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PUBLIC SERVICE COMMISSION

OF

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Kevin Kelly

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PREFACE

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 December 1, 2002 through September 30, 2004. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 1978, 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.

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KENNARD JONES
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Judge

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XD-2004-0052	Axon Telecom, L.L.C. (Certificate of service authority, interexchange telecommunications services, canceled)	7/28/03

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PD-2005-0017	B&A Communications, Inc. (Certificate of service authority, pay phones, canceled)	9/10/04
PD-2005-0016	Barker, Gina (Certificate of service authority, pay phones, canceled)	9/13/04
PD-2005-0016	Barker, Shirley J. (Certificate of service authority, pay phones, canceled)	9/13/04
TC-2004-0127	BarTel Communications, Inc., Public Service Commission Staff v. (Complaint case, order granting default)	3/5/04
TK-2003-0279	BBC Telephone, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	3/25/03
CA-2003-0242	BBC Telephone, Inc. (Certificate of service authority, basic local telecommunications services, granted)	3/27/03
TC-2004-0317	BCGI Communications Corp., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	6/17/04
TC-2004-0317	BCGI Communications Corp., Public Service Commission Staff v. (Complaint case, order denying motion to set aside order granting default and certificate of service authority, IXC, canceled)	7/8/04
TD-2004-0475	Beddow, Kelly S. d/b/a Universal Telephone (Certificate of service authority, basic local telecommunications services, canceled)	5/3/04
XA-2003-0262	Bee Line Long Distance, LLC, d/b/a Hello Telecom (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	2/26/03
LM-2004-0552	BellSouth BSE, Inc. and BellSouth Long Distance, Inc. (Authority to transfer control from BellSouth BSE, Inc. to BellSouth Long Distance, Inc.; grants BellSouth Long Distance, Inc. a certificate of service authority to provide basic local telecommunications services, granted)	7/1/04
PD-2005-0033	Berghoff, James (Certificate of service authority, pay phones, canceled)	8/2/04
ZA-2004-0284	Bethesda Health Group, Inc. (Certificate of service authority, shared tenant services, granted)	3/12/04

XA-2003-0283	Better World Telecom, Inc. (Certificate of service authority, IXC, approved)	3/19/03
XD-2004-0289	Big Planet, Inc. (Certificate of service authority, IXC, canceled)	2/2/04
LA-2003-0551	Big River Telephone Company, LLC (Certificate of service authority, expand its certificate of basic local telecommunications service, granted)	9/18/03
LO-2004-0448	Big River Telephone Company, LLC (Adoption of interconnection agreement between Spectra Communications Group, LLC and Chariton Valley Telecom Corporation, order recognizing adoption of interconnection agreement)	5/14/04
PD-2003-0382	Bilmar Systems, Inc. (Certificate of service authority, pay phones, canceled)	4/16/03
PD-2003-0394	Blanch, Kent (Certificate of service authority, pay phones, canceled)	4/15/03
IO-2003-0207	BPS Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved)	2/3/03
TO-2004-0484	BPS Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	8/26/04
TC-2004-0312	Branson Telephone, Public Service Commission Staff v. (Order granting default)	4/15/04
TC-2004-0312	Branson Telephone, Public Service Commission Staff v. (Complaint case, order denying motion to set aside order granting default, certificate of service authority, IXC, canceled)	6/17/04
XD-2004-0432	Broadview NP Acquisition Corp., d/b/a Broadview New Plus (Certificate of service authority, IXC, canceled)	3/18/04
XA-2003-0356	Broadwing Communications Services, Inc. and Broadwing Telecommunications, Inc. (Certificate of service authority, IXC, canceled)	6/26/03
CK-2003-0161	BullsEye Telecom, Inc. (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company, granted)	12/10/02
CA-2003-0113	BullsEye Telecom, Inc. (Certificate of service authority, basic local telecommunications service, granted)	12/16/02
XA-2003-0233	Business Network Long Distance, Inc. (Certificate of service authority, IXC, granted)	2/14/03
XN-2003-0450	Buyers United, Inc. f/k/a Buyers United International, Inc. (Name change to Buyers United, Inc. d/b/a buyersonline, recognized)	5/20/03
XA-2003-0554	Buyers United, Inc. d/b/a United Carrier Networks (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	7/23/03
XA-2003-0231	Buzz Telecom, Corporation (Certificate of service authority, IXC, granted)	2/14/03

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TC-2004-0311	Cable One, Inc., Public Service Commission Staff v. (Complaint case, order granting default and denying motion to dismiss)	6/17/04
TC-2004-0311	Cable One, Inc., Public Service Commission Staff v. (Complaint case, order granting motion to set aside order granting default)	8/5/04
TC-2004-0311	Cable One, Inc., Public Service Commission Staff v. (Complaint case, order dismissing complaint)	9/27/04
XD-2003-0217	Cable & Wireless Global Cards Services, Inc. (Certificate of service authority, IXC, canceled)	2/5/03
XD-2003-0585	Cable & Wireless Global Markets, Inc. (Certificate of service authority, IXC, canceled)	9/23/03
PA-2005-0014	Callahan, James D., d/b/a Callahan Enterprise & Distribution (Certificate of service authority, pay phones, granted)	8/4/04
SA-2004-0279	Calvey Brook Sewer, Inc. (Certificate of public convenience and necessity, sewer system in Franklin County near St. Clair, Missouri, granted)	5/25/04
WA-2004-0280	Calvey Brook Water, Inc. (Certificate of public convenience and necessity, water system in Franklin County near St. Clair, Missouri, granted)	5/25/04
WC-2004-0353	Camelot Utilities Company, Public Service Commission Staff v. (Complaint case, order granting default)	3/16/04
XA-2004-0250	Capital International Communications, L.L.C. (Certificate of service authority, IXC, granted)	1/22/04
TC-2004-0429	Capsule Communications, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/29/04
TD-2003-0555	Caribbean Telephone and Telegraph, Inc. (Certificate of service authority, IXC, canceled)	7/14/03
TC-2004-0396	Carr Square Tenant Corporation, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, shared tenant services, canceled)	4/1/04
PD-2003-0580	Cartwright, Randy d/b/a Cartwright Communications (Certificate of service authority, pay phones, canceled)	7/18/03
TD-2004-0235	Cash Back Rebates LD.Com, Inc. (Certificate of service authority, IXC, canceled)	12/17/03
IO-2003-0210	Cass County Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved)	2/3/03
TK-2003-0572	Cass County Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/27/03
TO-2004-0504	Cass County Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	9/23/04
WM-2003-0185	CAT-PAC Waterworks, Inc. (Transfer of assets to Public Water Supply District No. 3 of Franklin County, agreement approved)	5/27/03

TC-2004-0301	CCCMO, Inc. d/b/a Connect!, Public Service Commission Staff v. (Complaint case, order granting default)	4/29/04
TK-2003-0235	CD TELECOMMUNICATIONS, LLC (Interconnection agreement with Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company, approved)	3/4/03
XA-2004-0506	CD Telecommunications, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	5/10/04
WM-2003-0194	Cedar Hill Estates Water Company, Inc. (Merger of water system into KMB Utility Corporation, granted)	12/30/02
TC-2004-0300	Central Missouri Telecommunications,Inc., Public Service Commission Staff v. (Complaint case, order granting default)	4/29/04
XA-2003-0416	CenturyTel Fiber Company II, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing private line services, granted)	5/16/03
LN-2004-0189	CenturyTel Fiber Company II, LLC (Name change to CenturyTel Fiber Company II, LLC d/b/a LightCore, a CenturyTel company, recognized)	11/3/03
LK-2003-0144	CenturyTel of Missouri, LLC (Interconnection agreement with BarTel Communications, Inc., granted)	12/13/02
IK-2003-0192	CenturyTel of Missouri, LLC (Resale agreement with Delta Phones, Inc., approved)	1/13/03
TK-2003-0258	CenturyTel of Missouri, LLC (Interconnection, resale and unbundling agreement with CD Telecommunications, LLC, approved)	3/4/03
TK-2003-0357	CenturyTel of Misssouri, L.L.C. (Interconnection, resale and unbundling agreement with Missouri Telecom, Inc., granted)	4/28/03
TK-2004-0499	CenturyTel of Missouri, LLC (Interconnection agreement with WWC License LLC, approved)	5/11/04
IK-2004-0534	CenturyTel of Missouri, LLC (Interconnection and reciprocal compensation agreement with Dobson Cellular Systems, Inc., approved)	5/17/04
LA-2004-0105	CenturyTel Solutions, LLC (Certificate of service authority, basic local, nonswitched local and IXC services, granted)	1/7/04
TK-2004-0199	Chariton Valley Telecom Corporation (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, Inc., approved)	12/5/03
CO-2004-0469	Chariton Valley Telephone Corporation (Petition for modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
TK-2004-0614	Chariton Valley Telecom Corporation (Interconnection agreement with Southwestern Bell Telephone d/b/a SBC Missouri, approved)	8/16/04
TK-2004-0613	Chariton Valley Telecom Corporation (Interconnection agreement with Southwestern Bell Telephone d/b/a SBC Missouri, approved)	8/16/04

TK-2004-0518	Chariton Valley Telephone Corporation (Interconnection agreement with Cingular Wireless LLC and Cingular Southwestern Bell Wireless LLC, d/b/a Cingular Wireless, approved)	5/25/04
TK-2004-0543	Chariton Valley Telephone Corporation (Interconnection agreement with Sprint Spectrum, L.P. d/b/a Sprint PCS, approved)	5/28/04
IO-2004-0467	Chariton Valley Telephone Corporation (Petition for modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
TC-2004-0302	Choctaw Communications, Inc. d/b/a Smoke Signal Communications, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, basic local exchange telecommunications services, canceled)	4/6/04
TK-2003-0373	Choctaw Telephone Company (Wireless interconnection agreement with Sprint Spectrum, L.P., granted)	6/10/03
TK-2004-0514	Choctaw Telephone Company (Interconnection agreement with Cingular Wireless LLC and Cingular Southwestern Bell Wireless LLC, d/b/a Cingular Wireless, approved)	5/25/04
IO-2004-0546	Choctaw Telephone Company (Petition for modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
XA-2004-0269	Cincinnati Bell Any Distance, Inc. (Certificate of service authority, IXC, granted)	1/23/04
CA-2003-0303	Cinergy Communications Company (Certificate of service authority, basic local telecommunications service, granted)	5/12/03
XM-2003-0393	Citizens Communications Company, Citizens Telecommunications Company & Frontier Communications of America, Inc. (Merger whereby Frontier Communications of America, Inc. would transfer its assets and be merged into Citizens Telecommunications which would then be renamed Frontier Communications of America, approved)	5/27/03
TO-2004-0486	Citizens Telephone Company of Higginsville, Missouri (Petition for modification of the Federal Communications Commission’s local number portability requirements, order approving agreement)	6/29/04
EM-2003-0454	Citizens Electric Corporation (Sale of certain assets to the Fruitland Fire Protection District, granted)	7/3/03
IK-2003-0254	Citizens Telephone Company (Interconnection agreement with Verizon Wireless LLC, approved)	3/20/03
TK-2003-0533	Citizens Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/20/03
TC-2004-0339	Clear Call Telecom, LLC, Public Service Commission Staff v. (Complaint case, order granting default)	4/6/04

PA-2003-0546	Coats, Janet (Certificate of service authority, pay phones, granted)	7/16/03
PD-2004-0087	Coats, Janet (Certificate of service authority, pay phones, canceled)	8/12/03
PD-2003-0398	Coin Tel Company (Certificate of service authority, pay phones, canceled)	4/25/03
TD-2003-0557	Colorado River Communications Corp. (Certificate of service authority, IXC, canceled)	9/18/03
TD-2003-0522	Comm/Net Service Corporation (Certificate of service authority, IXC, canceled)	6/26/03
TC-2004-0414	CommRad.com, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/15/04
XA-2003-0515	Comm South Companies, Inc., d/b/a Missouri Comm South, Inc. (Certificate of service authority, IXC, granted)	6/23/03
TC-2004-0344	Communication Management Systems, Public Service Commission Staff v. (Complaint case, order granting default)	5/25/04
TD-2003-0352	Communications Cable-Laying Company, Inc., d/b/a Dial U.S.A. (Certificate of service authority, WATS reseller, canceled)	4/15/03
PD-2005-0017	Communications Central of Georgia, Inc.(Certificate of service authority, pay phones, canceled)	9/10/04
XA-2004-0298	Communications Network Billing, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	2/24/04
XN-2003-0448	Community Telephone Corporation (Name change to Cinergy Communications Company, recognized)	4/30/03
XA-2005-0015	Computer Network Technology Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to dedicated private line services, granted)	8/11/04
CA-2004-0393	COMTECH 21, LLC (Certificate of service authority, basic local telecommunications services, granted)	5/6/04
TC-2004-0331	Connect!LD, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, canceled)	3/12/04
TD-2004-0283	Connectsouth Communications of Missouri, Inc. (Certificate of service authority, IXC and basic local service, canceled)	3/4/04
GA-2004-0343	ConocoPhillips Company (Certificate as a seller of energy services, granted)	3/30/04
XA-2004-0020	Consolidated Communications Network Services, Inc. (Certificate of service authority, IXC, granted)	8/13/03
XA-2003-0456	Consolidated Communications Operator Services, Inc. (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	5/28/03
TD-2003-0270	Contact America, Inc. (Certificate of service authority, IXC, canceled)	2/18/03

XA-2003-0246	Convergia, Inc. (Certificate of service authority, IXC, granted)	2/27/03
XA-2004-0045	Corban Communications, Inc. (Certificate of service authority, intrastate interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)....	8/19/03
PD-2005-0016	Cornwell, Betty (Certificate of service authority, pay phones, canceled)	9/13/04
TD-2004-0283	Corporate Services Telcom, Inc. (Certificate of service authority, IXC, canceled)	3/4/04
TD-2005-0040	Corrigan Associates Limited Partnership (Certificate of service authority, shared tenant services, canceled) ...	9/10/04
TC-2004-0389	Corrigan Associates Missouri Limited Partnership, Public Service Commission Staff v. (Complaint case, order granting default)	5/25/04
IK-2003-0245	Craw-Kan Telephone Cooperative (Interconnection agreement with Verizon Wireless, LLC, St. Joseph CellTelco, and Cellco Partnership, all d/b/a Verizon Wireless, granted)	4/4/03
TK-2003-0577	Craw-Kan Telephone Cooperative (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/27/03
TO-2004-0505	Craw-Kan Telephone Cooperative (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	9/23/04
XA-2003-0356	C III Communications Operations (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	6/17/03
XA-2003-0356	C III Communications Operations, C III Communications, LLC, Broadwing Communications Services, Inc., Broadwing Telecommunications, Inc. (Transfer to C III Communications Operations the broadband business of Broadwing Communications Services, Inc., granted)...	6/17/03

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XA-2003-0310	Davidson Telecom, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications service, restricted to dedicated private line services, granted).....	4/1/03
CA-2003-0308	Davidson Telecom, LLC (Certificate of service authority, basic local telecommunications services, granted)	4/24/03
PA-2004-0147	Davidson Telecom, LLC (Certificate of service authority, pay phones, granted)	10/15/03
XA-2004-0599	DCT Telecom Group, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	7/16/04

PA-2003-0364	DeBlase, Jeffrey (Certificate of service authority, pay phones, granted)	4/23/03
LA-2002-1075	Delta Communications, LLC d/b/a Clearwave Communications (Certificate of service authority, basic local, nonswitched local and IXC, granted)	12/10/02
CK-2003-0182	Delta Phones, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, granted)	12/23/02
XA-2003-0241	Dialaround Enterprises, Inc. (Certificate of service authority, IXC, granted)	2/20/03
XA-2004-0085	Dial-Around Telecom, Inc. (Certificate of service authority, IXC, granted)	10/24/03
TM-2003-0415	Digital Teleport, Inc. (Transfer of core domestic telecommunications assets of Digital Teleport to CenturyTel Fiber Company II, LLC, granted)	5/20/03
XA-2004-0594	Digizip.com, Inc. (Certificate of service authority, IXC, granted)	6/29/04
TD-2004-0283	Discount Call Rating, Inc. d/b/a Flat Rate Long Distance d/b/a ConnectFree (Certificate of service authority, IXC, canceled)	3/4/04
IK-2004-0535	Dobson Cellular Systems, Inc. (Adoption of interconnection and reciprocal compensation agreement between Spectra Communications Group, LLC and WWC License, LLC, order recognizing adoption of interconnection agreement)	5/13/04
WM-2004-0449	DOD-CO Enterprise, L.L.C. (Sale of its water and sewer systems to Shell Rock Not-for-Profit Water Corporation and Shell Rock Not-for-Profit Sewer Corporation, respectively, approved)	5/13/04
PA-2005-0051	Dream Building, Inc. (Certificate of service authority, pay phones, granted)	9/13/04
GO-2003-0317	DTE Enterprises, Inc. and DTE Ozark, Inc. (Purchase from Tartan Management Company of Missouri, L.C. its five percent of the outstanding partnership interest in Southern Missouri Gas Company, L.P., approved)	5/13/03

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TC-2004-0413	Eagle Telecom, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/15/04
TD-2004-0309	Easton Telecom Services, Inc. (Certificate of service authority, IXC, canceled)	2/3/04
TC-2004-0321	Easton Telecom Services, L.L.C., Public Service Commission Staff v. (Complaint case, order granting default)	4/15/04
PA-2005-0032	Ecton, Jim d/b/a JSE Enterprises (Certificate of service authority, pay phones, granted)	9/1/04
TD-2004-0441	8182 Maryland Associates (Certificate of service authority, shared tenant services, canceled)	3/22/04
TK-2003-0307	Ellington Telephone Company (Interconnection agreement with Verizon Wireless, LLC, granted)	4/9/03

TO-2004-0480	Ellington Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	8/26/04
XN-2005-0044	eMertius Communications, Inc. (Name change to VarTec Solutions, Inc., recognized)	9/3/04
TK-2004-0190	Empire District Industries, Inc. (Resale agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved)	11/26/03
TN-2003-0417	Enhanced Communications Group, L.L.C. (Name change to Enhanced Communications Group, L.L.C. d/b/a ECG, recognized)	5/6/03
TC-2004-0315	Enkido, Inc., Public Service Commission Staff v. (Complaint case, order granting default)	4/15/04
TD-2004-0579	Enkido, Inc. (Certificate of service authority, IXC and non-switched local telecommunications services, canceled)	6/8/04
TC-2004-0358	Enron Broadband Services, Inc., Public Service Commission Staff v. (Complaint case, certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled)	3/16/04
XA-2003-0263	Entrix Telecom, Inc. (Certificate of service authority, IXC, granted)	3/6/03
XA-2003-0260	Epixtar Communications Corp. (Certificate of service authority, IXC, granted)	3/6/03
TC-2004-0404	EqualNet Corporation, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/6/04
TC-2004-0421	Erbia Network, Inc., Public Service Commission Staff v. (Complaint case, order granting default)	8/3/04
TD-2003-0509	Essential.com, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled)	6/12/03
TD-2004-0044	Essex Communications, Inc., d/b/a eLEC Communications (Certificate of service authority, basic local telecommunications services, canceled)	8/8/03
ZD-2003-0225	Estes, James R. and Sara S. (Certificate of service authority, shared tenant services, canceled)	2/28/03
XD-2004-0118	Everest Connections Corporation (Certificate of service authority, IXC and nonswitched local and basic local telecommunications services, canceled)	12/16/03
XD-2004-0022 & TD-2003-0584	Evolution Networks Midwest, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled)	9/24/03
TD-2004-0283	eVulkan, Inc. (Certificate of service authority, IXC and local exchange service, canceled)	3/4/04
XA-2003-0291	Exergy Group, LLC (Certificate of service authority, IXC, approved)	3/24/03
TN-2003-0249	ExOp of Missouri, Inc. (Name change to ExOp of Missouri, Inc., d/b/a Unite, recognized)	2/6/03
CE-2004-0249	ExOp of Missouri Inc. (Refinancing, order approving application)	2/19/04

CO-2003-0252	ExOp of Missouri, Inc. d/b/a Unite (Designation as an eligible telecommunications carrier for federal universal service support under Section 254 of the Telecommunications Act of 1996 in the Platte City exchange, granted)	4/10/03
CA-2004-0595	ExOp of Missouri d/b/a Unite (Expansion of certificate of service authority to provide basic local telecommunications services, granted)	7/30/04
TK-2004-0058	EZ Talk Communications, LLC (Resale agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved)	10/7/03
TC-2004-0239	EZ Talk Communications, LLC, Public Service Commission Staff v. (Complaint case, order dismissing complaint and closing case)	9/28/04

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TC-2004-0320	Fairpoint Communications Solutions Corporation, Public Service Commission Staff v. (Complaint case, order granting default)	4/15/04
XA-2004-0282	FamilyTel of Missouri, LLC (Certificate of service authority, IXC, granted)	3/10/04
TO-2004-0437	Farber Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	7/27/04
TD-2004-0283	Fast Connections, Inc. (Certificate of service authority, IXC, canceled)	3/4/04
PA-2004-0137	Faulkner, Jeffrey d/b/a Mister Jeff's Hair Center (Certificate of service authority, pay phones, granted)	10/24/03
TD-2004-0283	Federal Transtel, Inc. (Certificate of service authority, IXC, canceled)	3/4/04
TC-2004-0571	FiberNet, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	6/17/04
TD-2004-0476	Fibernet St. Louis, Inc. (Certificate of service authority, IXC, canceled)	4/14/04
TD-2003-0471	Fiberoptic Alternative Systems Technologies, Inc. (Certificate of service authority, IXC, canceled)	5/29/03
CK-2003-0287	Fidelity Communication Services I, Inc. (Interconnection agreement with Verizon Wireless, LLC, St. Joseph CellTelco and Cellco Partnership, d/b/a Verizon Wireless, approved)	3/27/03
CK-2003-0285	Fidelity Communication Services II, Inc. (Interconnection agreement with Verizon Wireless, LLC, St. Joseph CellTelco and Cellco Partnership d/b/a Verizon Wireless, approved)	3/25/03
TK-2003-0541	Fidelity Communications Services I, Inc. (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/20/03

TO-2004-0446	Fidelity Communications Services I, Inc. (Interconnection agreement with Cingular Southwestern Bell Wireless, LLC, approved)	3/26/04
TO-2004-0447	Fidelity Communications Services II, Inc. (Interconnection agreement with Cingular Southwestern Bell Wireless, LLC, approved)	3/26/04
GR-2003-0148	Fidelity Gas Company, Incorporated (2001-2002 Actual Cost Adjustment case, order adopting Staff recommendation and requiring adjustment of ACA balance)	5/6/03
GR-2003-0323	Fidelity Natural Gas, Incorporated (2002-2003 Purchased Gas Adjustment filings and Actual Cost Adjustment filing, order establishing ACA balance and closing case)	3/18/04
IK-2003-0284	Fidelity Telephone Company (Interconnection agreement with Verizon Wireless, LLC, St. Joseph CellTelco and Cellco Partnership, d/b/a Verizon Wireless, approved)	3/25/03
TK-2003-0539	Fidelity Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/20/03
TO-2004-0445	Fidelity Telephone Company (Interconnection agreement with Cingular Southwestern Bell Wireless, LLC, approved)	4/6/04
TO-2004-0489	Fidelity Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
PD-2005-0017	Fields Rentals, Inc. (Certificate of service authority, pay phones, canceled)	9/10/04
TD-2003-0276	FON Digital Network, Inc. (Certificate of service authority, IXC, canceled)	2/19/03
TC-2004-0410	Forum Executive Suites-K.C., Public Service Commission Staff v.(Complaint case, order granting default)	6/17/04
XA-2003-0549	Fox Communications Corporation (Certificate of service authority, IXC, granted)	7/17/03
WR-2002-1162	Foxfire Utility Company (Water rate increase request, order approving agreement)	12/5/02
SR-2002-1163	Foxfire Utility Company (Sewer rate increase request, order approving agreement)	12/5/02
PD-2003-0521	Franklin, Jim and Judy (Certificate of service authority, pay phones, canceled)	6/11/03

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PD-2005-0017	Gateway Phone Systems, Inc. (Certificate of service authority, pay phones, canceled)	9/10/04
PD-2004-0055	George, Lynn and Robert (Certificate of service authority, pay phones, canceled)	9/18/03
PA-2003-0236	Gilmore, Kent d/b/a Lourell's (Certificate of service authority, pay phones, granted)	2/6/03

XA-2003-0188	Global Communications Consulting Corp. (Certificate of service authority, IXC and nonswitched local exchange telecommunications service, restricted to providing dedicated private line services, granted)	12/20/02
TC-2004-0386	Global Communications Network, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	4/6/04
TC-2004-0367	Global Telelink Services, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, basic local and local exchange telecommunications services, canceled)	3/16/04
TD-2003-0581	Global Time, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled)	9/26/03
XA-2003-0483	GLOBCOM INCORPORATED (Certificate of service authority, IXC, granted)	6/12/03
CA-2003-0505	GLOBCOM INCORPORATED (Certificate of service authority, basic local telecommunications services, granted)	10/14/03
TK-2004-0165	Goodman Telephone Company (Interconnection agreement with T-Mobile USA f/k/a VoiceStream Wireless Corp., approved)	11/5/03
TO-2004-0490	Goodman Telephone Company, Ozark Telephone Company and Seneca Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
PD-2005-0016	Gorman, Shekki (Certificate of service authority, pay phones, canceled)	9/13/04
TO-2004-0493	Granby Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
IO-2003-0213	Grand River Mutual Telephone Company (Interconnection agreement with Verizon Wireless LLC, approved)	3/17/03
TK-2003-0537	Grand River Mutual Telephone Corp. (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/20/03
TO-2004-0456	Grand River Mutual Telephone Corporation (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	8/26/04
LA-2004-0124	Granite Telecommunications, LLC (Certificate of service authority, basic local, local exchange and IXC, granted)..	12/3/03
TK-2004-0465	Granite Telecommunications, LLC (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved)	4/23/04
PD-2003-0520	Green, Dennis (Certificate of service authority, pay phones, canceled)	6/11/03

CO-2003-0162	Green Hills Area Cellular Telephone, Inc. d/b/a Green Hills Telecommunications Services (Designates Green Hills as an eligible carrier for federal universal service support pursuant to Section 254 of the Telecommunications Act of 1996, order approving agreement)	3/4/03
IO-2003-0208	Green Hills Telephone Corporation (Interconnection agreement with Verizon Wireless, LLC, approved)	3/17/03
TK-2003-0532	Green Hills Telephone Corporation (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/20/03
TO-2004-0428	Green Hills Telephone Corporation (Petition for suspension of the Federal Communications Commission's local number portability requirements, report & order)	8/17/04
TD-2003-0339	GST Net, Inc. (Certificate of service authority, IXC, canceled)	4/15/03
TD-2004-0473	GTN Corp., d/b/a Global Telecom Network (Certificate of service authority, IXC, canceled)	4/14/04

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PA-2003-0309	Hadjiha, Mojtaba M. (Certificate of service authority, pay phones, granted)	5/19/03
WO-2004-0163	Hannibal, City of and Public Water Supply District No. 1 of Ralls County (Water territorial agreement concerning water service areas in Marion County, approved)	1/20/04
ZO-2005-0047	Heartland Health (Certificate of service authority, shared tenant services, expansion of current certificate, granted)	9/28/04
TC-2004-0390	Heartland Health System, Inc., Public Service Commission Staff v. (Complaint case, Report & Order).....	7/15/04
PD-2005-0017	Heartland Telecom, Inc. (Certificate of service authority, pay phones, canceled)	9/10/04
PA-2004-0554	Herschel's Coin Communications Company (Certificate of service authority, pay phones, granted)	6/8/04
XA-2005-0023	Hierholzer Communications, Inc., d/b/a Andrew Communications (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	8/13/04
WA-2004-0588, et al.	Highway H Utilities, Inc. (Certificate of public convenience and necessity, serve an unincorporated area of Pulaski County, granted)	9/2/04
XN-2003-0175	HJN Telecom, Inc. (Name change to Reliant Communications, Inc., acknowledged)	12/5/02
CN-2003-0174	HJN Telecom, Inc. (Name change to Reliant Communications, Inc., acknowledged)	12/5/02
PA-2005-0036	HKH Management Services, Inc. (Certificate of service authority, pay phones, granted)	8/23/04

TO-2004-0403	Holway Telephone Company (Petition for suspension of the Federal Communications Commission's local number portability requirements, order approving agreement)	7/27/04
TD-2003-0338	Home Owners Long Distance Incorporated (Certificate of service authority, IXC, canceled)	4/11/03
XA-2003-0180	Horizon Telecom, Inc. (Certificate of service authority, IXC, granted)	12/23/02
EO-2004-0071	Howell-Oregon Electric Cooperative, Inc. (Addendum to approved territorial agreement with the City of Thayer, order approving addendum)	2/2/04
PD-2003-0400	Hurt, Darren S. (Certificate of service authority, pay phones, canceled)	4/25/03
PD-2004-0054	Husemann, Douglas (Certificate of service authority, pay phones, canceled)	9/18/03

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IO-2003-0209	IAMO Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved)	2/6/03
TK-2003-0536	IAMO Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/20/03
TO-2004-0459	Iamo Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	8/26/04
CK-2004-0200	ICG Telecom Group, Inc. (Amendments to the interconnection agreement with Southwestern Bell Telephone L.P. d/b/a SBC Missouri, approved)	12/19/03
TD-2004-0283	Idealdial Corporation (Certificate of service authority, IXC, canceled)	3/4/04
TD-2004-0283	IG2, Inc. (Certificate of service authority, IXC and basic local service, canceled)	3/4/04
WC-2004-0129	IH Utilities, Inc., Public Service Commission Staff v. (Complaint case, order granting default)	3/5/04
XD-2004-0436	I-Link Communications, Inc. (Certificate of service authority, IXC, canceled)	3/5/04
LA-2004-0444	Image Access, Inc. d/b/a NewPhone (Certificate of service authority, IXC and basic local telecommunications services, granted)	5/6/04
TC-2004-0412	Inacom Communications, Inc., Public Service Commission Staff v. (Complaint case, certificate of service authority, IXC, canceled)	3/23/04
TC-2004-0395	Independent Network Services, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	3/30/04
PD-2005-0017	Infinitel, Inc. (Certificate of service authority, pay phones, canceled)	9/10/04
TC-2004-0365	INET Interactive Network System, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	3/18/04

XA-2004-0478	Inmate Calling Solutions, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	4/13/04
PA-2003-0361	Inmate Communications Corporation (Certificate of service authority, pay phones, granted)	4/16/03
CA-2003-0109	Integrated Telecommunication Services, LLC (Certificate of service authority, basic local telecommunications services, granted)	1/9/03
TC-2004-0377	Intelcom, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/6/04
TC-2004-0377	Intelcom, Inc., Public Service Commission Staff v. (Complaint case, order granting motion to set aside order of default)	9/27/04
TC-2004-0381	Intelecall Communications, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)...	4/6/04
TD-2003-0583	Intelicom International Corporation (Certificate of service authority, IXC, canceled)	9/18/03
PD-2005-0017	Intellicom, Inc. (Certificate of service authority, pay phones, canceled)	9/10/04
TC-2004-0405	Intelnet International Corporation, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	4/15/04
TD-2004-0472	Intercontinental Communications Group, Inc. d/b/a Fusion Trucker Phone (Certificate of service authority, IXC, canceled)	4/14/04
CA-2004-0485	Inter-Tel NetSolutions, Inc. (Certificate of service authority, basic local exchange, nonswitched local exchange and exchange access telecommunications services, granted)	6/17/04
XM-2003-0274	International Exchange Communications, Inc. (Transfer of assets and subscribers to Matrix Telecom, Inc., granted)	5/29/03
TD-2004-0283	International Telecommunications Corporation d/b/a ITC (Certificate of service authority, IXC, canceled)	3/4/04
IO-2004-0540	Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom (Review of its proposal for reorganization, order finding no jurisdiction)	6/17/04
TD-2004-0283	IPVoice Communications, Inc. (Certificate of service authority, IXC and basic local service, canceled).....	3/4/04

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PA-2003-0377	Jaroth, Inc., d/b/a Pacific Telemanagement Services (Certificate of service authority, pay phones, granted)....	4/23/03
TD-2004-0283	JATO Operating Corp. (Certificate of service authority, IXC and basic local service, canceled).....	3/4/04
PD-2005-0016	Jovcev, Zahari (Certificate of service authority, pay phones, canceled).....	9/13/04

PD-2003-0511 J P Connections (Certificate of service authority, pay phones, canceled)..... 6/12/03

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PD-2003-0502 Kan Corporation (Certificate of service authority, pay phones, canceled)..... 6/12/03
TC-2004-0408 Kansas City Executive Suites, Inc., Public Service Commission Staff v. (Order canceling certificate and directing General Counsel to seek penalties)..... 8/17/04
EE-2003-0199 Kansas City Power & Light Company (Variance from separate meter requirement, granted)..... 3/27/03
EA-2003-0135 Kansas City Power & Light Company (Certificate of public convenience and necessity, extension of 69kV transmission line in Clay County, granted)..... 2/20/03
EE-2003-0282 Kansas City Power & Light Company (Request for variance from Commission rules which would require separate metering for a new building, granted) 5/13/03
EE-2003-0529 Kansas City Power & Light Company (Variance from provisions of certain Commission rules to offer electronic billing, granted)..... 7/1/03
EO-2003-0527 Kansas City Power & Light Company (Sale of KCP&L's Johnson County Service Center to the City of Overland Park, Kansas, granted)..... 7/10/03
EF-2004-0265 Kansas City Power & Light Company (Financing, order approving financing)..... 5/27/04
EF-2004-0512 Kansas City Power & Light Company (Order approving financing) 6/28/04
TC-2004-0356 K.C. Fibernet, Public Service Commission Staff v. (Complaint case, order granting default)..... 3/16/04
TC-2004-0356 K.C. Fibernet, Public Service Commission Staff v. (Complaint case, order setting aside default) 4/15/04
TC-2004-0356 K.C. Fibernet, Public Service Commission Staff v. (Certificate of service authority, IXC, canceled)..... 5/27/04
TN-2003-0325 KDD America, Inc. (Name change to KDDI America, Inc., recognized)..... 4/14/03
XD-2004-0258 Keen LD, Inc. (Certificate of service authority, IXC, canceled)..... 1/26/04
GE-2003-0503 Kennett, City of (Waiver from rule requiring the replacement of unprotected steel yard lines, granted).... 7/22/03
PA-2004-0573 Kent, Carl (Certificate of service authority, pay phones, granted)..... 6/8/04
IO-2003-0201 Kingdom Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved)..... 2/3/03
TK-2003-0534 Kingdom Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)..... 8/20/03
TO-2004-0487 Kingdom Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement)..... 6/29/04

SR-2003-0442	KMB Utility Corporation (Sewer rate increase, granted)...	5/6/03
WR-2003-0387	KMB Utility Corporation (Water rate increase, granted)....	5/6/03
TK-2003-0200	KMC Telecom III, LLC, KMC Telecom V, Inc. and Spectra Communications Group, LLC (Adoption of interconnection agreement between Green Hills Telecommunications Services and Spectra, approved)...	1/15/03
CA-2004-0173	KMC Telecom V, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	1/21/04
TC-2004-0357	Knobview Telephone Company, Public Service Commission Staff v. (Complaint case, order granting default)	4/6/04

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GF-2004-0025	Laclede Gas Company (Financing case)	10/9/03
GR-2002-1103	Laclede Gas Company (Variance from its budget billing tariff and motion for expedited treatment, granted).....	11/4/03
GR-2002-1103	Laclede Gas Company (2001-2002 Actual Cost Adjustment, order requiring adjustment of ACA balance)..	1/13/04
SO-2004-0144	Lake Hannibal Sewer Corporation (Certificate of convenience and necessity, sewer service, canceled)...	2/26/04
WO-2004-0251	Lakewood Manor, Limited (Sale of assets to AquaSource/RU, Incorporated, granted).....	3/12/04
PA-2004-0572	Lalani, Mumtaz (Certificate of service authority, pay phones, granted).....	6/8/04
PD-2003-0542	Lamm Communications (Certificate of service authority, pay phones, canceled)	6/18/03
TD-2003-0277	Landmark Communications Company, Inc. (Certificate of service authority, IXC, canceled).....	2/19/03
TC-2002-349	Langerud, Frances v. Spectra Communications Group, LLC d/b/a CenturyTel (Complaint case, order approving agreement)	12/2/03
IK-2003-0214	Lathrop Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved).....	2/5/03
TK-2004-0191	Lathrop Telephone Company (Wireless interconnection agreement with Sprint Spectrum, L.P. as Agent and General Partner for Wireless Co. L.P. d/b/a Sprint PCS, approved)	11/26/03
TO-2004-0457	Lathrop Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	8/26/04
TC-2004-0318	LDCC, Inc., Public Service Commission Staff v. (Complaint case, order canceling IXC certificate)	3/5/04
TC-2004-0420	LD Exchange.Com, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	5/4/04
TD-2003-0278	LD Network Services, Inc. (Certificate of service authority, IXC, canceled).....	2/19/03
TD-2003-0556	Legends Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications service, canceled).....	7/1/03

PA-2003-0220	Lenox, Gwenda G. (Certificate of service authority, pay phones, granted)	2/10/03
IK-2003-0255	Le-Ru Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved)	3/12/03
TO-2004-0494	Le-Ru Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
XO-2004-0252	Lightyear Communications, Inc. and Lightyear Network Solutions, LLC (Order granting authority to reorganize)	2/3/04
XA-2004-0253	Lightyear Network Solutions, LLC (Certificate of service authority, IXC, granted)	1/27/04
PN-2004-0117	Lindeman, Robert W. (Name change to Lind-Comm, LLC, recognized)	11/6/03
XM-2003-0493	Local Telcom Holdings, LLC, d/b/a Transpoint Communications (Transfer of assets and customers to WorldxChange Corp., granted)	6/24/03
TC-2004-0415 & XE-2004-0488	Lockheed Martin Global Telecommunications Services, Public Service Commission Staff v. (Complaint case, order rejecting agreement)	9/2/04
TC-2004-0327	Long Distance Billing Services, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, canceled)	3/12/04
TC-2004-0384	Long Distance Direct Holdings, Inc., Public Service Commission Staff v.(Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/6/04
PD-2004-0142	Long, John (Certificate of service authority, pay phones, canceled)	1/30/04
XN-2003-0265	Long Distance of Michigan, Inc. d/b/a LDMI Telecommunications, Inc. (Name change to LDMI Telecommunications, Inc., d/b/a LDMI Telecommunications, recognized)	2/19/03
PD-2005-0016	Loy, Michael F. d/b/a Bexar Communications (Certificate of service authority, pay phones, canceled)	9/13/04
TC-2004-0379	LTS, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/6/04

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GC-2003-0342	Marbrie, Kenneth B. v. Missouri Gas Energy (Complaint case, allegations of being wrongfully billed for costs surrounding a stolen gas meter, Commission orders bill be adjusted)	9/30/03
TO-2004-0458	Mark Twain Rural Telephone Company, (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order)	8/26/04
XA-2004-0238	Matrix Telecom, Inc. d/b/a IE Com (Certificate of service authority, IXC, granted)	1/6/04
TD-2003-0344	Maverix.Net, Inc. (Certificate of service authority, IXC, canceled)	4/15/03

TC-2004-0423	Maxcom Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, basic local and IXC, canceled).....	4/29/04
TD-2004-0307	MaxTel USA (Certificate of service authority, IXC, canceled)	2/5/04
TO-2004-0491	McDonald County Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement).....	6/29/04
PD-2005-0016	McGee, Marguerite L. (Certificate of service authority, pay phones, canceled).....	9/13/04
XA-2004-0174	McGraw Communications, Inc. (Certificate of service authority, IXC, granted)	11/4/03
TO-2002-222	MCImetro Access Transmission Services LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. (Petition for arbitration of an interconnection agreement with Southwestern Bell Telephone Company, order regarding interconnection agreement).....	6/5/03
TO-2002-222	MCImetro Access Transmission Services, LLC (Arbitrated interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, granted)	8/20/03
LT-2004-0616	MCI WorldCom Communications, Inc. (Increase intrastate connection fee to recover access costs charged by local telephone companies, order denying suspension and approving tariff)	7/22/04
PD-2003-0402	McMillen, John (Certificate of service authority, pay phones, canceled)	6/5/03
TC-2004-0392	Members' Long Distance Advantage, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	3/30/04
PD-2005-0017	Memphis Best Restaurants (Certificate of service authority, pay phones, canceled).....	9/10/04
TD-2003-0351	Metracom Corporation (Certificate of service authority, IXC, canceled).....	4/11/03
TK-2003-0179	Metrocall, Inc. (Wireless interconnection agreement with Southwestern Bell Telephone L.P. d/b/a Southwestern Bell Telephone Company, approved).....	12/4/02
CA-2003-0497	Metro Communications Company (Certificate of service authority, basic local exchange telecommunications services, granted)	7/22/03
TD-2004-0474	Metro Connection, Inc. d/b/a TransAmerican Telephone (Certificate of service authority, basic local telecommunications services, canceled)	4/8/04
XA-2004-0019	Metro Teleconnect Companies, Inc. (Certificate of service authority, IXC, granted).....	8/5/03
XA-2004-0150	MG LLC d/b/a SearsConnect (Certificate of service authority, IXC, granted).....	10/27/03
PD-2003-0383	Mid-Missouri Communications, Inc. (Certificate of service authority, pay phones, canceled).....	4/15/03

TK-2004-0550	Mid-Missouri Telephone Company (Interconnection agreement with Sprint Spectrum, L.P. d/b/a Sprint PCS, approved).....	5/25/04
TK-2004-0516	Mid-Missouri Telephone Company (Interconnection agreement with Cingular Wireless LLC and Cingular Southwestern Bell Wireless LLC, d/b/a Cingular Wireless, approved).....	5/25/04
CD-2004-0119	Mid-Plains Communications, Inc. (Certificate of service authority, basic local telecommunications services, canceled).....	9/26/03
TC-2004-0435	Midwestern Services, L.C. d/b/a Midwestern Tel, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, basic local and IXC, canceled).....	4/29/04
TK-2003-0315	Miller Telephone Company (Interconnection agreement with Verizon Wireless, LLC, St. Joseph CellTelco, and Cellco Partnership, all d/b/a Verizon Wireless, granted)...	4/7/03
TO-2004-0511	Miller Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement).....	7/27/04
WT-2004-0156	Missouri-American Water Company (St. Joseph Economic Development Rider)	10/2/03
GT-2003-0490	Missouri Gas Energy (Tariff designed to provide economic relief to MGE customers with property damage from the May 2003 tornadoes, approved).....	5/15/03
GA-2003-0492	Missouri Gas Energy (Certificate of public convenience and necessity to construct and operate a natural gas supply line in Greene County, order approving agreement).....	8/21/03
GC-2003-0342	Missouri Gas Energy, Marbrie, Kenneth B. v. (Complaint case, allegations of being wrongfully billed for costs surrounding a stolen gas meter, Commission orders bill be adjusted).....	9/30/03
GO-2004-0242	Missouri Gas Energy (Infrastructure system replacement surcharge, order approving surcharge but rejecting submitted tariff).....	2/26/04
GA-2004-0241	Missouri Gas Energy (Certificate of public convenience and necessity, provide gas service in Greene County, expansion of existing certificated area, agreement approved).....	3/5/04
GO-2004-0524	Missouri Gas Energy (Order granting waiver regarding refunds)	5/6/04
GC-2003-0076	Missouri Gas Energy, Public Service Commission Staff v. (Staff complaint case alleging violation of Commission rules in connection with a natural gas incident near the intersection of 32nd and North Oak Street, Kansas City, order approving agreement and closing case)	12/19/02
GA-2005-0002	Missouri Gas Energy (Certificate of convenience and necessity, expansion of area in Christian County, granted)	8/24/04

IO-2004-0440	Missouri Network Alliance (Notice of adoption of interconnection agreement between CenturyTel of Missouri, LLC and Missouri Telecom, Inc., approved).....	3/30/04
GR-2001-461	Missouri Public Service (1999-2000 and 2000-2001 PGA and ACA filings, order approving agreement)	3/13/03
XA-2004-0176	Missouri Telecom, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	11/18/03
WC-2004-0335	Missouri Utilities Company, Public Service Commission Staff v. (Complaint case, order granting default, certificate of public convenience and necessity canceled).....	3/12/04
CN-2003-0266	M.L.M. Telecommunications, Inc. (Name change to M.L.M. Telecommunications, Inc., d/b/a Ameritel, Your Phone Company, recognized).....	3/13/03
XA-2004-0018	M.L.M. Telecommunications, Inc., d/b/a Ameritel, Your Phone Company (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	7/29/03
PD-2004-0237	M.L. Phones (Certificate of service authority, pay phones, canceled).....	1/14/04
TK-2004-0515	MoKan Dial, Inc. (Interconnection agreement with Cingular Southwestern Bell Wireless LLC and Cingular Southwestern Bell Wireless LLC, d/b/a Cingular Wireless, approved)	5/25/04
IK-2004-0501	MOCELCO, LLC (Interconnection agreement, notice of adoption of interconnection agreement between Spectra Communications Group, LLC and WWC License LLC, order recognizing adoption of interconnection agreement)	5/6/04
TK-2003-0427	MoKan Dial (Wireless interconnection agreement with Sprint Spectrum, LP, granted).....	6/23/03
IO-2004-0545	Mo-Kan Dial, Inc. (Petition for modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
XA-2004-0037	Motion Telecom, Inc. (Certificate of service authority, IXC, granted).....	8/19/03
TD-2003-0280	Mpower Communications Corp. (Certificate of service authority, basic local telecommunications services and IXC, terminated).....	2/26/03
XO-2004-0194	MVP Communications, Inc. (Certificate of service authority, IXC, canceled).....	1/6/04
TD-2004-0400	MWR Fibercom, Inc. (Certificate of service authority, IXC, canceled)	4/9/04
PD-2003-0399	Myers, Daniel R. (Certificate of service authority, pay phones, canceled).....	4/11/03

