2000.

<sup>16</sup> Section 536.090, RSMo 2000.

This *Report and Order* would be unnecessary altogether if MAWC dismissed its action, or if the Commission allowed the tariff to take effect by operation of law alone.<sup>17</sup> But that is not the outcome that the parties seek. The parties do not waive final decision.<sup>18</sup> On the contrary, the parties expressly ask for an “Order approving all of the specific terms and conditions of”<sup>19</sup> the settlement. The settlement’s terms include terms<sup>20</sup> and rates<sup>21</sup> for water and sewer service. The order must include a report of the Commission’s conclusions.<sup>22</sup> Therefore, the Commission independently finds and concludes as follows.

**IV. Jurisdiction**

Because the Commission is a creature of statute, the statutes determine the Commission’s jurisdiction, and the Commission should explain its jurisdiction in every case.<sup>23</sup>

The Commission’s jurisdiction generally includes every public utility:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

\* \* \*

(5) To all public utility corporations and persons whatsoever subject to the provisions of this chapter [386, RSMo] as herein defined [<sup>24</sup>]

Chapter 386, RSMo, defines public utility corporations to include:

(43) . . . every . . . water corporation . . . and sewer corporation, as these terms

<sup>17</sup> Section 393.150, RSMo 2000.

<sup>18</sup> Nor can they. *Weber v. Firemen’s Retirement System*, 872 S.W.2d 477, 480 (Mo. banc, 1994).

<sup>19</sup> Settlement, page 10 last paragraph to page 11.

<sup>20</sup> Settlement, pages 4-5, paragraphs 7-10.

<sup>21</sup> Settlement, page 2, paragraph 3.

<sup>22</sup> Section 386.420.2, RSMo 2000.

<sup>23</sup> *Greene County Nursing & Care Center v. Department of Social Servs.*, 807 S.W.2d 117, 118-19 (Mo. App., W.D. 1991).

<sup>24</sup> Section 386.250, RSMo 2000.

MISSOURI-AMERICAN WATER COMPANY

488

19 Mo. P.S.C. 3d

are defined in this section [<sup>25</sup>]

That section provides the following definitions:

(49) "Sewer corporation" includes every corporation . . . owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain . . . ;

\* \* \*

(59) "Water corporation" includes every corporation . . . owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water[<sup>26</sup>]

Also:

The commission shall:

(1) Have general supervision of all . . . water corporations and sewer corporations [<sup>27</sup>]

Those provisions include MAWC because MAWC provides sewer service to customers in three territories, and water service to customers in 12 territories, across Missouri.

Regulating MAWC's services and rates is specifically within the Commission's jurisdiction:

The commission shall:

\* \* \*

(11) Have power to require every . . . water corporation, and sewer corporation to file with the commission . . . schedules showing . . . and all rules and regulations relating to rates, charges or service [.]

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<sup>25</sup> Section 386.020, RSMo Supp. 2009.

<sup>26</sup> Id.

<sup>27</sup> Section 393.140, RSMo 2000.

MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

489

\* \* \*

No corporation shall charge . . . different compensation for any service . . . than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time [. <sup>28</sup>]

Such schedules—or “tariffs”—and are subject to the Commission’s decision:

Whenever there shall be filed with the commission by any [utility] any [tariff], the commission [may] enter upon a hearing concerning the propriety of such [tariff], upon its own initiative[. <sup>29</sup>]

This action began with the filing with the Commission of tariffs proposing changes in terms and rates for sewer service<sup>30</sup> and water service.<sup>31</sup>

**V. Service**

The standard for service is as follows:

[E]very water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate [. <sup>32</sup>]

Upon review of the record and the settlement, the Commission independently finds and concludes that the settlement’s proposed terms support safe and adequate service. Without further discussion, the Commission incorporates such provisions, as if fully set forth, into this *Report and Order*.

**VI. Rates**

The standard for rates is “just and reasonable,”<sup>33</sup> a standard founded on constitutional provisions, as the United States Supreme Court has explained:

Rates which are not sufficient to yield a

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<sup>28</sup> *Id.*

<sup>29</sup> Section 393.150.1, RSMo 2000.

<sup>30</sup> File No. SR-2010-0135.

<sup>31</sup> File No. WR-2010-0131.

<sup>32</sup> Section 393.130.1, RSMo Supp. 2009.

<sup>33</sup> *Id.* and Section 393.150.2, RSMo 2000.

MISSOURI-AMERICAN WATER COMPANY

490

19 Mo. P.S.C. 3d

reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>34</sup>

But the Commission must also consider the customers:

The rate-making process . . . i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.<sup>35</sup>

Further, that balancing has no single formula:

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>36</sup>

Moreover, making such pragmatic adjustments is part of the Commission's duty:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.<sup>37</sup>

And:

[T]he Commission [is] not bound to the use of any single formula or combination

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<sup>34</sup> *Bluefield Water Works & Improvement Co. v. Public Serv. Com'n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

<sup>35</sup> *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

<sup>36</sup> *Federal Power Com'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

<sup>37</sup> *Bluefield*, 262 U.S. at 692.



MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

491

of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.'<sup>38</sup>

Thus, the law requires a just and reasonable end, but does not specify a means:

Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts.<sup>39</sup>

The means employed in the settlement consists of "rate case usage parameters [<sup>40</sup>]" which is a system of policy decisions and accountancy conventions as follows.

**a. Rate Adjustment**

Determining whether a rate adjustment is necessary requires comparing MAWC's current net income to MAWC's revenue requirement. Revenue requirement is the amount of money that a utility may collect per year, which depends on the requirements for providing safe and effective service at a profit. Those requirements are tangible and intangible:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.<sup>41</sup>

That and similar holdings have led to a conventional analysis of the resources devoted to service, from which the Commission determines revenue requirement as follows.

To provide service, a utility devotes resources, which accounting conventions classify as either expense or investment. Expenses include operation, replacement of capital items as they depreciate

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<sup>38</sup> State ex rel. Associated Natural Gas Co. v. Public. Serv. Com'n, 706 S.W.2d 870, 873 (Mo. App., W.D. 1985) (citing Hope Natural Gas Co., 320 U.S. at 602-03).

<sup>39</sup> *Id.*

<sup>40</sup> Stipulation and Agreement, page 2, paragraph 3.

<sup>41</sup> **Hope Natural Gas Co.**, 320 U.S. at 603 (1944).

MISSOURI-AMERICAN WATER COMPANY

492

19 Mo. P.S.C. 3d

(“current depreciation”), and taxes on the return. Investment is the basis (“rate base”) on which the utility seeks profit (“return”). Return is therefore a percentage (“rate of return”) of rate base. Rate base includes capital assets (“gross plant”), less historic deterioration of such assets (“accumulated depreciation”), plus other items.

Those components relate to each other in the following formula:

$$\text{Revenue Requirement} = \text{Expenses} + \text{Return on Rate Base}$$

$$\text{Rate of Return} \times \text{Rate Base}$$

$$\text{Cost of Capital} \times \text{Capital Invested}$$

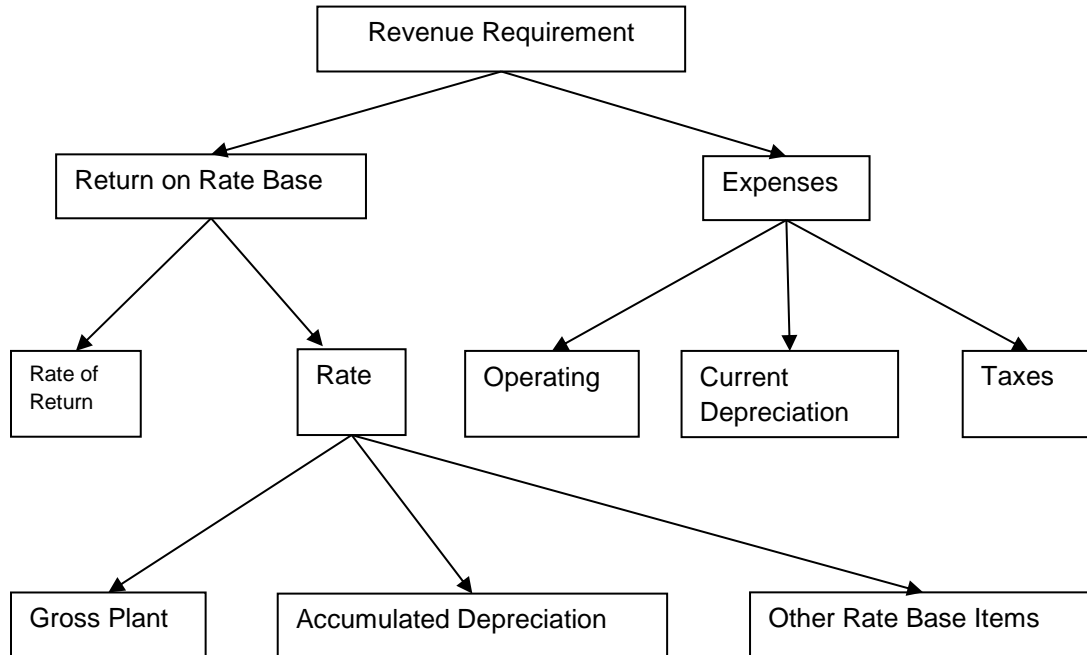
where:

$$\text{Capital Invested} = \text{Gross Plant} - \text{Accumulated Depreciation on Plant} + \text{Other Items}$$

and:

$$\text{Expenses} = \text{Operating Costs} + \text{Current Depreciation} + \text{Taxes}$$

Thus, the revenue requirement breaks down into its elements as follows.

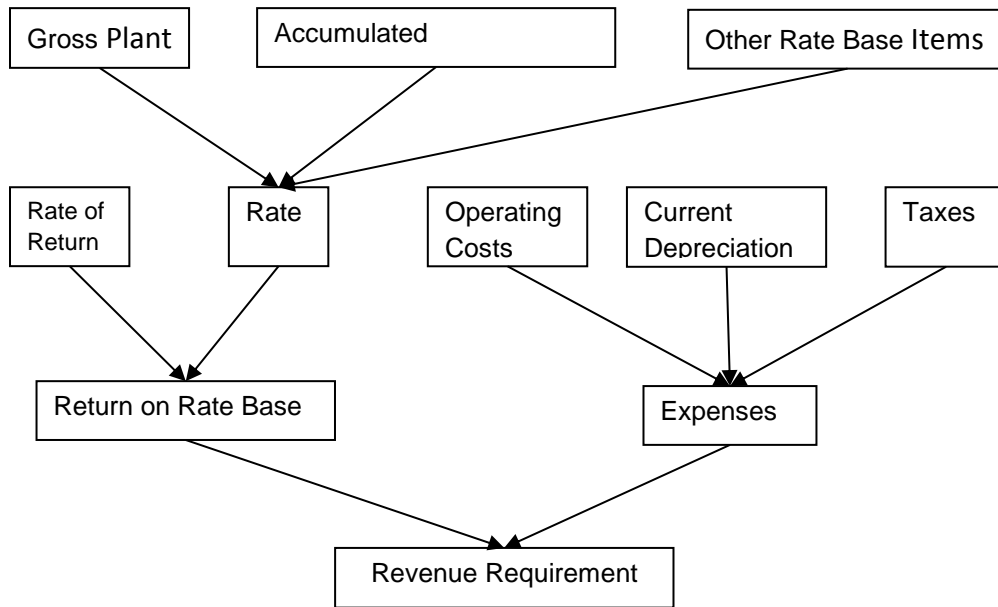


MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

493

Conversely, determining the revenue requirement means putting those elements together.



But determining that amount does not end the analysis, because the utility must collect that amount from its customers, and all customers need not receive identical treatment.

**b. Rate Design**

Rate design is how a utility distributes its revenue requirement among its various classes of customer. Customers vary as to the costs attributable to their service. Accordingly, their rates should reflect their costs, respectively. Just and reasonable rates may account for such differences among customers.

**c. Rates Proposed in the Settlement**

A utility has the burden of proving that increased rates are just and reasonable<sup>42</sup> by a preponderance of the evidence.<sup>43</sup> The

<sup>42</sup> Section 393.150.2, RSMo 2000.

## MISSOURI-AMERICAN WATER COMPANY

494

19 Mo. P.S.C. 3d

Commission has compared the substantial and competent evidence on the whole record with the settlement as to both rate adjustment and rate design. The Commission independently finds and concludes that the rates proposed in the settlement are just and reasonable rates. Therefore, the Commission incorporates such provisions, as if fully set forth, into this *Report and Order* without further discussion.

### **VII. Expedited Dates**

For those reasons, the Commission will reject the tariff and order the filing of new tariff sheets in compliance with this *Report and Order* ("compliance tariffs"). The parties request approval of such compliance tariffs for services provided on and after July 1, 2010. To accommodate that request, the Commission will order an expedited effective date for this *Report and Order*,<sup>44</sup> and expedited dates for the filing of compliance tariffs, the effective date of compliance tariffs,<sup>45</sup> and the filing of Staff's recommendation on the compliance tariffs.

### **VIII. Additional Report**

In addition, the Commission notes that the settlement's effect on the average residential customer varies widely among MAWC's service territories, as Exhibit 227, Attachment A shows. While the record contains substantial and competent evidence weighing in favor of the settlement's provisions, it does not describe the facts that lead to such disparity of rates. Therefore, the Commission will order a report as follows.

Staff, MAWC, and the Office of the Public Counsel shall jointly file a report setting forth, for each service in each service territory, the underlying facts that support each territory's cost of service. Such details may include, but are not limited to, variations in infrastructure requirements, age of each system, number of customers, or differences in water treatment to make water potable. Also, the report will show Exhibit 227, Attachment A with a sixth column that will estimate a single-tariff rate based on comparable usage for the average residential customer. The report will be drafted in a manner such that a layperson will be able to understand the differences in rates.

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<sup>43</sup> *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>44</sup> Section 386.490.3, RSMo 2000.

<sup>45</sup> Section 393.140(11), RSMo 2000.

MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

495

**THE COMMISSION ORDERS THAT:**

1. Exhibit No. 227 is entered into the record.
2. The tariff sheets filed by Missouri-American Water Company, to which the Commission assigned tariff number YW-2010-0310, are rejected.
3. Missouri-American Water Company shall file a new tariff consistent with this *Report and Order* no later than June 18, 2010.
4. As to the tariff described in ordered paragraph 3, the Commission's staff shall file its recommendation no later than June 21, 2010.
5. Staff, Missouri-American Water Company, and the Office of the Public Counsel shall file the report described in the body of this *Report and Order* no later than October 15, 2010.
6. The Commission makes no determination as to the deferred matters described  
in the body of this *Report and Order*.
7. This *Report and Order* shall become effective on June 18, 2010.

Jarrett, Gunn, and Kenney, CC., concur.  
Clayton, Chm., concurs with separate concurring opinion attached;  
and Davis, C., concurs with separate concurring opinion to follow;  
and certify compliance with the provisions of  
Section 536.080, RSMo.

\*NOTE: At time of publication, no opinion of Commissioner Davis has been filed.

\*NOTE: See page 152 for another order in this case.

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

While this Commissioner concurs in the Commission's Order Approving Unanimous Disposition Agreements and Approving Tariffs, these matters are representative of the most difficult decisions that face this Commission. During a time of difficult economic circumstances, increasing energy costs and significant instances of unemployment and underemployment, it is not a good time for any rate increase. Additionally, the increases in this order raise rates for some of Missouri American Water Company's (MAWC's) customers to some of the highest

## MISSOURI-AMERICAN WATER COMPANY

496

19 Mo. P.S.C. 3d

rates in the state for water or sewer service. The Commission has before it a unanimous agreement addressing the appropriateness of these rate increases and no party, including the Public Counsel, has raised any objection to its approval. The Commission must do a better job explaining why the Commission approves the request, what steps the Commission may be taking with regard to improving service for customers and why there is a great disparity of rates among the different service territories of MAWC.

First, the Commission has before it a Unanimous Stipulation and Agreement in which nearly all parties in the case have agreed. The parties that have signed the agreement include Missouri American Water Company, Office of the Public Counsel, MOPSC Staff, AG Processing Inc., Missouri Energy Group, Triumph Foods, LLC, Missouri Industrial Energy Consumers, Water District Intervenors, Metropolitan St. Louis Sewer District, City of Riverside, St. Louis Fire Sprinkler Association, and City of St. Joseph. Additionally, other parties who refused to sign have chosen to not object to the agreement, as is their right, which means that the agreement can be treated as unanimous. The fact that all parties agree or fail to object illustrates the fairness of the result and that the rates are based on fully audited and approved expenses and investments. The PSC staff conducted the audit and, having the most intimate knowledge of MAWC's books, has supported the varying increases among customers. Customers can have confidence that expenses have been deemed prudent, the expenses are necessary to provide safe and adequate service and the infrastructure investments are appropriate under the circumstances.

Secondly, the Commission undertook the challenge of revamping and reformulating its policies associated with Local Public Hearings in the service territories of MAWC. It has become a challenge in difficult economic times explaining the role of the Commission, its staff and the parties that appear before the Commission. In the past, customers have attended Local Public Hearings to express frustration and anger and leave the meetings without any additional understanding of the process or the personnel involved in decisions. In fact, customers regularly confuse the PSC with the company and question how the parties are in a conspiracy together with substantial rate increases in mind. The Commission, during this case, implemented new methods of communicating what role the PSC plays in the process. Customers were

## MISSOURI-AMERICAN WATER COMPANY

19 Mo. P.S.C. 3d

497

made aware that decisions are based on facts that come before us at evidentiary hearing and are not to be made arbitrarily or by simply estimating what the public can handle or tolerate. The Commission is in part a political entity but as an administrative tribunal must make its decisions on the evidentiary record.

For the first time in this Commissioner's tenure, PSC staff now provide comprehensive, east-to-understand explanations of the role of the Commission, the process and the parties. Customers are now formally introduced to Company leaders as well as customers' representative, the Office of Public Counsel. Customers are invited to ask questions directly of the parties to understand their role, their positions and their policies. It has been this Commissioner's goal that customers leave the Local Public Hearings with the knowledge that it is from among the positions stated by the parties, from which the Commission must choose in setting rates and regulatory policy. These decisions come from the evidentiary hearing or settlement and illustrate that the Commission is the unbiased arbiter and fair decision-maker. This process has best been described as not preventing customers from being angry, but rather, making sure that they fully understand why they are angry when they leave.

The Commission's Staff has investigated all customer complaints and concerns that have been brought to their attention and the Commission will be continually monitoring the quality of MAWC's services. In the event that customers feel that their specific concerns have not been addressed, they are invited to contact my office for further inquiry.

Lastly, this Commission is compelled to note the disparity in rates paid among the different service territories of MAWC. Monthly rates for water range from \$22.75 per month (Warrensburg Water) to \$65.86 per month (Parkville Water) based on comparable residential usage. Through filings in this case, those disparities were highlighted by the varying filings of the Company, the PSC staff and the Office of Public Counsel. Additionally, a number of communities engaged legal representation to ensure their fair treatment in the allocation of costs and corresponding rates. Many customers face increases of 35% while one community experiences a decrease in rates. This concept can be difficult to explain as to why customers using the same amount of water in varying parts of the state should be pay starkly different utility rates.

MISSOURI-AMERICAN WATER COMPANY

498

19 Mo. P.S.C. 3d

The reason for those differences relates to differences in underlying costs for each system. The Commission is continuing the practice of each community paying its own way, for the most part, in terms of its cost of service and the rates that pay that cost. Systems that have fewer customers, have newer systems or greater challenges in procuring clean, potable water may have higher costs. Systems with large numbers of customers, older depreciated systems or easily attainable water have lower costs. While the parties refuse to acknowledge any subsidy paid by some districts to support smaller or costly districts, it is clear that there are several districts paying lower than their costs including Brunswick and Warren County Sewer.

All parties have agreed that the costs for each district have been verified and approved. The primary answer as to why rates are different is simple: The costs for the districts are different and higher costs produce higher rates. However, we must do better in explaining why the costs vary. It is for this reason that the Commission will ask the PSC staff, MAWC and OPC to compile a report in laymen's terms explaining the basic factual differences among MAWC's districts so that the Commission can publish a guide to MAWC ratepayers. Customers have a right to know the reasons for the differences in rates and the general nature of the system serving each community. The guide will address past actions, present conditions as well as estimates for future investment that will have a future impact on rates. Lastly, the report will include an estimate of the monthly rate for water or sewer service if all districts were combined into a single district and everyone paid the same rate.

The Commission recognizes the difficult economic times that customers face, but the alternatives in this situation are extremely limited. The Commission's mandate is to make sure that investor-owned utilities offer "safe and adequate" service at "just and reasonable rates. While rates are increased in this case and, in some cases, are high, they are based on prudent expenses and investments in plant and the Commission believes that the new rates are "just and reasonable."

For the foregoing reasons, this Commissioner concurs.



## ASSESSMENT FISCAL YEAR 2011

19 Mo. P.S.C. 3d

499

### **In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2010**

*File No. AO-2010-0366  
Decided June 17, 2010*

**Public Utilities §1.** The Commission estimated its Fiscal Year 2011 assessment to be \$18,661,847.

#### **ASSESSMENT ORDER FOR FISCAL YEAR 2011**

Pursuant to 386.370 RSMo 2000, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2010. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$18,661,847. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$10,588,390. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$8,073,457.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$429,544. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2010, is estimated to be \$2,590,139. The Commission deducts these amounts and estimates its Fiscal Year 2011 Assessment to be \$15,642,164. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2009, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and

ASSESSMENT FISCAL YEAR 2011

500

19 Mo. P.S.C. 3d

other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric .....	\$ 6,431,419
Gas .....	\$ 4,832,249
Steam/Heating .....	\$ 41,769
Water .....	\$ 1,625,125
Sewer .....	\$ 590,586
Telephone.....	\$ 2,121,016
Total .....	\$15,642,164

The Commission allocates a proportionate share of the \$15,642,164 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2010. The assessment shall be due and payable on or before July 15, 2010, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2010, October 15, 2010, January 15, 2011, and April 15, 2011. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission  
Budget and Fiscal Services Department  
P.O. Box 360  
Jefferson City, MO, 65102-0360

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

501

**IT IS ORDERED THAT:**

1. The assessment for fiscal year 2011 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2010.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. This order shall become effective on July 1, 2010.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

**In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and consolidated with Maintain a Natural Gas Distribution System to Provide Gas Service in Pettis and Benton Counties, Missouri as a Certificated Area**

*File No. GA-2010-0289*

*Decided: June 30, 2010*

**Certificates §22.** The Commission granted a Certificate of Convenience and Necessity to Missouri Gas Utility, Inc., authorizing the company to construct and operate a gas distribution system in Pettis and Benton Counties, with the shareholders, rather than the ratepayers, accepting full financial responsibility of the success of the project.

**ORDER GRANTING CERTIFICATES**

MISSOURI GAS UTILITY, INC.

502

19 Mo. P.S.C. 3d

**OF CONVENIENCE AND NECESSITY**

**Background**

On April 19, 2010, Missouri Gas Utility, Inc. filed three applications for certificates of convenience and necessity. Those applications were designated as file numbers GA-2010-0289, GA-3010-0290 and GA-2010-0291. The Commission issued notice of the applications and invited those who might be interested to intervene. There were no requests to intervene. Thereafter, upon MGU's motion, the Commission consolidated the cases into File No. GA-2010-0289.

The Staff of the Commission filed its recommendation on June 21. MGU filed its response to Staff's recommendation on the same day, stating that it had no objections to the recommendation.

**The Applications**

Through the several applications filed by MGU, the company seeks to serve areas in Pettis and Benton counties. In each application, MGU states that the areas for which it seeks certification are developed, there is no natural gas supplier available in the areas, MGU has the ability to provide service in the areas by construction of new facilities, and potential new customers should be afforded the opportunity to take service from MGU.

With its applications, MGU also included a list of at least 10 residents in each the areas, a legal description of each service area, a feasibility study, a description of the route of construction and plans for financing. MGU states that it will require no additional franchises or permits from governmental bodies.

**Staff's Recommendation**

Staff recommends that the Commission approve the applications under the following conditions:

MGU's shareholders accept full financial responsibility for the success of this project, with no liability or responsibility falling on customers.

MGU shall use the depreciation rates currently on file with the Commission.

As ordered in Case No. GA-2009-0264, MGU shall submit to a rate review within 36 months after the effective date in Case No. GA-2009-0264. This review should also include consideration of the

MISSOURI GAS UTILITY, INC.

19 Mo. P.S.C. 3d

503

authority granted in these cases.

Staff's investigation also includes assurances that MGU has the operational capacity to provide gas service in the proposed service areas and that service to current customers would not be jeopardized.

Further, Staff informs the Commission that MGU's projected customer count after 5 years will be 24 residential or general service customers and 12 commercial customers. The rates to be charged are the same as those approved in Commission File No. GA-2009-0264. In that case, the Commission granted a certificate of convenience and necessity to the company to construct and operate a gas distribution system in both Pettis and Benton Counties. The certificate sought herein is an extension of the certificated authority granted therein. Thus, MGU currently has a certificate to serve areas adjacent to the areas the company seeks to serve through these three consolidated applications. Staff also states that the company provided supportive information that its current contracted capacity for its southern service area is sufficient to serve the additional areas.

**Discussion**

Under Commission rule<sup>1</sup> MGU must submit with its application certain documentation, i.e., a list of 10 residents in each area, a legal description of each area, a feasibility study, a description of the routes of construction and plans for financing. With its applications, MGU has supplied the documentation and statements required by the Commission's rule.

Missouri law<sup>2</sup> requires that MGU obtain Commission approval for a gas transmission line and to service an area. Prior to granting the authority, the Commission must determine that it is necessary or convenient for the public service. As set out in MGU's applications, there is no service in the proposed service areas. The proposed service areas are adjacent to areas that MGU currently serves. MGU has the ability to provide service in the areas. Additionally, the company has satisfied Staff that the company's current contracted capacity for its service area is sufficient to serve the additional service areas.

Based on the company's application and Staff's

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<sup>1</sup> Commission rule 4 CSR 240-3.205.

<sup>2</sup> Section 393.170.1

MISSOURI GAS UTILITY, INC.

504

19 Mo. P.S.C. 3d

recommendation, the Commission determines that such construction and the exercise of MGU's franchise, through the relief sought in its application, is necessary or convenient for the public service. The Commission will grant the company's requests.

**THE COMMISSION ORDERS THAT:**

1. Missouri Gas Utility, Inc. is granted a Certificate of Convenience and Necessity to construct, install, own, operate, control, manage, and maintain gas transmission lines and distribution systems for the provision of natural gas service in the requested areas in Pettis and Benton counties, as separately described in its applications under Commission File Nos. GA-2010-0289, GA-2010-0290 and GA-2010-0291.

2. The authority granted to Missouri Gas Utility, Inc., shall be subject to the following conditions:

- MGU's shareholders accept full financial responsibility for the success of these projects, with no liability or responsibility falling on customers;
- MGU shall use the depreciation rates currently on file with the Commission;
- As ordered in Case No. GA-2009-0264, MGU shall submit to a rate review within 36 months after the effective date in Case No. GA-2009-0264. This review should also include these newly certificated areas granted in this case; and
- MGU shall obtain adequate capacity on the pipeline to reliably serve all customers in this areas, including capacity necessary to serve any future growth.

3. Missouri Gas Utility, Inc. shall file, within 30 days of the effective date of this order, a revised tariff sheets reflecting the Commission grant of authority in this case.

4. This order shall become effective on July 10, 2010.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Jones, Senior Regulatory Law Judge

**In the Matter of a Proposed Rulemaking Regarding Electric Utility Renewable Energy Standard Requirements.**

*File No. EX-2010-0169*

*Decided July 6, 2010*

**Evidence, Practice and Procedure §27.** The applicants failed to show sufficient reason to rehear the Commission's final order of rulemaking.

**ORDER DENYING MOTION AND APPLICATIONS FOR REHEARING AND REQUESTS FOR STAY**

At its June 2, 2010, agenda meeting the Commission authorized its Secretary to file final orders of rulemaking to promulgate rules 4 CSR 240-3.156 and 4 CSR 240-20.100 regarding electric utility renewable energy standard requirements. As required by statute, the Commission delivered those rules to the Joint Committee on Administrative Rules (JCAR) on June 2. JCAR reviewed the rules and conducted multiple hearings. On July 1, in response to JCAR's concerns, the Commission issued a revised final order of rulemaking regarding 4 CSR 240-20.100.<sup>1</sup> The Commission ordered that the July 1 revised final order of rulemaking would become effective at 12:00 p.m. on July 6.

On June 30, 2010, applications for rehearing and requests for stay regarding the June 2 final order of rulemaking were filed by: Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company; Union Electric Company, d/b/a AmerenUE; the Missouri Energy Development Association (MEDA); and The Empire District Electric Company. The Office of the Public Counsel filed an application for rehearing and request for stay regarding the June 2 final order of rulemaking on July 1. Also on July 1, the Missouri Retailers Association<sup>2</sup> and the Missouri Industrial Energy Consumers filed applications for rehearing and requests for stay regarding both the June

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<sup>1</sup> The other rule, 4 CSR 240-3.156, merely directs the reader to the substantive rule found at 4 CSR 240-20.100 and has not drawn any comment or concern.

<sup>2</sup> The Missouri Retailers Association filed its July 1 motion for rehearing after the Commission's vote at its agenda meeting, but before the order was issued. The Association refiled its motion for rehearing on July 2.

## RENEWABLE ENERGY STANDARD REQUIREMENTS RULEMAKING

506

19 Mo. P.S.C. 3d

2 final order of rulemaking and the July 1 revised final order of rulemaking. On July 2, The Empire District Electric Company, Union Electric Company, d/b/a AmerenUE, the Office of the Public Counsel, and Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company, filed applications for rehearing and requests for stay regarding the July 1 revised final order of rulemaking.

Section 386.500.1, RSMo 2000, indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." The applicants have not shown sufficient reason to rehear either of the Commission's orders. The Commission will deny the motion and applications for rehearing and the requests for stay.

### **THE COMMISSION ORDERS THAT:**

1. The Application for Rehearing and Request for Stay filed by Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company regarding the June 2, 2010 final order of rulemaking is denied.

2. The Application for Rehearing and Request for Stay filed by Union Electric Company, d/b/a AmerenUE, regarding the June 2, 2010 final order of rulemaking is denied.

3. The Application for Rehearing and Request for Stay filed by the Missouri Energy Development Association regarding the June 2, 2010 final order of rulemaking is denied.

4. The Application for Rehearing and Request for Stay filed by The Empire District Electric Company regarding the June 2, 2010 final order of rulemaking is denied.

5. The Application for Rehearing and Request for Stay filed by the Office of the Public Counsel regarding the June 2, 2010 final order of rulemaking is denied.

6. The Motion for Rehearing filed by the Missouri Retailers Association regarding the June 2, 2010 final order of rulemaking and the July 1 revised final order of rulemaking is denied.

7. The Application for Rehearing and Request for Stay filed by the Missouri Industrial Energy Consumers regarding the June 2, 2010 final order of rulemaking and the July 1 revised final order of rulemaking is denied.

8. The Application for Rehearing or Revised Order of



RENEWABLE ENERGY STANDARD REQUIREMENTS RULEMAKING

19 Mo. P.S.C. 3d

507

Rulemaking and Request for Stay, or in the Alternative, Request for Clarification filed by the Office of the Public Counsel regarding the July 1, 2010 revised final order of rulemaking is denied.

9. The Application for Rehearing and Request for Stay filed by Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company regarding the July 1, 2010 revised final order of rulemaking is denied.

10. The Supplemental Application for Rehearing and Request for Stay filed by the Missouri Industrial Energy Consumers regarding the June 2, 2010 final order of rulemaking and the July 1, 2010 revised final order of rulemaking is denied.

11. The Application for Rehearing and Request for Stay filed by the Missouri Energy Development Association regarding the July 1, 2010 revised final order of rulemaking is denied.

12. The Second Application for Rehearing and Request for Stay filed by the Union Electric Company, d/b/a AmerenUE, regarding the July 1, 2010 revised final order of rulemaking is denied.

13. The Application for Rehearing and Request for Stay filed by The Empire District Electric Company regarding the July 1, 2010 revised final order of rulemaking is denied.

14. This order shall become effective upon issuance.

Clayton, Chm., Gunn, and Kenney, CC., concur;  
Davis and Jarrett, CC., dissent.

Morris L. Woodruff, Regulatory Law Judge

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT**

The law is clear and I strongly oppose the majority's decision with regard to its approval of filing with the Secretary of State the second/revised Order of Rulemaking of this Commission without compliance with the provisions of Section 536.073 .8 RSMo 2009. That section makes it clear that this agency shall "not file [any] disapproved portion of any rule with the secretary of state . . ." if the joint committee on administrative rules disapproves any rule or portion thereof. On July

## RENEWABLE ENERGY STANDARD REQUIREMENTS RULEMAKING

508

19 Mo. P.S.C. 3d

1, 2010 the Joint Committee on Administrative Rules voted to disapprove sections 4 CSR 240-20.100(2)(A) and 4 CSR 240-20.100(2)(B)<sup>2</sup> and to hold these sections in abeyance . In a letter dated July 1, 2010, by Senator Luann Ridgeway, Chairman Joint Committee on Administrative Rules to the Missouri Secretary of State, this information is communicated while also informing the Secretary to refrain from publishing the disapproved sections.<sup>1</sup>

The Missouri Public Service Commission, however, by a 3-2 vote, has determined that it will overlook the mandatory statutory obligations assigned to it under Section 536.073 .8 and has directed the Secretary of the Commission to **submit** the Amended Rule, in its complete form, without regard to the law. Because the rule being presented to the Secretary of State is not in conformance with the law, I respectfully dissent.

Focus on the outcome or effect of following the law is not a matter for deliberation by this Commission; rather, this Commission's charge is plain, straightforward and simple - that is, to follow the law, not to ignore it as it sees fit. John Adams once said, "we are a nation of laws, not men." I am afraid that the majority's action today turns that bedrock principle on its head.

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<sup>1</sup> State of Missouri, Joint Committee on Administrative Rules, Letter from the Honorable Luann Ridgeway, July 1, 2010 to the Honorable Secretary of State Robin Carnahan.

<sup>2</sup> Section 536.021 .1 requires this Commission to file, not submit the final Order of Rulemaking to the Secretary of State. I do not know what the majority means by the term "submit" but I assume it means something different than the term "file" in that they chose not to use "file" which is contained in the law.

**DISSENT OF COMMISSIONER JEFF DAVIS TO AUTHORIZE FILING  
OF RENEWABLE ENERGY STANDARDS RULES WITH THE  
SECRETARY OF STATE**

I respectfully dissent with the majority of my Commission colleagues in their decision to transmit the entire rule to the Secretary of State including those portions specifically disapproved of by the Joint Committee on Administrative Rules (JCAR). I concur with Commissioner Jarrett's dissent and wish to offer a few more brief thoughts.

**THE RULE ITSELF IS IMPROVED, BUT STILL NEEDS MUCH WORK:**

First, the rule is improved. Had JCAR not intervened Missourians would be stuck with a standard offer contract that would enrich the solar industry at everyone else's expense and utilities would have been facing costly litigation over penalty provisions that everyone now recognizes as being unconstitutional. I am glad my colleagues came to their senses and voted to amend these provisions.

More importantly, JCAR did its job and should be lauded for stopping the geographic sourcing provisions of this regulation. These two provisions will cost tens, possibly hundreds of millions of dollars in the aggregate and those costs will ultimately be born by the ratepayers if adopted.

The rate cap language is also problematic. I heard counsel for Renew Missouri as well as my colleagues at times talk about the intent of the voters or legislative intent.

Everyone needs to get one thing straight -the majority wasn't following the intent of the voters in crafting this section. My impression and that of every disinterested person I asked is that they thought they were voting for a one percent rate cap or at worst one percent per year, not one percent over what projected rates would be otherwise.

**THE LAW IS NOT SILLY PUTTY FOR AGENCIES TO MOLD AS THEY SEE FIT:**

I might not be as eloquent as Commissioner Jarrett quoting John Adams, but my concerns are the same. The law is the law. It's not some guideline that we can disregard at will and read ambiguity into where there is absolutely none. It's designed to limit our actions as public officials, not to be treated like silly putty that we can mold into whatever we want it to be in order to achieve whatever particular purpose we might have at the time, no matter how noble that purpose may be. There is a simple solution: if you don't like the law, change it. We have separation of powers for a reason -to prevent one branch of government from

## RENEWABLE ENERGY STANDARD LAW WORKSHOP

510

19 Mo. P.S.C. 3d

overreaching the other two. There was a whole lot of overreaching going on in this rulemaking docket.

### **I AM CONCERNED THAT THE PSC MAJORITY HAS DAMAGED OUR CREDIBILITY WITH THE MISSOURI GENERAL ASSEMBLY:**

Finally, I am deeply concerned that the Commission majority's initial interpretation of the statutes in submitting the rule to JCAR and its subsequent course of conduct has damaged our credibility with the Missouri General Assembly. We have to appear in front of the legislature to testify on our budget and on numerous other policy issues. We need the legislature's support and I question whether they are going to be inclined to listen to us after this debacle.

The legislature has a number of tools at its disposal when dealing with administrative agencies. It would be unfortunate, but understandable if the PSC budget gets reduced, our rulemaking authority gets restricted or nobody listens to us on an important policy issue as a result of these events. For all of these reasons, I respectfully dissent.

### **In the Matter of a Workshop File to Explore Legislative and Regulatory Means to Improve and Clarify Missouri's Renewable Energy Standard Law, Mo. Rev. Stat. §§ 393.1020 to 393.1030**

*File No. EW-2011-0031  
Decided August 5, 2010*

**Electric §9.** After the Joint Committee on Administrative Rules (JCAR) disallowed Commission rule concerning geographic sourcing requirement, Commission opened workshop to explore legislative and regulatory means to clarify Missouri's Renewable Energy Standards law, voted by the citizens of Missouri as Proposition C.

### **ORDER OPENING A WORKSHOP FILE TO EXPLORE LEGISLATIVE AND REGULATORY MEANS TO IMPROVE AND CLARIFY MISSOURI'S RENEWABLE ENERGY STANDARD LAW, MO. REV. STAT. §§ 393.1020 TO 393.1030**

In November 2008, the people of Missouri voted for Proposition C, (the "Renewable Energy Standard" law or the "RES"). The RES establishes percentages of renewable energy that must comprise investor-owned utilities' energy portfolio. The meaning to ascribe to the RES is unclear as to the source of renewable energy that may be counted toward compliance with the RES.

## RENEWABLE ENERGY STANDARD LAW WORKSHOP

19 Mo. P.S.C. 3d

511

The Staff of the Missouri Public Service Commission and various stakeholders worked diligently to implement the mandates of the statute while simultaneously accommodating multiple competing interests. Despite the best efforts of the stakeholders no agreement on the meaning or potential impact of the statutory language was reached.

The Commission, by a 3-2 vote, issued a final rule with the following language:

(A) Electric energy or RECs associated with electric energy are eligible to be counted towards the RES requirements only if the generation facility for the renewable energy resource is either located in Missouri or, if located outside of Missouri, the renewable energy resource is sold to Missouri electric energy retail customers. For renewable energy resources generated at facilities located outside Missouri, an electric utility shall provide proof that the electric energy was sold to Missouri customers.

(B) The amount of renewable energy resources or RECs associated with renewable energy resources that can be counted towards meeting the RES requirements are as follows:

2. If the facility generating the renewable energy resources is located outside Missouri, the allowed amount is the amount of megawatt-hours generated by the applicable generating facility that is sold to Missouri customers. For the purposes of subsections (A) and (B) of this section, Missouri electric energy retail customers shall include retail customers of regulated Missouri utilities as well as customers of Missouri municipal utilities and Missouri rural electric cooperatives.

4 CSR 240-20.100(2)(A) and (B)2.

This provision of the rule, commonly known as “geographic sourcing,” was predicated on the desire for the RES to spur and incent economic development in the state of Missouri.

The Joint Committee on Administrative Rules (JCAR), pursuant to Section 536.014, disallowed 4 CSR 240-20.100(2)(A) and (B)2; therefore, uncertainty regarding geographic sourcing requirements remains. What is certain is that litigation will ensue. Litigation and uncertainty will likely delay proper and complete implementation of the RES. For this reason, clarity regarding geographic sourcing is necessary.

A legislative clarification of the RES, as well as regulatory clarification of 4 CSR 240-20.100(2)(A) and (B)2 will add certainty and, hopefully, minimize costly litigation. The Commission asks stakeholders

## RENEWABLE ENERGY STANDARD LAW WORKSHOP

512

19 Mo. P.S.C. 3d

to resume discussions in order to resolve the issue of geographic sourcing through developing legislative proposals and regulatory options that will promote the development of renewable energy in the state of Missouri while protecting retail customers.

### **THE COMMISSION ORDERS THAT:**

1. This file is established to gather information and explore legislative proposals to clarify the RES.

2. This file is established to gather information and explore regulatory proposals and to clarify and/or revise 4 CSR 240-20.100(2)(A) and (B)2.

3. This file is established to gather information and explore legislative and regulatory options and proposals designed to clarify other areas of uncertainty that directly impact 4 CSR 240-20.100(2)(A) and (B)2.

4. The stakeholders and interested parties shall file written position statements no later than October 1, 2010. The written position statements should address, at a minimum, the following questions:

A. What are the legal, economic and public policy consequences and implications of requiring electric energy or RECs associated with electric energy for compliance with the RES to come from a generation facility located in Missouri?

B. What are the legal, economic and public policy consequences and implications of allowing electric energy or RECs associated with electric energy for compliance with the RES to come from a generation facility located outside of Missouri, only if the energy for compliance with the RES is sold to Missouri customers?

C. What are the legal, economic and public policy consequences and implications of allowing electric energy or RECs associated with electric energy for compliance with the RES to come from a generation facility located outside of Missouri, only if the energy for compliance with the RES is sold to retail customers located within the Regional Transmission Organization or Independent

RENEWABLE ENERGY STANDARD LAW WORKSHOP

19 Mo. P.S.C. 3d

513

Transmission System Operator in which Missouri is located?

D. What are the legal, economic and public policy consequences and implications of allowing electric energy or RECs associated with electric energy for compliance with the RES to come from a generation facility located anywhere outside of Missouri irrespective of the location of the delivery of the energy.

E. Which of the above potential scenarios (as set forth in A, B, C, or D above) are legally permissible and/or supportable under the current statute?

F. In answering the questions set forth in A-D, stakeholders should also discuss the operation of the 1% retail rate impact under each of the scenarios.

5. The Commission invites the stakeholders and interested parties to file suggested statutory and/or regulatory language regarding geographic sourcing.

6. The Commission invites the members of the general public, interested parties and stakeholders to submit initial written comments by October 1, 2010.

7. A copy of this notice shall be sent by U.S. mail or electronic mail to those potentially interested people or organizations who participated in the previous workshop, EW-2009-0324, and in the rulemaking, EX-2010-0169.

8. The Commission's Public Information Office shall make this notice available to the news media of this state and to the members of the General Assembly.

9. This order shall become effective immediately upon issuance.

Nancy Dippell, Deputy Chief Regulatory  
Law Judge, by delegation of authority  
pursuant to Section 386.240, RSMo 2000.

ENERGY EFFICIENCY ADVISORY GROUPS AND  
COLLABORATIVES

514

19 Mo. P.S.C. 3d

**In the Matter of the Chairman's Request for A Status Report  
Regarding Energy Efficiency Advisory Groups and Collaboratives**

*File No. AO-2011-0035  
Decided August 10, 2010*

**Public Utilities §1.** Staff directed to prepare a summary report about existing energy efficiency advisory groups and collaboratives regarding Missouri's investor-owned electric and natural gas utilities.