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XA-2003-0586	National Access Long Distance, Inc. (Certificate of service authority, IXC, granted).....	7/24/03
TC-2004-0326	National Accounts Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority canceled)	3/12/04
PD-2005-0017	National West Coast Vending, Inc. (Certificate of service authority, pay phones, canceled).....	9/10/04
TC-2004-0378	Nettronix, Inc., Public Service Commission Staff v.(Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
XA-2004-0620	Network Communications International Corp. d/b/a 1800Call4Less (Certificate of service authority, IXC, granted).....	8/2/04
XA-2004-0622	Network Communications International Corp. d/b/a Mundo Telecom (Certificate of service authority, IXC, granted).....	8/13/04
TD-2004-0026	Network Enhanced Technologies, Inc. (Certificate of service authority, IXC, canceled).....	9/19/03
TD-2003-0341	Network International, LC (Certificate of service authority, IXC, canceled).....	4/15/03
XM-2004-0203	New Access Communications, LLC (Transfer of customers and core domestic telecommunications assets of Ciera Network Systems, Inc., to New Access Communications, LLC, approved).....	11/20/03
TC-2004-0325	New Century Telecom, Inc., Public Service Commission Staff v. (Complaint case, order granting summary determination, findings of fact, conclusions of law, decision, and order directing General Counsel to seek penalties and closing case)	5/13/04
IO-2003-0211	New Florence Telephone Company (Interconnection agreement with Verizon Wireless, LLC, approved).....	2/5/03
TK-2003-0552	New Florence Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted).....	8/27/03
TO-2004-0503	New Florence Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement).....	7/27/04
TC-2004-0397	News-Press & Gazette Company d/b/a St. Joseph Cablevision, Public Service Commission Staff v. (Complaint case, order granting default).....	4/6/04
TC-2004-0397	News-Press & Gazette Company d/b/a St. Joseph Cablevision, Public Service Commission Staff v. (Complaint case, order setting aside default)	6/24/04
TC-2004-0397	News-Press & Gazette Company d/b/a St. Joseph Cablevision, Public Service Commission Staff v. (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/1/04

TC-2004-0397	News-Press & Gazette Company d/b/a St. Joseph Cablevision, Public Service Commission Staff v. (Complaint case, order granting motion for rehearing).....	8/10/04
XA-2004-0214	Nexus Communications, Inc. d/b/a TSI (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, approved).....	12/16/03
CA-2004-0204	Nexus Communications, Inc. d/b/a TSI (Certificate of service authority, basic local telecommunications services, granted).....	1/21/04
TD-2003-0346	North American Communications Control, Inc. (Certificate of service authority, IXC, canceled).....	4/11/03
PD-2005-0017	North American Intelecom, Inc. (Certificate of service authority, pay phones, canceled).....	9/10/04
XN-2003-0519	North by NortheastCom LLC (Name change to Infone, LLC, recognized).....	6/6/03
TK-2004-0544	Northeast Missouri Rural Telephone Company (Interconnection agreement with Sprint Spectrum, L.P. d/b/a Sprint PCS, approved).....	5/21/04
TK-2004-0513	Northeast Missouri Rural Telephone Company (Interconnection agreement with Cingular Southwestern Bell Wireless LLC and Cingular Southwestern Bell Wireless LLC, d/b/a Cingular Wireless, approved).....	5/25/04
IO-2004-0468	Northeast Missouri Rural Telephone Company (Petition for modification of the Federal Communications Commission's local number portability requirements, order approving agreement)	6/29/04
PD-2003-0395	Northland Pay Phones (Certificate of service authority, pay phones, canceled).....	4/15/03
SR-2004-0306	North Oak Sewer District, Inc. (Rate case, sewer, report and order).....	4/6/04
LA-2004-0236	NorVergence, Inc. (Certificate of service authority, IXC, granted).....	1/29/04
TD-2004-0027	Nova Telecom, Inc. (Certificate of service authority, IXC, granted).....	7/21/03
XA-2004-0066	Now Acquisition Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	9/9/03
CA-2004-0067	Now Acquisition Corporation (Certificate of service authority, basic local telecommunications services, granted).....	9/16/03
TK-2004-0460	Now Acquisition Corporation (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved).....	4/15/04
XM-2004-0065	NOW Communications, Inc. (Transfer of assets and customers to Now Acquisition Corporation, granted)	10/2/03
XA-2003-0495	NOW Intermedia, Incorporated (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, granted).....	8/8/03
TD-2004-0283	Ntegrity Teleconnect Services, Inc. (Certificate of service authority, IXC and local exchange service, canceled).....	3/4/04

TC-2004-0422	Ntera, Inc., Public Service Commission Staff v.(Complaint case, order granting default).....	8/3/04
XN-2004-0611	NUI Telecom, Inc. (Name change to BCN Telecom, Inc., recognized).....	7/13/04
XK-2004-0221	NuVox Communications of Missouri, Inc. (Amendments to its interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved).....	1/16/04
XD-2003-0544	NXLD Company, d/b/a Nextel Long Distance (Certificate of service authority, IXC, canceled).....	6/27/03

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EO-2004-0263	Office of the Public Counsel (Request investigation into certain resource planning decisions of The Empire District Electric Company, order denying OPC motion to open case).....	3/5/04
TC-2004-0409	Officeplus Corporation of Missouri, Public Service Commission Staff v. (Complaint case, order granting relief)	9/23/04
PD-2003-0510	Ol'Macdonalds Farm (Certificate of service authority, pay phones, canceled).....	6/12/03
TD-2003-0480	Omniplex Communications Group, L.L.C. (Certificate of service authority, IXC, basic local and local telecommunications services, canceled).....	5/29/03
TD-2005-0042	Orchard House Partnership (Certificate of service authority, shared tenant services, canceled).....	9/28/04
TK-2003-0571	Oregon Farmers Mutual Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as Agent and General Partner for Wireless Co., L.P., d/b/a Sprint PCS, granted)	8/27/03
TO-2004-0526	Oregon Farmers Telephone Company (Petition for suspension of the Federal Communications Commission's requirement to implement number portability, report & order).....	8/26/04
XA-2004-0575	Orion Telecommunications Corp. (Certificate of service authority, IXC, granted).....	8/13/03
PD-2003-0401	Osborne, Hugh (Certificate of service authority, pay phones, canceled)	5/30/03
TD-2003-0560	Overlook Communications International Corporation (Certificate of service authority, IXC, canceled)	9/23/03
TC-2004-0355	Ozark Telecom, Inc., Public Service Commission Staff v. (Complaint case, order granting default)	3/16/04
TK-2004-0166	Ozark Telephone Company (Interconnection agreement with T-Mobile USA f/k/a VoiceStream Wireless Corp., approved)	11/5/03
TO-2004-0490	Ozark Telephone Company, Goodman Telephone Company, and Seneca Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement).....	6/29/04
SM-2004-0198	Ozark Water and Wastewater Management Co., Inc. (Sale of sewer system assets to English Village Not-for-Profit Sewer Corporation, granted).....	2/17/04

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XA-2004-0509	Pacific Centrex Services, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	6/17/04
CA-2004-0508	Pacific Centrex Services, Inc. (Certificate of service authority, basic local telecommunications service, granted)	9/28/04
XD-2004-0602	Paramount International Telecommunications, Inc. d/b/a R Network (Certificate of service authority, IXC, canceled).....	7/8/04
PD-2004-0601	Paramount International Telecommunications, Inc. d/b/a R Network (Certificate of service authority, pay phones, canceled).....	7/8/04
PD-2005-0016	Paxton, David H. (Certificate of service authority, pay phones, canceled).....	9/13/04
IK-2003-0223	Peace Valley Telephone Company, Inc. (Interconnection agreement with Verizon Wireless, LLC, approved).....	2/5/03
TO-2004-0438	Peace Valley Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement).....	7/27/04
PD-2004-0152	Pebbles, Enoch (Certificate of service authority, pay phones, canceled).....	10/6/03
PD-2004-0068	Pennick, Paul P. (Certificate of service authority, pay phones, canceled).....	8/12/03
TD-2004-0402	PF.Net, LLC, which later changed its name to PF.Net Network Services, Corp. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled).....	5/6/04
TK-2004-0549	PNG Telecommunications, Inc. (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved)	6/24/04
TD-2003-0501	Phone Bank, Inc. d/b/a Phone Banc, Inc. (Certificate of service authority, basic local exchange telecommunications services, canceled).....	6/5/03
TK-2004-0230	Phone-Link, Inc. (Interconnection agreement with Southwestern Bell Telephone L.P. d/b/a SBC Missouri, approved).....	12/19/03
XA-2004-0270	Phonetec PCS, LLC (Certificate of service authority, IXC, granted).....	1/16/04
PA-2004-0612	Prather, Todd R. (Certificate of service authority, pay phones, granted).....	7/27/04
TD-2003-0470	Preferred/Telecom, Inc. (Certificate of service authority, IXC, canceled).....	5/29/03
XD-2003-0486	Premiere Communications, Inc. (Certificate of service authority, IXC, canceled)	6/16/03
TD-2004-0580	Premiere Paging & Cellular, Inc. (Certificate of service authority, basic local telecommunications services, canceled).....	6/8/04

TC-2004-0391	Pride America, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/30/04
TD-2003-0331	Primecall, Inc. (Certificate of service authority, IXC, canceled).....	4/15/03
XM-2004-0213	Primus Telecommunications, Inc. and Least Cost Routing, Inc. (Seeking approval of a pro forma transfer of control, order granting motion to dismiss in part and approving stock transfer).....	12/2/03
PD-2005-0017	Progressive Controls, Inc. (Certificate of service authority, pay phones, canceled).....	9/10/04
TC-2004-0361	Promise-Net International, Ltd., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	3/16/04
TD-2003-0559	PTT Telekom, Inc. (Certificate of service authority, IXC, canceled).....	9/18/03
WO-2003-0457	Public Funding Corporation of the City of Ozark (Refinance the Finley Valley Water Company note at a lower interest rate, granted).....	6/17/03
TC-2004-0314	Public Service Commission Staff v. AGL Networks, LLC (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	6/17/04
TC-2004-0345	Public Service Commission Staff v. All-Star Acquisition Corporation (Complaint case, order granting default, certificate of service authority, telecommunications services, canceled).....	4/6/04
MC-2005-0028	Public Service Commission Staff v. America's Home Brokers, Inc. (Complaint case, order granting default).....	9/21/04
TC-2004-0333	Public Service Commission Staff v. AmericaNetworks, Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
TC-2004-0319	Public Service Commission Staff v. Arizona Telephony Brokers, L.L.C. (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/6/04
TC-2004-0334	Public Service Commission Staff v. Arrival Communications, Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
TC-2004-0127	Public Service Commission Staff v. BarTel Communications, Inc. (Complaint case, order granting default).....	3/5/04
TC-2004-0317	Public Service Commission Staff v. BCGI Communications Corp. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	6/17/04
TC-2004-0317	Public Service Commission Staff v. BCGI Communications Corp. (Complaint case, order denying motion to set aside order granting default and certificate of service authority, IXC, canceled).....	7/8/04
TC-2004-0312	Public Service Commission Staff v. Branson Telephone (Order granting default).....	4/15/04

TC-2004-0312	Public Service Commission Staff v. Branson Telephone (Complaint case, order denying motion to set aside order granting default, certificate of service authority, IXC, canceled).....	6/17/04
TC-2004-0311	Public Service Commission Staff v. Cable One, Inc. (Complaint case, order granting default and denying motion to dismiss).....	6/17/04
TC-2004-0311	Public Service Commission Staff v. Cable One, Inc. (Complaint case, order granting motion to set aside order granting default).....	8/5/04
TC-2004-0311	Public Service Commission Staff v. Cable One, Inc. (Complaint case, order dismissing complaint).....	9/27/04
WC-2004-0353	Public Service Commission Staff v. Camelot Utilities Company (Complaint case, order granting default).....	3/16/04
TC-2004-0429	Public Service Commission Staff v. Capsule Communications, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	4/29/04
TC-2004-0396	Public Service Commission Staff v. Carr Square Tenant Corporation (Complaint case, order granting default, certificate of service authority, shared tenant services, canceled).....	4/1/04
TC-2004-0301	Public Service Commission Staff v. CCCMO, Inc. d/b/a Connect! (Complaint case, order granting default).....	4/29/04
TC-2004-0300	Public Service Commission Staff v. Central Missouri Telecommunications, Inc. (Complaint case, order granting default).....	4/29/04
TC-2004-0302	Public Service Commission Staff v. Choctaw Communications, Inc. d/b/a Smoke Signal Communications (Complaint case, order granting default, certificate of service authority, basic local exchange telecommunications services, canceled).....	4/6/04
TC-2004-0339	Public Service Commission Staff v. Clear Call Telecom, LLC (Complaint case, order granting default).....	4/6/04
TC-2004-0414	Public Service Commission Staff v. CommRad.com (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/15/04
TC-2004-0344	Public Service Commission Staff v. Communication Management Systems (Complaint case, order granting default)	5/25/04
TC-2004-0331	Public Service Commission Staff v. Connect!LD, Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
TC-2004-0389	Public Service Commission Staff v. Corrigan Associates Missouri Limited Partnership (Complaint case, order granting default).....	5/25/04
TC-2004-0413	Public Service Commission Staff v. Eagle Telecom, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/15/04
TC-2004-0321	Public Service Commission Staff v. Easton Telecom Services, L.L.C. (Complaint case, order granting default)	4/15/04
TC-2004-0315	Public Service Commission Staff v. Enkido, Inc. (Complaint case, order granting default).....	4/15/04

TC-2004-0358	Public Service Commission Staff v. Enron Broadband Services, Inc. (Complaint case, certificate of service authority, interexchange and non-switched local exchange telecommunications services, canceled)	3/16/04
TC-2004-0404	Public Service Commission Staff v. EqualNet Corporation (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0421	Public Service Commission Staff v. Erbia Network, Inc. (Complaint case, order granting default).....	8/3/04
TC-2004-0239	Public Service Commission Staff v. EZ Talk Communications, LLC (Complaint case, order dismissing complaint and closing case).....	9/28/04
TC-2004-0320	Public Service Commission Staff v. Fairpoint Communications Solutions Corporation (Complaint case, order granting default).....	4/15/04
TC-2004-0571	Public Service Commission Staff v. FiberNet, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	6/17/04
TC-2004-0410	Public Service Commission Staff v. Forum Executive Suites-K.C. (Complaint case, order granting default).....	6/17/04
TC-2004-0386	Public Service Commission Staff v. Global Communications Network (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0367	Public Service Commission Staff v. Global Telelink Services, Inc. (Complaint case, order granting default, certificate of service authority, basic local and local exchange telecommunications services, canceled)	3/16/04
TC-2004-0390	Public Service Commission Staff v. Heartland Health System, Inc. (Complaint case, Report & Order).....	7/15/04
WC-2004-0129	Public Service Commission Staff v. IH Utilities, Inc. (Complaint case, order granting default).....	3/5/04
TC-2004-0412	Public Service Commission Staff v. Inacom Communications, Inc. (Complaint case, certificate of service authority, IXC, canceled).....	3/23/04
TC-2004-0395	Public Service Commission Staff v. Independent Network Services (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/30/04
TC-2004-0365	Public Service Commission Staff v. INET Interactive Network System, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	3/18/04
TC-2004-0377	Public Service Commission Staff v. Intelcom, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0377	Public Service Commission Staff v. Intelcom, Inc. (Complaint case, order granting motion to set aside order of default).....	9/27/04
TC-2004-0381	Public Service Commission Staff v. Intelecall Communications, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/6/04
TC-2004-0405	Public Service Commission Staff v. Intelnet International Corporation (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/15/04

TC-2004-0408	Public Service Commission Staff v. Kansas City Executive Suites, Inc. (Order canceling certificate and directing General Counsel to seek penalties).....	8/17/04
TC-2004-0356	Public Service Commission Staff v. K.C. Fibernet (Complaint case, order granting default).....	3/16/04
TC-2004-0356	Public Service Commission Staff v. K.C. Fibernet (Complaint case, order setting aside default).....	4/15/04
TC-2004-0356	Public Service Commission Staff v. K.C. Fibernet (Certificate of service authority, IXC, canceled)	5/27/04
TC-2004-0357	Public Service Commission Staff v. Knobview Telephone Company (Complaint case, order granting default).....	4/6/04
TC-2004-0318	Public Service Commission Staff v. LDCC, Inc. (Complaint case, order canceling IXC certificate).....	3/5/04
TC-2004-0420	Public Service Commission Staff v. LD Exchange.Com, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	5/4/04
TC-2004-0415 & XE-2004-0488	Public Service Commission Staff v. Lockheed Martin Global Telecommunications Services (Complaint case, order rejecting agreement).....	9/2/04
TC-2004-0327	Public Service Commission Staff v. Long Distance Billing Services, Inc. (Complaint case, order granting default, certificate of service authorit, canceled).....	3/12/04
TC-2004-0384	Public Service Commission Staff v. Long Distance Direct Holdings, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0379	Public Service Commission Staff v. LTS, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0423	Public Service Commission Staff v. Maxcom Inc. (Complaint case, order granting default, certificate of service authority, basic local and IXC, canceled).....	4/29/04
TC-2004-0392	Public Service Commission Staff v. Members' Long Distance Advantage (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	3/30/04
TC-2004-0435	Public Service Commission Staff v. Midwestern Services, L.C. d/b/a Midwestern Tel (Complaint case, order granting default, certificate of service authority, basic local and IXC, canceled)	4/29/04
GC-2003-0076	Public Service Commission Staff v. Missouri Gas Energy (Staff complaint case alleging violation of Commission rules in connection with a natural gas incident near the intersection of 32nd and North Oak Street, Kansas City, order approving agreement and closing case).....	12/19/02
WC-2004-0335	Public Service Commission Staff v. Missouri Utilities Company (Complaint case, order granting default, certificate of public convenience and necessity canceled).....	3/12/04
TC-2004-0326	Public Service Commission Staff v. National Accounts Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04

TC-2004-0378	Public Service Commission Staff v. Nettronix, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0325	Public Service Commission Staff v. New Century Telecom, Inc. (Complaint case, order granting summary determination, findings of fact, conclusions of law, decision, and order directing General Counsel to seek penalties and closing case)	5/13/04
TC-2004-0397	Public Service Commission Staff v. News-Press & Gazette Company d/b/a St. Joseph Cablevision (Complaint case, order granting default).....	4/6/04
TC-2004-0397	Public Service Commission Staff v. News-Press & Gazette Company d/b/a St. Joseph Cablevision (Complaint case, order setting aside default).....	6/24/04
TC-2004-0397	Public Service Commission Staff v. News-Press & Gazette Company d/b/a St. Joseph Cablevision (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/1/04
TC-2004-0397	Public Service Commission Staff v. News-Press & Gazette Company d/b/a St. Joseph Cablevision (Complaint case, order granting motion for rehearing).....	8/10/04
TC-2004-0422	Public Service Commission Staff v. Ntera, Inc. (Complaint case, order granting default).....	8/3/04
TC-2004-0409	Public Service Commission Staff v. Officeplus Corporation of Missouri (Complaint case, order granting relief).....	9/23/04
TC-2004-0355	Public Service Commission Staff v. Ozark Telecom, Inc. (Complaint case, order granting default).....	3/16/04
TC-2004-0391	Public Service Commission Staff v. Pride America, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/30/04
TC-2004-0361	Public Service Commission Staff v. Promise-Net International, Ltd. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	3/16/04
TC-2004-0380	Public Service Commission Staff v. QAI, Inc. d/b/a Long Distance Billing (Complaint case, order granting default)..	4/6/04
TC-2004-0373	Public Service Commission Staff v. Radiant Telecom, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/18/04
TC-2004-0310	Public Service Commission Staff v. Secured Technologies, L.C. (Complaint case, report and order).....	9/9/04
TC-2004-0382	Public Service Commission Staff v. Southwest Communications, Inc. (Complaint case, order vacating order directing filing of proposed procedural schedule, determination on the pleadings and order directing General Counsel to seek penalties).....	4/29/04
TC-2004-0359	Public Service Commission Staff v. Special Accounts Billing Group, Inc. (Complaint case, order granting default, certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	3/16/04

WC-2004-0351	Public Service Commission Staff v. Spokane Highlands Water Company (Complaint case, order granting default).	3/16/04
TC-2004-0374	Public Service Commission Staff v. St. Andrews Telecommunications, L.L.C. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/15/04
TC-2004-0366	Public Service Commission Staff v. STI Merger Co. (Complaint case, order granting default and certificate of service authority, IXC, canceled).....	3/18/04
TC-2004-0406	Public Service Commission Staff v. St. John's Regional Medical Center (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/6/04
TC-2004-0406	Public Service Commission Staff v. St. John's Regional Medical Center (Complaint case, order granting application for rehearing and reconsideration).....	8/10/04
WC-2004-0342	Public Service Commission Staff v. Taney County Utilities Corporation (Complaint case, order granting default).....	4/6/04
TC-2004-0362	Public Service Commission Staff v. Telecents Communications, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	3/16/04
TC-2004-0316	Public Service Commission Staff v. TelecomEZ Corp. (Complaint case, order granting default).....	4/15/04
TC-2004-0385	Public Service Commission Staff v. TeleComp Communications (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	5/25/04
TC-2004-0313	Public Service Commission Staff v. Telegenius, Inc. (Complaint case, order granting default).....	4/15/04
TC-2004-0368	Public Service Commission Staff v. Telephone Co., Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/20/04
TC-2004-0369	Public Service Commission Staff v. TelePlus, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	5/13/04
TC-2004-0338	Public Service Commission Staff v. Telera Communications, Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
TC-2004-0418	Public Service Commission Staff v. Tenet Healthsystem DI, d/b/a Orchard House Partnership (Complaint case, order granting default).....	4/15/04
TC-2004-0417	Public Service Commission Staff v. Tin Can Communications Co., LLC d/b/a The Cube (Complaint case, order granting default).....	4/15/04
TC-2004-0383	Public Service Commission Staff v. TON Services, Inc. (Complaint case, order granting default).....	4/6/04
TC-2004-0363	Public Service Commission Staff v. Total-Tel USA Communications, Inc. (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties, certificate of service authority, IXC, canceled).....	4/29/04

TC-2004-0364	Public Service Commission Staff v. Trans-Net Connect, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	6/3/04
TC-2004-0337	Public Service Commission Staff v. Tri-State Telecommunications, Inc. d/b/a The Phone Company (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
TC-2004-0303	Public Service Commission Staff v. United States Telecommunications, Inc. d/b/a Tel Com Plus (Complaint case, order granting default, certificate of service authority, basic local, IXC and local exchange telecommunications services, canceled).....	4/6/04
TC-2004-0394	Public Service Commission Staff v. United Services Telephone, L.L.C. (Complaint case, order granting default).....	3/30/04
TC-2004-0399	Public Service Commission Staff v. Universal Telecommunications, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/6/04
TC-2004-0372	Public Service Commission Staff v. U.S. Network Services, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/18/04
TC-2004-0330	Public Service Commission Staff v. WebNet Communications, Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
SC-2004-0350	Public Service Commission Staff v. West 16th Street Sewer Company, Inc. (Complaint case, order granting default).....	4/6/04
TC-2004-0375	Public Service Commission Staff v. World Telecom, Inc. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/20/04
WC-2004-0349	Public Service Commission Staff v. W.P.C. Sewer Company (Complaint case, order granting default).....	4/6/04
TC-2004-0347	Public Service Commission Staff v. WWC License LLC, d/b/a Cellular One Long Distance (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/29/04
TC-2004-0328	Public Service Commission Staff v. Zenex Long Distance, Inc. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04

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TC-2004-0380	QAI, Inc. d/b/a Long Distance Billing, Public Service Commission Staff v.(Complaint case, order granting default).....	4/6/04
TD-2003-0558	Quest Telecommunications, Inc., d/b/a QTI, Inc. (Certificate of service authority, IXC, canceled).....	9/24/03

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TC-2004-0373	Radiant Telecom, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/18/04
PA-2004-0615	Ragland, Catherine A. (Certificate of service authority, pay phones, granted).....	7/20/04
XD-2003-0240	RCN Telecom Services, Inc. (Certificate of service authority, IXC, canceled).....	1/21/03
XA-2003-0576	Red River Networks, LLC (Certificate of service authority, IXC, granted).....	7/21/03
XA-2003-0567	Ren-Tel Communications, Inc. (Certificate of service authority, IXC, granted).....	7/22/03
IK-2003-0259	Rock Port Telephone Company (Interconnection agreement with Verizon Wireless, LLC; St. Joseph CellTelco; and Cellco Partnership, all d/b/a Verizon Wireless, approved).....	3/4/03
TO-2004-0439	Rock Port Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order).....	8/17/04
TD-2004-0234	Rocky Mountain Broadband, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services and basic local exchange telecommunications services, canceled).....	6/9/04
TD-2005-0043	Ross Management, Inc. d/b/a Forum Executive Suites-K.C. (Certificate of service authority, shared tenant services, canceled).....	9/10/04
XD-2003-0453	RSL COM U.S.A., Inc. (Certificate of service authority, IXC, canceled).....	6/2/03
XA-2004-0060	R2C Communications, Inc. (Certificate of service authority, IXC, granted).....	8/20/03
PD-2005-0016	Rucker, Chris L. (Certificate of service authority, pay phones, canceled).....	9/13/04
XA-2003-0498	Rystec, Inc. (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	6/25/03
CA-2004-0111	Rystec, Inc. (Certificate of service authority, basic local telecommunications services, granted)	11/24/03
IO-2004-0426	Rystec, Inc. (Notice of adoption of interconnection, resale and unbundling agreement between Spectra Communications Group, LLC and Missouri Telecom, Inc., recognized).....	3/30/04
IO-2004-0425	Rystec, Inc. (Notice of adoption of interconnection, resale and unbundling agreement between CenturyTel of Missouri, LLC and Missouri Telecom, Inc., recognized).	3/30/04

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TK-2004-0074	SBC Missouri, L.P. d/b/a SBC Missouri (Paging facilities and interconnection agreement with St. Louis Electronics Communications Corp., approved).....	9/2/03
TK-2004-0076	SBC Missouri, L.P. d/b/a SBC Missouri (Paging facilities and interconnection agreement with MO-ARK Communications, Inc., approved).....	9/2/03
TK-2004-0075	SBC Missouri, L.P. d/b/a SBC Missouri (Paging facilities and interconnection agreement with RCC, Inc. d/b/a Radio Comm Paging, approved).....	9/2/03
TD-2003-0313	Schremp, Leland L. (Certificate of service authority, pay phones, canceled).....	3/6/03
TC-2004-0310	Secured Technologies, L.C., Public Service Commission Staff v. (Complaint case, report and order).....	9/9/04
TK-2004-0167	Seneca Telephone Company (Interconnection agreement with T-Mobile USA f/k/a VoiceStream Wireless Corp., approved).....	11/5/03
TO-2004-0490	Seneca Telephone Company, Goodman Telephone Company and Ozark Telephone Company (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, order approving agreement).....	6/29/04
PA-2003-0553	Shelton, Shawn (Certificate of service authority, pay phones, granted).....	7/8/03
TD-2004-0283	Siesta Telecom, Inc.(Certificate of service authority, IXC, canceled)	3/4/04
TD-2004-0283	Simply Local Services, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04
TD-2003-0347	Simply Long Distance, Inc. (Certificate of service authority, IXC, canceled).....	4/3/03
TD-2004-0283	SmarTalk Teleservices, Inc. d/b/a PRONTO! (Certificate of service authority, IXC, canceled).....	3/4/04
TD-2003-0516	Smartel Communications, Inc. (Certificate of service authority, IXC, canceled).....	6/13/03
PD-2005-0016	Smith, Michael (Certificate of service authority, pay phones, canceled).....	9/13/04
TK-2003-0504	Snappy Phone of Texas, Inc. d/b/a Snappy Phone (Interconnection and resale agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, granted).....	6/25/03
CO-2005-0039	Socket Telecom, LLC (Notice of adoption of terms of interconnection agreement between Sprint and Level 3 Communications, LLC, order recognizing adoption of interconnection agreement).....	9/14/04
XA-2003-0239	SOEC Technologies, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	2/19/03
GR-2004-0193	Southern Missouri Gas Company (2002-2003 Actual Cost Adjustment, order adopting staff recommendations and requiring adjustment of ACA balance).....	6/17/04

GO-2005-0019	Southern Union Company d/b/a Missouri Gas Energy (Acquisition of equity interest in CrossCountry Energy, L.L.C., approved).....	8/31/04
TC-2004-0382	Southwest Communications, Inc., Public Service Commission Staff v. (Complaint case, order vacating order directing filing of proposed procedural schedule, determination on the pleadings and order directing General Counsel to seek penalties).....	4/29/04
XD-2003-0289	Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (Certificate of service authority, interexchange and local exchange telecommunications services, canceled).....	3/14/03
IO-2003-0475	Southwestern Bell Telephone Company (Tariff designed to waive installation charge and one month of monthly charges for various call forwarding services for customers affected by recent tornadoes, granted).....	5/6/03
IN-2003-0247	Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company (Name change to Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, recognized).....	1/31/03
TK-2004-0073	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Ozark Telecom, Inc., approved).....	9/4/03
TK-2004-0121	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Haug Communications, Inc., approved).....	10/14/03
TK-2004-0139	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Interconnection agreement with V.I.P. Enterprises, Inc., approved).....	11/5/03
IO-2004-0123	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Interconnection agreement with Professional Answering Service, Inc., approved).....	11/5/03
TK-2004-0181	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Paging facilities and interconnection agreement with Mobilpage, Inc., approved).....	12/1/03
TK-2004-0208	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Interconnection agreement with Data Investments, Inc., d/b/a Star Communications, approved).....	12/5/03
TK-2004-0255	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Interconnection agreement with Central Communications Service, granted).....	1/23/04
TK-2004-0477	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Joplin Beepers, approved).....	4/16/04
TK-2004-0430	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Mobile Radio Communications, Inc., approved).....	4/23/04
TM-2001-708	Southwest Fiber Communications, LLC (Transfer of Southwest Fiber Communications, Inc. into Southwest Fiber Communications, LLC, granted).....	6/5/03
TC-2004-0359	Special Accounts Billing Group, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled)	3/16/04

IO-2003-0132	Spectra Communications Group, L.L.C. d/b/a CenturyTel (Determination that it is subject to price cap regulation)....	12/17/02
TK-2003-0221	Spectra Communications Group, LLC (Resale agreement with Phone Connection, Inc., d/b/a Affordable Phone, approved).....	2/6/03
TK-2003-0306	Spectra Communications Group, LLC (Interconnection agreement with WWC License LLC, approved).....	5/1/03
TK-2003-0294	Spectra Communications Group, LLC (Interconnection and reciprocal compensation agreement with T-Mobile USA, Inc., granted).....	5/19/03
TK-2003-0474	Spectra Communications Group, LLC (Interconnection, resale and unbundling agreement with Missouri Telecom, Inc., granted).....	6/5/03
TK-2004-0164	Spectra Communications Group, LLC (Interconnection and reciprocal compensation agreement with SBC Wireless, LLC, d/b/a Cingular Wireless, granted).....	11/19/03
TO-2004-0232	Spectra Communications Group, LLC, d/b/a CenturyTel and CenturyTel of Missouri, LLC (Petition for suspension of FCC requirement to implement wireline/wireless number portability, order granting temporary suspension).....	11/20/03
TC-2002-349	Spectra Communications Group, LLC d/b/a CenturyTel, Langerud, Frances v.(Complaint case, order approving agreement).....	12/2/03
WC-2004-0351	Spokane Highlands Water Company, Public Service Commission Staff v.(Complaint case, order granting default).....	3/16/04
TD-2004-0029	Springfield Fiber Net, Inc. (Certificate of service authority, IXC and local exchange private line telecommunications service, canceled).....	9/25/03
AC-2003-0526	Springfield City Utilities (Surcharges on nonresidents of Springfield, order dismissing complaint).....	2/10/04
TK-2003-0206	Sprint Communications Company, L.P. (Interconnection agreement with Southwestern Bell L.P. d/b/a Southwestern Bell Telephone Company, approved).....	2/3/03
CK-2004-0031	Sprint Communications Company L.P. d/b/a Sprint (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved).....	9/22/03
IO-2004-0424	Sprint Communications Company, L.P. (Notice of adoption of interconnection, resale and unbundling agreement between Spectra Communications Group, LLC and Chariton Valley Telecom Corporation, order recognizing adoption).....	4/1/04
TK-2004-0531	Sprint Communications Company, L.P. (Adoption of interconnection agreement between ALLTEL Missouri, Inc. d/b/a ALLTEL and Level 3 Communications, LLC, order recognizing adoption of interconnection agreement).....	5/25/04
IT-2003-0169	Sprint Missouri, Inc. d/b/a Sprint (Modify rates under price cap filing, tariffs approved).....	12/10/02
IT-2003-0170	Sprint Missouri, Inc. d/b/a Sprint (Modify rates under price cap filing, tariffs approved).....	12/10/02

IT-2003-0167	Sprint Missouri, Inc. d/b/a Sprint (Modify rates under price cap filing, tariffs approved).....	12/10/02
IT-2003-0168	Sprint Missouri, Inc. d/b/a Sprint (Modify rates under price cap filing, tariffs approved).....	12/10/02
IT-2003-0166	Sprint Missouri, Inc. d/b/a Sprint (Modify rates under price cap filing, tariffs approved).....	12/10/02
IK-2003-0146	Sprint Missouri, Inc. d/b/a Sprint (Interconnection and resale agreement with Phone-Link, Inc., granted).....	12/12/02
TK-2003-0215	Sprint Missouri, Inc. d/b/a Sprint (Commercial mobile radio interconnection agreement with Sprint Spectrum, L.P. as an agent for WirelessCo L.P. and Sprintcom, Inc. jointly d/b/a Sprint PCS, approved).....	2/5/03
TK-2003-0216	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Sprint Communications Company, L.P., approved).....	3/6/03
TK-2003-0414	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with SBC Advanced Solutions, Inc., approved).....	5/19/03
TK-2003-0443	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Maxcess, Inc., approved).....	5/22/03
TK-2003-0430	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with U.S. TelePacific Corp. d/b/a TelePacific Communications, approved).....	5/22/03
TK-2003-0428	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Network Alliance, LLC, approved).....	5/22/03
TK-2003-0407	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with The Phone Connection, d/b/a Affordable Phone, approved).....	5/22/03
TK-2003-0444	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Digital Teleport, Inc., approved).....	5/28/03
TK-2003-0426	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with AltiComm, approved).....	5/28/03
TK-2003-0409	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Sprint Communications Company, L.P., approved).....	5/29/03
TK-2003-0408	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with DSL.net Communications, LLC, granted)	6/10/03
TK-2003-0569	Sprint Missouri, Inc., d/b/a Sprint (Interconnection and resale agreement with Fidelity Communications Services I, Inc., granted).....	8/26/03
TK-2003-0535	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with ICG Telecom Group, Inc., granted).....	8/29/03
IK-2004-0032	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with SBC Advanced Solutions, Inc., approved).....	9/8/03
TK-2004-0185	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection and resale agreement with American Fiber Network, Inc., approved).....	11/24/03
TK-2004-0178	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Metro Teleconnect Companies, Inc., approved).....	11/26/03

TK-2004-0179	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Camarato Distributing, Inc., d/b/a Nex-Phon, approved).....	12/23/03
TK-2004-0290	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with ACN Communications Services, Inc., approved).....	2/26/04
TK-2004-0292	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Budget Phone, Inc., approved).....	2/26/04
TK-2004-0291	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with dPi Teleconnect, LLC, approved).....	2/26/04
TK-2004-0293	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Ernest Communications, Inc., approved)	2/26/04
TK-2004-0434	Sprint Missouri, Inc. (Master interconnection and resale agreement with XO Missouri, Inc., adopting the master interconnection and resale agreement between Sprint and Fidelity Communications Services I, Inc., order recognizing adoption of interconnection agreement).....	5/11/04
TK-2004-0566	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection and resale agreement with Local Line America, Inc., approved).....	5/28/04
TK-2004-0569	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection, collocation and resale agreement with Tele-Reconnect, Inc., approved).....	6/1/04
TK-2004-0567	Sprint Missouri, Inc. d/b/a Sprint (Interconnection and resale agreement with Level 3 Communications, LLC, approved).....	6/10/04
TK-2004-0521	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection, collocation and resale agreement with Southern Telecom Network, Inc., approved).....	6/15/04
IK-2005-0026	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection, collocation and resale agreement with 1-800-Reconex, Inc., approved).....	8/26/04
IK-2005-0046	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Chariton Valley Communications Corporation, Inc., approved).....	9/21/04
TK-2004-0180	Sprint Spectrum L.P., d/b/a Sprint PCS (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved).....	12/5/03
TC-2004-0374	St. Andrews Telecommunications, L.L.C., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	4/15/04
ZA-2003-0184	St. Anthony's Medical Center (Certificate of service authority, private shared tenant services, granted).....	12/31/02
TD-2003-0524	Starlink Communications, L.L.CV. (Certificate of service authority, IXC, canceled).....	6/26/03
XD-2003-0528	Starpower Communications, LLC (Certificate of service authority, IXC, canceled).....	6/25/03
IK-2003-0222	Steelville Telephone Exchange, Inc. (Interconnection agreement with Verizon Wireless, LLC, approved).....	2/5/03
TO-2004-0454	Steelville Telephone Exchange, Inc. (Petition for suspension and modification of the Federal Communications Commission's local number portability requirements, report & order).....	8/26/04

ZD-2003-0358	Stephens Park Medical Building General Partnership (Certificate of service authority, shared tenant services, canceled).....	5/1/03
TD-2003-0332	Sterling Time Company (Certificate of service authority, IXC, canceled).....	4/15/03
CA-2004-0568	Steve's Wildcat Web, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	7/29/04
XA-2005-0021	Steve's Wildcat Web, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated, private line services, granted)	8/31/04
TC-2004-0366	STI Merger Co., Public Service Commission Staff v. (Complaint case, order granting default and certificate of service authority, IXC, canceled).....	3/18/04
TC-2004-0406	St. John's Regional Medical Center, Public Service Commission Staff v.(Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/6/04
TC-2004-0406	St. John's Regional Medical Center, Public Service Commission Staff v. (Complaint case, order granting application for rehearing and reconsideration).....	8/10/04
TD-2004-0283	StormTel, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04
TD-2004-0277	Supra Telecommunications and Information Systems, Inc. (Certificate of service authority, IXC, non-switched local exchange and basic local exchange telecommunications services, canceled).....	1/27/04

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TD-2003-0561	TalkNow, Inc. (Certificate of service authority, IXC, canceled).....	9/18/03
WC-2004-0342	Taney County Utilities Corporation, Public Service Commission Staff v. (Complaint case, order granting default).....	4/6/04
WR-2004-0450, et al.	Taney County Utilities Corporation (Water and sewer rate cases, order approving small company rate increase).....	5/13/04
SR-2003-0244	TBJ Sewer System, Inc. (Rate case, sewer services)	2/11/03
SA-2003-0189	TBJ Sewer System, Inc. (Certificate of public convenience and necessity to enlarge and extend its service area in Franklin County, granted).....	7/3/03
CO-2003-0578	TCG St. Louis, Inc. (Seeking review and reversal of the North American Numbering Plan Administrator's decision to deny request for additional numbering resources, order granting additional numbering resources).....	7/15/03
XD-2003-0261	TDS Engineering, L.L.C. (Certificate of service authority, IXC, canceled).....	2/20/03
XA-2004-0605	TelAtlantic Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	7/27/04

TD-2003-0333	Telcam, Telecommunications Company of the Americas, Inc. (Certificate of service authority, IXC, canceled).....	4/15/03
TC-2004-0362	Telecents Communications, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)....	3/16/04
XA-2004-0483	Tele Circuit Network Corporation (Certificate of service authority, IXC, granted).....	4/12/04
PD-2005-0017	Telecoin Communications Limited (Certificate of service authority, pay phones, canceled).....	9/10/04
TC-2004-0316	TelecomEZ Corp., Public Service Commission Staff v. (Complaint case, order granting default).....	4/15/04
TD-2003-0392	Telecommunications Cooperative Network, d/b/a TCN, Inc. (Certificate of service authority, IXC, canceled).....	4/15/03
XD-2004-0299	Telecommunications Resources, Inc. (Certificate of service authority, IXC, canceled).....	2/24/04
TC-2004-0385	TeleComp Communications, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	5/25/04
XT-2004-0617	Teleconnect Long Distance Services and Systems Company d/b/a TelecomUSA (Increase intrastate connection fee to recover access costs charged by local telephone companies, order denying suspension and approving tariff).....	7/22/04
TC-2004-0313	Telegenius, Inc., Public Service Commission Staff v. (Complaint case, order granting default).....	4/15/04
XA-2004-0464	Teleglobe America, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	4/21/04
XM-2003-0299	Teleglobe USA Inc. (“Old Teleglobe”), Teleglobe USA LLC d/b/a Teleglobe USA LLC (Missouri) (“New Teleglobe”) and TLGB Corporation (Transfer of telecommunications assets from Old Teleglobe to New Teleglobe and for New Teleglobe’s stock to be transferred to TLGB Corporation, order approving merger).....	3/27/03
XA-2003-0300	Teleglobe USA LLC d/b/a Teleglobe USA LLC (Missouri) (Certificate of service authority, IXC, approved).....	3/27/03
XD-2004-0346	Teleglobe USA, LLC (Certificate of service authority, IXC, canceled).....	3/17/04
XD-2004-0017	Teleglobe USA, Inc. (Certificate of service authority, IXC, canceled).....	7/11/03
TD-2003-0334	Telehub Network Services Corporation (Certificate of service authority, IXC, canceled).....	4/10/03
TC-2004-0368	Telephone Co., Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)	4/20/04
TC-2004-0369	TelePlus, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	5/13/04

TC-2004-0338	Telera Communications, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
CA-2004-0088	Tele-Reconnect, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	10/15/03
IK-2004-0536	Tele-Reconnect, Inc. (Adoption of interconnection, resale and unbundling agreement between Spectra Communications Group, LLC and Missouri Telecom, Inc., order recognizing adoption of interconnection agreement).....	5/14/04
IK-2004-0537	Tele-Reconnect, Inc. (Adoption of interconnection, resale and unbundling agreement between CenturyTel of Missouri, LLC and Missouri Telecom, Inc., order recognizing adoption of interconnection agreement).....	5/17/04
TD-2004-0283	Telergy Network Services, Inc. (Certificate of service authority, IXC and basic local services, canceled).....	3/4/04
TD-2004-0283	Telicor, Inc. (Certificate of service authority, IXC and basic local services, canceled).....	3/4/04
XA-2004-0197	Telrite Corporation (Certificate of service authority, IXC, granted).....	11/18/03
TD-2003-0335	Telscape USA, Inc. (Certificate of service authority, IXC, canceled).....	4/15/03
TD-2003-0360	Teltrust Communications, Services, Inc. (Certificate of service authority, IXC, canceled).....	4/11/03
TC-2004-0418	Tenet Healthsystem DI, d/b/a Orchard House Partnership, Public Service Commission Staff v.(Complaint case, order granting default).....	4/15/04
TD-2004-0175	Teutenberg, Jay d/b/a Advertisnet Internet Services (Certificate of service authority, IXC, canceled).....	12/9/03
PD-2005-0017	The Battle Group, Inc. (Certificate of service authority, pay phones, canceled).....	9/10/04
XA-2005-0009	The Dodson Group, Incorporated (Certificate of service authority, IXC, granted).....	8/12/04
WR-2003-0177	The Empire District Electric Company (Water rate increase request, order approving agreement).....	12/17/02
EO-2004-0246	The Empire District Electric Company (Territorial agreement with White River Valley Electric Cooperative designating the boundaries for each within the Canyon Springs of Branson, approved).....	3/16/04
EF-2004-0109	The Empire District Electric Company (Order approving financing).....	9/9/04
TM-2003-0530	The Free Network, LLC (Transfer of assets and subscribers to Lightyear Communications, Inc., approved).....	9/23/03
TD-2003-0349	The Furst Group, Inc. (Certificate of service authority, IXC, canceled).....	4/3/03
TD-2003-0523	The Millennium Group Telemanagement, L.L.C. (Certificate of service authority, IXC, canceled).....	6/11/03
CO-2003-0094	The Pager Company (Designation as an eligible telecommunications carrier for federal universal service support under Section 254 of the Telecommunications Act of 1996, granted).....	4/1/03

CK-2003-0164	The Phone Connection, Inc. d/b/a Affordable Phone Company (Interconnection and resale agreement with ALLTEL Missouri, Inc., granted).....	12/13/02
XA-2003-0191	3U Telecom, Inc. (Certificate of service authority, IXC, granted).....	1/8/03
SR-2004-0532	Timber Creek Sewer Company (Rate case, order approving agreement).....	7/15/04
LA-2004-0133	Time Warner Cable Information Services (Missouri) LLC (Certificate of service authority, basic local telecommunications services, non-switched local exchange telecommunications service, IXC, granted)....	3/2/04
LO-2004-0547	Time Warner Cable Information Services, LLC (Request for authority to sell, assign or transfer assets, order granting motion to dismiss for lack of jurisdiction).....	4/29/04
TC-2004-0417	Tin Can Communications Co., LLC d/b/a The Cube, Public Service Commission Staff v.(Complaint case, order granting default).....	4/15/04
TD-2003-0472	TLC Next Generation International Holdings, LLC (Certificate of service authority, basic local exchange telecommunications services, canceled).....	6/2/03
XD-2003-0198	TLX Communications, Inc. d/b/a TelAmerica (Certificate of services authority, IXC, canceled).....	1/7/03
XD-2004-0107	T-NETIX Internet Services, Inc. (Certificate of service authority, IXC, canceled).....	9/24/03
TM-2004-0431	T-NETIX, Inc. (Sale of stock and related transactions to TZ Holdings, Inc., approved).....	3/31/04
TC-2004-0383	TON Services, Inc., Public Service Commission Staff v. (Complaint case, order granting default).....	4/6/04
TC-2004-0363	Total-Tel USA Communications, Inc., Public Service Commission Staff v. (Complaint case, determination on the pleadings and order directing General Counsel to seek penalties, certificate of service authority, IXC, canceled).....	4/29/04
XD-2004-0297	Touch America, Inc. (Certificate of service authority, IXC, canceled).....	3/2/04
XA-2003-0234	Transcom Communications, Inc. (Certificate of service authority, IXC,granted).....	2/14/03
PD-2005-0017	Trans Continental Communications, Inc. (Certificate of service authority, pay phones, canceled).....	9/10/04
TC-2004-0364	Trans-Net Connect, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	6/3/04
TD-2003-0467	Triax Telecom, Inc. (Certificate of service authority, IXC, canceled).....	5/29/03
TC-2004-0337	Tri-State Telecommunications, Inc. d/b/a The Phone Company, Public Service Commission Staff v.(Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
WA-2004-0276	Tri-State Utility, Inc. (Certificate of public convenience and necessity, extend service area in Taney County, granted).....	5/25/04

XA-2004-0114	TruComm Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	10/8/03
CA-2004-0115	TruComm Corporation (Certificate of service authority, basic local telecommunications services, granted).....	10/21/03
XA-2004-0187	TSI Telecommunications Network Services, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	11/13/03
XN-2004-0593	TSI Telecommunications Network Services, Inc. (Name change to Syniverse Networks, Inc., recognized).....	6/17/04

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PA-2003-0316	Underwood, Kevin S. (Certificate of service authority, pay phones, granted).....	4/2/03
WO-2003-0186	Union, City of (Water territorial agreement with Public Water Supply District No. 1 of Franklin County concerning territory in Franklin County, approved).....	3/6/03
EF-2003-0514	Union Electric Company d/b/a AmerenUE (Authority to issue and sell additional indebtedness, granted).....	6/24/03
GR-2002-438	Union Electric Company d/b/a AmerenUE (2001-2002 Actual Cost Adjustment filing, order approving agreement).....	9/2/03
EE-2004-0069	Union Electric Company d/b/a AmerenUE (Variance to permit master metering for a residential apartment building, granted).....	9/23/03
EE-2004-0092	Union Electric Company d/b/a AmerenUE (Variance to permit master metering for a residential apartment building, granted).....	9/23/03
EO-2004-0177	Union Electric Company d/b/a AmerenUE (Amendments to its nuclear decommissioning trust agreement and changes to its investment guidelines, approved).....	12/18/03
EF-2004-0205	Union Electric Company d/b/a AmerenUE (Order approving financing).....	1/29/04
GR-2000-392	United Cities Gas Company (1999-2000 Actual Cost Adjustment, order establishing ACA balance and closing case).....	12/23/02
TC-2004-0303	United States Telecommunications, Inc. d/b/a Tel Com Plus, Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, basic local, IXC and local exchange telecommunications services, canceled).....	4/6/04
TC-2004-0394	United Services Telephone, L.L.C., Public Service Commission Staff v. (Complaint case, order granting default).....	3/30/04
XM-2004-0039	Univance Telecommunications, Inc. (Transfer of assets, including customers, to Motion Telecom, Inc., granted).....	8/21/03
TD-2003-0337	Universal Telecom Technologies (Certificate of service authority, IXC, canceled).....	4/15/03

TC-2004-0399	Universal Telecommunications, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled)...	4/6/04
LA-2004-0136	UpLync Telecommunications, Inc. (Certificate of service authority, IXC, basic local and nonswitched local telecommunications services, granted).....	12/5/03
TC-2004-0372	U.S. Network Services, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	3/18/04
XA-2003-0321	US LEC Communications, Inc. (Certificate of service authority, IXC, granted).....	4/11/03
TD-2003-0460	USN Communications Long Distance, Inc. (Certificate of service authority, IXC, canceled).....	5/14/03
TD-2003-0466	U.S. Net, Inc. (Certificate of service authority, IXC, canceled).....	5/29/03
XT-2003-0256	U.S. Telecom Long Distance, Inc. (Add an Instate Recovery Fee to the Rates and Charges section of the tariff, order denying motion to suspend).....	2/6/03
TD-2004-0283	UTS of St. Louis, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04

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PD-2005-0016	Valek, Kenny (Certificate of service authority, pay phones, canceled).....	9/13/04
TD-2004-0028	Value Call International, Inc. (Certificate of service authority, IXC, canceled).....	7/22/03
XM-2004-0621	Valu-Line of St. Joseph, Inc. (Transfer of assets to Communigroup of K.C., Inc., approved).....	8/17/04
XM-2004-0621	Valu-Line of St. Joseph, Inc. (Certificate of service authority, IXC, canceled).....	9/22/04
PD-2003-0397	Vernon, Frank d/b/a C & F Payphones Unlimited (Certificate of service authority, pay phones, canceled)..	4/29/03
TD-2004-0283	Viatel Services, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04
CA-2004-0427	Victory Communications, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	4/15/04
WA-2004-0151	Village Greens Water Company (Certificate of public convenience and necessity to serve Village of Parkway in Franklin County, granted).....	9/7/04
PD-2005-0017	Visioncomm, Inc. (Certificate of service authority, pay phones, canceled).....	9/10/04
TD-2004-0048	Viva Telecom, LLC (Certificate of service authority, IXC, canceled).....	7/29/03
TD-2004-0283	Vocall Communications Corp. (Certificate of service authority, IXC, canceled).....	3/4/04

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XA-2004-0145	WDT World Discount Telecommunications Co. (Certificate of service authority, IXC, granted).....	10/23/03

PA-2004-0084	Weber Communications, LLC (Certificate of service authority, pay phones, granted)	9/17/03
TC-2004-0330	WebNet Communications, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, canceled)	3/12/04
TD-2004-0283	West End Communications, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04
SC-2004-0350	West 16th Street Sewer Company, Inc., Public Service Commission Staff v. (Complaint case, order granting default).....	4/6/04
LA-2003-0491	WesTex Communications, LLC, d/b/a WTX Communications (Certificate of service authority, IXC, granted).....	6/24/03
PA-2005-0010	White Picket Fence, LLC d/b/a Tiny Bubbles Laundromat (Certificate of service authority, pay phones, granted)....	8/4/04
PA-2003-0473	Whitson, Angelique d/b/a Unique Creations (Certificate of service authority, pay phones, granted).....	6/4/03
PD-2005-0016	Whitson, Angelique d/b/a Unique Creations (Certificate of service authority, pay phones, canceled).....	9/13/04
XN-2005-0029	Williams Communications, LLC d/b/a Williams Vyvx, LLC (Name change to WilTel Communications, LLC, recognized)	8/10/04
XN-2005-0031	Williams Communications, LLC, d/b/a Williams Vyvx, LLC (Name change to WilTel Communications, LLC, recognized).....	8/12/04
XN-2005-0011	Williams Local Network's, LLC (Name change to WilTel Local Network, LLC and Williams Communications', LLC d/b/a Vyvx, LLC (Name change to WilTel Communications, LLC, recognized).....	7/28/04
PD-2005-0016	Wood, David and Laura (Certificate of service authority, pay phones, canceled).....	9/13/04
TM-2004-0146	WorldCom, Inc. (Application for approval of restructuring, granted).....	11/13/03
TC-2004-0375	World Telecom, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, IXC, canceled).....	4/20/04
TD-2004-0283	WorldxChange Communications, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04
XN-2003-0461	WorldxChange Corp. (Name change to WorldxChange Corp. d/b/a Acceris Communications, recognized).....	5/16/03
XM-2003-0493	WorldxChange Corp. and Local Telcom Holdings, LLC d/b/a Transpoint Communications (Transfer of assets of Transpoint Communications to WorldxChange, granted).....	7/15/04
TD-2004-0030	World Wide Communications, Inc. (Certificate of service authority, IXC, canceled).....	9/25/03
SC-2004-0349	W.P.C. Sewer Company, Public Service Commission Staff v. (Complaint case, order granting default).....	4/6/04
TC-2004-0347	WWC License LLC, d/b/a Cellular One Long Distance, Public Service Commission Staff v.(Complaint case, determination on the pleadings and order directing General Counsel to seek penalties).....	7/29/04

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XD-2003-0295	XO Long Distance Services, Inc. (Certificate of service authority, IXC, canceled).....	3/19/03
XA-2002-1154	Xspedius Management Co. of Kansas City, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	1/29/03
XN-2003-0463	Xspedius Management Co. of Kansas City, LLC (Name change to Xspedius Management Co. of Kansas City, LLC, d/b/a Xspedius Communications, recognized).....	5/16/03
TK-2003-0202	Xspedius Management Co. Switched Services, L.L.C. and Xspedius Management Co. of Kansas City, L.L.C. (Interconnection and resale agreement with Southwestern Bell Telephone L.P. d/b/a Southwestern Bell Telephone Company, approved).....	1/14/03
LA-2003-0001	Xspedius Management Co. Switched Services, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	1/29/03
CA-2002-1153	Xspedius Management Co. Switched Services, LLC (Certificate of service authority, basic local telecommunications services, granted).....	3/20/03
CN-2003-0462	Xspedius Management Co. Switched Services, LLC (Name change to Xspedius Management Co. Switched Services, LLC, d/b/a Xspedius Communications, recognized).....	5/16/03
TD-2004-0283	Xtracom, Inc. (Certificate of service authority, IXC, canceled).....	3/4/04
XA-2003-0451	X2Comm, Inc., d/b/a DC Communications (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	5/27/03

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XA-2004-0104	Yak Communications (America), Inc. (Certificate of service authority, IXC, granted).....	9/18/03

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TC-2004-0328	Zenex Long Distance, Inc., Public Service Commission Staff v. (Complaint case, order granting default, certificate of service authority, canceled).....	3/12/04
TD-2003-0353	Zephion Networks Communications, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	4/15/03

REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI

In the Matter of the Application of Missouri Pipeline Company for Authorization to Convert to a Limited Liability Company and Change its Name Accordingly.

Case No. GN-2003-0017
Decided December 3, 2002

Gas §3. The Commission granted permission to Missouri Pipeline Company, LLC, to adopt Missouri Pipeline Company's certificate of convenience and necessity. Because Missouri Pipeline was simply reorganizing, and was not dissolving to form a new corporation, Missouri Pipeline Company, LLC, did not have to apply for a new certificate.

Gas §7. The Commission had the jurisdiction to determine whether Missouri Pipeline Company could reorganize into Missouri Pipeline Company, LLC. Missouri Pipeline Company is a gas corporation and public utility operating in Missouri. Section 393.250 RSMo states that the reorganization of such a corporation is subject to the Commission's supervision and control. The Commission found the proposed reorganization reasonable and not detrimental to the public interest, and therefore approved it.

ORDER APPROVING PLAN OF REORGANIZATION

Syllabus: This order approves the reorganization plan of Missouri Pipeline Company into a limited liability company.

Procedural History:

Missouri Pipeline filed its Application and Motion for Expedited Treatment in this case on July 25, 2002. Missouri Pipeline requests the Commission permit it to convert from a Delaware corporation to a Delaware limited liability company. Staff replied on August 27, 2002, stating it did not receive the Motion for Expedited Treatment from Missouri Pipeline. On September 4, 2002, Staff filed its Recommendation. Staff did not object to the Commission permitting Missouri Pipeline to reorganize, subject to certain conditions. Missouri Pipeline responded on September 10, 2002, asking the Commission to reject Staff's conditions.

On September 12, 2002, the Commission ordered the parties to attend a September 23, 2002 prehearing conference. In that same order, the Commission ordered the parties to file a proposed procedural schedule. Because the parties stated they were close to settling this case, Missouri Pipeline asked the Commission to suspend that requirement on September 25, 2002. On September 27, 2002, the Commission granted Missouri Pipeline's request, and ordered the parties to file a proposed procedural schedule by October 30, 2002.

The parties entered into a Unanimous Stipulation and Agreement on October 24, 2002. Staff filed Suggestions in Support on October 31, 2002.

The agreement between the parties stated that Staff consented to Missouri Pipeline Company, LLC, adopting the certificate of convenience and necessity from Missouri Pipeline Company. On November 18, 2002, the Commission directed Staff to comment on whether the Commission had the authority to do so, or whether Missouri Pipeline Company, LLC, needed to apply for a new certificate.

Staff replied on December 2, 2002. Staff stated that Delaware law permits Missouri Pipeline Company to reorganize into a limited liability corporation, rather than requiring it to dissolve and form a new corporation. Because Missouri Pipeline Company simply is reorganizing, Staff believes that the Commission should allow Missouri Pipeline Company, LLC, to continue to use the same certificate.

Findings of Fact:

Missouri Pipeline distributes and transports natural gas to Missouri customers. Missouri Pipeline seeks approval from the Commission to reorganize into a limited liability company. The proposed reorganization will not change the terms and conditions of the services Missouri Pipeline provides. The reorganization will also not affect the tax revenues of any Missouri political subdivision. The reorganization will be virtually transparent to Missouri Pipeline's customers. The only difference between the current structure and the proposed structure will be tax advantages for Missouri Pipeline.

The Commission finds that it should approve Missouri Pipeline's plans to reorganize, subject to the following. Missouri Pipeline shall file with the Commission a copy of the organization agreement and operating agreement before the name change and reorganization takes effect. Missouri Pipeline shall also inform the Commission of any changes to the organization agreement and operating agreement. Furthermore, Missouri Pipeline, LLC, shall not conduct business in Missouri until it either files new tariffs or adopts the tariffs of Missouri Pipeline.

In addition, Missouri Pipeline agrees to give Staff and the Office of the Public Counsel its tax information and tax information of its members if it files a general rate increase or if Staff or the Office of the Public Counsel files an over-earnings complaint, and if the moving party wants income tax expense as part of its cost of service. Missouri Pipeline further promises that once it becomes Missouri Pipeline, LLC, it will pass a resolution to bind itself to this promise. The Commission finds Missouri Pipeline's covenant reasonable, and approves of it.

Conclusions of Law:

Based on these facts, the Commission makes the following conclusions of law:

Missouri Pipeline is a "gas corporation" and a "public utility" as defined by Section 386.020, (18) and (42), RSMo 2000, and is thus subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 2000.

Missouri Pipeline seeks authority to reorganize under Section 393.250, RSMo 2000. That statute provides that the reorganization of a gas corporation is subject to Commission "supervision and control" and may not be had without authorization

from the Commission.[1] The statute also empowers the Commission to set the capitalization amount of the reorganized entity.[2]

Based on its consideration of the record before it, the Commission concludes that the agreement among the parties and the proposed reorganization is reasonable and is not a detriment to the public interest. Therefore, it should be approved.

IT IS THEREFORE ORDERED:

1. That the verified application filed by Missouri Pipeline Company on July 25, 2002, is approved.

2. That Missouri Pipeline Company is authorized to reorganize and rename itself Missouri Pipeline Company, LLC, subject to the following conditions:

A. Missouri Pipeline Company shall file in this case a copy of the organization agreement and operating agreement before the name change and reorganization takes effect;

B. Missouri Pipeline Company shall continue to inform the Commission of any changes to the organization agreement and operating agreement;

C. After the reorganization, Missouri Pipeline Company, LLC, shall pass a formal and binding resolution in which it promises to allow the Staff of the Commission and the Office of the Public Counsel access to the tax information of Missouri Pipeline Company, LLC, and its members if Missouri Pipeline Company, LLC, files a general rate increase case, or the Staff of the Commission or the Office of the Public Counsel file an over-earnings complaint, and the movant wants income tax expense to be a cost of service item.

3. That Missouri Pipeline Company is authorized to take all necessary and lawful actions to effect the reorganization.

4. That Missouri Pipeline Company, LLC, may operate under the certificate of convenience and necessity the Commission granted to Missouri Pipeline Company.

5. That before Missouri Pipeline Company, LLC, does business in Missouri, either it shall file new tariffs with the Commission or adopt Missouri Pipeline Company's current tariffs.

6. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions, and expenditures involved. The Commission reserves the right to consider any ratemaking treatment to be given the properties, transactions, and expenditures in a later proceeding.

7. That Missouri Pipeline Company, LLC, shall file a notice in this case informing the Commission that the reorganization is complete and that Missouri Pipeline Company, LLC, has passed the resolution ordered in paragraph 2 within 30 days of their completion.

8. That this order shall become effective on December 12, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Pridgin, Regulatory Law Judge

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[1] Section 393.250.1, RSMo 2000.

[2] Section 393.250, 2 and 3, RSMo 2000.

In the Matter of the Application of Missouri Gas Company for Authorization to Convert to a Limited Liability Company and Change its Name Accordingly.

Case No. GN-2003-0016
Decided December 3, 2002

Gas §3. The Commission granted permission to Missouri Gas Company, LLC, to adopt Missouri Gas Company's certificate of convenience and necessity. Because Missouri Gas was simply reorganizing, and was not dissolving to form a new corporation, Missouri Gas Company, LLC, did not have to apply for a new certificate.

Gas §7. The Commission had the jurisdiction to determine whether Missouri Gas Company could reorganize into Missouri Gas Company, LLC. Missouri Gas Company is a gas corporation and public utility operating in Missouri. Section 393.250 RSMo states that the reorganization of such a corporation is subject to the Commission's supervision and control. The Commission found the proposed reorganization reasonable and not detrimental to the public interest, and therefore approved it.

ORDER APPROVING PLAN OF REORGANIZATION

Syllabus: This order approves the reorganization plan of Missouri Gas Company into a limited liability company.

Procedural History:

Missouri Gas filed its Application and Motion for Expedited Treatment in this case on July 25, 2002. Missouri Gas requests the Commission permit it to convert from a Delaware corporation to a Delaware limited liability company. Staff replied on August 27, 2002, stating it did not receive the Motion for Expedited Treatment from Missouri Gas. On September 4, 2002, Staff filed its Recommendation. Staff did not object to the Commission permitting Missouri Gas to reorganize, subject to certain conditions. Missouri Gas responded on September 10, 2002, asking the Commission to reject Staff's conditions.

On September 12, 2002, the Commission ordered the parties to attend a September 23, 2002 prehearing conference. In that same order, the Commission ordered the parties to file a proposed procedural schedule. Because the parties stated they were close to settling this case, Missouri Gas asked the Commission to suspend that requirement on September 25, 2002. On September 27, 2002, the Commission granted Missouri Gas' request, and ordered the parties to file a proposed procedural schedule by October 30, 2002.

The parties entered into a Unanimous Stipulation and Agreement on October 24, 2002. Staff filed Suggestions in Support on October 31, 2002.

The agreement between the parties stated that Staff consented to Missouri Gas Company, LLC, adopting the certificate of convenience and necessity from Missouri Gas Company. On November 18, 2002, the Commission directed Staff to comment on whether the Commission had the authority to do so, or whether Missouri Gas Company, LLC, needed to apply for a new certificate.

Staff replied on December 2, 2002. Staff stated that Delaware law permits Missouri Gas Company to reorganize into a limited liability corporation, rather than requiring it to dissolve and form a new corporation. Because Missouri Gas Company is simply reorganizing, Staff believes that the Commission should allow Missouri Gas Company, LLC, to continue to use the same certificate.

Findings of Fact:

Missouri Gas distributes and transports natural gas to Missouri customers. Missouri Gas seeks approval from the Commission to reorganize into a limited liability company. The proposed reorganization will not change the terms and conditions of the services Missouri Gas provides. The reorganization will also not affect the tax revenues of any Missouri political subdivision. The reorganization will be virtually transparent to Missouri Gas' customers. The only difference between the current structure and the proposed structure will be tax advantages for Missouri Gas.

The Commission finds that it should approve Missouri Gas' plans to reorganize, subject to the following. Missouri Gas shall file with the Commission a copy of the organization agreement and operating agreement before the name change and reorganization takes effect. Missouri Gas shall also inform the Commission of any changes to the organization agreement and operating agreement. Furthermore, Missouri Gas, LLC, shall not conduct business in Missouri until it either files new tariffs or adopts the tariffs of Missouri Gas.

In addition, Missouri Gas agrees to give Staff and the Office of the Public Counsel its tax information and tax information of its members if it files a general rate increase or if Staff or the Office of the Public Counsel files an over-earnings complaint, and if the moving party wants income tax expense as part of its cost of service. Missouri Gas further promises that once it becomes Missouri Gas, LLC, it will pass a resolution to bind itself to this promise. The Commission finds Missouri Gas' covenant reasonable, and approves of it.

Conclusions of Law:

Based on these facts, the Commission makes the following conclusions of law:

Missouri Gas is a "gas corporation" and a "public utility" as defined by Section 386.020, (18) and (42), RSMo 2000, and is thus subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 2000.

Missouri Gas seeks authority to reorganize under Section 393.250, RSMo 2000. That statute provides that the reorganization of a gas corporation is subject to Commission "supervision and control" and may not be had without authorization from the Commission.[1] The statute also empowers the Commission to set the capitalization amount of the reorganized entity.[2]

Based on its consideration of the record before it, the Commission concludes that the agreement among the parties and the proposed reorganization is reasonable and is not a detriment to the public interest. Therefore, it should be approved.

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[1] Section 393.250.1, RSMo 2000.

[2] Section 393.250, 2 and 3, RSMo 2000.

IT IS THEREFORE ORDERED:

1. That the verified application filed by Missouri Gas Company on July 25, 2002, is approved.

2. That Missouri Gas Company is authorized to reorganize and rename itself Missouri Gas Company, LLC, subject to the following conditions:

A. Missouri Gas Company shall file in this case a copy of the organization agreement and operating agreement before the name change and reorganization takes effect;

B. Missouri Gas Company shall continue to inform the Commission of any changes to the organization agreement and operating agreement;

C. After the reorganization, Missouri Gas Company, LLC, shall pass a formal and binding resolution in which it promises to allow the Staff of the Commission and the Office of the Public Counsel access to the tax information of Missouri Gas Company, LLC, and its members if Missouri Gas Company, LLC, files a general rate increase case, or the Staff of the Commission or the Office of the Public Counsel file an over-earnings complaint, and the movant wants income tax expense to be a cost of service item.

3. That Missouri Gas Company is authorized to take all necessary and lawful actions to effect the reorganization.

4. That Missouri Gas Company, LLC, may operate under the certificate of convenience and necessity the Commission granted to Missouri Gas Company.

5. That before Missouri Gas Company, LLC, does business in Missouri, either it shall file new tariffs with the Commission or adopt Missouri Gas Company's current tariffs.

6. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions, and expenditures involved. The Commission reserves the right to consider any ratemaking treatment to be given the properties, transactions, and expenditures in a later proceeding.

7. That Missouri Gas Company, LLC, shall file a notice in this case informing the Commission that the reorganization is complete and that Missouri Gas Company, LLC, has passed the resolution ordered in paragraph 2 within 30 days of their completion.

8. That this order shall become effective on December 12, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Pridgin, Regulatory Law Judge

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Initiate Residential Customer Winback Promotion.*

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Extend Business Customer Winback Promotions.

Case Nos. TT-2002-472 & TT-2002-473
Decided December 3, 2002

Telecommunications §45. The Commission held that it would not reject tariffs that offer winback promotions absent a showing that the particular tariff is harmful to competition in the local exchange market.

Telecommunications §45. The Commission indicated that it would approve two tariffs offered by an incumbent local service provider after finding that these particular tariffs would not harm competition in the local exchange market.

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* The Commission, in an order issued on December 19, 2002, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (03CV323134).

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REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

The Commission finds that two tariffs submitted by Southwestern Bell Telephone Company are not harmful to competition and comply with applicable Missouri statutes. Because the tariffs are promotions whose terms have substantially expired while the tariffs were suspended, the Commission rejects the specific tariff submissions but indicates that it will approve resubmitted tariffs with new effective dates.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

These cases began on April 3, 2002, when the Staff of the Commission filed motions asking the Commission to suspend and reject two tariffs filed by Southwestern Bell Telephone Company. The first tariff that Staff asked the Commission to reject is tariff file number 200200831. The Commission opened case number TT-2002-472 to consider Staff's motion regarding that tariff. The second tariff that Staff asked the Commission to suspend and reject is tariff number 200200828. The Commission opened case number TT-2002-473 to consider Staff's motion regarding that tariff.

Southwestern Bell filed a response defending its tariffs in both cases on April 4, 2002. However, on April 5, the Commission issued an order in both cases suspending the tariffs for thirty days beyond April 9, to May 9, to allow the Commission more time to study the tariffs and their effects. Thereafter, on April 18, the Commission further suspended both tariffs for an additional 90 days, until August 7.

The order that further suspended the tariffs also directed that a copy of the order be sent to all telecommunications companies certificated to do business in Missouri. Interested parties wishing to intervene were allowed until May 9, 2002, to file an application to intervene. MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, and MCI WorldCom Communications, Inc. - collectively referred to as the WorldCom companies - filed a timely application to intervene in both cases. AT&T Communications of the Southwest, Inc., also filed a timely application to intervene in both cases. NuVox Communications of Missouri, Inc. timely filed an application to intervene only in case number TT-2002-473. Each of the applications to intervene was granted in separate orders issued in the two cases on May 10.

At a prehearing conference held in both cases on May 22, 2002, all parties indicated that it would be appropriate to consolidate these cases. Thereafter, on May 22, the Commission issued an order consolidating these cases, designating TT-2002-472 as the lead case.

On June 7, 2002, the Commission issued an order establishing a procedural schedule leading to a hearing on September 3 and 24. Because the hearing would not begin until September 3, the Commission, on June 13, further suspended the tariffs from August 7, until November 7.

Southwestern Bell filed a motion on June 13, 2002, indicating that two of its witness would not be available on September 3, and asking that the procedural schedule be modified to provide for a hearing on September 24 and 25. The Commission granted that motion on June 17.

The parties submitted prefiled direct, rebuttal and surrebuttal testimony and the consolidated cases proceeded to hearing on September 24, 25 and 26, 2002. Southwestern Bell, Staff, the Office of the Public Counsel, the WorldCom companies, NuVox, and AT&T filed initial briefs on October 21. Southwestern Bell, Staff, the WorldCom companies, and AT&T filed reply briefs on October 28.

On November 5, the Commission issued an order that further suspended Southwestern Bell's tariffs until December 7, 2002.

The Tariffs

The Commission has suspended two tariffs submitted by Southwestern Bell. The first suspended tariff is tariff file number 200200831. That tariff would offer a promotion to residential customers who have disconnected their access line with Southwestern Bell for the purpose of establishing service with a competing local exchange carrier. If such a customer agreed to reestablish local service with Southwestern Bell, the tariff would waive the nonrecurring connection charges that would otherwise be imposed on a customer establishing service with Southwestern Bell. That tariff was to be effective on April 9, 2002. The promotion was to be available from April 9, 2002 to April 8, 2003.

The second suspended tariff is tariff number 200200828. That tariff would extend a promotion offered to business customers who have disconnected their access line with Southwestern Bell for the purpose of establishing service with a competing local exchange carrier, or who have previously received service from a competing local exchange carrier. If such a business customer agreed to establish or reestablish local service with Southwestern Bell, the tariff would waive the nonrecurring connection charges that would otherwise be imposed on a customer establishing service with Southwestern Bell. That tariff was to be effective on April 9, 2002. The promotion was to be available from April 9, 2002 to April 8, 2003.

The tariffs at issue are sometimes referred to as "winback" promotions, as they are designed to win back former customers of Southwestern Bell who are now customers of a competing company by encouraging them to return to Southwestern Bell for their local telephone service. The suspended business customer tariff is also a "win" tariff in that it is designed to win business customers who have not previously received local service from Southwestern Bell away from competing companies.

The Parties and Competition

Southwestern Bell is an incumbent local exchange carrier (ILEC). That means that before the passage of the Telecommunications Act of 1996, Southwestern Bell was a regulated monopoly provider of local exchange service within its exchanges. In other words, before the advent of competition, all local service customers within Southwestern Bell's exchanges were customers of Southwestern Bell.

With the coming of competition, other companies have entered into the local service market in competition with Southwestern Bell and the other ILECs. Those competing companies are known as competitive local exchange carriers, generally referred to by the acronym, CLEC. Several CLECs were allowed to intervene in this case and have opposed Southwestern Bell's tariff.

Since competition began in the local market, the CLECs have made inroads into Southwestern Bell's former monopoly. Southwestern Bell's witness testified, without contradiction, that as of April 2002, the CLECs controlled a minimum of twelve percent of the basic local market.[1] The converse of that fact is, of course, that Southwestern Bell continues to control a maximum of 88 percent of the basic local market.

In its report and order in Case Number TT-2002-108, the Commission rejected two tariffs that had been submitted by Southwestern Bell. In rejecting the tariffs as unjust and unreasonable, the Commission found that the tariffs, which included both winback and term commitment provisions, would harm competition in Missouri's emerging basic local telecommunications market.[2] The Commission indicated that until the CLECs are in a strong enough position to effectively compete with Southwestern Bell, the use of save and winback provisions by Southwestern Bell is anticompetitive.

The CLECs, as well as the Commission's Staff and the Office of the Public Counsel, argue that the two winback tariffs currently before the Commission are

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[1] Hughes Direct, Exhibit 4, Page 7, Lines 14-15.

[2] Report and Order, Case No. TT-2002-108 (December 18, 2001).

also anticompetitive and should, for that reason, be rejected. However, the effect that the tariffs at issue in this case will have on competition differs from the effect of the tariffs that the Commission rejected when it last looked at this issue.

The Effect of Southwestern Bell's Tariffs on Competition

Southwestern Bell's suspended residential winback tariff would waive otherwise applicable non-recurring charges when a customer returns to Southwestern Bell for basic local service after having received service from a CLEC. It would also allow the returning customer to sign up for one of Southwestern Bell's vertical services packages without incurring any non-recurring charge for those services.[3] The suspended business winback tariff would waive non-recurring charges for customers who are establishing new service with Southwestern Bell, or who are returning to service with Southwestern Bell, after having previously been served by a CLEC.[4]

The initial effect of Southwestern Bell's promotion is, of course, a benefit for consumers who wish to once again become customers of Southwestern Bell. Those consumers are able to make that change without having to pay the non-recurring costs associated with that move. Thus, consumers save money and are happy. However, as the Commission has indicated in prior decisions, the consumers' short-term interest in saving money must be balanced against the their long-term interest in preserving a competitive basic local telecommunications market. Winback tariffs are targeted directly at the customers of the CLECs and are potentially damaging to those competing companies. Consumers will never gain the long-term benefits of competition if most of the competitors are eliminated in the short term. Therefore, the Commission must carefully consider the likely effect of these winback tariffs.

Unlike the winback tariffs that the Commission previously rejected, these tariffs are not a part of a term agreement. That is an important distinction because in rejecting Southwestern Bell's tariffs in TT-2002-108, the Commission expressed great concern that the combination of term discounts with winback provisions would permit Southwestern Bell to take back the CLEC's customers and then lock them up in a long-term contract, precluding any attempt by the CLEC to reclaim those customers through further competition. Because these tariffs do not include a term agreement, the CLECs are free to compete to take back their lost customers.

Furthermore, these tariffs are limited enough that they cannot be said to constitute any sort of predatory pricing, or cutthroat competition. These tariffs simply waive the non-recurring costs associated with reestablishing service with Southwestern Bell. For most customers the waived charges amount to approximately $35.00 for a residential service connection, and $52.00 for a business service connection.[5] It is unlikely that any CLEC customer will choose to switch to

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[3] Hughes Direct, Exhibit 4, Pages 4-5, Lines 21-23, 1-4. A copy of the tariff is attached to Hughes' Direct as Schedule 6.

[4] Regan Direct, Exhibit 2, Pages 3-4, Lines 18-23, 1-5. A copy of the tariff is attached to Regan's Direct as Schedule 3.

[5] Transcript, Page 107, Lines 1-14.

Southwestern Bell simply because they will not incur a cost to do so. Therefore, the CLECs are able to compete to keep their customers by offering lower rates or better service. That fosters healthy competition. Yet, if through that healthy competition, Southwestern Bell is able to offer a customer lower rates or better service, a customer that chooses to return to Southwestern Bell does not expect to pay a charge to be reconnected.[6] Imposition of such charges might actually discourage customers from switching service providers and thereby limit competition. Therefore, by waiving those non-recurring charges, Southwestern Bell is promoting, rather than damaging competition.

While it will not back away from its position that it must be willing to act to protect competition in Missouri's basic local telecommunications market, the Commission finds, as a matter of fact, that the two specific tariffs currently before it will not harm the necessary competitive market.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Southwestern Bell is a "telecommunications company" as that term is defined in Section 386.020(51), RSMo 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Southwestern Bell is an "incumbent local exchange telecommunications company" as that term is defined in Section 386.020(22), RSMo 2000.

NuVox Communications of Missouri, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, and AT&T Communications of the Southwest, Inc., are "competitive telecommunications companies" as that term is defined in Section 386.020(9), RSMo 2000.

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company. That same section authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days, plus an additional six months if the hearing regarding such suspension cannot be concluded within 120 days.

In 1996, the Missouri General Assembly passed legislation aimed at promoting competition in Missouri's telecommunications industry. Section 392.185, RSMo 2000, which establishes the purpose of that legislation, states that:

> The provisions of this chapter shall be construed to: … (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri; … (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest."

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[6] Hughes Surrebuttal, Exhibit 5, Page 4, Lines 14-16.

Therefore, the Public Service Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition.

Section 392.200.2, RSMo 2000, provides in pertinent part as follows:

> No telecommunications company shall directly or indirectly or by a special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. *Promotional programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission.* … (emphasis added)

This statute means that the Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition.

Section 392.200.3, RSMo 2000, provides as follows:

> No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

This statute has been interpreted to "forbid discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions."[7] Rate differences are permitted only if there is any "reasonable and fair difference in condition which equitably and logically justifies a different rate."[8]

Staff, Public Counsel, and the CLECs argue that the two Southwestern Bell tariffs before the Commission violate the requirements of these statutes because they improperly discriminate between similarly situated customers. In other words, if Southwestern Bell waives non-recurring fees for customers returning from

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[7] *State ex rel. DePaul Hospital v. PSC*, 464 S.W.2d 737, 738 (Mo. App. 1970).
[8] *Id*. at 740.

service with a CLEC, it must also waive those fees for all new customers. As they interpret the statute, to do otherwise would be discriminatory and would be forbidden.

This interpretation of the statute is too narrow. Section 392.200.3, by its clear terms, does not bar the offer of any and all preference or advantage. Instead it forbids an "undue or unreasonable preference or advantage," or "unreasonable prejudice or disadvantage." This is an important distinction because all promotional offers, by their very nature, offer a preference to certain customers. Those customers that are eligible for and accept a promotional offer get a better deal than those that do not. That is what a promotional offer does.

Missouri statutes recognize that promotional offers are acceptable, if not essential, in a functioning competitive market. Section 392.200.2, RSMo 2000, indicates that "promotional programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission." Thus, promotional offers are appropriate so long as they do not offer an undue or unreasonable preference or advantage. The question then becomes, do the promotional offers created by these two Southwestern Bell tariffs give an undue or unreasonable preference or advantage, or create an unreasonable prejudice or disadvantage, to any customer?

The preferences offered by these tariffs are not undue or unreasonable. They simply waive certain fees as a reward and incentive for those customers who choose to return to service from Southwestern Bell after trying a competitor. Certainly, such winback offers are very common and well accepted in the competitive interexchange, long-distance, market.[9] Section 392.200.2, RSMo 2000, applies to interexchange carriers as much as it does to basic local service providers, but none of the parties suggest that the statute should absolutely bar such promotional offers for long-distance service.

Similarly, the Federal Communications Commission has permitted telecommunications carriers to make winback offers despite the existence of a federal statute that prohibits undue or unreasonable preferences in terms very similar to Missouri's statute.[10] In its order dealing with winback offers, the FCC determined that "winback campaigns … facilitate and foster competition among carriers."[11] It also determined that "winback facilitates direct competition on price and other terms, for example, by encouraging carriers to 'out bid' each other for a customer's business."[12] The FCC further indicated that "such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this

[9] Aron, Exhibit 1, Pages 12-13, Lines 16-25, 1-3.

[10] 47 U.S.C. 202(a) "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

[11] *Order on Reconsideration and Petitions for Forbearance*, FCC 99-223, Paragraph 66, August 16, 1999. A copy of the order was admitted into the record as Exhibit 27.

[12] *Id*. at Paragraph 68.

practice."[13] Finally, the FCC stated that "because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory."[14]

The last quoted finding of the FCC is instructive for this Commission. The FCC would bar the use of winback offers by an ILEC only if it could be shown that the winback offer was "predatory." That is similar to the Commission's previously stated resolve to forbid promotional offers that would be harmful to competition.[15] Absent a showing that a particular winback promotional offer is harmful to competition, the Commission need not, and will not, bar such offers.

The Commission has previously found, as a matter of fact, that the tariffs submitted by Southwestern Bell are not harmful to competition. Therefore, the tariffs do not violate the provisions of Missouri's statutes.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1. Should the Commission approve SWBT's proposed revision to Local Exchange Tariff, P.S.C. Mo-24, to offer a waiver of Service and Equipment Charges to residential customers who have disconnected their access lines with SWBT for the purpose of establishing service with another local exchange carrier ("LEC") within the SWBT service area and who now wish to return to service with SWBT?

The tariff proposed by Southwestern Bell is not harmful to competition and complies with the applicable Missouri statutes. The Commission is willing to approve the proposed tariff. However, the proposed tariff indicates that the offer would be in effect from April 9, 2002 through April 8, 2003. Most of that period has expired while the tariff has been suspended. Therefore, the Commission will reject this particular tariff. But if Southwestern Bell wishes to resubmit the tariff with revised effective dates, the Commission will approve the resubmitted tariff.

2. Should the Commission approve SWBT's proposed revision to Local Exchange Tariff, P.S.C. Mo-24, Sections 2 and 3 of the Integrated Services Tariff P.S.C. Mo-41 and Section 38 of the General Exchange Tariff P.S.C. Mo-35 to offer a waiver of Service and Equipment Charges to business customers who have disconnected their access line with SWBT for the purpose of establishing service with another local exchange carrier ("LEC") within the SWBT service area and who now wish to return to service with SWBT?

The tariff proposed by Southwestern Bell is not harmful to competition and complies with the applicable Missouri statutes. The Commission is willing to

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[13] *Id*. at Paragraph 69.

[14] *Id*. at Paragraph 70.

[15] The Commission does not wish to imply that a winback offer can be harmful to competition only if it is predatory. As was made clear in Dr. Aron's testimony for Southwestern Bell, the terms "predatory" and "anticompetitive" have defined meanings within antitrust law that do not necessarily match the meaning that the Commission intends to place on those terms.

approve the proposed tariff. However, the proposed tariff indicates that the offer would be in effect from April 9, 2002 through April 8, 2003. Most of that period has expired while the tariff has been suspended. Therefore, the Commission will reject this particular tariff. But if Southwestern Bell wishes to resubmit the tariff with revised effective dates, the Commission will approve the resubmitted tariff.

IT IS THEREFORE ORDERED:

1. That the tariff sheet issued on March 29, 2002, by Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company, and assigned Tariff No. 200200831, previously suspended until December 7, 2002, is rejected. The tariff sheet rejected is:

P.S.C. Mo. - No 24
3rd Revised Sheet 2, Replacing 2nd Revised Sheet 2

2. That the tariff sheets issued on March 29, 2002, by Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company, and assigned Tariff No. 200200828, previously suspended until December 7, 2002, are rejected. The tariff sheets rejected are:

P.S.C. Mo. - No 24
3rd Revised Sheet 1.03, Replacing 2nd Revised Sheet 1.03

P.S.C. Mo. - No. 41
Section 2
1st Revised Sheet 6.03, Replacing Original Sheet 6.03
Section 3
1st Revised Sheet 14.02, Replacing Original Sheet 14.02

P.S.C. Mo. - No. 35
Section 38
1st Revised Sheet 15, Replacing Original Sheet 15

3. That this Report and Order shall become effective on December 7, 2002.

Simmons, Ch., and Forbis, CC., concur;
Murray, C., concurs, with concurring opinion attached;
Lumpe, C., dissents, with dissenting opinion attached;
Gaw, C., dissents, with dissenting opinion to follow;
certify compliance with the provisions of Section 536.080, RSMo 2000.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

I write separately to indicate that, while I agree with the majority that the winback tariffs at issue comply with all applicable statutes, I continue to maintain that combining term discounts with winback provisions does not automatically render tariffs anti-competitive or unlawful or otherwise against the public interest.

DISSENTING OPINION OF COMMISSIONER SHEILA LUMPE

I respectfully disagree with the majority's decision. The Commission today approves two tariffs filed by Southwestern Bell Telephone Company that initiate or extend customer winback promotions. These tariffs are directly targeted at those local service customers who have chosen to receive service from one of Southwest-

ern Bell's competitors. By offering special discounts to this limited group of consumers, Southwestern Bell hopes to "win" back those consumers without offering the type of price discounts that would benefit all consumers and herald the true arrival of competition in the basic local market.

Indeed, by offering these limited, targeted discounts, Southwestern Bell may harm some consumers by inappropriately shifting its costs to customers who are less likely to be served by a CLEC. When Southwestern Bell waives the collection of reconnection charges, it is not paid for the cost of reconnecting that customer. In a fully competitive market, the force of the market would prevent a company from recovering those costs from its other customers. There would always be other companies willing to offer a lower price to prevent such cost shifting. However, many of Southwestern Bell's customers, particularly its residential customers, do not currently have a reasonable opportunity to obtain service from a CLEC. As several witnesses testified, the CLECs do not market their services to ordinary residential customers who are not interested in paying for a large bundle of extra services. Therefore, there is nothing to stop Southwestern Bell from shifting costs to those customers who must rely on Southwestern Bell for basic local service.

I am also concerned that by offering targeted discounts, Southwestern Bell may be striking an unfair blow against its competitors, and against the continued viability of competition in the basic local market. Only twelve percent of the market is currently served by the CLECs and that twelve percent is spread among many competitors, none of which has an individual market share sufficient to reasonably challenge Southwestern Bells market supremacy. That is hardly robust competition.

Certainly, other states have also expressed concern about the impact of winback promotions on the continued existence of competition in the local market. Dr. Aron's testimony for Southwestern Bell indicates that investigations into this issue are ongoing in Texas, Florida, and Alabama.

For the foregoing reasons, Southwestern Bell's tariffs offer an unreasonable and undue preference to CLEC customers that Southwestern Bell hopes to grab from its competitors. The tariffs thereby violate the proscriptions of Sections 392.200.2 & .3, RSMo 2000. Since these tariffs do not comply with the requirements of Missouri law, I would reject the tariffs.

I respectfully dissent.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I must respectfully dissent from the majority in this case. In a previous case I expressed uncertainty as to whether a winback tariff was on its own harmful to competition. While I still believe that efforts to bring customers back to a company may not be harmful to competition in some cases, I am concerned that the majority renders the statute against discriminating among customers virtually meaningless. §392.200 states in pertinent part:

2. No telecommunications company shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any

service rendered or to be rendered with respect to telecommunications in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. Promotions programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission. Neither this subsection nor subsection 3 of this section shall be construed to prohibit an economy rate telephone service offering. This section and section 392.220 to the contrary notwithstanding, the commission is authorized to approve tariffs filed by local exchange telecommunications companies which elect to provide reduced charges for residential telecommunications connection services pursuant to the lifeline connection assistance plan as promulgated by the federal communications commission. Eligible subscribers for such connection services shall be those as defined by participating local exchange telecommunications company tariffs.

3. No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

4. (1) No telecommunications company may define a telecommunications service as a different telecommunications service based on the geographic area or other market segmentation within which such telecommunications service is offered or provided, unless the telecommunications company makes application and files a tariff or tariffs which propose relief from this subsection. Any such tariff shall be subject to the provisions of sections 392.220 and 392.230 and in any hearing thereon the burden shall be on the telecommunications company to show, by clear and convincing evidence, that the definition of such service based on the geographic area or other market within which such service is offered is reasonably necessary to promote the public interest and the purposes and policies of this chapter. …

The statute sends a clear message to the PSC. Discrimination should not be allowed unless it falls within an exception. This is a continuation of the theme, expressed in other parts of the act, that the benefits of competition should be available to everyone.