**CHAIRMAN'S REQUEST FOR STATUS REPORT REGARDING  
ENERGY EFFICIENCY ADVISORY GROUPS AND  
COLLABORATIVES**

Over the past several years, the Missouri Public Service Commission has approved the creation of energy efficiency advisory groups and collaboratives to examine energy efficiency issues facing each of Missouri's investor-owned electric and natural gas utilities. Chairman Robert Clayton requests that the Commission's Staff prepare a brief (no more than one to two pages per group or collaborative) summary describing the work of each collaborative, a listing of those entities involved in each collaborative, a description of the programs that have been put in place, a description of which programs are working and which are not, specifically identify success stories and on-going challenges, funding level adequacy, level of cooperation among stakeholders, and any other issues Staff determines should be brought to the attention of the Commission. In preparing the summaries of activity, the reports should identify areas of consistency among service territories and utilities, as well as areas of stark contrast.

**THE COMMISSION ORDERS THAT:**

1. Staff shall file the summary report described in the body of this order no later than September 15, 2010.
2. This order shall become effective immediately upon issuance.

Woodruff, Chief Regulatory Law  
Judge, by delegation of authority pursuant  
to Section 386.240, RSMo 2000.



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

515

**In the Matter of Lake Region Water & Sewer Company's Application  
to Implement a General Rate Increase in Water and Sewer Service**

*File Nos. SR-2010-0110 & WR-2010-0111  
Decided August 18, 2010*

**Evidence, Practice and Procedure §10.** Statements in an answer filed by a utility owner in an unrelated civil case did not constitute a judicial admission against interest of the utility because although the Commission took administrative notice of the legal file, the civil case was not between the same parties and did not involve the same basic facts or claims for relief, the answer was merely an outline of anticipated proof and not an admission of fact, and the statements in the answer were not responsive to any allegations or supportive of the theory asserted.

**Water §8.** Availability fees collected by the utility from lot owners prior to the owners' connection to the utility's water distribution system were a "commodity" and "service" and subject to the Commission's jurisdiction because the utility had direct use of or access to this revenue stream.

**Water §16.** The Commission determined that it would be unjust and unreasonable to impute to the utility revenue from availability fees collected by the utility from lot owners prior to the owners' connection to the utility's water distribution system.

**Water §18.** The Commission determined that the utility should recover in rates costs for executive management fees on a per hour basis and rate case expenses amortized over three years.

**REPORT AND ORDER**

**APPEARANCES**

APPEARING FOR LAKE REGION WATER & SEWER COMPANY:

**Mark. W. Comley**, Newman, Comley & Ruth P.C., 600 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102.

APPEARING FOR THE FOUR SEASON RACQUET AND COUNTRY CLUB  
CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC.:

**Craig S. Johnson**, Berry Wilson, L.L.C., 304 East High Street, Suite 100, P.O. Box 1606, Jefferson City, MO 65102.

APPEARING FOR THE FOUR SEASONS LAKESITES PROPERTY OWNERS  
ASSOCIATION, INC.:

**Lisa C. Langeneckert**, Sandberg Phoenix & Von Gontard P.C., 515

LAKE REGION WATER & SEWER COMPANY

516

19 Mo. P.S.C. 3d

North Sixth Street, Suite 1500, St. Louis, MO 63101.

APPEARING FOR THE OFFICE OF THE PUBLIC COUNSEL AND THE PUBLIC:

**Christina Baker**, Assistant Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.

APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:

**Shelley Brueggemann**, Chief Litigation Attorney, **Rachel Lewis**, Deputy Counsel, and **Jamie Ott**, Legal Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102, for.

**REGULATORY LAW JUDGE:** Harold Stearley, Senior Regulatory Law Judge

**Syllabus:**

**I. Procedural History**

**A. Tariff Filings, Notice and Interventions, and Procedural Schedule**

On October 7, 2009, Lake Region Water & Sewer Company (“Lake Region” or “LRWS”) filed tariff sheets designed to implement a \$331,223 general rate increase for its water and sewer service. The tariff sheets bear an effective date of November 6, 2009.<sup>1</sup> In order to allow sufficient time to study the effect of the tariff sheets and to determine if the rates established by those sheets was just, reasonable, and in the public interest, the tariff sheets were suspended until September 6, 2010.<sup>2</sup> On December 7, Lake Region revised its rate increase request down from \$331,223 to \$215,622.

The Commission granted requests for intervention to Four Season Racquet and Country Club Condominium Property Owners Association, Inc. and Four Seasons Lakesites Property Owners Association, Inc., and set a procedural schedule culminating in an

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<sup>1</sup> Lake Region also filed prepared direct testimony in support of its requested rates.

<sup>2</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Suspension Order and Notice*, issued October 8, 2009; *Second Suspension Order and Notice*, issued October 9, 2009. EFIS is the Commission’s Electronic Information and Filing System.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

517

evidentiary hearing on March 29 – April 2, 2010.<sup>3</sup> The Commission also reserved time for a True-Up hearing on April 26, 2010.

### **B. Test year and True-Up**

The test year is a central component in the ratemaking process. Rates are usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.<sup>4</sup> From these four factors is calculated the “revenue requirement,” which, in the context of rate setting, is the amount of revenue ratepayers must generate to pay the costs of producing the utility service they receive while yielding a reasonable rate of return to the investors.<sup>5</sup> A historical test year is used because the past expenses of a utility can be used as a basis for determining what rate is reasonable to be charged in the future.<sup>6</sup>

The parties agreed to, and the Commission adopted, a test year of twelve months ending on December 31, 2008 and further agreed to update this test year to include known and measurable changes through September 30, 2009.<sup>7</sup> The Commission also established the True-Up period, if one was required, to run through March 31, 2010, to reflect any significant and material impacts on Lake Region’s revenue

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<sup>3</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Order Adopting Procedural Schedule* issued November 17, 2009; *Order Setting Start Time, Location and Conditions For Hearings*, issued November 24, 2009.

<sup>4</sup> *State ex rel. Union Electric Company v. Public Service Comm’n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

<sup>5</sup> *State ex rel. Capital City Water Co. v. Public Service Comm’n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

<sup>6</sup> See *State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Comm’n*, 585 S.W.2d 41, 59 (Mo. banc 1979).

<sup>7</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Letter and Tariff*, filed on October 7, 2009; *Staff’s Response to Position Regarding Test Year and True-up Period*, filed on November 16, 2009; *The Office of the Public Counsel’s Recommendations Regarding Test Year and True-Up*, filed on November 16, 2009; *Four Seasons Laksites Property Owners Association, Inc. Test Year and True-Up Recommendation*, filed on November 16, 2009; *Four Season Racquet and Club Condo Property Owners Assoc., Inc Test Year and True-Up Recommendation*, filed on November 16, 2009; *Staff’s Response to the Office of Public Counsel’s Recommendations Regarding Test Year and True-up Period*, filed on November 24, 2009; *The Office of the Public Counsel’s Response to Staff’s Objection Regarding Test Year and True-Up*, filed on November 25, 2009; *Order Regarding Test Year and True-Up Period*, issued December 1, 2009.

## LAKE REGION WATER & SEWER COMPANY

518

19 Mo. P.S.C. 3d

requirement.<sup>8</sup>

The use of a True-Up audit and hearing in ratemaking is a compromise between the use of a historical test year and the use of a projected or future test year.<sup>9</sup> It involves adjustment of the historical test year figures for known and measurable subsequent or future changes.<sup>10</sup> However, while the “test year as updated” involves all accounts, the True-Up is generally limited to only those accounts necessarily affected by some significant known and measurable change, such as a new labor contract, a new tax rate, or the completion of a new capital asset. Both the “test year as updated” and the True-Up are devices employed to reduce regulatory lag, which is “the lapse of time between a change in revenue requirement and the reflection of that change in rates.”<sup>11</sup>

### **C. Local Public Hearing**

On November 20, 2009, The Office of the Public Counsel (“Public Counsel”), on behalf of all of the parties, filed recommendations for the time, date and location for a local public hearing to give Lake Region’s customers an opportunity to respond to the requested rate increase.<sup>12</sup> The hearing was held at City Hall, in the City of Osage Beach, on January 26, 2010. At the conclusion of the local public hearing, the Commission had received the sworn testimony of four witnesses.<sup>13</sup> No exhibits were offered or admitted into the record.<sup>14</sup> All of the parties were given the opportunity to cross-examine the witnesses.

### **D. Stipulations**

On February 22, 2010, Lake Region, Staff and the Four Seasons Racquet and Country Club Condominium Owners Association, Inc. (“Racquet Club”) filed a partial nonunanimous stipulation.<sup>15</sup> This

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<sup>8</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *Order Regarding Test Year and True-Up Period*, issued December 1, 2009.

<sup>9</sup> *St. ex rel. Missouri Public Service Comm’n v. Fraas*, 627 S.W.2d 882, 887-888 (Mo. App. 1981).

<sup>10</sup> *Id.* at 888.

<sup>11</sup> *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Report & Order*, issued December 31, 1996), at p. 8.

<sup>12</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *The Office of the Public Counsel’s Request for Local Public Hearing*, filed on November 20, 2009.

<sup>13</sup> Transcript, pp. 1-21.

<sup>14</sup> *Id.*

<sup>15</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *Partial Nonunanimous Stipulation Respecting Adjustments to Sewer Charges Applicable to Intervenor Four Seasons Racquet and Country Club Condominium Owners Association, Inc.*, filed February 22, 2010.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

519

stipulation addressed potential adjustments to sewer charges applicable to the Racquet Club and resolved all issues between it and Lake Region. No other party objected to the stipulation. Because the stipulation was unopposed, the Commission treated the stipulation as though it were unanimous, found it to be reasonable and approved it on April 14, 2010 to become effective on April 24, 2010.<sup>16</sup>

On March 16, 2010, the parties jointly filed a Unanimous Stipulation of Undisputed Facts. The Commission, having fully examined this stipulation, will address the specifics of the agreement in its findings of facts and conclusions of law.

### **E. Issues List**

The parties jointly filed the list of issues they believed required decisions from the Commission. Notably, the parties stressed:

The statements of issues in the list of issues below are not necessarily agreed to by all parties as the best or even an appropriate characterization of the issue; therefore, some parties may state the issue differently in their pleadings and briefs. Further, parties may address one or more issues not clearly included in the list of issues, or parties may state they consider an issue listed to not be a contested issue or a proper issue for Commission consideration. Specifically, LRWS, as footnoted, objects to inclusion of the issues pertaining to availability fees. Further, the Commission should not construe the list of issues here to impair any party's ability to argue about any of the listed issues or related matters, or to restrict the scope of any party's response to arguments made by other parties.<sup>17</sup>

Although the parties are not in agreement, their list included the following:

1. What is the appropriate level of executive

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<sup>16</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *Order Approving Partial Nonunanimous Stipulation Respecting Adjustments to Sewer Charges Applicable to Intervenor Four Seasons Racquet and Country Club Condominium Owners Association, Inc.* On May 27, 2010, Lake Region and the Racquet Club filed a motion requesting an extension of time to implement part of their agreement, specifically regarding the timeline for installing certain flow meters. The Commission granted that extension on June 1, 2010.

<sup>17</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *List of Issues and Order of Opening and Cross-Examination*, filed March 23, 2010.

LAKE REGION WATER & SEWER COMPANY

520

19 Mo. P.S.C. 3d

management compensation to be included in LRWS's revenue requirement for setting LRWS's rates?

2. Should charges for availability fees collected from owners of undeveloped lots in LRWS's service territory and billed and retained by an affiliate company be classified as LRWS revenue or applied against rate base?

(LRWS objects to the inclusion of this issue on grounds that it is beyond the jurisdiction of the Commission and therefore is irrelevant. Additionally, LRWS objects to the form of the issue in that there is no evidence that "an affiliate company" bills and retains such fees.)

3. If the Commission finds charges for availability fees of undeveloped lots are not to be classified as LRWS revenue, or applied against rate base, then what costs should be identified and excluded from LRWS's cost of service?

(LRWS objects to the inclusion of this issue on grounds that it is beyond the jurisdiction of the Commission and therefore is irrelevant. LRWS objects to this issue additionally on those grounds set forth in its Motion to Strike which was filed with the Commission on March 22, 2010.)

The Commission did not adopt the parties' list of issues, or limit the scope of the issues in this matter.

**F. Evidentiary Hearing**

The evidentiary hearing was convened on March 29, 2010, and recessed on March 31, 2010.<sup>18</sup> The Commission directed its Staff to conduct further discovery and set a deadline for requesting additional hearing time.<sup>19</sup>

On April 26, 2010, the Commission convened the True-Up

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<sup>18</sup> Transcript, Volumes 3, 4 and 5.

<sup>19</sup> See EFIS docket Entries for *Order Directing Discovery and Directing Filing*, issued April 8, 2010.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

521

hearing.<sup>20</sup> Testimony was adduced with regard to Lake Region completing and placing into service a new sewer pumping station and sewer force main. The new facilities were placed into service approximately on March 10, 2010.<sup>21</sup> An additional issue surfaced during the True-Up concerning rate case expense. The parties presented differing positions regarding how much rate case expense should be recovered, and the amortization period.

On June 24, 2010, the Commission reconvened the evidentiary hearing.<sup>22</sup> At the hearing, the Commission received into evidence a number of documents and affidavits related to the additional discovery Staff conducted.

### **G. Case Submission**

The evidentiary hearing concluded on June 24, 2010, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of 10 witnesses and received some 71 exhibits into evidence. Post-hearing briefs and proposed findings of fact and conclusions of law were filed in stages according to the post-hearing procedural schedule, as modified and revised. The final post-hearing briefs, addressing the issue of availability fees, were filed on July 16, 2010. The case was deemed submitted for the Commission's decision on that date.<sup>23</sup>

## **II. Findings of Fact**

### **A. The Parties**

**1. Lake Region Water & Sewer Company** ("Lake Region") is a Missouri corporation with its principal office and place of business located at 62 Bittersweet Road, Four Seasons, Missouri and/or P.O. Box 9, Lake Ozark, Missouri 65049. Lake Region provides water and sewer service to approximately 1400 customers<sup>24</sup> in Camden and Miller Counties and the community of The Village of Four Seasons, all within its Missouri

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<sup>20</sup> Transcript, Volume 6.

<sup>21</sup> Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

<sup>22</sup> Transcript, Volume 8.

<sup>23</sup> "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

<sup>24</sup> Lake Region Exh. #4, Summers Direct, p. 3; Transcript, Volume 3, p. 175; Staff Exh. 4, Prenger Surrebuttal, p. 4; Staff Exh. 5, Unanimous Stipulation of Undisputed Facts, paragraph 16; Staff Exh. 7, Cost of Service Report, p. 6; Staff Exh. 9, Harris Surrebuttal, pp. 14-15 Staff Exh. 13, Featherstone Direct, p 8; Staff Exh. 18, Staff Accounting Schedules True-Up Direct, Accounting Schedules 4-1.

## LAKE REGION WATER & SEWER COMPANY

522

19 Mo. P.S.C. 3d

service territory.<sup>25</sup> Lake Region's customer count is composed of: (1) 638 water customers on Shawnee Bend, (2) 615 sewer customers on Shawnee Bend, and (3) 147 sewer customers on Horseshoe Bend.<sup>26</sup> Lake Region estimates that approximately 70% of its customers are seasonal and 30% are full-time residents.<sup>27</sup> While the majority of Lake Region's customers are single family residential, approximately 40% of the company's revenues are derived from commercial sewer customers located in the Horseshoe Bend area.<sup>28</sup>

**2. Four Season Racquet and Country Club Condominium Property Owners Association, Inc.** ("Racquet Club") is a Missouri not-for-profit corporation organized and operating under Missouri law with its principal office and place of business located at 251 Racquet Club Drive, Box 2370, Lake Ozark, Missouri, 65049. The Racquet Club provides condominium association services, including the purchase of water and sewer services, on behalf of its members and has purchased water and sewer services from Lake Region, or its affiliates, on behalf of over 500 condominium property owners. The Racquet Club interfaces with Lake Region on behalf of the condominium property owners with respect to service installation, service maintenance, service repair, and the propriety of Lake Region charges.<sup>29</sup>

**3. Four Seasons Lakesites Property Owners Association, Inc.** ("Lakesites POA") is a nonprofit corporation organized under the laws of the state of Missouri with its principal office and place of business located at 36 Vintage Landing, Four Seasons, Missouri 65049. Lakesites POA represents approximately 7100 property owners on the Shawnee Bend and Horseshoe Bend peninsulas with the mission "to act as an objective body while maintaining and enhancing property values, representing property owners by enforcing the Declaration of Restrictive Covenants and being financially responsible, all in the best interest of the community." Approximately one quarter of the members of the Lakesites POA have properties that are served by Lake Region and Lakesites POA's members have purchased significant amounts of water and sewer

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<sup>25</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Letter and Tariffs*, filed October 7, 2009; Lake Region Exh. #4, Summers Direct, pp. 1-5.

<sup>26</sup> See Footnote Number 25, *supra*.

<sup>27</sup> Staff Exh. 7, Cost of Service Report, p. 6.

<sup>28</sup> Lake Region Exh. #4, Summers Direct, pp. 1-5.

<sup>29</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Application to Intervene in Opposition to Rate Increase*, filed October 26, 2009.



## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

523

services from Lake Region for those properties.<sup>30</sup>

**4. The Office of the Public Counsel** (“Public Counsel”) “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”<sup>31</sup> Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”<sup>32</sup>

**5. The Staff of the Missouri Public Service Commission** (“Staff”) is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.<sup>33</sup> Staff is represented by **The General Counsel of the Missouri Public Service Commission** who “represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”<sup>34</sup>

### **B. Witnesses**

**6.** The Commission finds that the following witnesses are subject matter experts for their individual fields of expertise as identified

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<sup>30</sup> See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Application to Intervene of the Four Seasons Lakesites Property Owners Association, Inc.*, filed October 28, 2009.

<sup>31</sup> Section 386.710(2); Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

<sup>32</sup> Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel “shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

<sup>33</sup> Commission Rules 4 CSR 240-2.010(11) and 2.040(1).

<sup>34</sup> Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

LAKE REGION WATER & SEWER COMPANY

524

19 Mo. P.S.C. 3d

in their testimony and their associated exhibits admitted into the record.<sup>35</sup>

a. **John R. Summers** is the General Manager of Public Water Supply District Number Four of Camden County. In this capacity he serves as the de facto General Manager for Ozark Shores Water Company, The Meadows Water Company and Lake Region Water & Sewer Company in Missouri as well as Northern Illinois Investment Group which operates a small water system in Illinois. He has earned a Bachelor of Science Degree in Accounting from Missouri Valley College and a Masters of Business Administration from Rockhurst University. He currently holds a Class D Wastewater Treatment license and a DS I Water Distribution license issued by the Missouri Department of Natural Resources.

Mr. Summers is a subject matter expert in the fields of accounting, business management and public utilities operation and management because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his

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<sup>35</sup> The qualification of a witness as an expert rests within the factfinder's discretion. *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with **any** scientific, technical or other specialized knowledge. (Emphasis added). The standard established in Section 490.065 applies to administrative contested cases. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. The extent of an expert's experience or training in a particular field goes to the weight rather than the admissibility of the testimony." *In re Interest of C.L.M.*, 625 S.E.2d 613, 615 (Mo. banc 1981). An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 267 S.W.3d 700, 710 (Mo. App. 2008). The expert is not required to be an expert in all subject matters in order to assist the finder of fact. As with all witnesses and all subject matter expert witnesses, any proven deficiencies in any specific testimony are evaluated in terms of the weight and credibility to be given to that specific testimony. Witness credibility is a matter for the factfinder, "which is free to believe none, part, or all of the testimony." *In re C.W.*, 211 S.W.3d 93, 99 (Mo. banc 2007).

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

525

knowledge, skill, experience, training, and education.<sup>36</sup>

b. **Vernon Stump** is the President of Lake Region. He has earned a Bachelor in Science Degree in Civil Engineering from the University of Missouri, a Masters Degree in Civil Engineering from the University of California and a Doctor of Philosophy Degree in Sanitary Engineering from the University of Missouri. He has over 40 years of experience in the water and sewer industry.

Mr. Stump is a subject matter expert in the field of engineering specifically in regard to water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.<sup>37</sup>

c. **Martin Hummel** is employed by the Commission as a Utility Engineering Specialist III in the Water and Sewer Department. He has earned a Bachelor of Science Degree in Engineering and a Bachelor of Science Degree in Education Science from the University of Missouri.

Mr. Hummel is a subject matter expert in the field of engineering specifically in regard to water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.<sup>38</sup>

d. **James M. Russo** is employed by the Commission as a Rate and Tariff Examination Supervisor in the Water and Sewer Department. He has

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<sup>36</sup> Lake Region Exh. 4, Summers Direct, pp. 1-2; Transcript pp. 216-366, 689-715.

<sup>37</sup> Lake Region Exh. 2, Stump Rebuttal, p. 1 and Attached Exhibit 1; Transcript pp. 118-144, 559-654.

<sup>38</sup> Staff Exh. 1, Hummel Direct, pp. 1-9, and Schedule 1.

LAKE REGION WATER & SEWER COMPANY

526

19 Mo. P.S.C. 3d

earned a Bachelor of Science Degree in Accounting from California State University. Witness Russo is the case coordinator for the Utility Operations Division.

Mr. Russo is a subject matter expert in the fields of accounting, auditing and regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.<sup>39</sup>

e. **Bret G. Prenger** is employed by the Commission as a Regulatory Auditor. He holds a Bachelor of Science Degree in Accounting from Missouri State University.

Mr. Prenger is a subject matter expert with regard to auditing and accounting because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.<sup>40</sup>

f. **V. William Harris** is employed by the Commission as a Regulatory Auditor. He holds a Bachelor of Science Degree in Business Administration with a major in Accounting from Missouri Western State College. He is a Certified Public Accountant.

Mr. Harris is a subject matter expert with regard to auditing and accounting because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his

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<sup>39</sup> Staff Exh. 2, Russo Direct, pp. 1-4, and Schedule 1.

<sup>40</sup> Staff Exh. 7, Cost of Service Report, Appendices, p. 25; Staff Exh. 4, Prenger Surrebuttal, pp. 1-7.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

527

knowledge, skill, experience, training, and education.<sup>41</sup>

g. **Cary G. Featherstone** is employed by the Commission as a Utility Regulatory Auditor. He holds a Bachelor of Science Degree in Economics from the University of Missouri. Witness Featherstone is sponsoring Staff's Cost of Service Report and is case coordinator for the Utility Services Division.

Mr. Featherstone is a subject matter expert with regard to auditing, accounting and regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.<sup>42</sup>

h. **James A. Merciel, Jr.** is employed by the Commission as Utility Regulatory Engineering Supervisor in the Water and Sewer Department. He holds a Bachelor of Science Degree in Civil Engineering from the University of Missouri. He is a Registered Professional Engineer.

Mr. Merciel is a subject matter expert with regard to operation and engineering and maintenance of water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.<sup>43</sup>

i. **Ted Robertson** is employed by the Office of the Public counsel as a Public Utility Accountant. He holds a Bachelor of Science Degree in Accounting from

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<sup>41</sup> Staff Exh. 7, Cost of Service Report, Appendices, p. 18; Staff Exh. 9; Harris Surrebuttal, pp. 1-16; Transcript pp. 144-164.

<sup>42</sup> Staff Exh. 13, Featherstone Direct, pp. 1-3, and Schedule CGF 1; Transcript pp. 411-479, 718-752.

<sup>43</sup> Staff Exh. 15, Merciel Direct, pp. 1-2 and Attachment 1; Transcript pp. 479-547.

LAKE REGION WATER & SEWER COMPANY

528

19 Mo. P.S.C. 3d

Southwest Missouri State University. He is a Certified Public Accountant.

Mr. Robertson is a subject matter expert with regard to auditing, accounting and the regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determine facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Robertson is not a subject matter expert in the field of engineering.<sup>44</sup>

**7.** Witness **Nancy Cason**, called by Lakesites POA, is the President of the Association.<sup>45</sup>

**8.** Witness Cason did not provide testimony involving scientific, technical and other specialized knowledge, but rather provided testimony regarding her personal knowledge on the issue of availability fees.<sup>46</sup> Witness Cason is not a subject matter expert.<sup>47</sup>

**9.** The following additional members of the Commission's Staff participated with auditing Lake Region and produced numerous accounting schedules that were admitted into evidence: Shana Atkinson, Nila Hagemeyer, and Karen Herrington. These Staff members also submitted pre-filed testimony as part of Staff's Cost of Service Report, but they were not called to the stand by any party to give live testimony. The components of their accounting schedules and cost of service report are verified by affidavit.<sup>48</sup>

**10.** The Commission finds that any given witness's qualifications and overall credibility are not dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will

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<sup>44</sup> OPC Exh. 2, Robertson Direct, pp. 1-2, and Schedule TJR-1; Transcript pp. 164-216, 556-559 752-755.

<sup>45</sup> Lakesites POA Exh. 2, Cason Surrebuttal, pp. 1-6; Transcript, pp. 366-411, 654-658, 755-759.

<sup>46</sup> *Id.*

<sup>47</sup> Transcript, pp. 22-23.

<sup>48</sup> Staff Exh. 7, Cost of Service Report, and Appendix 1. See all accounting schedules. Witness Featherstone is sponsoring Staff's Cost of Service Report. *Id.* at p. 7.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

529

make additional specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.<sup>49</sup>

11. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.<sup>50</sup>

### **C. Lake Region's Water and Sewer System**

12. Lake Region's water system is comprised of: (1) two deep wells, each with a pumping capacity of 360,000 gallons per day; (2) a 200,000 gallon elevated water storage tank; and, (3) a total of approximately 96,832 feet of water mains.<sup>51</sup>

13. Lake Region's sewer system is comprised of: (1) four sewage treatment plants: (a) Lodge, with a 326,500 gallon daily capacity, (b) Racquet Club, with a 292,500 gallon daily capacity, (c) Charleston Condominiums, with a 24,000 gallon daily capacity, and (d) Shawnee Bend, with a 100,000 gallon daily capacity; (2) multiple lift stations; and, (3) a total of approximately 8,924 feet of collecting sewers.<sup>52</sup>

14. Included with Lake Region's 100,000 gallons-per-day wastewater treatment plant on Shawnee Bend is an expansion project that increased capacity when the daily flow of this plant reached 75,000 gallons-per-day in July 2009.<sup>53</sup>

15. Lake Region completed building an additional lift station and collection line on Horseshoe Bend to service the Duckhead Road area. The lift station and collection line run from the Duckhead Road area to the Company's Racquet Club Treatment Plant. The in-service date for this addition was March 10, 2010.<sup>54</sup>

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<sup>49</sup> Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

<sup>50</sup> An Administrative Agency, as factfinder, also receives deference when choosing between conflicting evidence. *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

<sup>51</sup> Lake Region Exh. 4, Summers Direct, pp. 3-4; Staff Exh. 7, Cost of Service Report, pp. 42-44; Staff Exh. 9, Harris Surrebutal, pp. 14-16; Staff Exh. 13, Featherstone Direct, pp. 7-8; Lake Region Water and Sewer Company, Inc. Annual Report for the calendar year of January 1-December 31, 2008, pp. W-7 – W-9 & S-6.

<sup>52</sup> *Id.*

<sup>53</sup> Staff Exh. 7, Cost of Service Report, pp. 43-44.

<sup>54</sup> *Id.*; Lake Region Exhibit 11, Summers True-Up Direct, p. 1.

## LAKE REGION WATER & SEWER COMPANY

530

19 Mo. P.S.C. 3d

16. Lake Region also plans to rehabilitate lift stations on Shawnee Bend.<sup>55</sup>

### **D. Lake Region's Ownership and Certificate History**

17. On August 10, 1971, Four Seasons Lakesites Water & Sewer Company ("Lakesites W&S") was incorporated to provide water and sewer service for the development.<sup>56</sup>

18. On February 27, 1973, Four Seasons Lakesites Water & Sewer Company was issued a Permit of Approval from the Division of Health to supply water to the public.<sup>57</sup>

19. The Commission granted Lakesites W&S its certificate of convenience and necessity ("CCN") to provide water service effective December 27, 1973 in Case No. 17,954. The Commission amended the company's certificate in Case No. 18,002 effective May 16, 1974, to expand its water service to areas immediately adjacent to the previously authorized certificated area.<sup>58</sup>

20. Ultimately, Lakesites W&S, or its successors-in-interest,<sup>59</sup> received Commission approval for providing sewer service and to expand its certificated water and sewer service areas as follows:

- a. December 16, 1975: Effective date of Commission Order granting an expansion to Lakesites W&S's CCN. Case No. 18,416.<sup>60</sup>
- b. March 14, 1980: Additional authority granted to Lakesites W&S in an unreported order. Case No. WA-79-266.<sup>61</sup>
- c. February 16, 1990: Additional authority granted to Lakesites W&S to provide sewer service in an

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<sup>55</sup> Staff Exh. 7, Cost of Service Report, pp. 43-44.

<sup>56</sup> Certificate of Incorporation, dated August 10, 1971

<sup>57</sup> Lake Region Exhibit 13, Engineering Report in Case No. 17,954.

<sup>58</sup> *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience and Necessity to Construct, Operate and Maintain an Intrastate Water System*, Case No. 17,954, Report and Order, Issued December 17, 1973, Effective December 27, 1973; Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8; Lake Region Exh. 15, Report and Order in Case No. 17,954.

<sup>59</sup> Lakesites W&S's successors-in-interest are Four Seasons Water and Sewer Company and Lake Region Water and Sewer Company.

<sup>60</sup> *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for an Amendment to Their Certificate of Public Convenience and Necessity to Construct, Operate and Maintain an Intrastate Water System*, Case No. 18,416, Report and Order, Issued December 4, 1975, Effective December 16, 1975.

<sup>61</sup> Formal case caption not listed in Mo.P.S.C. Reports, Volume 23, p. xv.



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

531

- d. July 11, 1997: Effective date for Commission order approving a Unanimous Stipulation to grant Lakesites W&S Company a CCN to extend its sewer operation to areas in Shawnee Bend and Horseshoe Bend and adjust water tariffs (depreciation schedules). The Company already had a CCN to provide sewer service in part of Horseshoe Bend. Case No. WA-95-164.<sup>63</sup>
- e. October 9, 1998: Effective date for Commission order extending Four Seasons Water & Sewer Company's ("Four Seasons W&S") CNN for its sewer operations. Case No. SA-98-248.<sup>64</sup>
- f. September 1, 2000: Effective date for Commission order granting Lake Region an extension of its CCN to provide water and sewer service in the Shawnee Bend area. Case No. SA-2000-295.<sup>65</sup>
- g. November 5, 2006: Effective date of Commission

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<sup>62</sup> *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience and Necessity to Own, Operate and Maintain Sewer System*, Case No. SA-89-135, Report and Order Adopted, February 16, 1990; Staff Exh. 13, Featherstone Direct, p. 8.

<sup>63</sup> Transcript, pp. 486-487; *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain Water and Sewer Utility Properties for the Public, Located in an Unincorporated Area in Camden County and Miller County, Missouri Generally Comprising the Eastern Half of the Area Known as "Shawnee Bend,"* Case No. WA-95-164, Order Approving Unanimous Stipulation and Agreement, Granting Certificate of Convenience and Necessity, Approving Tariffs, and Denying Application to Intervene, Issued July 1, 1997, Effective July 11, 1997.

<sup>64</sup> *In the Matter of the Application of Four Seasons Water and Sewer Company for a Certificate of Convenience and necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain Sewer Utility Properties for the Public, Located in an Unincorporated Area In Camden County, Missouri by Expansion of its Existing Certificated Area in a Westward Direction Along the Shore of the Lake of the Ozarks,* Case No. SA-98-248, Order Granting Certificate of Convenience and Necessity, Issued September 29, 1998, Effective October 9, 1998.

<sup>65</sup> *In the Matter of the Application of Lake Region Water and Sewer Company for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Centralized Sewage Collection and Treatment System in an Area in an Unincorporated Area of Camden County, Missouri , as an Expansion of its Existing Certificated Area,* Order Granting Certificate of Public Convenience and Necessity, Issued August 22, 2000, Effective September 1, 2000; Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8.

LAKE REGION WATER & SEWER COMPANY

532

19 Mo. P.S.C. 3d

order approving expansion of Lake Region's CCN. WA-2005-0463 and WA-2005-0464.<sup>66</sup>

**21.** In March of 2004, the Commission denied Lake Region's requests for CCNs in Case Number SA-2004-0182.<sup>67</sup>

**22.** In addition to the many certificate cases, Lakesites W&S, or its successors-in-interest, appeared before the Commission seeking rate increases in the following cases:

a. April 16, 1975: Effective date for Commission order denying Lakesites W&S's tariff for an imposition of rates for unmetered service. Case No. 18,081.<sup>68</sup>

b. December 5, 1991: Effective date for Commission order granting Lakesites W&S a rate increase request pursuant to a unanimous agreement. Case No. WR-92-59.<sup>69</sup>

c. August 2, 1998: Effective date for Commission order granting Four Seasons W&S an increase in rates for its sewer service after the filing of a unanimous disposition agreement. This increase in rates involved the completed expansion at the Racquet Club wastewater treatment plant; Case No. SR-98-564.<sup>70</sup>

**23.** With regard to ownership of the company:

a. December 29, 1992: The Commission approved Lakesites W&S application to sell its water system on Horseshoe Bend

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<sup>66</sup> *In the Matter of the Application of Lake Region Water and Sewer Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Water and Sewer System for the Public Located in an Unincorporated Area in Camden County, Missouri, Order Approving Application for Certificate of Convenience and Necessity, Issued October 26, 2006, Effective November 5, 2006.*

<sup>67</sup> *In the Matter of the Applications of Lake Region Water and Sewer Company for Certificates of Convenience and Necessity, Order Denying Motion to Reconsider Order Dismissing Applications, Issued March 18, 2004, Effective March 28, 2004. This order covered application filed in Case Nos. SA-2004-0182, SA-2004-0183, WA-2004-0184, WA, 2004-0201 and SA-2004-0202.*

<sup>68</sup> *In the Matter of Four Seasons Lakesites Water and Sewer Company of St. Louis, Missouri, for Authority to file a Water Rate for General Service Unmetered in its Certificated Area in the State of Missouri, Report and Order, Issued March 17, 1975, Effective April 16, 1975.*

<sup>69</sup> *In the Matter of Four Seasons Lakesites Water and Sewer Company's Tariff to Increase Rates Pursuant to Their Informal Rate Procedure, Case No. WR-92-59, Report and Order, Issued November 27, 1991, Effective December 5, 1991.*

<sup>70</sup> *In the Matter of Four Seasons Water and Sewer Company's Tariff for Rate Increase Pursuant to Small Company Rate Increase, Order Approving Tariff, Issue July 30, 1998, Effective August 2, 1998.*

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

533

to the Ozark Shores Water Company ("Ozark Shores"), but continued to provide sewer service to the Horseshoe Bend area.<sup>71</sup> Unreported Case No. WM-93-24.<sup>72</sup>

b. October 9, 1998: Lakesites W&S changed its name to Four Seasons Water and Sewer Company ("Four Seasons W&S") in Case No. SA-98-248.<sup>73</sup>

c. May 16, 1999: The Commission recognized Four Seasons W&S's change of name to Lake Region Water & Sewer Company (Lake Region) in case No. WO-99-469.<sup>74</sup>

**24.** Lake Region is currently owned equally by RPS Properties, Inc. ("RPS Properties") and Sally Stump, wife of Vernon Stump, the current President of the Company.<sup>75</sup>

**25.** RPS Properties and Sally Stump paid \$3,000,000 to purchase the stock of Lake Region.<sup>76</sup>

**26.** RPS Properties is a partnership for the Schwermann family, with Robert Schwermann being the General Partner.<sup>77</sup>

**27.** Mr. Schwermann was president of Lake Region until September 2009 when one of the other owners, Vernon Stump, took over as president.<sup>78</sup>

**28.** These same owners also own and operate Ozark Shores, also regulated by the Commission. Ozark Shores is wholly owned by North Suburban Public Utilities, Inc. which is owned 51.76% by RPS Properties and 48.24% by Sally Stump.<sup>79</sup>

**29.** The partnership of Robert Schwermann through RPS

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<sup>71</sup> Transcript, pp. 484-486; Staff Exh. 7, Cost of Service Report, pp. 1-7. Ozark Shores was granted a subsequent increase in rates in Case No. WR-99-183.

<sup>72</sup> *Four Seasons Lakesites Application to Sell Water Assets to Ozark Shores Company*, Case No WM-93-24. The order approving the sale was issued on December 29, 1992.

<sup>73</sup> Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8. Note: Staff reports the name change occurring in this case; however, the docket entries do not reflect a name change application.

<sup>74</sup> *In the Matter of Four Seasons Water and Sewer Company for Name Change to Lake Region Water and Sewer Company*, Case No. WO-99-0469, Order Recognizing Change of Corporate Name and Filing of Adoption Notice, Effective May 16, 1999. Note: The Commission was unable to locate the specific case where it approved the transfer of assets that is more fully described in the section of this order addressing the issue of availability fees.

<sup>75</sup> Transcript, pp. 166-167; Staff Exh. 7, Cost of Service Report, pp. 1-7.

<sup>76</sup> Transcript, pp. 243, 612-613.

<sup>77</sup> Transcript pp. 328, 626-627; Staff Exh. 7, Cost of Service Report, pp. 1-7.

<sup>78</sup> Transcript pp.141,194; Staff Exh. 7, Cost of Service Report, pp. 1-7.

<sup>79</sup> Transcript p. 269, 327-328, 339, 579; Staff Exh. 7, Cost of Service Report, pp. 1-7. North Suburban also owns a small water system in northern Illinois, outside of Chicago.

## LAKE REGION WATER & SEWER COMPANY

534

19 Mo. P.S.C. 3d

Properties and the Stump family also own equally a company called Northern Illinois Investment Group, Inc. (also referred to as "Fairhaven").<sup>80</sup>

**30.** Lake Region's service territory is located in Camden County, with the exception of the eastern tip of Shawnee Bend, which is in Miller County. The number of customers increased significantly, approximately 70 customers yearly between 2004 and 2006, after completion of the toll bridge connecting the Horseshoe Bend area to the Shawnee Bend area. However, since 2007 new customer additions have slowed dramatically.<sup>81</sup>

**31.** Subdivisions serviced by Lake Region on Horseshoe Bend include Seasons Ridge, Country Club Estates 1 and 2, Black Hawk Estates, Country Club Cove, and other customers in unincorporated areas not located within a named subdivision.<sup>82</sup>

**32.** Large commercial accounts serviced by Lake Region include the Lodge of the Four Seasons, the Country Club Hotel, the Racquet Club, and several condominium complexes.<sup>83</sup>

**33.** Subdivisions serviced by Lake Region on Shawnee Bend include Porto Cima (Grand Point, Champion's Run, La Riva Estates, Eagles Cove, Fox Run Town Homes, and Heritage Isle), Thornwood, Magnolia Point, Bello Point, The Villages (Stone Bridge, Forest Ridge, and Sycamore Point), and Shawnee Bend 2, 3, and 4.<sup>84</sup>

**34.** Commercial accounts serviced by Lake Region include two convenience stores, a bank, and Majestic Point Condominiums.<sup>85</sup>

**35.** The subdivisions served by Lake Region have experienced an approximate build out of 20-30 percent, leaving approximately 70 to 80 percent of the lots undeveloped.<sup>86</sup>

**36.** Currently, there are 1285 undeveloped lots and 332 improved lots in the Porto Cima subdivision of the Shawnee Bend Peninsula.<sup>87</sup>

### **E. Lake Region's Proposed General Rate Increase**

**37.** As originally filed, Lake Region's proposed tariffs seek to establish a rate increase of approximately 50% based on test year

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<sup>80</sup> Staff Exh. 7, Cost of Service Report, pp. 1-7.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; Transcript, pp. 292-293.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Staff Exh. 7, Cost of Service Report, pp. 1-7.

<sup>86</sup> Transcript, pp. 332-333, 431, 495-496, 603-604, 649-650, 734-735.

<sup>87</sup> Lakesites POA Exh. 4, Update to Lakes POA Exhibit 3.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

535

revenue of approximately \$658,935; i.e., water revenue of \$167,144 from Shawnee Bend, sewer revenue from Horseshoe Bend of \$314,902, and sewer revenue from Shawnee Bend of \$176,889.<sup>88</sup>

**38.** The originally requested rate increase was predicated upon Lake Region's calculation of a gross revenue deficiency of approximately \$331,223, based upon normalized operating results for the 12 months ending December 31, 2008, exclusive of applicable gross receipts, sales or franchise fees.<sup>89</sup>

**39.** The Company originally proposed a rate of return on equity of 10.51% applied to a 60% equity capital structure.<sup>90</sup>

**40.** On December 7, 2009, Lake Region's total revenue request dropped to \$215,622 based upon an update for known and measureable changes through September 30, 2009; i.e., water revenue of \$28,182 from Shawnee Bend, sewer revenue from Horseshoe Bend of \$78,307, and sewer revenue from Shawnee Bend of \$109,133.<sup>91</sup>

**41.** The revised request from December 7, 2009, if granted, would establish a total rate increase of approximately 32%.<sup>92</sup>

### **F. General Rate Making Principals**

**42.** In order to determine the appropriate level of utility rates, the Commission examines the major elements of the utility's operations, including: rate base items such as plant-in-service and accumulated depreciation and deferred income tax reserves, material and supplies and other investment items.<sup>93</sup>

**43.** Essential in this process is a review of the revenues and expenses, making adjustments through the annualization and normalization processes. These items include: payroll, payroll related benefits, payroll taxes, office rent including utility (electricity) costs, chemical costs, operation and maintenance costs for non-payroll related costs such as material and equipment costs, small tool costs, and outside vendor costs for equipment repairs.<sup>94</sup>

**44.** Depreciation expense and taxes, including federal, state, and property taxes, are all considered when setting rates.<sup>95</sup>

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<sup>88</sup> EFIS Docket Entry Number 1, *Letter and Tariffs*, filed October 7, 2009; Lake Region Exh. # 4, Summers Direct, pp. 1-5.

<sup>89</sup> *Id.*

<sup>90</sup> Staff Exh. 7, Cost of Service Report, pp. 3-4.

<sup>91</sup> *Id.*; See also letter and worksheets filed on December 7, 2009 by Lake Region.

<sup>92</sup> *Id.*

<sup>93</sup> Staff Exh. 13, Featherstone Direct, pp. 13-23.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

536

19 Mo. P.S.C. 3d

**45.** The Commission maintains a representative relationship between rate base, revenues and expenses in order for a public utility to have an opportunity to earn a fair and reasonable return.<sup>96</sup>

**46.** The Commission sets rates to properly reflect the levels of investment and expenses necessary to serve a customer base which provides revenues to the utility.<sup>97</sup>

**47.** The Commission identifies a utility's ongoing costs to provide utility service in the future and what rates will need to be set to collect those ongoing costs in the future.<sup>98</sup>

**48.** A test year is a historical year used as the starting point for determining the basis for adjustments that are necessary to reflect annual revenues and operating costs in calculating any shortfall or excess of earnings by the utility.<sup>99</sup>

**49.** The purpose of a test year is to develop a relationship between the various components of the ratemaking process and keep those relationships in synchronization.<sup>100</sup>

**50.** All of the aspects of the test year operations may be adjusted upward or downward to exclude unusual or unreasonable items, or include unusual items, by amortization or otherwise, in order to arrive at a proper allowable level of all of the elements of the Company's operations.<sup>101</sup>

**51.** Annualization and normalization adjustments are made to the test year results when the unadjusted results do not fairly represent the utility's most current annual level of existing revenue and operating costs.<sup>102</sup>

**52.** The test year selected for both of these cases is the year ended December 31, 2008.<sup>103</sup>

**53.** A proper determination of revenue requirement is dependent upon considering all material components of the rate base,

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* The December 31, 2008 test year was chosen by the Company, agreed to by Staff, Office of the Public Counsel and both Intervenors, and approved by the Commission in its December 1, 2009 *Order Regarding Test Year and True-up Period*. In that same Order the Commission also approved the use of an update to the test year for known and measurable changes through September 30, 2009. *Id.*

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

537

return on investment, current level of revenues, along with operating costs, all at the same point in time. This ratemaking principle is commonly referred to as the “matching” principle.<sup>104</sup>

**54.** Selecting a “known and measurable date” or “known and measurable period” is important to synchronize and capture all revenues and expenses to satisfy the matching principle.<sup>105</sup>

**55.** The known and measurable dates established for these cases are December 31, 2008 (test year), September 30, 2009 (update period) and March 31, 2010 (true-up period).<sup>106</sup>

**56.** The September 30, 2009 date for the known and measurable period was chosen to enable the parties and Staff an update period that provides time to obtain actual information obtained from the Company upon which to perform analyses and make calculations regarding various components to the revenue requirement.<sup>107</sup>

**57.** Since Lake Region completed a construction project on the Horseshoe Bend sewer system to enhance its sewer system within the confines of this rate case, it is also necessary to have a true-up for that part of the rate request.<sup>108</sup>

**58.** Because the Horseshoe Bend operating system is being trued-up, the Shawnee Bend water and sewer operating systems will be trued-up to reflect any increases or decrease to the overall revenue requirement calculation using the most current information available to these cases.<sup>109</sup>

**59.** The Commission determined that the true-up period should be through March 31, 2010.<sup>110</sup>

**60.** True-ups are used in cases where cost increases or decreases are expected to occur during the period subsequent to the known and measurable period, in this case September 30, 2009.<sup>111</sup>

**61.** True-ups ensure that all material components of the revenue requirement are examined so that rates are based on the most current information.<sup>112</sup>

**62.** The true-up process looks at the changes in the revenue

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

538

19 Mo. P.S.C. 3d

requirement to reduce regulatory lag.<sup>113</sup>

**63.** Regulatory lag is that time that passes between a utility's request for new rates and the granting of the new rates by utility commissions. Revenue requirement changes continually take place during this time period.<sup>114</sup>

**64.** True-ups are designed to reduce or eliminate as much as possible the events that cause changes in the rate structure. Because of the requirement to base rates using actual or historical information, the true-up procedure is used to obtain the latest information available to develop the revenue requirement allowing for sufficient time for the Commission to consider in its decisions.<sup>115</sup>

**65.** The ratemaking process includes making adjustments to reflect normal, on-going operations of a utility. This process generally uses four approaches to reflect changes determined to be reasonable and appropriate. These are commonly referred to as annualization adjustments, normalization adjustments, disallowances, and pro forma adjustments.<sup>116</sup>

**66.** An annualization adjustment is made when costs or revenues change during the audit period that will be ongoing at a level different than they existed during the audit period.<sup>117</sup>

**67.** A normalization adjustment is an adjustment made to reflect normal, on-going operations of the utility. Revenues or costs that were incurred in the test year that are determined to be untypical or abnormal will get specific rate treatment and generally require some type of adjustment to reflect normal or typical operations. The ratemaking process removes abnormal or unusual events from the cost of service calculations and replaces those events with normal levels of revenues or costs.<sup>118</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*; See also *State ex rel. Laclede Gas Co. v. Public Service Comm'n*, 535 S.W.2d 561, 570 (Mo. App. 1976).

<sup>115</sup> Staff Exh. 13, Featherstone Direct, pp. 13-23.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Typical examples are payroll increases granted to employees or employees starting employment mid-year which would require an annualization adjustment to reflect a full annual period of payroll costs-- without such an adjustment payroll would be understated. Reflecting new customers that start taking service at the end of the test year or update period would also require an annualization to properly reflect a full 12-month of revenues.

*Id.*

<sup>118</sup> *Id.* An example of an abnormal event is the impact that unusually dry or rainy weather has on revenues for those customers that are weather sensitive. The impact of extreme temperatures on customer usage for natural gas and electrical companies can result in a



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

539

**68.** A disallowance adjustment results in removing cost elements from the cost of service for test-year results because the items are either non-recurring, not necessary to the provision of utility service, or the expenditures were imprudent.<sup>119</sup>

**69.** A pro forma adjustment is made to reflect increases and decreases to revenue requirement because of a rate increase or decrease. Pro forma adjustments are made because of the need to reflect the impact of items and events that occur subsequent to the test year. These items or events significantly impact revenue, expense and the rate base relationship and should be recognized to address the forward-looking objective of the test year.<sup>120</sup>

**70.** The term revenue requirement is used to identify the incremental differences that result from a comparison of the utility's rate of return and capital structure on the investment with the revenues and costs to provide a particular utility service. This difference occurs when the results of a cost of service calculation is compared to existing rates which identifies any revenue shortfall (positive revenue requirement) or excess (negative revenue requirement).<sup>121</sup>

**71.** The revenue requirement calculation can be identified by a formula as follows:<sup>122</sup> Revenue Requirement = Cost of Providing Utility Service or  $RR = O + (V - D) R$  where,

RR = Revenue Requirement;

O = Operating Costs; (such as fuel, payroll, maintenance, etc., Depreciation and Taxes);

V = Gross Valuation of Property Used for Providing Service;

D = Accumulated Depreciation Representing the

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distortion to test-year revenues. Since utility rates are set using normalized processes, adjustments to test-year levels must be made when it is determined that unusual or abnormal events cause unusually high or low results. *Id.*

<sup>119</sup> *Id.* A disallowance adjustment results when the cost recovery in rates is considered inappropriate. Disallowances are made to eliminate costs from test year results either entirely or on a partial basis. One example is the removal from test year results of certain advertising costs. While some advertising costs should be included in rates, others should be eliminated because they are not necessary to the provision of utility service. In this case Staff disallowed the costs charged to the test year for certain medical insurance premiums incurred for one of the owners of Company as unnecessary for the provision of utility service. *Id.*

<sup>120</sup> *Id.* The most common example of a pro forma adjustment is the grossing up of net income deficiency for income tax purposes. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

540

19 Mo. P.S.C. 3d

Capital Recovery of Gross Property Investment.  
(V - D) = Rate Base (Gross Property Investment less  
Accumulated Depreciation = Net Property  
Investment)  
R = Overall Rate of Return or Weighted Cost of  
Capital  
(V - D) R = Return Allowed on Net Property  
Investment

72. This formula provides the traditional rate of return calculation the Commission uses to set just and reasonable rates. The result provides a total revenue requirement amount. That amount represents the incremental change in revenues over existing rates for the test year necessary to allow the utility the opportunity to earn the Commission's authorized return. That return is collected on the appropriate level of rate base investment. The revenue requirement calculation also allows for the recovery of the proper level of utility costs, including income taxes.<sup>123</sup>

**G. Stipulated Facts**

73. The Parties adopt, without exception, Staff's methodology used in the design of rates, as found within the direct testimony of James M. Russo filed on January 21, 2010.<sup>124</sup>

74. Having fully reviewed the methodology used in the design of rates accepted by the parties after review by their subject matter experts, the Commission adopts Staff's methodology, as described in the direct testimony of James M. Russo, as the correct methodology for the design of rates.<sup>125</sup>

75. The Parties do not dispute the information contained within the Staff Accounting Schedules-Utility Service, filed on January 14, 2010, and subsequently updated as of February 8, 2010, to correct a revenue calculation error and a miscommunication between Lake Region and Staff regarding payroll resulting in adjusted increased revenue requirements of \$18,125 for Horseshoe Bend Sewer, \$108,076 for Shawnee Bend Sewer and \$20,549 for Shawnee Bend Water, subject

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<sup>123</sup> *Id.*

<sup>124</sup> Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 2, Russo Direct, pp. 1-4; Staff Exh. 3, Staff Rate Design Report, dated January 21, 2010.

<sup>125</sup> *Id.* Staff Exh. 2, Russo Direct, pp. 1-4; Staff Exh. 3, Staff Rate Design Report, dated January 21, 2010.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

541

however to the following exceptions: specific information on the topics of Management Fees and Availability Fees.<sup>126</sup>

**76.** Having fully reviewed the information contained within the Staff Accounting Schedules-Utility Service, filed on January 14, 2010, and subsequently updated as of February 8, 2010, accepted by the parties after review by their subject matter experts, the Commission adopts, as findings of fact, the information contained within the Staff Accounting Schedules-Utility Service, filed on January 14, 2010, and subsequently updated as of February 8, 2010, to correct a revenue calculation error and a miscommunication between Lake Region and Staff regarding payroll resulting in adjusted increased revenue requirements of \$18,125 for Horseshoe Bend Sewer, \$108,076 for Shawnee Bend Sewer and \$20,549 for Shawnee Bend Water with the exception of all information on the disputed issues concerning Management Fees and Availability Fees.<sup>127</sup>

**77.** The Parties stipulate and agree that the information contained within the Staff's Cost of Service Report—Utility Services, filed on January 14, 2010 and updated and adjusted on February 8, 2010, is the cost of service of Lake Region subject to the following exceptions: specific information on the topics of Management Fees, and Availability Fees.<sup>128</sup>

**78.** Having fully reviewed the information contained within the Staff's Cost of Service Report—Utility Services, filed on January 14, 2010 and updated and adjusted on February 8, 2010, the Commission adopts, as findings of fact, the information contained within the Staff's Cost of Service Report—Utility Services, filed on January 14, 2010 and updated and adjusted on February 8, 2010, as being the cost of service of Lake Region; except for all information on the topics of Management Fees, and Availability Fees.<sup>129</sup>

**79.** The Stipulation does not include any adjustments that will result from the True-Up proceeding.<sup>130</sup>

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<sup>126</sup> Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Ex. 7, Cost of Service Report, dated January 2010; Staff Ex. 8 Staff Accounting Schedules, dated January 2010.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Transcript, Vol. 6 and Staff's Late-Filed Exhibit, filed on June 21, 2010; reflecting correct amounts for plant additions and other corrections to other plant accounts.

LAKE REGION WATER & SEWER COMPANY

542

19 Mo. P.S.C. 3d

**H. Capital Structure, Return on Equity, Rate of Return, Revenue, Expenses and Revenue Requirement**

**80.** According to Staff's Accounting Schedules (True-Up Direct) Lake Region's revenue for the Test Year ending December 31, 2008, updated for known and measurable changes though September 30, 2009 and Trued-Up through March 31, 2010 is as follows:<sup>131</sup>

Horseshoe Bend Sewer Adjusted Jurisdictional Revenue	=
\$327,158	
Shawnee Bend Sewer Adjusted Jurisdictional Revenue	=
\$179,089	
Shawnee Bend Water Adjusted Jurisdictional Revenue	=
\$171,769	
TOTAL REVENUE = \$678,016	

**81.** This revenue calculation for Lake Region is not in dispute.

**82.** According to Staff's Accounting Schedules (True-Up Direct) Lake Region's operating expenses for the Test Year ending December 31, 2008, updated for known and measurable changes though September 30, 2009 and Trued-Up through March 31, 2010 is as follows:<sup>132</sup>

Horseshoe Bend Sewer Adjusted Jurisdictional Expenses	=
\$334,550	
Shawnee Bend Sewer Adjusted Jurisdictional Expenses	=
\$203,294	
Shawnee Bend Water Adjusted Jurisdictional Expenses	=
\$142,200	
TOTAL EXPENSES = \$680,044	

**83.** To the extent that Staff's calculation includes expenses for executive management fees and rate case expense, the operating expenses are disputed.

**84.** According to the Jointly Filed Accounting Schedules, in relation to two of the Commission's ordered revenue requirement scenarios, as of July 23, 2010, there had been a small adjustment to Lake Region's operating expenses as follows:<sup>133</sup>

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<sup>131</sup> Staff Exh. 18, Staff Accounting Schedule, True-Up Direct, Schedule 3 for each water and sewer division.

<sup>132</sup> Staff Exh. 18, Staff Accounting Schedule, True-Up Direct, Schedule 1 for each water and sewer division.

<sup>133</sup> Staff Accounting Schedules, Report Volumes 1 & 2 for Revised Scenarios 1 & 2, Schedule 1 for each water and sewer division, filed July 23, 2010 by Staff and Lake Region.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

543

Horseshoe Bend Sewer Adjusted Jurisdictional Expenses	=
\$337,506	
Shawnee Bend Sewer Adjusted Jurisdictional Expenses	=
\$203,713	
Shawnee Bend Water Adjusted Jurisdictional Expenses	=
\$142,619	
TOTAL EXPENSES =	\$683,838

85. To the extent that these accounting schedules include expenses for executive management fees and rate case expense, the operating expenses are disputed.

**Additions to Plant from Horseshoe Bend Construction Project**

86. Lake Region completed construction of a sewer pumping station and sewer force main and placed them into service on March 10, 2010.<sup>134</sup> Staff engineer Martin Hummel inspected the project and confirmed the new facilities are in operation and in service.<sup>135</sup> The correct amount for plant additions for this project is \$242,604.<sup>136</sup>

87. No party is contesting the amount for plant additions related to the completed construction project on the Horseshoe Bend sewer system.

**Rate Base**

88. The parties concede that the correct rate base for Lake Region as of June 24, 2010, following the True-Up for the new additions to plant at Horseshoe Bend sewer operation, is: Shawnee Bend Water = \$874,282; Shawnee Bend Sewer = \$1,486,680; Horseshoe Bend Sewer = \$584,138 for a total rate base of \$2,945,100.<sup>137</sup>

<sup>134</sup> Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

<sup>135</sup> *Id.*

<sup>136</sup> Transcript, Vol. 6; Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3; Staff's Late-Filed Exhibit, filed June 21, 2010, p. 1; Staff's Late-Filed Exhibit, filed June 23, 2010, p.4. Lake Region has reviewed and accepted the work of Staff accounting witness Herrington on the other plant and depreciation issues in this case and accepts her work on this issue as well. Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

<sup>137</sup> Transcript, pp. 854-855; where parties' counsels concede to this amount. "A true judicial admission is one made in court or preparatory to trial by a party or his attorney that concedes, for the purposes of that particular trial, the truth of some alleged fact so that one party need offer no evidence to prove it, and the other party ordinarily is not allowed to disprove it." *Owens v. Dougherty*, 84 S.W.3d 542, 547 (Mo. App. 2002); "It removes the proposition in question from the field of disputed issues in the case in which it is made, and is a substitute for evidence in the sense that it does away with the need for evidence on that subject in that cause." *Id.* See also June 23, 2010 "Refiling of Staff's June 21, 2010 Response to Missouri Public Service Commission June 16, 2010 Order Regarding Clarification to Plant Additions," p. 5, filed June 23, 2010.

## LAKE REGION WATER & SEWER COMPANY

544

19 Mo. P.S.C. 3d

**89.** Not included in this rate base is a total of \$6,231,652 in Contributions In Aid of Construction (“CIAC”). Of that total amount, \$5,273,850 applies to the infrastructure, the plant in service, on the two Shawnee Bend systems, the area in which availability fees are in force. This \$5,273,850 was recorded from Four Seasons Lakesites in 2002. The remaining \$957,802 in CIAC is for other service areas on Shawnee Bend. None of this CIAC is applicable to the Horseshoe Bend operation. The remaining \$957,802 in CIAC is composed of other contributions that include service connection fees.<sup>138</sup>

**90.** CIAC is a negative offset to rate base.<sup>139</sup>

### Capital Structure

**91.** Staff’s proposed capital structure most accurately reflects the costs of capital employed in Lake Region’s operation.<sup>140</sup>

**92.** Staff proposed capital structure and weighted cost of capital through the date of September 30, 2009 for Lake Region is as follows:<sup>141</sup>

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<sup>138</sup> Transcript, pp. 47-48, 281-282, 335-338, 343-348, 421, 459, 468, 484, 589-590, 630-631, 729-730; Lake Region Exh. 12, Summers True-Up Rebuttal, pp. 12-13. Staff Exh. 17, Featherstone True-Up Direct, pp. 29-30. The \$5,273,850 amount was frequently referenced throughout the testimony as being approximately \$5.3 million, but the exact amount was utilized for revenue requirement scenarios ordered by the Commission. See EFIS Docket Entries for: (1) Order Directing Discovery and Directing Filing, issued April 8, 2010; (2) Lake Region Water & Sewer Company’s Response to April 8, 2010 Order of the Commission, filed on April 30, 2010; (3) Staff’s Status Report and Accounting Schedules filed on May 18, 2010; (4) Staff’s Reply to Lake Region’s May 19, 2010 Filing, filed on June 7, 2010; (5) Staff’s Late-Filed Exhibit and Accounting Schedules, filed on June 21, 2010; (6) Staff’s Late-filed Exhibit, filed on June 23, 2010; (7) Lake Region Water & Sewer Company and Staff’s Joint Revenue Requirement Scenario, filed on July 16, 2010; (8) Lake Region Water & Sewer Company and Staff’s Joint Revenue Requirement Scenario filed on July 20, 2010; and (9) Lake Region Water & Sewer Company and Staff’s Updated Joint Revenue Requirement Scenario, filed on July 23, 2010.

<sup>139</sup> See Lake Region Water & Sewer Company and Staff’s Updated Joint Revenue Requirement Scenario for an explanation of rate base treatment of Contributions in Aid of Construction filed on July 23, 2010.

<sup>140</sup> Lake Region Exh. 5, Summers Rebuttal, pp. 8-9. Public Counsel’s subject matter expert, Ted Robertson, testified that while there were some concerns with the manner in which debt and the value of equity were determined, since Lake Region believed that Staff’s proposed capital structure was most accurate that it would not oppose Staff’s recommended capital structure. OPC Exh. 4, Robertson Surrebuttal, pp. 2-3.

<sup>141</sup> Staff Exh. 8, Staff Accounting Schedules – Accounting Schedule 8. The capital structures listed for Horseshoe Bend Sewer and Shawnee Bend Water and Sewer are all identical. *Id.* Staff Exh. 7, Cost of Service Report, pp. 12-13, and Cost of Service Appendices, Appendix 2, Schedule 1.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

545

Capital Component Description	Dollar Amount	Percentage of Total Capital Structure	Embedded Cost of Capital	Weighted Cost of Capital		
				8.00%	8.50%	9.00%
Common Stock Equity	\$514,404.60	16.36%	-----	1.31%	1.39%	1.47%
Other Security Non-Tax Deductible	\$0	0.00%	0.00%	0.00%	0.00%	0.00%
Preferred Stock	\$0	0.00%	0.00%	0.00%	0.00%	0.00%
Long-Term Debt	\$2,629,091.40	83.64%	5.01%	4.19%	4.19%	4.19%
Short-Term Debt	\$0	0.00%	3.38%	0.00%	0.00%	0.00%
Other Security Tax Deductible	\$0	0.00%	0.00%	0.00%	0.00%	0.00%
<b>Total Capitalization</b>	<b>\$3,143,496.00</b>	<b>100.00%</b>		<b>5.50%</b>	<b>5.58%</b>	<b>5.66%</b>

93. Lake Region is financed by 83.64 percent debt and 16.36 percent equity.<sup>142</sup>

94. The equity ratio is correctly determined by subtracting the long-term debt amount from the total capital amount and then dividing that equity amount by the total capital.<sup>143</sup>

95. The correct embedded cost of debt is 5.01 percent for debt associated with Lake Region, as of September 30, 2009. This cost of debt is based on the cost of the acquisition debt and a small amount of debt held at Lake Region. Staff calculated the 5.01 percent by dividing the total annual cost of the loans by the total outstanding balance of the loans as of September 30, 2009. The annual cost was determined by

<sup>142</sup> *Id.*; Staff Exh. 7, Cost of Service Report, pp. 9-10.

<sup>143</sup> Staff Exh. 7, Cost of Service Report, p. 12. The owner's of Lake Region decided to issue debt at the partnership level rather than at the Lake Region level. If the owners had issued this debt at Lake Region, then this debt would be more clearly identifiable. However, if this debt had been issued by Lake Region, then this would cause the balance sheet to show a negative amount of equity. *Id.* at pp. 12-13.

## LAKE REGION WATER & SEWER COMPANY

546

19 Mo. P.S.C. 3d

multiplying the 12-month ended weighted average interest rates as of September 30, 2009 for the outstanding loans by the amount outstanding for each of these loans as of September 30, 2009.<sup>144</sup>

**96.** The cost of common equity is correctly determined by adding a risk premium to the cost of debt given the fact that this cost of debt is based on a current cost rate.<sup>145</sup> Because utility stocks behave much like bonds, a 3 percent risk premium is appropriate to arrive at an estimated cost of common equity. Adding a 3 percent risk premium to the current cost of debt of 5 percent indicates a cost of common equity of 8.00 percent. Considering this is a relatively low estimated cost of common equity compared to estimates in other pending rate cases, it is appropriate to add 100 basis points to this point estimate for a total estimated cost of common equity of 8.00 percent to 9.00 percent with a midpoint of 8.50 percent.<sup>146</sup>

**97.** For purposes of determining Lake Region's baseline revenue requirement, as reflected in Staff's accounting schedules in January of 2010, the True-Up Schedules in April, and as is reflected in the various revenue requirement scenarios that have been filed throughout this matter, the parties accepted Staff's midpoint weighted cost of capital of 8.50%. Consequently, the parties utilized the recommended weighted rate of return on debt of 4.19% plus the recommended weighted rate of return on equity including income tax of 1.74% (equity tax factor of 1.2490 times recommended weighted return on equity of 1.39%) for a total weighted rate of return including income tax of 5.93%.<sup>147</sup>

### **Baseline Revenue Requirement**

**98.** The parties filed multiple reconciliations as the case progressed.<sup>148</sup>

**99.** Based upon the agreed to calculations on current

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<sup>144</sup> Staff Exh. 7, Cost of Service Report, pp. 12-14.

<sup>145</sup> Staff Exh. 7, Cost of Service Report, pp. 12-14. According to the textbook, *Analysis of Equity Investments: Valuation* (2002) by John D. Stowe, Thomas R. Robinson, Jerald E. Pinto and Dennis W. McLeavey (used as part of the curriculum in the Chartered Financial Analyst Program), a typical risk premium added to the yield-to-maturity (MM) of a company's long-term debt is in the 3 to 4 percent range. *Id.*

<sup>146</sup> Staff Exh. 7, Cost of Service Report, pp. 14-15.

<sup>147</sup> See all accounting schedules.

<sup>148</sup> Staff Exh. 6, Reconciliation, filed March 19, 2010; Staff Exh. 19, [Updated] Reconciliation, filed April 23, 2010; Staff Exh. 50, [Updated] Reconciliation, filed June 23, 2010; See EFIS Docket Entries Numbers 252 for File Number SR-2010-0110 and Number 251 for File Number WR-2010-0111, [Updated] Reconciliation, filed July 16, 2010.



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

547

earnings, expenses, rate base, capital structure, return on equity and rate of return, the parties agreed and conceded that Lake Region's increased revenue requirement, at the time of the True-Up hearing (April 26, 2010), was as follows:

Horseshoe Bend Sewer	\$ 44,552;
Shawnee Bend Sewer	\$112,327;
Shawnee Bend Water	\$ 22,252;

with the exception of disputed issues and amounts associated with management fees, rate case expense and availability fees.<sup>149</sup>

**100.** On July 16, 2010, the Commission's Staff filed the final updated reconciliation where it reflects corrected cost of service or slightly increased revenue requirements for each water and sewer division.<sup>150</sup> Based upon the agreed to calculations on current earnings, expenses, rate base, capital structure, return on equity and rate of return, the parties agreed and conceded that Lake Region's increased revenue requirement was as follows:

Horseshoe Bend Sewer	\$ 44,971;
Shawnee Bend Sewer	\$112,746;
Shawnee Bend Water	\$ 22,671;

with the exception of the disputed issues and amounts associated with management fees, rate case expense and availability fees.<sup>151</sup>

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<sup>149</sup> Transcript, pp. 855-856; Staff Exh. 50, [Updated] Reconciliation, filed June 23, 2010. On July 21, 2010, during a conference between Staff, Public Counsel, Lake Region, and the Regulatory Law Judge, it became apparent that there was disagreement as to the concession made during the final day of the evidentiary hearing with regard to the revenue requirements in terms of whether rate case expense had been factored in or out. The parties present were able to agree as to what the baseline revenue requirement should be exclusive of all disputed issues. The Commission issued an order on July 26, 2010 setting a deadline for any party to object to, challenge or seek clarification regarding the July 16, 2010 Reconciliation and the agreed upon baseline revenue requirement. None of the parties objected or contested this revenue requirement. See EFIS Docket Entries for *Order Regarding July 16, 2010 Reconciliation and Baseline Revenue Requirement*, issued July 26, 2010 – response deadline set for August 2, 2010.

<sup>150</sup> Staff Exh. 6, Reconciliation, filed March 19, 2010; Staff Exh. 19, [Updated] Reconciliation, filed April 23, 2010; Staff Exh. 50, [Updated] Reconciliation, filed June 23, 2010; See EFIS Docket Entries Numbers 252 for File Number SR-2010-0110 and Number 251 for File Number WR-2010-0111, [Updated] Reconciliation, filed July 16, 2010. See in particular [Updated] Reconciliation, filed July 16, 2010.

<sup>151</sup> [Updated] Reconciliation, filed July 16, 2010. The Commission issued an order on July 26, 2010 setting a deadline for any party to object to, challenge or seek clarification regarding the July 16, 2010 Reconciliation and the agreed upon baseline revenue requirement. None of the parties objected or contested this revenue requirement. See EFIS Docket Entries for *Order Regarding July 16, 2010 Reconciliation and Baseline Revenue Requirement*, issued July 26, 2010 – response deadline set for August 2, 2010.

LAKE REGION WATER & SEWER COMPANY

548

19 Mo. P.S.C. 3d

**101.** The revenue requirement in Finding of Fact Number 100, is inclusive of Staff’s recommendations for executive management fees and rate case expense and those amounts must be subtracted to reveal the agreed upon baseline revenue requirement exclusive of the disputed issues.<sup>152</sup>

**102.** Based upon the parties’ unanimous stipulation, their subsequent agreements and concessions and the Commission’s independent review of the evidence, Lake Region’s baseline revenue requirement, exclusive of all disputed issues, is:<sup>153</sup>

Utility Division	Horseshoe Bend Sewer	Shawnee Bend Sewer	Shawnee Bend Water	TOTAL
Revenue Requirement Inclusive of Staff’s Recommendations for Management Fees and Rate Case Expense	44,971	112,746	22,671	180,388
Staff’s Management Fees Recommendation	(13,309)	(7,477)	(7,115)	(27,901)
Staff’s Recommendation on Rate Case Expense	(2,919)	(2,919)	(2,919)	(8,757)
Revenue Requirement Exclusive of Staff’s Recommendations and Exclusive of all Disputed Revenue Issues	28,743	102,350	12,637	<b>143,730</b>

**103.** The parties still dispute: (1) the amount and proper treatment availability fees; (2) the amount of executive management fees; and (3) the amount and proper treatment of rate case expense.

**I. Rate Design**

**104.** Based upon the parties’ unanimous stipulation and the Commission’s independent review, the Commission finds that the proper method to implement any over-all revenue increase is the Water and Sewer Department’s small company rate design methodology.<sup>154</sup>

<sup>152</sup> [Updated] Reconciliation, filed July 16, 2010.

<sup>153</sup> *Id.* Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7. See also Footnotes 149-151, *supra*. On July 29, 2010, Public Counsel filed a statement of concurrence with the baseline revenue requirement.

<sup>154</sup> Transcript, pp. 13, 88, 143, 751; Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

549

**105.** Lake Region's Shawnee Bend water customers consist primarily of residential customers, but there are also 33 commercial customers.<sup>155</sup>

**106.** The current rates consist of a fixed monthly customer charge and a usage or commodity charge.<sup>156</sup>

**107.** Based upon the parties' unanimous stipulation and the Commission's independent review, the proper rate design for any overall rate increase in water rates is to implement an equal percentage increase for the customer and commodity charges.<sup>157</sup>

**108.** Lake Region's Shawnee Bend sewer customers consist primarily of residential customers, but there are also 11 commercial customers.<sup>158</sup>

**109.** Lake Regions' Horseshoe Bend sewer customers consist of primarily of residential customers, but there are also 2 multi-unit customers and 17 commercial customers.<sup>159</sup>

**110.** The commercial sewer customers in Shawnee Bend and Horseshoe Bend are primarily restaurants, hotels and condominium units.<sup>160</sup>

**111.** The usage for the majority of the commercial sewer customers is similar to residential customers.<sup>161</sup>

**112.** The residential sewer customers of the Shawnee Bend and Horseshoe Bend service areas are based on a flat rate.<sup>162</sup>

**113.** The multi-unit and commercial sewer customers of the Shawnee Bend service area have a customer charge and commodity charge for any usage above 6,000 gallons.<sup>163</sup>

**114.** The commercial sewer customers of the Horseshoe Bend service area have a base charge calculated on the highest month's sewer or water usage during the previous calendar year with the base

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Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>155</sup> Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>156</sup> *Id.*

<sup>157</sup> Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>158</sup> Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>159</sup> *Id.*

<sup>160</sup> Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>161</sup> Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>162</sup> Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>163</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

550

19 Mo. P.S.C. 3d

charge adjusted in January and a commodity charge.<sup>164</sup>

**115.** The design of commercial sewer customer's charge of the Horseshoe Bend service area should be similar to the design of the customer charge for the Shawnee Bend sewer operations.<sup>165</sup>

**116.** Based upon the parties' unanimous stipulation and the Commission's independent review, the proper rate design for any over-all rate increase in sewer rates for the Shawnee Bend sewer operations and for the residential sewer customers on Horseshoe Bend is to implement an equal percentage increase for the customer and commodity charges.<sup>166</sup>

**117.** Based upon the parties' unanimous stipulation and the Commission's independent review, the proper rate design for the Horseshoe Bend commercial sewer operations includes changing the commercial sewer customer charge to a traditional customer charge similar to the customer charge for the Shawnee Bend sewer operations to result in a consistent rate design for all of Lake Region's customers.<sup>167</sup> Following this change, the proper application for any over-all rate increase is to implement an equal percentage increase for the customer and commodity charges.<sup>168</sup>

**118.** Any increase in commodity charge provides an added economic incentive to customers with high inflow and infiltration to make necessary repairs and improvement to the collection systems.<sup>169</sup>

**J. Miscellaneous Tariff Issues**

**119.** Lake Region's current returned check charge of \$15.00 is less than the actual cost incurred by Lake Region related to bank charges, account, tracking, monitoring and additional notices. The proper return check charge for Lake Region is \$25.00.<sup>170</sup>

**120.** Lake Region's current tariff language does not include a method to allow Lake Region to disconnect a customer for any reason except upon the request of the customer. Lake Region's tariff lacks legally required language to allow the company to disconnect a customer

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

<sup>170</sup> *Id.* at pp.6-7.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

551

for non-payment pursuant to Commission Rule 4 CSR 240-13.050.<sup>171</sup>

**K. Availability Fees**

**The Creation of the Availability Fees**

**121.** On December 2, 1969, Harold Koplal, the original developer of Four Seasons Lakesites, Inc., executed the original Declaration of Restrictive Covenants for the development that would eventually encompass Lake Region's service area.<sup>172</sup> No copy of the original Declaration of Restrictive Covenants was submitted to the Commission or admitted into the record.

**122.** On March 10, 1971, Harold Koplal, the original developer of Four Seasons Lakesites, Inc., executed the [First] Amended Declaration of Restrictive Covenants ("1<sup>st</sup> Covenants") for the development that would eventually encompass Lake Region's service area.<sup>173</sup>

**123.** Article VI of the 1<sup>st</sup> Covenants establishes Lakesites POA, and the all property owners in the development automatically become a member in the Association when they purchase property.<sup>174</sup>

**124.** Article VII of the 1<sup>st</sup> Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards.<sup>175</sup>

**125.** Articles VII and VIII of the 1<sup>st</sup> Covenants pertain to the central sewage disposal system and water works.<sup>176</sup> These sections:

- a.) establish a "minimum monthly availability charge for water, water service and the accommodations afforded the owners of said lots by said water works

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<sup>171</sup> *Id.*

<sup>172</sup> Transcript pp. 640-641; Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants. Transcript citations related to the restrictive covenants are found at pp. 219-227, 241, 275-277, 335-336, 380-396, 400-403, 461-462, 504-519, 532-532, 590-592, 637-643, 705-706.

<sup>173</sup> Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

<sup>174</sup> Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

552

19 Mo. P.S.C. 3d

- systems” that would commence when water service was available and continue regardless whether the property owner takes water service from the central system to be constructed within the development;
- b.) allow for the construction of individual wells until such time as the central water system is constructed, after which the property owner must connect to the central system;
  - c.) establish “a minimum monthly availability charge for sewage disposal and treatment and the accommodations afforded the owners of said lots by said sewage disposal system” that would commence upon the availability for use of a sewage collection main that leads to an operating sewage treatment facility and continue regardless whether the property owner connects to the central sewage to be constructed within the development;
  - d.) allow for the construction of individual sewer systems, i.e. septic tanks and tile fields, until completion of the central sewer system, after which the property owner must connect to the central system;
  - e.) provide that no charge will be made to the lot owners for the right to connect to the water and/or sewer systems; and,
  - f.) provide that the owner or owners of the water works system and sewage disposal system will be a privately owned utility authorized by a CCN issued by the MoPSC and all availability charges, and times and methods of payment, shall be provided in schedules or rates and rules to be approved by the MoPSC.

**126.** Article VIII of the 1<sup>st</sup> Covenants further provides that the availability fees are to be paid to the owner or owners of the sewage disposal system and water works system and that any “unpaid [availability] charges shall become a lien on the lot or lots to which they are applicable as the date the same became due.”<sup>177</sup>

**127.** The 1<sup>st</sup> Covenants constitute an agreement between

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<sup>177</sup> *Id.*

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

553

the developer and the property owner. It also creates contractual duties that flow between the property owner and Lakesites POA. The 1<sup>st</sup> Covenants are not a contract or agreement between Lake Region and the property owner.<sup>178</sup>

**128.** In addition to agreeing to the restrictive covenants upon the purchase of an undeveloped lot, the owner of each lot executed a separate water and sewer agreement, the provisions of which mirrored those in the 1<sup>st</sup> Covenants.<sup>179</sup>

**129.** On January 14, 1986, the Second Amended and Restated Declaration of Restrictive Covenants was executed by the developer.<sup>180</sup> No copy of the Second Amended and Restated Declaration of Restrictive Covenants was submitted to the Commission or admitted into the record.

**130.** On July 2, 1996, Peter N. Brown, successive developer for Four Seasons Lakesites, Inc., executed the Third Amended and Restated Declaration of Restrictive Covenants (3<sup>rd</sup> Covenants).<sup>181</sup>

**131.** Article VII of the 3<sup>rd</sup> Covenants pertain to Lakesites POA, and the all property owners in the development automatically become a member in the Association when they purchase property.<sup>182</sup>

**132.** Article VIII of the 3<sup>rd</sup> Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards and DNR.<sup>183</sup>

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<sup>178</sup> While the 1<sup>st</sup> Covenants direct that payment of the availability fees will be made to the owners of the sewage disposal system and water works system, the owners of the sewage disposal system and water works system have no enforcement rights as they are not parties to the contract. In this instance, the developer and owner of the utilities were the same, but standing for enforcement of the contractual rights stems from the developer being the party to the contract, not the owner of the utility.

<sup>179</sup> Lake Region Exhibit 13, Engineering Report in Case No. 17,954.

<sup>180</sup> Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

<sup>181</sup> Transcript, pp. 618-619, 639-642, 709, 714; Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4. The 3<sup>rd</sup> Covenants were attested to by Susan Koplak Brown, Secretary of Four Seasons Lakesites, Inc. Mr. Brown is the son-in-law of the original developer, Harold Koplak.

<sup>182</sup> Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants.

<sup>183</sup> Staff Exh. 15, Merciel Rebuttal, Attachment 3, Third Amended and Restated Declaration of Restrictive Covenants.

LAKE REGION WATER & SEWER COMPANY

554

19 Mo. P.S.C. 3d

**133.** Article IX(A) of the 3<sup>rd</sup> Covenants duplicates the provisions from prior declarations relating to the water system, but the water system only.<sup>184</sup> This duplication includes the provisions concerning availability fees.<sup>185</sup> This article includes the provision that owners of the water works system will be a privately owned utility authorized by a CCN issued by the MoPSC and all availability charges, and times and methods of payment thereof, shall be provided in schedules or rates and rules to be approved by the MoPSC, or if not so provided, as determined by the Owner of the water works system.<sup>186</sup>

**134.** Article IX(C) of the 3<sup>rd</sup> Covenants provides for a plan for sewage treatment by individual treatment facilities, which must meet the specifications of Lakesites POA's DNR-approved plan or by "other methods of sewage treatment by the Development." It also provides that Lakesites POA will periodically maintain each individual treatment facility and each lot owner is required to pay a monthly maintenance fee to the POA for administering the plan. The 3<sup>rd</sup> Covenants do not mention or require any availability fees for sewer service to be paid to the developer or to Four Seasons Lakesites Water & Sewer Company.<sup>187</sup>

**135.** The "Development," for purposes of Article IX(C) of the 3<sup>rd</sup> Covenants, refers to the Horseshoe Bend lots.<sup>188</sup>

**136.** Article IX(E) of the 3<sup>rd</sup> Covenants provides that, barring certain exceptions, "all homes and other structures requiring sewage or waste water disposal facilities, shall conform to the plan for sewage treatment; no such home or structure may be occupied unless so connected to the sewage treatment facility and no septic tank, cesspool or other means of disposal of sewage on an individual lot may be used in the subdivisions."

**137.** There are multiple amendments to the 3<sup>rd</sup> Covenants.<sup>189</sup>

**138.** The amendment to the 3<sup>rd</sup> Covenants executed on July 23, 2009 contains specific provisions regarding the water and sewer systems.<sup>190</sup>

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<sup>184</sup> Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4.

<sup>185</sup> *Id.*

<sup>186</sup> Staff Exh. 15, Merciel Rebuttal, Attachment 3, Third Amended and Restated Declaration of Restrictive Covenants.

<sup>187</sup> Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4.

<sup>188</sup> *Id.* See in particular the definitions section and the Amendment to the 3<sup>rd</sup> Covenants dated July 23, 2009.

<sup>189</sup> Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4. See in particular the definitions section and the Amendment to the 3<sup>rd</sup> Covenants dated July 23, 2009.

<sup>190</sup> *Id.*



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

555

139. Article IX in July 23, 2009 amendment removes and replaces the entire Article IX from the 3<sup>rd</sup> Covenants, and provides, *inter alia*:<sup>191</sup>

- a.) **Shawnee Bend Lot Owners must “pay the owner of the central water system, or its assigns or designees,** a monthly availability charge of Ten Dollars (\$10.00), unless the Owner of the Lot is contractually obligated to Developer, or Developer’s assign to pay a different amount;”
- b.) The **water availability fee for Shawnee Bend Lot Owners**<sup>192</sup> commences upon the availability of water in a water system distribution main provided for the Lot and terminates when the Owner of the Lot connects his Lot to the water distribution main.
- c.) Unpaid water availability fees become a lien on the Lot the date they become due.
- d.) **Shawnee Bend Lot Owners** must “pay the owner of the central **sewer system, or its assigns or designees,** a monthly availability charge of Fifteen Dollars (\$15.00), unless the Owner of the Lot is contractually obligated to Developer, or Developer’s assign to pay a different amount.”
- e.) **Horseshoe Bend Lot Owners** must pay the owner of the **water works** system a minimum monthly availability charge (amount not specified).
- f.) The **Owner of the Horseshoe Bend water works system** will be a privately owned public utility authorized by a certificate of public convenience and necessity issued by the MoPSC to operate the water works system.
- g.) The availability fees charged for the **Horseshoe Bend Water System** shall be provided in the Schedules of Rate and Rules. And, regulations and conditions for water services shall be approved by the MoPSC (or any successor) **and if not so provided will be determined by the owner of the water works.**

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<sup>191</sup> *Id.*

<sup>192</sup> Similar water provisions apply to Horseshoe Bend Lot Owners; however, Horseshoe Bend water service is provided by a different corporate entity (Ozark Shores) and water service to Horseshoe Bend is not at issue in this case.

LAKE REGION WATER & SEWER COMPANY

556

19 Mo. P.S.C. 3d

h.) The **Horseshoe Bend sewer treatment** plan has essentially the same terms as outlined in Finding of Fact Number 136.

i.) Unpaid sewer fees for maintenance, owed to Lakesites POA, become a lien on the Lot and may be enforced by the Association.

j.) The water and sewer amendment shall survive the execution and recording of the Fourth Amended and Restated Declaration and shall remain in full force and effect and be incorporated into the Fourth Amended and Restated Declaration.

**140.** All references to regulation by the Commission in the 3<sup>rd</sup> Covenants apply to the Horseshoe Bend Water System, which is not at issue in this case since this system was sold and became Ozark Shores Water Company in 1992.<sup>193</sup>

**141.** The 3<sup>rd</sup> Covenants constitute an agreement between the developer and the property owner. They also create obligations that flow between the property owner and Lakesites POA. The 3<sup>rd</sup> Covenants are not a contract or agreement between Lake Region and the property owner.

**142.** On October 1, 2009, the Fourth Amended and Restated Declaration of Restrictive Covenants (“4<sup>th</sup> Covenants”) was executed by Peter Brown, Vice-President of Four Seasons Lakesites, Inc.<sup>194</sup>

**143.** Article 9 of the 4<sup>th</sup> Covenants states that all provisions relating to the water and sewer systems and treatment are set forth in the Amendment to the 3<sup>rd</sup> Covenants dated July 22, 2009 (executed July 23, 2009).<sup>195</sup> See Finding of Fact Numbers 138-140.

**144.** Recital E in the 4<sup>th</sup> Covenants indicates the Declarant may amend the Declaration at any time until all the lots in development have been sold.<sup>196</sup>

**145.** All of the lots developed by Four Seasons Lakesites, Inc.

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<sup>193</sup> See Finding of Fact Number 23.

<sup>194</sup> Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. The 2009 Annual Registration Report from Four Seasons Lakesites, Inc., dated June 11, 2009, lists Peter Brown as being the president. His wife, Susan, is Vice-President.<sup>194</sup>

<sup>195</sup> Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

<sup>196</sup> *Id.*

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

557

on Shawnee Bend have been sold.<sup>197</sup>

**146.** Section 19.3 of the 4<sup>th</sup> Covenants allows the property owners to seek amendment of the Declaration subject to certain conditions.<sup>198</sup> Those conditions include:<sup>199</sup>

- a.) The Declaration is binding until January 15, 2015, after which it is automatically renewed unless the owners of 90% of the lots vote to terminate the Declaration.
- b.) The Declaration may be amended at any time by the Developer at the request or with the consent of the Board until such time as all lots are sold, at which such time the Declaration may be amended by the affirmative vote of two-thirds of the owners of all of the lots entitled to vote.
- c.) In the case of amendment by two-thirds of the property owners the amendment shall be executed by the requisite lot owners or the POA.

**147.** The current owners of Lake Region have no control over the provisions in the Declaration of Restrictive Covenants executed by the property developer or any amendments to the Covenants.

**148.** The 4<sup>th</sup> Covenants constitute an agreement between the developer and the property owner. It also creates obligations between the property owner and Lakesites POA. The 4<sup>th</sup> Covenants are not a contract or agreement between Lake Region and the property owner.

**149.** The 3<sup>rd</sup> and 4<sup>th</sup> Covenants do not represent that the Commission would determine or tariff rates for availability fees.

**150.** With respect to the water systems, the 3<sup>rd</sup> and 4<sup>th</sup> Covenants provide that if the Commission does not provide or approve regulations and conditions for services, they will be determined by the owner of the system.

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<sup>197</sup> Recital F (October 1, 2010) indicates that not all lots have been sold. Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. However, Peter N. Brown, by an affidavit dated April 29, 2010, states that all of the lots developed by Four Seasons Lakesites, Inc. on Shawnee Bend have been sold. Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

<sup>198</sup> Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. The covenants have been amended or supplemented a minimum of 47 times. Also, additional covenants and restrictions apply to specific subdivisions of the development. *Id.*

<sup>199</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

558

19 Mo. P.S.C. 3d

**151.** There is no provision or language in the 1<sup>st</sup>, 3<sup>rd</sup> or 4<sup>th</sup> Covenants that identifies an intent or purpose for charging or collecting availability fees.<sup>200</sup>

**152.** The specimen land sales contract utilized by Four Seasons Lakesites, Inc. also contains provisions regarding the charging of availability fees. Paragraph 9 (B) and (C) provide:

- a.) all lots in the development will be served by a central water system;
- b.) the buyer agrees to pay availability fees until the central water system is completed to the point that a main water line runs in front of the buyer's property;
- c.) the availability fee for water is \$10.00 per month;
- d.) the availability fee for water shall be paid to the seller of the seller's assignee, Lake Region Water & Sewer Co.;
- e.) the buyer agrees to pay all cost for connecting buyer's home to the central water system;
- f.) all lots in the development will be served by a central sewer system;
- g.) the buyer agrees to pay a monthly availability fee to the seller or seller's assignee until such time as the buyer constructs a home on the property; and,
- h.) once the buyer constructs a home, the buyer shall pay the sewer system operator a one-time connection fee and monthly fee for sewer service.<sup>201</sup>

**153.** It is unclear whether this specimen contract was actually used by the developer; or what time period it might have been used; or if it had been used, whether it is still used by the developer. No actual contracts that had been executed between a property owner and the developer were offered into evidence.<sup>202</sup>

**154.** There is no provision or language in the specimen contract that identifies an intent or purpose for charging or collecting availability fees.