Given this, it should be the burden of the company offering a discriminatory tariff to show that its tariff meets an exception to the ban of such tariffs under §392.200. In this case the majority opinion glosses over the question of whether the tariffs are promotional programs,[1] and concludes that the burden is on complaining parties to show that the program is harmful to competition. The opinion then proceeds to

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[1] There is at least a question of whether a program of one year in length qualifies as "promotional", Case No. TT-97-473.

discuss §392.200.3 RSMo. 2000. The opinion suggests that any promotional program is by its nature discriminatory, but that a promotional program under subsection 2 should be approved "so long as the offer is otherwise consistent with the provisions of this chapter and approved by the Commission." The test, concludes the majority, is whether SWBT tariffs give an unreasonable preference or advantage. The opinion then simply concludes that the "preferences" are not undue or unreasonable since they are similar to those used in the long distance market. The opinion completely ignores the difference in the development of the long distance market to the local market. It conveniently "forgets" previous findings of this Commission that the local markets while "open" to competition are not yet competitive in most areas of the state (unlike the long distance market) and need more nurturing and oversight to fully develop. This is not an apple to apples comparison. In short, the majority grinds up apples and tells us it has made orange juice.

There is no question that the proposed tariffs are discriminatory. The benefits of the tariff are available only to a particular class. SWBT's testimony reduced the statute against discrimination to the ridiculous:

Commissioner Gaw: Let me ask you this question. Do you think it would be appropriate for a telephone company to offer a particular promotional that would only apply to residents - residential users who lived in houses painted red?

Mr. Hughes: I think that would depend - and I'm trying to come up with an example for you while I'm answering this. I think that would depend, Commissioner, on whether or not there was one house painted red in the state or if we thought there was one on every block or every city or in every exchange or whatever, but - and the reason I say that is if you - if someone - here's an example of one that I don't think would be acceptable under the statute, okay, and that is in your scenario with a house that's painted red.

If there is a promotion that is defined so what I'll call narrowly that there are only a small, and when I say small, I mean a handful of customers or maybe only one customer, I think that could be something that the Commission should look at. But if it's generally available, then I'm not sure.

But, Commissioner, and I can't recall the exact citation in the statute, but there are some provisions to price below, as an example, below an exchange level as well in the statute.

So I think the statute is very broad in the guidance that it gives as far as interpretation on allowing the marketplace to work in a competitive environment. And you may be familiar - I can't right at my fingertips point to that cite in the statute, but you may be familiar with it.[2]

Continuing later in the testimony of Counsel:

Mr. Curtis: And I was surprised to hear you say that classes can be created on virtually any basis and discounts awarded under that statute. Is that generally what you were suggesting?

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[2] See Volume 4 of Transcript, pages 392 and 393.

Mr. Hughes: I believe the statute is very broad, yes.

Mr. Curtis: And you maybe drew the line at customers who had red houses because there might be just a very small number of those red houses?

Mr. Hughes: That's what I stated.

Mr. Curtis: But you - if we could posit that within a - within Southwestern Bell's exchanges brick houses constitute 35 percent of the homes, that would be a large enough group that clearly a discount could be given to all Southwestern Bell customers who had brick houses, is that correct?

Mr. Hughes: That's correct.

Mr. Curtis: Okay. Let me ask this further. Could you also say that households in which you can produce one family member who has red hair would be entitled to a discount under your theory?

Mr. Hughes: I guess, theoretically only, I can do that, but - yes.

Mr. Curtis: You could do that?

Mr. Hughes: I think you could.[3]

By agreeing with SWBT (under SWBT's interpretation the prohibition against discrimination in telecommunications tariffs is meaningless), this Commission pronounces that Missouri law against discrimination among telecommunications customers is a mirage.

Analysis should first be made to determine whether the tariffs were truly "promotions". Although the parties did not raise this issue, I am concerned that the length of the tariffs might be too long to qualify as a promotion. If the tariffs are found to be promotions, then the company should show to the Commission that the discrimination is consistent with the purposes of the telecommunications act, including that it meets the purposes of Chapter 392 found in §392.185. No such analysis of the discrimination is made by the majority.

One company dominates the marketplace in Missouri. SWBT has 88% of the local customer business in Missouri while the remainder divides 12% among them. The exact percentages possessed by each CLEC are not yet disclosed. In this environment, by targeting CLEC customers who have left Bell, Bell is attacking a particularly vulnerable group of "niche competitors" rather than participating in healthy robust competition. If this marketplace were truly competitive, all carriers would be more likely to offer promotions open to everyone. Wal-Mart and Sears don't make a habit of excluding customers from their sales promotions. The availability of promotions to all customers is the kind of benefit envisioned by the 1996 Act.

This Commission has an obligation to promote the growth of competition in this state until a different direction is provided by the Legislature. It is unclear today that the grand experiment of 1996 will succeed. Recent financial failings of major telecommunication companies and continued dominance of local market shares by incumbents certainly do not give confidence. However, until that different direction is given, the Commission must nurture the development of competition and ensure that all receive its benefits. That means that a discriminatory tariff must be found not to create undue or unreasonable advantage or preference. A

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[3] See Volume 4 of Transcript, pages 405 and 406.

promotion that is inconsistent with the purpose and intent of the Act, should not be allowed. In this case the waiver of the reconnection fee is not much of a concern and in fact, approval after proper and thorough analysis might be appropriate. But I must dissent from a broad order that gives no analysis as to whether these tariffs are healthy for the local telecommunications markets, places no burden on the company to demonstrate the same, and provides little protection for consumers from discriminatory calling plans in a fragile and underdeveloped state of competition. Our policies should encourage pricing plans that offer reduced rates for everyone. That is the spirit of competition promoted in the Telecommunications Act, but that is not the spirit of the majority opinion.

In the Matter of the Tariff Filing of Sprint Missouri, Inc., d/b/a Sprint to Modify Rates in Accordance with Sprint's Price Cap Regulation Pursuant to Section 392.245, RSMo 2000.*

Case No. IT-2003-0166
Decided December 10, 2002

Telecommunications §14. The Commission approved the company's proposed tariff revising the company's General Exchange tariff, finding that the tariff modifies rates in accordance with the price cap statute, Section 392.245, RSMo 2000. The proposed tariff adjusts the company's basic rates by the change in the CPI-TS as required by Section 392.245.4; updates its maximum allowable prices for non-basic services and adjusts certain rates as allowed by Section 392.245.11; and adjusts certain switched access rates and rebalances local rates as in accordance with the provisions of Section 392.245.9.

The Commission rejected the argument of the Office of the Public Counsel that the company's rate rebalancing was not supported by appropriate cost studies.

Rates §110. The Commission approved the company's proposed tariff revising the company's General Exchange tariff, finding that the tariff modifies rates in accordance with the price cap statute, Section 392.245, RSMo 2000. The proposed tariff adjusts the company's basic rates by the change in the CPI-TS as required by Section 392.245.4; updates its maximum allowable prices for non-basic services and adjusts certain rates as allowed by Section 392.245.11; and adjusts certain switched access rates and rebalances local rates as in accordance with the provisions of Section 392.245.9.

The Commission rejected the argument of the Office of the Public Counsel that the company's rate rebalancing was not supported by appropriate cost studies.

ORDER REGARDING TARIFF

On October 25, 2002, Sprint Missouri, Inc., d/b/a Sprint, filed a proposed tariff revising the company's General Exchange tariff. At the same time, Sprint filed

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* The Commission, in an order issued on January 23, 2002, denied applications for rehearing. This case was appealed to Cole County Circuit Court (03CV323400). Please refer to Case Nos. IT-2003-0167, IT-2003-0168, IT-2003-0169 and IT-2003-0170 for other orders.

revisions to the following tariffs: Message Telecommunications Service (Case No. IT-2003-0167); Private Line Service (Case No. IT-2003-0168); and WATS (Case No. IT-2003-0169); and Access Service (Case No. IT-2003-0170). The proposed tariffs bear an effective date of December 11, 2002.

On November 5, 2002, the Office of the Public Counsel filed a motion requesting that the Commission suspend the tariff and schedule a hearing in this matter. Public Counsel argues that a hearing is necessary to determine whether or not the proposed maximum allowable prices of non-basic services and adjustments made to rates comply with Section 392.245.11, RSMo[1] and the Commission's October 17, 2002 decision in *In the Matter of the Tariff Filing of Sprint Missouri, Inc. d/b/a Sprint to Increase the Residential and Business Monthly Rate for the Metropolitan Calling Area (MCA) Plan,* Case No. TT-2002-447. Public Counsel also states that suspension and a hearing is necessary to review the proposed adjustment of switched access rates and rebalancing of local rates under Section 392.245.9, RSMo. Public Counsel alleges that the adjustments and rebalancing are not supported by competent and substantial evidence of a properly constructed cost study and were not conducted pursuant to any investigation by the Missouri Public Service Commission as required by Section 392.245.

On November 8, 2002, Sprint filed its response to Public Counsel's motion to suspend. Sprint claims that Public Counsel's motion is without merit and should be denied. Sprint states that it has satisfied all statutory obligations related to its tariff change requests. Sprint argues that as a Price Cap company, Sprint's tariff modifies rates in accordance with the Price Cap statute, Section 392.245, RSMo. Sprint indicates that its filing proposes to adjust its basic rates by the change in the CPI-TS as required by 392.245.4; updates its maximum allowable prices for non-basic services and adjusts certain rates as allowed by 392.245.11; and adjusts certain switched access rates and rebalances local rates in accordance with the provisions of Section 392.245.9.

Sprint notes that Public Counsel claims that the Company's rate rebalancing is not supported by appropriate cost studies and that Section 392.245.9 requires the PSC to conduct an investigation. Sprint points out that Public Counsel's argument is the same one that it made last year in Sprint's 2001 annual price cap case, TR-2001-251, and that the Commission rejected the argument at that time. Sprint states that in that case, the Commission ruled that Sprint meets or exceeds the simple mathematical formula contained in the statute and that ample supporting cost material was provided and reviewed. The Cole County Circuit Court affirmed the Commission's order in Case No. 02CV323112.

Sprint also notes that Public Counsel requests an evidentiary hearing to examine whether Sprint's proposed maximum allowable prices for non-basic services are compliant with statute and prior Commission orders. Sprint argues that a calculator is all that is needed to make this determination and that evidentiary hearings would be an unnecessary and unwarranted delay that would needlessly expend Commission and company resources. Sprint also states that the Commission's order in the MCA Plan case, Case No. TT-2002-447, has no effect

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[1] Although Public Counsel initially cites Section 342.245, it appears that Public Counsel is referring to Section 392.245.

on this tariff filings. Sprint indicates that the issue in Case No. TT-2002-447 was whether statutes allow price regulated companies to "bank" increases in maximum allowable rates from one year to the next or if companies have to "use-it-or-lose it" in regards to the annual eight percent increase. Sprint notes that the Commission ruled that "the statute provides a 'use it or lost it' price cap mechanism…." Sprint states that its current tariff revisions do not include any increase that exceeds eight percent, and therefore, the "banking" argument is not relevant. Sprint also indicates that its tariff filings do not propose adjustments to the actual rate for MCA service.

Staff filed a response to the motion to suspend on November 14, 2002. Like Sprint, Staff noted that in Case No. TR-2001-251, the Commission found that Sprint meets or exceeds the simply mathematical formula found in the statute and that ample supporting cost material was provided and reviewed. Staff notes that the Commission's order in Case No. TR-2001-251 has been affirmed by the Cole County Circuit Court, and although on appeal to the Western District Court of Appeals, the Commission's order has not been stayed and remains in force. Staff states that the supporting cost studies were before the Commission in TR-2001-251, and that the Commission made its initial determination under Section 392.245.9 at that time and need not revisit it in this case. Staff requested that it be allowed additional time to complete its review of the proposed tariff and file its recommendation.

On November 26, 2002, Staff filed its Memorandum and Recommendation. Staff recommends that the Commission approve the proposed tariffs in Case Nos. IT-2003-0166, IT-2003-0167, IT-2003-0168, IT-2003-0169, and IT-2003-0170. Staff states that it has reviewed the rebalancing adjustments and finds them consistent with Sections 392.245.8 and 392.245.9, RSMo. Staff also notes that it has reviewed the CPI-TS adjustments and finds them consistent with Section 392.245.4, RSMo. Staff further explains that Sprint proposes to increase many of its maximum allowable prices for non-basic services by eight percent or less; however, the company is proposing to only increase selected, non-basic rates by the eight percent or less. Staff notes that Sprint has increased the maximum allowable price for certain Metropolitan Calling Area (MCA) services, but has not increased any MCA rates. Staff again indicates that it has reviewed the adjustments and has found that they are consistent with Section 392.245.11.

On December 5, 2002, the Commission issued an order directing Staff and Sprint to file additional pleadings clarifying the changes being made to MCA service in Sprint's proposed tariff. On December 9, 2002, Sprint filed a pleading indicating that it was withdrawing Section 50, the portion of the tariff that proposes to adjust the maximum allowable prices for MCA services. Staff filed its response to the Commission's Order Directing Filing on December 9, 2002.

On December 10, 2002, Public Counsel filed a supplemental pleading countering the arguments of Sprint and Staff and more fully developing Public Counsel's position as to why it believes that the tariffs should be suspended. Also on December 10, 2002, Sprint filed a Motion to Strike Office of the Public Counsel's Response To Staff and Sprint's Supplemental Pleadings. Sprint notes that Public Counsel moved to suspend Sprint's tariffs on November 5, 2002. Sprint filed its

response to the motion to suspend on November 8, 2002.[2] Public Counsel did not file a reply within the ten-day period found in Commission Rule 4 CSR 240-2.080.16. Sprint notes that on December 5, 2002, the Commission issued an order directing the parties to respond to a specific question regarding the MCA Plan. Sprint indicates that Public Counsel's December 10th pleading goes far beyond the scope of the Commission's Order Directing Filing, and instead addresses topics such as an alleged misapplication of the CPI increase, re-argument of the application of the rebalancing formula, re-argument of Public Counsel's request for hearing of Sprint's 2001 Price Cap filing, re-argument of costing and application of the Price-Cap formula for both the 2001 and 2002 Price Cap filings, and re-argument of Public Counsel's request for public hearings. Sprint requests that the Commission strike Public Counsel's pleading in that it goes beyond the scope of the Commission's Order Directing Filing and is a belated attempt to file a reply pleading after the deadline for doing so.

The Commission finds that Public Counsel's December 10 filing goes far beyond the scope of the Commission's December 5, 2002, order and is an untimely response to the November 5, 14, and 26 filings of Sprint and Staff. Therefore, the Commission will grant Sprint's Motion to Strike.

The Commission has reviewed the proposed tariff, tariff file number JI-2003-0998, and the parties' filings. The Commission finds that the proposed adjustments comply with Section 392.245. The Commission also notes that Case No. TT-2002-447 addressed the issue of "banking" and is not applicable to this case. Furthermore, the Commission determines that, as discussed in Case No. TT-2001-251, Sprint's cost studies meet the statutory requirements and the company's calculations for non-basic services pass the statutory mathematical test. The Commission finds that the proposed tariff should be approved; however, the Commission notes that the tariffs bear an effective date of December 11, 2002, just one day following the issuance of this order. Therefore, the Commission will briefly suspend the tariffs in order to allow a longer period between the issuance of this order and the effective date of the tariffs.

IT IS THEREFORE ORDERED:

1. That effective December 11, 2002, the proposed tariff sheets (Tariff No. JI-2003-0998), filed by Sprint Missouri, Inc., d/b/a Sprint, on October 25, 2002, and amended on November 6, 2002, November 21, 2002, December 6, 2002, and December 9, 2002, are suspended for a period of seven days, until December 18, 2002.

2. That the proposed tariff sheets (Tariff No. JI-2003-0998), filed by Sprint Missouri, Inc., d/b/a Sprint, on October 25, 2002, and amended on November 21, 2002, are approved to become effective on December 18, 2002.

3. That the Motion to Strike Office of the Public Counsel's Response to Staff and Sprint's Supplemental Pleadings, filed on December 10, 2002, by Sprint Missouri, Inc. d/b/a Sprint, is granted.

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[2] Although the dates of Staff's pleadings are not noted in Sprint's Motion to Strike, Staff filed a response to the motion to suspend on November 14, 2002. Staff then filed its Recommendation and Memorandum on November 26, 2002.

4. That except for Ordered Paragraph No. 1, this order shall become effective on December 18, 2002.

Murray, Lumpe, and Forbis, CC., concur.
Simmons, Ch., and Gaw, C., dissent.

Ruth, Senior Regulatory Law Judge

The Staff of the Missouri Public Service Commission, Complainant, v. Osage Water Company, Respondent.

Case No. WC-2003-0134
Decided December 10, 2002

Water §10. Section 393.145.1, RSMo 2000 provides that "if the commission shall determine that any sewer or water corporation having one thousand or fewer customers is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners …the commission may 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."

Water §10. The Commission directed its Staff to seek appointment of a receiver after it found that a small water and sewer company had been effectively abandoned by its owners, where a lack of available capital, poor management practices, and conflict between the owners, made it unlikely that the company could continue to provide service to its customers.

Water §10. The Commission directed its Staff to seek appointment of a receiver after it found that a small water and sewer company was unable or unwilling to provide safe and adequate service because of its desperate financial situation.

Evidence, Practice and Procedure §24. The Commission permitted the part owner of a small water and sewer company to appear both as a witness and as attorney for the company where the need to expedite the hearing did not allow enough time to permit the company to obtain alternative legal counsel and where it would be manifestly unjust to deny the company legal representation.

APPEARANCES

Gregory D. Williams, Attorney at Law, Highway 5 at 5-33, Post Office Box 431, Sunrise Beach, Missouri 65079, for Osage Water Company.

Thomas E. Loraine, Attorney at Law, Loraine and Associates, 4075 Highway 54, Suite 300, Osage Beach, Missouri 65065, for Hancock Construction Company.

M. Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Keith R. Krueger, Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

The Commission determines that Osage Water Company has been effectively abandoned by its owners and that it is unable or unwilling to provide safe and adequate service to its customers. The Commission directs its Staff to file a petition in circuit court seeking an order attaching the assets of Osage Water and appointing a receiver to take control and responsibility of the company. The Commission also directs its Staff to seek a determination from the circuit court that Osage Water Company should not be returned to its owners but rather should be liquidated by the receiver, acting in the best interest of the company's customers.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

On October 7, 2002, the Staff of the Commission filed a complaint against Osage Water Company. Staff alleged that Osage Water is unable or unwilling to provide safe and adequate service. Staff further alleged that Osage Water has been abandoned by its owners. Staff's complaint asks the Commission to direct Staff to file a petition in circuit court to attach the assets of Osage Water and place Osage Water under the control and responsibility of a receiver. Staff further requests that the Commission direct Staff to seek a finding from the circuit court that control and responsibility for Osage Water should not be returned to the owners of Osage Water and that instead the assets of the company should be liquidated.

Along with its complaint, Staff filed a motion requesting that the Commission expedite its consideration of the complaint. As the basis for this motion, Staff alleged that there was an imminent danger that the customers of Osage Water would lose their water or sewer service. Staff requested that Osage Water be required to answer the complaint on or before October 18, and that the case be scheduled for an evidentiary hearing as soon as possible. Staff further requested that the Commission expedite its consideration of the complaint by modifying its customary procedures to not accept prefiled testimony and instead hear all testimony live at the hearing. Staff requested that the hearing be scheduled on or before November 1.

In response to Staff's complaint and motion for expedited treatment, on October 7, the Commission issued a notice informing Osage Water of the complaint and an order directing Osage Water to file its answer to the complaint no later than October 18. On October 8, the Office of the Public Counsel filed a pleading indicating that it joined in the complaint filed by Staff and also requested expedited consid-

eration. On October 10, Hancock Construction Company filed a pleading in which it indicated that it wished to join in the complaint and requested permission to intervene. The Commission granted Hancock's application to intervene on October 21.

On October 11, in keeping with Staff's request that consideration of its complaint be expedited, the Commission issued an order setting the complaint for hearing on October 24. That order also directed that all testimony be presented live at the hearing and indicated that post-hearing briefs would not be permitted. Instead, the parties were directed to present oral arguments at the conclusion of the evidentiary hearing.

On October 17, Osage Water filed its answer to the complaint. Osage Water admitted that it was experiencing financial difficulties but denied that the appointment of a receiver was necessary or appropriate and instead asked the Commission to order its Staff to commence a rate case to afford a rate increase for the company.

Along with its answer, Osage Water filed a motion arguing that an expedited hearing on Staff's complaint was unnecessary and unfair. Osage Water urged the Commission to strike the expedited hearing and to instead schedule a prehearing conference for the purpose of discussing a more extended procedural schedule. On October 21, Staff and Public Counsel filed responses to Osage Water's motion to strike the expedited hearing. Both urged the Commission to proceed with the expedited schedule. The Commission denied Osage Water's motion on October 22.

The day before the hearing, on October 23, Staff filed a motion asking the Commission to disqualify Osage Water's legal counsel, Gregory D. Williams, from representing Osage Water at the hearing. Staff's motion indicated that Greg Williams had been subpoenaed to testify at the hearing, and suggested that he should, therefore, be disqualified from appearing as counsel in a matter in which he would be a witness. When the hearing began on October 24, Greg Williams presented a written motion recognizing that he would be required to appear as a witness and for that reason requesting that the hearing be continued for at least ninety days to allow Osage Water to obtain other legal counsel.[1] As an alternative, Greg Williams requested that the Commission recognize that to require Osage Water to proceed to hearing without legal counsel would result in an undue hardship, and for that reason, permit Greg Williams to serve as legal counsel for Osage Water while also appearing as a witness.[2] The presiding judge ruled that Greg Williams, as half owner of Osage Water, needed to testify. However, given the nature of the allegations, the matter could not be continued for long enough to permit Osage Water to obtain alternative counsel. It would, however, be manifestly unfair to deny Osage Water legal representation at the hearing. Therefore, Staff's motion to disqualify Osage Water's legal counsel was denied, and Greg Williams was permitted to appear both as a witness and as legal counsel for Osage Water.[3]

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[1] Transcript Page 5, Lines 4-25, Page 6, Line 1.

[2] Transcript Page 6, Lines 2-12.

[3] Transcript Page 22, Lines 8-13.

Osage Water also filed a motion objecting to the expedited nature of the hearing, arguing that the short notice denied it a fair opportunity to prepare a defense against the allegations made in Staff's complaint. That motion was denied by the presiding judge.[4] The Commission proceeded to hear evidence regarding Staff's complaint. The hearing was not finished on October 24, and was continued on October 29, 30, and 31. The hearing again resumed on November 14, and concluded on November 15. Staff, Public Counsel, Hancock, and Osage Water presented evidence.

Osage Water Company

Osage Water Company is a Missouri corporation that serves as a regulated water and sewer utility, providing water and sewer services to the public in part of Osage Beach, as well as in other developments on the shores of the Lake of the Ozarks in Camden County, Missouri. It currently serves approximately 300 water customers, of which, approximately 250 are also sewer customers.[5]

William P. (Pat) Mitchell and Gregory D. Williams each own fifty percent of the voting stock of Osage Water. Pat Mitchell and Greg Williams have been in the water and sewer business together since 1992. At that time, in exchange for water and sewer systems that he owned, Greg Williams obtained a share of the company that had been founded by Pat Mitchell and his parents, Bill and Martha Mitchell, in the late 1980s.[6] David L. Hancock, owner of Hancock Construction, an intervenor in this case, also gained a share of Osage Water in 1992, but surrendered his voting shares in the company in 1996.[7] He continues to own preferred stock in Osage Water.

Prior to September of 2002, Pat Mitchell, Greg Williams, and Debra Williams served as officers and directors of Osage Water. On September 3, 2002, Greg Williams and Debra Williams submitted a letter to Pat Mitchell, as president of Osage Water, in which they resigned as directors of the company. Greg Williams also resigned as registered agent and Debra Williams resigned as secretary of Osage Water.[8] Greg Williams' term as an officer of Osage Water had previously expired.[9] By resigning their corporate offices, Greg and Debra Williams hoped to disassociate themselves from Osage Water because they did not want to continue sharing ownership of a company with Pat Mitchell.[10] Greg Williams does, however, continue to own 50 percent of the common stock in the company. Pat Mitchell remains president of Osage Water and owns the other 50 percent of the common stock in the company.[11]

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[4] Transcript Page 23, Lines 6-7.

[5] Transcript Page 450, Lines 22-24.

[6] Transcript 271, Lines 18-25.

[7] Transcript page 1181, Line 1.

[8] Exhibit 9.

[9] Transcript Page 269, Lines 22-23.

[10] Transcript, Page 89-90, Lines 16-25, 1-10.

[11] Transcript, Page 905, Lines 16-17.

On September 4, 2002, Osage Water was administratively dissolved by the Missouri Secretary of State. The notice of dissolution issued by the Secretary of State indicates that the corporation was dissolved for "failing to file a correct annual report to the Secretary of State."[12] Greg Williams testified that, as the attorney for Osage Water, he has taken steps to seek reinstatement of Osage Water's corporate status.[13] However, exactly what Osage Water needs to do to obtain reinstatement is not clear. When first asked why Osage Water was administratively dissolved, Greg Williams testified that it was dissolved because of a mistake by the Secretary of State's office and implied that it could be reinstated at any time.[14] Later, when questioned further on the subject by a Commissioner, Greg Williams testified that the underlying cause of the administrative dissolution was Osage Water's failure to file a franchise tax report. Greg Williams also testified that Osage Water did not owe a franchise tax and should not have been required to file a franchise tax report.[15] He indicated that the company has requested a tax clearance letter and has prepared the required annual report and tendered it to the Secretary of State. Later the same day, when further questioned by the presiding judge, Greg Williams revealed that Osage Water owes approximately $3,000 in state withholding taxes that must be paid before Osage Water can be cleared for reinstatement by the Secretary of State.[16]

The Operation of Osage Water Company

For most of the time, until July 2001, the water and sewer operations of Osage Water were handled by Water Laboratory Company through a contractual arrangement.[17] Water Laboratory Company is a corporation controlled by Pat Mitchell, and Pat Mitchell served as the licensed water and sewer operator for Osage Water. That meant that Pat Mitchell controlled the day-to-day operations of the water and sewer systems, in addition to controlling the record keeping, bookkeeping, billing, and customer-relations activities of Osage Water.[18]

On July 7, 2001, Pat Mitchell, who was also serving as president of Osage Water, left all the company's records in boxes on the front porch of Greg Williams' law office. The records were accompanied by a letter, addressed to Greg Williams, that began "I am tired and broke. You want all of assets you get all of the headaches", and ended with "Good luck - you will need it." In between, the letter advised Greg Williams of various tasks that needed to be performed to keep the company operating. The letter was signed "William P. Mitchell, on vacation."[19]

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[12] Exhibit 21.

[13] Transcript, Page 492, Lines 12-14.

[14] Transcript, Page 283, Lines 6-17.

[15] Transcript, Page 494, Lines 8-16.

[16] Transcript, Page 574, Lines 17-24.

[17] Transcript, Page 272, Lines 5-6.

[18] Transcript, Page 907, Lines 2-21.

[19] Exhibit 22.

After the company records were left on their doorstep, Greg Williams and his wife Debra J. Williams took over day-to-day operations of Osage Water, with Debra Williams being named as manager of the company.[20] Debra Williams continued to manage Osage Water until September 1, 2002, when Pat Mitchell, acting as president of Osage Water, signed an Operation and Maintenance Agreement with Environmental Utilities, LLC. Under that agreement, Environmental Utilities, a company owned by Greg and Debra Williams, was appointed as the agent for Osage Water for the purpose of operating, maintaining, and repairing the water and sewer utility systems owned by Osage Water. Environmental Utilities is authorized by the agreement to collect the revenues owed to Osage Water and to use those revenues to pay for the operation and maintenance of the water and sewer systems. Any remaining revenues are to be applied to the debt owed by Osage Water to Environmental Utilities under a promissory note held by Environmental Utilities.[21]

Debra Williams now serves as manager for Environmental Utilities and in that role continues to have day-to-day operating control over Osage Water's water and sewer systems. The former employees of Osage Water are now employees of Environmental Utilities.[22] Osage Water, through the management of Environmental Utilities, continues to provide service to its water and sewer customers.

Osage Water Company's Financial Position

By all accounts, Osage Water is currently insolvent. Greg Williams testified that "Osage Water Company lacks sufficient income with which to pay its debts as they come due. It's able to pay its current operating expenses, but it is unable to pay significant debt that it's incurred in the past."[23] Pat Mitchell also testified that Osage Water lacks sufficient income to pay its debts.[24] Debra Williams testified that Osage Water has an average monthly income of approximately $15,000. She also indicated that average monthly expenses range around $12,000 to $13,000 not counting repairs, meters, and other incidents that occur each month.[25] That leaves nothing available for making payments on Osage Water's substantial debt.

Much of Osage Water's debt is owed to its shareholders. Greg Williams, who has provided legal services to the corporation over the last 8 - 10 years, claims in excess of $500,000 in unpaid legal fees. Pat Mitchell, who also provided services to the corporation, claims $360,000. David Hancock, an owner of preferred stock in the corporation, has obtained a judgment for approximately $210,000, for construction work he performed for the corporation. In addition, the Internal Revenue Service is owed approximately $50,000 for past due federal withholding taxes. Smaller, but still substantial debts are owed to various other suppliers of goods and services. In total, Osage Water's debts exceed 1.13 million dollars.[26]

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[20] Transcript, Page 59, Lines 14-18.

[21] Exhibit 30.

[22] Transcript, Page 64, Lines 14-22.

[23] Transcript, Page 259, Lines 17-20.

[24] Transcript, Page 920, Lines 7-10.

[25] Transcript, Page 370, Lines 5-8.

[26] Exhibit 29.

If Osage Water is to survive and pay its existing debts it must either extinguish some of its debts or obtain additional capital.[27] The current owners of Osage Water are unwilling, or unable to pump more cash into the company. Greg Williams testified that he was unwilling to make any additional capital contributions to Osage Water unless he could be assured of earning a return on that capital. He also testified that he was "quite certain the company does not have rates sufficient to pay return on such capital, since it can't pay a return on its existing capital."[28] Debra Williams testified that neither she nor her husband were willing to infuse new capital into Osage Water.[29] Pat Mitchell simply testified that he has no cash that he could place in Osage Water and that he did not know of anyone else that was willing to put additional cash into the company.[30]

Rather than infuse more capital into Osage Water, Greg Williams has taken steps to try to collect the debt that he is owed by Osage Water. On February 15, 2001, Osage Water gave Greg Williams a future advance deed of trust on all the property it owns in Camden County.[31] The purpose of the deed of trust was to secure a promissory note that the company gave Greg Williams on the same day to cover the debt that Osage Water owed Greg Williams for his legal work in representing the company.[32]

On August 14, 2002, Greg Williams assigned the note and deed of trust to Environmental Utilities,[33] a company that Greg and Debra Williams formed with the intent to take over the operation of Osage Water after Pat Mitchell abruptly ceased operating that company in July of 2001. Thereafter, Debra Williams, as trustee on the deed of trust, instituted a foreclosure action to sell the assets of Osage Water on September 13, 2002, at the East front door of the Camden County Courthouse.[34] At the same time, Environmental Utilities filed an application with the Commission seeking permission to operate the water and sewer systems of Osage Water if it were the successful bidder at the foreclosure auction.[35] Pat Mitchell did not oppose the foreclosure action against Osage Water's assets because he did not believe that the company has any positive value.[36]

Ultimately, the Staff of the Commission obtained an order from the Circuit Court of Camden County that blocked the foreclosure action. As a result, Environmental Utilities has not been able to acquire the assets of Osage Water, although it does operate Osage Water through the previously described Operation and Maintenance Agreement.[37]

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[27] Transcript, Page 262, Lines 14-18.

[28] Transcript, Page 263, Lines 11-14.

[29] Transcript, Page 74, Lines 5-10.

[30] Transcript, Page 924, Lines 9-14.

[31] Exhibit 7.

[32] Exhibit 8.

[33] Exhibit 24.

[34] Exhibit 17.

[35] Exhibit 1.

[36] Transcript, Page 1102, Lines 9-24.

[37] Exhibit 30.

How did Osage Water get into such a cash starved position that it faced foreclosure? Greg Williams and Pat Mitchell testified that Osage Water ran into financial difficulty because the City of Osage Beach has overbuilt Osage Water's existing water distribution and sewer collection systems. As a result, Osage Water has lost some 220 customers to competition from the City of Osage Beach.[38] Many of the lost customers were among Osage Water's largest commercial customers and Osage Water has had to try to replace them with less lucrative residential customers.[39]

While Osage Water has certainly suffered from its loss of customers to the City of Osage Beach, that is not the only reason that Osage Water is having financial difficulties. Testimony established that Osage Water has a history of non-compliance with the Commission's regulatory requirements. In particular, Osage Water has been totally unable to keep its books and records in the manner required by the Commission's regulations. Osage Water has not followed the uniform system of accounts prescribed by the National Association of Regulatory Commissioners (NARUC) as required by the Commission's regulations. Even Pat Mitchell testified that Osage Water has not kept its books in the appropriate manner.[40]

Osage Water's inability to keep its books and records in a proper manner has also caused it to fail to comply with the requirement that it file an annual report with the Commission. Osage Water has not yet filed its 2001 annual report that was due on April 15, 2002. It has not filed its 2000 annual report. The 1999 annual report was filed a year and a half late. In fact, all of Osage Water's annual reports after 1992 have been filed significantly late.[41]

Failure to keep its books in proper order is not just a technical violation of the Commission's rules. Without good records, the Commission is not able to perform a good audit that would verify the company's expenses and revenues.[42] Osage Water's failure to keep good records has kept it from recovering the rates it might have otherwise received in previous rate cases and it would make it difficult for Osage Water to support an application for increased rates in the future.

In addition, Osage Water has mismanaged its relationship with its customers. Staff's witness, James Merciel, offered credible testimony establishing that Osage Water has failed to maintain a good relationship with its customers.[43] Mr. Merciel also established that Osage Water has a history of poor relations with housing developers.[44] Yet another example of Osage Water's problems in dealing with a developer came to the Commission's attention during the course of the hearing when a dispute with the developer of the Eagle Woods subdivision threatened to interrupt service to Osage Water's customers in that subdivision.

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[38] Transcript, Page 981, Lines 6-8.

[39] Transcript, Page 1088-1089, Lines 17-25, 1-15.

[40] Transcript, Pages 1262-1263, Lines 23-25, 1.

[41] Transcript, Pages 628-630.

[42] Transcript, Page 1164, Lines 3-16. see also, Transcript, Page 1238, Lines 6-10.

[43] Transcript, Page 730, Lines 14-19.

[44] Transcript, Page 742, Lines 16-21.

Although Osage Water has improved its relationship with its customers since Debra Williams took over management of the company's water and sewer operations,[45] the legacy of poor customer relations would make it much harder for the current owners to successfully operate the company.

Has Osage Water Company been Abandoned?

As set out in the conclusions of law section of this report and order, the statute that governs the appointment of a receiver for a small water or sewer company provides that the Commission may petition the circuit court to appoint a receiver if it determines that the water or sewer company has been "actually or effectively abandoned by its owners" or is "unable or unwilling to provide safe and adequate service."[46] One of the company's owners, Greg Williams, candidly admits that he has resigned from all his former positions with Osage Water and that he has abandoned the company.[47] Staff's complaint attempts to establish that the company's other owner, Pat Mitchell, abandoned Osage Water Company when he left the company records on Greg Williams' front porch.

Pat Mitchell denies that he ever intended to abandon Osage Water. He instead testified that when he left the records of the company on the Williams' doorstep he merely intended to turn over control of the day-to-day operations of the company and take a much-needed vacation. Whatever Mr. Mitchell's intent may have been in July of 2001, it is now apparent that he has not actually abandoned Osage Water. He is currently functioning as president of the company and has entered into a management contract with Environmental Utilities to provide for the day-to-day operations of the company. Customers are still receiving water and sewer service under these arrangements. Clearly, Osage Water has not been actually abandoned by at least one of its owners.

However, the statute permitting the Commission to seek appointment of a receiver is not limited to situations where a utility has been actually abandoned by its owners. The statute also permits the Commission to act when it finds that a utility has been effectively abandoned by its owners. Osage Water has been effectively abandoned by its owners.

Osage Water is an orphaned corporation with no means of long-term survival. The two men that own and control the corporation have stated that they no longer want to be in business with each other.[48] Greg Williams and his wife have created another company, Environmental Utilities, intending to acquire and operate the utility systems owned by Osage Water.[49] Environmental Utilities then attempted to foreclose on Osage Water's assets, thereby putting Osage Water out of the utility business.

Osage Water does not currently have enough money to pay its bills and, according to Greg Williams, it is a virtual certainty that it will not have enough money to pay its bills in the future.[50] Pat Mitchell testified that Osage Water would need

[45] Transcript, Page 856, Lines 1-15.

[46] Section 393.145.1, RSMo 2000.

[47] Transcript, Pages 549-550, Lines 21-25, 1-3.

[48] Transcript, Page 919, Lines 4-11 & Pages 89-90, Lines 16-25, 1-10.

[49] Transcript, Pages 91-92, Lines 23-25, 1-12.

[50] Transcript, Page 980, Lines 7-11.

approximately $180,000 in additional revenue each year in order to pay its operating expenses and its accumulated debts, roughly doubling its current revenue.[51] The Company is currently spending all of its revenue on operation and maintenance expenses, leaving nothing to be set-aside in reserve for surplus or contingencies.[52] If Osage Water is unable to pay Environmental Utilities for its services under the management agreement, then Environmental Utilities might well cancel that agreement, leaving no one willing or able to operate Osage Water's utility systems and provide water and sewer service to its customers.[53]

Yet, given the poor state of its record keeping, the continued conflicts between its owners, and its inability to pay its legal counsel, it is highly unlikely that Osage Water will be able to successfully bring a rate case before the Commission. There is also no hope that any additional money will be invested in Osage Water since there is little possibility that such an investment would ever be returned. Osage Water has been sued by its creditors and one creditor, David Hancock, has obtained a judgment for $216,000.[54] The company also owes substantial sums of money to both federal and state tax authorities.[55] Osage Water does not even have a bank account so that it can avoid having its account seized by its creditors.[56] Under the circumstances, there is little reason to believe that Osage Water will be able to continue to provide service in the future.

Is Osage Water unable or unwilling to provide safe and adequate service?

In addition to having been effectively abandoned by its owners, Osage Water, because of its financial difficulties and the conflict between its owners, is unable to provide safe and adequate service to its utility customers. When questioned about the company's ability to provide safe and adequate service, Pat Mitchell repeatedly indicated that the service provided by the Osage Water was "barely safe and barely adequate."[57] That assessment, while perhaps accurate, is not reassuring to the Commission.

Osage Water is teetering on the edge of an abyss. It has no money set aside to pay for major repairs to its system and no one is willing or able to put more money into the company in the event that such repairs are needed. Furthermore, Osage Water's systems are not in good repair and it already has at least one major leak in a water main that it has not been able to repair.[58] Martin Hummel, an engineer for the Staff, testified that such a leak could cause future problems with the operation of the company's well and other equipment if it is not repaired.[59] Mr. Hummel also testified that because of a lack of money, Osage Water has been performing only minimal maintenance on its systems.[60]

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[51] Transcript, Page 1084, Lines 10-20.

[52] Transcript, Page 1087, Lines 12-14.

[53] Transcript, Pages 995-996, Lines 18-25, 1-15.

[54] Transcript, Page 1184, Lines 7-15.

[55] Exhibit 29.

[56] Transcript, Pages 929-930, Lines 23-25, 1-5.

[57] Transcript, Page 921, Line 8, Page 1103, Lines 21, & Page 1153, Lines 17-18.

[58] Transcript, Pages 1281-1283, Lines 16-25, 1-25, & 1-20.

[59] Transcript, Page 643, Lines 16-23.

[60] Transcript, Page 659, Lines 17-24.

The combination of systems in poor repair and the lack of money to pay for major, essential repairs to those systems indicates a very grave danger that Osage Water's customers could suddenly find themselves without water or sewer service, and with limited prospects for timely restoration of that service. Some of Osage Water's customers have already had a foretaste of that scenario.

In August of 2002, a pump burned out in Osage Water's well serving the Broadwater Bay subdivision in Osage Beach. For a time the City of Osage Beach sold water to Osage Water for the use of its customers but that emergency supply was shut off after ten days when Osage Water and the city were unable to agree upon the price to be paid for the water. Thereafter, Osage Water's customers in the Broadwater Bay subdivision were without water.[61] The water shutoff lasted for three days and water service was restored only after Osage Water discovered that it had insurance coverage that would pay for repairs to the well pump. If insurance coverage had not been discovered, the water shutoff might have lasted much longer as Greg Williams testified that Osage Water did not have the money needed to either make repairs to the well or to continue to purchase water from the city. [62] When asked whether Osage Water would have restored service to its customers if there had been no insurance money, Debra Williams, manager of Osage Water at the time of the outage, testified "I don't know how we could have. We had no money."[63]

The Commission is very concerned that an outage similar to the Broadwater Bay outage could be repeated at any time. If there is another major outage, Osage Water clearly will not have the financial resources required to make the needed repairs. Although Greg Williams testified that Osage Water does have very broad mechanical failure and casualty insurance coverage, the Commission was not provided with the details of that coverage and is not willing to accept possible insurance coverage as a substitute for financially viability. If Osage Water is again unable to make essential repairs to its system, its customers could be without essential services for an extended period. Obviously, absence of service is neither safe nor adequate service. Because of its desperate financial situation and the continuing conflict between its owners, Osage Water simply is not able to assure continued safe and adequate service to its customers.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Osage Water is a public utility, a sewer corporation, and a water corporation as those terms are defined in Section 386.020(42), (48) and (58), RSMo 2000. As such, Osage Water is subject to the Commission's jurisdiction pursuant to Section 386.250(3) & (4), RSMo 2000.

4 CSR 240.50.030 requires water companies to maintain their records using the uniform system of accounts issued by the National Association of Regulatory

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[61] Transcript, Pages 724-729.

[62] Transcript, Page 213, Lines 2-6.

[63] Transcript, Page 215, Lines 22-25.

Utility Commissioners. 4 CSR 240-61.020 makes the same requirement of sewer companies. The Commission found as a matter of fact that Osage Water has failed to comply with the requirements of these regulations.

Section 393.140(6) and 4 CSR 240-10.080 require all water and sewer utilities regulated by the Commission to file an annual report with the Commission on or before April 15 of each year. The Commission found as a matter of fact that Osage Water has failed to comply with this requirement.

Section 393.145.1, RSMo 2000, provides, in pertinent part:

> If the commission shall determine that any sewer or water corporation having one thousand or fewer customers is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners ... the commission may 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.

Section 393.145.3, RSMo 2000, provides, in pertinent part:

> A receiver appointed pursuant to this section shall be a responsible person, partnership, or corporation knowledgeable in the operation of utilities.

Section 393.145.4, RSMo 2000, provides as follows:

> The receiver shall give bond, and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment. The receiver shall operate the utility so as to preserve the assets of the utility and to serve the best interests of its customers. The receiver shall be compensated from the assets of the utility in an amount to be determined by the court.

Section 393.145.5 RSMo 2000, provides as follows:

> Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interest of its customers, be returned to the owners. If the court determines after hearing that control of and responsibility for the utility should not, in the best interests of its customers, be returned to the owners, the receiver shall proceed to liquidate the assets of the utility in the manner provided by law.

The Commission has found as a matter of fact that Osage Water has fewer than one thousand customers. It has also found that Osage Water has been effectively abandoned by its owners and that it is unable or unwilling to provide safe and adequate service to its customers. Therefore, the Commission concludes that the requirements of the statute have been satisfied and that the Commission may petition the circuit court for an order attaching the assets of Osage Water and placing it under the control and responsibility of a receiver.

Staff also requests that it be authorized to petition the circuit court to find that control and responsibility for Osage Water should not, in the best interests of its customers, be returned to its owners, and instead that the assets of the company should be liquidated.

The Commission has determined that Osage Water has effectively been abandoned by its owners and that it is unable or unwilling to provide safe and adequate service. The Commission found that Osage Water is in dire financial condition and that its owners no longer wish to be in business with each other. There is no credible evidence in the record to suggest that those conditions would improve if the utility were returned to the owners after being in the hands of a receiver. Therefore, liquidation of Osage Water's assets is the best available option.

One of the duties of a receiver must be to protect the public interest. Indeed, the whole reason to appoint a receiver is to ensure the continuation of safe and adequate service to the utility's customers when it appears that the utility itself is unable to do so. Section 393.145 uses the phrase "best interests of the customers" twice. It would be contrary to the best interests of the customers to allow a receiver to liquidate the assets of a utility in a manner that would prevent customers from continuing to receive utility service. The Commission will therefore ask the court to instruct the receiver to liquidate the assets of the company on terms that protect the interest of all of the customers of the utility.

The Commission is particularly concerned that some of the utility systems of Osage Water might be more easily sold than others. That raises the possibility that economically non-viable systems that still must serve customers might be left orphaned after the more valuable systems are sold. Therefore, the receiver must be careful to ensure that any assets that are not immediately sold may still be efficiently operated after other systems and assets are sold.

Section 393.145 does not contain any special venue provisions indicating where the receivership action may be filed. In the absence of any special statutory venue provisions, venue is governed by Missouri's general venue laws.[64] Under Section 508.030, RSMo 2000, actions affecting title to real estate are to be brought in the counties in which the real estate is located. Section 508.040, RSMo 2000, requires that suits against a corporation must be brought in the county where the cause accrued, or where the corporation maintains an office. Under either statute the proper venue would be in Camden County. However, Section 386.600, RSMo 2000, provides that "[a]n action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri …." This provision would appear to allow this action to be brought in any circuit court in the state.

The circuit court has the authority to decide who will be named as receiver for Osage Water, but the Commission will direct its Staff to recommend a receiver who is not connected to Osage Water or any of its creditors.

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[64] *State ex rel. Missouri Property and Cas. Ins. Guar. Ass'n. v. Brown*, 900 S.W2d 268, 271 (1995).

IT IS THEREFORE ORDERED:

1. That the General Counsel of the Commission shall, on behalf of the Commission pursuant to Section 393.145, RSMo 2000, petition the appropriate circuit court for an order attaching the assets of Osage Water Company and placing the utility under the control and responsibility of a receiver.

2. That the General Counsel of the Commission shall, on behalf of the Commission pursuant to Section 393.145, RSMo 2000, seek a determination from the appropriate circuit court that Osage Water Company should not be returned to its owners but should rather be liquidated by the receiver as discussed herein.

3. That this order shall become effective on December 20, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.
Gaw, C., not participating.

In the Matter of the Joint Application of Missouri-American Water Company, St. Louis County Water Company, d/b/a Missouri-American Water Company, and Jefferson City Water Works Company, d/b/a Missouri-American Water Company, for an Accounting Authority Order Relating to Security Costs.*

Case No. WO-2002-273
Decided December 10, 2002

Water §1. The Commission determined that Missouri-American Water Company's request for an accounting authority order permitting deferral of expenditures made to upgrade security following the events of September 11, 2001, was reasonable under the circumstances and should be granted.

Water §29. Missouri-American Water Company filed an application for an accounting authority order relating to security costs. The company alleged that the costs were incurred as a direct result of the unexpected and extraordinary events of September 11, 2001. The company sought an accounting authority order so that it might recover some part of these costs in a later rate case. The Commission concluded that an accounting authority order was reasonable under the circumstances and should be granted.

Water §32. The Commission determined that Missouri-American Water Company's request for an accounting authority order permitting deferral of expenditures made to upgrade security following the events of September 11, 2001, was reasonable in the circumstances and should be granted. The Commission authorized the company to defer and book to Account 186 expenditures relating to security improvements and enhancements beginning September 11, 2001, and continuing through September 11, 2003.

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* The Commission, in an order issued on January 23, 2003, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (03CV323385). See page 199, Volume 11, MPSC 3d for another order in this case.

The Commission stated that it will continue to review accounting authority order requests on a case-by-case basis and will grant or deny them as is reasonable according to the particular circumstances of each case. The Commission declined to adopt the four-factor test proposed by Staff.

The Commission determined that a utility must show a good and sufficient reason to justify a deviation from the normal accounting rules, one that confers a more general benefit than mere protection of the shareholders from regulatory law. In reviewing such requests, the Commission must balance the interests of the company against the interests of the public, with the public interest being given more weight.

APPEARANCES

Dean L. Cooper, Esq., Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri-American Water Company.

Stuart W. Conrad, Esq., Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209, Kansas City, Missouri 664111, for the St. Joseph Industrial Intervenors.

Jeremiah D. Finnegan, Esq., Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209, Kansas City, Missouri 664111, for the City of Riverside, Missouri.

James B. Deutsch, Esq., and *Marc H. Ellinger*, Esq., Blitz, Bardgett & Deutsch, 308 East High Street, Suite 301, Jefferson City, Missouri 65101, for the City of Joplin, Missouri.

Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Keith R. Krueger, Deputy General Counsel, Office of the General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Syllabus

The Commission determines that Missouri-American Water Company's request for an Accounting Authority Order permitting deferral of expenditures made to upgrade security following the events of September 11, 2001, is reasonable in the circumstances and should be granted.

Procedural History

On December 10, 2001, Missouri-American Water Company, St. Louis County Water Company and Jefferson City Water Works Company, the latter two doing business as Missouri-American Water Company,[1] filed their joint application for an Accounting Authority Order relating to security costs.[2] These costs were

[1] On January 22, 2002, the joint applicants advised the Commission that St. Louis County Water Company and Jefferson City Water Company had merged into Missouri-American Water Company, leaving Missouri-American as the single applicant.

[2] An Accounting Authority Order is typically referred to in the utility industry as an AAO; this usage will be followed here.

incurred, the joint application stated, as a direct result of the unexpected and extraordinary events of September 11, 2001. The applicants sought an AAO so that they might recover some part of these costs in a later rate case. The applicants also initially sought expedited treatment so that the order, if granted, would apply to costs incurred during calendar year 2001.[3]

On December 12, the Office of the Public Counsel filed its response opposing the joint application for an AAO and also opposing the request for expedited treatment. Public Counsel stated that the joint applicants had not alleged facts such as would support an AAO. Public Counsel further stated that expedited treatment was unwarranted because it would obstruct Public Counsel's ability to adequately investigate joint applicants' need for an AAO.

At a prehearing conference on December 17, the City of Joplin appeared by counsel and moved to intervene; no parties objected and the presiding officer granted the motion.[4] A group of industrial customers of Missouri American located in St. Joseph, Missouri, AG Processing, Nestle USA, doing business as Friskies Petcare, and Wire Rope Corporation of America, Inc., also appeared by counsel and moved to intervene. Again, no parties objected and the presiding officer granted the motion.[5] By its order of December 12, the Commission also adopted its standard protective order for use in this case.

On December 26, the City of Riverside, Missouri, filed its application to Intervene. On January 18, 2002, the Commission issued its Order Granting Intervention and Adopting Procedural Schedule, granting Riverside's application to intervene. The Commission also imposed a procedural schedule on the parties, adopted its standard conditions and shortened the interval set by rule for responses to data requests.[6]

On February 28, Local 335 of the Utility Workers of America, AFL-CIO, applied to intervene, stating that it is a labor organization that represents some 300 employees of Missouri-American in two bargaining units. On April 16, the Commission granted Local 335's application to intervene over the objection of Missouri-American. On May 17, Local 335 requested leave to withdraw as a party; this request was granted on June 27.

On March 12, 2002, the Commission denied a motion to dismiss filed by Public Counsel, modified the protective order to permit security-related information to be designated Highly Confidential, and granted a motion to compel filed by Public Counsel.

Pursuant to the procedural schedule, the parties filed direct, rebuttal and surrebuttal testimony, as well as an agreed list of issues, and statements of their positions on each of the issues. The Commission convened an evidentiary hearing on June 27 and 28, 2002. All of the parties were represented at the hearing. The Commission heard testimony from five witnesses and received 15 exhibits.

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[3] The companies originally sought an order by January 4, 2002.

[4] Counsel for the City of Joplin did not file briefs.

[5] AG Processing, Nestle USA, d/b/a Friskies Petcare, and Wire Rope Corporation of America, Inc., shall for convenience be referred to as the St. Joseph Industrial Intervenors. These intervenors also filed an application to intervene on December 17.

[6] *See* Rule 4 CSR 240-2.090.

On July 2, 2002, the Commission issued a briefing schedule as agreed by the parties at the close of the hearing on June 28. This schedule called for the filing of a Late Filed Exhibit, No. 13, requested by the Commission on July 12; the filing of any objections to that exhibit by July 26; the filing of simultaneous initial briefs on August 15 and the filing of simultaneous reply briefs on August 30.

Late Filed Exhibit 13 (Highly Confidential) was filed on July 18. No party objected to it and the Commission will receive it into the record of this proceeding.

On August 15, the City of Riverside filed its Agreed Motion to Modify the Briefing Schedule. This pleading explained that the parties had agreed to extend the briefing dates to August 20 and September 4, respectively. Accordingly, all parties filed their initial briefs on August 20 and their reply briefs on September 4.

Discussion

The parties jointly submitted a list of issues for determination by the Commission. Each party also submitted a statement of its position on each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

The issues formulated by the parties are only intelligible in the light of Staff's proposal, presented in the Rebuttal Testimony of Janis E. Fischer, that the Commission adopt in this case four criteria by which to determine whether or not an AAO should be granted, both for purposes of this case and for general application. The four criteria proposed by Staff are as follows:[7]

> 1. The costs in question must equal or exceed five percent of net income, calculated over the next preceding 12 months and excluding the costs sought to be deferred.
>
> 2. Current rates must be inadequate to cover the event.
>
> 3. The costs in question must result from either an extraordinary capital addition or an extraordinary event beyond the control of management.
>
> 4. There must be satisfactory reasons why the utility cannot file a rate case to recover the costs in question. Alternatively, the utility must file a rate case within 90 days of the granting of the AAO.

The issues formulated by the parties in this case, and their positions on those issues, are as follows:

1. Should the Commission expressly adopt the four criteria proposed by the Staff for this Accounting Authority Order application?

All of the parties except Missouri-American took the position that the Commission should adopt the criteria suggested by Staff.

[7] Ex. 6, pp. 10-12.

A. Do Staff's proposed criteria constitute an unlawful change in statewide policy because such change would not be made through a rule making proceeding?

Only Missouri-American took the position that the adoption by the Commission in its resolution of this case of Staff's four proposed criteria would constitute a violation of Chapter 536, RSMo.

B. If the Commission adopts the Staff's four criteria, then:

(1) Are the costs incurred and which are sought to be deferred in this proceeding at least 5% of MAWC's regulated Missouri income, computed before extraordinary items?

Only Missouri-American asserted that the costs at issue constituted at least five percent of Missouri-American's annual net income.

(2) Are MAWC's current rates inadequate to cover the event (i.e., are MAWC's existing rates sufficient to cover the extraordinary cost and still provide MAWC with a reasonable expectation of earning its authorized rate of return)?

Missouri-American took the position that the answer to this question could not be ascertained. Staff does not contend that MAWC's current rates are adequate to cover the extraordinary event; the other parties asserted that they were.

(3)(a) [Did the expenses result from] an extraordinary capital addition that is required to insure the continuation of safe and adequate service in which unique conditions preclude recovery of these costs through a rate case filing?

Missouri-American asserted that it met both prongs of this criterion. Staff took the position that Missouri-American satisfied one prong but not the other. The other parties contend that Missouri-American did not meet either prong of this test.

(3)(b) [Did the expenses result from] an extraordinary event that is beyond the control of the utility's management?

Missouri-American took the position that the costs in question met this criterion. All of the other parties took the view that the expenditures in question were made by Missouri-American's management under no binding compulsion of any kind.

(4) Is there a sufficient reason why MAWC cannot recover the costs resulting from these expenditures through the normal rate case process?

Missouri-American took no position on this criterion. However, in response to Issue 1.B.(3)(a), Missouri-American pointed out that rate cases deal with prospective costs, not costs already incurred. All of the other parties took the position that Missouri-American was free to file a rate case at any time and that these expenditures, if prudently made within the test year, could be recovered.

C. If the Commission does not adopt Staff's four criteria as requirements to granting an AAO, are the costs incurred by MAWC to increase security measures subsequent to the events of September 11, 2001, "extraordinary, unusual, unique and non-recurring"?

Missouri-American asserted that they were; all of the other parties insisted that they were not.

2. In light of the above, should the Commission grant to MAWC an Accounting Authority Order to defer recognition of the costs it incurred and attributed to increased security needs after the terrorist attacks of September 11, 2001, in New York City and Washington, D.C.?

Missouri-American replied "yes" to this question; all of the other parties replied "no."

3. If the Commission grants MAWC an Accounting Authority Order:

A. What conditions, if any, should be reflected in the Commission's order?

Missouri-American argued that no conditions should be placed on any AAO granted in this case. However, should the Commission require Missouri-American to file a new rate case within a certain interval, Missouri-American asserts that the interval should be at least two years. The St. Joseph Industrial Intervenors took no position on this question. The City of Joplin simply restated its position that no AAO should be granted. Public Counsel suggested that Missouri-American be required to begin amortizing any amount deferred immediately. Staff contended that Missouri-American should be required to file a new rate case within 90 days.

B. Should the Commission make any indications regarding future ratemaking treatment of the deferred expenditures in the Commission's order? If so, what indications should the Commission make?

Missouri-American stated that the Commission should support its security upgrade by committing itself to approving all prudently incurred security expenses and permitting their amortization over a three- to five-year period. The other parties argued that the Commission should expressly defer ratemaking treatment to a later case.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

***The Parties*:**

Missouri-American Water Company is a Missouri corporation headquartered at 535 North New Ballas Road, St. Louis, Missouri.[8] Missouri-American is a subsidiary of American Waterworks Company, Inc.[9] American Waterworks is headquartered in New Jersey.[10] American Waterworks owns Missouri-American as well as other regulated water utilities in other states.[11] Missouri-American operates nine water systems in the state of Missouri, providing public drinking

[8] Ex. 3, pp. 3-4.

[9] Tr. 114, 156, 290; Ex. 4, pg. 7.

[10] Tr. 156.

[11] Tr. 156.

water service to some 418,089 customers in and around the communities of St. Louis County, northern Jefferson County, parts of St. Charles County, Jefferson City, Mexico, Brunswick, Warrensburg, St. Joseph, Joplin, and Parkville.[12] Although three affiliated entities jointly filed the application under consideration in this case, two of them merged into the third, Missouri-American, as of December 31, 2001.[13] The merger was undertaken pursuant to a standard policy of American Waterworks to operate in each state through a single entity in order to realize various savings and cost efficiencies.[14]

The Staff of the Commission is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]"[15]

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[.]"[16]

Several parties were permitted to intervene in this matter. The Cities of Joplin and Riverside are Missouri municipalities served by Missouri-American. The St. Joseph Industrial Intervenors are a group of industrial customers of Missouri-American located in St. Joseph, Missouri, including AG Processing, Nestle USA, doing business as Friskies Petcare, and Wire Rope Corporation of America, Inc. Local 335 of the Utility Workers of America, AFL-CIO, is a labor organization that represents some 300 employees of Missouri-American in two bargaining units.[17]

Why Missouri-American Upgraded its Security:

The terrorist attack on the United States on September 11, 2001, was a tragic event that resulted in great loss of life.[18] It caused an increased focus on the security of utilities, particularly public drinking water utilities.[19] Missouri-American received

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[12] Ex. 1, pg. 1; Ex. 3, pg. 4.

[13] Tr. 275.

[14] Tr. 275-76.

[15] Section 386.071, RSMo 2000. Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[16] Sections 386.700 and 386.710.

[17] On May 17, Local 335 requested leave to withdraw as a party; this request was granted on June 27.

[18] Ex. 6, pg. 13. The record does not include a description of the events of September 11, 2001. As these are well-known to all Americans, the Commission will take notice that the events of that day included the hijacking of four commercial airliners, two of which were intentionally crashed into the two towers of the World Trade Center in New York City; another was intentionally crashed into the Pentagon; and the last crashed in Pennsylvania. Many lives were lost in the course of these events and the United States embarked upon a world-wide war on terrorism. *See Staff's Initial Brief* at 4 and 16, for the events of September 11, 2001, and *id.,* at 1 and 17-18, for the nation's response to these events.

[19] Ex. 1, pp. 2-3. The events of September 11, 2001, are commonly referred to as "9-11" and will be so referenced here.

several advisories suggesting that a terrorist threat existed to public water supplies in the United States.[20] In November, 2001, the National Association of Regulatory Utility Commissioners (NARUC) adopted a resolution urging water utilities "to take all necessary and prudent precautionary steps to secure [their] facilities."[21] Although Missouri-American has always provided for the security of its facilities, its management decided to upgrade and increase its security measures after 9-11.[22] The particular steps taken were chosen in consultation with various state and federal agencies, including this Commission and the Federal Bureau of Investigation.[23] Missouri-American took these steps although it suffered no damage in the events of 9-11.[24] Likewise, no governmental entity ever ordered Missouri-American to upgrade its security.[25]

Missouri-American's management did not believe that it had an option to just do nothing after 9-11.[26] Frank Kartmann of Missouri-American testified, "I believe we took the only action we could as responsible managers."[27] The climate of opinion in the nation, and in the state, demanded immediate action because the events of 9-11 had revealed the nation's vulnerability to terrorist acts.[28] Staff's expert, Janis Fischer, admitted: "I don't believe we would expect any company, any utility company in the state of Missouri to not make some change in their procedures after 9-11."[29] In Missouri, Governor Holden appointed the Missouri Security Panel to examine security issues and necessary upgrades.[30] This panel included a Utility Committee; a member of this Commission served on both the panel and the committee.[31] The panel produced a "Best Practices" List that this Commission has posted on its website.[32] The actions taken by Missouri-American are consistent with the recommendations on this list.[33] The actions taken by Missouri-American in response to 9-11 were similar to the response of the government of Missouri, which stationed troops at eight regional airports in the state, although no attacks were made on Missouri soil on 9-11.[34] Even Staff witness Fischer, who opposed Missouri-American's request for an AAO, admitted that "it is prudent for both

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[20] This evidence is in part Highly Confidential. Ex. 1, pg. 3. [Ex. 1, Sch. FLK-1.]

[21] Ex. 1, Sch. FLK-2. This resolution specifically urged Commissions to consider granting AAOs to cover the costs of upgraded security.

[22] Ex. 1, pg. 4; Tr. 306.

[23] Ex. 1, pg. 5; Tr. 143.

[24] Tr. 172, 185.

[25] Tr. 307-308.

[26] Ex. 2, pp. 1-2; Ex. 4, pp. 20-21; Tr. 223-24, 301, 305-306.

[27] Tr. 186; *and see* Tr. 224.

[28] Ex. 2, pg. 2-3; Ex. 5, pg. 4; Tr. 224.

[29] Tr. 437.

[30] Ex. 2, pp. 2-3.

[31] Ex. 2, pg. 3.

[32] Ex. 2, pp. 3-5.

[33] Ex. 2, pg. 5.

[34] Tr. 225-26.

regulated and non-regulated businesses to seriously consider the adequacy of their security measures in light of the September 11 attacks, and enhance those measures as appropriate."[35]

Prior to 9-11, security was the subject of much less emphasis.[36] Water is not inherently dangerous, like electricity and natural gas, and so water utilities generally had less security in place prior to 9-11 than did energy utilities.[37] The perceived threats at that time consisted of vandalism and mischief. However, that emphasis changed overnight after 9-11.[39] There was no reason, prior to 9 11, to implement the sort of security arrangements since put in place. [40] During the 1990s, in response to various terrorist acts, St. Louis County Water Company made security improvements commensurate with the level of perceived risk.[41] For example, in response to the 1995 bombing of a federal building in Oklahoma City, St. Louis County Water Company developed a bomb threat response procedure.[42] Since that time, Missouri-American has improved security at its facilities as part of every capital project.[43] There is no comparison between threats of terrorist attack and threats of vandalism.[44] Additionally, public drinking water utilities are unique because their product is ingested by the public.[45] For this reason, a high level of security is appropriate now that a realistic terrorist threat has materialized.[46]

Missouri-American has not received any threat specifically targeting its facilities.[47] However, threats to the public water supply have been made since 9-11.[48] The FBI issued an alert in October, 2001, regarding a threat to the nation's drinking water.[49] Intelligence indicates that terrorist groups have collected information regarding public water supply systems in the United States.[50] Frank Kartmann of Missouri-American testified that attacks on public water facilities in Orlando, Florida, and Bridgeport, Connecticut, had been thwarted by the authorities.[51]

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[35] Ex. 6, pg. 20.

[36] Ex. 2, pg. 9.

[37] Ex. 4, pg. 22.

[38] Tr. 170.

[39] Ex. 2, pg. 9; Tr. 226.

[40] Ex. 2, pg. 9.

[41] Tr. 139.

[42] Tr. 137, 191.

[43] Tr. 191-92.

[44] Ex. 5, pg. 6.

[45] Ex. 4, pg. 22.

[46] Ex. 4, pg. 22.

[47] Tr. 158.

[48] Tr. 158.

[49] Ex. 5, pg. 4. The exhibit gives the date of the alert as October 2002, a date certainly in error as the exhibit itself is dated May 2002.

[50] Tr. 224.

[51] Tr. 186-87.

In October, 2001, officials of St. Louis-area utilities met with the St. Louis County Police Office of Emergency Management.[52] The police requested, but did not order, each utility to review its security arrangements and make all possible improvements in order to reduce the effect of a terrorist attack.[53]

Particular Steps Taken By Missouri-American:

Missouri-American consulted with several agencies after 9-11, including the Federal Bureau of Investigation. [54] The FBI advised Missouri-American regarding the types of threats to secure against.[55] Missouri-American also consulted with the Local Emergency Planning Commission of St. Louis County, a part of the State Emergency Management Agency, the Missouri Department of Natural Resources, the Missouri Highway Patrol, and the Governor's Special Advisor for Homeland Security.[56] While these agencies did not order Missouri-American to make any specific improvements, they strongly encouraged the company to do so.[57]

Missouri-American provided armed guards at some of its facilities.[58] The company also undertook increased water sampling.[59] Missouri-American also took steps to protect its computer network from attack.[60] The costs of these items represented expenses rather than capital investments.[61]

By July 2002, about 70 percent of the new security measures planned by Missouri-American were in place, including physical barriers and general "hardening" of the facilities.[62] Other measures, such as cameras and detection devices, remained to be installed.[63] All of the work was expected to be completed by August, 2002.[64]

In St. Joseph, Missouri, most of the expenditures made were intended to increase security at existing system components, such as tanks and mains, rather than to enhance security at the new water treatment plant.[65]

Is An Accounting Authority Order Appropriate?

An AAO is an order of the Commission that authorizes a utility to defer recognition of an expense associated with some extraordinary event from one

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[52] Ex. 5, pp. 4-5.

[53] Ex. 5, pg. 5; Tr. 231.

[54] Tr. 143.

[55] Tr. 143.

[56] Tr. 144-146.

[57] Tr. 143, 144, 148, 188.

[58] Tr. 194.

[59] Tr. 194.

[60] Tr. 332.

[61] Tr. 195.

[62] Tr. 194.

[63] Tr. 194.

[64] Tr. 194.

[65] Tr. 225.

period to another period.[66] An extraordinary event, in turn, is one that is both unusual and rare.[67] The ratemaking process is premised upon normality and regularity; therefore, extraordinary events may call for extraordinary accounting treatment.[68] An AAO permits a utility to earn a higher rate of return and to enjoy enhanced cash flow.[69] It also permits the utility to seek recovery of the deferred expense in its next rate case and to avoid the negative effect on earnings that immediate recognition of the expense would entail.[70] Because they permit ratemaking consideration of items outside the test year, AAOs should be used sparingly.[71]

The Commission's Staff opposes the AAO sought by Missouri-American in this case, as does the Office of the Public Counsel.[72] Staff opposes Missouri-American's request because Staff does not believe that the events of 9-11 constituted an extraordinary event with respect to Missouri-American.[73] Staff also seeks to persuade the Commission to adopt more stringent standards for the consideration of AAOs generally.[74] Staff urges the Commission to use a new four part test in order to avoid AAO requests that do not reasonably merit consideration; that is, frivolous requests.[75] However, Staff did not consider the present request to be frivolous.[76]

The purpose of the AAO sought by Missouri-American is to protect against service interruptions due to terrorist acts. [77] Therefore, this AAO is similar to AAOs sought with respect to extraordinary expenses caused by Acts of God.[78] It is also similar to AAOs granted to cover the expenses of government mandates due to the encouragement that Missouri-American received from various federal and state governmental entities; however, no governmental entity ever ordered Missouri-American to upgrade its security.[79] Three other state commissions have permitted American Waterworks subsidiaries to defer expenses caused by security upgrades following 9-11.[80] However, Missouri-American will move forward with its plan to increase security at its facilities even if the requested AAO is denied.[81]

In its November, 2001, resolution urging water utilities "to take all necessary and prudent precautionary steps to secure [their] facilities," the National Associa-

[66] Ex. 6, pg. 3; Ex. 7, pg. 3.

[67] Ex. 6, pp. 3-4.

[68] Ex. 6, pg. 4.

[69] Ex. 6, pg. 6.

[70] Ex. 6, pp. 6-7.

[71] Ex. 7, pg. 3.

[72] Ex. 6, pp. 9-13; Ex. 7, pg. 3.

[73] Tr. 457.

[74] Ex. 6, pp. 9-13.

[75] Tr. 416, 460-61.

[76] Tr. 467.

[77] Ex. 4, pp. 21-22.

[78] Ex. 4, pp. 21-22.

[79] Tr. 307-308.

[80] Tr. 290-293. The states are Virginia, West Virginia and Ohio.

[81] Tr. 290.

tion of Regulatory Utility Commissioners (NARUC) specifically urged state commissions to consider granting AAOs to cover the costs of upgraded security.[82] Frank Kartmann of Missouri-American testified that the company's response to 9-11 was extraordinary because it required the outlay of tremendous resources over a short period of time.[83] The present AAO application includes only expenditures made after 9-11.[84] If the requested AAO is not granted, Missouri-American will not be able to recover the amounts it has spent to upgrade security.[85]

Federal funds for security upgrades may be available through the Environmental Protection Agency.[86] Missouri-American has not yet applied for such funds, but intends to do so.[87] Missouri-American's planned expenditures consist of both one time costs and recurring costs. If the requested AAO is not granted, Missouri-American will not recover any of the amounts expended for one-time, non-capital costs or recurring costs.[88] Additionally, Missouri-American would also lose depreciation expenses and carrying costs even on the new capital assets.[89]

Edward J. Grubb, Missouri-American's accounting witness, was unable on June 27, 2002, to state what return the company was actually earning at that time.[90] However, he testified that it was about 11.0 to 11.2 percent as of December 31, 2001.[91] Missouri-American's earnings for the year ending December 31, 2001, were $22.38 million.[92]

Missouri-American presently plans to file a rate case in June 2003.[93] The water industry in general is a rising cost industry, particularly in areas like St. Louis in which large amounts of aging infrastructure must be replaced.[94] Mr. Grubb stated that such increased costs could well be greater than any savings realized from Missouri-American's recent merger.[95]

Staff, as noted, opposes Missouri-American's AAO request.[96] Applying its own proposed four-factor test, Staff concluded that Missouri-American's request fails three of the four parts of the test in that it is not material, not extraordinary and not

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[82] Ex. 1, Sch. FLK-2. This resolution specifically urged State Commissions to consider granting AAOs to cover the costs of upgraded security.

[83] Tr. 168.

[84] Tr. 171.

[85] Ex. 3, pg. 7; Ex. 4, pg. 8.

[86] Tr. 202.

[87] Tr. 202.

[88] Tr. 346-47, 400.

[89] Tr. 401-402.

[90] Tr. 272-73.

[91] Tr. 279.

[92] Tr. 279.

[93] Tr. 316.

[94] Tr. 330.

[95] Tr. 330.

[96] Ex. 6, *passim.*

within the proposed limitation.[97] First, Staff witness Fischer testified that security costs are not extraordinary for a water utility and, in any event, that the upgrades were not required by any government agency.[98] Second, Fischer testified that the amount proposed to be deferred is not material according to its proposed standard.[99] Third, Fischer testified that there is no reason that Missouri-American could not immediately file a rate case to recover the costs of the security upgrade.[100]

Edward J. Grubb testified for Missouri-American that, should Staff's measure of materiality be adopted by the Commission, then the impact of Missouri-American's increased security expenditures should be calculated on an annualized basis.[101] Grubb testified that Staff's proposed calculation, based on the 12 months following September 11, 2001, tended to lessen the financial impact of that event.[102] Staff also ended its calculation period in August 2002 rather than September 2002.[103] Staff also overstated Missouri American's 2001 regulated Missouri income by including nonregulated items.[104] When these mistakes are corrected, Grubb testified that the impact of the additional security expenditures is well-above Staff's five percent materiality standard.[105]

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Missouri-American pursuant to Section 386.250 and Chapter 393.

Burden of Proof:

Missouri-American, which is seeking an order authorizing a deviation from otherwise mandatory accounting rules, necessarily has the burden of showing that such an order is appropriate in the circumstances.

What is an Accounting Authority Order (AAO)?

The Commission is authorized to "prescribe uniform methods of keeping accounts, records and books, to be observed by . . . water corporations[.]"[106] Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-50.030(1), which requires water corporations to utilize the Uniform System of Accounts issued by the National Association of Regulatory Utility Commissioners

[97] Ex. 6, pp. 12-13.

[98] Ex. 6, pp. 13-16.

[99] Ex. 6, pp. 16-19.

[100] Ex. 6, pp. 19-21.

[101] Ex. 4, pg. 12.

[102] Ex. 4, pg. 12.

[103] Ex. 4, pg. 13.

[104] Ex. 4, pg. 14.

[105] Ex. 3, pg. 7; Ex. 4, pg. 14.

[106] Section 393.140(4).

(NARUC) in 1973 and revised in July, 1976. The Commission is also authorized "after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."[107]

An AAO is an order of the Commission authorizing an accounting treatment for a transaction or group of transactions other than that prescribed by the Uniform System of Accounts. It is an accounting mechanism that is generally used to permit deferral of costs from one period to another.[108] The items deferred are booked as a regulatory asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period.[109] During a subsequent rate case, the Commission determines what portion, if any, of the deferred amounts will be recovered in rates. It has been said that AAOs should be used sparingly because they permit ratemaking consideration of items from outside the test year:[110]

> The deferral of cost from one period to another period for the development of a revenue requirement violates the traditional method of setting rates. 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.

Should the Commission Adopt the Four-Factor Test Proposed by Staff?

The Commission's Staff urges the Commission to use this case as an opportunity to adopt a new four-part test for AAOs. Staff has taken this position in other recent cases involving AAOs and the Commission has not adopted it.[111] Missouri-American strenuously opposes Staff's proposal; the other parties are willing to accept it.

Staff's proposed four-factor test is as follows:

Materiality: The amount proposed for deferral must be *material* in that it equals or exceeds five percent of the utility's Missouri regulated annual income, excluding the precipitating event.

Magnitude: The amount proposed for deferral must be of such magnitude that it cannot be covered by current revenue and still permit the utility a reasonable expectation of earning its authorized rate of return.

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[107] Section 393.140(8).

[108] *In the Matter of Missouri Public Service,* 1 Mo.P.S.C.3d 200, 202 (Dec. 20, 1991).

[109] *Id.*

[110] *In the Matter of Missouri Public Service,* 1 Mo.P.S.C.3d at 205, *citing State ex. rel. Union Electric Company v. Public Service Commission,* 765 S.W.2d 618, 622 (Mo. App., W.D. 1988).

[111] *E.g., In the Matter of Missouri Public Service and St. Joseph Light & Power, Divisions of UtiliCorp United, Inc.,* Case No. GO-2002-175, decided by the Commission on November 14, 2002.

Extraordinary: The amount proposed for deferral must result from an extraordinary event, either an extraordinary capital addition or some event outside of management control, such as a storm or flood.

Limitation: The utility must show a sufficient reason why it is not immediately filing a rate case to recover the amount proposed to be deferred. Should the Commission grant the AAO, the utility must file a rate case within 90 days.

Staff characterizes its proposed four-factor test as a summary of the criteria examined by the Commission in recent AAO cases, a point that Missouri-American vehemently denies.[112] Staff urges the Commission to use this test in order to avoid AAO requests that do not reasonably merit consideration; that is, as a way to avoid frivolous requests.[113] Staff further supports its proposal by stating that its adoption would "establish an ascertainable standard, which would enable utilities to know how their application would be judged and would prevent the filing of cases that have little merit [or] . . . little chance of approval."[114]

Missouri-American opposes Staff's position and suggests that the Commission continue to use what Missouri-American characterizes as the "traditional test," that is, whether the expenditures in question are "extraordinary, unusual, unique and nonrecurring."[115] Missouri-American points out that the Commission has had no difficulty in applying its traditional test. Further, Missouri-American suggests that the adoption of Staff's proposed new test in this case for general application would be unlawful in that it would constitute an evasion of the rule-making procedures mandated by state statute.[116]

The City of Riverside and the St. Joseph Industrial Intervenors, writing together, contend that Staff's proposed four-factor test is "nothing more than a distillation of [the Commission's prior AAO] cases to provide a more precise analytical framework for decisions."[117] Consequently, it is not rulemaking and its application in this case would not be unlawful. Public Counsel argues that use of Staff's four-factor test could be "helpful" and would provide "guidance" for the Commission when considering AAO requests.

As noted previously, this Commission by its Regulation 4 CSR 240-50.020(1) requires that water utilities in the state of Missouri use the Uniform System of Accounts for water companies as published by NARUC in 1973 and revised in 1976. That regulation, properly promulgated pursuant to authority delegated to the

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[112] *Missouri-American Water Company's Reply Brief,* at 12 ff.

[113] Tr. 416, 460-61.

[114] *Staff's Reply Brief*, at 4.

[115] *Initial Brief of Missouri-American Water Company,* at 4; *Staff's Reply Brief,* at 4. The parties agree that the so-called "traditional test" was derived by the Commission from the language of the Uniform System of Accounts.

[116] *See NME Hospitals, Inc. v. Department of Social Services,* 850 S.W.2d 71, 74 (Mo. banc 1993).

[117] *Initial Brief of the City of Riverside, Missouri, and St. Joseph Industrial Intervenors,* at 21.

Commission by statute,[118] has the force and effect of law.[119] It is binding on Missouri-American and, indeed, on this Commission as well.[120] The Uniform System of Accounts, in turn, describes Account 186, Miscellaneous Deferred Debits, as follows:[121]

> This account shall include all debits not elsewhere provided for, such as miscellaneous work in progress, losses on disposition of property, net of income taxes, deferred by authorization of the Commission, and unusual or extraordinary expenses, not included in other accounts, which are in process of amortization, and items the proper final disposition of which is uncertain.

This definition unmistakably lists items "deferred by authorization of the Commission" as merely one of several categories of debits properly to be recorded in Account 186; another is "unusual or extraordinary expenses." For this reason, the Commission has previously noted that its prior authorization is not, in fact, necessary for the deferral of extraordinary expenses by water utilities.[122]

The Commission is expressly authorized "after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."[123] "Statutory provisions relating to the same subject matter are considered in *pari materia*[.]"[124] "Statutes in *pari materia* are intended to be read consistently and harmoniously."[125] The reader must "interpret and apply statutory provisions with reference to each other in order to determine legislative intent."[126] Thus, the Commission's authority at Section 393.140(8) to prescribe the accounting treatment to be given any particular item must be read together with its authority at Section 393.140(4) to prescribe uniform methods of accounting. The purpose of the authority at Section 393.140(8) is to permit accounting flexibility where such flexibility is desirable. Because the statute does not specify any particular standard

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[118] Section 393.140(4).

[119] *State ex rel. Martin-Erb v. Missouri Commission on Human Rights,* 77 S.W.3d 600, 607 (Mo. banc 2002), *citing Missouri National Education Association v. Missouri State Board of Mediation,* 695 S.W.2d 894, 897 (Mo. banc 1985).

[120] *Id.*

[121] National Association of Regulatory Utility Commissioners, *Uniform System of Accounts for Class A and B Water Utilities, 1973* (revised 1976), at 61, paragraph 186.A.

[122] *See In the Matter of Missouri-American Water Company,* Case No. WR-2000-281 (*Order Concerning Non-unanimous Stipulation and Agreement,* issued March 23, 2000). This order was cited by Staff witness Fischer in her Rebuttal Testimony.

[123] Section 393.140(8).

[124] *EBG Health Care III, Inc. v. Missouri Health Facilities Review Commission,* 12 S.W.3d 354, 360 (Mo. App. 2000).

[125] *Id.*

[126] *Phillips v. American Motorist Insurance Co.,* 996 S.W.2d 584, 587 n. 3 (Mo. App. 1999); *see also Board v. Eurostyle, Inc.,* 998 S.W.2d 810, 814 (Mo. App. 1999).

to be applied in making such an order, this authority is committed to the sound discretion of the Commission.[127]

It is true, as the parties note, that the Commission has in the past used a standard drawn from the Uniform System of Account's description of Account 186 in exercising this authority; however, that standard is not imposed by either statute or rule. Indeed, the so called "traditional test" is not a standard so much as a description of an item which may appropriately be deferred. The true standard applicable to the Commission's exercise of its authority at Section 393.140(8) is necessarily the standard by which such exercise of its discretion will be reviewed: "Judicial review is to determine [the] lawfulness of the order under the statutes, as well as reasonableness of the order and whether it is supported by competent and substantial evidence on the whole record."[128] Missouri courts have already upheld the Commission's authority to grant AAOs.[129] Thus, the only remaining issue is whether the Commission's exercise of-or refusal to exercise-its authority under Section 393.140(8) is reasonable under the circumstances.

The Commission will not adopt the four-factor test proposed by Staff for use in this case. The Commission will continue to review AAO requests on a case-by-case basis and will grant them or refuse to grant them as is reasonable according to the particular circumstances of each case. With respect to the so-called "traditional test," that is, whether the expenditures in question are "extraordinary, unusual, unique and nonrecurring," the Commission points out that it is encompassed by the reasonable-under-the-circumstances standard. A utility must show a good and sufficient reason to justify a deviation from the normal accounting rules, one that confers a more general benefit than mere protection of the shareholders from regulatory lag. In reviewing such requests, the Commission is mindful that it must balance the interests of the company against the interests of the public, with the public interest to be given more weight.[130] As the Missouri Supreme Court has 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

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[127] *See St. ex rel. Laclede Gas Company v. Public Service Commission,* 535 S.W.2d 561, 567 (Mo. App. 1976).

[128] *St. ex. rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 47 (Mo. banc 1979); *Missouri Gas Energy v. Public Service Commission,* 978 S.W.2d 434, 436 (Mo. App., W.D. 1998).

[129] *St. ex rel. Office of the Public Counsel v. Public Service Commission of Missouri,* 858 S.W.2d 806, 811 (Mo. App., W.D. 1993).

[130] The "dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental." *State ex rel. Crown Coach Co. v. Public Service Commission,* 238 Mo. App. 287, ___, 179 S.W.2d 123, 126 (1944).

> 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.[131]

Should the Commission Grant the Requested AAO?

Missouri-American seeks an AAO permitting it to defer various expenditures incurred in improving the security of its facilities after 9-11. If the AAO is granted, Missouri-American will attempt to recover these expenditures in its next general rate case. Staff, Public Counsel, and the remaining intervenors oppose the requested AAO. The question for the Commission is whether the requested AAO is reasonable under all the circumstances.

Some of the opponents of the AAO accuse Missouri-American of opportunism. The City of Riverside and the St. Joseph Industrial Intervenors, writing together, characterize Missouri-American's application as "a rather shameless attempt by an already highly profitable monopoly utility to exploit the national tragedy of 9-11 and increase its already substantial profit, by improving its financial position through an accounting authority order or 'AAO'."[132] Likewise, the Public Counsel states "This is a case of a regulated utility company seeking to take advantage of our national tragedy in order to benefit financially."[133]

The Industrial Intervenors argue that Missouri-American has not shown that the expenses in question meet the Commission's traditional test for an AAO, much less the four-factor test proposed by Staff. Because these expenses are "standard, ongoing business expenses that are included in every rate case," the requested AAO should be denied according to Riverside and the Industrial Intervenors.[134] Staff and Public Counsel join in this view. Further, Public Counsel characterizes Missouri-American's request in this case as an attempt to insulate shareholders from regulatory lag.

Public Counsel, Staff and the Industrial Intervenors argue that the events of 9-11 were not extraordinary with respect to Missouri-American because, first, none of its facilities were damaged on that day and, second, no government agency required that it take any action in response to the events of 9-11. Missouri-American presented testimony to show that its management had no choice but to upgrade the security of its facilities after 9-11. However, Public Counsel, Staff and the Industrial Intervenors insist that this was a management decision rather than a government mandate and that the associated costs should therefore be paid by the shareholders rather than the ratepayers. Public Counsel argues that there is insufficient "nexus" between the admittedly extraordinary events of 9-11 and the expenditures that Missouri-American seeks to defer.

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[131] *State ex rel. Washington University et al. v. Public Service Commission, et al.*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (banc 1925).

[132] *Initial Brief of the City of Riverside, Missouri, and St. Joseph Industrial Intervenors,* at 1.

[133] *Initial Brief of the Office of the Public Counsel,* at 1.

[134] *Id.,* at 4-5.

Staff explains that the present case must be contrasted to those in which a utility must meet a government mandate or restore service after a disaster. In such cases, Staff argues, the decisions as to what to do and when to do it are truly taken out of the hands of the utility's management. In the present case, by contrast, Staff contends that Missouri-American's management was fully in charge of the nature, scope and pace of the utility's response to the events of 9-11. Staff essentially states that, while it may be true that the company had to do something, it was not required to do what it did.

The arguments raised against Missouri-American's request may be summarized as follows: First, the expenditures in question are not eligible for deferral because they are normal business expenses in that utilities always have a duty to provide appropriate security for their facilities. Second, the expenditures in question are not eligible for deferral because they are not extraordinary, either in amount or in purpose, as shown by the fact that Missouri-American's management chose to make them and was not required to make them. These arguments are driven by a basic misunderstanding of AAOs. The test, as explained above, is whether deferral is reasonable under all the circumstances.

By seeking an AAO, Missouri-American seeks to preserve the possibility-not the certainty-of recovering some of the expenditures made to upgrade security from the very ratepayers protected thereby. It is true that the management of Missouri-American chose to make the expenditures under consideration in this case; it was not required to do so by any government agency or Act of God. However, that point is simply one of the circumstances that the Commission must consider, as is the fact that the decision was made in the light of the events of 9-11 and the various governmental responses to those events. For these reasons, the Commission concludes that an AAO is reasonable under all the circumstances and should be granted.

What Conditions Should the Commission Impose on the AAO?

Staff urges the Commission to impose certain conditions if it should grant the AAO requested in this case.

First, Staff urges that Missouri-American be required to begin amortization of the deferred amount immediately upon the effective date of the order granting the AAO. Missouri-American has indicated that this condition is acceptable and the Commission will adopt it.

Second, Staff advises the Commission to leave the determination of the length of the amortization period to a subsequent rate case. Or, should the Commission decide to fix an amortization period in this case, then Staff suggests a ten-year period rather than the 20-year period proposed by Missouri-American. Missouri-American contends that, should an AAO be granted, then the Commission must specify the length of the amortization period. Public Counsel argues for amortization over 20 years rather than ten.

The Commission agrees with Missouri-American that, if amortization is to begin immediately, then the Commission must specify an amortization period. The Commission will adopt Staff's suggestion of a ten-year amortization period,

because this will amortize the deferred costs over a period more nearly contemporaneous with the time the ratepayers receive the benefit of the expenditures being amortized.

Third, Staff contends that the Commission should give no indications as to future ratemaking treatment in the order issued in this case. Public Counsel agrees with Staff that the order in this case should include no indications of future ratemaking treatment. In particular, Public Counsel advises the Commission to say nothing as to the prudence of the expenditures involved. The Commission agrees and will adopt these suggestions.

Missouri-American has indicated that it intends to file a rate case in June, 2003. Therefore, the Commission will terminate the AAO granted in this case in September, 2003.

IT IS THEREFORE ORDERED:

1. That Late Filed Exhibit 13 (Highly Confidential), filed by Missouri-American Water Company at the request of the Commission on July 18, 2002, is received and made a part of the record of this proceeding.

2. That the Agreed Motion to Modify Briefing Schedule filed by the City of Riverside, Missouri, on August 15, 2002, is granted.

3. That all other pending motions not already ruled herein are denied.

4. That the application for an Accounting Authority Order filed by Missouri-American Water Company and its predecessors on December 10, 2001, is granted as further specified herein.

5. That Missouri-American Water Company is hereby granted authority to defer and book to Account 186 expenditures relating to security improvements and enhancements beginning September 11, 2001, and continuing through September 11, 2003.

6. That Missouri-American Water Company shall, upon the effective date of this Order, immediately begin the amortization over a ten-year period of any amount deferred under the authority granted in this order.

7. That nothing in this Order shall be considered a finding by the Commission of the value or prudence for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

8. That this Report and Order shall become effective on December 20, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

In the Matter of the Petition of Spectra Communications Group, L.L.C. d/b/a CenturyTel Regarding Price Cap Regulation under Section 392.245, RSMo 2000.

Case No. IO-2003-0132
Decided: December 17, 2002

Telecommunications §41. Under Section 392.245.2, RSMo 2000, as currently supplemented, a large incumbent local telecommunications company is subject to price cap regulation when the Commission finds that an alternative local telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area. The record shows that Spectra meets the statutory requirements and thus will be subject to price cap regulation without the necessity of a contested hearing.

ORDER APPROVING PRICE CAP REGULATION

Syllabus: This order approves the applicant's petition for a determination that it is subject to price cap regulation.

Brief Procedural History

On October 4, 2002, Spectra Communications Group, L.L.C. d/b/a CenturyTel filed with the Missouri Public Service Commission a verified petition for a determination that it is subject to price cap regulation under Section 392 .245, RSMo 2000,[1] known as the "price cap statute."

On October 9, 2002, the Commission issued its order and notice, setting an intervention deadline of October 29, 2002. No one intervened. On October 28, 2002, the Office of the Public Counsel filed its request for an evidentiary hearing. The Staff of the Commission responded both to Spectra's and Public Counsel's pleading on October 29, 2002.

On October 30, 2002, the Commission ordered Staff to file its memorandum and recommendation by November 20, 2002, and also ordered that any party wishing to respond to Staff's pleading should do so by November 30, 2002. Staff filed its memorandum and recommendation on November 1, 2002, and Spectra responded to it on November 25, 2002. No other party responded.