**155.** The specimen land sales contract constitutes an agreement between the developer and the property owner. The land

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<sup>200</sup> See 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Covenants. Transcript, p. 731.

<sup>201</sup> Staff Exh. 53, Four Seasons Lakesites, Inc. Sales Contract.

<sup>202</sup> *Id.*; No copies of an executed land sales contract were introduced into evidence. Transcript, pp. 708-709, 713-715.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

559

sales contract is not a contract or agreement between Lake Region and the property owner.

**Purpose of Availability Fees**

**156.** In Commission Case Number 17,954, the original certification case, the Commission received into evidence an engineering report and the testimony of James W. French, registered professional engineer.<sup>203</sup>

**157.** The engineering report and testimony demonstrate that the economic feasibility of constructing the water and sewer system for what would ultimately become the service area for Lake Region was dependent upon the use of availability fees charged to the purchasers of the undeveloped lots.<sup>204</sup>

**158.** A copy of a separate availability fee agreement is attached to the engineering report.<sup>205</sup> The availability fee agreement contains provisions mirroring the terms for water and sewer service outlined in the 1<sup>st</sup> Covenants as described in Finding of Fact Numbers 122-128.<sup>206</sup>

**159.** The Commission's Report and Order in Case No. 17,954, effective December 27, 1973, ("1973 Order") granting Four Seasons Lake Sites Water and Sewer Company (Lake Region's predecessor in interest) its CCN for water service, acknowledges the use of availability fees and distinguishes the agreement for those charges from the rates and charges proposed for rendering metered and unmetered water service.<sup>207</sup>

**160.** The 1973 Order requires Lake Region's predecessor in interest to file tariffs including the rates for metered and unmetered water service. The Commission's order does not requiring the tariffing of availability fees.<sup>208</sup>

**161.** The collection of availability fees, by the terms and

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<sup>203</sup> Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954.

<sup>204</sup> Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954; *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience and Necessity to Construct, Operate and Maintain an Intrastate Water System*, Case No. 17,954, Report and Order, Issued December 17, 1973, Effective December 27, 1973.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

## LAKE REGION WATER & SEWER COMPANY

560

19 Mo. P.S.C. 3d

timing of the original agreements, began prior to construction or completion of the water and sewer systems and were collected to make construction of the systems feasible.<sup>209</sup>

**162.** The purpose for establishing the availability fees was to recover the investment in the water and sewer systems, not to maintain or repair the existing operations of the systems once they were constructed.<sup>210</sup>

**163.** People who purchase lots who are subject to paying the availability fees receive a benefit from paying the availability fees. That primary benefit is access to required utility service, in this instance potable water and sewage treatment, without having to sustain additional costs of installing a well or a septic system. A secondary benefit for paying the fees is the avoidance of having a lien placed on the property by operation of the terms of the land sales contract or the restrictive

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<sup>209</sup> Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954.

<sup>210</sup> Transcript, pp. 281-282, 335, 343-346, 364-365, 562, 565, 692-702 (see in particular pp. 700-702). Staff Witness Featherstone testified that Staff's theory that the cost of original infrastructure was recovered in the price of the lots, and not from availability fees, was based upon an assumption. (Transcript, p. 461). Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010; Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954. While the Commission's Staff has levied many accusations regarding the purpose of the availability fees being to repair and maintain existing infrastructure, as opposed to recovering the investment in infrastructure, Staff has not provided any evidence to support its theories. Moreover, Staff's testimony has been contradictory; for example, without supporting evidence, Staff witness Featherstone testifies that he believes availability fees would be used to offset maintenance and repair and future replacement construction (Transcript, pp. 415, 468, 731-732). Mr. Featherstone appears to contradict himself when he further testified: The original infrastructure, "to the extent there has been construction and additions" was donated to Lake Region, while: "Replacements to that infrastructure, that would have been paid for by the Lake Region utility and ultimately paid for by the Lake Region customers," i.e., not from availability fees. (Transcript, p. 459). Staff Witness Merciel also contradicts Mr. Featherstone when he testifies that "you can't tell what they're (the availability fees) supposed to be for" (Transcript, p. 482). Staff's latest argument (in its post-hearing brief) refers to a 2003 civil case involving Lake Region and one of its previous owners, Waldo Morris. That argument will be addressed in the conclusions of law section.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

561

covenants. Having the infrastructure in place also facilitates the sale of lots by complying with deed restrictions.<sup>211</sup>

**164.** Lake Region customers have benefited from the availability fees, because the contributed plant associated with those fees lowers rate base and lowers utility rates for the ratepayers.<sup>212</sup>

### **Assignment or Transfer of Ownership of the Availability Fees**

**165.** On August 17, 1998, Four Seasons Lakesites, Inc. (Developer) and Four Seasons Water & Sewer Co. assigned the availability fees to Roy and Cindy Slates.<sup>213</sup>

**166.** The 1998 and 1999 Annual Reports for the company confirm that the company's stock was also transferred to the Slates, but no Stock Purchase Agreement was offered or entered into evidence.<sup>214</sup>

**167.** Following the August 17, 1998 assignment, neither Four Seasons Group, Inc. nor Four Seasons Lakesites, Inc. were involved with the billing or collection of availability fees assessed to the properties in water and sewer companies' service areas.<sup>215</sup>

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<sup>211</sup> Judicial admission by Public Counsel: "Standby and availability charges are fees which are exacted for the benefit which accrues to property by the virtue of having water available to it even though the water might not actually be used at the present time." Transcript, p. 20. The deed restrictions require accessing the utility infrastructure and compliance with paying the availability fee allows for sale of the lots. Transcript pp. 249-250. Alleviates the need for the property owner to drill a well or install a septic system. Transcript, pp. 357-358. The chief benefit of having the infrastructure in place is the availability of potable water distribution and permanent sewer treatment – lot owners gain this benefit from paying availability fees. Transcript 458-459, 741-742 (Featherstone) Mr. Featherstone's prefiled testimony contradicts his testimony at hearing. Transcript, p. 734. There is an economic benefit to pay the fees to avoid a lien on the property. Transcript, p. 499.

<sup>212</sup> Transcript, pp. 253, 357-358, 432-433, 455, 461. See also Footnote 211.

<sup>213</sup> Transcript pp. 242-247, 259-262, 277, 287, 342-346, 351-352, 355, 357, 423-424, 457-458, 518, 544, 635-636; Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement; OPC Exh. 2, Robertson Direct, pp. 3-5 (Lake Region's response to Staff Data Request No. 44.1).

<sup>214</sup> *Id.*; Lake Region Exh. 7, Annual Report of Lake Region Water and Sewer Company for the year ended December 31, 1998; Lake Region Exh. 8, Annual Report of Lake Region Water and Sewer Company for the year ended December 31, 1999; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

<sup>215</sup> Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010. As previously noted, on October 9, 1998, Lakesites W&S changed its name to Four Seasons Water and Sewer Company ("Four Seasons W&S"), and On May 16, 1999, Four Seasons W&S changed its name to Lake Region. Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8. Note: Staff reports the name change occurring in this case; however, the docket entries do not reflect a name change application; *In the Matter of Four Seasons Water and Sewer Company for Name Change to Lake Region Water and Sewer Company*, Case No. WO-99-0469, Order Recognizing Change of Corporate Name and Filing of Adoption Notice, Effective May 16, 1999.

LAKE REGION WATER & SEWER COMPANY

562

19 Mo. P.S.C. 3d

**168.** On July 27, 1999, Lake Region filed its annual report for the year ending December 31, 1998. Availability fees are listed as being “other income” and total \$52,648.<sup>216</sup> This is consistent with timing of the assignment of the fees to the Slates. The 1998 Annual Report was the last year availability fees were reported.<sup>217</sup>

**169.** On April 12, 2000, Roy and Cindy Slates assigned the availability fees to Lake Region Water & Sewer Company.<sup>218</sup>

**170.** On April 12, 2000, Lake Region Water & Sewer Company assigned availability fees to Waldo I. Morris.<sup>219</sup>

**171.** On October 13, 2004, Waldo I. Morris (President of Lake Region Water & Sewer Co.) and Robert P. Schwermann and Sally J. Stump executed a “Contract Regarding Availability Fees” (“Fee Contract”).<sup>220</sup>

**172.** Part of the Fee Contract included consummating and closing a Stock Purchase Agreement (dated September 10, 2004) in which Robert P. Schwermann and Sally J. Stump purchased all of the stock in Lake Region for three million dollars.<sup>221</sup> The Stock Purchase Agreement was not offered or entered into evidence.

**173.** The Fee Contract was accompanied by a separate “Assignment of Availability Fees” agreement specifying that for the amount of \$1.00, and “other good and valuable consideration,” Mr. Morris assigned the availability fees to Robert P. Schwermann and Sally J. Stump.<sup>222</sup>

**174.** Robert P. Schwermann and Sally J. Stump hold the availability fees as tenants in common.<sup>223</sup>

**175.** On October 8, 2003, a lawsuit was initiated by Four Seasons Lakesites, Inc., contesting the ownership of the property rights for the availability fees; Civil Case No. CV103-760CC. The defendants in that lawsuit included Lake Region and Roy and Cindy Slates, and Waldo Morris, the former owners of Lake Region. On April 15, 2005, a confidential settlement was reached regarding who owned the property

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<sup>216</sup> See Footnotes 213 - 215.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement. Transcript, p. 612, 643-644.

<sup>222</sup> *Id.*; Transcript, pp. 245, 259-261, 612-613.

<sup>223</sup> Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement.



## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

563

rights to the fees. Because the ownership of Lake Region had changed hands again, this settlement included the assignment of availability fees from Waldo Morris to Robert P. Schwermann and Sally J. Stump. Sally J. Stump and RPS Properties, L.P. received the right to collect the availability fees as a result of that settlement; however, terms were put in place as to which party received what portion of the availability fees.<sup>224</sup>

**176.** Four Seasons Lakesites, Inc. holds a security interest in RPS Properties, L.P.'s and Sally Stump's availability fees as defined in the Collateral Assignment and Security Agreement dated April 15, 2005 and the Availability Fee Assessment rights as defined in the Collateral Assignment and Security Agreement dated April 15, 2005. This security interest includes all accounts, accounts receivable, payment intangibles, contract rights, chattel paper, instruments and documents and notes; all proceeds relating thereto; and all of the foregoing, which are related to or arising from such Availability Fees and the Availability Fee Assessment Rights.<sup>225</sup>

### **Collection and Amount of Availability Fees**

**177.** According to the terms of the sales contract and the restrictive covenants (described in Findings of Fact Numbers 121-155) availability fees are levied on the owners of undeveloped lots. Once lots are developed, the owner of the property must connect to the water and sewage systems and availability fees are no longer charged once the

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<sup>224</sup> Civil Case No. CV103-760CC. The Commission took administrative notice of this case during the evidentiary hearing. The lawsuit also involved a "Demand for Delivery of Possession" wherein the ownership of a certain tract of property was in dispute. Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010; (HC – Paragraphs 12, 13, 15 to be made public by this order). Staff Exh. 23, Confidential Settlement Agreement in Circuit Court Case CV-103-760CC executed between Four Seasons Lakesites, Inc., Lake Region Water and Sewer Company, Sally J. Stump and RPS Properties, L.P. on April 15, 2005. (HC – no terms of the agreement are disclosed). See also Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010; Transcript, pp. 245, 247, 250, 697, 707-708,

<sup>225</sup> Lake Region Exh. 10, UCC Financing Statement: Four Seasons Lakesites, Inc.'s Security Interest in Availability Fees owned by Sally Stump and RPS Properties, L.P. Beginning with Lake Region's 2005 Annual Report, filed on August 1, 2006, a new entry appears in Annual Reports in the category of "Payments for Services Rendered by Other than Employees." The new entry is entitled Lake Utility Availability, Management. Lake Region Water and Sewer Company, Water and Sewer Annual Report, Small Company, to the Missouri Public Service Commission for the year ending December 31, 2005. This line item books costs associated with debt service cost for the amount of money the shareholders borrowed to purchase Lake Region. *Id.* See also Staff's Response to Commission Request for Annual Report Analysis, filed on May 28, 2010, and Lake Region's Response to June 1, 2010 Order of the Commission, filed June 8, 2010.

LAKE REGION WATER & SEWER COMPANY

564

19 Mo. P.S.C. 3d

connection is made and water and sewer service are being provided.<sup>226</sup>

**178.** Availability fees are not paid by Lake Region's water and sewer service customers.<sup>227</sup>

**179.** Lake Region must provide service to any property owner requesting service within Lake Region's service area, even if the property owner does not pay or is in arrears on paying the availability fees.<sup>228</sup>

**180.** The number of annual bills for availability fees will vary while lots are sold and developed and will continue to vary annually until all lots are sold and developed.<sup>229</sup>

**181.** The actual amount of availability fees collected will vary based upon the property owners fulfilling their obligation to pay.<sup>230</sup>

**182.** The actual amount of availability fees collected annually will vary based upon when the property owners pay the fees.

**183.** Depending on how quickly property owners develop their lots, some may pay availability fees for a very small number of months and some may pay the fees for years.

**184.** Availability fees collected during the years of 1974 through 2004 that were reported by Lake Region's predecessors vary in amount. Fees collected were reported for the years 1974 through 1985, 1987 through 1992, and 1995 through 1998.<sup>231</sup>

**185.** The total amount of availability fees that were collected and reported during the years of 1973 through 2004 that can be verified by the company's annual reports is \$1,571,749.<sup>232</sup>

**186.** The total amount of availability fees that were collected and reported during the years of 1973 through 2004 were collected by the previous owners of the company, i.e. Harold Kopljar, Peter N. Brown, Roy and Cindy Slates, and Waldo I. Morris.

**187.** The total amount of availability fees that were collected

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<sup>226</sup> The undeveloped lots contain no structures, no service lines to connect a structure to a main and there is no actual exchange of water or sewage discharge between a structure and a water or sewer main. Transcript, pp. 534-535.

<sup>227</sup> Transcript pp. 557-558.

<sup>228</sup> Transcript, pp. 489-490, 614.

<sup>229</sup> See the annual reports for Lake Region and its Predecessor Company that report varying amount of fees collected. See Lakesites POA Exhs. 3 and 5. See also "Staff's Response to Commission Request for Annual Report Analysis," filed on May 28, 2010.

<sup>230</sup> See the annual reports for Lake Region and its Predecessor Company that report varying amount of fees collected. See also "Staff's Response to Commission Request for Annual Report Analysis," filed on May 28, 2010.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

565

and reported during the years of 1974 through 2004 that can be verified by the Lake Region's predecessor's annual reports is inaccurate because: (1) data is missing for the years of 1986, 1993, 1994, 1999, 2000, 2001, 2002, 2003, and 2004; (2) there is no breakdown of the dollars collected to know whether the fees were collected for water or sewer customers on Shawnee Bend versus Horseshoe Bend; and (3) based on the timing of the certification cases and the transfer of assets cases, availability fees collected between the years of 1974 and 1992 are comprised primarily, if not totally, from fees collected in relation to the Horseshoe Bend water system, which is irrelevant to this matter.

**188.** The availability fee income that is reported appears on line F-42 of the annual reports for "Other Income and Deductions."<sup>233</sup>

**189.** Since the sale of Lake Region's stock and the assignment of availability fees to Robert P. Schwermann and Sally J. Stump, and the settlement agreement executed in Civil Case No. CV103-760CC, Sally J. Stump and RPS Properties, L.P. have the right to collect the availability fees.<sup>234</sup>

**190.** RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 bills for and collects "availability fees" from land owners of undeveloped lots within the service area of the Lake Region. Lake Utility Availability 1 is a fictitious name.<sup>235</sup>

**191.** For convenience, management fees are paid into the same account in which the availability fees are deposited. That account is titled Lake Utility Availability Fees and is owned by RPS Properties and Sally Stump.<sup>236</sup>

**192.** Billing statements for the availability fees bear the caption "Lake Utility Availability" and display the same address and phone number as a copy of a customer bill for water and sewer service from Lake Region.<sup>237</sup>

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<sup>233</sup> See the annual reports for Lake Region and its predecessor companies.

<sup>234</sup> Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

<sup>235</sup> Transcript, pp. 261-266, 279-280, 323-327, 609, 650; Staff Exhibit 11, Registration of Fictitious Name – Lake Utility Availability, Filed with the Secretary of State on December 1, 2004, expired December 1, 2009; See also Registration of Fictitious Name – Lake Utility Availability 1, Filed with the Secretary of State on August 24, 2005, expires August 24, 2010; Staff Exh. 7, Cost of Service Report, pp. 1-7.

<sup>236</sup> Transcript, p. 358, 417-418. There has been no objections from the original registrant of the fictitious name Lake Utility Availability made to the current registrant of the fictitious name Lake Utility Availability 1 to the use of the abbreviated name. Transcript, p. 650.

<sup>237</sup> Staff Exh. 15, Merciel Rebuttal, Attachment No. 6.

LAKE REGION WATER & SEWER COMPANY

566

19 Mo. P.S.C. 3d

**193.** Cynthia Goldsby is currently a billing clerk employed by Camden County Public Water Supply District Number 4.<sup>238</sup>

**194.** Ms. Goldsby's hourly wage is paid by Camden County PWSD4 and is \$12.90.<sup>239</sup>

**195.** As part of Ms. Goldsby's job responsibilities, she handles billing and collection of the availability fees, but she is unaware as to which entity or entities for which she conducts these activities.<sup>240</sup>

**196.** RPS Properties, L.P. makes no payments for Ms. Goldsby's services.<sup>241</sup> RPS Properties, L.P. makes no payments to the Camden County PWSD4 for Ms. Goldsby's services.<sup>242</sup>

**197.** Ms. Goldsby currently sends bills for annual availability fees to 1,345 individuals or entities owning Shawnee Bend properties.<sup>243</sup>

**198.** The annual availability fees for both water and sewer for each entity billed is \$300.<sup>244</sup>

**199.** RPS Properties, L.P. and Sally Stump began collecting availability fees in 2005, but they retain only a portion of the availability fees pursuant to the April 15, 2005 settlement agreement in Civil Case No. CV103-760CC.<sup>245</sup>

**200.** Based upon the confidential affidavits introduced into evidence identifying the total amount of availability fees collected, and the amount RPS and Sally Stump cannot retain pursuant to the settlement agreement in Civil Case No. CV103-760CC (the specific

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<sup>238</sup> Staff Exh. 26, Affidavit of Cynthia Goldsby, executed May 24, 2010.

<sup>239</sup> Staff Exh. 26, Affidavit of Cynthia Goldsby, executed May 24, 2010.

<sup>240</sup> Transcript pp. 257-258, 282-287, 307-314; Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010.

<sup>241</sup> Staff Exh. 22, Affidavit of Brian Schwermann, executed May 23, 2010. (HC – Paragraphs 4 & 5 to be made public by this order).

<sup>242</sup> *Id.*

<sup>243</sup> Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010; Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010. (HC – Paragraph 8 to be made public by this order). Lakesites POA introduced evidence of the number of undeveloped lots in the Porto Cima subdivision of the Shawnee Bend Peninsula. These numbers presented by Lakesites POA demonstrate the annual fluctuation in the number of unimproved lots; however, these numbers, absent an accurate count of the actual bills levied for availability fees are of no value in determining the actual amount of availability fees billed for and collected on an annual basis. See Lakesites POA Exhs. 3 and 5.

<sup>244</sup> Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010; Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010 (HC – Paragraph 9 to be made public by this order); Staff Exh. 20, Affidavit of Sally Stump, executed June 1, 2010.

<sup>245</sup> Staff Exhibit 23, Confidential Settlement Agreement in the Circuit Court Case Between Four Seasons Lakesite and Lake Region Water & Sewer Company's Sally Stump and RPS Properties. (HC– no confidential material disclosed).

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

567

terms of which the Commission will not disclose), the annualized amount of revenue actually received from the availability fees by RPS and Sally Stump can be definitively calculated. However, for reasons more fully articulated in the conclusions of law, those actual numbers will not be disclosed.<sup>246</sup>

**201.** On November 13, 2006, John Summers (General Manager of Lake Region) received an e-mail from Roberta Grissum of the Commission's Staff, instructing Ozark Shores (one of the companies managed in conjunction with Lake Region) to file an amended Annual Report for the calendar year of 2005. The e-mail directs Ozark Shores to include only regulated revenues in its annual reports. The e-mail was giving Ozark Shores specific instructions to remove any revenue the company collected as availability fees and any expense associated with collecting those fees from its annual report because Staff classified these fees as unregulated revenue. Mr. Summers has continued to follow the practice of not including availability fees on the annual reports after receiving Staff's instructions.<sup>247</sup>

**202.** Staff's calculations regarding the amount of the availability fees being collected are estimates that are not reliable, that have not been verified and that assume that Lake Region is the entity collecting the fees.<sup>248</sup>

### **Historical Treatment of Availability Fees**

**203.** The Commission has had a number of cases come before it in the past that have dealt with issues concerning availability

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<sup>246</sup> Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010 (HC – Paragraphs 10 & 17 NOT to be made public by this order); Staff Exh. 22, Affidavit of Brian Schwermann, executed May 24, 2010. (HC – Paragraph 6 NOT to be made public by this order). Staff Exh. 23, Confidential Settlement Agreement in Circuit Court Case CV-103-760CC executed between Four Seasons Lakesites, Inc., Lake Region Water and Sewer Company, Sally J. Stump and RPS Properties, L.P. on April 15, 2005. (HC – no terms of the agreement are disclosed) (NOT to be made public – Protective Order in place).

<sup>247</sup> Lake Region Exh. 9, E-mail dated November 13, 2006 from Roberta Grissum to John R. Summers; Transcript, pp. 360-362.

<sup>248</sup> Transcript, pp. 523-524. Judicial admission of Staff Counsel in opening statement for the True-Up Proceeding: "Staff's total amount of availability fee revenue is based upon its estimated number of undeveloped lots in the Shawnee Bend region. Staff has been unable to be [sic] verify this number to be true and accurate from Lake Region, Lake Utility Availability and/or Lake Utility Availability One." Transcript, p. 687. The actual amounts of availability fees collected by the current owners of Lake Region are provided in the Affidavits from Brian Schwermann.

## LAKE REGION WATER & SEWER COMPANY

568

19 Mo. P.S.C. 3d

fees. Those issues involved determinations regarding whether the fees constitute regulated utility services and how to treat the revenue derived from fees.

**204.** In Case No. WR-92-59, where Lakesites Water & Sewer Company (Lake Region's predecessor) sought an increase in rates, the availability fees were removed from the general revenue stream and the rate base was reduced a certain amount as an offset for the reduction in general revenue related to the availability fees. This case was settled with a unanimous agreement from the parties that the Commission approved.<sup>249</sup>

**205.** In Case No. WR-99-193, where Ozark Shores sought an increase in rates, the parties agreed to add availability fees into the general revenue stream of the company and add additional rate base to the company as an offset. The availability fees are included in utility rates and are not tarified. This case was settled with a unanimous agreement from the parties that the Commission approved.<sup>250</sup>

**206.** Peaceful Valley Service Company, a wholly owned subsidiary of Peaceful Valley Property Owners Association, collects availability charges as general revenue to reserve access to its water service and the fees are tarified. Peaceful Valley's tariff provision applies to availability charges that are generated through a contract between the property owner and the company, or from a contract between a property owner and a developer that was assigned to the utility company. The treatment of the availability fees stemmed from a unanimous agreement from the parties that the Commission approved.<sup>251</sup>

**207.** I.H. Utilities formerly collected availability fees as general revenue and these charges were tarified in rates. The fees originated in a contract between the developer and the property owner that was later assigned to the company. I.H. Utilities no longer collects the fees and

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<sup>249</sup> Case No. WR-92-59, *In the Matter of Four Seasons Lakesites Water and Sewer Company's Tariff to Increase Rates Pursuant to Their Informal Rate Procedure*, Report and Order, issued November 27, 1991, Order Approving Tariff, Issued may 15, 1992; Transcript, pp. 559-561.

<sup>250</sup> Case No. WR-99-183, *In the Matter of Ozark Shores Water Company, Inc. for a Small Company Rate Increase*, Order Approving Tariff, issued December 10, 1998, Effective December 11, 1998 ; Transcript, pp. 359-360, 491-492, 559-561. This case was referenced as Case No. WR-98-990 during Mr. Stump's testimony; however, Lake Region clarified the proper case number in its brief as being Case No. WR-99-183.

<sup>251</sup> Transcript pp. 491-497, 502-507, 529-532, 538; Tariff JW-2002-0105, P.S.C. Mo. No. 2, 1<sup>st</sup> Revised Sheet # 6; Staff Exh. 15, Merciel Rebuttal, Attachment 2.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

569

they are no longer tarified in rates.<sup>252</sup>

**208.** Staff's subject matter experts have consistently testified in their expert capacity that availability fees are not utility services.<sup>253</sup>

**209.** The Commission has previous found that availability fees are not utility services.<sup>254</sup>

**210.** The Commission's Staff has always been aware of the availability fees being charged to the property owners in the Shawnee Bend area.<sup>255</sup>

### **Costs Associated with Billing and Collection of Availability Fees**

**211.** Staff did not audit the actual costs associated with billing and collection for the availability fees. Staff treated RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 as a fourth entity to estimate an allocation of costs related to the management and payroll associated with billing and collection of the fees.<sup>256</sup>

**212.** Lake Region examined the cost associated with billing 1200 individuals or entities for availability fees each year. Based upon total billing of 38,000 bills per year, Lake Region's billing clerk spends

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<sup>252</sup> Transcript pp. 532-533.

<sup>253</sup> Transcript pp. 432 (Featherstone), 496-498, 534-535 (Merciel); Staff Exh. 15, Merciel Rebuttal, p. 6. "As a technical expert, I believe that "service" is provided to a water customer when that customer is connected to the water system and has use of the water, which is the utility's product/commodity furnished to the customer, as desired. Similarly, a "service" is provided to a sewer customer when that customer is connected to the sewer system, in that any time the customer discharges sewage it will be taken and properly treated by the sewer utility. The availability charge is different because it applies when the utility "service" is available to the property owner by virtue of the existence of pipelines in front of the property, but the property owners does not connect and actually receive utility "service." *Id.*

In the Report and Order in *Orler v. Folsom Ridge, LLC* 2007 WL 2066385, 16 (Mo.P.S.C.) (Mo.P.S.C.2007), the Commission determined that fees paid to reserve service is not the provision of water or sewer service and does not involve a use, accommodation, product or commodity, based upon Mr. Merciel's testimony in that case (Transcript from WC-2006-0082 & WO-2007-0277, pp. 1093-1096). See also the testimony of Gregory Meyer in WA-95-164: "An availability fee is established by a developer and is charged to a lot owner when that lot has the capability of receiving water and sewer service. In order words, the water and sewer mains and production and treatment facilities have been constructed, but no service is being provided as of yet." OPC Exh. 2, Robertson Direct, pp.6-7.

<sup>254</sup> *Id.* Similarly, in *In re Central Jefferson County Utilities, Inc.* 2007 WL 824040, 11, (Mo.P.S.C.) (Mo.P.S.C.2007), the Commission determined that it lacked jurisdiction over the developers charging connection fees for services, even when the developers and the utility company were owned by the same individuals, because these were separate corporate entities.

<sup>255</sup> Transcript, pp. 525-526.

<sup>256</sup> Transcript, pp. 446-454.

LAKE REGION WATER & SEWER COMPANY

570

19 Mo. P.S.C. 3d

3% of her time associated with billing for availability fees. There is a cost of 50 cents for each bill associated with stamps and paper. There is a cost for the management of providing the billing and collection service of 3/10<sup>th</sup> of one percent or \$600 a year for that function. In total, a reasonable cost for providing the billing and collection service for 1200 bills for availability fees is \$2,000 annually.<sup>257</sup>

**L. Executive Management Fees**

**213.** Lake Region does not have any employees.<sup>258</sup>

**214.** Lake Region contracts with the Camden County Public Water Supply District Number Four ("Water District"), to operate and manage the day-to-day operations of the Lake Region and Ozark Shores Water Company ("Ozark Shores").<sup>259</sup>

**215.** The Water District staff performs normal day-to-day administrative and operational functions for all three entities and consists of a General Manager, two accountant-administrative assistants and seven field operators.<sup>260</sup>

**216.** The work of the employees is structured to share in their efforts to perform the necessary tasks required of operating water and sewer companies. Economies are gained and benefits recognized by all three entities when the work of the employees is spread out among Lake Region, Ozark Shores and the Water District.<sup>261</sup>

**217.** Lake Region does not have its own office space.<sup>262</sup>

**218.** Lake Region shares office space with Ozark Shores and the Water District. This is an older building that is not excessive in its size or décor.<sup>263</sup>

**219.** There are economic benefits to the sharing of office space versus having to acquire stand-alone office space.<sup>264</sup>

**220.** There are common facilities and equipment (vehicle equipment, wells for the water services and a water storage tank) that are owned by either the Water District or Lake Region or Ozark Shores that are used by all three of these entities to provide each with respective utility services.<sup>265</sup>

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<sup>257</sup> Transcript, pp. 566-568.

<sup>258</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Transcript, pp. 122-213.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

571

**221.** Overlapping service areas between the three entities require coordination and evaluation of decision making to ensure the most effective approach to these operations.<sup>266</sup>

**222.** Coordinating the efforts of the three entities--Lake Region, Ozark Shores and the Water District-- is required to take full advantage of the economies of scale of operating all the water and sewer entities.<sup>267</sup>

**223.** To the extent the personnel, work procedures and equipment can be coordinated and shared between the three entities, all three companies benefit.<sup>268</sup>

**224.** If each of these entities operated separately as stand-alone companies they would have to have additional equipment which would be costly to the customers and would incur greater payroll and benefit costs.<sup>269</sup>

**225.** In lieu of owning equipment needed to operate water and sewer utilities, the stand-alone companies could lease this equipment as needed but this too would be costly over time.<sup>270</sup>

**226.** Lake Region and Ozark Shores benefit from its relationship to each other as well as to the Water District in sharing the expensive equipment such as backhoes and trucks.<sup>271</sup>

**227.** There is a written agreement between the entities to share the equipment and reimburse the Water District for its use.<sup>272</sup>

**228.** This agreement and the coordination of the three entities are in place because of the efforts of the general manager, John Summers, and the Executive Management Group ("EMG").<sup>273</sup>

**229.** Mr. Summers, as General Manager, could not act on his own, to create the operational structure that exists for Lake Region, Ozark Shores and the Water District.<sup>274</sup>

**230.** Mr. Summers is an employee of the Water District who manages that entity and manages Lake Region and Ozark Shores by contract.<sup>275</sup>

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<sup>266</sup> *Id.*  
<sup>267</sup> *Id.*  
<sup>268</sup> *Id.*  
<sup>269</sup> *Id.*  
<sup>270</sup> *Id.*  
<sup>271</sup> *Id.*  
<sup>272</sup> *Id.*  
<sup>273</sup> *Id.*  
<sup>274</sup> *Id.*  
<sup>275</sup> *Id.*

LAKE REGION WATER & SEWER COMPANY

572

19 Mo. P.S.C. 3d

**231.** Only the EMG had the authority to set up the organization in the matter in which it operates and enter into the contractual arrangement with the Water District.<sup>276</sup>

**232.** The EMG, consisting of Vernon Stump, Robert Schwermann and Brian Schwermann, interacts with the Water District staff and provides executive management oversight on a variety of advanced operational, technological and financial issues that are not generally expected to occur in the normal course of day-to-day operations.<sup>277</sup>

**233.** The EMG shares offices with the non-utility operations of RPS Properties Inc. (the company owned by the Schwermanns) for its investments in real estate that is located in Overland Park, Kansas.<sup>278</sup>

**234.** The EMG holds its annual Board meeting at the offices of RPS Properties Inc.<sup>279</sup>

**235.** When Mr. and Mrs. Stump are in Kansas City for Board meetings and meetings regarding the operations of the two regulated companies they own they work out of the Overland Park offices.

**236.** The EMG attends the monthly meetings of the Water District to determine whether there are issues affecting Lake Region and/or Ozark Shores.<sup>280</sup>

**237.** The EMG evaluates the operations of Lake Region and Ozark Shores and makes decisions based on the overall best interest of each entity.<sup>281</sup>

**238.** Mr. Stump provides the over-all direction of Lake Region, takes care of the operational, functional and engineering aspects Lake Region; including, but not limited to, expansions and repairs, decisions with respect to DNR requirements, budget parameters, negotiates contracts and tracking performance of the company.<sup>282</sup>

**239.** Mr. Stump communicates with Mr. Summers, the

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*; Lake Region Exh. 2, Stump Rebuttal, p. 2.

<sup>278</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Registration of Fiction Name for Lake Utility Availability 1 filed with the Missouri Secretary of State on August 24, 2005 confirms that RPS properties, L.P. is located at 10777 Barkley, suite 210, Overland Park, Kansas (See Transcript p. 29).

<sup>279</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16. The office space shared with Water District is insufficient for the EMG to perform all of its functions on a permanent basis. *Id.*

<sup>280</sup> Transcript, p. 124,148; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>281</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>282</sup> Transcript, pp. 125, 150.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

573

General Manager, twice a week.<sup>283</sup>

**240.** The Schwermanns take care of the financial aspects of Lake Region, including, but not limited to, financial services, tax returns and accounting issues.<sup>284</sup>

**241.** While one responsibility of the EMG is to prepare and participate in the Board of Directors meetings of Lake Region and Ozark Shores, the EMG provides many other managerial services to Lake Region and its affiliate Ozark Shores that are not normally duties of a company's Board of Directors.<sup>285</sup>

**242.** Activities the EMG performs which are not normally the responsibilities of Board members include:

- a.) Meeting and negotiating with representatives of the Company's largest customer to resolve a dispute regarding an inflow and infiltration (I&I) issue.
- b.) Developing and implementing plans to install a new lift station and force main.
- c.) Planning the implementation of a new automated meter reading system.
- d.) Identifying solutions for water pressure issues.
- e.) Arranging the financing of capital projects and on-going operations.
- f.) Maintaining the accounting system, tax reporting requirements and overall records of the company.
- g.) Maintaining ongoing relationships with lending institutions and outside auditors.
- h.) Communicating regulatory matters with the Missouri Public Service Commission, its Staff and other stakeholders on an on-going basis.
- i.) Attending industry meetings and open discussions such as the Small Utility Meeting hosted by the Missouri Public Service Commission on December 14, 2009.
- j.) Actively participating in this rate case including filing testimony (Mr. Stump) and attending discussions with representatives of Staff, the Office of Public Counsel and other parties to this case.
- k.) Maintaining the utility operations in accordance with

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<sup>283</sup> Transcript, p. 126.

<sup>284</sup> Transcript, p. 125-126.

<sup>285</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Transcript, pp. 122-213.

LAKE REGION WATER & SEWER COMPANY

574

19 Mo. P.S.C. 3d

the Missouri Department of Natural Resources permits, rules and regulations.<sup>286</sup>

**243.** The Commission knows of no other Board of Directors member of any of its regulated public utilities who provides any of the aforementioned services.<sup>287</sup>

**244.** Board members who are not employees do not make management decisions. Non-employee board members who are not compensated in any other manner than through board of director fees do not make the managerial proposals such as capital expenditures. Those decisions are presented to the Board for approval.<sup>288</sup>

**245.** Boards of Directors do not negotiate labor agreements or other contracts affecting the utility operations; do not develop capital and operating budgets and do not get directly involved in the operational issues of running a public utility like Lake Region and Ozark Shores.<sup>289</sup>

**246.** While directors are typically advised of the operations of the companies and have to approve major decisions including contracts and financing, they do not implement those decisions nor do directors have the responsibility to carry out the decisions of the board - that is the job of the executive management team.<sup>290</sup>

**247.** All of the members of Lake Region's EMG have other work activities they are involved in. They work on a part time basis to run the water and sewer operations of Lake Region and Ozark Shores.<sup>291</sup>

**248.** The EMG is responsible for approximately 1,400 total customers for Lake Region (splitting out the overlapping water and sewer customers) and 1,790 customers for Ozark Shores or a combined total of 3,190 customers.

**249.** While Lake Region does have over-lapping water and sewer customers for Shawnee Bend, these customers represent two separate entities. There may be one bill for water and sewer service, but each water customer requires infrastructure, i.e. a tower, well and water meter, and each sewer customer requires a treatment plant and a collection line.<sup>292</sup>

**250.** The amount of pipe the EMG is responsible for

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<sup>286</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16 Transcript, pp. 122-213.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Transcript, pp. 128-129, 140, 176.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

575

maintaining totals 322,173 feet, broken down as follows: (1) Shawnee Bend Water 96,832 feet; (2) Horseshoe Bend Water 216,427 feet; and (3) Horseshoe Bend Sewer 8,914 feet.<sup>293</sup>

**251.** Lake Region's service of the large condominium customers generates customer equivalents, in terms of water and sewer usage, closer to having 3000 customers.<sup>294</sup>

**252.** Lake Region is a complicated utility requiring the management of a large amount of infrastructure.<sup>295</sup>

**253.** Lake Region is, on a stand-alone basis, the eighth largest water or sewer utility in the state in terms of customers served. As a combined water and sewer utility, it ranks behind only Missouri-American and Aqua Missouri in total number of Missouri customers. If it is combined with Ozark Shores, which shares the cost of executive management with Lake Region, they collectively rank fifth in revenue, sixth in number of customers and third in number of feet of water and sewer mains of the water or sewer utilities in Missouri.<sup>296</sup>

**254.** A company the size of Lake Region requires management leadership. Considering the total number of customers served by Lake Region, as well as the number of customers served by its affiliate company, Ozark Shores, it is necessary to have an executive management team in place to direct and guide the operations of these entities.<sup>297</sup>

**255.** Proper executive management of Lake Region's enterprises requires regular onsite attendance and review to prevent deterioration of the operations and unnecessary increases in costs.<sup>298</sup>

**256.** The management oversight by the EMG is directly related to the operations of both Lake Region and Ozark Shores and must be compensated like any other service provider to these companies.<sup>299</sup>

**257.** There are several theories that serve as the basis for determining proper executive management compensation, including: (1)

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<sup>293</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>294</sup> Transcript, p141.

<sup>295</sup> Transcript, p. 141. Staff Exh. 18, Staff Accounting Schedules, True-Up Direct, Schedule 9, Plant in Service for each utility division. In addition to the pipes, and water towers, there are four separate treatment plants with 40 or 50 small lift stations. *Id.* See also Findings of Facts Numbers 12-16.

<sup>296</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>297</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>298</sup> Transcript, pp 133-135.

<sup>299</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

LAKE REGION WATER & SEWER COMPANY

576

19 Mo. P.S.C. 3d

cost per customer basis; (2) percentage of revenue basis; and (3) an hourly compensation basis.

**Per Customer Basis**

**258.** All other water and sewer utilities in the state with annual revenues exceeding \$500,000, (like Lake Region) where utilities pay management fees to an outside service or a salary to an executive or owner is summarized in the following table:<sup>300</sup>

Water & Sewer Revenues >\$500,000

UTILITY COMPANY NAME	UTILITY TYPE	2Y-2018 INTRASTATE REVENUE	Number of customers	Water and sewer mains (in feet)	Management Fees (outside services)	Management Salary (payroll)	Total Payroll (inc. mgmt.)
Algonquin Water Resources of Missouri, LLC	Water & Sewer	\$887,814	not in Annual Report	not included in annual report	not included in annual report	not included in annual report	not included in annual report
Aqua Missouri, Inc. (CU)	Water & Sewer	\$912,300	2,544	216,962	\$51,717	\$75,555	\$308,278
Aqua Missouri, Inc. (RU)	Water	\$309,067	827	134,497	\$23,610		\$103,690
Aqua Missouri, Inc. (Combined)	Water & Sewer	\$1,211,267	3,441	351,059	\$75,327	\$75,555	\$482,928
House Springs Sewer Company, Inc.	Sewer	\$580,295	not in Annual Report	not included in annual report	not included in annual report	not included in annual report	not included in annual report
Roark Water and Sewer, Inc.	Water & Sewer	\$550,778	1,290	54,567	\$33,369	\$89,383	\$125,161
Timber Creek Sewer Company	Sewer	\$882,693	1,313	170,896		\$70,510	\$242,967
Tri-State Utility, Inc.	Water	\$981,788	3,484	227,344	not in Annual Report		\$213,809
U.S. Water Company	Water	\$742,914	2,135	223,789		\$97,200	\$387,904
<b>TOTAL WATER and SEWER</b>		<b>\$6,462,747</b>	<b>11,683</b>	<b>1,833,837</b>	<b>\$183,823</b>	<b>\$302,661</b>	<b>\$1,382,580</b>

**259.** Management fees on a per customer basis for the companies in the table above are as follows:

Name of Utility	Number of Customers	Management Fees	Dollars Per Customer
Algonquin Water Resources of Mo.	Unknown	Unknown	Unknown
Aqua Missouri, Inc.	3,441	\$150,815	\$43.83
Roark Water & Sewer	1,290	\$33,369	\$25.87
House Springs Sewer Co.	Unknown	\$59,383	Unknown
Timber Creek Sewer Co.	1,313	\$70,510	\$53.70
U.S. Water Company	2,135	\$97,200	\$45.53

**260.** The average dollar per customer for management fees for those companies where the data was reported is \$42.23.

**Percentage Basis**

**261.** Lake Region compared management fees as a percentage of revenue for Aqua Missouri, Inc., Aqua Missouri RU, Inc. and US Water Company and determined that executive management fees were, on average, compensated at a rate of 8% of the companies' revenue.<sup>301</sup>

**262.** Applying Lake Region's 8% analysis to the full proxy

<sup>300</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16 and Schedule VWH-1.

<sup>301</sup> Lake Region Exh. 2, Stump Rebuttal, p. 3 and accompanying Schedule 1.

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

577

group of regulated Missouri water and sewer companies earning over \$500,000 annually from the table in Finding of Fact Number 258 produces the following results:

Name of Utility	Intrastate Revenue	Management Fees at 8% of Intrastate Revenue
Algonquin Water Resources of Mo.	\$697,914	\$55,833
Aqua Missouri, Inc. (combined)	\$1,311,267	\$104,901
Roark Water & Sewer	\$556,778	\$44,542
House Springs Sewer Co.	\$560,295	\$44,824
Timber Creek Sewer Co.	\$662,693	\$53,015
Tri-States Utility, Inc.	\$961,786	\$76,943
U.S. Water Company	\$742,014	\$59,361
<b>Average</b>		<b>\$62,774</b>

**Hourly Compensation Basis**

**263.** Each member of the EMG spends approximately one travel day and four days each month involved with managing the systems.<sup>302</sup>

**264.** The proper hourly compensation rate for this level of executive management is approximately \$64 per hour.<sup>303 304</sup>

**265.** After a full review of the evidentiary record, the Commission finds that \$64 per hour is the appropriate hourly compensation for Lake Region's level of executive management.

**266.** For reasons to be more fully articulated in the conclusions of law section, the Commission finds the appropriate amount of executive compensation for the EMG to be recovered in rates is \$33,232.

**M. Rate Case Expense**

**267.** Lake Region's direct costs for rate case expense was \$22,498 through April 2, 2010.<sup>305</sup> Lake Region's rate case expense as of April 22, 2010 is \$26,449, and this amount continued to rise with the litigation.<sup>306</sup> Lake Region's rate case expense through May 12, 2010 is

<sup>302</sup> Transcript, pp. 123-124,151.