The Applicant

Spectra states that it is a Delaware limited liability company authorized to do business in Missouri under the certificate of authority issued by the Secretary of State and filed in case number TM-2000-182. According to Spectra, it operates in Missouri using the fictitious name of "CenturyTel," the registration of which is filed in case number TO-2001-437. Spectra's principal place of business is 1151 CenturyTel Drive, Wentzville, Missouri.

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[1] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000, as currently supplemented.

Spectra points out that it is a provider of basic local telecommunications services in 107 rural exchanges throughout Missouri, including the exchanges of Lewiston, LaBelle, and Ewing. Spectra says that it provides basic local telecommunications services under tariffs filed with the Commission. According to Spectra, it currently provides telecommunications service to customers located in the state of Missouri totaling approximately 130,988 access lines.

Spectra's Petition

Spectra cites Section 386.020(22), which defines "incumbent local exchange telecommunications company" as a "local exchange telecommunications company authorized to provide basic local telecommunications service in a specific geographic area as of December 31, 1995, or a successor in interest to such a company." Spectra notes that GTE Midwest Incorporated, also known as Verizon, was a local exchange telecommunications company authorized to provide basic local telecommunications service as of December 31, 1995. Spectra argues that it is a "successor in interest" to GTE/Verizon as a result of its purchase of local exchange properties which was approved by the Commission[2] and Spectra is therefore an incumbent local exchange company.

Spectra then cites Section 386.020(30), which defines a large local exchange telecommunications company as a company that has at least one hundred thousand access lines in Missouri. Since, according to Spectra, it presently serves more than 100,000 access lines in Missouri, it is thus a large incumbent local exchange telecommunications company as defined in Missouri statutes.

Spectra argues that Section 392.245.2 requires that a large local exchange telecommunications company must be regulated under price cap regulation when: 1) a competitive local exchange company is properly certificated to provide service in its service area; and 2) the competitive local exchange company is, in fact, providing service in any part of the incumbent local exchange company's service area.

Spectra states these two things have happened: Mark Twain Communications Company has been certified to provide basic local telecommunications service in two of Spectra's exchanges.[3] Mark Twain, says Spectra, is also now providing basic local telecommunications service in three Spectra exchanges and customers of Mark Twain have subscribed to basic local telecommunications service.[4]

Spectra does not consider price cap regulation to be discretionary. To the contrary, argues Spectra, the statute provides that a large incumbent local exchange telecommunications company must be subject to price cap regulation after a determination has been made that a competitor is certified and providing basic

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[2] Report and Order, *Re GTE Midwest Incorporated and Spectra Communications Group L.L.C.*, Case No. TM-2000-182 (issued April 4, 2000).

[3] Order Granting Certificate of Service Authority and Suspending Tariff, *In the Matter of the Application of Mark Twain Communications Company*, Case No. TM-98-305 (issued May 19, 1998).

[4] *See* Affidavit of Arthur Martinez attached to Spectra's petition as Appendix 2.

local telecommunications services. Spectra cites some of the cases where the Commission has made this determination for other large incumbent local exchange companies.[5] Spectra also points out that its affiliate, CenturyTel of Missouri L.L.C., was also determined to be price cap regulated.[6]

Spectra concluded by noting that the Commission has previously found that Mark Twain is certificated and providing service in the Lewiston and LaBelle exchanges.[7] Those findings are equally true today, says Spectra, except that the exchanges are now served by Spectra instead of GTE/Verizon.

Staff's Response to Public Counsel

In its response to Spectra's petition and Public Counsel's request for an evidentiary hearing, Staff noted that the Commission need not grant a hearing to a party in a noncontested case merely because a party requests a hearing. Staff cites the Cole County Circuit Court, which has found that Section 392.245.2 does not give rise to a Section 536.010(2) "contested case" scenario and does not require notice and hearing before the Commission makes its determinations in response to a large incumbent local exchange telecommunications company's price cap application.[8] Since, in Staff's view, notice and hearing are not mandatory, and the facts supporting the petition are straightforward and are not in dispute, there is no need for an evidentiary hearing, and the Commission should deny Public Counsel's request.

There are no further questions of law or fact for the Commission to decide, so the Commission agrees with its Staff that there is no necessity of an evidentiary hearing and will deny Public Counsel's request for such a hearing.

Staff's Memorandum and Recommendation

Staff recommends that the Commission grant Spectra price cap status because it meets the criteria in Section 392.245.2. Staff notes that Spectra now serves as a "large incumbent local exchange telecommunications company," as used in Section 392.245.2, by providing service to former GTE Midwest Incorporated exchanges, and that Mark Twain Communications Company is acting as an "alternative local exchange telecommunications company" as used in Sections 386.020(1) and 392.245.2.

Staff believes that Mark Twain has not only the authority to provide service in Spectra's service area, but is also in fact doing so. According to Staff, Mark Twain serves 784 full facility-based residential voice grade equivalent lines and 250 full facility-based business voice grade equivalent lines in the Spectra service area. Staff recommends that the Commission grant Spectra price cap status.

The Commission agrees with its Staff and will grant Spectra price cap status.

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[5] See Report & Order, *Re Southwestern Bell Telephone Company*, Case No. TO-97-397 (issued September 16, 1997); Order Approving Price Cap Regulation Appication, *Re GTE Midwest Incorporated*, Case No. TO-99-294 (issued January 26, 1999); Order approving Price Cap Application, *Re Sprint Missouri, Inc.*, Case No. TO-99-359 (issued August 19, 1999).

[6] Report and Order, *Re GTE Midwest Incorproated d/b/a Verizon Midwest and CenturyTel of Missouri L.L.C.*, Case NO. TM-2002-232 (issued May 21, 2002).

[7] Order Approving Price Cap Regulation Application in Case No. TO-99-294, *supra*.

[8] *State of Missouri, ex rel. Public Counsel Martha S. Hogerty v. The Public Serv. Comm'n of the State of Mo., et al.*, Cause No. CV199-282CC (Cole Co. Cir. Ct., July 27, 1999).

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

In order to qualify for price cap regulation under Section 392.245.2, Spectra must show and has shown: (1) that an alternative local exchange company is properly certificated to provide local exchange telecommunications services in Spectra's service area, and (2) that the alternative local exchange carrier is, in fact, providing such services in any part of Spectra's service area.

The Commission finds, after consideration of the petition and supporting materials, that Mark Twain is a facilities based, alternative local exchange carrier that is duly certificated and actually providing basic local telecommunications service within Spectra's service area.

The Commission further finds that Spectra is a large incumbent local exchange company under Section 392.245.2 in that it operates in excess of 100,000 access lines.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Spectra under Section 386.250 and Chapter 392.

Under Section 392.245.2, a large incumbent local telecommunications company is subject to price cap regulation after a determination by the Commission that an alternative local telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area. The record shows that Spectra meets the conditions contained in Section 392.245.2, and thus will be subject to price cap regulation.

IT IS THEREFORE ORDERED:

1. That the request for an evidentiary hearing filed by the Office of the Public Counsel on October 28, 2002, is denied.

2. That Spectra Communications Group, L.L.C. d/b/a CenturyTel will be subject to price cap regulation under Section 392.245.2, RSMo 2000, as currently supplemented.

3. That this order will become effective on December 27, 2002.

Murray, Lumpe and Forbis, CC., concur
Simmons, Ch., and Gaw, C., dissent

Hopkins, Senior Regulatory Law Judge

In the Matter of Southwestern Bell Telephone Company's Tariff to Initiate a Residential Customer Winback Promotion

Case No. TT-2003-0204
Decided December 19, 2002

Evidence, Practice and Procedure §27. The Commission denied a motion to suspend a tariff that had been submitted in compliance with a previous report and order.

ORDER DENYING MOTION TO SUSPEND, DENYING APPLICATION TO INTERVENE, AND APPROVING TARIFF

On December 13, 2002, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri issued a proposed tariff carrying an effective date of December 23, 2002. Southwestern Bell's tariff would revise its local exchange tariff to institute a promotion that was approved by the Commission in a report and order issued on December 3, 2002, in case number TT-2002-472. On December 17, AT&T Communications of the Southwest, Inc., MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. filed a Joint Application for Intervention and Motion to Suspend Tariffs.

The applicants ask the Commission to suspend Southwestern Bell's tariff for three reasons: first, the application for rehearing in TT-2002-472 is still pending and the applicants argue that this tariff should not be approved until the Commission decides whether to rehear that case; second, Southwestern Bell did not make certain changes to the tariff that it indicated it would make in testimony in TT-2002-472; and third, the Commission should not approve this tariff until it has conducted an investigation into Southwestern Bell's winback practices.

The Commission's Staff filed a recommendation on December 17 in which it indicated that the tariff is identical to the tariff that the Commission indicated it would approve in the report and order in case number TT-2002-472. Staff recommends that the tariff be allowed to go into effect on its December 23 effective date.

The Commission has reviewed the tariff sheet, the motion to suspend, and Staff's recommendation. The motion to suspend is not persuasive. The Commission has now acted to deny the application for rehearing in case number TT-2002-472, Southwestern Bell has filed a tariff in compliance with the Commission's previous report and order, and the applicants' request for an investigation was previously rejected in TT-2002-472. Because Southwestern Bell's tariff will not be suspended, there will be no proceedings for which intervention would be appropriate. Therefore, the application to intervene will be denied. Finally, the tariff filed by Southwestern Bell will be approved.

IT IS THEREFORE ORDERED:

1. That AT&T's and WorldCom's Joint Application for Intervention and Motion to Suspend Tariffs or in the Alternative a Request for the Imposition of a 30-day Waiting Period for any Winback Contact is denied.

2. That the tariff sheet filed by Southwestern Bell Telephone, L.P. d/b/a SBC Missouri on December 13, 2002, and assigned tariff number JI-2003-1231, is approved to become effective on December 23, 2002. The tariff sheet approved is:

P.S.C. Mo. No. 24
3rd Revised Sheet 2, Replacing 2nd Revised Sheet 2

3. That this order shall become effective on December 23, 2002.

Simmons, Ch., Murray and Forbis, CC., concur
Lumpe and Gaw, CC., dissent

Woodruff, Senior Regulatory Law Judge

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Extend Business Customer Winback Promotions

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Case No. TT-2003-0205
Decided December 19, 2002

Evidence, Practice and Procedure §27. The Commission denied a motion to suspend a tariff that had been submitted in compliance with a previous report and order.

ORDER DENYING MOTION TO SUSPEND, DENYING APPLICATION TO INTERVENE, AND APPROVING TARIFF

On December 13, 2002, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri issued a proposed tariff carrying an effective date of December 23, 2002. Southwestern Bell's tariff would extend certain business customer winback promotions that were approved by the Commission in a report and order issued on December 3, 2002, in case number TT-2002-472. On December 17, AT&T Communications of the Southwest, Inc., MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. filed a Joint Application for Intervention and Motion to Suspend Tariffs.

The applicants ask the Commission to suspend Southwestern Bell's tariff for three reasons: first, the application for rehearing in TT-2002-472 is still pending and the applicants argue that this tariff should not be approved until the Commission decides whether to rehear that case; second, Southwestern Bell did not make certain changes to the tariff that it indicated it would make in testimony in TT-2002-472; and third, the Commission should not approve this tariff until it has conducted an investigation into Southwestern Bell's winback practices.

The Commission's Staff filed a recommendation on December 17 in which it indicated that the tariff is identical to the tariff that the Commission indicated it would

approve in the report and order in case number TT-2002-472. Staff recommends that the tariff be allowed to go into effect on its December 23 effective date.

The Commission has reviewed the tariff sheets, the motion to suspend, and Staff's recommendation. The motion to suspend is not persuasive. The Commission has now acted to deny the application for rehearing in case number TT-2002-472; Southwestern Bell has filed a tariff in compliance with the Commission's previous report and order; and the applicants' request for an investigation was previously rejected in TT-2002-472. Because Southwestern Bell's tariff will not be suspended, there will be no proceedings for which intervention would be appropriate. Therefore, the application to intervene will be denied. Finally, the tariff filed by Southwestern Bell will be approved.

IT IS THEREFORE ORDERED:

1. That AT&T's and WorldCom's Joint Application for Intervention and Motion to Suspend Tariffs or in the Alternative a Request for the Imposition of a 30-day Waiting Period for any Winback Contact is denied.

2. That the tariff sheets filed by Southwestern Bell Telephone, L.P. d/b/a SBC Missouri on December 13, 2002, and assigned tariff number JI-2003-1232, are approved to become effective on December 23, 2002. The tariff sheets approved are:

P.S.C. Mo. No. 24
3rd Revised Sheet 1.03, Replacing 2nd Revised Sheet 1.03

P.S.C. Mo. No. 41
1st Revised Sheet 6.03, Replacing Original Sheet 6.03
1st Revised Sheet 14.02, Replacing Original Sheet 14.02

P.S.C. Mo. No. 35
1st Revised Sheet 15, Replacing Original Sheet 15

3. That this order shall become effective on December 23, 2002.

Simmons, Ch., Murray and Forbis, CC., concur
Lumpe and Gaw, CC., dissent

Woodruff, Senior Regulatory Law Judge

In the Matter of an Incident in a Missouri Gas Energy Utility Vault in Kansas City, Missouri.*

Case No. GS-2002-345
Decided December 19, 2002

Gas §1. This case was opened for the purpose of receiving information and a gas incident report regarding an explosion that occurred in one of Missouri Gas Energy's utility vaults in Kansas City, Missouri. The Commission approved the Settlement Agreement and Satisfaction of Complaint between the Staff of the Commission and Missouri Gas Energy. As part of the agreement, the company agreed to change its vault entry procedure to require testing for combustible gas before an employee opens the vault. The company also agreed to fix the vault that was involved in the explosion and to inspect, at least semiannually, all ten of its vaults that have tight-sealed doors and no external vents. The agreement also provides that the company will review its procedures regarding what work its employees must do and what work the company may hire out to contractors. The company also agreed to review the issue of what training it should give employees and contractors, as well as when a company employee should be present to assist a contractor.

Gas §35. As part of a Settlement Agreement and Satisfaction of Complaint between Missouri Gas Energy and the Staff of the Commission, the company agreed to fix the vault where an explosion recently occurred, change its vault entry procedures to require testing for combustible gas before an employee opens the vault, and to inspect all ten of its vaults that have tight-sealed doors and no external vents. In addition, the company agreed to additional changes regarding the work it hires out to contractors.

ORDER APPROVING SETTLEMENT AGREEMENT AND SATISFACTION OF COMPLAINT

Syllabus:

This order approves the Settlement Agreement and Satisfaction of Complaint between the Staff of the Missouri Public Service Commission and Missouri Gas Energy (MGE), and instructs MGE to file certain notices regarding its progress reports.

Procedural History:

On January 16, 2002, the Staff of the Missouri Public Service Commission filed a motion to open this case. Staff indicated that on December 10, 2001, a representative of Missouri Gas Energy was notified of an explosion in one of the company's utility vaults located near the intersection of 32nd and North Oak Street in Kansas City, Missouri. Staff stated that two men were in the vault at the time of the explosion, and both men were taken to nearby hospitals and treated for injuries. On January 23, 2002, the Commission issued an order establishing this case for the purpose of receiving information and a gas incident report.

*Also see GC-2003-076.

On August 28, 2002, Staff filed its Recommendation, including its Gas Incident Report. Staff determined that the probable cause of the incident was the introduction of an ignition source (an impact wrench used by a contract employee) in a flammable atmosphere that had accumulated within the utility vault. Also on August 28, 2002, Staff filed a complaint case against the company, GC-2003-0076, alleging violation of Commission Rules 4 CSR 240-40.030(12)(B)3, 4 CSR 240-40.030(13)(X), and 4 CSR 240-40.030(12)(D), regarding, respectively, compliance with gas safety rules, minimizing the danger of accidental ignition, and training of individuals who perform work on pipeline systems.

By order issued September 16, 2002, the Commission directed MGE to file its response to the Incident Report no later than October 28, 2002.

Staff and MGE filed a Settlement Agreement and Satisfaction of Complaint, resolving the issues in both cases, on October 25, 2002. On November 1, 2002, Staff filed its Suggestions in Support of the Settlement Agreement and Satisfaction of Complaint.

Discussion:

In the Settlement Agreement and Satisfaction of Complaint, the parties stipulate and agree that MGE has changed its vault entry procedure to require testing for combustible gas before an employee opens the vault. MGE has ten vaults that have tight-sealed doors and no external vents. The company agrees to fix the vault that is the subject of Case No. GC-2003-0076, as well as to inspect all ten of the above-described vaults at least semiannually.

In addition, MGE agrees to review its procedures concerning what work its employees must do and what work MGE may hire out to contractors. Also, MGE will revisit what training the company should give those employees and contractors, as well as when an MGE employee should be present to assist a contractor. MGE agrees to submit two reports on its progress to Staff within 60 and 180 days, respectively, of the Commission's order. In its Suggestions in Support of the Agreement, Staff requests that the Commission approve the Agreement, and requests that the Commission suspend the requirement that MGE file a response to the Incident Report. Staff also requests that the Commission issue an order closing Case Nos. GO-2002-345 and GC-2003-0076.

The Office of the Public Counsel did not sign the Settlement Agreement and Satisfaction of Complaint. However, Commission Rule 4 CSR 240-2.115(1) provides that if no party requests a hearing, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement. No party has requested a hearing, and therefore, the Stipulation and Agreement will be treated as unanimous.

Section 536.060, RSMo Supp. 2001, provides that 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. The Commission finds the Settlement Agreement and Satisfaction of Complaint to be reasonable. Therefore, the Commission will approve the Agreement of the parties. In addition, the Commission will direct MGE to file a notice in this case when it submits each of its progress reports to Staff. This case will remain open pending the filing of the two notices.

IT IS THEREFORE ORDERED:

1. That the Settlement Agreement and Satisfaction of Complaint between the Staff of the Commission and Missouri Gas Energy, filed by the parties filed on November 1, 2002, is approved.

2. That the Staff of the Commission and Missouri Gas Energy shall comply with the terms of the Stipulation and Agreement.

3. That Missouri Gas Energy is directed to file a notice in this case when it submits each of its progress reports to Staff as noted above.

4. That Missouri Gas Energy is relieved of the requirement to file a response to the Gas Incident Report.

5. That this order shall become effective on December 29, 2002.

6. That this case may be closed on December 30, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Ruth, Senior Regulatory Law Judge

Editor's 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.

Application of Union Electric Company d/b/a AmerenUE for Approval of Decommissioning Cost Estimate and Funding Level of Nuclear Decommissioning Trust Fund.

Case No. EO-2003-0083
Decided December 30, 2002

Electric §45. The Commission approved a Stipulation and Agreement concerning AmerenUE's decommissioning costs. The Commission ordered that AmerenUE's accruals and trust fund payments stay at the current level.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 30, 2002, Union Electric Company d/b/a AmerenUE filed an application requesting that the Commission: (1) approve the Company's estimate of decommissioning costs and the funding level necessary to defray these costs, and (2) specifically find that the annual funding level contributed to the decommissioning trust fund is included in the Company's current cost of service for ratemaking purposes.

The Commission issued notice of the application, and allowed interested entities the opportunity to intervene. No applications to intervene were filed.

The Office of the Public Counsel, Staff, and AmerenUE (the parties) filed a unanimous stipulation and agreement on December 10, 2002. The parties agree that AmerenUE shall continue its Missouri retail jurisdiction expense accruals and trust fund payments at current levels without any change in its Missouri retail jurisdictional rates. The parties further agree that annual decommissioning costs in the amount of $6,214,184 are, and should continue to be, included in AmerenUE's cost of service and reflected in its current rates for ratemaking purposes.

On December 6, 2002, Staff filed a Staff Recommendation in support of the agreement. In the agreement itself, the parties state that the Staff Recommendation will serve as Staff's suggestions in support of the agreement.

The Commission has considered the verified application and its attendant studies and analyses, the unanimous stipulation and agreement, and the Staff Recommendation. The Commission finds that AmerenUE's currently effective rates include an annual amount of $6,214,184 for decommissioning expense. The Commission also finds that AmerenUE's 2002 Cost Study meets the requirements of 4 CSR 240-20.070(9).

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on December 10, 2002, is approved.

2. That Union Electric Company d/b/a AmerenUE's retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of $6,214,184.

3. That AmerenUE or its trustee shall file on a prospective basis in Case No. EO-2003-0083 one copy of the quarterly reports required by 4 CSR 240-20.070(5) and one copy of the annual reports required by 4 CSR 240-20.070(6).

4. That this order shall become effective on January 9, 2003.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Editor's 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 Kansas City Power & Light Company for Approval of the Accrual and Funding of Wolf Creek Generating Station Decommissioning Costs at Current Levels.

Case No. EO-2003-0081
Decided December 30, 2002

Electric §45. The Commission approved a Stipulation and Agreement concerning KCP&L's decommissioning costs. The Commission ordered that KCP&L's accruals and trust fund payments stay at the current level.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 30, 2002, Kansas City Power & Light Company filed an application pertaining to the Wolf Creek station requesting that the Commission: (a) find that the 2002 Study satisfies the requirements of 4 CSR 240-20.070(9); (b) approve the 2002 decommissioning cost estimate of $468,000,000; (c) approve the continuation of the annual accrual at the current level of $2,303,856; and (d) find that the decommissioning costs are included in KCPL's current cost of service and are reflected in current rates for ratemaking purposes.

The Commission issued notice of the application, and allowed interested entities the opportunity to intervene. No applications to intervene were filed.

The Office of the Public Counsel, Staff, and KCPL (the parties) filed a unanimous stipulation and agreement on December 10, 2002. The parties agree that KCPL shall continue its Missouri retail jurisdiction expense accruals and trust fund payments at current levels without any change in its Missouri retail jurisdictional rates. The parties further agree that annual decommissioning costs in the amount of $2,303,586 are, and should continue to be, included in KCPL's cost of service and reflected in its current rates for ratemaking purposes.

On December 6, 2002, Staff filed a Staff Recommendation in support of the agreement. In the agreement itself, the parties state that the Staff Recommendation will serve as Staff's suggestions in support of the agreement.

The Commission has considered the verified application and its attendant studies and analyses, the unanimous stipulation and agreement, and the Staff Recommendation. The Commission finds that KCPL's currently effective rates include an annual amount of $2,303,586 for decommissioning expense. The Commission also finds that KCPL's 2002 Cost Study meets the requirements of 4 CSR 240-20.070(9).

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on December 10, 2002, is approved.

2. That Kansas City Power & Light Company's retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of $2,303,586.

3. That Kansas City Power & Light Company or its trustee shall file on a prospective basis in Case No. EO-2003-0081 one copy of the quarterly reports required by 4 CSR 240-20.070(5) and one copy of the annual reports required by 4 CSR 240-20.070(6).

4. That this order shall become effective on January 9, 2003.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Editor's 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.

Tari Christ, d/b/a ANJ Communications, et al.,Complainants, v. Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company; Sprint Missouri, Inc., d/b/a Sprint; and GTE Midwest Incorporated, d/b/a Verizon Midwest, Respondents.*

Case No. TC-2003-0066
Decided January 9, 2003

Evidence, Practice and Procedure §25. Having determined that Complainants failed to state a claim upon which relief could be granted, the Commission granted Respondents motions to dismiss.

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* The Commission, in an order issued on February 4, 2003, denied rehearing and denied complainants' alternative motion for leave to amend. This case was appealed to Cole County Circuit Court (03CV323550) and to the Missouri Court of Appeals - Western District (WD63588).

ORDER REGARDING MOTIONS TO DISMISS

Procedural History and Summary of the Parties' Positions:

On August 22, 2002, some 25 payphone providers[1] filed their Complaint against Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, Sprint Missouri, Inc., doing business as Sprint, and GTE Midwest Incorporated, doing business as Verizon Midwest, alleging that certain rates contained in those companies' Commission-approved tariffs are not just and reasonable in that the Respondents have unlawfully set their prices for network services provided to payphone providers higher than the level mandated by the Federal Communications Commission.[2] That mandated level, according to Complainants, is actual cost plus a reasonable amount to recover overhead, as measured by the F.C.C.'s New Services Test. The Payphone Providers argue that the F.C.C. has directed State Commissions to apply this price cap not only to Bell Operating Company local exchange carriers (BOC LECs), as specified by the Telecommunications Act of 1996, 47 U.S.C. Section 276, but also to non-BOC LECs.[3] Additionally, the Payphone Providers complain that the Commission has not investigated to determine whether Respondents have ceased subsidizing their own competitive payphone operations from their noncompetitive basic local services revenues. The Payphone Providers seek several remedies, including (1) a declaration that Respondents' rates have been unlawful since April 15, 1997; (2) an order that Respondents reduce their rates to lawful levels; (3) an order requiring Respondents to produce their total long run incremental costs for exchange and exchange access services so that the Complainants may assure themselves that Respondents have indeed removed all costs related to their payphone operations from these services; (4) an order requiring each Respondent to pass an Imputation

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[1] The several Petitioners shall be collectively referred to as the Complainants or the Payphone Providers. The Petitioners are Tari Christ, d/b/a ANJ Communications; Bev Coleman, an Individual; Commercial Communications Services, L.L.C.; Community Payphones, Inc.; Coyote Call, Inc.; William J. Crews, d/b/a Bell Tone Enterprises; Illinois Payphone Systems, Inc.; Jerry Myers, d/b/a Jerry Myers Phone Co.; John Ryan, an Individual; JOLTRAN Communications Corp.; Bob Lindeman, d/b/a Lindeman Communications; Monica T. Herman, d/b/a M L Phones; Midwest Communications Solutions, Inc.; Mark B. Langworthy, d/b/a Midwest Telephone; Missouri Public Pay Phone Corp.; Missouri Telephone & Telegraph, Inc.; Pay Phone Concepts, Inc.; Toni M. Tolley, d/b/a Payphones of America North; Jerry Perry, an Individual; PhoneTel Technologies, Inc.; Sunset Enterprises, Inc.; Teletrust, Inc.; Tel Pro, Inc.; Vision Communications, Incorporated; and Gale Wachsnicht, d/b/a Wavelength, LTD.

[2] *In the Matter of the Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, *Report and Order*, FCC 96-388 (released September 20,1996) (*"Payphone Order"*), at Para. 147; *Order on Reconsideration*, FCC 96-439 (released November 8, 1996) (*"Order on Reconsideration"*), at Para. 163. The Federal Communications Commission is generally referred to as the F.C.C. and will be so referenced here.

[3] *In the Matter of Wisconsin Public Service Commission Order Directing Filings,* FCC 02-25; Bureau/CPD No. 00-01. (*"Wisconsin Order"*), *Memorandum Opinion and Order* (January 31, 2002). A "LEC" is a Local Exchange Carrier; a "BOC" is a Bell Operating Company.

Test, using rates established by the New Services Test, to ensure that their payphone operations are not being subsidized with revenue from noncompetitive services; (5) an order requiring each Respondent to calculate and refund to Complainants the difference between the rates actually charged Complainants since April 15, 1997, and the rates established in this proceeding; (6) an order requiring each Respondent to pay interest to Complainants on such refunds; and (7) "such further and additional relief as is equitable and just."

Each of the Respondents moved to dismiss the Complaint. All of the grounds stated were in the form of motions to dismiss for failure to state a claim. Verizon filed its Motion to Dismiss on October 1. Verizon asserts, first, that Verizon does not now operate as a telecommunications carrier in Missouri and is therefore no longer subject to this Commission's jurisdiction. Verizon asserts, second, that the rates it formerly charged were properly tariffed and approved by this Commission and that the Complaint therefore represents an impermissible collateral attack on the Commission's approval of those tariffs.[4] Verizon asserts, third, that Complainants have failed to perfect their complaint as required by Section 386.390.1, RSMo 2000,[5] in that, while signed by 25 purported customers or prospective customers, it is not signed by 25 customers or prospective customers of Verizon.[6] Verizon points out that one complainant is authorized to provide payphone services in Illinois, not Missouri. Verizon also points out a scrivener's error in the Complaint by which Complainants demand a remedy from Bell in a paragraph ostensibly dealing with Verizon.[7]

Sprint filed its Motion to Dismiss on October 3. Sprint asserts, first, that the New Services Test applies only to BOC LECs and Sprint is not a BOC LEC. Sprint points out that the F.C.C. has admitted that it is without jurisdiction to impose the New Services Test on non-BOC LECs, contrary to the allegation of Paragraph 41 of the Complaint.[8] Sprint asserts, second, that its rates are properly tariffed and were approved by this Commission in Case No. TT-97-421 and that the Complaint therefore represents an impermissible collateral attack on the Commission's approval of those tariffs.[9] Sprint asserts, third, that the Complaint is fatally defective in that it does not allege that Sprint has violated any law, rule or order of this Commission as required by Sections 386.330 and 386.390.[10] Sprint asserts,

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[4] *St. ex rel. Licata, Inc. v. PSC,* 829 S.W.2d 515 (Mo. App. 1992). Verizon characterizes this defense as relying upon the Filed Rate Doctrine.

[5] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[6] The pleadings all reference, additionally, a parallel requirement in the Commission's rules at 4 CSR 240-2.070(3). Any discussion of the Complaint perfection requirement in this Order should be understood to encompass that rule as well as Section 386.390.1.

[7] Paragraph a of Complainants' *ad damnum* clause directed at Verizon, on page 18 of the Complaint.

[8] *Wisconsin Order,* Paragraphs 31 and 42.

[9] Section 386.550.

[10] *St. ex rel. Ozark Border Electric v. PSC,* 924 S.W.2d 597, 600 (Mo. App., W.D. 1996).

fourth, that the Commission is without authority to order pecuniary relief[11] or to require compensation for past overcharges.[12] Sprint asserts, fifth, that Complainants have failed to perfect their complaint as required by Section 386.390.1 in that, while signed by 25 purported customers, it is not signed by 25 customers of Sprint. Sprint states that only two of the 25 Complainants are customers of Sprint. Finally, Sprint asserts that the Complaint fails to state a claim upon which relief can be granted in that it seeks to have the Commission retroactively apply the New Services Test to its rates in violation of the Missouri Constitution.[13]

Bell also filed its Motion to Dismiss on October 3. Bell asserts, first, that its rates are properly tariffed and were approved by this Commission and that the Complaint therefore represents an impermissible collateral attack on the Commission's approval of those tariffs.[14] Second, Bell asserts that the Complainants raised these same points as members of Midwest Independent Coin Payphone Association in Case No. TT-97-345 and that the Commission determined the issues against them in its order of April 11, 1997.[15] Bell claims that, having failed to properly appeal that order, Complainants may not now bring these arguments in a new case. Bell further contends that the Commission later refused to permit MICPA to again raise these issues in Case No. TW-98-207, because Staff had applied the New Services Test to Bell's rates and was satisfied that Bell met the test.[16] Third, Bell asserts that the Complainants have failed to perfect their complaint as required by Section 386.390.1 in that, while signed by 25 purported customers, it is not signed by 25 customers of Bell. Bell states that four of the Complainants lack standing in that they evidently are not certificated in Missouri.[17] Fourth, Bell asserts that it is subject to price cap regulation under Section 392.245 and that any of its rates that are equal or less than the rates in effect on December 31, 1996, are just and reasonable as a matter of law. As the rates in question are not in excess of the amounts Bell may charge under the Price Cap Statute, the Commission is without jurisdiction to order a reduction in those rates. Fifth, Bell asserts that the Complainants' demand for retroactive refunds is barred by the prohibition against retroactive ratemaking.[18]

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[11] *B.G. DeMaranville v. Fee Fee Trunk Sewer,* 573 S.W.2d 674, 676 (Mo. App., E.D. 1978).

[12] *May Dept. Stores Co. v. Union Electric L.P. Co.*, 107 S.W.2d 41, 58 (Mo. 1937).

[13] Mo. Const., Art. I, Sec. 13; *and see Mo. Nat'l Educ. Ass'n v. Mo. St. Bd. of Ed.,* 34 S.W.3d 266 (Mo. App., W.D. 2000).

[14] *St. ex rel. Licata, Inc. v. PSC,* 829 S.W.2d 515 (Mo. App. 1992).

[15] *In the Matter of Southwestern Bell Telephone Company, Case No. TT-97-345 (Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order, and Denying as Moot Discovery Requests*, issued April 11, 1997). The Midwest Independent Coin Payphone Association is generally referred to as MICPA and will be so referenced here.

[16] *In the Matter of an Investigation of Payphone Issues Pursuant to the Telecommunications Act of 1996*, Case No. TW-98-207 (*Order Denying Motion to Expand Issues Under Investigation and Amend Procedural Schedule and Granting Request to Submit Case on the Record Presented*, issued June 16, 1998).

[17] *See MCI Telecommunications Corp. v. Southwestern Bell Telephone Co.*, Case No. TC-97-303 (*Report and Order*, issued Sept. 16, 1997) at 14, 15-16.

[18] *St. ex rel. Utility Consumers Council, Inc. v. PSC*, 585 S.W.2d 41, 58 (Mo. banc 1979).

Complainants filed their Suggestions in Opposition to the various motions to dismiss on October 18. First, Complainants point out that, when a motion to dismiss for failure to state a claim is filed, the subject complaint is to be evaluated in "academic fashion" to determine its sufficiency with respect to the elements of a known or proposed cause of action.[19] All averments in the complaint are assumed to be true for this purpose and there is no weighing of facts to determine truth or falsity. Second, Complainants argue that the Filed Rate Doctrine does not bar their Complaint because it is not an impermissible collateral attack. Complainants note that Section 386.400.6 expressly authorizes telecommunications carriers to challenge by complaint the justness and reasonableness of any rate or charge for a service offered by a noncompetitive or transitionally competitive carrier. Complainants further claim that the Filed Rate Doctrine prohibits attack on Commission-approved tariffs in court; it does not apply to prevent a challenge before the Commission itself.[20] Complainants further assert that Bell's claim that the Commission has previously considered and rejected Complainants claims is of no relevance because it does not meet any of the four prongs of the test for collateral estoppel: There was no prior adjudication; there was no decision on the merits; the parties are not identical or in privity; and there was no full and fair opportunity to litigate.[21] Complainants further contend that Respondents' assertion, based on Section 386.390.1, that the Complaint is not properly perfected, is irrelevant because Section 393.400.6 permits even a single telecommunications carrier to challenge the rates of a noncompetitive carrier and this Commission has entertained such cases in the past.[22] Complainants further contend that the Price Cap Statute, Section 393.245, does not immunize an unlawful rate from correction by the Commission and that, in any event, the rules of the F.C.C. preempt contradictory state law.[23] Complainants further contend that this Commission retains jurisdiction over Verizon with respect to conduct that occurred while Verizon was a regulated utility in Missouri and that some, at least, of the requested relief has not been mooted by Verizon's withdrawal from Missouri. As to the scrivener's

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[19] *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002).

[20] *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568 (Mo. App., E.D. 1997).

[21] This discussion is primarily based on Complainants' contention that, in Case No. TT-97-345, MICPA had no opportunity to examine SWBT's cost study, to offer testimony, to cross examine witnesses, or to advance its arguments orally or in briefs. Complainants also contend that there is no evidence before the Commission establishing either their identity or privity with MICPA.

[22] *E.g., AT&T Communications of the Southwest v. GTE North, Inc.,* 29 Mo. P.S.C. (N.S.) 591. Interestingly, a case in which the Commission found a tariff approved by it two years previously to be unjust and unreasonable because miscalculated, with no suggestion that the Filed Rate Doctrine, collateral estoppel or *res judicata* prohibited it from reaching this determination. *But see contra, MCI Telecommunications Corp. v. Southwestern Bell Telephone Co.,* Case No. TC-97-303, limiting complaints under Section 393.400.6 to allegations of unlawful subsidies.

[23] 47 U.S.C. Sec. 276(c): ". . . the Commission's regulations on such matters shall pre-empt such State requirements."

error relied upon by Verizon, Complainants ask leave to amend the Complaint by interlineation and urge that such leave should be freely granted in the interests of justice, particularly as Verizon does not make any claim that it has been prejudiced by the error. Complainants further contend that the prohibition against retroactive ratemaking simply does not apply in this case and that Respondents, in any event, are estopped from asserting that defense due to a promise made by the BOCs to make refunds retroactive to April 15, 1997, in a request for a 45-day waiver made to the F.C.C. and granted in partial reliance on that promise. The F.C.C. later extended the waiver to all LECs, conditioned on similar retroactive refunds of overpayments. Complainants admit that they are presently unsure whether either Verizon or Sprint took advantage of this waiver offer, but assert that they are entitled to use discovery in this case to determine that point. Complainants further contend that the New Services Test does apply to non-BOC LECs, contrary to Sprint's assertion. Complainants note that in Case No. TT-97-421, Sprint acknowledged that it was subject to the New Services Test. Although the F.C.C. found that it lacked jurisdiction to impose the New Services Test on non-BOC LECs, it encouraged the State Commissions to do so.[24] Finally, in the event that the Commission finds that the perfection requirement at Section 386.390.1 does apply to this Complaint and that this Complaint is not properly perfected, Complainants seek a reasonable interval in which to add new Complainants.

Verizon replied on November 1. First, Verizon points out that the F.C.C. itself has acknowledged that it lacks jurisdiction to impose the New Services Test on non-BOC LECs.[25] Verizon's predecessor, GTE Midwest, was not a BOC, and did not become one when GTE Corporation merged with Bell Atlantic to form Verizon. The BOCs are defined by statute.[26] Verizon points out that this Commission recently read Paragraph 42 of the *Wisconsin Order* and understood that the F.C.C. itself has concluded that it cannot impose the New Services Test on non-BOC LECs.[27] Second, Verizon contends that the perfection requirement at Section 386.390.1 does indeed apply to this Complaint and, inasmuch as the Complaint is not properly perfected, as Complainants themselves admit, it must be dismissed in accordance with long-standing Commission precedent.[28] Verizon denies that Section 392.400.6, cited by Complainants as an alternative source of jurisdiction, authorizes the present Complaint, explaining that the Commission has consis-

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[24] *Wisconsin Order*, at Para. 42.

[25] *Wisconsin Order*, at Para. 42; *In the Matter of the North Carolina Payphone Assoc.*, 17 FCC Rcrd 4275, Para. 5 (Mar. 4, 2002).

[26] 47 U.S.C. Sec. 153(4).

[27] *In the Matter of the Joint Application of GTE Midwest Incorporated, doing business as Verizon Midwest, and CenturyTel of Missouri, LLC*, Case No. TM-2002-232 (*Order Denying Application to Intervene, Denying Motion to Suspend Tariffs, Approving Tariffs, Canceling Tariffs, and Directing Filing*, issued Aug. 29, 2002) at page 3, footnote 2.

[28] *See AT&T Communications of the Southwest, Inc., v. GTE North Incorporated*, Case No. TC-93-58 (*Order Granting Motion to Dismiss*, issued July 20, 1993); *MCI v. Southwestern Bell Telephone Co.*, Case No. TC-97-303 (*Report and Order*, issued Sept. 16, 1997).

tently interpreted Section 392.400.6 as authorizing only complaints intended to prevent noncompetitive and transitionally competitive carriers from improperly subsidizing their competitive services.[29] Third, Verizon contends that the Commission is without authority to either award money damages or retroactively correct a rate.[30] Verizon again points to its present uncertificated status in Missouri and suggests, in view of the Commission's purely prospective powers, that the matters urged in the Complaint are moot as to it.

Bell also replied on November 1. Bell contends, first, that Complainants are mistaken in their contention that the present Complaint is not barred by Section 386.550 as a collateral attack on a Commission Order, explaining away Complainants' characterization of this Complaint as a direct attack, rather than a collateral attack, as a "distinction without a difference." Bell criticizes Complainants' effort to distinguish *Licata,* relied on by Bell in its Motion to Dismiss.[31] Bell also cites a recent Commission order to purportedly show that this Commission recognizes that Section 386.550 bars attacks on Commission-approved tariffs:

> No objection was ever raised to Atmos' tariff and it is not before the Commission in this case. Having been duly approved by the Commission, Atmos' tariff is immune to collateral attack, therefore, no order affecting that tariff can be made in this case.[9] "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature."[10]
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> FN 9: Section 386.550, RSMo Supp. 2001.
> FN 10: *A.C. Jacobs & Co., Inc. v. Union Electric Company*, 17 S.W.3d 579, 581 (Mo. App., W.D. 2000); *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App., W.D. 1997).

Second, Bell again asserts the Filed Rate Doctrine as a defense, arguing that rates collected pursuant to a filed and approved tariff become the property of the utility; the tariffed rates cannot be changed retroactively and the utility cannot be forced to disgorge its lawfully collected revenues.[32] Third, Bell asserts that Complainants are indeed collaterally estopped from challenging Bell's tariffs because Complainants' trade association, MICPA, participated in Case No. TT-97-345 in which the Commission approved those tariffs. Contrary to Complainants' assertions, Bell argues that all four prongs of the test for collateral estoppel are met here: the issues

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[29] *Id.*

[30] *American Petroleum Exchange v. PSC*, 172 S.W.2d 952, 955 (Mo. 1943); *Utility Consumers Council, supra*. (*see* Footnote 11).

[31] In *Licata,* Plaintiff attempted in Circuit Court to challenge the validity of a utility company rule; the court, relying on Section 386.550, barred the challenge as an impermissible collateral attack on the Commission's order approving the challenged rule. *St. ex rel. Licata, Inc. v. PSC,* 829 S.W.2d 515 (Mo. App. 1992); *and see* Footnote 3.

[32] *St. ex rel. Barvick v. PSC,* 606 S.W.2d 474, 476 (Mo. App., W.D. 1980).

are identical; the parties are in privity, as MICPA has traditionally represented the interests of payphone providers, whether or not these Complainants are members of MICPA; the previous proceeding ended in a final determination on the merits in that the Commission rejected MICPA's arguments and approved the tariff; and Complainants cannot now argue that they did not have a full and fair opportunity to litigate in the prior proceeding because they never sought rehearing in that case on the grounds of improper procedure or denial of due process. Fourth, Bell insists that this Complaint must be dismissed because it is required to be perfected under Section 386.390.1 and it is not. Like Verizon, Bell cites prior Commission authority to show that Section 386.400.6 does not authorize the present Complaint.[33] Bell points out that Complainants have not identified any service allegedly offered by Respondents *below cost*; therefore, they have not made out a *prima facie* case of unlawful subsidization under Section 386.400.6. Fifth, Bell reasserts its position that the Price Cap Statute, Section 393.245, bars this proceeding because the Commission has no power to inquire into the justness and reasonableness of the rates of a price-capped carrier.[34] Sixth, Bell argues that the prohibition against retroactive ratemaking bars the retroactive relief and refund sought herein by Complainants.[35] Finally, Bell addresses Complainants' reliance on the BOCs' promise to make retroactive refunds in exchange for a 45-day waiver by the F.C.C.: Bell asserts that this promise does not apply to Missouri because the new tariffs eventually filed here by Bell did not result in lower rates. In any event, that promise included only overpayments, if any, collected during the 45-day waiver period.

Sprint replied on November 4. First, Sprint asserts that the Complaint is fatally defective because it does not allege that Sprint violated any law, rule or Commission order, which defect is jurisdictional in a complaint brought under Section 386.390.[36] As to Complainants' citation of Section 386.400.6 as an alternative basis of jurisdiction, Sprint, like Verizon and Bell, cites a Commission case limiting that cause of action to accusations of improper subsidization.[37] Second, Sprint reasserts its position that this Complaint is an unlawful collateral attack on a prior Commission decision. In Case No. TT-97-421, issued on April 11, 1997, the Commission approved Sprint's payphone tariffs over the objections of MICPA, effective April 15, 1997.[38] Neither MICPA nor these Complainants pursued a motion for rehearing of that order. By seeking a refund retroactive to April 15, 1997, Sprint

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[33] *MCI v. Southwestern Bell Telephone Co.*, Case No. TC-97-303 (*Report and Order*, issued Sept. 16, 1997) at pg. 11.

[34] *St. ex rel. Hogarty v. PSC,* Case Nos. CV197-1795CC and CV197-1810CC (*Revised Findings of Fact and Conclusions of Law and Judgment,* issued Aug. 6, 1998) (Circuit Court of Cole County, Mo., Brown, J.) at 4.

[35] *Utility Consumers' Council*, *supra*, at 58.

[36] *St. ex rel. Ozark Border Electric Cooperative v. PSC*, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

[37] *MCI v. Southwestern Bell Telephone Co.,* Case No. TC-97-303 (*Report and Order,* issued Sept. 16, 1997) at pp. 15-16, 23.

[38] *In the Matter of United Telephone of Missouri, doing business as Sprint*, Case No. TT-97-421 (*Order Approving Tariff, Denying Motion to Suspend, and Denying Application for Intervention*, issued April 11, 1997) at 4.

explains, Complainants make plain that they are indeed collaterally attacking the Commission's order approving Sprint's tariffs, effective that very day. Third, Sprint restates its position that the Complainants' prayer that the Commission determine what a just and reasonable rate would have been and refund the difference, with interest, from April 15, 1997, is the very sort of retroactive ratemaking prohibited by the Supreme Court in *Utility Consumers' Council*.[39] Fourth, Sprint points out that the Commission has no authority to award a refund.[40] Fifth, Sprint points out that the New Services Test does not apply to it, a non-BOC LEC. Sprint notes that the F.C.C. has come around to this point of view,[41] and that this Commission also recently embraced it.[42] Finally, Sprint notes that this Commission approved Sprint's tariffs at a time when both Sprint and the Commission mistakenly believed that the New Services Test *did* apply to Sprint's tariffs, and that the Commission at that time determined that Sprint was in compliance under that test.