<sup>303</sup> *Id.*; Lake Region Exh. 2, Stump Rebuttal, p. 3 and accompanying Schedule 1; Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

<sup>304</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

<sup>305</sup> Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

<sup>306</sup> Lake Region Exh. 12, Summers True-Up Rebuttal, p. 3.

LAKE REGION WATER & SEWER COMPANY

578

19 Mo. P.S.C. 3d

\$42,997.<sup>307</sup>

**268.** Due to increasing operating expenses and anticipated capital improvements, Lake Region will likely file for additional rate relief closer to the three-year time frame; consequently, amortization of rate case expense over three years is more appropriate.<sup>308</sup>

**269.** For reasons more completely articulated in the conclusions of law, the Commission finds \$42,997 is the correct rate case expense. The appropriate annualization period is a three years, and the annual amount of rate case expenses to be included in revenue requirement is \$14,331. When allocated for the three operating systems, \$4,777 is included in the revenue requirement of each, i.e. Shawnee Bend Water, Shawnee Bend Sewer and Horseshoe Bend Sewer.<sup>309</sup>

**N. Service Quality**

**270.** The customers of Lake Region are happy with the services they receive and have no service or billing problems with the company.<sup>310</sup>

**271.** No party alleges any deficiencies, problems or issues with the quality of service provided by Lake Region.

**272.** No party alleges any deficiencies, problems or issues with Lake Region's billing for services.

**273.** No party alleges any deficiencies, problems or issues with Lake Region's response to customer calls.

**274.** The Commission finds no deficiencies, problems or issues with the quality of service provided by Lake Region.

**III. Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

**A. Jurisdiction, Burden of Proof, Presumption of Prudence and the Public Interest<sup>311</sup>**

Lake Region is a sewer corporation, a water corporation and a public utility as defined in Sections 386.020(49), 386.020(59), and 386.020(43), RSMo Cum. Supp. 2009, respectively, and as such is

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<sup>307</sup> Staff Exh. 50, [Second Updated] Reconciliation; Staff Exh. 19, [Updated] Reconciliation; Final [Updated] Reconciliation, filed on July 16, 2010; Staff's Update to Rate Case Expense - Staff's July 9, 2010 Response to Missouri Public Service Commission's June 24, 2010 Order Regarding Rate Case Expense, filed July 9, 2010, verified by the Affidavit of Cary G. Featherstone.

<sup>308</sup> Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

<sup>309</sup> See Footnote 307.

<sup>310</sup> Transcript, pp. 11(Elrod), 14-15 (Finn), 18 (Parham), 20 (Becker), and 375 (Cason).

<sup>311</sup> See Findings of Fact Numbers 1-36 for this section.



## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

579

subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. The Commission's subject matter jurisdiction over Lake Region's rate increase request is established under Section 393.150, RSMo 2000.<sup>312</sup>

Sections 393.130 and 393.140, RSMo 2000, mandate that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable. Section 393.150.2 makes clear that at any hearing involving a requested rate increase the burden of proof to show the proposed increase is just and reasonable rests on the corporation seeking the rate increase.

As the party requesting the rate increase, Lake Region bears the burden of proving that its proposed rate increase is just and reasonable. In order to carry its burden of proof, Lake Region must meet the preponderance of the evidence standard.<sup>313</sup> And in order to meet this standard, Lake Region must convince the Commission it is "more likely than not" that Lake Region's proposed rate increase is just and reasonable.<sup>314</sup>

While a utility has the burden of proof to justify its proposed rate increase, there is initially a presumption that its expenditures, comprising one component of its revenue requirement, are prudent. The

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<sup>312</sup> Lake Region filed its application pursuant to Section 393.150 and Commission Rules 4 CSR 240-2.060, 2.065, and 3.030. These rules outline the minimum filing requirements for Lake Region to pursue its rate increase request.

<sup>313</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

<sup>314</sup> *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992). The burden of proof has two parts: the burden of production and the burden of persuasion. The burden of production requires Lake Region to introduce enough evidence on the material issue or issues to have that issue or those issues decided by the Commission, rather than the Commission deciding against Lake Region in a peremptory ruling such as a summary determination or a determination on the pleadings. *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 745 (Mo. App. 2005); *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001); *State v. Ramires*, 152 S.W.3d 385, 395 (Mo. App. 2004). The burden of persuasion requires Lake Region to convince the Commission to favor its position, (*Id.*) and this burden always remains with Lake Region. *Middlemas v. Director of Revenue, State of Missouri*, 159 S.W.3d 515, 517 (Mo. App. 2005); *R.T. French Co. v. Springfield Mayor's Com'n on Human Rights and Community Relations*, 650 S.W.2d 717, 722 (Mo. App. 1983).

LAKE REGION WATER & SEWER COMPANY

580

19 Mo. P.S.C. 3d

Commission has previously cited the following description of this process as found to apply to the Federal Energy Regulatory Commission:

The Federal Power Act imposes on the Company the “burden of proof to show that the increased rate or charge is just and reasonable.” Edison relies on Supreme Court precedent for the proposition that a utility’s cost are [sic] presumed to be prudently incurred. However, the presumption does not survive “a showing of inefficiency or improvidence.” As the Commission has explained, “utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.”<sup>315</sup>

While the standard for evaluating the proposed rate increase pursuant to Section 393.150 is clear, and while Lake Region receives an initial presumption that its expenditures are prudent, the Commission must also consider the “public interest” when it makes its determination as to if the proposed increased rates are just and reasonable.<sup>316</sup> The public interest is a matter of policy to be determined by the Commission.<sup>317</sup> It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.<sup>318</sup> Determining what is in the interest

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<sup>315</sup> *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

<sup>316</sup> *In re Rahn’s Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (Mo. 1926); *Morrhead v. Railways Co.*, Mo. 121 165, 96 S.W. 261, 271 (Mo. banc 1907); *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974). The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission’s authority.

<sup>317</sup> *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980); *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

<sup>318</sup> *State ex rel. Intercon Gas, Inc. v. Public Service Com’n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

581

of the public is a balancing process.<sup>319</sup> In making such a determination, the total interests of the public served must be assessed.<sup>320</sup> This means that some of the public may suffer adverse consequences for the total public interest.<sup>321</sup> Individual rights are subservient to the rights of the public.<sup>322</sup> The “public interest” necessarily must include the interests of both the ratepaying public and the investing public;<sup>323</sup> however, as noted, the rights of individual groups are subservient to the rights of the public in general.

### **B. Rate Making Standards and Practices<sup>324</sup>**

The Commission has exclusive jurisdiction to establish public utility rates,<sup>325</sup> and the rates it sets have the force and effect of law.<sup>326</sup> A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;<sup>327</sup> neither can a public utility change its rates without first seeking authority from the Commission.<sup>328</sup> A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's,<sup>329</sup> subject to judicial review of the question of reasonableness.<sup>330</sup>

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and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

<sup>319</sup> *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

<sup>323</sup> The United States Supreme Court tells us simply that “the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.” *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 186 S.W.3d 376, 383 (Mo. App. W.D. 2005), citing to, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The Missouri Supreme Court has also previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property. See *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>324</sup> See Findings of Fact Numbers 36-72 for this section.

<sup>325</sup> *May Dep't Stores*, 107 S.W.2d at 57.

<sup>326</sup> *Utility Consumers Council*, 585 S.W.2d at 49.

<sup>327</sup> *Id.*

<sup>328</sup> *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

<sup>329</sup> *May Dep't Stores*, 107 S.W.2d at 50.

<sup>330</sup> *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W.

## LAKE REGION WATER & SEWER COMPANY

582

19 Mo. P.S.C. 3d

A “just and reasonable” rate is one that is fair to both the utility and its customers;<sup>331</sup> it is no more than is sufficient to “keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested.”<sup>332</sup> The Commission’s guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.<sup>333</sup> However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.<sup>334</sup> “There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment.”<sup>335</sup>

Ratemaking involves two successive processes:<sup>336</sup> first, the determination of the “revenue requirement,” that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.<sup>337</sup> The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers.

Revenue requirement is usually established based upon a historical test year which focuses on four factors: (1) the rate of return

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852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

<sup>331</sup> *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

<sup>332</sup> *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

<sup>333</sup> *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

<sup>334</sup> *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

<sup>335</sup> *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).

<sup>336</sup> It is worth noting here that Missouri recognizes two distinct ratemaking methods: the “file-and-suspend” method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility’s rates are not just and reasonable. See *Utility Consumers Council*, 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975).

<sup>337</sup> *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

583

the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.<sup>338</sup> The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.<sup>339</sup> For any utility, its fair rate of return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of common equity, the cost used is its estimated cost.<sup>340</sup>

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<sup>338</sup> *Id.*, citing Colton, "Excess Capacity: Who Gets the Charge From the Power Plant?," 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).

<sup>339</sup> *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 75 -76 (Mo. App. S.D. 2009); *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988). The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility's books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility's prudent operating costs. Section 393.230 authorizes the Commission to value the property of any water and sewer corporation operating in Missouri, that is, to determine the rate base. Section 393.240 authorizes the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

<sup>340</sup> Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized. See Phillips, *The Regulation of Public Utilities*, Public Utilities Reports, Inc., p. 394 (1993). The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. *Bluefield, supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally

## LAKE REGION WATER & SEWER COMPANY

584

19 Mo. P.S.C. 3d

In the final analysis, it is not the method employed, but the result reached, that is important.<sup>341</sup> The Constitution "does not bind ratemaking bodies to the service of any single formula or combination of formulas."<sup>342</sup>

### **C. Lake Region's Baseline Revenue Requirement, Rate Design and Miscellaneous Tariff Issues<sup>343</sup>**

#### **Baseline Revenue Requirement**

Throughout this proceeding the parties have filed numerous accounting schedules, revenue scenarios and reconciliations. The parties have stipulated and conceded to the determination of the baseline revenue requirement for Lake Region that is exclusive of the contested issues concerning availability fees, executive management fees and rate case expense. The Commission finds it highly persuasive that multiple parties representing diverse interests utilizing accounting and auditing analyses from multiple subject matter experts have reached agreement on Lake Region's baseline revenue requirement. The factors considered in reaching this agreement, *inter alia*, include Lake Region's current earnings, expenses, rate base, capital structure, and the appropriate return on equity and rate of return.

After undertaking an independent review of all relevant factors,<sup>344</sup> the Commission determines that the substantial and

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being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

<sup>341</sup> Within a wide range of discretion the Commission may select the methodology. *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434 (Mo. App., W.D. 1998), *rehearing and/or transfer denied*; *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880, 882 (Mo. App., W.D. 1985); *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 888 (Mo. App., W.D. 1981). It may select a combination of methodologies. *State ex rel. City of Lake Lotawana v. Public Service Comm'n of State*, 732 S.W.2d 191, 194 (Mo. App., W.D. 1987).

<sup>342</sup> *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1049-50 (1942).

<sup>343</sup> Refer to Findings of Facts Numbers 73-120 for this section.

<sup>344</sup> When interpreting Section 386.420, the statute delineating the Commission's procedural requirements for conducting hearings and making its reports, Missouri Courts have held

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

585

competent evidence on the record as a whole supports the conclusion that Lake Region’s baseline revenue requirement for its water and sewer districts is as follows:

Utility Division	Horseshoe Bend Sewer	Shawnee Bend Sewer	Shawnee Bend Water	TOTAL
Baseline Revenue Requirement Exclusive of all Disputed Revenue Issues	28,743	102,350	12,637	143,730

**Rate Design**

The parties have also reached agreement on the proper rate design for Lake Region. Based upon the parties’ unanimous stipulation and the Commission’s independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper method to implement any over-all revenue increase is the Water and Sewer Department’s small company rate design methodology.

Applying this methodology, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper rate design for any over-all rate increase in Lake Region’s Shawnee Bend water customers’ rates is to implement an equal percentage increase for the customer and commodity charges. Similarly, based upon the parties’ unanimous stipulation and the Commission’s independent review of all relevant factors, the

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that in contested cases the Commission must include findings of fact in its written report. Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm’n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm’n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm’n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The Commission cannot merely adopt agreements or positions of the parties on the ultimate legal issues presented because such action fails to satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. *Id.* Litigants cannot stipulate as to questions of law. *State v. Biddle*, 599 S.W.2d 182,186 and n. 4 (Mo. banc 1980). The Commission must independently and impartially review the facts and make a separate and independent determination. *Kennedy v. Missouri Real Estate Comm’n*, 762 S.W.2d 454, 457 (Mo. App. 1988).

## LAKE REGION WATER & SEWER COMPANY

586

19 Mo. P.S.C. 3d

Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper rate design for any over-all rate increase in sewer rates for the residential sewer customers served by Shawnee Bend's sewer operations and Horseshoe Bend's sewer operations is to implement an equal percentage increase for any customer and commodity charges.

Lake Region currently has two different rate designs in place for charging its Shawnee Bend and Horseshoe Bend commercial sewer customers. The design of the commercial sewer customer's charge of the Horseshoe Bend service area should be similar to the design of the customer charge for the Shawnee Bend sewer operations. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper rate design for the Horseshoe Bend commercial sewer operations includes changing the commercial sewer customer charge to a traditional customer charge similar to the customer charge for the Shawnee Bend sewer operations to result in a consistent rate design for all of Lake Region's customers. Following this change, the proper application for any over-all rate increase is to implement an equal percentage increase for the customer and commodity charges.

### **Miscellaneous Tariff Issues**

Lake Region also needs to correct certain miscellaneous defects in its tariffs. Lake Region's current returned check charge of \$15.00 is less than the actual cost incurred by Lake Region related to bank charges, account, tracking, monitoring and additional notices. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper return check charge for Lake Region is \$25.00.

Lake Region's current tariff language does not include a method to allow Lake Region to disconnect a customer for any reason except upon the request of the customer. The tariff lacks legally required language to allow the company to disconnect a customer for non-payment pursuant to Commission Rule 4 CSR 240-13.050. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that Lake Region will be directed to add language to its



## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

587

tariff to bring it into compliance with 4 CSR 240-13.050.

### **D. Availability Fees<sup>345</sup>**

The issue surrounding the proper treatment of availability fees collected by RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 is the most hotly contested issue in this matter. Staff, Public Counsel and Lakesites POA advocate for considering the fees to be part of Lake Region's ordinary revenue, while Lake Region argues the fees are outside the Commission's supervision and regulation. And, because the various positions advocated by the parties involve whether ratemaking treatment should be applied to the revenue generated from these fees, the Commission will initially make note of its authority to determine the assets of water and sewer corporations.

Section 393.230.1, RSMo 2000, conveys the power upon this Commission to "ascertain the value of the property of every . . . water corporation and sewer corporation in this state and every fact which in its judgment may or does have any bearing on such value." Section 393.270.4 and .5 provide that the Commission, when determining the price to be charged for water or sewer service may "consider all facts which in its judgment have any bearing upon a proper determination of the question." Commission Rules 4 CSR 240-50.030(4) and 4 CSR 240-61.020(4) provide that the Commission "does not commit itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining other matters before the commission." In order words, the Commission is not bound by the generally accepted principles of accounting in all instances when determining proper rates.

#### **1. Lake Region's Position**

Lake Region has maintained throughout this proceeding that the Commission lacks the jurisdiction to consider the availability fees. Lake Region's position is that: (1) Lake Utility Availability 1 (the d/b/a collecting the availability fee) is not a water company, not a sewer company and not a regulated public utility; (2) utility customers do not pay availability fees; (3) the revenue stream generated by the availability fees is not generated by the provision of a regulated utility service; (4) Lake Region has no access to the revenue stream generated by the availability fees; and (5) Lake Region has no legally enforceable right to acquire the revenue stream generated by the availability fees.

Lake Region further argues that the history of how the

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<sup>345</sup> Refer to Findings of Facts Numbers 121-212 for this section.

## LAKE REGION WATER & SEWER COMPANY

588

19 Mo. P.S.C. 3d

availability fees originated and the Commission's past treatment of these fees weigh in favor of not considering this revenue when determining its rates. Lake Region asserts: (1) the purpose behind the property developer's creation of the fees was to recover the investment in the utility infrastructure; (2) the Commission, recognizing this purpose or recognizing that it had no jurisdiction over the fees, has elected for 37 years not to consider the availability fees when setting rates; (3) the Commission's Staff, prior to this case, has informed the company that these fees are not regulated revenue; and, (4) the Commission has made several past determinations that support its position that the fees are not regulated. Lake Region contends it has relied on the Commission's past treatment and determinations regarding the nature of these fees not being revenue for the company.<sup>346</sup>

However, Lake Region argues in the alternative that should the Commission find the fees are within its jurisdiction to regulate the Commission should not impute the revenue collected from those fees without providing a corresponding adjustment (an increase) to its rate base to allow for more earnings. Lake Region claims that imputing the fees without offsetting the rate base would violate the matching principle in accounting. Because the availability fees were used to pay for infrastructure, and because that infrastructure was donated by the developer when he divested himself of the utility company, to impute availability fees as income would have the effect of artificially donating the infrastructure the fees financed twice.<sup>347</sup> As Lake Region further explains:

The Developer always reported this revenue as Non-utility Income in the Annual Report to the Missouri Public Service Commission and no one from the Commission ever notified the Company this was incorrect. The rights to the availability fees owned by the utility in 1998 were transferred to individuals in 1998 when the stock of the Company was sold to Roy and Cindy Slates. The Developer owned the rights to all subsequently created availability fees until 2005 when the rights were assigned to RPS Properties and Sally Stump. By imputing

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<sup>346</sup> Transcript, pp. 238-239, 738-739 (Staff repetitively stipulated to agreements that did not include availability fees in customer rates.) See also the history of the company outlined in the Findings of Fact and Staff Exh. 15, Merciel Rebuttal, pp. 13-14 on the company's history.

<sup>347</sup> Lake Region Exh. 12, Summers True-Up Rebuttal, pp. 3-4.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

589

revenues to the Company without allowing the corresponding return on the plant the Staff is creating an actual loss at the Company which will threaten its financial viability.<sup>348</sup>

Lake Region's proposed adjustment to rate base would be implemented on the accounting schedules by reducing the amount of plant donated by the company in the form of contributions in aid of construction. Thus, CIAC would be offset to increase the rate base of the company to balance the effect of imputing revenue from availability fees.

### 2. Staff's Position

Staff's position is that: (1) the availability fees were created to repair, maintain the infrastructure and for future replacement of infrastructure; (2) the developer recovered the cost of the infrastructure in the sales price of the lots that were sold; (3) the availability fees provide an "accommodation" for future utility service and as such they are a regulated utility service; (4) the Commission has jurisdiction over the fees; and, (5) the fees should be considered as ordinary income to Lake Region and considered when setting rates. Staff doesn't believe the Commission's past treatment of availability fees is relevant to this matter.

With regard to Lake Region's alternative theory about providing a corresponding offset to rate base, Staff argues there should be no corresponding shift in rate base with the imputation of availability fee revenues. Staff cites to Section 393.270(5) that provides the Commission with the authority to determine sewer rates, including a "reasonable average return upon the value of the property actually used in the public service. . . ." and cites to the holding in the Missouri Supreme Court decision in *Martigney Creek Sewer Co. v. Public Service Commission* interpreting Section 393.270(5). In that case the Court held: "where the **customers and users** of a utility have substantially paid for the facilities employed in the public service, the antithesis of a just and reasonable rate is one that would permit a utility's stockholders to recover a return on money which they, in fact, never invested."<sup>349</sup>

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<sup>348</sup> Transcript pp. 561-562, 598-600 (The Commission's Staff has repeatedly changed its position on treatment of the fees); Lake Region Exh. 12, Summers True-Up Rebuttal, pp. 3-4.

<sup>349</sup> *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 SW2d 388, 392 (Mo. banc 1976). Later in the opinion, the Court restates its holding as follows: "The court has construed 393.270(5) earlier in this opinion to mean that the value of the plant is

LAKE REGION WATER & SEWER COMPANY

590

19 Mo. P.S.C. 3d

(Emphasis added).

Staff's theory is premised on its position that the plant has already been paid for by the customers when they purchased their lots from the developer. The contributed plant donated by the developer is considered a contribution-in-aid-of-construction (CIAC), which results in a reduction to rate base. Ratepayers do not pay a return on the donated contributed plant. Staff claims that when determining utility rates, investment in contributed plant is not a recoverable utility cost because, generally, customers have already paid for the contributed plant through the purchase price of the lot and thus it is not included in rates. Consequently Staff argues that if customers have to pay the utility company a return on property for which there is no investment, then customers will have to pay for the contributed plant twice; in the lot sale price and in the payment of utility rates.

Staff's theory on how much revenue to impute to Lake Region is based upon an estimated number of undeveloped lots (1200), the known annual charge for availability fees (\$300), and an estimated number or percentage of those billed who do not pay the charges when they are assessed (10%). Staff argues that \$324,000 of revenue should be allocated to the Shawnee Bend operations (no availability fees are collected on Horseshoe Bend for sewer service) in a 60/40 ratio – 60% allocated to Shawnee Bend Sewer and 40% to Shawnee Bend Water. While this allocation would result in a negative increase for these two operations, Staff does not advocate for a rate reduction. Staff simply argues there should be no rate increase for the Shawnee Bend operations.

Two things should be noted at this juncture that are problematic for Staff's assertions. First, while the *Martigney* case might limit the Commission's ability to consider a rate base adjustment in other circumstances, the guidance to be derived from it in this matter is murky at best because it has been established in this matter that ratepayers, the customers and users of the utility, do not pay the availability fees. Second, in its opening statement during the True-Up hearing Staff Counsel stated:

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one of the elements to be considered by the PSC in arriving at a rate base, but that it does not authorize the PSC to include in the rate base property donated or paid for by the rate payers by contributions in aid of construction." *Id.* at 393. As previously determined by the Commission, the ratepayers do not pay the availability fees.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

591

“Mr. Featherstone's true-up direct executive summary illustrates Staff's position in this proceeding. Mr. Featherstone included in amounts of availability fees to be imputed into revenues base on information obtained during the evidentiary hearing. During this evidentiary hearing, Lake Region's witness, Dr. Stump, testified that 10 percent of the lot owners who are billed availability fees simply do not pay. With this information, Staff then reduced the total amount of availability fees it believes Lake Utility Availability and/or Lake Utility Availability One collect by 10 percent. Staff's total amount of availability fee revenue is based upon its estimated number of undeveloped lots in the Shawnee Bend region. **Staff has been unable to verify this number to be true and accurate** from Lake Region, Lake Utility Availability and/or Lake Utility Availability One.” (Transcript p. 687).

Should the Commission decide that availability fee revenue should be included in Lake Region's revenue, Staff's judicial admission of its inability to verify its estimates as being true and accurate must taken into consideration when determining how much availability fee revenue has, in fact, been collected on an annual basis in order to decide how much to impute.

### **3. Public Counsel's Position**

Public Counsel argues the availability fees should be considered as income for similar reasons as Staff, although Public Counsel also claims that the availability fees are not just an accommodation, but are a commodity pursuant to the definition of utility service. Public Counsel asserts that the availability fees are used to repay the utilities' cost of plant and infrastructure and that it makes no difference that the charge originates with a contract from the developer because it is a charge for a service provided by the utility.

As its first line position, Public Counsel claims the amount recouped from availability fees should be used to offset rate base, a negative offset to rate base. This lowering of rate base would lower the company's revenue requirement. As an alternative position, Public Counsel argues that the income should be imputed. But, instead of estimating fees to determine the amount of income to impute, Public Counsel's calculation utilizes the number of undeveloped lots attested to by Lakesites POA's witness Nancy Cason (1285) the known annual

## LAKE REGION WATER & SEWER COMPANY

592

19 Mo. P.S.C. 3d

charge for availability fees (\$300), and does not reduce this amount by any estimated number or percentage of those billed who do not pay the charges when they are assessed.<sup>350</sup>

Public Counsel claims that \$385,500 of availability fee revenue should be allocated to the Shawnee Bend operations – 60% allocated to Shawnee Bend Sewer and 40% to Shawnee Bend Water. And unlike Staff, Public Counsel seeks a rate reduction for the Shawnee Bend Operations – a reduction to Shawnee Bend Sewer of \$231,300 and a reduction to Shawnee Bend Water of \$154,200. Public Counsel's recommendation would not alter the baseline revenue requirement for the Horseshoe Bend sewer operations, but it would result in a negative revenue requirement of \$131,529 for the Shawnee Bend water operations and a negative revenue requirement of \$118,554 for the Shawnee Bend sewer operations.

#### **4. Lakesites POA's Position**

It is not completely clear what Lakesites POA's specific position is regarding how to consider the availability fees, because the Association did not file a brief on this issue. However, throughout the proceeding, Lakesites POA has advocated that the Commission should consider the availability fees as revenue to lower Lake Region's revenue requirement. Because the Association represents lot owners and home owners, the Commission will assume that its position is in alignment with Public Counsel who represents the public and the ratepayers.

#### **5. The Commission's Decision**

##### **The Purpose of the Fees and Lake Region's Pending Motion to Strike**

Staff's position is that the availability fees were established to maintain and repair existing infrastructure or for the future replacement of decaying infrastructure. Staff has asserted that the purpose of establishing the availability fees could not have been related to recovery of the cost of the infrastructure, because according to Staff the cost of the infrastructure was recovered in the sales price of the lots sold by the developer. But Staff has provided the Commission with no evidence to support its allegation that the price of infrastructure was recovered in the

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<sup>350</sup> While Public Counsel's estimates have a sounder basis than Staff's, the Commission notes that actual amounts collected in availability fees were provided in affidavits from Brian Schwermann. Those numbers taken in conjunction with the requirement for distribution of the fees provided in the confidential settlement agreement form Civil Case CV103-760CC provide an exact calculation that can be annualized.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

593

sales price of the lots. In fact, Mr. Featherstone has testified that this was an assumption on Staff's part.<sup>351</sup> Staff also claims that the original infrastructure cost has been fully recovered, so if the original purpose for the fees was to recover this cost the fees have served their purpose and the revenue currently being generated from the fees should be considered ordinary revenue for Lake Region.<sup>352</sup>

The Commission did receive into evidence numerous financial statements of Four Seasons Lakesites, Inc., the developer. But, these statements do not identify individual lot sales prices, do not identify specific costs associated with installing utility infrastructure, and do not even identify the specific properties to which the financial data applies. These statements, without further documentation are of little assistance to Staff's position.

Staff also points to Civil Case Number CV103-760CC, a circuit court case where ownership of the availability fees was contested, in an attempt to demonstrate how the third owner of Lake Region, Waldo Morris, spent the fees. The Commission took official notice of this case: "Four Seasons Lakesites, Inc., Plaintiff, versus Lake Region Water & Sewer Co., et al., Defendants."

Staff argues Mr. Morris's Answer in that case is a judicial admission binding the current owners of Lake Region and his Answer shows that the purpose of the fees was to maintain the infrastructure, not to recover the cost of investment in the infrastructure. Staff's argument prompted Lake Region to file a Motion to Strike Staff's the portions of Staff's brief in relation to these arguments. The Commission took the motion with the case because the arguments must be addressed as part of the Commission's over-all decision on how to treat the availability fees.

In its motion to strike, Lake Region asserts that while the Commission took official notice of Case No. CV103760CC at Staff's request, Staff did not request that the Commission take official notice of the pleadings or other records in that case. And that even if Staff made that request, official notice of such records is generally refused. Lake Region, cites to *Sher v. Chand*, 889 S.W.2d 79, 84-85 (Mo. App. 1994) for the general rule that: "[C]ourts in general do not take judicial notice of records in one proceeding in deciding another and different proceeding, as a party is entitled to have the merits of his case reviewed upon

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<sup>351</sup> Transcript p. 461.

<sup>352</sup> Ordinary revenue has been defined by Witness Merciel as being revenue used for the day-to-day operations of the company. Transcript, p. 482-483.

LAKE REGION WATER & SEWER COMPANY

594

19 Mo. P.S.C. 3d

evidence properly introduced. [citation omitted].” Consequently, Lake Region claims that Staff’s use and dependence upon matters outside the record in this proceeding for purposes of briefing and argument, and for purposes of Staff’s proposed Findings, is inappropriate and objectionable.

To evaluate Staff’s position, and Lake Region’s motion to strike, the Commission must decide if taking official notice of Civil Case Number CV103-760CC, elevated the file in that case to the level of competent evidence, if the Answer filed by Waldo Morris is in fact an admission against Lake Region’s interest, and if it is in fact “evidence” if it actually supports Staff’s theory.

Section 536.070(6) permits an administrative agency to “take official notice of all matters of which the courts take judicial notice.”<sup>353</sup> It is well settled law that courts may, and should, “take judicial notice of their own records in prior proceedings **which are between the same parties on the same basic facts involving the same general claims for relief.**”<sup>354</sup> (Emphasis added). “Judicial notice of records from other related proceedings involving the same parties can be on the court’s own motion or at the request of a party.”<sup>355</sup>

This does not conclude our inquiry, however. It must be determined whether the Commission took official notice of the other case file in a manner sufficient to place those documents in evidence.<sup>356</sup> “When the record in another case forms an essential element of a party’s claim or defense, the record itself must be introduced in evidence, absent an admission of its contents by the opposing party.”<sup>357</sup> “The introduction of the other court file into evidence may be accomplished by the court taking judicial notice of the file if it is physically before it.”<sup>358</sup> A party’s “[f]ailure to specifically object to the court taking judicial notice constitutes a waiver.”<sup>359</sup>

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<sup>353</sup> *Moore v. Missouri Dental Bd.*, 311 S.W.3d 298, 305 -306 (Mo. App. 2010); *Chandler v. Hemeyer*, 49 S.W.3d 786, 791 -792 (Mo. App. 2001); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474 (Mo. App. 1998); *Meiners Co. v. Clayton Greens Nursing Ctr., Inc.*, 645 S.W.2d 722, 724 (Mo. App. 1982); *Hardin v. Hardin*, 512 S.W.2d 851, 854 (Mo. App. 1974). See also *State v. Hurst*, 845 S.W.2d 669, 670 (Mo. App. 1993); *Schrader v. State*, 561 S.W.2d 734, 735 (Mo. App. 1978).

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Rice v. James*, 844 S.W.2d 64, 68 (Mo. App. 1992).



LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

595

When the Commission took administrative notice of civil case number CV103-760CC, Staff had a copy of the legal file, or parts of it, present before the RLJ at the time of the hearing.<sup>360</sup> Lake Region objected to the direct admission of the documents, objected to the offer of proof in relation to the documents, but did not specifically object to the taking of official notice. Lake Region also requested additional hearing time to rebut the alleged evidence should the Commission decide to consider the documents.

At hearing, and in its post hearing brief, the Commission's Staff cites to the Answer filed by Waldo Morris in Civil Case No. CV103-760CC as evidence of the purpose of the availability fees being to maintain the company's infrastructure as opposed to recovering the cost of the infrastructure investment. The specific paragraphs of the Answer to which Staff cites, and those surrounding Staff's citations, read as follows:

23. Since August, 1998, Plaintiff has continued attaching the requirement to pay availability or standby fees to the lots it sells, has continued to allow Defendant Waldo Morris to collect the fees, and has continued to allow Defendant Waldo Morris to spend the fees for the benefit of Defendant Lake Region Water & Sewer Company to guarantee capacity and service for Plaintiff's developments.

24. Pursuant to Chapter 644, RSMo, and its implementing regulations, Plaintiff cannot sell lots without first demonstrating to the Missouri Department of Natural Resources that the entity certificated by the Missouri Public Service Commission to provide sewerage to the geographic area where the lots are located has sufficient capacity to provide sewer service for the lots Plaintiff sells.

25. Defendant Lake Region Water & Sewer Co. is the entity certified by the Missouri Public Service Commission to provide sewerage to Plaintiff's developments.

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<sup>360</sup> Absent from the file was the Petition.

LAKE REGION WATER & SEWER COMPANY

596

19 Mo. P.S.C. 3d

26. When Four Seasons Group, Inc. transferred the water and sewer company through the July, 1998, Stock Purchase Agreement, Plaintiff Four Seasons Lakesites, Inc. was limited by the State of Missouri to sell no more than fifty lots because of insufficient sewage capacity.

27. Lake Region Water & Sewer Company has used the availability or standby fees to build new sewage treatment plant and new water tower, invest in capital improvements, and otherwise increase capacity and services in order to provide capacity for Plaintiff's developments.

28. Plaintiff has never had to stop selling lots due to lack of capacity from Lake Region Water & Sewer Company, and Plaintiff has been able to develop and sell more lots because of Lake Region Water & Sewer Company's use of the availability or standby fees. Had Lake Region Water & Sewer Company not used the fees for their intended purpose, which only Lake Region Water & Sewer Company can do, Plaintiff's development would have stopped long ago.

Staff claims that the Answer in the 2003 civil case serves as a judicial admission against interest of Lake Region in this matter. Staff's theory is incorrect for multiple reasons:

- (1) Administrative notice in this instance did not elevate the noticed legal file to the level of competent evidence. Indeed, Civil Case No. CV103-760CC is not between the same parties, nor does it involve the same basic facts or the same general claims for relief. Case No. CV103-760CC involves a lawsuit over who possessed the availability fees assigned by Four Seasons Lakesites, Inc. to Roy and Cindy Slates in 1998 and later to Waldo I. Morris in 2000. The case has nothing to do with the original developer's intent of establishing availability fees. Even Lake Region, the only named party in common to both matters, is not the same entity today as it was in the year this case was filed, 2003, because Lake Region's ownership has changed. The parties, facts and claims for relief are not in privity.
- (2) An Answer to a petition is a pleading drafted by and filed by the

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

597

attorney of record and statements of attorneys (in opening arguments in the current case) can only constitute a judicial admission **if they are “a clear, unequivocal admission of fact,** in which case they are binding on the party in whose interest they are made;” **however,** “[a] mere statement or outline,” . . . “of anticipated proof upon one or more issues in the case is not to be regarded as a binding admission to either bind the party whose counsel made the statement or to dispense with the necessity of proof on the issue on the part of his adversary.” *Mills v. Redington*, 736 S.W.2d 522, 525 (Mo. App. 1987). An answer to a petition, unless declaring itself to be an admission or unless it is accompanied by any underlying documentation to support the statement, is merely an outline of anticipated proof, not an admission of fact. Mr. Morris’ statement of how he used the availability fees would require documentation to prove the statement; therefore it can only be an outline of anticipated proof. Moreover, how he spent the fees was not an issue in the civil case. The issue was who owned the fees.

- (3) A judicial admission has two parts: (1) an allegation, and (2) an admission by the opposing party. *Creech v. MBNA America Bank, N.A.*, 250 S.W.3d 715, 717 (Mo. App. 2008). As the Answer reflects, there is no allegation concerning the intent for collecting the availability fees made by the Plaintiff, so the paragraph providing the statement regarding how availability fees may have been spent does not constitute an answer to, or an admission of, an un-alleged intent. In fact, the paragraphs in the Answer cited by Staff are not responsive to any allegations at all. They appear under a section outlining affirmative defenses captioned “Estoppel, Laches, and Course of Conduct;” a section that follows the section of the answer that addresses the specific counts of the petition.

“A true judicial admission is one made in court or preparatory to trial by a party or his attorney that concedes, **for the purposes of that particular trial**, the truth of some alleged fact so that one party need offer no evidence to prove it, and the other party ordinarily is not allowed to disprove it.” (Emphasis added). *Owens v. Dougherty*, 84 S.W.3d 542, 547 (Mo. App. 2002). The Answer is from a separate civil matter that occurred when Waldo Morris was the sole shareholder and owner of Lake Region. Waldo Morris’ statements in this 2003 civil case are not made in privity with the current shareholders and owners and cannot be

LAKE REGION WATER & SEWER COMPANY

598

19 Mo. P.S.C. 3d

construed to be admissions on the part of the current owners. Waldo Morris is not a party to the present case and cannot make an admission for the purposes of this case that is proceeding some seven years after the 2003 case.

- (4) How Waldo Morris, the third owner of Lake Region, spends the availability fees is totally irrelevant to what the original purpose was for creating the fees. Harold Koplak and Peter Brown, the original owners of the utility, created the fees to recover investment in the infrastructure. This is borne out by Mr. Brown's affidavit and the original feasibility study and testimony in the company's first CCN case that concluded in 1975.
- (5) Finally, assuming, *arguendo*, that the Answer could be construed to be an admission by the current incarnation of Lake Region, the Answer does not support Staff's theory. Staff predicated its theory that availability fees were not used for recovery of infrastructure investment but rather to maintain and repair all of the existing infrastructure, including infrastructure installed for undeveloped lots. Waldo Morris' Answer outlines his anticipated proof that he spent the money on new infrastructure to expand capacity and services "in order to provide capacity for Plaintiff's developments," not to maintain or repair the existing system or for replacement of decaying infrastructure. Waldo Morris' statement, without additional specificity, demonstrates that he was spending the availability fees in the same manner as the original developer – to put new infrastructure in the ground.

In fact, Staff Witness Merciel discusses two types of capital improvement in his testimony. The first type he refers to is capital investment that is normally recoverable through utility rates paid by customers or that could be recovered by developers through lots sales. The second is "legitimate capital recovery through availability charges" where the investment exists for lot owners not yet connected.<sup>361</sup> In this instance, Staff not only failed to demonstrate that any capital investment was recovered through the sales price of the lots, but the investment in capital improvements referenced by Mr. Morris in paragraph 27 of his Answer was made to increase capacity to promote the sales of lots, i.e. legitimate capital recovery through availability fees to place infrastructure in the ground for potential lot owners that are not yet connected. Because Staff's argument concerning Mr. Morris' Answer in Civil Case

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<sup>361</sup> Staff Exh. 15, Merciel Rebuttal, p. 8.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

599

No. CV103-760CC is of no legal consequence, there is little need to grant Lake Region's Motion to strike it from Staff's brief.

While Staff has failed to support its position that the availability fees were recovered in the sales price of the lots or that they were created to maintain the water and sewer systems after they were installed, the record includes the affidavit of the original developer, who attests that the purpose for the fees was recover the cost of the infrastructure. The record also includes the feasibility study and testimony filed in the first certification case for the water operations. That evidence also demonstrates that the fees were collected to pay for the infrastructure. Indeed, the Commission acknowledged the availability fees in Case No. 17,954 and elected not to consider that revenue when setting rates for the company.

Further, Mr. Summer's testimony and the confidential settlement agreement of Civil Case No. CV103-760CC demonstrate that the original developer is still collecting a portion of the fees and as Mr. Summer's has deduced, the purpose must be related to recovery of his initial investment since the developer has nothing to do with maintaining the water and sewer systems. In short, the only competent and substantial evidence in the record as a whole supports the conclusion that the availability fees were created by the developer in land sales contracts and restrictive covenants to recover the cost of the infrastructure.

### **Jurisdiction Over the Availability Fees**

Staff and Public Counsel have argued that the availability fees are either an "accommodation" or a "commodity," and, as such, the fees constitute a regulated utility "service" subject to the jurisdiction of the Commission. Public Counsel has also argued that it makes no difference that the availability fees arise from a land sales contract or the restrictive covenants – both contractual agreements to which Lake Region is not a party – because the charge is for a utility service.

Section 386.020(48), RSMo Cum. Supp. 2009, defines "service" as including:

not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation,

## LAKE REGION WATER & SEWER COMPANY

600

19 Mo. P.S.C. 3d

person or public utility, and to the use and accommodation of consumers or patrons.

Staff's subject matter experts, however, have consistently testified, in this and in past proceedings, that availability fees are not a utility "service," nor are they the provision of a utility "service." While Staff's subject matter experts are not experts in the law, their technical knowledge concerning what constitutes a utility service is persuasive, and the Commission has relied on this testimony when making decisions in prior actions.<sup>362</sup>

An "accommodation" is defined as: the act of accommodating or the state of being accommodated; adjustment; or something that meets a need; a convenience.<sup>363</sup> Legally, however, there is a distinction because legally an "accommodation" is an arrangement or engagement made as a favor to another, not upon consideration received.<sup>364</sup>

A "commodity" is defined as: something useful that can that can be turned to commercial or other advantage.<sup>365</sup> Legally speaking a commodity is a thing that is useful or serviceable, particularly articles of merchandise movable in trade such as goods or wares; things that are bought and sold.<sup>366</sup>

Because an "accommodation" does not involve consideration, an availability fee does not fall within that definition. However, the ability to hook up to a water and sewer system is property right that can be transferred; it can be bought and sold. While the Commission has not done so in the past, availability fees could be construed to be a "commodity" and thus fall under the definition of a "service," despite its expert Staff's testimony to the contrary. To make this determination in this matter would be a substantial departure from past Commission decisions, policy and practice. And, although the Commission is not bound by *stare decisis*<sup>367</sup> the rulings, interpretations, and decisions of a

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<sup>362</sup> See Finding of Fact Number 208 and accompanying footnote.

<sup>363</sup> The American Heritage College Dictionary (3<sup>rd</sup>), Houghton Mifflin Company, 1997, p. 8.

<sup>364</sup> Black's Law Dictionary (6<sup>th</sup>) West Publishing Company, 1990, p. 16.

<sup>365</sup> The American Heritage College Dictionary (3<sup>rd</sup>), Houghton Mifflin Company, 1997, p. 281.

<sup>366</sup> Black's Law Dictionary (6<sup>th</sup>) West Publishing Company, 1990, p. 274.

<sup>367</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

601

neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which **courts and litigants** may properly resort for guidance.” (Emphasis added).<sup>368</sup> It has been established that Lake Region has indeed relied upon this Commission’s past decisions and the directions it received from the Commission’s Staff for guidance with how availability fee revenue was not regulated revenue and would not receive ratemaking treatment.<sup>369</sup> And, Missouri Courts have applied the doctrine of quasi-estoppel to prevent agencies from taking positions contrary to, or inconsistent with, positions they have previously taken.<sup>370</sup>

Additionally, even if the Commission reverses course and the fees are determined to be a “service,” this alone does not confer

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593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm’n*, 835 S.W.2d 356, 371 (Mo. App. 1992).

<sup>368</sup> *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004).

<sup>369</sup> See Footnotes 206, 208-215; Transcript, p. 239.

<sup>370</sup> As the Eastern District has succinctly stated in *Sapp v. St. Louis*:

The doctrine of quasi-estoppel prevents a party from taking a position directly contrary to or inconsistent with another position previously taken. See *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703, 710 (Mo. App. 2008) and *Porter v. Erickson Transport Corp.*, 851 S.W.2d 725, 736 (Mo. App. 1993). In this case, the City took the position that Sapp was not entitled to a contested case hearing through its promulgation of the Commission’s policy that suspensions such as his were handled through written review procedures that fall short of those required for contested case hearings. Then when Sapp attempted to appeal his case under the statute for non-contested cases, the City changed its position and argued he was entitled to a contested case hearing, but that he waived it. Further, the City asserted because he was entitled to a contested case hearing, his notice of appeal of the Commission’s decision was untimely. As a result, we find the doctrine of quasi-estoppel applies to prevent the City from contending Sapp waived his contested case hearing after it led him to believe he was only entitled to a non-contested written review.

Therefore, applying the doctrine of quasi-estoppel, we find the trial court’s judgment finding it did not have subject matter jurisdiction in this case was unauthorized by law. As a result, we hereby deny the City’s motion to dismiss for lack of subject matter jurisdiction, and we remand this matter to the circuit court with orders to remand it to the Commission so the Commission can hear and decide the appeal in accordance with contested case procedures prescribed by Section 536.010 et seq.

*Sapp v. City of St. Louis*, L 2749645, 5 -6 (Mo. App. 2010).

## LAKE REGION WATER & SEWER COMPANY

602

19 Mo. P.S.C. 3d

jurisdiction over those fees to the Commission. There are many entities, such as municipalities, cooperatives and not-for-profit property or home owners associations that provide utility services, which are not subject to the Commission's jurisdiction.

There is another factor at play when determining its jurisdiction over the availability fees. In past cases where availability fees, standby fees, reservation fees or connection fees were collected, and where the Commission determined it lacked jurisdiction over those fees, the fees were always kept completely separate from the entity providing utility service. The fees were never part of the regulated public utility. Even if the ownership of the corporate entity collecting the fees was identical to the ownership of the utility, the revenue was never comingled with, or directly available to, the utility.

The record in this case demonstrates the utility had possession of the fees at their inception. The fees were paid directly to the utility between 1974 and 1998. After that, the availability fee revenue stream was sold to Roy and Cindy Slates. Availability fee revenue was combined with the utility during the sale of the stock and fees to Waldo Morris, but only long enough to split it off for Mr. Morris as a separate revenue stream. This was repeated when the stock and fees were sold to the current owners of Lake Region. Because the utility had, at different intervals, direct use of or access to this revenue stream, and because the fees can be defined as a commodity falling under the definition of utility service, the Commission concludes that it should assert jurisdiction over availability fees. And when the prior owners eliminated Lake Region's access to these fees, these acts had the potential to become a detriment to the ratepayers; albeit, these actions were done with Public Service Commission acquiescence or approval in many cases over many years.<sup>371</sup>

### **Appropriate Treatment of the Availability Fees**

The history of the Commission's action in relation to availability

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<sup>371</sup> See the findings of fact related to Lake Region's history and the historical treatment of availability fees. See also Transcript pp. 239, 739, Staff Exh. 15, Merciel Rebuttal, pp. 13-14 describing the overall history of company. The Commission cannot definitely conclude from this record that transferring the fees was, in fact, a detriment to the ratepayers because the evidence shows the infrastructure paid for with the availability fees was donated as contributions in aid of construction, thus lower rate base and decreasing utility rates for Lake Region's customers. Also, the record indicates that there are no service issues with the company and the customers are happy with the service they receive. A potential detriment could occur where the availability fee revenue exceeds the cost of the infrastructure investment, but the record is incomplete with regard to that possibility.



## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

603

fees is paramount in determining the appropriate method of how to treat the fees in this instance. While the Commission has approved settlement agreements that have included similar charges in a company's tariffs, when the issue has been contested and adjudicated, the Commission has long held that availability fees are not a utility service and are not within the Commission's jurisdiction, regulation or control.<sup>372</sup> This policy stems from the Commission's prior interpretation of Section 386.010(48), its expert Staff's testimony, and the Commission's past approval of the use of availability fees as being legitimate method of capital recovery. Changing this interpretation will have a future effect which will act on unnamed and unspecified persons and facts – persons or entities not party to this proceeding.

The Commission asserting jurisdiction over revenue derived from availability fees, as now declared in this matter, cannot simply be based on an adjudication on a specific set of accrued facts.<sup>373</sup> What the Commission is announcing today is it is going to prospectively change its statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements before this agency.<sup>374</sup> Agencies cannot engage in this type of rulemaking by an adjudicated order.<sup>375</sup> Pursuing a major change in the Commission's interpretation, implementation and

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<sup>372</sup> The fact that the Commission's Staff entered into agreements with different companies to allow different ratemaking treatment of the availability fees does not escape the Commission. This flip-flopping on position does little to bolster Staff's credibility in this action where it has strenuously argued for declaring jurisdiction and imputing the revenue. See the findings of fact related to Lake Region's history and the historical treatment of availability fees. See also the Transcript, pp. 598-600, 561-562.

<sup>373</sup> In contrast to a rule, an adjudication is "[a]n agency decision which acts on a specific set of accrued facts and concludes only them." *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004). An adjudication results from a "contested case," which the APA defines as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." *Id.* Section 536.010(4), RSMo Cum. Supp. 2009. *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 - 229 (Mo. App. 2004)

<sup>374</sup> Section 536.010(6) defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy." In other words, a rule is "[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified persons or facts." *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo.App.1979). *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004); *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

<sup>375</sup> *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

LAKE REGION WATER & SEWER COMPANY

604

19 Mo. P.S.C. 3d

prescription of its definitional statutes and its long-standing policy regarding ratemaking treatment of availability fees, requires compliance with the more stringent and lengthy process of rulemaking as required under section 536.021.<sup>376</sup>

The Commission has been rebuked before by the Courts for attempting to make major shifts in policy without following proper rulemaking procedure. In *Beaufort Transfer Co. v. Public Service Comm'n*, the Court of Appeals reversed the Commission's decision attempting to apply a methodology advocated by its Staff to define a particular trade territory using a mileage formula because to do so would have the effect of a rule, i.e. a future application or interpretation of the law that can affect future litigants. The court determined that application of this formula went beyond adjudicating the facts of the case being immediately considered.<sup>377</sup> Again, in *Gulf Transport Co. v. Public Service Comm'n*, the Commission had attempted to apply a general policy authorizing charter rights in conjunction with "regular route" operations and the Court held the policy was a rule within the definition of Section 536.010 and as such to apply this policy required the rule be properly promulgated pursuant to the Missouri Administrative Procedures Act.<sup>378</sup>

While not every generally applicable statement or announcement of intent by a state agency is a rule, an agency declaration that has the potential, however slight, of impacting the substantive or procedural

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<sup>376</sup> Similarly, Missouri Courts apply changes in decisional law **prospectively-only** in order to avoid injustice and unfairness "when "parties have relied on the state of the decisional law as it existed prior to the change." (Emphasis added). *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985). In *Sumners*, the Supreme Court adopted a three-factor test for determining whether or not to apply a change in substantive law prospectively only. First, the decision " 'must establish a new principle of law ... by overruling clear past precedent[.]' " *Id.* at 724 (citation omitted). Second, the court determines whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. *Id.* The third factor involves a balancing of interests: "[T]he Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule." *Id.* Applying the *Sumners* test in this instance would also weigh in favor of prospective application of the Commission's change in decisional law.

<sup>377</sup> *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100-101 (Mo. App. 1980).

<sup>378</sup> *State ex rel. Gulf Transport Co. v. Public Service Comm'n of State*, 658 S.W.2d 448, 454 -455 (Mo. App. 1983).

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

605

rights of some member of the public is a rule.<sup>379</sup> “Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.”<sup>380</sup>

Moreover, the Commission has not found an example of when it has ever completely reclassified revenue and imputed that revenue to the company for ratemaking purposes, and to do so now after Lake Region legitimately relied on the Commission’s past treatment of this revenue would be the very definition of an arbitrary and capricious ruling. As the Missouri Supreme court has observed:

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency’s action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency’s decision must be made using some kind of objective data rather than mere surmise, guesswork, or “gut feeling.” An agency must not act in a totally subjective manner without any guidelines or criteria.<sup>381</sup>

To satisfy the standards of due process and avoid unpredictability with such a significant issue involved with determining a company’s operational revenues, the Commission will open a workshop docket to lead to rulemaking. In the rulemaking proceeding, the Commission will delineate the definitive policy for the prospective treatment of availability fees, reservation fees, standby fees, connection fees, or any other similar fees, their proper use as mechanisms of capital recovery and their proper ratemaking treatment.

In making its decision not to impute the revenue derived from the availability fees in this proceeding, the Commission notes that it has spent a significant amount of time and analysis of the issues surrounding the fees, their prior legal treatment, the Commission’s policies and practices, and the practical effects of such action. Indeed, the Commission directed its Staff and Lake Region to file numerous revenue requirement scenarios to analyze the effects of reclassifying and

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<sup>379</sup> *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994).

<sup>380</sup> *Id.*

<sup>381</sup> *Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 11 (Mo. banc 2008). See also Section 536.140, RSMo 2000.

## LAKE REGION WATER & SEWER COMPANY

606

19 Mo. P.S.C. 3d

imputing the revenue and of imputing the revenue while providing corresponding offsets to rate base. Additionally, the Commission examined the effects of not imputing revenue but reclassifying it as CIAC to reducing the company's rate base and revenue requirement.

After considering all of the possible revenue scenarios, the relevant law, and the Commission's prior policy and practice on ratemaking treatment of availability fees, the Commission determines that the substantial and competent evidence in the record as a whole supports the conclusion that it would be unjust and unreasonable to impute additional revenue to Lake Region derived from the availability fees already collected.

### **E. Executive Management Fees<sup>382</sup>**

#### **1. Lake Region's Position**

Lake Region initially sought \$99,695 in management fees for the company's cost of service for executive management oversight, but it has reduced this request to \$49,848,<sup>383</sup> recognizing that half of the Executive Management Group's ("EMG") time is spent managing Ozark Shores and half is spent on managing Lake Region.<sup>384</sup> Lake Region initially reviewed the 2008 Annual Reports for Aqua Missouri, Aqua RU, Inc., and US Water Company and determined that the amounts recorded for salary and benefits for top management fees range from 6% to 12% of the operating revenue of the companies (\$31,562 to \$87,200) with the average being 8% (\$56,826).<sup>385</sup> Lake Region also quantified the number of days spent by each member of the EMG involved with the management of Lake Region, and claim that each member of the EMG spends approximately four days a month, usually longer than 8 hours days, working on matters for Lake Region – 2 days a month from home and 2 days a month in Missouri with 1 additional day for travel.

Based on its analysis, Lake Region incorporated its survey amounts for the top executive, the top engineering executive and the top financial executive of privately owned utilities, the same way it defines the three members of its EMG,<sup>386</sup> and took the average of the annual salaries and derived an hourly rate of \$75 based upon 1,769 annual

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<sup>382</sup> See Finding of Facts Numbers 213-266 and 270-274 for this section.

<sup>383</sup> Transcript, p. 127-138; Lake Region Exh. 3, Stump Surrebuttal, p. 3; Staff Exh. 19, Updated Reconciliation (True-Up Reconciliation).

<sup>384</sup> Transcript, p. 127.

<sup>385</sup> Lake Region Exh. 3, Stump Surrebuttal, p. 3.

<sup>386</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

607

hours.<sup>387</sup> However, as Lake Region Witness Vernon Stump would later testify, Lake Region ultimately agreed with Staff's analysis based upon 2080 annual hours that \$64 dollars an hour is the standard rate of compensation for Missouri executives.<sup>388</sup> Lake Region's request, if approved, would result in each member of the EMG receiving approximately \$1385 per month.<sup>389</sup>

Lake Region and the Commission's Staff agree that the executive management compensation should be allocated in the following percentages based upon the relative amount of management and executive oversight associated with each utility division: Shawnee Bend Water – 25.5%; Shawnee Bend Sewer – 26.8%; and Horseshoe Bend Sewer – 47.7%. Consequently, if Lake Region's request for \$49,848 were approved the management fees would be allocated as follows: Shawnee Bend Water – \$12,711; Shawnee Bend Sewer – \$13,359; and Horseshoe Bend Sewer – \$23,777.

### **2. Staff's Position**

The Commission's Staff toured Lake Region's facilities and discussed all aspects of the operations with Mr. Summers and the EMG.<sup>390</sup> Staff reviewed the executive salaries in the *American Water Works Association 2008 Water Utility Compensation Survey* for executive salaries,<sup>391</sup> and compared the average annual executive salary Lake Region was using with the salaries published by the Missouri Economic Research and Information Center (MERIC) for chief executives in Missouri's Central Region (including Camden County, the county Lake Region is in) and compared them with the executive salaries of Missouri water and sewer utilities whose operating revenues exceeded \$500,000 annually.<sup>392</sup>

Staff determined the annual rate Lake Region was using was reasonable, but applying it to 2,080 annual hours instead of 1,769 annual hours it arrived at an hourly rate of approximately \$64 (\$63.77).<sup>393</sup> Staff then applied its hourly rate to 288 annualized hours for each of the two general functions of executive management – operational management (provided by Mr. Stump) and financial management (provided by the

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<sup>387</sup> Staff Exh. 9, Harris Surrebuttal, pp. 9-10.

<sup>388</sup> Transcript p. 131.

<sup>389</sup> Transcript, pp. 129-138.

<sup>390</sup> Transcript, pp. 150-151, 154-159; 161-163; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>391</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>392</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

<sup>393</sup> Staff Exh. 9, Harris Surrebuttal, p. 10; OPC Exh. 3, Robertson Rebuttal, p. 6.

## LAKE REGION WATER & SEWER COMPANY

608

19 Mo. P.S.C. 3d

Schwermanns)<sup>394</sup> Staff views the services provided by the Schwermanns as being interchangeable.<sup>395</sup>

Staff's annualized hour calculation included three eight-hour days per month per function -- two days on site at Lake Ozark meeting with the District's board of directors and staff and the equivalent of one eight-hour day per month from remote locations. Staff also factored in twenty-four days of lodging, meal and travel costs for the time that executive management spends in Lake Ozark, and included costs for office expense and communication expense associated with the time that executive management spends on the utilities from remote locations.<sup>396</sup>

Based upon its calculations, and recommendation that the Commission use the "two function" approach to determining executive compensation, Staff recommends \$27,901 be awarded in executive management fees. However, Staff believes this amount is conservative given the size and complexity of the Lake Region/Ozark Shores/Water District Operation.<sup>397</sup> Staff is in agreement with Lake Region with regard to the percentage allocation of EMG compensation among the three utility divisions and recommends the total of \$27,901 be allocated as follows: Shawnee Bend Water – \$7,115; Shawnee Bend Sewer – \$7,477 and Horseshoe Bend Sewer – \$13,309.<sup>398</sup>

Staff's has also put forth an alternative position that reduces executive management compensation and payroll costs further in the event the Commission declines to impute the availability fees as revenue. Since the Commission has concluded it would not be proper to impute that income, the Commission must evaluate this alternative position. Under these circumstances, Staff proposes to treat RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 as a separate entity or utility division and re-allocate a total of \$17,493 in what it believes would be management and payroll costs connected to the fictitious name.

### 3. Public Counsel's Position

Public Counsel believes the EMG acts more like a board of directors and that each member of the EMG should receive only \$200 annually for a total of \$600.<sup>399</sup> Under its analysis, Public Counsel would

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<sup>394</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

<sup>395</sup> Transcript, pp. 149-150.

<sup>396</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>397</sup> Transcript, p. 160; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>398</sup> Transcript, p. 145; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>399</sup> Transcript, pp. 195-196; OPC Exh. 2, Robertson Direct, pp. 14-23; OPC Exh. 3.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

609

allocate \$200 to each of the three utility divisions. Public Counsel derived the \$200 amount based upon a review of what Raytown Water paid its board of directors for each meeting.<sup>400</sup> Public Counsel also concurs with implementing Staff's alternative position in the event the Commission declined to impute the availability fees.

However, Public Counsel's witness, Ted Robertson, did not visit Lake Ozark and see first-hand the combined Water District/Lake Region/Ozark Shores operation and service area,<sup>401</sup> nor did he visit the office in Overland Park where the annual board of directors meetings are held.<sup>402</sup> Mr. Robertson did not interview any members of the EMG,<sup>403</sup> or make a comparison between Lake Region and similarly sized utilities in this state to see how it fit in with other water and sewer companies.<sup>404</sup> Instead, he relied upon data requests, viewing the minutes from board of directors meetings and communications with Mr. Summers, the general manager.<sup>405</sup>

Mr. Robertson did not include any travel costs in order for the executive management group to attend the annual board meeting or any travel costs associated with the EMG attending the monthly Water District meetings where the EMG determines if there are issues affecting Lake Region.<sup>406</sup> He did not include an amount for Brian Schwermann to attend the board meeting even though Mr. Schwermann, in his capacity as board secretary, is required to take the minutes.<sup>407</sup>

#### **4. Lakesites POA's Position**

Again, it is unclear what position Lakesites POA has on this position because it did not file a brief on this issue.

#### **5. The Commission's Decision**

The management oversight by Lake Region's EMG is directly related to the operations of Lake Region and the EMG must be compensated like any other service provider. The Commission's Staff performed an extensive review of Lake Region's operations and as the Commission's findings bear out, contrary to Public Counsel's position,

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Robertson Rebuttal, pp. 3-9; OPC Exh. 4, Robertson Surrebuttal, pp. 3-11. See Generally Transcript, pp. 164-213.

<sup>400</sup> Transcript, p. 195-196.

<sup>401</sup> Transcript, p. 181-182; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>402</sup> *Id.*

<sup>403</sup> Transcript, pp. 173-174, 181-182.

<sup>404</sup> Transcript, p. 175.

<sup>405</sup> Transcript, p. 181-182, 168, 170

<sup>406</sup> Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

<sup>407</sup> *Id.*

## LAKE REGION WATER & SEWER COMPANY

610

19 Mo. P.S.C. 3d

the EMG's management and oversight duties far exceed the duties of a board of directors. Public Counsel failed to conduct a thorough investigation or analysis of Lake Region's management structure and it substantially understated the true costs of the executive management compensation that should be included in rates.<sup>408</sup> Because Public Counsel's analysis and position are not credible, the Commission will review Lake Region's and Staff's positions considering the relevant facts and appropriate methods for determining executive compensation.

Having determined that Lake Region's EMG is deserving of an appropriate level of executive management compensation, the Commission's review of the record and its findings demonstrate there are several valid methods for determining the proper amount of executive management fees. The three methods supported in the record, and delineated in the Commission's findings of fact, are a \$42.23 per customer basis, an 8% percentage of total revenue basis, and an the \$64 per hour basis.<sup>409</sup>

Accounting for the overlap of Lake Region's water and sewer customers, approximately 785 households receive bills each month from Lake Region for either water service, sewer service, or both. Using households to represent customers and applying the \$42.23 per customer basis for determining management fees results in management compensation totaling \$33,150. Using the uncombined water and sewer customers, i.e. 1400 customers, would result in management fees of \$59,122.

Applying the percentage of revenue method, whereby 8% of total revenue is included in rates as compensation for salary and benefits, to Lake Region's revenue of \$678,016 would result in management fees totaling \$54,241.<sup>410</sup> Applying the 8% method to the full proxy group of Missouri water and sewer companies (identified by Staff Witness Harris) earning over \$500,000 per year produces an average of executive compensation fees of \$62,774.

Lake Region and Staff, through their independent analyses, have reached agreement on a \$64 per hour method for determining executive compensation, and because the accountants and auditors of both Lake Region and Staff have reached this same conclusion, the Commission finds it persuasive that the hourly basis is the most

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<sup>408</sup> *Id.*

<sup>409</sup> Finding of Fact Numbers 257-266.

<sup>410</sup> Staff Exhibit 18, Accounting Scheduled, True-Up Direct, Schedule 3 for each water and sewer division.



## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

611

appropriate method to determine executive compensation. But, examining all of the methods and the credible evidence produces a range for comparison, whereby reasonable management fees for Lake Region could fall anywhere between \$27,901 to 62,774 (mid-point of \$45,337) depending upon what the specific facts of the case support.

Where Lake Region and Staff disagree is the number of annualized hours spent by each member of the EMG managing Lake Region and number of members of the EMG that should be compensated. Lake Region appears to have focused on a combined cost of the hours each member of the EMG contributes and associated expenses, while Staff's analysis breaks out hours and expenses. Working backwards from Lake Region's requested total of \$49,848, Lake Region is essentially arguing that each member of the EMG spends approximately 21.635 hours per month or 259.62 annualized hours involved with the management and executive oversight of Lake Region, inclusive of expenses.<sup>411</sup>

Staff, on the other hand, has provided a much more detailed accounting and has determined that each member of the EMG spends approximately 288 annualized hours managing Lake Region and Ozark shores, or 144 for Lake Region alone.<sup>412</sup> Staff adds specific expenses and then factors in its functional analysis whereby only two members of the EMG should be compensated to reach its total recommendation of \$27,901. While Staff's accounting appears to be more detailed, Staff concedes that its total is low due to Lake Region being a complex utility to manage. And, the Commission finds Mr. Stump's testimony regarding the hours spent managing the company to be very persuasive.

While Lake Region receives a presumption that its expenses are prudent, Staff's challenge to their requested level of compensation is sufficient to rebut that presumption requiring Lake Region to proffer further evidence to carry its burden. The evidence that convinces the Commission that Lake Region is entitled to more compensation than what Staff recommends is the size and complexity of the operations and the fact that this is a well managed company with satisfied customers – it

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<sup>411</sup> Transcript, pp. 123-124,151. This figure must include the accounting for expenses based upon the number of days the EMG is involved with Lake Region's operations, but that specific amount is not clear from the record. Lake Region's original calculation of \$99,695 was apparently based upon each of the three members of the EMG contributing approximately 43.27 hours each month towards managing the Lake Region and Ozark Shores. This would translate to approximately \$1385 per month for each member of the team for wages and travel expenses.

<sup>412</sup>

LAKE REGION WATER & SEWER COMPANY

612

19 Mo. P.S.C. 3d

requires a significant investment of hours to run Lake Region properly. As Mr. Stump has testified, failure to maintain proper hands-on oversight would result in deterioration of the company that would increase overall costs for the ratepayers.<sup>413</sup>

Nevertheless, the Commission is also persuaded that Staff's functional analysis is correct and having two members of the EMG involved with the financial oversight is duplicative. Lake Region has not provided enough evidence to rebut Staff's evidence in this regard, but it has provided sufficient evidence that the two functions of the EMG (operational and financial) should be compensated at a higher rate than Staff's recommended total of \$27,901. Consequently, the Commission determines that substantial and competent evidence in the record as a whole supports the conclusion that Lake Region should be awarded two thirds of its total request for \$49,848 or \$33,232 in executive compensation, the compensation for the two functions of its EMG. And, as a cross-check, this amount falls within the acceptable range produced by all three methods of determining executive management fees. This total compensation shall be allocated to the utility divisions as follows: Shawnee Bend Water – 25.5%; Shawnee Bend Sewer – 26.8% and Horseshoe Bend Sewer – 47.7%.

With regard to Staff's alternative argument of making a reduction in executive management compensation and payroll by treating RPS Properties and Sally Stump d/b/a Lake Utility Availability 1, a fictitious name, as a fourth entity being managed by the EMG, the evidence demonstrates that Staff did not undertake an actual audit of expenses associated with the billing and collection of availability fees. Consequently, Staff's argument is based on speculation and assumption and not on credible evidence. Lake Region has provided a much more accurate accounting of these expenses of totaling approximately \$2,000 annually, an amount the Commission finds to be *de minimis* given the quality of the EMG's management and oversight of the company and the Commission's determination to implement its change of policy regarding availability fees prospectively with properly promulgated rules. The Commission has already substantially reduced the amount of executive management compensation to be recovered in rates and concludes there is no substantial or competent evidence requiring it to further reduce this amount.

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<sup>413</sup> Transcript, p. 134.

**F. Rate Case Expense<sup>414</sup>****1. The Parties' Positions**

Lake Region is seeking recovery in rates for rate case expense totaling \$42,997 to be amortized over three years and allocated equally among its three utility divisions. The Commission's Staff has confirmed that these expenses were incurred through May of this year.<sup>415</sup> While Staff believes the three-year amortization period is correct, Staff believes Lake Region should only be allowed to recover expenses through the True-Up Date of March 31, 2010, totaling \$26,273.<sup>416</sup> Staff argues that it is not customary for the Commission to authorize rate case expense past the True-Up date, and believes that taking an out-of-period adjustment for rate case expense distorts the revenue calculation requirement.<sup>417</sup>

Public Counsel updated its analysis on rate case expense through June 17, 2010. Public Counsel calculated rate case expense to be \$44,729. However, Public Counsel claims that Lake Region should only be allowed to recover \$25,830 in rate case expense. Public Counsel believes that the Commission should disallow \$18,899 in legal expenses associated with Lake Region's jurisdictional arguments concerning availability fees and for objecting to data requests concerning the same issue.<sup>418</sup> Public Counsel asserts that a five-year amortization is appropriate because the company has not sought a rate increase for 11 or 12 years and five years is approximately how long the present owners have owned the company.<sup>419</sup>

**2. The Commission's Decision**

When examining the procedural history, the Commission must acknowledge that the delay in prosecuting past the True-Up period in this case is attributable to the Commission directing its Staff to engage in further discovery on the issue of availability fees. This delay is not the fault of Lake Region and because of the delay the company incurred additional litigation expense. As was noted at the Agenda session in

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<sup>414</sup> See Finding of Facts Numbers 267-269 for this section.

<sup>415</sup> Staff Exh. 50, [Second Updated] Reconciliation; Staff Exh. 19, [Updated] Reconciliation; Final [Updated] Reconciliation, filed on July 16, 2010; Staff's Update to Rate Case Expense - Staff's July 9, 2010 Response to Missouri Public Service Commission's June 24, 2010 Order Regarding Rate Case Expense, filed July 9, 2010, verified by the Affidavit of Cary G. Featherstone.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> OPC Exh. 5, Robertson, True-Up Direct, pp. 1-3; OPC True-Up Brief and Attachment A, filed June 24, 2010.

<sup>419</sup> OPC Exh. 5, Robertson, True-Up Direct, pp. 3-4.

## LAKE REGION WATER & SEWER COMPANY

614

19 Mo. P.S.C. 3d

which the Commission voted on its decisions, this is precisely the reason that all issues should be fully developed and presented to the Commission at the earliest possible stage of the litigation.

Additionally, Lake Region was justified in raising its jurisdictional challenges and it could have conceivably constituted legal malpractice for Lake Region's attorney to overlook the jurisdictional arguments as they pertain to availability fees. Public Counsel offers no evidence to support a determination that Lake Region engaged in any frivolous or unnecessary legal practice with prosecuting its case that would support a disallowance. The objections Lake Region made with regard to data requests concerning availability fees were never over-ruled, and there were no motions filed by any party seeking to compel answers to the data requests where Lake Region lodged an objection. There simply is no evidence in the record to suggest that Lake Region's rate case expenses were imprudently incurred that would support any disallowance of rate case expenses.

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusion that Lake Region should be allowed to recover \$42,997 in rates for rate case expense. Because of increasing operating expenses and anticipated capital improvements that Lake Region will be seeking recovery for, and because the Commission is directing Lake Region as a part of this proceeding to return in within three years for another ratemaking proceeding, the appropriate amortization period for rate case expense is three years. Allocating the amortized expense among the three utility division results in an annual allocation of \$4,777 to each operating division (Shawnee Bend Water, Shawnee Bend Sewer and Horseshoe Bend Sewer) as depicted in the Reconciliation filed on July 16, 2010.

### **G. Precedential Effect**

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.<sup>420</sup> The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.<sup>421</sup>

An administrative agency is not bound by stare decisis, nor are

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<sup>420</sup> *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social*

*Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

<sup>421</sup> *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

## LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

615

agency decisions binding precedent on the Missouri courts.<sup>422</sup> “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.”<sup>423</sup> The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.<sup>424</sup> “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”<sup>425</sup>

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the

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<sup>422</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

<sup>423</sup> *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

<sup>424</sup> *Id.*

<sup>425</sup> *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

LAKE REGION WATER & SEWER COMPANY

616

19 Mo. P.S.C. 3d

Commission.

**IV. Final Decision**

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following final decision.

Lake Region has, by a preponderance of the evidence, met its burden of proving, that the baseline rate increase for its operations totaling \$143,730 (Shawnee Bend Water - \$12,637; Shawnee Bend Sewer - \$102,350; Horseshoe Bend Sewer \$28,743) approved in this order is just and reasonable. Lake Region has also, by a preponderance of the evidence, met its burden of proving that \$33,232 is the just and reasonable amount to be recovered in rates for executive management compensation and that \$42,997 is the just and reasonable amount to be recovered in rates for rate case expense, as amortized and allocated as described.

Additionally, Lake Region provides safe and adequate service and the Commission concludes, based upon its independent review of the whole record that the rates approved in this order support the provision of safe and adequate service. The revenue increase approved by the Commission today is concluded to be no more than what is sufficient to keep Lake Region's utility plants in proper repair for effective public service, and insure to Lake Region's investors an opportunity to earn a reasonable return upon funds invested.

The Commission must address one final issue in this matter. Staff Exhibits 21, 22, and 23 were filed as highly confidential documents. The Commission specifically issued a protective order with regard to Staff Exhibit 23 prior to its filing. Because the Commission is not imputing availability fees to Lake Region in this case, the Commission will not alter the classification of the documents and will not disclose the actual amounts of availability fees collected or how the portions of those fees are divided as a result of the confidential settlement agreement in Civil Case No. CV103-760CC. However, there were answers to various questions contained in Staff Exhibits 21 and 22, the Affidavits of Brian Schwermann, which pertained to matters not falling under the definitions of proprietary or highly confidential information as defined in Commission Rule 4 CSR 240-2.135. The Commission shall declassify this

LAKE REGION WATER AND SEWER COMPANY

19 Mo. P.S.C. 3d

617

information.

**THE COMMISSION ORDERS THAT:**

1. The water and sewer service tariff sheets submitted on October 7-8, 2009, by Lake Region Water & Sewer Company, assigned Tariff Nos. YS-2010-0250 and YW-2010-0251, are rejected.<sup>426</sup> The specific sheets rejected are:

**PSC MO. No. 1 (Water)**

**First Revised Sheet No. 4, Replacing Original Sheet No. 4**

**First Revised Sheet No. 5, Replacing Original Sheet No. 5**

**PSC MO. No. 2 (Sewer)**

**Second Revised Sheet No. 6, Replacing First Revised Sheet No. 6**

**Second Revised Sheet No. 7, Replacing First Revised Sheet No. 7**

2. Lake Region Water & Sewer Company is authorized to file tariff sheets in compliance with this order, sufficient to recover revenues approved in the body of this order. Lake Region Water & Sewer Company shall file its compliance tariff sheets no later than August 23, 2010.

3. No later than 3:00 p.m. on August 26, 2010, the Staff of the Missouri Public Service Commission shall file its recommendation concerning approval of Lake Region Water & Sewer Company's compliance tariff sheets.

4. No later than August 27, 2010, the Staff of the Missouri Public Service Commission and Lake Region Water & Sewer Company shall jointly file updated and revised rate design schedules 1-11, that were originally filed by Staff Witness James Russo on January 21, 2010, to reflect the implemented rate increase and rate design, and the monthly bill comparisons.

5. Lake Region Water & Sewer Company shall file a new general rate increase request no later than three years following the effective date of this order.

6. Lake Region Water & Sewer Company's motion to strike portions of Staff's brief regarding availability fees is denied.

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<sup>426</sup> Originally tariff sheets were filed on October 7, 2009. The original tariff sheets for sewer service, Tracking No. YS-2010-0249, were withdrawn by Lake Region on October 8, 2010, new sheets were filed and assigned Tracking No. YS-2010-0250. These sheets were then substituted but retained the Tracking No. of YS-2010-0250. The original tariff sheets for water service were assigned Tracking No. YW-2010-0251, substitute sheets were filed but they retained the Tracking No. YW-2010-0251.

LAKE REGION WATER & SEWER COMPANY

618

19 Mo. P.S.C. 3d

7. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.

8. The following portions of Staff Exhibits 21 and 22, Affidavits of Brian Schwermann, received into evidence as highly confidential documents shall be publically disclosed: Exhibit 21, Paragraphs 1-9, 11-16 and 18; Exhibit 22, Paragraphs 1-5. The Commission's Data Center shall file redacted versions of these exhibits in the Commission's Electronic Information and Filing System.

9. By separate order, The Commission shall open a workshop docket, as described in the body of this order to prospective treatment of availability fees, reservation fees, standby fees, connection fees, or any other similar fees, their proper use as mechanisms of capital recovery and their proper ratemaking treatment.

10. This Report and Order shall become effective on August 28, 2010.

Clayton, Chm., Gunn, and Kenney, CC., concur;  
Davis and Jarrett, CC., dissent;  
and certify compliance with the provisions  
of Section 536.080, RSMo 2000.

**\*NOTE:** An order of correction has been issued in this case and has not been published. If needed, this document is available in the official case files of the Public Service Commission.



THE EMPIRE DISTRICT ELECTRIC COMPANY

19 Mo. P.S.C. 3d

619

**In the Matter of The Empire District Electric Company Of Joplin,  
Missouri for Authority to File Tariffs Increasing Rates for Electric  
Service Provided to Customers in the Missouri Service Area**

*File No. ER-2010-0130  
Decided August 18, 2010*

**Rates §104.** The Commission approved a Stipulation and Agreement including the now-operational Plum Point generating facility in The Empire District Electric Company's rate structure.

**ORDER APPROVING STIPULATION AND AGREEMENT  
AND CANCELLING HEARING**

On May 29, 2010, the Missouri Public Service Commission approved a Unanimous Stipulation and Agreement, settling all but one issue: whether the Plum Point generating unit would be fully operational and used for service no later than August 15, 2010. The parties agreed that if Plum Point is operational by August 15, then the increase in Empire's revenue would be \$36,800,000.

On August 16, the parties filed a Stipulation and Agreement stating that Plum Point was fully operational on August 13 and that The Empire District Electric Company shall file tariff sheets containing rate schedules in conformance with Appendix A to the May 12, 2010 Stipulation and Agreement, which was approved by the Commission on May 29.

In the Stipulation and Agreement, the signatories request that the Commission: (1) approve the agreement; (2) admit into evidence Exhibit 1 to the Agreement, which is the Memorandum filed by the Staff of the Commission containing an assessment of the parameters relevant to whether Plum Point is operational; (3) determine that Plum Point is fully operational and used for service as of August 13, 2010; (4) order Empire to file revised tariff sheets containing rate schedules in conformance with Appendix A to the May 12, 2010 Stipulation and Agreement; and (5) cancel the hearing set for August 20, 2010, the purpose of which would have been to resolve the issue of whether Plum Point is operational.

The parties to the agreement represent that those parties<sup>1</sup>

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<sup>1</sup> The Missouri Department of Natural Resources, Midwest Energy Users' Association, Kansas City Power & Light Company, and the City of Joplin, Missouri.

THE EMPIRE DISTRICT ELECTRIC COMPANY

620

19 Mo. P.S.C. 3d

who did not sign the agreement do not object to the agreement nor do they object to cancelling the hearing set for August 20.

The Commission has the authority to accept a stipulation and agreement offered by the parties.<sup>2</sup> Notably, every decision and order in a contested case shall be in writing, and except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.<sup>3</sup> Consequently, because this case is being disposed of by stipulation and agreed settlement, the Commission need not make findings of fact or conclusions of law.

On June 6, the Commission, by stipulation of the parties, admitted all pre-filed testimony into the record. Exhibit 1, the Staff Memorandum attached to the Agreement has been offered as evidence without objection. The Commission will admit Exhibit 1 into the record. The record therefore contains substantial and competent evidence. Upon review of the Agreement and all evidence admitted, the Commission independently finds that such evidence weighs in favor of the agreement and determines that Plum Point is fully operational and used for service as of August 13, 2010.

The Commission will order Empire to file revised tariff sheets containing rate schedules in conformance with Appendix A to the May 12, 2010 Agreement. Because the present Agreement obviates the need for the hearing set for August 20, the Commission will cancel the hearing

Finally, the Commission has reviewed the Stipulation and Agreement and finds it reasonable. The Agreement will therefore be approved and the parties will be directed to abide by its terms.

**THE COMMISSION ORDERS THAT:**

1. The Stipulation and Agreement, signed by The Empire District Electric Company, the Staff of the Missouri Public Service Commission and the Office of the Public Counsel and filed on August 16, 2010, is approved.
2. The parties shall abide by the terms of the Unanimous Stipulation and Agreement.
3. The Staff of the Commission's Memorandum, Exhibit 1, is admitted into evidence.

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<sup>2</sup> Section 536.060, RSMo.

<sup>3</sup> Section 536.090, RSMo.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

621

4. The Empire District Electric Company shall file tariff sheets containing the rate schedules in conformance with Appendix A to the May 12, 2010 Stipulation and Agreement.

5. The hearing scheduled for August 20, 2010 is cancelled.

6. This order shall become effective on August 28, 2010.

Clayton, Chm., Davis, Jarrett,  
Gunn, and Kenney, CC., concur.

Jones, Senior Regulatory Law Judge

\*NOTE: A notice of correction in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

\*NOTE: The Stipulation & Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

\*NOTE: See pages 322 and 368 for other orders in this case.

**In the Matter of Laclede Gas Company's Tariff to Increase Its Annual Revenues for Natural Gas Service**

*File No. GR-2010-0171  
Decided August 18, 2010*

**Gas §18.** The Commission rejects a proposed rate increase of \$60.7 million and concludes that an increase of \$31.4 million will support safe and adequate service at just and reasonable rates.

**Rates §108.** The Commission rejects a proposed rate increase of \$60.7 million and concludes that an increase of \$31.4 million will support safe and adequate service at just and reasonable rates.

**REPORT AND ORDER**

The Missouri Public Service Commission is determining the terms of, and charges for, the gas services of Laclede Gas Company ("Laclede Gas") as set forth in the *Partial Stipulation and Agreement*<sup>1</sup> and the *Second Stipulation and Agreement*.<sup>2</sup> Such terms include a revenue increase of approximately \$ 31,400,000, but Laclede Gas is already

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<sup>1</sup> Filed on May 25, 2010.

<sup>2</sup> Filed on August 3, 2010.

## LACLEDE GAS COMPANY

622

19 Mo. P.S.C. 3d

collecting \$ 10,912,000 of that amount as infrastructure system replacement surcharge ("ISRS"). The Commission is rejecting the pending tariff assigned Tracking No. YG-2010-0376, and ordering Laclede Gas to file a new tariff in compliance with this *Report and Order*.

The Commission makes each ruling on consideration of all allegations and arguments of each party, and the substantial and competent evidence upon the whole record. But the Commission does not specifically address matters that are not dispositive. The Commission's findings reflect its determinations of credibility.

On those grounds, the Commission independently finds and concludes as follows.

### **I. Appearances**

**Michael C. Pendergast**, Vice President and Associate General Counsel, and **Rick Zucker**, Assistant General Counsel – Regulatory, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, MO 63101, for Laclede Gas Company.

**Lera Shemwell**, Deputy General Counsel, Attorney for the Staff of the Missouri Public Service Commission, P. O. Box 360, Jefferson City, MO 65102, for the Commission's Staff.

**Marc D. Poston**, Senior Public Counsel, P. O. Box 2230, Jefferson City MO 65102, for Office of the Public Counsel.

**Lisa C. Langeneckert**, 600 Washington Avenue, 15th Floor, St. Louis, MO 63101-1313, for Missouri Energy Group.

**Diana M. Vuylsteke**, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, for Missouri Industrial Energy Consumers.

**Michael A. Evans** and **Sherrie A. Schroeder** with Hammond, Shinnors, Turcotte, Larrew and Young, P.C., 7730 Carondelet Avenue, Suite 200, St. Louis, MO 63105, for USW Local 11-6.

**Shelley A. Woods** and **Sarah Mangelsdorf**, Assistant Attorneys General, P.O. Box 899, Jefferson City, Missouri 65102, for Missouri Department of Natural Resources.

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

623

**Daniel Jordan**, Regulatory Law Judge.

### **II. Procedural History**

On December 4, 2009, Laclede Gas filed tariffs. The tariffs proposed an increase in revenue of approximately \$60.7 million, of which Laclede stated it was already collecting approximately \$8.1 million as ISRS. The tariffs bore an effective date of January 4, 2010.

By order dated December 10, 2009, the Commission suspended the tariffs until November 4, 2010, the maximum time allowed by statute.<sup>3</sup> The suspension of the tariffs initiated a contested case.<sup>4</sup> Also in that same order, the Commission directed that notice of this action be provided to the public and to certain parties, and set a deadline for filing applications to intervene.

By orders dated January 13 and 14, 2010, the Commission granted applications to intervene from all persons filing them:

- Missouri Energy Group.
- Missouri Industrial Energy Consumers.
- USW Local 11-6.
- Missouri Department of Natural Resources.

By order dated February 1, 2010, the Commission issued a procedural schedule. Also in the February 1, 2010, order, the Commission ruled on the dates of a test year, and the update period for known and measurable changes, relevant to setting Laclede Gas's rates. As to other significant items relevant to Laclede Gas's rates ("true-up"), the Commission reserved ruling on a period and accounts in that same order.

In May and June 2010, the Commission conducted seven local public hearings in Laclede Gas's service territory to take comments from Laclede Gas's customers and the public regarding this action. By July 20, 2010, the parties pre-filed all direct, rebuttal, and sur-rebuttal testimony, except as to the true-up period.

On July 23, 2010, the parties filed the *Partial Stipulation and Agreement*, which provided that it eliminated the need for a true-up period, accounts, and hearing. On July 26, 2010, the parties filed a Joint Statement of Issues. On July 28, 2010, the parties asked to suspend the procedural schedule. The parties filed the *Second Stipulation and Agreement*, which included specimen tariffs, on August 3, 2010. The

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<sup>3</sup> Section 393.150, RSMo 2000.

<sup>4</sup> Section 393.150.1, RSMo 2000; and Section 536.010(4), RSMo Supp. 2009.

LACLEDE GAS COMPANY

624

19 Mo. P.S.C. 3d

*Partial Stipulation and Agreement* and *Second Stipulation and Agreement* (together, "settlement") resolve all issues between all parties, so the settlement is unanimous.

**III. Settlement**

The *Second Stipulation and Agreement* provides that the parties will either separately reach agreement, or seek this Commission's decision, at a later date as to certain matters ("deferred matters"). Deferred matters appear in the *Second Stipulation and Agreement* at paragraphs:

9(c) Modifications to Low-Income Assistance Program.

10(d) Disputed Matters as to Low-Income Weatherization Program.

This *Report and Order* includes no determination on the deferred matters.

As to deferred matters and all other issues, the settlement disposes of this action, so the Commission need not separately state its findings of fact.<sup>5</sup> The settlement also waives procedural requirements that would otherwise be necessary before final decision.<sup>6</sup> Those requirements include each commissioner's duty to either hear all the evidence or read the full record.<sup>7</sup>

The settlement includes a stipulation to enter all pre-filed testimony into the record.<sup>8</sup> On August 6, 2010, all parties other than MIEC filed a *Motion to Have Testimony, as Filed in EFIS, Received into Evidence by Reference*. MIEC's deadline to file any response was noon on August 13, 2010.<sup>9</sup> MIEC filed no response. The Commission granted that motion later in the day on August 13, 2010.

The record therefore contains substantial and competent evidence. The Commission independently finds that such evidence weighs in favor of the settlement's provisions. The Commission incorporates such provisions into this *Report and Order*.

Nevertheless, the Commission also sets forth its independent conclusions and decision<sup>10</sup> as follows.

**IV. Jurisdiction**

Because the Commission is a creature of statute, the statutes

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<sup>5</sup> Section 536.090, RSMo 2000.

<sup>6</sup> Section 536.060, RSMo 2000.

<sup>7</sup> Section 536.080.2, RSMo 2000.

<sup>8</sup> *Partial Settlement and agreement*, paragraph 23; *Second Settlement and Agreement*, paragraph 15.

<sup>9</sup> Order dated August 9, 2010.

<sup>10</sup> Section 386.420.2. All sections are in the 2000 Revised Statutes of Missouri unless otherwise stated.

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

625

determine the Commission's jurisdiction, and the Commission should explain its jurisdiction in every case.<sup>11</sup>

The Commission's jurisdiction generally includes every public utility:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

\* \* \*

(5) To all public utility corporations and persons whatsoever subject to the provisions of this chapter [386, RSMo] as herein defined [. <sup>12</sup>]

Chapter 386, RSMo, defines public utility corporations to include:

(43) . . . every . . . gas corporation [as] defined in this section [. <sup>13</sup>]

That section provides the following definitions:

(18) "Gas corporation" includes every [entity] owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof [. <sup>14</sup>]

Those provisions include Laclede Gas because the Commission has certified Laclede Gas to provide gas service in the region of St. Louis, Missouri, where it serves approximately 630,000 customers.

The Commission's jurisdiction includes:

(1) . . . general supervision of all gas corporations [. <sup>15</sup>]

Regulating Laclede Gas's services and rates is specifically within the Commission's jurisdiction:

The commission shall:

\* \* \*

(11) Have power to require every gas corporation . . . to file with the commission . . .

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<sup>11</sup> *Greene County Nursing & Care Center v. Department of Social Servs.*, 807 S.W.2d 117, 118-19 (Mo. App., W.D. 1991).

<sup>12</sup> Section 386.250, RSMo 2000.

<sup>13</sup> Section 386.020, RSMo Supp. 2009.

<sup>14</sup> *Id.*

<sup>15</sup> Section 393.140, RSMo 2000.

LACLEDE GAS COMPANY

626

19 Mo. P.S.C. 3d

schedules showing . . . and all rules and regulations relating to rates, charges or service [.]