On November 8, Complainants filed further suggestions in opposition to the various motions to dismiss in order to address certain new issues that had arisen. First, the Complainants point to Section 386.270 and note that it expressly contemplates suits brought under Chapter 386 to challenge Commission-approved rates.[43] The Missouri Supreme Court has also recognized that customers may bring an action to challenge utility rates. Second, the Complainants contend that collateral estoppel is inappropriate in this case because MICPA was never a party to Bell's payphone tariff case; its application for intervention was denied by this Commission. Third, the Complainants note that, even if application of the New Services Test to Respondents is not mandatory, the Commission can decide to do so as a matter of policy. Fourth, the Complainants point out that the matter of the BOC waiver and the extent, if any, to which Sprint and Verizon relied upon the F.C.C.'s waiver offer to all LECs, are issues of fact that the Commission must determine after hearing and that it would be premature to determine them on a motion to dismiss, before the facts have been developed.

On December 9, Sprint sought leave to advise the Commission of an additional authority, a decision of the Public Utilities Commission of Ohio on November 26, 2002, that the New Services Test does not apply to non-BOC LECs and that retroactive refunds are prohibited as retroactive ratemaking.[44]

Discussion:

The Commission will take up only those issues, among the many raised by the parties, that are necessary to the resolution of the motions before it.

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[39] *Utility Consumers' Council*, *supra*, at 58.

[40] *St. ex rel. Laundry, Inc. v. PSC*, 34 S.W.2d 37, 46 (Mo. 1931); *Barvick, supra*.

[41] *See* Footnote 17.

[42] *See* Footnote 19.

[43] *St. ex rel. Jackson County v. PSC,* 532 S.W.2d 20, 32-33 (Mo. banc 1975).

[44] Sprint initially attempted to file this electronically on December 6, but that attempt failed for some unknown reason. The Ohio decision is *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services,* Case No. 96-1310-TOPrS-COI (*Entry,* Public Utilities Commission of Ohio, Nov. 26, 2002).

A. The Applicable Standard

As stated by Complainants, a motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint.[45] While the determination of such motions was, at one time, limited to consideration of matters contained within the four corners of the complaint, the modern trend is to extend consideration to matters outside the complaint, as well.[46] All well pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.[47] Complainants enjoy the benefit of all reasonable inferences.[48] The complaint should not be dismissed unless it shows no set of facts entitling it to relief.[49] A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.[50]

B. The Complaint

The Complaint first addresses the identity of the Complainants. There are 25 Complainants. Twenty-one of them are authorized to provide public telecommunications service in Missouri.[51] Three others are authorized to do business in Missouri, but are not, evidently, authorized to provide public telecommunications service in this or any other state.[52] One other is described as authorized to provide public telecommunications service in Illinois.[53] The Complaint does not describe this Complainant's relationship, if any, to Missouri. Next, the Complaint alleges that the 25 Complainants are "customers, or prospective customers, of network services that are made available to companies that provide pay telephone services to end users[.]" There is no allegation that any of the Complainants is a customer or prospective customer of any of the three Respondents.[54]

The Complaint also seeks a waiver from certain pleading requirements contained in Regulation 4 CSR 240-2.070(5)(A), regarding the signature of each Complainant and the address of each location where service was rendered. In connection with this latter requirement, the Complaint states: "one or more of the payphone access services, the rates for which are the subject matter of this complaint, are delivered to each payphone operated by the Complainants[.]"[55]

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[45] For this discussion, *see* J.R. Devine, *Missouri Civil Pleading and Practice,* Section 20-3 (1986).

[46] Devine, *supra,* pg. 264 and Section 24-2.

[47] *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. banc 1993).

[48] *Id.*

[49] *Id.*

[50] *St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,* 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

[51] *Complaint,* Para's 1, 2, 4, 6-16, 19-25.

[52] *Complaint,* Para's 3, 5, 17.

[53] *Complaint,* Para. 18.

[54] *Complaint,* Para. 26.

[55] *Complaint,* Para. 27.

The Complaint next addresses the identities of the Respondents. It alleges that each Respondent provides local exchange and other network telecommunications services to payphone providers and also offers payphone service to end users in competition with Complainants.[56] It alleges that Complainants have "contacted" the Respondents concerning the circumstances giving rise to the Complaint.[57] In a long series of allegations, the Complaint charges that Section 392.200.1 requires telecommunications carriers to charge no more "than allowed by law"; that Section 276 of the Telecommunications Act imposes certain obligations and restrictions relating to payphones on BOC LECs; and that the F.C.C. has extended these obligations and restrictions to all LECs.[58] Among these is an allegation that the Respondents were required to file tariffs with this Commission, no later than April 15, 1997, implementing the obligations and restrictions imposed by the F.C.C. on LECs under Section 276 of the Telecommunications Act. [59] Another allegation in this series is that the F.C.C. specifically has required that state commissions apply the New Services Test to the tariffs of all LECs.[60] The Complaint asserts, "In order to be just and reasonable under Missouri law, the payphone line rates charged by SWBT, Sprint and Verizon must comply with the New Services Test."[61] The Complaint then alleges that "[a]n imputation test for the LEC's payphone operations, that compares the revenue derived from the LECs' payphone operations to the costs (including imputed costs) of providing those services, will test whether the LEC's are subsidizing their payphone operations in violation of Section 276 of the Federal Communications Act."[62]

The Complaint then makes certain parallel allegations against the three Respondents. First, each Respondent's rates for network services made available to payphone providers are specified.[63] Second, it is alleged that these rates "are not cost-based and recover more than a reasonable amount of the company's common expenses. As a result, the rates . . . do not comply with the New Services Test and are therefore unjust, unreasonable and unlawful."[64] The Complaint then makes these allegations:

> The Commission has not engaged in any examination or investigation, under contested case procedures, to determine whether all expenses associated with [Respondent]'s payphone operations have been removed from the total long run service incremental costs associated with exchange and exchange access services.[65]

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[56] *Complaint,* Para's 28, 29, 30.

[57] *Complaint,* Para. 31.

[58] *Complaint,* Para's 32-43.

[59] *Complaint,* Para. 38.

[60] *Complaint,* Para. 41.

[61] *Complaint,* Para. 41.

[62] *Complaint,* Para. 44.

[63] *Complaint,* Para's 46, 53, 60.

[64] *Complaint,* Para's 47, 54, 61.

[65] *Complaint,* Para's 48, 55, 62.

> The Commission has not engaged in any examination or investigation, under contested case procedures, to determine whether [Respondent]'s payphone operations, taking into account the long run service incremental costs of its services and the imputed tariffed rates (as calculated under the New Services Test) used by its own payphone operations, would pass an imputation test consistent with the requirements of federal and state law.[66]

In a final pair of allegations, the Complaint charges that each Respondent "has not complied with the nonstructural safeguards" purportedly required of all LECs by the F.C.C.,[67] and that each Respondent has, since April 15, 1997, "charged the Complainants rates greater than a price consistent with the New Services Test and the Complainants are entitled to a refund of the difference between rates approved by the Commission under the New Services Test" and the rates actually charged since April 15, 1997.[68]

C. The Governing Statutes

The Public Service Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted."[69] While the Commission properly exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary.[70] "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise."[71] Therefore, in determining the sufficiency of a complaint, the Commission must consider whether the pleading contains adequate allegations on each element of the authorizing statute or statutes. Likewise, the complaint must meet any special requirements or restrictions imposed by the authorizing statute or statutes.

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[66] *Complaint,* Para's 49, 56, 63.

[67] *Complaint,* Para's 50, 57, 64.

[68] *Complaint,* Para's 51, 58, 65.

[69] *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission,* 310 S.W.2d 925, 928 (Mo. banc 1958).

[70] *State Tax Commission v. Administrative Hearing Commission,* 641 S.W.2d 69, 75 (Mo. 1982), *quoting Liechty v. Kansas City Bridge Co.,* 162 S.W.2d 275, 279 (Mo. 1942).

[71] *State Tax Commission, supra.*

Complainants recite that they bring their Complaint under Sections 386.330.3; 386.390.1; 386.400; 392.200.1; 392.400.6; Regulation 4 CSR 240-2.070; and the Telecommunications Act of 1996, 47 U.S.C. Section 276. Of these provisions, only two actually authorize this Commission to hear and determine complaints.[72] Section 386.390.1 is the Commission's general complaint power. Section 392.400.6 is an additional, special complaint authority limited to telecommunications matters. It has been cited by Complainants as an independent basis for their Complaint.

1. Section 386.390.1:

Section 386.390.1 authorizes the Missouri Public Service Commission to hear and determine complaints. The section effectively contains two distinct complaint powers.

a. The Commission's General Complaint Authority

In a broad grant of authority, Section 386.390.1 authorizes the Commission to determine complaints as to "any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]" Such a complaint may be brought by anyone,[73] and such a complaint may even be brought to challenge a "rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility[.]"[74] As asserted by Sprint, a complaint brought under this authority necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.[75]

Missouri Courts have read Section 386.390.1 together with Section 386.550, which provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In *State ex rel. Licata v. Public Service Commission of the State of Missouri*,[76] the

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[72] Section 386.330.3 requires the Commission to make a final order within 60 days of its completion of an investigation into a complaint against a telecommunications carrier. It does not independently authorize the Commission to entertain complaints. Section 386.400 authorizes utilities to file complaints on the same basis as other parties. It does not create an independent complaint authority. Section 392.200.1 imposes certain requirements upon telecommunications carriers, but does not independently authorize anyone to bring a complaint. Regulation 4 CSR 240-2.070 is the Commission's rule establishing procedures for complaint cases. It is not independent authority under which a complaint may be brought. Finally, Section 276 of the Telecommunications Act includes various matters relating to the deregulation of pay telephones, but it does not independently authorize anyone to bring a complaint before this Commission.

[73] Specifically, "[c]omplaint may be made by the commission on its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation[.]" Section 386.390.1.

[74] *Id.* But not, however, to challenge a rule, regulation or charge previously approved by the Commission. *See St. ex rel. Licata v. PSC,* 829 S.W.2d 515 (Mo. App., W.D. 1992).

[75] *St. ex rel. Ozark Border Electric Cooperative v. PSC,* 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

[76] 829 S.W.2d 515 (Mo. App., W.D. 1992).

Western District held that Section 386.550 barred a complaint challenging as unlawful a utility company rule that had been approved by the Commission. In its transfer application, the Relator complained that the Court had deprived it of the right of complaint granted in Section 386.390.1. The *Licata* Court explained that this contention was erroneous: Section 386.390.1 authorizes complaints alleging violations of Commission orders, while Section 386.550 bars complaints attacking Commission orders. The Court explained, "Section 386.390 and Section 386.550 are not in conflict but address separate problems."[77] In a second case, *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri,*[78] the Western District held that a complaint brought under Section 394.312.6, which authorizes complaints attacking territorial agreements previously approved by the Commission, must include an allegation of a substantial change in circumstances in order to avoid the bar imposed by Section 386.550, despite the fact that Section 394.312 does not expressly require such an allegation.[79] Reading *Licata* and *Ozark Border* together, it is clear that a complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances; otherwise, Section 386.550 bars the complaint.

Turning to the Complaint, the Commission finds allegations of two violations of law: First, that Respondents' rates do not comply with the New Services Test and are therefore unlawful.[80] Second, that Respondents have not complied with the nonstructural safeguards purportedly imposed by the F.C.C. on all LECs.[81] Nonetheless, the Commission must dismiss the Complaint insofar as it is brought under the general complaint authority contained in Section 386.390.1.

As the Complaint alleges, the Respondents filed tariffs with this Commission prior to April 15, 1997, which tariffs were intended to comply in all respects with the obligations and restrictions purportedly imposed on all LECs by the F.C.C. under authority of Section 276 of the Telecommunications Act. Each of the Respondents points to a prior Order in which this Commission approved that Respondent's present payphone service tariffs, specifically finding that they were in compliance with the federal statute and regulatory orders relied on by Complainants and refusing to suspend the tariffs on grounds similar in part to those raised in the present Complaint.[82] In the Bell Order, the Commission stated:

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[77] *Licata, supra,* 829 S.W.2d at 519.

[78] 924 S.W.2d 597 (Mo. App., W.D. 1996).

[79] 924 S.W.2d at 6001-601.

[80] *Complaint,* Para's 47, 54, 61.

[81] *Complaint,* Para's 50, 57, 64.

[82] *In the Matter of Southwestern Bell Telephone Company*, Case No. TT-97-345 (*Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order, and Denying as Moot Discovery Requests*, issued April 11, 1997); *In the Matter of GTE Midwest, Incorporated*, Case No. TT-97-399 (*Order Approving Tariff, Denying Motion to Suspend and Denying Application to Intervene*, issued April 11, 1997); *In the Matter of United Telephone of Missouri, doing business as Sprint*, Case No. TT-97-421 (*Order Approving Tariff, Denying Motion to Suspend and Denying Application to Intervene*, issued April 11, 1997).

> The Commission has thoroughly reviewed the many filings in this case, including the motions to suspend filed by MCI and MICPA, and finds that SWBT's[83] proposed tariff revisions are in compliance with the FCC's orders, and should therefore be approved as amended. Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary. Therefore, the applications to intervene and motions to suspend filed by MCI and MICPA should be denied. Since the tariff revisions will not be suspended, MCI's motion for protective order is unnecessary, and will be denied. In addition, MCI's discovery requests are denied as moot. The Commission further finds that no intrastate rate reductions are necessary in conjunction with SWBT's subsidy calculation, and finds that the rates proposed by SWBT for its payphone services are just and reasonable.

Similar language appeared in the Verizon Order and the Sprint Order.

As the quoted language shows, the Commission's prior orders were determinations on the merits. In them, the Commission found that the Respondents' tariffs complied with the F.C.C. directives relied on herein by Complainants. Those orders are long since final and this is a collateral proceeding. The Complaint does not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of *Licata*, the Commission concludes that Section 386.550 bars this proceeding and that the Complaint must be dismissed. Unlike such court-made doctrines as collateral estoppel and *res judicata*, Section 386.550 applies to any petitioner, whether or not it was a party in the prior proceeding or has any relationship with any party in the prior proceeding.

Complainants attempt to avoid this result by characterizing the present proceeding as a *direct* attack rather than a collateral attack and asserting that such an action is expressly authorized by statute. But, as noted earlier, Missouri courts have held that Section 386.550 bars actions brought before this Commission and, specifically, actions brought under Section 386.390.1.[84]

Complainants also argue that Section 386.550 operates only to bar collateral attacks on Commission decisions in court and not before the Commission itself. The *Licata* decision also disposes of this argument. In *Licata*, the court held that Section 386.550 barred a proceeding before the Commission that challenged a Commission-approved tariff provision as unconstitutional.[85] The situation in *Licata* was directly comparable to the present one, in which Commission-approved tariff provisions are challenged as contrary to statute. The Complainants cite *Bauer v. Southwestern Bell Telephone Company* in support of their position.[86] However,

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[83] At that time, Bell was regularly referenced as “SWBT” in Commission orders.

[84] *Ozark Border, supra; Licata, supra.*

[85] *Licata, supra,* 829 S.W.2d at 519.

[86] 958 S.W.2d 568 (Mo. App., E.D. 1998).

Bauer is a case that deals not with Section 386.550, but with the Filed Rate Doctrine. *Bauer* has nothing at all to say about Section 386.550 and whether it applies to actions before the Commission.

For these reasons, the Commission determines that the Complaint cannot go forward to the extent that it is brought under the Commission's general complaint authority in Section 386.390.1.

b. The Commission's Complaint Authority as to Rates

The second grant of authority to hear and determine complaints contained in Section 386.390.1 is much more restricted. First, such a complaint may only address "the reasonableness of any rates or charges of any gas, electrical, water, sewer or telephone corporation[.]"[87] Second, only certain specified entities may bring such a complaint.[88] Where the complainants are consumers or customers of the respondent utility, actual or prospective, at least 25 must join in the complaint.[89] This last requirement is sometimes referred to as the "perfection" of the complaint. Complainants have stated that it is this second authority in Section 386.390.1 that authorizes their Complaint and the Complaint includes allegations that Respondents' rates are not just and reasonable.[90]

The Respondents contend, and the Commission agrees, that the Complaint is not perfected as required by Section 386.390.1. Although there are 25 Complainants, there is no allegation that any of them are customers of any of the Respondents. It is not sufficient to allege, as Paragraph 26 appears to do, that the Complainants are customers of services like those offered by the Respondents. Section 386.390.1 requires that the relationship of each complainant to each respondent be plainly stated. Thus, Paragraphs 1 through 25 should each contain an allegation that the subject Complainant is a customer of a particular Respondent in that complainant purchases certain specified services from that Respondent.

Giving the Complainants the benefit of the inferences fairly derived from the Complaint, It is possible that Paragraph 27 supplies the missing allegation in that it states that "one or more of the payphone access services, the rates for which are the subject matter of this complaint, are delivered to each payphone operated by the Complainants[.]" But the Commission is still left to guess which Complainant is a customer of which Respondent. Nor would this construction fully cure the Complaint's deficiencies. The plain intention of Section 386.390.1 is that it is 25 customers of the respondent utility that must join in the Complaint.

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[87] Section 386.390.1

[88] These are "the commission . . . upon its own motion, . . . the public counsel or the mayor or the president or the chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty- five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service." Section 386.390.1.

[89] *Id.*.

[90] *Complaint,* Para's 47, 54, 61.

Of course, the statute also allows prospective customers to join in a complaint. What is a prospective customer? The statute gives no guidance on this point, but its language would be rendered meaningless unless some reasonable way can be found to separate proper prospective customers from improper prospective customers. As noted, three of the putative Complainants are not certified to provide public telephone services in Missouri and one other has no relationship with Missouri at all. None of these four are either customers or prospective customers of the Respondents within the meaning of Section 386.390.1. This defect of perfection alone is sufficient to require dismissal of the Complaint insofar as it is brought under the Commission's special complaint authority in Section 386.390.1. However, this is not the only fatal defect in the Complaint.

As discussed above, Section 386.550 applies to actions brought under Section 386.390.1, whether they are brought under the general complaint authority or the special complaint authority as to rates. The rates herein complained of are contained in tariffs that have been approved by this Commission. The Complaint, as noted above, contains no allegation of substantially changed circumstances. Therefore, the Commission concludes that Section 386.550 bars this Complaint.

For these reasons, the Commission determines that the Complaint cannot go forward to the extent that it is brought under the Commission's special complaint authority as to rates in Section 386.390.1.

2. Section 386.400.6:

Complainants rely on Section 392.400.6 as an independent statutory basis for their Complaint. Section 392.400.6 provides that "[a] telecommunications company may file a complaint as to the reasonableness or lawfulness of any rate or charge for service offered or provided by a noncompetitive or transitionally competitive telecommunications company." This provision is one of several provisions of Section 392.400, all of which are intended to prevent noncompetitive or transitionally competitive carriers from subsidizing their competitive services or transitionally competitive services with revenue realized from their noncompetitive services. The Commission, consequently, has always understood Section 392.400.6 as only authorizing complaints as to violations of Section 392.400. For example, the Commission stated in another case:

> The complainants in this case have made no allegation that SWBT's intrastate switched access services are subsidizing SWBT's transitionally competitive or competitive services. Section 392.400.6 only permits complaints that a company's noncompetitive services are subsidizing its competitive or transitionally competitive services and the complainants have failed to state such a claim. Complainants have made no allegation of subsidization. The complaint simply fails to state a claim upon which relief may be granted.[91]

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[91] *MCI Telecommunications Corp., et al., v. Southwestern Bell Telephone Company*, Case No. TC-97-303 (*Report and Order*, issued Sept. 16, 1997).

This understanding of Section 392.400.6 is supported by the restriction plainly stated in that section: an action may only be brought by a telecommunications company against a "noncompetitive or transitionally competitive telecommunications company." This is not a broad, independent complaint power granted to telecommunications carriers, as argued by Complainants; rather, it is a restricted and specialized complaint power created for a limited purpose. That purpose is the enforcement of Section 392.400.

Turning to the Complaint, the Commission finds neither an allegation that the Respondents have violated Section 392.400 nor an allegation that Respondents are subsidizing their competitive or transitionally competitive services with revenue from their noncompetitive services. Therefore, the Commission concludes that the Complaint fails to state a claim under Section 392.400.6.

D. Conclusion

The Commission has tested the Complaint herein against each of the authorizing statutes cited by the Complainants and has determined that, as urged by the Respondents, the Complaint fails to state a claim upon which relief may be granted. Therefore, the Commission will grant the Motions to Dismiss.

IT IS THEREFORE ORDERED:

1. That the Motion to Dismiss filed by GTE Midwest Incorporated, doing business as Verizon Midwest, on October 1, 2002, is granted.

2. That the Motion to Dismiss filed by Sprint Missouri, Inc., doing business as Sprint, on October 3, 2002, is granted.

3. That the Motion to Dismiss filed by Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, on October 3, 2002, is granted.

4. That this order shall become effective on January 19, 2003.

5. That this case may be closed on January 20, 2003.

Simmons, Ch., Lumpe, Gaw, and Forbis, CC., concur.
Murray, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

In the Matter of the Tariff Filing of Laclede Gas Company to Implement an Experimental Low-income Assistance Program Called Catch-Up/Keep-Up.*

Case No. GT-2003-0117
Decided January 16, 2003

Gas §1. Laclede Gas Company filed a proposed tariff designed to raise rates by $6 million in order to implement an arrearage forgiveness program, called the "Catch-Up/Keep-Up Plan," for eligible low income customers. The Commission found that while the concept of an arrearage forgiveness program is worthy of consideration, Laclede's proposal would unlawfully pass non-gas costs through the Purchased Gas Adjustment/Actual Cost Adjustment (PGA/ACA) mechanism. The Commission also determined that the program was longer in duration and larger in size than was reasonable based upon the evidence presented. Although Laclede would profit and some low-income customers would receive short-term help, most customers would receive a rate increase and be denied a corresponding rate offset related to reductions in uncollectible expenses and other costs until the current rate case moratorium ends. For these reasons, the Commission concluded that the proposed tariff should be rejected due to its flawed design and improper funding mechanism.

Gas §17.1. The Commission determined that Laclede Gas Company's proposed tariff to implement an arrearage forgiveness program unlawfully passed non-gas costs through the Purchased Gas Adjustment/Actual Cost Adjustment (PGA/ACA) mechanism.

Gas §18. The Commission rejected Laclede Gas Company's proposed tariff designed to raise rates by $6 million in order to implement an arrearage forgiveness program for eligible low income customers. The Commission found that although Laclede would profit and some low-income customers would receive short-term help, most customers would suffer a rate increase and be denied a corresponding rate offset related to reductions in uncollectible expense and other costs until the company's current rate case moratorium ends. The Commission also determined that the plan's funding mechanism was improper and that the program was longer in duration and larger in size than was reasonable based upon the evidence presented.

Rates §108. The Commission rejected the company's proposed tariff designed to implement an arrearage forgiveness program for eligible low income customers. The Commission found that although the company would profit and some low-income customers would receive short-term help, most customers would suffer a rate increase and be denied a corresponding rate offset related to reductions on uncollectible expense and other costs until the company's current rate case moratorium ends.

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, Missouri 63101, for Laclede Gas Company.

James C. Swearengen, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102 0456, for Laclede Gas Company.

* The Commission, in an order issued on March 6, 2003, denied a motion for reconsideration or rehearing.

Ronald Molteni, Assistant Attorney General, Office of the Attorney General, Post Office Box 899, Jefferson City, Missouri 65102, for the Missouri Department of Natural Resources.

John B. Coffman, Acting Public Counsel, *Michael F. Dandino*, Senior Public Counsel, and *Douglas E. Micheel*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Thomas R. Schwarz, Jr., Deputy General Counsel, *Lera L. Shemwell*, Associate General Counsel, and *David A. Meyer,* Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus

Laclede Gas Company filed a proposed tariff to implement an arrearage forgiveness program, called the "Catch-Up/Keep-Up Plan", for eligible, low income customers. While the concept of an arrearage forgiveness program is worthy of consideration, Laclede's proposal would unlawfully pass non-gas costs through the Purchased Gas Adjustment/Actual Cost Adjustment (PGA/ACA) mechanism. The Program is also longer in duration and larger in size than is reasonable based upon the evidence presented. Although Laclede would profit and some low-income customers would receive short-term help, most customers would suffer a rate increase and be denied a corresponding rate offset related to reductions in uncollectible expense and other costs until the current rate case moratorium ends. For these reasons, the Commission concludes that the proposed tariff should be rejected due to its flawed design and improper funding mechanism.

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. 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:

Laclede originally filed its tariff setting forth its initial proposal of an incentive program on July 29, 2002, as a separate filing during the prehearing settlement conference meetings in Laclede's rate case proceeding, Case No. GR-2002-356. Laclede's tariff sheets were designed to increase the Company's rates by $6 million and to implement an arrearage forgiveness program. As initially filed, the Program was to be funded with 30% of the discounts obtained by Laclede from the

maximum tariff rates that the Federal Energy Regulatory Commission allows pipelines to charge for transportation and storage services. Two thirds, or 20%, of the discounts were to be used to reduce the arrearages of low-income customers who make three timely payments of their current monthly levelized bills. The remaining third, or 10% of the discounts, was to be retained by Laclede as an indirect incentive to maximize the discounts.

On August 21, 2002, Staff filed a motion requesting that the Commission suspend and reject the proposed tariff. Staff raised a number of issues in support of its motion. Laclede withdrew the tariff on September 18, 2002, and filed a new tariff on September 23, 2002, that revised the Program. It is that September 23 tariff filing which initiated this case. The tariff originally bore an effective date of October 24, 2002.

On October 1, 2002, Staff filed a motion to suspend the proposed tariff, or in the alternative, to reject the tariff. The Office of the Public Counsel also filed a Motion to Suspend. The motions alleged, among other things, that the Program should be implemented only on an experimental basis with limited parameters so the Program could be studied and a determination could be made as to whether the purported benefits actually materialize. On October 8, 2002, Laclede filed its response in opposition to the motions to suspend.

On October 10, 2002, the Commission issued its Order that suspended the tariff until November 21, 2002, and scheduled a Prehearing Conference. On October 25, 2002, Staff filed its request to determine whether the Commission wished to schedule a public hearing. A prehearing conference was held on October 29, 2002. On October 31, 2002, Laclede filed a motion in opposition to holding local public hearings. On November 7, 2002, the Commission issued its Order scheduling a local public hearing in downtown St. Louis, Missouri. The local public hearing was held as scheduled on November 18, 2002.

On November 1, 2002, Laclede filed its procedural recommendations. On the same date, Staff and Public Counsel also filed a joint recommendation for a procedural schedule. On November 6, 2002, the Missouri Department of Natural Resources (DNR) filed an application to intervene. On November 18, 2002, Staff filed a motion in support of DNR's application to intervene, noting that DNR was named in Laclede's tariff. The Commission granted DNR's application on December 2, 2002.

On November 8, 2002, the Commission issued its Order Adopting Procedural Schedule and Expediting Transcript. In order to accommodate the procedural schedule, the Commission issued an order on November 18, 2002, further suspending the tariff until January 21, 2003. The parties filed direct testimony on November 19, 2002. The parties filed the order of witnesses and order of cross examination on November 21, 2002. The evidentiary hearing was held on December 2-5, 2002. During the hearing on December 3, 2002, Laclede distributed, but did not file, specimen tariff sheets that contained several changes that Laclede agreed to make to its Program.

DNR filed its brief on December 13, 2002, and its proposed Findings of Fact and Conclusions of Law on December 16, 2002. Laclede, Staff and Public Counsel filed their briefs and proposed Findings of Fact and Conclusions of Law on

December 16, 2002. Staff filed an amended version of its Findings of Fact and Conclusions of Law on December 18, 2002.

Tariff:

As noted above, Laclede filed proposed tariff sheets to implement an arrearage forgiveness program called the "Catch-Up/Keep-Up Plan", for eligible, low-income customers. The tariff would increase customers' costs for transportation of natural gas by $6 million by diverting up to that amount from the transportation discounts that would otherwise be returned to Laclede's customers. These diverted moneys would be placed in an escrow account to fund an arrearage forgiveness program. Currently, 100% of any pipeline discounts received by Laclede are flowed through to all non-transportation customers. Under Laclede's proposal, only 70% of the pipeline discounts would be flowed through to Laclede customers. The other 30% would be placed in an escrow account and used to reduce the arrearages of Laclede's low income customers. As arrearages are forgiven, funds would flow from the escrow account into Laclede's accounts receivables.

Laclede proposes to require no payment of arrearages for qualifying customers. Instead, Laclede proposes to require the general body of all ratepayers to pay one-fourth or $375, whichever is less, of each Program participant's arrearages for every three consecutive level-bill payments a Program participant makes.

Issues:

I. Is there a need for a Program similar to the one proposed by Laclede?

There was little dispute among the parties regarding the need for additional energy assistance for the Company's low-income customers. The parties disagree as to whether Laclede's plan should be approved. The Commission agrees that there is a need for additional energy assistance for low income customers. Whether Laclede's Catch Up/Keep Up Program is appropriate will be addressed below.

II. If there is a need for additional energy assistance for the Company's low income customers, is this Program properly designed to address that need?

A. General Design Issues

A properly designed low-income assistance program should benefit all stakeholders by promoting conservation and by assisting low-income consumers in reducing their energy burden. The low-income customers may then be able to pay their utility bills, thereby reducing utility costs for all ratepayers.

The Commission finds that there are numerous problems with the design of the Program. Laclede's arrearage Program is not properly designed to address the low-income consumer needs for rate affordability and usage assistance. The success of the Program is dependent on the modification of the behavior of the low-income customer. The expectation that low-income customers in the Program will become better able to pay their bills may be unrealistic. As noted by Staff, this Program has no track record. Laclede's proposal does not provide any means to assist participants with payment of current gas bills, although eligible customers must apply for assistance from available sources.

The Program requires no payment of arrearages from qualifying customers, but does require the general body of all customers to pay up to $375 of each Program participant's arrearages every three months for each program participant that makes three consecutive level-bill payments. Third-party community action programs (CAP agencies) would determine if Program customers face "extenuating circumstances" that would either excuse the three consecutive payment requirement or allow a defaulting customer to re-enter the Program. Laclede did not define what constitutes an extenuating circumstance and did not place any limitations on the CAP agencies' exercise of this broad discretion. Regularly granting waivers for extenuating circumstances could mean that low-income customers would receive arrearage forgiveness without ever developing regular payment habits, which is a stated Program goal.

The Program would increase rates because Laclede proposes funding this program through a surcharge in the PGA/ACA process that is the equivalent of raising the customer charge by between $0.62 and $1.00 per month. Since the Program raises rates for all customers by $6 million, it could harm those customers who just barely manage to pay their bills, but have not yet fallen into an arrearage situation.

The tariff's lack of a provision for comprehensive evaluation of the Program is another flaw. Although Laclede agreed at the hearing to collect additional data, if available, that is only sufficient if Laclede actually makes reasonable efforts to collect the data. Other flaws include the lack of quantified administrative costs of the Program; the lack of estimates of the Program's success or failure, including the number of customers that would participate and the affect the Program would have on write-offs; and the lack of estimates regarding the benefits that Laclede would realize as a result of the Program.

Although the Program is not well-designed to meet the needs of low-income customers, it is likely to have a positive impact on the Company's financial condition by improving cash flow and replacing income lost when the Commission denied Laclede's request to extend its Gas Supply Incentive Plan (GSIP).[1] The Program allows Laclede to divert a portion of the pipeline discounts that would otherwise be passed on to all ratepayers, and to then use those discounts to reduce the company's bad-debt expense. Thus, Laclede would receive a double recovery because bad-debt expense is already included in permanent rates. The Program also permits Laclede to delay write-offs to a subsequent period. Customers who would otherwise have been written off because they were unable to make the necessary payment to come on-line under the Cold Weather Rule provisions[2] will have the "payment" made for them through the arrearages Program. By reactivating the Program participant's account, Laclede would also delay making any further write-offs on that account.

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[1] *In the Matter of Laclede Gas Company's Tariff Filing to Implement an Experimental Fixed Price Plan and Other Modifications to Its Gas Supply Incentive Plan*, Case No. GT-2001-329.

[2] 4 CSR 240-13.055(7)(C).

B. Does the Program have the potential to benefit or harm customers?

1. All customers:

The Commission finds that the Program is likely to harm all customers. The Program requires all customers to pay higher rates than those approved by the Commission in the settlement of the Company's last rate case because the $6 million Laclede proposes to use to fund the Program would otherwise be used to offset the transportation cost of gas and reduce the amount all Laclede customers would pay on a per unit basis. In addition, the Commission finds that the moneys being charged to customers exceed any expectation of the cost of the Program. Any excess funds cannot be returned to consumers before the Program is terminated. Thus, the excess charges will accumulate as long as the Program remains in existence.

All customers will also be harmed by the fact that they will be required to fund, in advance, bad debts that would normally be considered in future rate cases to the extent the bad debts actually materialize. All firm sales customers will be harmed to the extent that a portion of their prepaid bad-debt expense benefit will be allocated to firm transportation customers even though the firm transportation customers will not pay for the Program.

In addition, all customers will be harmed if moneys raised from Dollar Help are reduced as a result of the Program. All customers will pay the increase to their cost of service as a result of the reduced collections from specific customers or outside agencies. If the Program participants cannot afford to keep current with their utility bills, the participants may eventually incur additional arrearages. This could result in a higher cost of service for all customers.

2. Low-income customers:

Low-income customers that can afford their gas bills, without the burden of payment of their arrearages, could receive short-term benefits from the Program by reducing their debt as payments are made for their arrearages from the escrow fund. Low-income customers that cannot afford to pay their current gas bills could benefit from the Program while they receive service. However, even with the payment of their arrearages, if these customers can't afford to continue to pay their gas bills, they can be disconnected for nonpayment during the three-month period. Consequently, these customers would then have even greater arrearage charges that they would need to satisfy to receive future service, or that would be paid by other customers through the recovery of bad debt expense. Furthermore, under the Program all customers, including low-income customers, would forego the benefit of pipeline discounts on their natural gas bills.

C. Does the Program have the potential to benefit or harm Laclede?

The Commission finds that under the Program, Laclede would likely experience higher reported earnings as a result of the double recovery, prepayment or deferred recognition of its bad debt expense. Laclede would also benefit to the extent that it has access to the excess funds accumulated by the Program that permit it to meet its other cash flow requirements, regulated or nonregulated, with funds otherwise used for bad debt. Thus, Laclede would experience an increased cash flow and an increase in income that would flow directly to Laclede's bottom line and consequently to shareholders. Therefore, the Commission finds that Laclede and its shareholders would benefit from the Program.

III. Funding Issues

A. Is the Program's level of funding appropriate?

Laclede argued that its proposed funding level of $6 million is appropriate. Staff countered that based on other programs, an experimental program funded at $600,000 would be more in line with previous experimental programs. Public Counsel stated that if the Commission desires to implement a version of the Catch-Up/Keep-Up Program, an arrearage reduction component should be set at $2.588 million on an annual basis. The Commission finds that Laclede's proposed level of funding is excessive for this experimental, untested program.

The Commission notes that Laclede has done no studies nor even estimated the costs of the Program. Laclede's witness, John Moten, admitted that the $6 million funding level was not directly tied to the funding needs of the Program, but that this level was based on the moneys that the Company previously received through the old Gas Supply Incentive Plan. That Gas Supply Incentive Plan expired on September 30, 2001, and as a result of the Commission's order in Case No. GT-2001-329, was not extended.

Furthermore, the $6 million level is significantly higher than any other low-income program in Missouri. The cost to consumers would equate to increasing Laclede's customer charge by approximately $0.62 - $1.00 per month - for an untested program. In contrast, Missouri Gas Energy's (MGE) experimental program only costs customers about $.08 per month. Moreover, the MGE program was designed as part of a stipulation and agreement between the parties to a rate case, is funded through the customer charge, is of shorter duration, and includes parameters for a thorough evaluation of the program.[3]

The Commission agrees with Staff that the evidence presented is not sufficient to determine several issues, including: 1) if the proposed funding level is not appropriate, what funding level is appropriate; 2) whether the Company's customers with the lowest incomes will actually be able to take advantage of the Program, or whether another approach might be necessary; 3) whether the program will reduce Laclede's costs so that all customers benefit as Laclede has suggested; and 4) whether the Program might actually exacerbate problems for low-income customers, resulting in additional arrearages.

B. How can the Program be funded? How should the Program be funded?

Laclede believes that the Program can and must be funded through the use of 30% of the pipeline discount savings achieved by the Company. Staff argues that the Program should be funded by means of an Accounting Authority Order (AAO). Public Counsel contends that a rate case would have been the appropriate place to address such a program.

Laclede's proposal uses the PGA/ACA process as a funding mechanism. The PGA/ACA process has been held to be lawful because the types of costs that are included are limited in nature to the cost of obtaining the gas itself, and because the Commission through its audit and adjustment process considers all relevant

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[3] *See In the Matter of Missouri Gas Energy's Tariff Filing for a General Rate Increase*, Case No. GR-2001-292.

factors. The PGA/ACA process may not include margin costs; in other words, the costs of doing business, such as labor or materials costs. Bad debt expenses fall within the category of the costs of doing business.

The Commission is unwilling to adopt a policy that allows the collection of bad debt through the ACA process. PGA costs are limited to recovery of natural gas costs necessary to bring the commodity from the production areas to the Company's city gate. City gate delivered costs include the cost of the commodity itself, interstate pipeline transportation charges, and interstate storage charges, all of which are subject to a later prudence review. Margin costs such as payroll, depreciation, customers service, bill collection and bad debt expenses are considered in the context of a general rate case and not subject to an adjustment process. Laclede's Program proposes to include margin costs in the ACA/PGA process. Such a use of the PGA/ACA mechanism is unlawful and could be the downfall of this process.

The Commission determines that Laclede's funding method for the Program is unlawful and that the tariff must be rejected. The Commission notes that a rate case would have been an appropriate place to consider the Program. Evaluating the Program in the context of a rate case would permit the Commission to consider all factors to determine the amount to include in rates, and would provide the Commission the flexibility to explore and implement several options. The rate case approach protects consumers from overcharges for bad debt expense as the amount of bad debt expense included in rates (e.g., $8 million in Laclede's last rate case) is matched with the costs. The rate case approach avoids the initial overcharges to consumers of up to $6 million as contained in Laclede's Program. The Commission has unanswered questions and concerns regarding whether the AAO would have been an appropriate funding method, as advocated by Staff. However, that is a question the Commission need not answer at this time.

IV. Other:

As noted above, the Commission finds that the proposed tariff must be rejected due to its flawed design and improper funding methods. There are no other issues that require Commission determination at this time.[4] However, the Commission determines that the concept of an arrearage forgiveness program is worthy of further review. The Commission hereby encourages the parties to establish a collaborative to meet and attempt to develop a possible alternative to the Catch-Up/ Keep-Up Plan.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Laclede Gas Company is a gas corporation as defined under Section 386.020(18), RSMo 2000. Laclede is an investor-owned public utility engaged in the provision of natural gas service in the state of Missouri and therefore is subject to the jurisdiction of the Missouri Public Service Commission under Chapters 386 and 393, RSMo 2002.

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[4] The Commission appreciates the suggestions made by the Department of Natural Resources regarding ways to improve the weatherization aspects of Laclede's proposed Catch-Up/ Keep-Up Plan. However, since the Commission is rejecting the tariff, a discussion of those issues is not necessary.

The Commission is an agency of limited jurisdiction and may only act in accord with its statutory mandate. *State ex rel. Kansas City Power & Light Co. v. Buzard,* 350 Mo. 763, 168 S.W.2d 1044, 1046 (Banc 1943).

The Commission is prevented from engaging in single-issue ratemaking as well as retroactive ratemaking. *State ex rel. Midwest Gas Users' Ass'n v. Public Serv. Com'n*., 976 S.W.2d 470 (Mo. App. W.D. 1998).

The Commission is also required to consider all relevant factors when setting rates. *State ex rel. Val. Sewage Co. v. Public Serv. Com'n*., 515 S.W.2d 845 (Mo. App. 1974).

The Commission has determined that it may not include non-gas costs in the ACA/PGA process for a number of reasons. *State ex rel. Midwest Gas Users' Ass'n v. Public Serv. Com'n*., 976 S.W.2d 470 (Mo. App. W.D. 1998). The PGA/ACA process has been determined to be lawful because it is limited to a specific type of cost - the cost of gas. The Court has said that in determining to allow a PGA mechanism, the Commission is necessarily determining that "due to the unique nature of gas fuel costs, including the fact that natural gas is a natural resource, not a product which must be produced with labor or materials, the fuel cost component of the rate may be treated differently. *State ex rel. Midwest Gas Users' Ass'n. v. Public Ser. Comm'n*., 976 S.W.2d 470, 480 (Mo. App. W.D. 1998). In approving the PGA the Commission created a mechanism that allows fuel costs to be passed along and fuel cost reductions to be passed along in the amount incurred. *Id.*

Laclede proposes to include bad debt recovery in this process. Uncollectible expenses do not meet the criteria established by the Court as a separate, discrete cost that may be considered outside a rate case. Bad debt is a cost of doing business and is a margin cost, not a commodity cost, and must be considered in the context of a rate case where all costs and reductions in costs may be considered.

Approval of the Program as proposed would constitute single-issue ratemaking. *State ex rel. Midwest Gas Users' Ass'n. v. Public Ser. Comm'n*., 976 S.W.2d 470, 480 (Mo. App. W.D. 1998). The Court has found gas supply incentive plans to be lawful only because the Commission determines ahead of time a benchmark price for gas that is representative of the cost of gas over a year. An actual cost adjustment is made periodically. (Sommerer Direct, Exh. 10, p. 3). The Court found this process to be lawful only because the Commission has set targets for gas prices and determined ahead of time what it will consider to be prudent and what it will consider to be imprudent. *Id.* It is only these prior determinations that allow this process to be considered lawful. *Id.*

Laclede's tariff does not include any benchmarks or information that would permit the Commission to make these prior determinations so that the Program could be funded with savings from an incentive plan. This is a significant defect that prevents the Commission from approving the funding mechanism proposed by Laclede in this tariff. *State ex rel. Midwest Gas Users' Ass'n. v. Public Ser. Comm'n.*, 976 S.W.2d 470, 480 (Mo. App. W.D. 1998).

Furthermore, the Commission acknowledges that there is the issue of whether the law permits a utility to charge, directly or indirectly, customers within the same

class a different rate for the same service.[5] As the Commission is rejecting the tariff on other grounds, it need not address this question. The Commission is also mindful that legislation has recently been introduced that would address this issue.[6]

The Commission appreciates the plight of low-income ratepayers and has previously authorized, and continues to support, a variety of other low-income support projects. The Commission has authorized an experimental pilot program for MGE that is similar to Laclede's proposal. That program, however, was implemented in the confines of a rate case where the Commission explored all relevant factors. Prudent public policy dictates that the Commission should await the results of that pilot program before committing the amount of resources that Laclede requests.

The tariff as filed must be rejected because of its serious deficiencies. In addition, the Commission notes that the proposed tariff bears an effective date of January 21, just a few days following the issuance of this order. Therefore, the Commission will briefly suspend the tariff in order to allow a longer period between the issuance of this order and the effective date of the tariff.

IT IS THEREFORE ORDERED:

1. That effective January 16, 2003, the proposed tariff (tariff file no. JG-2003-0396) filed by Laclede Gas Company on September 23, 2002, is suspended for a period of six days, from January 21, 2003, to January 27, 2003.

2. That the proposed tariff (tariff file no. JG-2003-0396) filed by Laclede Gas Company on September 23, 2002, is rejected.

3. That all motions not previously ruled upon by the Commission in this case are hereby denied.

4. That this except for Ordered Paragraph No. 1, this Report and Order shall become effective on January 26, 2003.

Lumpe, Gaw, and Forbis, CC., concur;
Simmons, Ch., dissents;
Murray, C., dissents, with dissenting opinion attached;
certify compliance with the provisions of Section 536.080, RSMo.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

The majority incorrectly determines that Laclede's funding mechanism is unlawful. The Catch-Up/Keep-Up Program would be funded by an incentive mechanism that the Commission has authority to flow through the PGA/ACA process.[1] It is not bad-debt recovery that would be passed through, as the majority suggests. It is, rather, an offset of a percentage of the savings from the discount

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[5] Section 393.130.2, RSMo 2000.

[6] Senate Bill 127.

[1] *State ex rel. Midwest Gas Users' Ass'n. v. Public Serv. Com'n.*, 976 S.W.2d 470 (Mo. App. W.D. 1998)

that Laclede is able to achieve through the incentive mechanism that would be passed through to ratepayers. Indeed, Laclede's former Gas Supply Incentive Plan (GSIP) flowed an offset of a percentage of those savings through to ratepayers for the direct benefit of Laclede's shareholders. This Commission first approved the GSIP for Laclede in 1996 for a three-year term and extended it, with modifications, for two additional years. It is inconsistent for such a flow-through mechanism to be considered lawful under the GSIP but unlawful under the instant proposal.

Today's Report and Order is inconsistent for other reasons, as well. On the one hand, the majority rejects Laclede's Catch-Up/Keep-Up Proposal because the benefits to low-income customers may not be great enough to enable them to break the cycle of missed payments and service interruptions. On the other hand, the majority rejects the proposal because it "is longer in duration and larger in size than is reasonable based upon the evidence presented."