\* \* \*

No corporation shall charge . . . different compensation for any service . . . than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time [.<sup>16</sup>]

Such schedules—or “tariffs”—and are subject to the Commission’s decision:

Whenever there shall be filed with the commission by any [utility] any [tariff], the commission [may] enter upon a hearing concerning the propriety of such [tariff], upon its own initiative[.<sup>17</sup>]

This action began with the filing with the Commission of tariffs proposing changes in terms of, and rates for, service.

**V. Service**

The standard for service requires Laclede Gas to:

[F]urnish and provide such service instrumentalities and facilities as shall be safe and adequate [.<sup>18</sup>]

Upon review of the record and the settlement, the Commission independently finds and concludes that the settlement’s proposed terms support safe and adequate service. Without further discussion, the Commission incorporates such provisions, as if fully set forth, into this *Report and Order*.

**VI. Rates**

The standard for rates is “just and reasonable,”<sup>19</sup> a standard founded on constitutional provisions, as the United States Supreme Court has explained:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the

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<sup>16</sup> *Id.*

<sup>17</sup> Section 393.150.1, RSMo 2000.

<sup>18</sup> Section 393.130.1, RSMo Supp. 2009.

<sup>19</sup> *Id.* and Section 393.150.2, RSMo 2000.



LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

627

public utility company of its property in violation of the Fourteenth Amendment.<sup>20</sup>

But the Commission must also consider the customers:

The rate-making process . . . i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.<sup>21</sup>

Further, that balancing has no single formula:

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>22</sup>

Moreover, making such pragmatic adjustments is part of the Commission's duty:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.<sup>23</sup>

And:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.'<sup>24</sup>

Thus, the law requires a just and reasonable end, but does not specify a means:

Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not

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<sup>20</sup> *Bluefield Water Works & Improvement Co. v. Public Serv. Com'n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

<sup>21</sup> *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

<sup>22</sup> *Federal Power Com'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

<sup>23</sup> *Bluefield*, 262 U.S. at 692.

<sup>24</sup> *State ex rel. Associated Natural Gas Co. v. Public. Serv. Com'n*, 706 S.W.2d 870, 873 (Mo. App., W.D. 1985) (citing *Hope Natural Gas Co.*, 320 U.S. at 602-03).

LACLEDE GAS COMPANY

628

19 Mo. P.S.C. 3d

theory but the impact of the rate order which counts.<sup>25</sup>

The specimen tariffs accompanying the settlement show that the parties have employed a system of policy decisions and accountancy conventions approved by law as follows.

**a. Rate Adjustment**

Determining whether a rate adjustment is necessary requires comparing Laclede Gas's current net income to Laclede Gas's revenue requirement. Revenue requirement is the amount of money that a utility may collect per year, which depends on the requirements for providing safe and effective service at a profit. Those requirements are tangible and intangible:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.

<sup>26</sup>

That and similar holdings have led to a conventional analysis of the resources devoted to service, from which the Commission determines revenue requirement as follows.

To provide service, a utility devotes resources, which accounting conventions classify as either expense or investment. Expenses include operation, replacement of capital items as they depreciate ("current depreciation"), and taxes on the return. Investment is the basis ("rate base") on which the utility seeks profit ("return"). Return is therefore a percentage ("rate of return") of rate base. Rate base includes capital assets ("gross plant"), less historic deterioration of such assets ("accumulated depreciation"), plus other items.

Those components relate to each other in the following formula:

*Revenue Requirement = Expenses + Return on Rate Base*

*Rate of Return x Rate Base*

*Cost of Capital x Capital Invested*

where:

*Capital Invested = Gross Plant – Accumulated Depreciation on Plant*

+ *Other Items*

and:

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<sup>25</sup> *Id.*

<sup>26</sup> *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

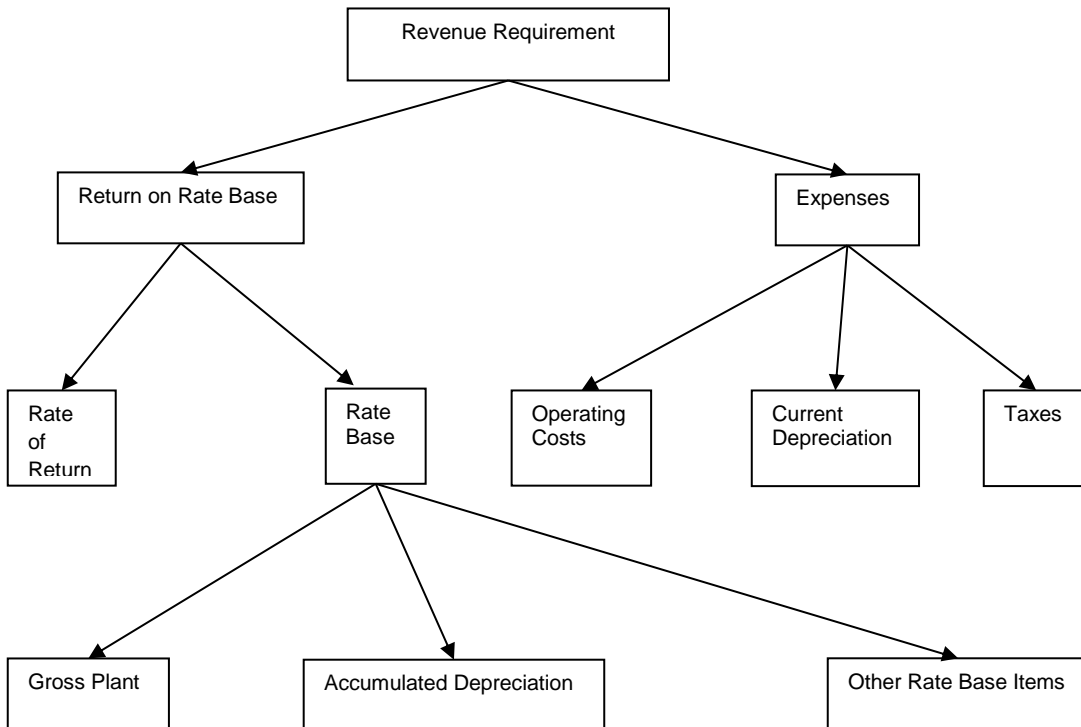
LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

629

$$\text{Expenses} = \text{Operating Costs} + \text{Current Depreciation} + \text{Taxes}$$

Thus, the revenue requirement breaks down into its elements as follows.

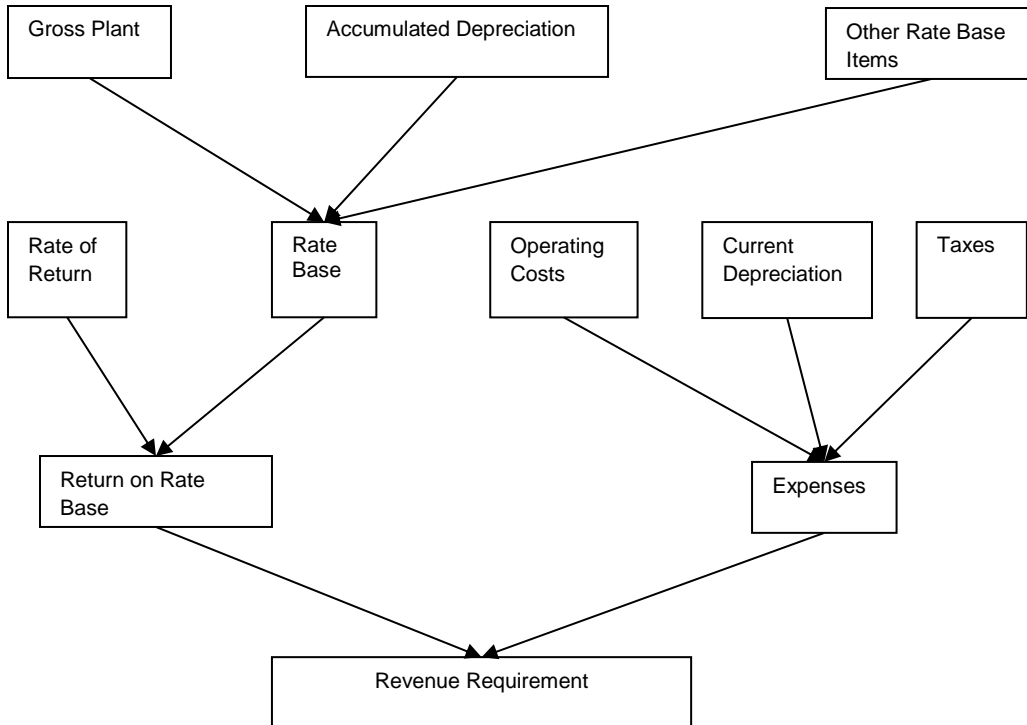


Conversely, determining the revenue requirement means putting those elements together.

LACLEDE GAS COMPANY

630

19 Mo. P.S.C. 3d



But determining that amount does not end the analysis, because the utility must collect that amount from its customers, and all customers need not receive identical treatment.

**b. Rate Design**

Rate design is how a utility distributes its revenue requirement among its various classes of customer. Customers vary as to the costs attributable to their service. Accordingly, their rates should reflect their costs, respectively. Just and reasonable rates may account for such differences among customers.

**c. Rates Proposed in the Settlement**

A utility has the burden of proving that increased rates are just and reasonable<sup>27</sup> by a preponderance of the evidence.<sup>28</sup> The Commission has compared the substantial and competent evidence on the whole

<sup>27</sup> Section 393.150.2, RSMo 2000.

<sup>28</sup> *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

631

record with the settlement as to both rate adjustment and rate design. The Commission independently finds and concludes that the rates proposed in the settlement are just and reasonable rates. Therefore, the Commission incorporates such provisions, as if fully set forth, into this *Report and Order* without further discussion.

**VII. Expedited Filing**

The parties ask for approval of tariffs effective for service on and after September 1, 2010. The parties have also already agreed to specimen tariffs that accompany the Second Stipulation and Agreement. Therefore, the Commission will order the filing of tariffs in compliance with this Report and Order on an expedited basis.

**THE COMMISSION ORDERS THAT:**

1. All pre-filed testimony is entered into the record.
2. The tariff sheets filed by Laclede Gas Company, to which the Commission assigned tariff number YG-2010-0376 are rejected.
3. Laclede Gas Company shall file a new tariff consistent with this *Report and Order* no later than August 20, 2010.
4. As to the tariff described in ordered paragraph 3, the Commission's staff shall file its recommendation no later than August 23, 2010.
5. The Commission makes no determination as to the deferred matters described in the body of this *Report and Order*.
6. This *Report and Order* shall become effective when issued.

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur;  
and certify compliance with the provisions of  
Section 536.080, RSMo.

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner concurs in the Commission's Report and Order addressing a rate increase request of Laclede Gas Company (Laclede). While rate increases are never welcome, Laclede has demonstrated that its costs and infrastructure investments demand slightly higher rates. While the rate increase amounts to roughly \$2.07 per month for a typical residential customer, any rate increase during challenging economic times will have a negative impact on family budgets. However, for the following reasons, this Commissioner believes

## LACLEDE GAS COMPANY

632

19 Mo. P.S.C. 3d

that the agreement presented to the Commission arguing for a modest increase should be approved.

First, the Commission continues to make a strong stand on funding of Energy Efficiency (EE). As part of the Commission's recent shift of policy on EE, this rate case results in the third time the Commission is pegging its goal of EE funding at .5% of gross operating revenues of the company. The Stipulation requires that Laclede shall ramp up its investment in EE programs to a target level of \$1,700,000, and by the year 2013, Laclede will work towards funding its programs based at .5% of gross revenues. This figure compares with an amount of less than \$1,170,000, which has been spent annually for the last several years. The Laclede Energy Efficiency Collaborative (Collaborative)<sup>1</sup> will continue its efforts at identifying and funding all cost effective ways of empowering customers to reduce their energy usage and, therefore, their energy bills.

Second, the Commission in this case is sending the message that it intends to stay involved as the Collaborative works through implementation of its programs. It is this Commissioner's hope that the Collaborative can continue to operate in a consensus and advisory fashion and, if any dispute or roadblock occurs, that the Commission can address differences in policy determinations. Expenditure levels, program types and funding as well as feedback from rate payer experiences are items that the Commission will have the ability to monitor and will contribute to the dialogue. In the event that the Collaborative reaches an impasse in decision-making or is unable to move forward because of lack of consensus, the parties are welcome to petition the Commission for direction. The goals of increased EE funding will be addressed regularly through on-going Commission involvement should the Collaborative fail to reach agreement or run into policy differences.

Third, Laclede will be addressing refreshed efforts at assisting low income customers who struggle with the affordability of heating homes during the winter months. The Order approves \$950,000 in assistance for low income weatherization. By assisting customers to arrest out of control energy usage by weatherizing their homes, customers are empowered to more effectively take control of their energy

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<sup>1</sup> The Energy Efficiency Collaborative is a group of stakeholders charged with the task of formulating detailed programs to effectuate the intent of the Commissions Report and Oder in regard to planning and implementing cost effective energy efficiency programs within the utility's service area.

## LACLEDE GAS COMPANY

19 Mo. P.S.C. 3d

633

costs. These funds will be coordinated with federal and state dollars to find ways of locating and assisting customers in need.

Fourth, this Order requires that Laclede's Low-Income Energy Assistance Program be continued at a funding level of \$600,000 per year. The Low-Income Program Review and Evaluation Team will continue its work in identifying ways of making energy affordable and encourage customers to stay current with bills.

Last, while this Commissioner has not been satisfied with the manner in which Laclede has reduced its compliance with past Commission orders on main replacement work within its system, there is no question that significant sums have been spent to improve the safety and ensure the quality of service provided by the company. Safety is a top priority of the Commission and safety investments pay more than economic dividends to the customers paying the rates. This Commissioner continues to press Laclede to satisfy its obligations and improve safety in infrastructure where necessary.

In conclusion, this Commissioner is compelled to commend the parties involved in this case who have effectively settled the vast majority of issues relating to rates, rate design and many other issues. While the Commission is prepared to make the challenging decisions on controversial and complicated matters, the public can take solace that each of the stipulating parties have placed their names on the line to responsibly reach a compromise on an appropriate level of rates. Though rate increases are never easy or welcome, the evidence in this case demonstrates that higher rates have been necessitated by prudent infrastructure investments and increases in general operating costs. The Commission has approved this increase unanimously and will engage in future filings to insure that the Commission directives are implemented. The Commission has a responsibility to insure that the utility offers safe and adequate service at "just and reasonable" rates. Following staff audit, settlement and transparent Commissioner deliberations, the Commission finds that these new rates to be just and reasonable.

For the foregoing reasons, this Commission concurs.

ATMOS ENERGY CORPORATION

634

19 Mo. P.S.C. 3d

**In the Matter of Atmos Energy Corporation's Tariff Revision  
Designed to Implement a General Rate Increase for Natural Gas  
Service in the Missouri Service Area of the Company**

*File No. GR-2010-0192, et al.  
Decided August 18, 2010*

**Gas §18.** The Commission approved a stipulation and agreement between the parties resolving all issues which implemented just and reasonable rates that support safe and adequate service.

**ORDER APPROVING STIPULATION AND AGREEMENT**

**Procedural History**

On December 28, 2009, Atmos Energy Corporation (“Atmos”) submitted a tariff designed to implement a general rate increase for natural gas service. Atmos indicates the new gas service rates are designed to increase its gross annual revenues by approximately \$6,438,586.<sup>1</sup> The submitted tariff carries a January 28, 2010 effective date.

On January 6, 2010, the Commission issued notice, set an intervention deadline and suspended the tariff for the maximum time allowed by statute<sup>2</sup> in order to have sufficient time to determine if the rate increase request was just and reasonable and in the public interest. The suspension of the tariffs initiated a contested case.<sup>3</sup> A contested case is a formal hearing procedure, but it allows for waiver of procedural formalities<sup>4</sup> and a decision without a hearing,<sup>5</sup> including by stipulation and agreement.<sup>6</sup>

The Commission granted timely intervention requests to Noranda Aluminum, Inc., and the Missouri Department of Natural Resources, and granted late intervention to the International Brotherhood of Electrical Workers, local 1439, AFL-CIO. Ultimately, Local 1439 voluntarily withdrew.

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<sup>1</sup> On February 3, 2010, the Commission consolidated this case with GR-2006-0387, Atmos’ prior rate case that had been remanded to the Commission by the Western District Court of Appeals.

<sup>2</sup> Section 393.150, RSMo 2000.

<sup>3</sup> Section 393.150.1, RSMo 2000; and Section 536.010(4), RSMo Supp. 2009.

<sup>4</sup> Sections 536.060(3) and 536.063(3), RSMo 2000.

<sup>5</sup> Sections 536.060, RSMo 2000.

<sup>6</sup> *Id.* and 4 CSR 240-2.115.



ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

635

On February 16, 2010, the Commission adopted a procedural schedule, established the Test Year, and adopted the proposed customer notice. The procedural schedule was modified and the evidentiary hearing was set to begin on August 23, 2010. The Commission held eight local public hearings in the cities of Palmyra, Hannibal, Kirksville, Butler, Caruthersville, Hayti, Sikeston, and Jackson, to take public comment on the proposed rate increase request.

The parties held a settlement conference July 12-15, 2010 and on August 11, 2010, they filed a Unanimous Stipulation and Agreement (“Agreement”). The Agreement purports to settle all issues in this matter. And, because the parties reached a settlement, the Commission suspended the procedural schedule and set an On-the-Record presentation so the Commission could inquire into the specific terms of the Agreement.

**The Agreement**

The agreement waives procedural requirements that would otherwise be necessary before final decision,<sup>7</sup> including each commissioner’s duty to either hear all the evidence or read the full record.<sup>8</sup> Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.<sup>9</sup> Therefore, the Commission incorporates the terms of the Agreement into this order.

This order would be unnecessary altogether if Atmos dismissed its action, or if the Commission allowed the tariff to take effect by operation of law alone.<sup>10</sup> But that is not the outcome that the parties seek. The parties do not waive final decision.<sup>11</sup> On the contrary, the parties expressly ask for an “Order approving all of the specific terms and conditions of this Stipulation.” The Agreement’s terms include rates for gas service, rate design, the reclassification of certain customers, billing determinants, treatment of special contracts, terms on reasonable reconnection charges, the withdrawal of a proposal to recover bad debt by means of a PGA, withdrawal of a proposal to eliminate *de minimis* ACA balances, ISRS calculations, an Energy

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<sup>7</sup> Section 536.060, RSMo 2000.

<sup>8</sup> Section 536.080.2, RSMo 2000.

<sup>9</sup> Section 536.090, RSMo 2000.

<sup>10</sup> Section 393.150, RSMo 2000.

<sup>11</sup> Nor can they. *Weber v. Firemen’s Retirement System*, 872 S.W.2d 477, 480 (Mo. banc, 1994).

ATMOS ENERGY CORPORATION

636

19 Mo. P.S.C. 3d

Conservation and Efficiency program and a bill check-off program. And, without further discussion, the Commission incorporates all provisions of the Agreement, as if fully set forth, into this order.

With regard to revenue requirement and rate design, the parties agree and recommend that the Commission authorize Atmos to increase its annual non-gas, Missouri jurisdictional revenues by \$5,650,000, which includes approximately \$1,000,000 in infrastructure system replacement surcharge revenues previously authorized by the Commission. The parties agree to the adoption of a two-part rate design whereby the existing three rate districts are maintained. But, a majority of the rate increase resulting from the Agreement will be recovered in volumetric rates.

Approximately 75% of the total revenue charged to the Residential and Small Firm General Service classes will be recovered through delivery rates. Revenue increases for the Medium General Service, Large General Service, Interruptible Large Volume Gas, and Transportation Service classes will be allocated on an across-the-board equal percentage basis to all rate elements. Additionally reclassifying commercial customers into the Small General Service, Medium General Service and Large General Service classes should be adopted by grouping all Type A and Type B meters into the Small General Service class, and all non-Type A and non-type B meters in the Medium General Service and Large General Service classes. The customers in these classes may request a review to determine if they would qualify for a different class through a meter replacement.

The parties further request the Commission to order Atmos to file tariff sheets, to be effective for service rendered on an after September 1, 2010 in conformity with the specimen tariff sheets attached to the Agreement.

**Ratemaking Standards**

The standard for rates is "just and reasonable,"<sup>12</sup> a standard founded on constitutional provisions, as the United States Supreme Court has explained:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust,

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<sup>12</sup> *Id.* and Section 393.150.2, RSMo 2000.

ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

637

unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>13</sup>

But the Commission must also consider the customers:

The rate-making process . . . i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.<sup>14</sup>

Further, that balancing has no single formula:

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>15</sup>

Moreover, making such pragmatic adjustments is part of the Commission's duty:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.<sup>16</sup>

And:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.'<sup>17</sup>

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<sup>13</sup> *Bluefield Water Works & Improvement Co. v. Public Serv. Com'n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

<sup>14</sup> *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

<sup>15</sup> *Federal Power Com'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

<sup>16</sup> *Bluefield*, 262 U.S. at 692.

<sup>17</sup> *State ex rel. Associated Natural Gas Co. v. Public. Serv. Com'n*, 706 S.W.2d 870, 873

ATMOS ENERGY CORPORATION

638

19 Mo. P.S.C. 3d

Thus, the law requires a just and reasonable end, but does not specify a means:

Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts.<sup>18</sup>

The means employed in the settlement consists of "rate case usage parameters [, <sup>19</sup>]" which is a system of policy decisions and accountancy conventions. Determining whether a rate adjustment is necessary requires comparing Atmos' current net income to Atmos' revenue requirement. Revenue requirement is the amount of money that a utility may collect per year, which depends on the requirements for providing safe and effective service at a profit. Those requirements are tangible and intangible:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.<sup>20</sup>

That and similar holdings have led to a conventional analysis of the resources devoted to service, from which the Commission determines revenue requirement as follows.

To provide service, a utility devotes resources, which accounting conventions classify as either expense or investment. Expenses include operation, replacement of capital items as they depreciate ("current depreciation"), and taxes on the return. Investment is the basis ("rate base") on which the utility seeks profit ("return"). Return is therefore a percentage ("rate of return") of rate base. Rate base includes capital assets ("gross plant"), less historic deterioration of such assets ("accumulated depreciation"), plus other items.

Those components relate to each other in the following formula:

Revenue Requirement = Cost of Providing Utility Service or  $RR = O + (V - D) R$  where,

RR = Revenue Requirement;

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(Mo. App. 1985) (citing *Hope Natural Gas Co.*, 320 U.S. at 602-03).

<sup>18</sup> *Id.*

<sup>19</sup> *Stipulation and Agreement*, page 2, paragraph 3.

<sup>20</sup> *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

639

O = Operating Costs; (such as fuel, payroll, maintenance, etc., Depreciation and Taxes);

V = Gross Valuation of Property Used for Providing Service;

D = Accumulated Depreciation Representing the Capital Recovery of Gross Property Investment.

(V-D) = Rate Base (Gross Property Investment less Accumulated Depreciation = Net Property Investment)

R = Overall Rate of Return or Weighted Cost of Capital

(V-D)R = Return Allowed on Net Property Investment

But determining the revenue requirement does not end the analysis, because the utility must collect that amount from its customers, and all customers need not receive identical treatment. Rate design is how a utility distributes its revenue requirement among its various classes of customer. Customers vary as to the costs attributable to their service. Accordingly, their rates should reflect their costs, respectively. Just and reasonable rates may account for such differences among customers.

**Conclusions**<sup>21</sup>

A utility has the burden of proving that increased rates are just and reasonable<sup>22</sup> by a preponderance of the evidence.<sup>23</sup> In this order, the Commission grants the parties' request to enter all pre-filed testimony and affidavits prepared by the parties into the record. The record thus contains substantial and competent evidence. The Commission has compared the substantial and competent evidence on the whole record with the Agreement as to both rate adjustment and rate design. The Commission independently finds and concludes that Atmos has met its burden of proof that the rates proposed in the Agreement are just and reasonable rates. Additionally, upon review of the record and the Agreement, the Commission independently finds and concludes that the Agreement's proposed terms support safe and adequate service.

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<sup>21</sup> Section 386.420.2, RSMo 2000 requires a report of the Commission's conclusions.

<sup>22</sup> Section 393.150.2, RSMo 2000.

<sup>23</sup> *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App. 2000).

ATMOS ENERGY CORPORATION

640

19 Mo. P.S.C. 3d

**THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement filed on August 10, 2010 is approved. A copy of the Agreement shall be attached to this order as "Attachment A."

2. The tariff submitted under Tariff File No. YG-2010-0426, on December 28, 2009, by Atmos Energy Corporation, for the purpose of increasing rates for natural gas service, is rejected. The specific tariff sheets rejected are:

**P.S.C. MO. No. 2**

2nd Revised Sheet No. 2, Cancelling 1st Revised Sheet No. 2  
2nd Revised Sheet No. 19, Cancelling 1st Revised Sheet No. 19  
1st Revised Sheet No. 21, Cancelling Original Sheet No. 21  
2nd Revised Sheet No. 22, Cancelling 1st Revised Sheet No. 22  
1st Revised Sheet No. 23, Cancelling Original Sheet No. 23  
2nd Revised Sheet No. 24, Cancelling 1st Revised Sheet No. 24  
1st Revised Sheet No. 25, Cancelling Original Sheet No. 25  
2nd Revised Sheet No. 26, Cancelling 1st Revised Sheet No. 26  
2nd Revised Sheet No. 28, Cancelling 1st Revised Sheet No. 28  
1st Revised Sheet No. 30, Cancelling Original Sheet No. 30  
2nd Revised Sheet No. 42, Cancelling 1st Revised Sheet No. 42  
2nd Revised Sheet No. 43, Cancelling 1st Revised Sheet No. 43  
2nd Revised Sheet No. 115, Cancelling 1st Revised Sheet No. 115  
2nd Revised Sheet No. 116, Cancelling 1st Revised Sheet No. 116  
2nd Revised Sheet No. 117, Cancelling 1st Revised Sheet No. 117  
2nd Revised Sheet No. 118, Cancelling 1st Revised Sheet No. 118  
1st Revised Sheet No. 119, Cancelling Original Sheet No. 119

3. The prefiled testimony, including all exhibits, appendices, schedules, etc. attached thereto, as well as all reports of all witnesses, that are already filed in the Commission's electronic filing and Information system ("EFIS") are hereby admitted into evidence. A copy of the exhibits list is attached to this order as "Attachment B." A notation in EFIS for the issuance of this order shall stand in lieu of a notation in EFIS for any exhibit's entry into the record.

4. Atmos Energy Corporation shall file new tariff sheets consistent with this order and the specimen tariff sheets attached to the Unanimous Stipulation and Agreement no later than August 19, 2010, bearing an effective date of September 1, 2010.

ATMOS ENERGY CORPORATION

19 Mo. P.S.C. 3d

641

5. The Commission's Staff may either join Atmos Energy Corporation with filing its compliance tariff sheets, or file a separate recommendation regarding their approval no later than August 20, 2010.

6. This order shall become effective on August 27, 2010, except for paragraphs 4 and 5 that shall become effective immediately upon this order's issuance.

Davis, Jarrett, Gunn, and Kenney, CC., concur;  
Clayton, Chm., dissents with dissenting opinion to follow.

Stearley, Senior Regulatory Law Judge

\*NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

\*NOTE: See page 235 for another order in this case.

**DISSENTING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner dissents from the Report and Order granting Atmos Energy Corporation (Atmos) a general rate increase. While there are a number of positive, constructive changes to the manner in which the Commission is addressing rate increases, this Commissioner has a basic philosophical difference of opinion that prevents participation in the Report. This opinion attempts to set out areas of disagreement in policy as well as highlight improvements from past cases.

First and foremost, in the eyes of rate payers, there is never a good time for a rate increase, especially during challenging economic times. Testimony at Local Public Hearings yet again confirmed that residential and commercial customers are struggling in the worst economic downturn since the Great Depression. Customers testified to increases in unemployment and many of those who are employed described the effects of underemployment. It is clear that many customers are living on a month-to-month basis without any cushion to absorb any unexpected or additional expenses. Further, business and governmental leaders have advised of cut-backs and layoffs, of reduced revenues and earnings and of uncertainties as the economy slowly recovers. Any increases in utility cost have a significant impact.

Consequently, this Commissioner dissents for a number of reasons. First, this Commissioner has concerns with the utility's rate design, in which the Northeast region continues to have the highest fixed

## ATMOS ENERGY CORPORATION

642

19 Mo. P.S.C. 3d

monthly charge in the Atmos service territory. In Atmos' last rate case, this Commissioner raised concerns that the Northeast region was being treated unfairly. The prior Commission order consolidated Atmos' seven service territories into three districts, the Northeast (NEMO, which includes Kirksville, Bowling Green, Hannibal and Palmyra), Southeast (SEMO, which includes Jackson, Sikeston, Kennett, New Madrid and Caruthersville), and the Western District (WEMO, which includes Butler). Over this Commissioner's objection, the Commission ordered strikingly different rates for each of the districts. The NEMO district was assigned the highest fixed monthly charge.

In this case, the disparity among districts increases. The NEMO and WEMO districts have a 14% increase while the SEMO district is only subjected to a 11% increase. In fact, the SEMO district actually has its fixed charge reduced while the other two districts have an increase. The NEMO district pays the highest fixed monthly charge and the highest volumetric charge under the new rate design. NEMO is especially affected because of significant infrastructure investments in safety-related main replacement programs and because it has a lower number of customers in comparison to the SEMO district. This Commissioner does not have sufficient confidence in the cost of service analysis to support such rates. Additional concerns arise because the NEMO district will face higher rates because of colder temperatures and more days of home heating because of its northern geographic location.

Secondly, this Commissioner dissents because of inadequate treatment of low-income customers. The Commission in recent cases for gas and electric utilities has mandated a fresh approach to addressing affordability issues for utility customers. Low-income customers struggle with paying their bill during the cold winter months. Recently, some utilities have been mandated to give a new look at affordability programs, rate design modifications and new levels of funding to do more than simply pay off past due accounts. While the parties attempted to contemplate low-income needs with a voluntary customer contribution and company matching program, it is this Commissioner's concern that we are not doing enough for Atmos' low-income customers.

While this Commissioner cannot support the Report and Order, it should be noted that this order is an improvement since the last case. This case is being resolved by unanimous agreement of the parties, including the rate payers' advocate. This order significantly increases funding for energy efficiency and weatherization to levels consistent with other utilities. Customers will now have improved access to information



## SEWER & WATER CAPITAL RECOVERY MECHANISMS WORKSHOP

19 Mo. P.S.C. 3d

643

and financial incentives to be empowered to take control of their energy usage. Funding levels will increase toward a goal of .5% of gross operating revenues. This approved agreement also retreats from prior requirements associated with customers paying seasonal disconnection fees.

Despite these improvements and based on the foregoing reasons, this Commissioner must respectfully dissent.

### **In the Matter of a Working Case to Investigate Appropriate Methods for Ratemaking Treatment of Fees or Other Mechanisms used for Capital Recovery of Sewer and Water Infrastructure Investment**

*File Nos. SW-2011-0042 & WW-2011-0043*

*Decided August 23, 2010*

**Sewer §28.** The Commission established a workshop docket to investigate options regarding new rules and regulations for ratemaking treatment of availability fees, reservation fees, standby fees, connection fees or any other similar fees and their proper use as mechanisms of capital recovery.

**Water §30.** The Commission established a workshop docket to investigate options regarding new rules and regulations for ratemaking treatment of availability fees, reservation fees, standby fees, connection fees or any other similar fees and their proper use as mechanisms of capital recovery.

### **ORDER DIRECTING NOTICE OF WORKING CASE AND DIRECTING FILING**

During the recent ratemaking proceeding for Lake Region Water and Sewer Company, the Commission announced its intention to change, on a prospective basis, its practices and policies with how it treats revenue derived through the use of availability fees and other similar fees for capital recovery of infrastructure investment in sewer and water companies. Consequently, the Commission is opening these files to explore all proper options for ratemaking treatment of this revenue and to ultimately formalize a proper policy in a subsequent rulemaking. It is the intent of the rulemaking proceeding to delineate a definitive policy for ratemaking treatment of availability fees, reservation fees, standby fees, connection fees, or any other similar fees and their proper use as mechanisms of capital recovery.

## SEWER & WATER CAPITAL RECOVERY MECHANISMS WORKSHOP

644

19 Mo. P.S.C. 3d

The two workshops will not be consolidated at this time because it is possible that different considerations, and thus different rules, will need to be articulated with regard to water and sewer systems. However, the Commission may consolidate these dockets in the future if it finds that issues of fact and law are substantially related for both types of utilities.

### **THE COMMISSION ORDERS THAT:**

1. No later than September 24, 2010, the Staff of the Missouri Public Service Commission shall file a proposed schedule for workshops, along with any other proposals it has regarding the procedure to follow in these workshop dockets.

2. The Commission's Data Center shall provide electronic notice of these workshop dockets to all regulated Missouri water and sewer companies. If the Commission's Data Center is unable to provide electronic notice to specific regulated entities, the Data Center shall notify those entities by mail.

3. The Commission's Data Center shall provide electronic notice of this workshop docket to all entities listed for the:

Missouri Chamber of Commerce Members at:  
<http://www.ccmo.org/mx/hm.asp?id=memdir>;

Missouri Growth Association at:  
<https://www.mogrowth.com/>;

Missouri Home Builders' Associations at:  
[http://www.nahb.org/local\\_association\\_search\\_results.aspx?state=MO](http://www.nahb.org/local_association_search_results.aspx?state=MO);

Associated General Contractors of Missouri, Inc. at:  
<http://www.agcmo.org/contact/> or [agcmo@agcmo.org](mailto:agcmo@agcmo.org) ;

Missouri Municipal League at:  
<http://www.mocities.com/index.php>

Missouri Economic Development Council at:  
<http://www.showme.org/>

If the Commission's Data Center is unable to provide electronic notice to these specific entities, the Data Center shall notify those entities by mail.

4. The Commission's Data Center shall also provide notice of

SEWER & WATER CAPITAL RECOVERY MECHANISMS WORKSHOP

19 Mo. P.S.C. 3d

645

this workshop docket to the Small Business Regulatory Fairness Board at: Missouri Department of Economic Development, 301 W. High Street, P.O. Box 1157, Jefferson City, Missouri 65102, by mail or by E-mail at: [SBRFB@ded.mo.gov](mailto:SBRFB@ded.mo.gov).

5. This order shall become effective immediately upon issue.

Harold Stearley, Senior Regulatory Law Judge,  
by delegation of authority pursuant to  
Section 386.240, RSMo 2000.

**\*NOTE:** A notice of correction in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.



**DIGEST OF REPORTS**

**OF THE**

**PUBLIC SERVICE COMMISSION**

**OF THE**

**STATE OF MISSOURI**



## LIST OF DIGEST TOPICS

	PAGE
Accounting .....	5
Certificates .....	6
Depreciation .....	10
Discrimination .....	12
Electric .....	13
Evidence, Practice, and Procedure .....	16
Expense .....	21
Gas .....	24
Manufactured Housing .....	30
Public Utilities .....	31
Rates .....	32
Security Issues .....	39
Service .....	42
Sewer .....	44
Steam .....	47
Telecommunications .....	49
Valuation .....	51
Water .....	54





## ACCOUNTING

### I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Jurisdiction and powers of the Federal Commissions
- §4. Jurisdiction and powers of the State Commission
- §5. Reports, records and statements
- §6. Vouchers and receipts

### II. DUTY TO KEEP PROPER ACCOUNTS

- §7. Duty to keep proper accounts generally
- §8. Uniform accounts and rules
- §9. Methods of accounting generally

### III. PARTICULAR ITEMS

- §10. Additions, retirements and replacements
- §11. Abandoned property
- §12. Capital account
- §13. Contributions by utility
- §14. Customers account
- §15. Deficits
- §16. Deposits by patrons
- §17. Depreciation reserve account
- §18. Financing costs
- §19. Fixed assets
- §20. Franchise cost
- §21. Incomplete construction
- §22. Interest
- §23. Labor cost
- §23.1. Employee compensation
- §24. Liabilities
- §25. Maintenance, repairs and depreciation
- §26. Notes
- §27. Plant adjustment account
- §28. Premiums on bonds
- §29. Property not used
- §30. Purchase price or original cost
- §31. Acquisition of property expenses
- §32. Rentals
- §33. Retirement account
- §34. Retirement of securities

- §35. Sinking fund
- §36. Securities
- §37. Supervision and engineering
- §38. Taxes
- §38.1. Book/tax timing differences
- §39. Welfare and pensions
- §39.1. OPEBS, Postretirement benefits other than pensions
- §40. Working capital and current assets
- §41. Expenses generally
- §42. Accounting Authority Orders
- §43. Financial Accounting Standards Board requirements

## **ACCOUNTING**

No headnotes in this volume involved the question of accounting.

## **CERTIFICATES**

### **I. IN GENERAL**

- §1. Generally
- §2. Unauthorized operations and construction
- §3. Obligation of the utility

### **II. JURISDICTION AND POWERS**

- §4. Jurisdiction and powers generally
- §5. Jurisdiction and powers of Federal Commissions
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of local authorities
- §8. Jurisdiction and powers over interstate operations
- §9. Jurisdiction and powers over operations in municipalities
- §10. Jurisdiction and powers over the organizations existing prior to the Public Service Commission law

### **III. WHEN A CERTIFICATE IS REQUIRED**

- §11. When a certificate is required generally
- §12. Certificate from federal commissions
- §13. Extension and changes
- §14. Incidental services or operations

- §15. Municipal limits
- §16. Use of streets or public places
- §17. Resumption after service discontinuance
- §18. Substitution or replacement of facilities
- §19. Effect of general laws, franchises and licenses
- §20. Certificate as a matter of right

#### **IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS**

- §21. Grant or refusal of certificate generally
- §21.1. Public interest
- §21.2. Technical qualifications of applicant
- §21.3. Financial ability of applicant
- §21.4. Economic feasibility of proposed service
- §22. Restrictions and conditions
- §23. Who may possess
- §24. Validity of certificate
- §25. Ability and prospects of success
- §26. Public safety
- §27. Charters and franchises
- §28. Contracts
- §29. Unauthorized operation or construction
- §30. Municipal or county action
- §31. Rate proposals
- §32. Competition or injury to competitor
- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

#### **V. PREFERENCE BETWEEN RIVAL APPLICANTS - FACTORS**

- §36. Preference between rival applicants generally
- §37. Ability and responsibility
- §38. Existing or past service
- §39. Priority of applications
- §40. Priority in occupying territory
- §41. Rate proposals

#### **VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES**

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority

- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

#### **VII. OPERATION UNDER TERMS OF THE CERTIFICATE**

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

#### **VIII. TRANSFER, MORTGAGE OR LEASE**

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
- §54. Dissolution
- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
- §59. Sale of certificate rights

#### **IX. REVOCATION, CANCELLATION AND FORFEITURE**

- §60. Revocation, cancellation and forfeiture generally
- §61. Acts or omissions justifying revocation or forfeiture
- §62. Necessity of action by the Commission
- §63. Penalties

### **CERTIFICATES**

#### **IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS**

- §22. Restrictions and conditions

The Commission granted a Certificate of Convenience and Necessity to Missouri Gas Utility, Inc., authorizing the company to construct and operate a gas distribution system in Pettis and Benton Counties, with the shareholders, rather than the ratepayers, accepting full financial responsibility of the success of the project. – Missouri Gas Utility, Inc. 19 MPSC 3rd 501.

**§34. Public convenience and necessity or public benefit**

Necessity refers to the regulation of competition, cost justification, and safe and adequate service. – Missouri Gas Utility, Inc. 19 MPSC 3rd 102.

The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area. – Missouri Gas Utility, Inc. 19 MPSC 3rd 102.

The Commission grants a certificate of convenience and necessity to applicant sewer company to serve residential subdivision conditioned on homeowners' association for that subdivision voting for that service. – Timber Creek Sewer Company 19 MPSC 3rd 121.

The Commission rescinds a certificate of convenience and necessity, issued on the condition that the homeowners' association would vote for the service, and association did not vote in favor of that service. – Timber Creek Sewer Company 19 MPSC 3d 225.

**VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES**

**§42. Electric and power**

The Commission issued a Certificate of Convenience and Necessity to AmerenUE (now Ameren Missouri) authorizing the company to construct and manage, in Maryland Heights, Missouri, electric production facilities fueled with renewable energy. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 366.

**§43. Gas**

Section 393.170 RSMo authorizes the Commission to grant two types of certificates of convenience and necessity. A "line certificate" permits the constructions of transmission lines or production facilities, while an "area certificate" is Commission approval to exercise a franchise by serving customers. – Missouri Gas Utility, Inc. 19 MPSC 3rd 2.

**§47. Sewers**

When an intervenor opposed an application and the Commission issued a notice of contested case, but the intervenor withdrew its opposition, the Commission decided the application as a non-contested case and granted the application on the basis of verified filings. – Timber Creek Sewer Company 19 MPSC 3d 360.

**DEPRECIATION****I. IN GENERAL**

- §1. Generally
- §2. Right to allowance for depreciation
- §3. Reports, records and statements
- §4. Obligation of the utility

**II. JURISDICTION AND POWERS**

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commission
- §8. Jurisdiction and powers of local authorities

**III. BASIS FOR CALCULATION**

- §9. Generally
- §10. Cost or value
- §11. Property subject to depreciation
- §12. Methods of calculation
- §13. Depreciation rates to be allowed
- §14. Rates or charges for service

**IV. FACTORS AFFECTING ANNUAL ALLOWANCE**

- §15. Factors affecting annual allowance generally
- §16. Life of enterprise
- §17. Life of property
- §18. Past depreciation
- §19. Charges to maintenance and other accounts
- §20. Particular methods and theories
- §21. Experience
- §22. Life of property and salvage
- §23. Sinking fund and straight line
- §24. Combination of methods

## V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
- §29. Investment and use
- §30. Earnings on reserve

## VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
- §32. Gas
- §33. Heating
- §34. Telecommunications
- §35. Water

## DEPRECIATION

### I. IN GENERAL

#### §2. Right to allowance for depreciation

Atmos Energy Corporation Sought a variance and waiver from 4 CSR 240-3.235, thereby allowing the company to file a new rate case without the inclusion of depreciation study. The Commission approved the terms of a stipulation and agreement and granted the waiver request. Under terms of the agreement, the company agreed to remove negative amortization of the depreciation reserve from the cost of service in the next filed rate case. –Atmos Energy Corporation 19 MPSC 3rd 75.

### VI. DEPRECIATION OF PARTICULAR UTILITIES

#### §34. Telecommunications

The Commission permitted a telecommunications company to book depreciation rates on new equipment in excess of depreciation rates previously allowed for ratemaking purposes in order to allow the company to replace equipment and improve services in response to competition and rapidly changing technology. – Mid-Missouri Telephone Company of Pilot Grove, Missouri 19 MPSC 3rd 167.

## **DISCRIMINATION**

### **I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Recovery of damages for discrimination
- §4. Recovery of discriminatory undercharge
- §5. Reports, records and statements

### **II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the local authorities

### **III. RATES**

- §9. Competitor's right to equal treatment
- §10. Free service
- §11. Inequality of rates
- §12. Methods of eliminating discrimination
- §13. Optional rates
- §14. Rebates
- §15. Service charge, meter rental or minimum charge
- §16. Special rates
- §17. Rates between localities
- §18. Concessions

### **IV. RATES BETWEEN CLASSES**

- §19. Bases for classification and differences
- §20. Right of the utility to classify
- §21. Reasonableness of classification

### **V. RATES AND CHARGES OF PARTICULAR UTILITIES**

- §22. Electric and power
- §23. Gas
- §24. Heating
- §25. Telecommunications
- §26. Sewer
- §27. Water



**VI. SERVICE IN GENERAL**

- §28. Service generally
- §29. Abandonment and discontinuance
- §30. Discrimination against competitor
- §31. Equipment, meters and instruments
- §32. Extensions
- §33. Preference during shortage of supply
- §34. Preferences to particular classes or persons

**VII. SERVICE BY PARTICULAR UTILITIES**

- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

**DISCRIMINATION**

No headnotes in this volume involved the question of discrimination.

**ELECTRIC****I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

**II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements

§12. Unregulated service agreements

### III. OPERATIONS

§13. Operations generally  
§14. Rules and regulations  
§15. Cooperatives  
§16. Public corporations  
§17. Abandonment and discontinuance  
§18. Depreciation  
§19. Discrimination  
§20. Rates  
§21. Refunds  
§22. Revenue  
§23. Return  
§24. Services generally  
§25. Competition  
§26. Valuation  
§27. Accounting  
§28. Apportionment  
§29. Rate of return  
§30. Construction  
§31. Equipment  
§32. Safety  
§33. Maintenance  
§34. Additions and betterments  
§35. Extensions  
§36. Local service  
§37. Liability for damage  
§38. Financing practices  
§39. Costs and expenses  
§40. Reports, records and statements  
§41. Billing practices  
§42. Planning and management  
§43. Accounting Authority orders  
§44. Safety  
§45. Decommissioning costs

### IV. RELATIONS BETWEEN CONNECTING COMPANIES

§46. Relations between connecting companies generally  
§47. Physical connection  
§48. Contracts  
§48.1 Qualifying facilities

**§49. Records and statements**

**ELECTRIC**

**II. JURISDICTION AND POWERS**

**§9. Jurisdiction and powers of the State Commission**

After the Joint Committee on Administrative Rules (JCAR) disallowed Commission rule concerning geographic sourcing requirement, Commission opened workshop to explore legislative and regulatory means to clarify Missouri's Renewable Energy Standards law, voted by the citizens of Missouri as Proposition C. – Renewable Energy Standard Requirements Rulemaking 19 MPSC 3rd 510.

**III. OPERATIONS**

**§18. Depreciation**

Life span, not mass property, is the appropriate method to use in determining depreciation rates for power plant accounts. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

Because of the effect of inflation, net salvage estimates must consider what is likely to occur in the future and properly reflect that information in the estimates. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

Expensing is not a reasonable way to calculate net salvage costs and would ensure that the company would under-recover its net salvage costs to the detriment of future generations of ratepayers who would have to pay a disproportionate share of unrecovered net salvage costs when the plant is actually retired. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

**§20. Rates**

Based on the agreement between Staff and the utility, the Commission approved a true-up of the utility's annual fuel adjustment clause. – KCP&L Greater Missouri Operations Company 19 MPSC 3rd 23.

The parties agreed, through partial stipulation and agreement that The Empire District Electric Company would not seek to recover through rates, the costs associated with its investment in the Iatan 2 generating unit. – The Empire District Gas Company 19 MPSC 3rd 322.

The Commission approved a rate increase, reached by Stipulation and Agreement, facilitating The Empire District Electric Companies' environmental upgrades at the Iatan 1 power plant and requiring Empire to continue certain demand-side management programs designed to help consumers control their energy costs and to continue funding a program to assist low-income customers. – The Empire District Gas Company 19 MPSC 3rd 368.

**§27. Accounting**

The parties agreed, through partial stipulation and agreement, to support “Construction Accounting” for certain investments by the Empire District Electric Company in Iatan 1 generating unit environmental upgrades/air quality control systems, Iatan 2, Iatan common plant, and Plum Point for specified periods. – The Empire District Gas Company 19 MPSC 3rd 322.

**§29. Rate of return**

The Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for ratepayers. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

The average return authorized by other state commissions provides a reasonableness test for the recommendations offered by return on equity experts. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

**§33. Maintenance**

The Commission accepted Staff's report regarding AmerenUE's storm restoration efforts following the January 2009 ice storm in Southeast Missouri. –Union Electric Company 19 MPSC 3rd 1.

## **EVIDENCE, PRACTICE AND PROCEDURE**

### **I. IN GENERAL**

- §1. Generally**
- §2. Jurisdiction and powers**
- §3. Judicial notice; matters outside the record**
- §4. Presumption and burden of proof**
- §5. Admissibility**
- §6. Weight, effect and sufficiency**
- §7. Competency**
- §8. Stipulation**

## II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally
- §10. Admissions
- §11. Best and secondary evidence
- §12. Depositions
- §13. Documentary evidence
- §14. Evidence by Commission witnesses
- §15. Opinions and conclusions; evidence by experts
- §16. Petitions, questionnaires and resolutions
- §17. Photographs
- §18. Record and evidence in other proceedings
- §19. Records and books of utilities
- §20. Reports by utilities
- §21. Views

## III. PRACTICE AND PROCEDURE

- §22. Parties
- §23. Notice and hearing
- §24. Procedures, evidence and proof
- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence
- §33. Defaults

## EVIDENCE, PRACTICE AND PROCEDURE

### I. IN GENERAL

#### §2. Jurisdiction and powers

The Commission has authority under Missouri law to intervene before the FERC in matters involving an interstate pipeline operating in this state. – MoGas Pipeline, LLC 19 MPSC 3d 9.

The Commission has authority under Missouri law to employ outside legal counsel to represent it in matters before the FERC. – MoGas Pipeline, LLC 19 MPSC 3d 9.

**§3. Judicial notice; matters outside the record**

Judicial notice is a rule of evidence that allows the Commission to dispense with proof of certain facts. Those facts include matters of common knowledge and facts capable of accurate and ready determination. Customer comments noted on cards sent to the Commission do not contain the type of facts that are matters of common knowledge or capable of accurate and ready determination. Thus, the Commission did not take official notice of the content of those cards. – Missouri Gas Energy 19 MPSC 3d 110.

**§5. Admissibility**

The customer cards are admissible because they are relevant. They are logically probative of a party's position and are admissible unless excluded by a rule of policy or law. The cards are not excluded as hearsay because they are not being offered for the truth of the matter asserted, but being offered to consider the state of mind of the customers making the comments. – Missouri Gas Energy 19 MPSC 3d 110.

**§8. Stipulation**

Based upon the Unanimous Stipulation and Agreement, the Commission found that the applicant met the stated criteria to receive a certificate of convenience and necessity. – Whispering Hills Water System 19 MPSC 3d 26.

Stipulation and Agreement accepted as a resolution of the issues addressed. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 350.

Stipulation and Agreement accepted as a resolution of the issues addressed. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 358.

**II. PARTICULAR KINDS OF EVIDENCE****§10. Admissions**

Statements in an answer filed by a utility owner in an unrelated civil case did not constitute a judicial admission against interest of the utility because although the Commission took administrative notice of the legal file, the civil case was not between the same parties and did not involve the same basic facts or claims for relief, the answer was merely an outline of anticipated proof and not an admission of fact, and the statements in the answer were not responsive to any allegations or supportive of the theory asserted. – Lake Region Water & Sewer 19 MPSC 3d 515.

### III. PRACTICE AND PROCEDURE

#### §22. Parties

The Consumers Council of Missouri was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 47.

AARP was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 48.

Commission regulation regarding applications to intervene does not require an incorporated consumer advocate organization to list its members when applying to intervene in a case before the Commission. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 50.

The Natural Resources Defense Council was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 52.

The Missouri Retailers Association was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 53.

The Missouri Joint Municipal Electric Utility Commission, even though it serves wholesale customers, was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 55.

The applicants were allowed to intervene because their interest as street lighting customers was different from that of the general public and because their intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 78.

Kanas City Power & Light Company was allowed to intervene because its interest was different from that of the general public and because its intervention would serve the public interest. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 108.

The Commission grants a motion for late intervention, and a motion to waive the requirement that an association list its members' names, on findings of good cause for each. – Missouri-American Water Company 19

MPSC 3d 152.

**§23. Notice and hearing**

The Commission will not render an advisory opinion on whether public information and advocacy activities of certain parties would violate the Commission's rules of conduct. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 199.

**§24. Procedures, evidence and proof**

The Commission decided to consolidate a case on remand from the court of appeals and a pending rate case involving the same company where the issues for determination were identical and the evidentiary hearings were scheduled to occur at approximately the same time. The Commission concluded that consolidation was appropriate to prevent the possibility of inconsistent decisions and ratepayer confusion and to promote the interests of judicial and administrative economy. – Atmos Energy Corporation 19 MPSC 3d 235.

When an intervenor opposed an application and the Commission issued a notice of contested case, but the intervenor withdrew its opposition, the Commission decided the application as a non-contested case and granted the application on the basis of verified filings. – Timber Creek Sewer Company 19 MPSC 3d 360.

**§25. Pleadings and exhibits**

The Commission denies a request for waiver not pled, not proven, and first raised until an on-the-record proceeding. – Nexus Communications, Inc., d/b/a TSI 19 MPSC 3d 43.

**§27. Finality and conclusiveness**

The applicants failed to show sufficient reason to rehear the Commission's final order of rulemaking. – Renewable Energy Standard Requirements Rulemaking 19 MPSC 3d 505.

**§29. Discovery**

If the information sought appears reasonably calculated to lead to the discovery of admissible evidence, it is discoverable. – Laclede Gas Company 19 MPSC 3d 95.

Commission found KCP&L's delay in responding to Staff's data request was reasonable based on volume of material requested and provided by KCP&L, and the continuous communication between KCP&L and Staff. – Kansas City Power and Light Company 19 MPSC 3d 125.

**§30. Settlement procedures**

Where Atmos Energy Corporation, Office of the Public Counsel and State



of the Missouri Public Service Commission submitted a non-unanimous stipulation and agreement, and intervenor did not submit an objection within seven days of its filing, the Commission relied on 4 CSR 240-2.115 to treat the stipulation and agreement as unanimous. The Commission approved the stipulation and agreement after concluding it was a reasonable resolution of all the issues. – Atmos Energy Corporation 19 MPSC 3d 75.

**§32. Confidential evidence**

Denying Staff's motion to compel, Commission determined KCP&L properly asserted attorney-client privilege and work product privilege. – Kansas City Power and Light Company 19 MPSC 3d 125.

Inadvertent disclosure of documents by KCP&L, which was not knowingly or voluntarily provided did not waive KCP&L's right to assert privilege with respect to a data request submitted by the Staff of the Missouri Public Service Commission. – Kansas City Power and Light Company 19 MPSC 3d 125.

**§33. Defaults**

When a telecommunications company filed to answer a staff complaint or comply with Commission orders, the Commission found the company to be in default and authorized its general counsel to pursue penalty actions in circuit court. – Communicate Technological Systems, LLC 19 MPSC 3d 32.

## **EXPENSE**

### **I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Financing practices
- §4. Apportionment
- §5. Valuation
- §6. Accounting

### **II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

### **III. EXPENSES OF PARTICULAR UTILITIES**

- §10. Electric and power

- §11. Gas
- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

#### **IV. ASCERTAINMENT OF EXPENSES**

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercorporate costs or dealings

#### **V. REASONABLENESS OF EXPENSE**

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

#### **VI. PARTICULAR KIND OF EXPENSE**

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings

- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

## **EXPENSE**

### **IV. ASCERTAINMENT OF EXPENSES**

#### **§19. Future expenses**

In normalizing a test year expense, the Commission must consider whether a proposed normalized test year expense is reasonably related to anticipated future expenses. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 376.

**§20. Methods of estimating**

Trackers should be used sparingly because they tend to limit a utility's incentive to prudently manage its costs. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 376.

**V. REASONABLENESS OF EXPENSE****§24. Test year and true up**

A test year is used to match income and expenses over the same period so that a true level of required revenue can be determined. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 376.

Reaching outside the test year to pull in an expense could violate the matching principle by allowing the company to recover excess revenue if that out-of-test-year expense would otherwise have been offset by some unconsidered item of out-of-test-year income. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 376.

The matching principle is important, but not absolute and may be disregarded for known and measurable future increased expenses. The ultimate purpose of a test year is to establish rates that will give a utility a reasonable opportunity to recover its prudent costs during the period when the rates are in effect. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3d 376.

**GAS****I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Abandonment or discontinuance
- §5. Liability for damages
- §6. Transfer, lease and sale

**II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

**III. CONSTRUCTION AND EQUIPMENT**

- §10. Construction and equipment generally
- §11. Leakage, shrinkage and waste
- §12. Location

- §13. Additions and betterments
- §14. Extensions
- §15. Maintenance
- §16. Safety

#### **IV. OPERATION**

- §17. Operation generally
- §17.1. Purchased Gas Adjustment (PGA)
- §17.2. Purchased Gas-incentive mechanism
- §18. Rates
- §19. Revenue
- §20. Return
- §21. Service
- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

#### **V. JOINT OPERATIONS**

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

#### **VI. PARTICULAR KIND OF EXPENSES**

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense

§47.	Auditing and bookkeeping
§48.	Burglary loss
§49.	Casualty losses and expenses
§50.	Capital amortization
§51.	Collection fees
§52.	Construction
§53.	Consolidation expense
§54.	Depreciation
§55.	Deficits under rate schedules
§56.	Donations
§57.	Dues
§58.	Employee's pension and welfare
§59.	Expenses relating to property not owned
§60.	Expenses and losses of subsidiaries or other departments
§61.	Expenses of non-utility business
§62.	Expenses relating to unused property
§63.	Expenses of rate proceedings
§64.	Extensions
§65.	Financing costs and interest
§66.	Franchise and license expense
§67.	Insurance and surety premiums
§68.	Legal expense
§69.	Loss from unprofitable business
§70.	Losses in distribution
§71.	Maintenance and depreciation; repairs and replacements
§72.	Management, administration and financing fees
§73.	Materials and supplies
§74.	Purchases under contract
§75.	Office expense
§76.	Officers' expenses
§77.	Political and lobbying expenditures
§78.	Payments to affiliated interests
§79.	Rentals
§80.	Research
§81.	Salaries and wages
§82.	Savings in operation
§83.	Securities redemption or amortization
§84.	Taxes
§85.	Uncollectible accounts
§86.	Administrative expense
§87.	Engineering and superintendence expense
§88.	Interest expense
§89.	Preliminary and organization expense
§90.	Expenses incurred in acquisition of property
§91.	Demand charges

**§92. Expenses incidental to refunds for overcharges**

**GAS**

**I. IN GENERAL**

**§1. Generally**

The Commission previously granted Missouri Gas Utility, Inc. a certificate of convenience and necessity to provide natural gas sales and transportation services for a certain area when the corporation realized a planned highway expansion by the Missouri Department of Transportation would likely require construction of a new line in a few years. The Commission approved a new certificate to allow for an alternate route of service. – Missouri Gas Utility, Inc. 19 MPSC 3rd 2.

**§2. Obligation of the utility**

When Missouri Gas Utility, Inc. applied for a certificate of convenience and necessity authority to construct, install, own, operate, control, manage, and maintain a distribution system to provide natural gas service in a new area, the Commission conditioned approval of the certificate on corporation's shareholders being totally responsible for the success of the project, with no liability or responsibility put on customers. – Missouri Gas Utility, Inc. 19 MPSC 3rd 2.

When Atmos Energy Corporation determined it was necessary to complete vintaging of current plant assets before conducting a depreciation study based on an actuarial life analysis, it sought a waiver of 4 CSR 240-3.235, in order to file its next rate case without a new depreciation study. The Commission approved the waiver request subject to conditions, including company's agreeing to remove the negative amortization of the depreciation reserve from the cost of service in its next rate case. –Atmos Energy Corporation 19 MPSC 3rd 75.

**§3. Certificate of convenience and necessity**

Section 393.170 RSMo authorizes the Commission to grant two types of certificates of convenience and necessity. A "line certificate" permits the constructions of transmission lines or production facilities, while an "area certificate" is Commission approval to exercise a franchise by serving customers. – Missouri Gas Utility, Inc. 19 MPSC 3rd 2.

The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area. – Missouri Gas Utility, Inc. 19 MPSC 3rd 102.

**§5. Liability for damages**

The Commission determined it was unreasonable to impose liability limitations for unregulated services where Laclede Gas Company's unregulated competitors were not afforded the same legal protections. Rejecting the tariff sheets, the Commission determined that although it had the legal authority to add liability limits in tariffs, it would decline if found to not be just and reasonable. – Laclede Gas Company 19 MPSC 3rd 201.

**II. JURISDICTION AND POWERS****§7. Jurisdiction and powers of the State Commission**

The Commission has authority under Missouri law to intervene before the FERC in matters involving an interstate pipeline operating in this state. – MoGas Pipeline, LLC 19 MPSC 3d 9.

The Commission has authority under Missouri law to employ outside legal counsel to represent it in matters before the FERC. – MoGas Pipeline, LLC 19 MPSC 3d 9.

The Commission's authority over Laclede's unregulated HVAC services was limited under section 386.762 to ensure compliance with prohibitions against subsidization under HVA rules. – Laclede Gas Company 19 MPSC 3rd 201.

**III. CONSTRUCTION AND EQUIPMENT****§10. Construction and equipment generally**

The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area. – Missouri Gas Utility, Inc. 19 MPSC 3rd 102.

**§14. Extensions**

The Commission grants a certificate of service authority for a geographic area new to the applicant gas company, conditioned on the development of tariff sheets for that area. – Missouri Gas Utility, Inc. 19 MPSC 3rd 102.



The Commission approves an application for a certificate of convenience and necessity to extend service to an area that includes an asphalt plant because that service will be profitable in 10 years and reduce the cost of service to other customers. – Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas 19 MPSC 3rd 156.

The Commission approves an application for a certificate of convenience and necessity to extend service subject to conditions that include a prohibition on farm taps. – Missouri Gas Utility, Inc. 19 MPSC 3rd 351.

#### **IV. OPERATION**

##### **§18. Rates**

The Commission clarifies its findings of fact as to energy efficiency, programs, prices, savings, and rebates, but does not change its conclusions of law. – The Empire District Electric Company 19 MPSC 3rd 336.

The Commission rejects a proposed rate increase of \$60.7 million and concludes that an increase of \$31.4 million will support safe and adequate service at just and reasonable rates. – Laclede Gas Company 19 MPSC 3rd 621.

The Commission approved a stipulation and agreement between the parties resolving all issues which implemented just and reasonable rates that support safe and adequate service. – Atmos Energy Corporation 19 MPSC 3rd 634.

##### **§32. Financing practices**

The Commission denies part of an application for long-term financing and grants the rest because the applicant proved that the latter amount was reasonable and necessary for statutorily authorized purposes. – Laclede Gas Company 19 MPSC 3rd 459.

#### **VI. PARTICULAR KIND OF EXPENSES**

##### **§91. Demand charges**

As part of Empire District Gas Company's rate case, the Commission approved an initial rebate of \$75 for tank storage gas water heaters as part of program to improve energy efficiency for customers. – The Empire District Gas Company 19 MPSC 3rd 213.

As part of Empire District Gas Company's rate case, the Commission approved an initial rebate of \$75 for tank storage gas water heaters as part of program to improve energy efficiency for customers. – The Empire District Gas Company 19 MPSC 3rd 308.

## **MANUFACTURED HOUSING**

### **I. IN GENERAL**

- §1. Generally
- §2. Obligation of the manufacturers and dealers
- §3. Jurisdiction and powers of Federal authorities
- §4. Jurisdiction and powers of the State Commission
- §5. Reports, records and statements

### **II. WHEN A PERMIT IS REQUIRED**

- §6. When a permit is required generally
- §7. Operations and construction

### **III. GRANT OR REFUSAL OF A PERMIT**

- §8. Grant or refusal generally
- §9. Restrictions or conditions
- §10. Who may possess
- §11. Public safety

### **IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION**

- §12. Operations under the permit generally
- §13. Duration of the permit
- §14. Modification and amendment of the permit generally
- §15. Transfer, mortgage or lease generally
- §16. Revocation, cancellation and forfeiture generally
- §17. Acts or omissions justifying revocation or forfeiture
- §18. Necessity of action by the Commission
- §19. Penalties

## **MANUFACTURED HOUSING**

No headnotes in this volume involved the question of manufactured housing.

## **PUBLIC UTILITIES**

### **I. IN GENERAL**

- §1. Generally
- §2. Nature of
- §3. Functions and powers
- §4. Termination of status
- §5. Obligation of the utility

### **II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

### **III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER**

- §10. Tests in general
- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

### **IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER**

- §23. Particular organizations generally
- §24. Municipal plants
- §25. Municipal districts
- §26. Mutual companies; cooperatives
- §27. Corporations
- §28. Foreign corporations or companies
- §29. Unincorporated companies
- §30. State or federally owned or operated utility
- §31. Trustees

## PUBLIC UTILITIES

### I. IN GENERAL

#### §1. Generally

KCP&L Greater Missouri Operations Company's use of the name KCP&L is a shortened version of a true name and as such is a permitted use of a brand or trademark rather than a forbidden use of an unregistered fictitious name. – KCP&L Greater Missouri Operations Company and Kansas City Power & Light Company 19 MPSC 3rd 160.

The Commission estimated its Fiscal Year 2011 assessment to be \$18,661,847. – Assessment Fiscal Year 2011 19 MPSC 3rd 499.

Staff directed to prepare a summary report about existing energy efficiency advisory groups and collaboratives regarding Missouri's investor-owned electric and natural gas utilities. – Energy Efficiency Advisory Groups and Collaboratives 19 MPSC 3rd 514.

### II. JURISDICTION AND POWERS

#### §7. Jurisdiction and powers of the State Commission

The Commission does not have authority to manage the utility and cannot dictate whether it must use internal workforce rather than outside contractors to perform the work of the company. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

## RATES

### I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

### II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

### **III. CONTRACTS AND FRANCHISES**

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

### **IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO**

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

### **V. KINDS AND FORMS OF RATES AND CHARGES**

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter

- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

#### **VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

#### **VII. EMERGENCY AND TEMPORARY RATES**

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

#### **VIII. RATE DESIGN, CLASS COST OF SERVICE**

- §118. Method of allocating costs
- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities
- §123. Rate design, class cost of service for telecommunications utilities

**§124. Rate design, class cost of service for heating utilities**

**RATES**

**II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS**

**§8. Reasonableness generally**

The Commission cannot simply find a rate of return on equity that is "correct"; a "correct" rate does not exist. However, there are some numbers that the Commission can use as guideposts in establishing an appropriate return on equity. In a recent Report and Order concerning MGE itself, the Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average." Nevertheless, the national average is an indicator of the capital market in which MGE will have to compete for necessary capital. That "zone of reasonableness" extends from 100 basis points above to 100 basis points below the recent national average of awarded ROEs. – Missouri Gas Energy 19 MPSC 3rd 245.

**§12. Capitalization and security prices**

There are at least two instances in which the Commission has the discretion to impose a hypothetical capital structure: when the actual debt-equity ratio is inefficient and unreasonable because it has too much equity and not enough debt, thereby giving the utility an inflated rate of return, or when the utility is part of a holding company. – Missouri Gas Energy 19 MPSC 3rd 245.

**IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO**

**§62. Initiation of rates and rate changes**

When Atmos Energy Corporation determined it was necessary to complete vintaging of current plant assets before conducting a depreciation study based on an actuarial life analysis, it sought a waiver of 4 CSR 240-3.235, in order to file its next rate case without a new depreciation study. The Commission approved the waiver request subject to conditions, including company's agreeing to remove the negative amortization of the depreciation reserve from the cost of service in its next rate case. – Atmos Energy Corporation 19 MPSC 3rd 75.

**V. KINDS AND FORMS OF RATES AND CHARGES**

**§93. Demand charge**



As part of Demand Side Management program, energy policies and additional funding found necessary by the Commission in a rate case to achieve savings significant to reduce wholesale price of natural gas as well as to generate direct cost savings to natural gas consumers. – The Empire District Gas Company 19 MPSC 3rd 213.

As part of Demand Side Management program, energy policies and additional funding found necessary by the Commission in a rate case to achieve savings significant to reduce wholesale price of natural gas as well as to generate direct cost savings to natural gas consumers. – The Empire District Gas Company 19 MPSC 3rd 308.

**§101. Fuel clauses**

The Commission approved a tariff implementing an interim rate adjustment under the company's fuel adjustment clause and directed the company to provide its Staff with workpapers in future filings. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 220.

The 95/5 sharing mechanism in Ameren Missouri's fuel adjustment clause was left unchanged in the absence of any evidence showing that the mechanism was not working as designed. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

**VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

**§104. Electric and power**

The Commission approved a Stipulation and Agreement including the now-operational Plum Point generating facility in The Empire District Electric Company's rate structure. – The Empire District Electric Company 19 MPSC 3rd 619.

**§108. Gas**

The Commission clarifies its findings of fact as to energy efficiency, programs, prices, savings, and rebates, but does not change its conclusions of law. – The Empire District Gas Company 19 MPSC 3rd 336.

The Commission rejects a proposed rate increase of \$60.7 million and concludes that an increase of \$31.4 million will support safe and adequate service at just and reasonable rates. – Laclede Gas Company 19 MPSC 3rd 621.

**§111. Water**

The Commission rejects a proposed rate increase of \$48.5 million and concludes that an increase of \$28 million will support safe and adequate service at just and reasonable rates. – Missouri-American Water Company 19 MPSC 3rd 481.

**VII. EMERGENCY AND TEMPORARY RATES****§114. Emergency and temporary rates generally**

The Commission scheduled an evidentiary hearing to take evidence regarding whether the utility had established the need to implement interim rates. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 80.

The Commission has broad discretion to determine whether a utility may implement an interim rate increase. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 169.

**§115. What constitutes an emergency**

In determining when an interim rate increase is appropriate, the Commission is not limited to an emergency or near emergency standard. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 169.

The Commission will not act to short circuit the rate case review process by granting an interim rate increase unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 169.

An interim rate increase should be used only in situations requiring a quick infusion of cash into a utility. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 169.

**§117. Burden of proof to show emergencies**

AmerenUE did not meet its burden of proving that it is facing extraordinary circumstances and has not demonstrated a compelling reason to implement an interim rate increase. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 169.

**VIII. RATE DESIGN, CLASS COST OF SERVICE****§118. Method of allocating costs**

Just because a company derives a higher rate of return from one class than another does not necessarily render those rates unjust or unreasonable. Class cost of service is often considered but a starting point in quantifying what part of the revenue responsibility is afforded to each

customer class. Indeed, class costs of service studies are often considered more art than science. Other factors should be considered when establishing rates. It is up to the Commission to evaluate the testimony of expert witnesses and accept or reject any or all of any witness's testimony. – Missouri Gas Energy 19 MPSC 3rd 245.

The Peak and Average method of allocating costs proposed by Staff is inappropriate because it double counts the average system usage, and for that reason is unreliable. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

**§119. Rate design, class cost of service for electric utilities**

Each customer class must carry its own weight by paying rates sufficient to cover the cost to serve that class as a matter of fairness and to encourage cost effective utilization of electricity by sending correct price signals to customers. – Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

The Commission has a great deal of discretion to set just and reasonable rates and is not bound to a mathematical calculation of class costs of service.– Union Electric Company, d/b/a AmerenUE 19 MPSC 3rd 376.

**§120. Rate design, class cost of service for gas utilities**

In deciding whether to approve a Straight Fixed Variable rate design, some factors the Commission should consider are: 1) whether high-use consumers will stop paying a disproportionate share of the operating expenses; 2) month-to-month volatility of bills will be reduced; 3) consumers will still retain control over a majority of their monthly natural gas costs; 4) ratepayers' interests will be aligned with the utility's shareholders because of the removal of the disincentive for the utility to encourage natural gas conservation. – Missouri Gas Energy 19 MPSC 3rd 245.

## **SECURITY ISSUES**

### **I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Authorization by a corporation**
- §4. Conversion, redemption and purchase by a corporation**
- §5. Decrease of capitalization**
- §6. Sinking funds**
- §7. Dividends**
- §8. Revocation and suspension of Commission authorization**

- §9. Fees and expenses
- §10. Purchase by utility
- §11. Accounting practices

## **II. JURISDICTION AND POWERS**

- §12. Jurisdiction and powers in general
- §13. Jurisdiction and powers of Federal Commissions
- §14. Jurisdiction and powers of the State Commission
- §15. Jurisdiction and powers of local authorities

## **III. NECESSITY OF AUTHORIZATION BY THE COMMISSION**

- §16. Necessity of authorization by the Commission generally
- §17. Installment contracts
- §18. Refunding or exchange of securities
- §19. Securities covering utility and nonutility property
- §20. Securities covering properties outside the State

## **IV. FACTORS AFFECTING AUTHORIZATION**

- §21. Factors affecting authorization generally
- §21.1. Effect on bond rating
- §22. Equity capital
- §23. Charters
- §24. Competition
- §25. Compliance with the terms of a mortgage or lease
- §26. Definite plans and purposes
- §27. Financial conditions and prospects
- §28. Use of proceeds
- §29. Dividends and dividend restrictions
- §30. Improper practices and irregularities
- §31. Intercorporate relations
- §32. Necessity of issuance
- §33. Revenue
- §34. Rates and rate base
- §35. Size of the company
- §36. Title of property
- §37. Amount
- §38. Kind of security
- §39. Restrictions imposed by the security

## **V. PURPOSES AND SUBJECTS OF CAPITALIZATION**

- §40. Purposes and subjects of capitalization generally

- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

#### **VI. KINDS AND PROPORTIONS**

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

#### **VII. SALE PRICE AND INTEREST RATES**

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

#### **VIII. FINANCING METHODS AND PRACTICES**

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

## **IX. PARTICULAR UTILITIES**

- §76. Telecommunications**
- §77. Electric and power**
- §78. Gas**
- §79. Sewer**
- §80. Water**
- §81. Miscellaneous**

## **SECURITY ISSUES**

### **III. NECESSITY OF AUTHORIZATION BY THE COMMISSION**

- §16. Necessity of authorization by the Commission generally**  
 The Commission denies part of an application for long-term financing and grants the rest because the applicant proved that the latter amount was reasonable and necessary for statutorily authorized purposes. – Laclede Gas Company 19 MPSC 3rd 459.

### **V. PURPOSES AND SUBJECTS OF CAPITALIZATION**

- §40. Purposes and subjects of capitalization generally**  
 The Commission denies part of an application for long-term financing and grants the rest because the applicant proved that the latter amount was reasonable and necessary for statutorily authorized purposes. – Laclede Gas Company 19 MPSC 3rd 459

Statute and regulation allow long-term financing of certain expenses made within five years before the filing of the pending application. – Laclede Gas Company 19 MPSC 3rd 459

## **SERVICE**

### **I. IN GENERAL**

- §1. Generally**
- §2. What constitutes adequate service**
- §3. Obligation of the utility**
- §4. Abandonment, discontinuance and refusal of service**
- §5. Contract, charter, franchise and ordinance provisions**
- §6. Restoration or continuation of service**

- §7. Substitution of service
- §7.1. Change of supplier
- §8. Discrimination

## II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally
- §10. Jurisdiction and powers of the Federal Commissions
- §11. Jurisdiction and powers of the State Commission
- §12. Jurisdiction and powers over service outside of the state
- §13. Jurisdiction and powers of the courts
- §14. Jurisdiction and powers of local authorities
- §15. Limitations on jurisdiction
- §16. Enforcement of duty to serve

## III. DUTY TO SERVE

- §17. Duty to serve in general
- §18. Duty to render adequate service
- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

## IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

## V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

## VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

## SERVICE

### I. IN GENERAL

- §4. **Abandonment, discontinuance and refusal of service**  
The Commission grants a variance from its regulations on disconnecting service, for a territory for which the applicant bills on a quarterly basis, because the regulation does not give the utility enough time after sending out notices of disconnection to complete all disconnections noticed in the quarter. – Missouri-American Water Company 19 MPSC 3d 327.

## V. SERVICE BY PARTICULAR UTILITIES

- §43. **Water**  
The Commission grants a variance from its regulations on disconnecting service, for a territory for which the applicant bills on a quarterly basis, because the regulation does not give the utility enough time after sending out notices of disconnection to complete all disconnections noticed in the quarter. – Missouri-American Water Company 19 MPSC 3d 327.

## SEWER

### I. IN GENERAL

- §1. **Generally**
- §2. **Certificate of convenience and necessity**



- §3. Obligation of the utility
- §4. Transfer, lease and sale

## II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

## III. OPERATIONS

- §10. Operation generally
- §11. Construction and equipment
- §12. Maintenance
- §13. Additions and betterments
- §14. Rates and revenues
- §15. Return
- §16. Costs and expenses
- §17. Service
- §18. Depreciation
- §19. Discrimination
- §20. Apportionment
- §21. Accounting
- §22. Valuation
- §23. Extensions
- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues
- §28. Rules and regulations
- §29. Billing practices
- §30. Eminent domain
- §31. Accounting Authority orders

## SEWER

### I. IN GENERAL

- §2. **Certificate of convenience and necessity**  
The Commission grants a certificate of convenience and necessity to applicant sewer company to serve residential subdivision conditioned on

homeowners' association for that subdivision voting for that service. – Timber Creek Sewer Company 19 MPSC 3d 121.

The Commission granted a certificate of convenience and necessity and authority to own, operate, maintain, control and manage a sewer system to RDG Development, LLC. The Commission granted a waiver of Commission Rule 4 CSR 240-3.305(1)(A)(5) to file a construction plan of the sewer system, but did require company to submit a map of the subdivision to show the location of manholes and sewer collection main lines. – RDG Development, LLC 19 MPSC 3d 146.

The Commission rescinds a certificate of convenience and necessity, issued on the condition that the homeowners' association would vote for the service, and association did not vote in favor of that service. – Timber Creek Sewer Company 19 MPSC 3d 225.

The Commission modified a conditional certificate of convenience and necessity previously granted because the company satisfied the requirement to provide a map showing manholes and sewer collection main lines and a certified operator was not mandated by Department of Natural Resources regulations. – RDG Development, LLC 19 MPSC 3d 355.

When an intervenor opposed an application and the Commission issued a notice of contested case, but the intervenor withdrew its opposition, the Commission decided the application as a non-contested case and granted the application on the basis of verified filings. – Timber Creek Sewer Company 19 MPSC 3d 360.

### **III. OPERATIONS**

#### **§14. Rates and revenues**

The Commission approved disposition agreements and conforming tariffs implementing new rates schedules to provide sufficient funding for the companies to provide safe and adequate service. – Aqua Missouri, Inc. 19 MPSC 3d 341.

#### **§24. Abandonment or discontinuance**

The Commission determined Mill Creek Sewers, Inc. demonstrated a continued inability and/or unwillingness to provide safe and adequate service to its customers, thereby effectively abandoning the sewer system. The Commission appointed an interim receiver and ordered the general counsel to petition the circuit court for an order attaching the assets of the company and placing it under the control and responsibility of a receiver. – Mill Creek Sewers, Inc. 19 MPSC 3d 331.

The Commission determined Mill Creek Sewers, Inc. demonstrated a continued inability and/or unwillingness to provide safe and adequate service to its customers, thereby effectively abandoning the sewer system. The Commission appointed an interim receiver and ordered the general counsel to petition the circuit court for an order attaching the assets of the company and placing it under the control and responsibility of a receiver. – Mill Creek Sewers, Inc. 19 MPSC 3d 339.

**§28. Rules and regulations**

The Commission established a workshop docket to investigate options regarding new rules and regulations for ratemaking treatment of availability fees, reservation fees, standby fees, connection fees or any other similar fees and their proper use as mechanisms of capital recovery. – Sewer & Water Capital Recovery Mechanisms Workshop 19 MPSC 3d 643.

**STEAM**

**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

**II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

**III. OPERATIONS**

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination

- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

#### **IV. RELATIONS BETWEEN CONNECTING COMPANIES**

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

#### **STEAM**

**No headnotes in this volume involved the question of steam.**

## **TELECOMMUNICATIONS**

### **I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

### **II. JURISDICTION AND POWERS**

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

### **III. OPERATIONS**

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §14.1. Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service

- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

#### **IV. RELATIONS BETWEEN CONNECTING COMPANIES**

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

#### **V. ALTERNATIVE REGULATION AND COMPETITION**

- §40. Classification of company or service as noncompetitive, transitionally, or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

### **TELECOMMUNICATIONS**

#### **II. JURISDICTION AND POWERS**

##### **§7. Jurisdiction and powers of the State Commission**

Under 47 CFR §54.409(a), federal law requires that state commissions establish income-related eligibility requirements for consumers receiving Lifeline service. – TracFone Wireless 19 MPSC 3d 36.

Where tw telecom of kansas city llc submitted an application requesting the Commission issue a blanket waiver for all similarly situated CLECs of a regulation which required the distribution of white pages to every customer, the Commission denied that request, concluding it would be improper rulemaking. – tw telecom of kansas city, llc 19 MPSC 3d 92.

### III. OPERATIONS

#### §8. Operations generally

The Commission approved a unanimous stipulation and agreement by which AT&T Missouri was allowed to distribute white pages directories only to those customers who request such a directory. – Southwestern Bell Telephone Company 19 MPSC 3d 20.

#### §14.1 Universal Service Fund

In order to be eligible for Lifeline service, the Commission will require that consumers present documentation showing participation in an income eligible program. – TracFone Wireless 19 MPSC 3d 36.

The argument that the ease of self-certification acting as an effective disincentive to abuse the Lifeline program, does not constitute “good cause” to waive the Commission’s rule requiring documentation of participation in an income-eligible program to qualify for Lifeline services. – TracFone Wireless 19 MPSC 3d 36.

The Commission waives regulations that govern a type of service that applicant does not want to offer. – Nexus Communications, Inc., d/b/a TSI 19 MPSC 3d 43.

### V. ALTERNATIVE REGULATION AND COMPETITION

#### §43. Waiver of statutes and rules

tw telecom of kansas city llc requested a waiver from 4 CSR 240-32.050(4)(B) consistent with a waiver of the mandatory white pages distribution requirement provided to other CLECs operating in AT&T Missouri’s St. Louis, Kansas City and/or Springfield territories. Unlike the partial waivers previously granted to other CLECs that allowed the companies to only provide white pages to customers that called the companies and requested the white pages, tw telecom of kansas city llc requested permission to have its customers call AT&T Missouri directly in order to receive a copy of the white pages. The Commission approved the waiver for tw telecom of kansas city llc. . – tw telecom of kansas city, llc 19 MPSC 3d 92.

## VALUATION

### I. IN GENERAL

- §1. Generally
- §2. Constitutional limitations
- §3. Necessity for

§4. Obligation of the utility

## II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of local authorities

## III. METHODS OR THEORIES OF VALUATION

- §9. Methods or theories generally
- §10. Purpose of valuation as a factor
- §11. Rule, formula or judgment as a guide
- §12. Permanent and tentative valuation

## IV. ASCERTAINMENT OF VALUE

- §13. Ascertainment of value generally
- §14. For rate making purposes
- §15. Purchase or sale price
- §16. For issuing securities

## V. FACTORS AFFECTING VALUE OR COST

- §17. Factors affecting value or cost generally
- §18. Contributions from customers
- §19. Appreciation
- §20. Apportionment of investment or costs
- §21. Experimental or testing cost
- §22. Financing costs
- §23. Intercorporate relationships
- §24. Organization and promotion costs
- §25. Discounts on securities
- §26. Property not used or useful
- §27. Overheads in general
- §28. Direct labor
- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
- §36. Contingencies and omissions



- §37. Contractor's profit and loss
- §38. Administrative expense
- §39. Legal expense
- §40. Promotion expense
- §41. Miscellaneous

#### **VI. VALUATION OF TANGIBLE PROPERTY**

- §42. Buildings and structures
- §43. Equipment and facilities
- §44. Land
- §45. Materials and supplies
- §46. Second-hand property
- §47. Property not used and useful

#### **VII. VALUATION OF INTANGIBLE PROPERTY**

- §48. Good will
- §49. Going value
- §50. Contracts
- §51. Equity of redemption
- §52. Franchises
- §53. Leases and leaseholds
- §54. Certificates and permits
- §55. Rights of way and easements
- §56. Water rights

#### **VIII. WORKING CAPITAL**

- §57. Working capital generally
- §58. Necessity of allowance
- §59. Factors affecting allowance
- §60. Billing and payment for service
- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
- §65. Materials and supplies
- §66. Amount to be allowed
- §67. Property not used or useful

#### **IX. DEPRECIATION**

- §68. Depreciation generally
- §69. Necessity of deduction for depreciation

- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
- §73. Deduction or addition of funds or reserve

#### **X. VALUATION OF PARTICULAR UTILITIES**

- §74. Electric and power
- §75. Gas
- §76. Heating
- §77. Telecommunications
- §78. Water
- §79. Sewer

### **VALUATION**

No headnotes in this volume involved the question of valuation.

### **WATER**

#### **I. IN GENERAL**

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale
- §5. Joint Municipal Utility Commissions

#### **II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the State Commission
- §9. Jurisdiction and powers of local authorities
- §10. Receivership
- §11. Territorial Agreements

#### **III. OPERATIONS**

- §12. Operation generally
- §13. Construction and equipment
- §14. Maintenance
- §15. Additions and betterments

§16.	Rates and revenues
§17.	Return
§18.	Costs and expenses
§19.	Service
§20.	Depreciation
§21.	Discrimination
§22.	Apportionment
§23.	Accounting
§24.	Valuation
§25.	Extensions
§26.	Abandonment or discontinuance
§27.	Reports, records and statements
§28.	Financing practices
§29.	Security issues
§30.	Rules and regulations
§31.	Billing practices
§32.	Accounting Authority orders

## WATER

### I. IN GENERAL

#### §2. Certificate of convenience and necessity

In making determinations to grant certificates of convenience and necessity, the Commission has used the following criteria: there must be a need for the service; the applicant must be qualified to provide the proposed service; the applicant must have the financial ability to provide the service; the applicant's proposal must be economically feasible; the service must promote the public interest. – Woodland Acres Water System 19 MPSC 3d 16.

The Commission stated five criteria it will use to decide whether to grant an applicant a certificate of convenience and necessity: 1) there must be a need for the service; 2) the applicant must be qualified to provide the proposed service; 3) the applicant must have the financial ability to provide the service; 4) the applicant's proposal must be economically feasible; 5) the service must promote the public interest. – Whispering Hills Water System 19 MPSC 3d 26.

The Commission stated five criteria it will use to decide whether to grant an applicant a certificate of convenience and necessity: 1) there must be a need for the service; 2) the applicant must be qualified to provide the proposed service; 3) the applicant must have the financial ability to provide the service; 4) the applicant's proposal must be economically feasible; 5)

the service must promote the public interest. – Seges Partners Mobile Home Park, LLC 19 MPSC 3d 29.

**§4. Transfer, lease and sale**

The Commission determined that the transfer of utility assets to a nonprofit corporation controlled by the homeowners association was in the public interest. – Black Oak Mountain Water Company and Black Oak Mountain Sewer Company 19 MPSC 3d 228.

**II. JURISDICTION AND POWERS**

**§8. Jurisdiction and powers of the State Commission**

Availability fees collected by the utility from lot owners prior to the owners' connection to the utility's water distribution system were a "commodity" and "service" and subject to the Commission's jurisdiction because the utility had direct use of or access to this revenue stream. – Lake Region Water & Sewer Company 19 MPSC 3d 515.

**III. OPERATIONS**

**§16. Rates and revenues**

The Commission approved disposition agreements and conforming tariffs implementing new rates schedules to provide sufficient funding for the companies to provide safe and adequate service. – Aqua Missouri, Inc. 19 MPSC 3d 341.

The Commission rejects a proposed rate increase of \$48.5 million and concludes that an increase of \$28 million will support safe and adequate service at just and reasonable rates. – Missouri-American Water Company 19 MPSC 3d 481.

The Commission determined that it would be unjust and unreasonable to impute to the utility revenue from availability fees collected by the utility from lot owners prior to the owners' connection to the utility's water distribution system. – Lake Region Water & Sewer Company 19 MPSC 3d 515.

**§18. Costs and expenses**

The Commission determined that the utility should recover in rates costs for executive management fees on a per hour basis and rate case expenses amortized over three years. – Lake Region Water & Sewer Company 19 MPSC 3d 515.

**§26. Abandonment or discontinuance**

The Commission grants a variance from its regulations on disconnecting service, for a territory for which the applicant bills on a quarterly basis, because the regulation does not give the utility enough time after sending out notices of disconnection to complete all disconnections noticed in the quarter. – Missouri-American Water Company 19 MPSC 3d 327.

**§30. Rules and regulations**

The Commission established a workshop docket to investigate options regarding new rules and regulations for ratemaking treatment of availability fees, reservation fees, standby fees, connection fees or any other similar fees and their proper use as mechanisms of capital recovery. – Sewer & Water Capital Recovery Mechanisms Workshop 19 MPSC 3d 643.