On the one hand, the majority determines that the concept of an arrearage-forgiveness program is worthy of further review and encourages the parties to establish a collaborative to develop a possible alternative to the Catch-Up/Keep-Up Proposal. On the other hand, the Commission used similarly encouraging language in its Report and Order rejecting an extension of the GSIP,[2] when it encouraged development of a collaborative for a workable incentive program. Laclede appears to have made a good-faith effort at such a collaborative and has proposed a program that would redirect incentive shareholder benefits to forgive arrearages of low-income customers.

While the majority mentioned the potential violation of 393.130.2, it did not reach that issue. The majority nevertheless, points out that the Commission has previously authorized, and continues to support a variety of other low-income support programs. These programs contain elements similar or identical to those contained in the Catch-Up/Keep-Up Proposal.

I would approve an experimental Catch-Up/Keep-Up Program incorporating the changes agreed to by Laclede, and further limiting the size of the program to $4.6 million. By simply rejecting the proposal, the Commission is missing an opportunity to assist low-income customers in a timely and meaningful way with an experimental program that has the potential to benefit Laclede's customers and shareholders alike.

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[2] *In the Matter of Laclede Gas Company's Tariff Filing to Implement an Experimental Fixed Price Plan and Other Modifications to Its Gas Supply Incentive Plan*, Case No. GT-2001-329.

In the Matter of the Application of Various Members of the Missouri Association of Natural Gas Operators for a Permanent Waiver from Certain Provisions of 4 CSR 240-40.030(9)(Q) and 49 CFR Part 192.481 for Intervals of Atmospheric Corrosion Inspections.

Case No. GE-2003-0137
Decided January 30, 2003

Gas § 7. The Commission has the power to waive an inspection rule. Commission Rule 4 CSR 240-2.060(14)(B) authorizes the Commission to waive its rules if an applicant gives a complete justification setting out the good cause for granting the waiver.

Gas §8. The Commission has the power to waive an inspection rule. Because the Commission's rule is similar to a federal rule, 49 USC § 60118(d) requires the Commission to give the U.S. Department of Transportation 60 days' notice of the waiver. The Secretary of Transportation may object to the Commission's waiver during the 60 days' notice.

Gas §11. Commission Rule 4 CSR 240-40.030(13)(M)2.B.(II) requires natural gas operators to inspect their exposed pipelines for leaks every 39 months, but no later than once every third calendar year.

Gas §16. The Commission waived its rule that requires natural gas operators to inspect their pipelines for corrosion every three years. Natural gas operators must also inspect their pipelines for leaks every 39 months, but no later than once every third calendar year. The Commission found that allowing the applicants to inspect for corrosion at the same time they inspect for leaks would not affect public safety.

ORDER GRANTING PERMANENT WAIVER FROM CERTAIN PROVISIONS OF 4 CSR 240-40.030(9)(Q) FOR INTERVALS OF ATMOSPHERIC CORROSION INSPECTIONS

Syllabus: This order grants the Applicants a permanent waiver from 4 CSR 240-40.030(9)(Q) for intervals of atmospheric corrosion inspections.

Various members of the Missouri Association of Natural Gas Operators[1] applied for waiver of certain rules on October 8, 2002. On November 26, 2002, the Applicants asked permission to amend their application and filed the amended application.

[1]The following municipal members of MANGO have joined in the application: the cities of Albany, Berger, Bernie, Bethany, Fulton, Gallatin, Granby, Green City, Hamilton, Hermann, Kennett, Macon, Madison, Mercer, Middletown, Milan, Montgomery City, New Haven, Paris, Perryville, Princeton, St. Robert, Stanberry, Unionville and Wheaton. In addition, the following business members of MANGO have joined in the application: Aquila, Inc.; Atmos Energy Corporation; City Utilities of Springfield, Missouri; Fidelity Natural Gas, Inc.; Laclede Gas Company; Missouri Gas Company; Missouri Gas Energy; Missouri Interstate Gas; Missouri Pipeline Company; Southern Missouri Gas Co. L.P.; Omega Pipeline Company; Union Electric Company d/b/a AmerenUE.

On December 10, 2002, the Commission allowed the Applicants to amend their pleadings, and directed the Staff of the Commission to file a Recommendation by January 9, 2003. On the same day, the Applicants filed a second request to amend their pleadings, and withdrew their first amended application. The Commission grants the Applicants' request to file their Second Amended Application.

MANGO consists of corporations and political subdivisions that operate natural gas distribution systems in Missouri. For purposes of its application, MANGO requests a waiver of Commission Rule 4 CSR 240-2.060(1).[2] That rule requires corporations file their articles of incorporation or certificates of authority to do business in Missouri. The rule also requires political subdivisions to cite to the statutory or other authority under which they operate. Because of the volume of the materials, and because Staff has assured the Commission through its pleadings that these companies and municipalities do indeed have authority to operate in Missouri, the Commission will grant MANGO's request.

MANGO asks the Commission to permanently waive the requirement that its members inspect their exposed service pipelines for corrosion at least every three years. Commission Rule 4 CSR 240-40.030(9)(Q)[3] imposes that requirement upon MANGO's members. In addition, Commission Rule 4 CSR 240-40.030(13)(M)2.B.(II) requires that the Applicants survey their pipelines for leaks every 39 months, but no later than once every third calendar year. MANGO wants permission to inspect for corrosion and for leaks simultaneously so that the members may more efficiently use their gas safety resources.

Staff filed its Recommendation on January 9, 2003. In the Recommendation, Staff stated that the Commission should approve the permanent waivers. Staff asserts that MANGO could operate more efficiently if its members could inspect their exposed service lines for corrosion and for leaks at the same time. Staff believes allowing MANGO an additional three months to inspect those lines for corrosion would not harm the public and is not inconsistent with gas pipeline safety. Staff noted that the Commission granted MANGO a similar waiver in Commission Case No. GE-2000-543. In that case, the Commission extended a twelve-month deadline to fifteen months for qualifying people who make plastic joints. In addition, Staff notes that 49 U.S.C § 60118(d) requires the Commission to give 60 days' notice of a waiver to the United States Department of Transportation. To allow for sufficient mail and review time, Staff recommends that the effective date of the waiver be 75 days from the date of the order.

Commission Rule 4 CSR 240-2.060(14)(B) requires an applicant for waiver of a Commission rule to give a complete justification setting out the good cause for granting the waiver. The Commission finds that the Applicants can use their resources more efficiently by inspecting their service lines for corrosion and for leaks at the same time. In addition, the Commission finds that an additional three months to inspect for corrosion would not affect public safety. The Commission finds there is good cause to grant the waiver. The Commission will waive Commission Rule 4 CSR 240-2.060(9)(Q).

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[2] The applicants actually requested a waiver of 4 CSR 240-2.060(11). However, the correct citation is 4 CSR 240-2.060(1).

[3] This rule is similar to the Minimum Federal Safety Standard contained in 49 CFR 192.481.

IT IS THEREFORE ORDERED:

1. That for the purposes of this application, the Commission waives Commission Rule 4 CSR 240-2.060(1) for the members of the Missouri Association of Natural Gas Operators that joined in the application.

2. That the Commission waives Commission Rule 4 CSR 240-40.030(9)(Q) for the members of the Missouri Association of Natural Gas Operators that joined in the application.

3. That the members of the Missouri Association of Natural Gas Operators that have been granted a waiver of Commission Rule 4 CSR 240-40.030(9)(Q) shall inspect their service pipelines exposed to the atmosphere for corrosion at least once each third calendar year, not to exceed a period of 39 months.

4. That as required by 49 USC § 60118(d), the Data Center shall send a copy of this order, the Second Amended Application, and the Staff Memorandum via overnight express mail to:

Stacey L. Gerard
Associate Administrator for Pipeline Safety
U.S. Department of Transportation
RSPA/Office of Pipeline Safety
400 Seventh Street, S.W., Room 7128
Washington, D.C. 20590

5. That this order shall become effective on April 15, 2003.

6. That this case may be closed on April 16, 2003.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., dissents

Pridgin, Regulatory Law Judge

In the Matter of the Application of Aquila, Inc., for Authority to Sell and Transfer to MidAmerican Energy Company 23.3 Miles of a 345,000-Volt Electric Transmission Line in a Portion of Atchison County, Missouri.

Case No. EM-2003-0091
Decided January 30, 2003

Electric §4. The Commission authorized a Missouri utility to transfer an electric transmission line to an Iowa utility, where such transfer was required by the transmission line agreement under which the line was constructed in 1968.

ORDER APPROVING APPLICATION TO TRANSFER ASSETS

This order grants Aquila, Inc.'s request for authority to sell a portion of a transmission line located in Atchison County, Missouri.

On September 4, 2002, Aquila, Inc. applied for authority to sell a portion of a 345 kV electric transmission line located in Atchison County, Missouri, to MidAmerican Energy Company, an Iowa utility. The transmission line cuts across the northwest corner of Missouri, running 23.3 miles from the Missouri-Nebraska border near the Cooper Nuclear Power station, to the Missouri-Iowa line. The line connects MidAmerican to the nuclear plant and does not serve any retail customers in Missouri.

The application indicates that the transmission line was built as the result of a Transmission Line Agreement signed on December 31, 1968, by St. Joseph Light & Power Company - now owned by Aquila - and Iowa Power & Light Company - now MidAmerican. The 1968 agreement requires Aquila to sell the transmission line to MidAmerican after it has been in service for 33 years. The sale price is established in the agreement as the original cost of construction less 3 percent, per year, depreciation, plus the cost of non-depreciable items such as rights of way and easements. The agreed upon purchase price is $183,274, subject to an adjustment for property taxes paid by Aquila for the 2002 tax year.

On September 9, 2002, the Commission issued an order directing that notice of Aquila's application be sent to the County Commission of Atchison County, to the members of the General Assembly who represent Atchison County, and to the newspapers that serve that county. The notice indicated that any interested person wishing to intervene should file an application to intervene on or before September 29, 2002. No requests to intervene were filed.

On December 19, 2002, the Staff of the Commission filed a recommendation and memorandum. Staff indicated that it reviewed the application for transfer of assets and concluded that the transaction will not be detrimental to the public interest. None of Aquila's customers receive service off this transmission line so no change of service provider will result from the sale of the line. There will be no interruption or deterioration of service to Aquila's customers as a result of the sale.

The sale of the transmission line will not affect the tax revenues of Atchison County because the purchaser, MidAmerican, will be responsible for payment of those taxes after the transfer of the line. Staff recommended that the Commission approve Aquila's application, while reserving any ratemaking determinations resulting from the sale for a future rate proceeding.

The Commission had additional questions about the transaction and on December 31, 2002, issued an order directing Aquila to file a supplemental pleading by January 13, 2003, indicating whether the Transmission Line Agreement entered into on December 31, 1968, was detrimental to the interests of Aquila's ratepayers. That order also directed Staff to file an additional recommendation not later than ten days following Aquila's filing.

Aquila filed its supplemental pleading on January 13, 2003. Aquila indicates that the Commission was fully aware of the terms of the Transmission Line Agreement at the time it approved the construction of the transmission line. Aquila further indicates that the line is being sold to MidAmerican at its net book value and that the agreement was reasonable and beneficial to both parties. Staff's additional recommendation, filed on January 24, 2003, indicates that the transmission line has been treated as non-jurisdictional and has never been included in Aquila's rate base for determination of retail rates in Missouri. Staff continues to believe that the proposed transaction is not detrimental to the public interest.

The Commission has reviewed Aquila's application and its supplemental report, as well as Staff's recommendations. The Commission finds that the proposed transfer of assets will have no adverse impact on the Missouri customers of Aquila. The Commission finds that the transaction is not detrimental to the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That Aquila, Inc.'s application for authority to sell and transfer to MidAmerican Energy Company a portion of a 345 kV electric transmission line located in Atchison County, Missouri, is approved.

2. That the Commission makes no finding of the value of this transaction for ratemaking purposes.

3. That the Commission reserves the right to consider in a later proceeding any ratemaking treatment to be afforded this transaction.

4. That this order shall become effective on February 9, 2003.

5. That this case may be closed on February 10, 2003.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., concurs, with concurring opinion attached

Woodruff, Senior Regulatory Law Judge

Editor's 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.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I am concurring in this matter as it appears from the information available to the Commission that the Transmission Sales Agreement, originally entered on December 31, 1968, was fair. Staff has responded to the Commission's inquiry by stating that the line was never considered a jurisdictional asset. This fact should not preclude further scrutiny of the transactions, however. Bad financial deals can carry over from other activities and become liabilities impacting regulated jurisdictional assets and finances. The agreement contemplated a financing arrangement between the parties' predecessors in interest that would and did result in St. Joseph Light & Power Company's construction of the line and its subsequent sale of the line to Iowa Power & Light Company. Because the agreement clearly concluded with the transfer of assets by a regulated company, approval should have been sought before December 31, 1968. Today's approval is really not prior approval; it is approval after the fact. However, if the Commission were to turn down the current request it would result in a situation as difficult as untangling a tangled trout line in a swift current. For that reason I concur in today's order.

In the future, transfer agreements such as this should be brought to the Commission for approval before their execution.

In the Matter of the Application of Southern Union Company d/b/a Missouri Gas Energy for Authority to Acquire Directly or Indirectly, Up to and Including One Hundred Percent (100%) of the Equity Interests of Panhandle Eastern Pipeline Company, Including its Subsidiaries, and to Take All Other Actions Reasonably Necessary to Effectuate Said Transaction.

Case No. GM-2003-0238
Decided March 27, 2003

Gas §6. The Commission approved a stipulation and agreement and authorized Southern Union Company to acquire Panhandle Eastern Pipeline Company, subject to numerous conditions designed to protect Missouri ratepayers.

ORDER APPROVING STIPULATION AND AGREEMENT AND APPROVING APPLICATION

This order approves a stipulation and agreement regarding the application of Southern Union Company d/b/a Missouri Gas Energy for authority to acquire the equity interests of Panhandle Eastern Pipeline Company. The order also grants Southern Union Company the authority it requests, subject to the conditions set out in the stipulation and agreement.

On January 13, 2003, Southern Union Company d/b/a Missouri Gas Energy filed an application asking the Commission for authority to acquire, directly or indirectly, up to and including one hundred percent of the equity interests of Panhandle Eastern Pipeline Company, including its subsidiaries. On January 16, the Commission issued an order that provided notice of Southern Union's application to all parties to Missouri Gas Energy's most recent rate case, to the County Commission of each county in MGE's service territory, to the members of the General Assembly who represent the counties in MGE's service territory, and to the newspapers that serve the counties in MGE's service territory. The Commission's order also established an intervention deadline of January 24, 2003.

On January 31, the Commission issued an order approving the requests to intervene of the Municipal Gas Commission of Missouri, Laclede Gas Company, Union Electric Company d/b/a AmerenUE, the Missouri Attorney General on behalf of the State of Missouri, Enbridge Pipelines, and the Midwest Gas Users' Association. Later, on February 11, Local 5-348 of Paper, Allied-Industrial, Chemical and Energy International Union (PACE) was allowed to intervene. Also on February 11, the Commission permitted Kansas City Power & Light Company to intervene out of time. On February 24, the Commission established a procedural schedule leading to a hearing beginning on March 26. Southern Union, Staff, Public Counsel, and Kansas City Power & Light Company filed written testimony before the hearing.

On March 25, Southern Union filed a stipulation and agreement signed by Southern Union, Staff, and Public Counsel. A copy of the stipulation and agreement is attached to this order. The stipulation and agreement indicates that the parties agree that the Commission should approve Southern Union's application to acquire the equity interests of Panhandle Eastern Pipeline Company. However, the stipulation and agreement asks the Commission to condition its approval of the application on several requirements to be imposed on Southern Union. The specific conditions are set out in the stipulation and agreement and will not be repeated in this order. However, in general, the conditions relate to the following categories as set out in the stipulation and agreement:

1) Customer service standards;
2) Insulation of Southern Union's MGE operating division from Panhandle business;
3) Insulation of Southern Union's Missouri customers from any possible adverse consequences associated with the transaction;
4) Affiliate transaction rules;
5) Incentive compensation;
6) Interstate and intrastate transportation and storage costs;
7) Assumption of risks;
8) Cost allocation manual;
9) Southern Star Central investment;
10) Divest Energy Worx;
11) Adherence to Missouri rules;
12) No detrimental impact;
13) Commission authority;
14) Access to information;

15) Commitments and representations are Missouri jurisdictional; and
16) Prefiled testimony to be received into evidence.

Staff filed suggestions in support of the stipulation and agreement on March 25.

No party other than Southern Union, Staff, and Public Counsel has signed the stipulation and agreement. However, Commission rule 4 CSR 240-2.115(2) provides that the Commission can treat a non-unanimous stipulation and agreement as a unanimous stipulation and agreement if no party objects. When the hearing convened on March 26, the Commission took up and granted requests from Enbridge Pipelines and Paper, Allied-Industrial, Chemical and Energy International Union, Local 5-348 (PACE) to withdraw as parties. The Municipal Gas Commission of Missouri was previously granted leave to withdraw as a party. Kansas City Power & Light Company, Union Electric Company d/b/a AmerenUE, Midwest Gas Users' Association, and the Missouri Attorney General on behalf of the State of Missouri each filed a notice on March 25 indicating that they did not object to the stipulation and agreement and did not request a hearing. Laclede Gas Company filed a pleading on March 26 indicating that it neither supports nor opposes the stipulation. Laclede also waived its right to a hearing. All non-signatory parties have either indicated that they do not object to the stipulation or agreement or have been dismissed from the case. Therefore the stipulation and agreement will be treated as a unanimous stipulation and agreement.

At the hearing on March 26, the Commission questioned the parties about the stipulation and agreement. In a response to a question, Southern Union agreed that it would provide the Staff of the Missouri Commission, as well as the Office of the Public Counsel, with the same reports and information that it is obligated to provide to the Massachusetts Department of Telecommunications and Energy by an order issued by that body on February 19, 2003.

In the stipulation and agreement, contingent upon the Commission's acceptance of the stipulation and agreement, the parties waive their rights to cross-examine witnesses, to present oral argument or briefs, to have the transcript read by the Commission, and to judicial review. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000.

After reviewing the stipulation and agreement of the parties, Staff's suggestions in support of that stipulation and agreement, and the evidence submitted by the parties, the Commission finds that the stipulation and agreement filed on March 25 should be approved. The Commission also finds that the transaction by which Southern Union will acquire the assets of Panhandle Eastern Pipeline Company, as conditioned by the stipulation and agreement, is not detrimental to the public interest.

The stipulation and agreement requests that the Commission approve the transaction and the stipulation and agreement as soon as possible and further that the Commission's order be made effective by April 1, if possible. However, at the hearing, counsel for Southern Union indicated that the Federal Trade Commission has not yet approved the transaction. Without approval from the FTC, Southern Union will be unable to close the transaction before April 1. Therefore, Southern Union would prefer that this order be given the customary ten-day effective date, even though the effective date of the order will be after April 1.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on March 25, 2003, is approved, and the signatory parties are ordered to comply with its terms.

2. That the application of Southern Union Company d/b/a Missouri Gas Energy for authority to acquire, directly or indirectly, up to and including one hundred percent of the equity interests of Panhandle Eastern Pipeline Company, including its subsidiaries, is granted, subject to the terms of the stipulation and agreement approved in paragraph 1.

3. That Southern Union Company d/b/a Missouri Gas Energy is authorized to directly or indirectly acquire up to and including one hundred percent of the equity interests of Panhandle Eastern Pipeline Company, including its subsidiaries, and to otherwise accomplish the transaction as permitted by the terms of the Purchase and Sale Agreement, Appendix 5 to the Application, subject to the terms of the stipulation and agreement approved in paragraph 1.

4. That Southern Union Company d/b/a Missouri Gas Energy is authorized to enter into, execute and perform in accordance with, or as may be permitted by or result from, the terms of the Purchase and Sale Agreement, Appendix 5 to the Application, subject to the terms of the stipulation and agreement approved in paragraph 1.

5. That Southern Union Company d/b/a Missouri Gas Energy is authorized to enter into, execute and perform in accordance with, or as may be permitted by or result from, the terms of all other documents and to take any and all other actions which may be reasonably necessary and incidental to the performance of the transaction, subject to the terms of the stipulation and agreement approved in paragraph 1.

6. That this order shall become effective on April 6, 2003.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., concurs, concurrence to follow

Woodruff, Senior Regulatory Law Judge

Editor's 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 Missouri Public Service Commission.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I write this concurrence to the approval of the Stipulation and Agreement to express concern about the need for additional financial analysis by the Staff.

There is much to like about the Stipulation and Agreement. The parties have delineated numerous conditions designed to protect customers of MGE from potential negative consequences of Southern Union's acquisition of Panhandle Eastern Pipeline Company from CMS. There will be protections in place for transactions between affiliates. These protections are delineated in Commission rules that have been appealed to the Supreme Court. Yet regardless of the outcome in the courts, affiliate transactions between MGE (Southern Union) and Panhandle will be governed by those rules. Current discounts on transportation rates will continue in MGE's PGA and ACA rates to its customers even if the discounts to MGE later decrease. While stopping short of forcing a spin-off of MGE into a separate

subsidiary - which would have provided legal protections against financial distress of Southern - the Stipulation and Agreement does attempt to protect MGE's ratepayers from additional capital costs to Southern from the purchase of Panhandle.

My concern about this acquisition is the lack of analysis done regarding the advisability of the purchase. Staff has done an analysis about the comments of the various credit rating agencies. This information can be helpful and is an important part of the Commission's analysis. However, I would like to have more information on the potential for this transaction to be a success for Southern. Some items of interest would include:

1. The net revenue from Panhandle in the recent past;
2. The projections for net revenue in the future;
3. The reason for the apparent increase in Panhandle's debt from 1999 to present; and
4. Whether there is sufficient revenue to:
   a. Service the debt and other expenses of Panhandle;
   b. Pay sufficient dividends to Southern to service the increase in debt and equity costs flowing from this transaction; and
   c. Pay a reasonable rate of return on this investment.

Since Panhandle is a transportation company, it is probable that FERC oversight provides a safety net to ensure adequate returns from Panhandle to Southern. However, such an analysis would help the Commission to determine whether this transaction is advisable.

I hope such an analysis is done in future cases.

In the Matter of a Recommendation Concerning the Surcharge for Deaf Relay Service and Equipment Distribution Program Fund.

Case No. TO-2003-0171
Decided March 27, 2003

Telecommunications §1. The Commission increased the surcharge for the Relay Missouri Program from $.09 to $.10 per month per access line. The Commission also directed that the retention amount should remain at the current level of $30.00 or one percent, whichever is greater. In addition, the Commission clarified that where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the Deaf Relay and Equipment Distribution Program Fund.

The Commission found that staff's recommendation to increase the surcharge for the Relay Missouri Program from $.09 to $.10 per month per access line was just and reasonable and should be adopted. The Commission noted that predicting the depletion rate of the fund was quite difficult. However, the evidence suggested that without an increase in the surcharge, the Relay Missouri Fund balance would continue to decline significantly, potentially reducing the fund balance to an unreasonably low level before the next review period.

Rates §81. The Commission increased the surcharge for the Relay Missouri Program from $.09 to $.10 per month per access line. The Commission also directed that the retention amount should remain at the current level of $30.00 or one percent, whichever is greater. In addition, the Commission clarified that where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the Deaf Relay and Equipment Distribution Program Fund.

APPEARANCES

Eric William Anderson, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Anthony K. Conroy, Attorney, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, One SBC Center, Room 3516, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

Larry W. Dority, Fischer & Dority P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

Lisa Creighton Hendricks, Attorney, Sprint, 6450 Sprint Parkway, Overland Park, Kansas 66251, for Sprint Missouri, Inc., d/b/a Sprint.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus:

This order establishes the surcharge for the Relay Missouri Program at $.10 per month per access line. It also clarifies that in cases where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the Deaf Relay and Equipment Distribution Program (DRS and EDP) Fund.

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. 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:

The Commission ordered the implementation of the Relay Missouri Program in Case No. TO-90-174. The Relay Missouri Program is a statewide dual-party telephone relay service for the deaf, hearing-impaired and speech-impaired, that

was created under Section 209.253, RSMo 2000. The Commission issued an order on February 19, 1991, setting the initial surcharge at $.06 per month per access line. Since that time, the surcharge was raised to $.13 per month per access line by Commission order dated October 2, 1992. By Commission order issued March 6, 2001, the surcharge was reduced to $.09 per month per access line.

The State of Missouri currently contracts with Sprint Communications LP for telecommunications relay service (TRS). The State is operating under the last of two optional two-year contract extensions. The current option expires June 30, 2003. The contract for TRS service is being re bid this year.

On November 5, 2002, the Staff of the Commission filed a Motion to Open Case and Staff Recommendation. In this initial Recommendation, Staff suggested that the surcharge be maintained at $0.09 per month per access line.

The Commission subsequently issued an order establishing this case and directing interested parties to intervene no later than January 6, 2003. Sprint Missouri, Inc., d/b/a Sprint, and Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, filed timely requests for intervention, which were granted by order issued January 21, 2003.

On January 31, 2003, the Commission issued an Order Directing Filing, instructing Staff to file a supplemental pleading regarding its recommendation. Staff filed a Supplemental Recommendation on February 10, 2003, stating that based on updated projections and in consideration of other factors, it now recommends that the Commission increase the surcharge from $0.09 to $0.10 per month per access line.

On February 19, 2003, the Commission issued an order scheduling an on-the -record presentation for March 3, 2003, to provide the Commissioners with an opportunity to ask questions regarding Staff's recommendations. Staff, the Office of the Public Counsel, and SBC appeared for the on-the-record presentation.

On March 7, 2003, Staff filed a supplemental pleading addressing certain questions raised at the on-the-record presentation. Public Counsel filed comments on March 11, 2003. On March 12, 2003, Staff filed a reply to Public Counsel's comments.

The Commission issued another Order Directing Filing on March 14, 2003. Staff filed its response on March 19, 2003. On the same date, the Commission issued a third Order Directing Filing, requesting that Staff provide additional information. Staff filed a supplemental pleading on March 20, 2003. The Commission issued a fourth Order Directing Filing on March 20, 2003. In response, Staff filed its supplemental pleading on March 24, 2003. Public Counsel filed a response to Staff's pleading on March 25, 2003.

Issues:

1. **At what amount should the Commission set the Relay Missouri Program surcharge?**

The current surcharge is set at $0.09 per month per access line. Staff initially recommended that the surcharge be maintained at that amount. However, Staff has revised its recommendation, and now urges the Commission to increase the

surcharge from $0.09 to $0.10 per month per access line. In the last four months, the Relay Fund balance has continued to steadily decline. At the end of September 2002, the fund balance was $6,488,386. As of January 31, 2003, the fund balance was $4,989,072, a 23 percent decrease over a period of four months. Staff updated its revenue and disbursement projections and resulting fund balances, and based upon the updated data, Staff expects the Relay Fund balance to be depleted between August and September 2004, two months earlier than previously projected. Staff believes that an increase in the surcharge to $0.10 should allow the Relay Fund to remain positive until the next review period and keep the Fund balance at a reasonable level.

Staff states that its projection of receipts is conservatively low to represent the receipts experienced during this fiscal year. Staff realizes that the TAP program's expenditures have not yet equaled the appropriated amount. However, since an agency may spend all the funds appropriated to it, Staff believes that the fund must be able to cover that appropriation. Staff has included a relatively flat estimate of relay expenses, and Staff notes that the expenses may be higher than Staff's estimate. Furthermore, the current relay service contract expires on June 30, 2003, and the costs could increase under the new contract.

At the hearing, SBC requested that if the Commission increases the surcharge, that the company be allowed 60 to 90 days to implement the change.

Public Counsel argues that the Commission has the authority to set the surcharge with an automatic contingency adjustment clause. Public Counsel suggests that the Commission set a $0.09 surcharge but provide for an automatic contingency adjustment to $0.10 if the fund falls below $3 million.

Staff counters that the statute does not permit conditional surcharges. Instead, the statute allows a Commission review of the surcharge no more than annually, but no less often than every two years, and authorizes the Commission to order changes to the surcharge subsequent to that review.[1] Staff argues that Public Counsel's recommendation requires the Commission to have the authority to review the surcharge more than once a year, and that under Section 209.259, the Commission does not have such authority. Staff also notes that the relay billing is somewhat erratic, and the fund may receive three months of billing at one time. In addition, the surcharge amounts are not received on consistent dates and sometimes not in every month; instead, several months' worth may be paid at once. Staff points out that this lack of consistency does not lend itself to setting a preconditioned surcharge change based on the balance of the fund.

The Commission has reviewed the parties' positions regarding an "automatic contingency adjustment" clause. The Commission finds that there is uncertainty surrounding such a proposal and will not adopt it at this time.

The Commission also notes that Public Counsel's March 11, 2003 filing included the suggestion that the Commission's annual review of the surcharge should include certain additional data. Staff responded to these comments briefly in its March 12, 2002 filing. In order to assist the Commission in its next review of the surcharge, the Commission will direct Staff to file a more thorough response to item 2 of Public Counsel's March 11, 2003 filing.

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[1] See Section 209.259.1, RSMo 2000.

The Commission finds that Staff's revised recommendation, to increase the surcharge from $0.09 to $0.10 per month per access line, is just and reasonable and should be adopted. The Commission notes that predicting the depletion rate of the fund is quite difficult. However, the evidence suggests that without an increase in the surcharge, the Relay Missouri Fund balance will continue to decline significantly, potentially reducing the fund balance to an unreasonably low level before the next review period. The Commission finds that an increase in the surcharge of $0.01 per month per access is appropriate.

2. The Retention Amount

a) Should the retention amount remain at the current level of $30.00 or one percent, whichever is greater?

b) Should the Commission clarify that in cases where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the DRS and EDP fund?

Section 209.257, RSMo 2000, allows the Commission to set a percentage that a telephone company may retain from the DRS and EDP Fund surcharge collected to defray the administrative costs. In Case No. TO-90-174, the Commission set the amount of retention at one percent or $30.00, whichever is greater. Staff recommends that the Commission keep the retention amount at the current level.

Staff also indicates that at least one company is requesting that the DRS and EDP Fund pay to the company the difference between the amount collected and $30.00 when a surcharge amount of under $30.00 is collected. Staff indicates that Section 209.257 calls for a retention of a percentage of the surcharge amount and does not call for a recovery above the surcharge collected. Therefore, Staff recommends that the Commission clarify that in cases where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the DRS and EDP Fund. Staff suggested that the Commission adopt the following language to clarify this issue:

> Except as provided below, the local exchange telephone company is to retain 1% or $30, whichever is greater, of the surcharge amount collected each month. If the carrier collects a monthly surcharge amount under $30, the carrier will retain the amount under $30 as its full payment for recovery of the billing, collecting, remitting and administrative costs attributed to its collection of the surcharge for that month.

The Commission finds that it is just and reasonable to keep the retention amount at the current level of $30.00 or one percent, whichever is greater, as recommended by Staff. The Commission also determines that it is necessary to clarify that if the amount of the surcharge collected is less than $30.00, the company may retain that amount, but may not attempt to recover the difference from the fund.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Section 209.253, RSMo 2000, requires the Commission to provide a statewide dual-party relay system, using third-party intervention to connect deaf, hearing-impaired, and speech-impaired persons and offices of organizations representing the deaf, hearing-impaired, and speech-impaired, with telecommunication devices for the deaf and the telephone system, making available reasonable access to telephone service to eligible subscribers.

Section 209.255 provides that the Commission shall establish a rate recovery mechanism to recover the costs of implementing and maintaining the programs provided for in Section 209.253.

Section 209.257 directs the Commission to determine the appropriate percentage of the surcharge to be deducted and retained by the local exchange telephone company to allow the company to recover the billing, collecting, remitting, and administrative costs attributed to the surcharge. Section 209.259.3 provides that concurrent with the review of the surcharge, the Commission shall review the percentage deducted and retained, under Section 209.257, by the local exchange telephone company and if necessary, shall order adjustments to the percentage to assure a just and reasonable compensation to the local exchange telephone company. The Commission previously set the retention amount at the level of $30.00 (or the amount collected, if less than $30.00), or one percent, whichever is greater. The Commission finds that this retention level remains just and reasonable. However, it is necessary for the Commission to clarify that if the amount of the surcharge collected is less than $30.00, the company may retain that amount, but may not attempt to recover the difference from the fund.

Section 209.258 establishes a deaf relay service fund for the purpose of paying the expenditures incurred in the operation of the statewide dual-party relay service and equipment distribution program.

Section 209.259 requires the Commission to review the Deaf Relay Service and Equipment Distribution Program Fund surcharge no less frequently than every two years, but no more frequently than annually. The statute also requires the Commission to order changes in the amount of the surcharge as necessary to assure available funds for the provision of the programs established in Section 209.253. As noted previously, the Commission finds that in order to assure available funds for the programs, the surcharge shall be raised from $0.09 to $0.10 per month per access line.

IT IS THEREFORE ORDERED:

1. That the Relay Missouri surcharge shall be raised to $.10 per month per access line, effective July 1, 2003.

2. That local exchange companies shall notify their customers of the increase by a notice included with or printed on each customer's bill.

3. That except as provided in the next sentence, the local exchange telephone company is to retain one percent or $30.00, whichever is greater, of the surcharge amount collected each month. If the carrier collects a monthly surcharge amount under $30.00, the

carrier will retain the amount under $30.00 as its full payment for recovery of the billing, collecting, remitting, and administrative costs attributed to its collection of the surcharge for that month.

4. That the Staff of the Commission shall monitor the Deaf Relay Service and Distribution Program Fund in light of the issues set out in its recommendation.

5. That no later than April 11, 2003, the Staff of the Commission shall file a response to item 2 of the Office of the Public Counsel's March 11, 2003 filing, as directed above.

6. That this Report and Order shall become effective on April 5, 2003.

Simmons, Ch., and Forbis, CC., concur;
Gaw, C., concurs, with separate concurring opinion attached;
Murray and Lumpe, CC., dissent.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I concur in this order to adjust the assessment for the deaf relay fund out of concern that doing nothing may place the fund in jeopardy before the Commission is authorized to revisit the matter next year.

Staff recommends that the surcharge be raised from .09¢ to .10¢ per month per access line. Staff's analysis is based on various assumptions and concludes that the fund will be depleted in the fall of 2004. One of Staff's assumptions is that there will be no increase in the contract rate for telecommunications relay service. This contract is currently up for rebid with additional services requested, potentially increasing expenditures from the fund. Furthermore, if the program expenditures are actually at the level of the contemplated appropriations, the fund could be depleted by the spring of 2004.

Instead of increasing the surcharge now, it would be my preference to accept Public Counsel's suggestion to leave the assessment at .09¢, with a triggering mechanism to raise the amount to .10¢ if the fund falls below a set balance. However, since three votes do not exist for this proposal, I believe we have an obligation to ensure the fund's viability until we are authorized to reevaluate the assessment. Therefore, I must concur in the result of the Commission's order.

In the Matter of the Application of Environmental Utilities, LLC, for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Water System for the Public Located in Unincorporated Portions of Camden County, Missouri (Golden Glade Subdivision).*

Case No. WA-2002-65
Decided April 10, 2003

Water §2. Certificates §21.4. A wholesale supply contract to sell water to a neighboring utility was sufficient to satisfy the Commission's concerns about the economic viability of the applicant utility and justified the issuance of a certificate of convenience and necessity that had otherwise been approved in an earlier report and order.

Water §2. Certificates §21.4. The fact that a wholesale supply contract to sell water to a neighboring utility was only for a six-month renewable term, did not raise concern about the long-term economic viability of the applicant utility where the neighboring utility had no other available source of water.

APPEARANCES

Gregory D. Williams, Attorney at Law, Highway 5 at 5-33, Post Office Box 431, Sunrise Beach, Missouri 65079, for Environmental Utilities, LLC.

M. Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Victoria Kizito, Assistant General Counsel, and *Keith R. Krueger,* Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

SECOND REPORT AND ORDER

SUMMARY

Environmental Utilities, LLC, applied for a certificate of convenience and necessity authorizing it to provide water service to a developing subdivision in Camden County, Missouri. The Commission approved that application in a Report and Order issued on June 27, 2002 but indicated that a certificate would not be issued until Environmental Utilities formalized arrangements to provide wholesale water to an adjoining subdivision. In this Second Report and Order, the Commission finds that Environmental Utilities has made the necessary arrangements and issues the appropriate certificate. The Commission also approves the operating tariff submitted by Environmental Utilities.

* See page 360, Volume 2 MPSC 3d for another order in this case.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

On August 6, 2001, Environmental Utilities, LLC, filed an application for a certificate of convenience and necessity to construct and operate a water system to serve the Golden Glade subdivision in an unincorporated portion of Camden County, Missouri. In a Report and Order issued on June 27, 2002, the Commission approved Environmental Utilities' application. However, that Report and Order indicated that the Commission would not issue a certificate to Environmental Utilities until it proved to the Commission's satisfaction that it had made arrangements to provide wholesale water to Osage Water Company for the use of Osage Water's customers in the adjoining Eagle Woods subdivision.

On September 1, 2002, Environmental Utilities issued a tariff that would establish rules for the provision of service in the requested service area. That tariff carried an effective date of October 1, 2002. Thereafter, on September 11, Environmental Utilities filed a Notice of Water Supply Agreement. Along with that notice, Environmental Utilities filed a Water Supply Agreement between Osage Water and Environmental Utilities. That agreement indicates that it was executed on September 1, 2002, and was signed by William P. Mitchell as president of Osage Water.

On September 12, the Commission issued an order directing its Staff to file a recommendation regarding whether the Water Supply Agreement submitted by Environmental Utilities satisfied the requirements for issuance of a certificate established in the Commission's June 27, 2002 Report and Order. The Commission directed Staff to file its recommendation no later than September 20, and directed any other parties wishing to make a recommendation do so by the same date.

Staff filed its recommendation on September 20, and the Office of the Public Counsel and Hancock Construction Company also filed timely recommendations. All three parties argued that the supply agreement did not satisfy the requirements of the June 27, 2002 Report and Order.

On September 24, the Commission issued an order suspending Environmental Utilities' tariff until January 29, 2003, and scheduling a prehearing conference. At the prehearing conference, held on October 9, the parties agreed that the issues before the Commission were legal rather than factual and that a further hearing was not necessary. The parties instead proposed a briefing schedule to permit them to present the legal issues to the Commission for determination.

The Commission adopted the proposed briefing schedule on October 16, 2002, and the parties filed initial and reply briefs in November 2002. After reviewing

the parties' briefs, the Commission issued an order finding that additional evidence was necessary before the Commission could make a decision about Environmental Utilities' compliance with the June 27, 2002 Report and Order. The Commission scheduled an additional hearing on February 19, 2003, and gave the parties the opportunity to file additional testimony. At the same time, the Commission further suspended Environmental Utilities' tariff until July 29, 2003.

The additional hearing was held on February 19. Staff and Public Counsel offered testimony. Environmental Utilities did not present any additional testimony but did appear and participate at the hearing. Staff, Public Counsel, and Environmental Utilities filed additional briefs after the hearing. Hancock Construction did not appear for the hearing and did not file an additional brief.

The Wholesale Water Agreement

In its June 27, 2002 Report and Order the Commission found that Environmental Utilities should be certified to provide regulated water service to the Golden Glade subdivision. However, the Commission also found that the Golden Glade subdivision would not, by itself, provide Environmental Utilities with enough customers to be financially viable. The Report and Order, however, recognized another potential source of customers for Environmental Utilities; the neighboring Eagle Woods subdivision, which receives regulated water service from Osage Water. The Commission found that Environmental Utilities would be financially viable only if it was able to make formal arrangements to sell wholesale water to Osage Water for resale to the residents of Eagle Woods.

In its Report and Order of June 27, 2002, the Commission directed that it would not issue the certificate of convenience and necessity that it had granted to Environmental Utilities until Environmental Utilities "files a pleading proving to the satisfaction of the Commission that it has made arrangements to provide wholesale water to Osage Water Company for the use of Osage Water Company's customers in Eagle Woods."[1] The Commission did not specify any particular means by which Environmental Utilities should make those arrangements. Environmental Utilities chose to meet that requirement by entering into a contract with Osage Water.

The contract between Osage Water and Environmental Utilities was executed on September 1, 2002, and was signed for Osage Water by William P. Mitchell, president of that company. Debra J. Williams signed as manager for Environmental Utilities. At that time, Osage Water was still a corporation in good standing. However, on September 4, Osage Water's corporate existence was dissolved by the Missouri Secretary of State for failure to comply with the Secretary of State's requirements. Osage Water is still administratively dissolved.

The Commission's Staff, and other parties, argued that the September 1 contract was inadequate because it (a) does not contain a provision to bind successors and assigns to the agreement, (b) does not contain a provision for adjustment of the rate charged for water in accordance with the ratemaking procedure of the Commission, and (c) does not bind the parties to the contract for

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[1] *Report and Order*, Ordered Paragraph 1, Page 29.

a period of at least five years.[2] Staff's initial brief regarding the water supply agreement indicates that at a prehearing conference on October 9, in response to these arguments, Environmental Utilities provided the other parties with a copy of a draft of a modified water supply agreement that responded to the criticisms of Staff. Staff attached a copy of this draft to its initial brief, and also attached it to the proposed procedural schedule it filed on October 15. Staff indicated that this modified agreement would satisfy its objections to the contract. However, Staff argued that while the modified agreement would be acceptable, Osage Water could not enter into such an agreement because it has been administratively dissolved by the Missouri Secretary of State.

Significantly, Environmental Utilities has never offered this modified water supply agreement to the Commission as proof that it has satisfied the Commission's requirement that it make arrangements to provide wholesale water to Osage Water. Indeed while the copy of the agreement provided by Staff is signed, the record does not clearly indicate whether this modified contract has, in fact, been executed by the parties. Instead of relying on the modified contract, Environmental Utilities argues that the proposed modifications to the agreement that it presented to the other parties at the October prehearing conference are merely cosmetic changes. According to Environmental Utilities, the original September 1 contract is adequate to meet the Commission's requirements.[3]

Staff responds that the September contract is inadequate for three reasons. First, Staff points out that the contract does not contain a provision to bind successors and assigns to the agreement. Staff contends that such a provision should be added to the contract. However, as Environmental Utilities points out, contract rights are generally assignable unless there is a provision in the contract restricting its assignability, or the assignment would violate some statutory provision.[4] The contract between Osage Water and Environmental Utilities does not contain any provision limiting its assignability and there is no provision of statute that would restrict its assignment. Therefore, there is nothing to prevent the assignment of the contract by either Osage Water or Environmental Utilities to another entity. As a result, the revision proposed by Staff is unnecessary.

Staff's second concern is that the September 1 contract does not contain a provision that would allow for the modification of the rates paid for water to match any future rate changes ordered by the Commission. Staff indicates that the rate established in the contract is consistent with the tariff that Environmental Utilities has proposed. However, it argues the contract should also contain a provision providing for the adjustment of the rate to match any rate changes ordered by the Commission in a future rate case. Staff argues that if such a provision is not added to the contract, Environmental Utilities could be locked into a contract with inadequate rates.

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[2] Staff's Initial Brief Regarding Water Supply Agreement, Page 3.

[3] See. Applicant's Reply Brief Regarding Water Supply Agreement.

[4] 6 Am. Jur. 2d Assignments §17.

Environmental Utilities cites a 1912 case, *State ex rel. St. Joseph Water Co. v. Geiger,*[5] for the proposition that the Commission has the authority to modify the rates set out in a contract simply by establishing a new rate for Environmental Utilities. From this, Environmental Utilities argues that the modification proposed by Staff is unnecessary. Unfortunately for Environmental Utilities' argument, the holding in the Geiger case was specifically overruled a few years later in *State ex rel. St. Joseph Water Co. v. Eastin et al*.[6] In that case the Missouri Supreme Court rejected its previous holding and found instead that a regulatory change could not be used to invalidate an otherwise valid private contract between a water utility and its customer. Thus, Staff is correct that the contract could continue to bind Environmental Utilities and Osage Water after a rate change.

However, the binding effect of the contract is important only if Staff's third objection to the September 1 contract is valid. Staff argues that the contract should be for a term of at least five years so that Environmental Utilities will be assured of a long-term source of revenue. The five-year term requirement is entirely a creation of Staff. The Commission's June 27, 2002 Report and Order does not include any such requirement. Paragraph 8 of the September 1 contract simply provides that the contract will continue in force until either party terminates it, "without cause, upon six (6) months written notice to the other." Obviously, if either party can terminate the contract with six months' notice, there is no reason to be concerned that Environmental Utilities will be bound to a particular rate.

While the fact that the contract can be easily terminated eliminates Staff's second concern, it does not resolve Staff's third concern. A short-term contract that can be canceled with six months' notice does not ensure Environmental Utilities of a long-term source of revenue. However, this concern is alleviated by the fact that Osage Water has no other practical source of water for its customers in the Eagle Woods subdivision.[7]

Osage Water intends to utilize Environmental Utilities' well to provide water service to its customers. Indeed, the well was originally built for that purpose and the customers in Eagle Woods are currently receiving water from that well. However, since the current owners of the well, Greg and Debra Williams, as individuals, do not have a certificate of convenience and necessity to provide that water, they are not being paid for the water that is flowing from the well. [8] Even if Osage Water were to decide to terminate the contract or, more likely, it were to cease to do business, Osage Water, or whatever entity is providing water to the customers in Eagle Woods will have no practical choice but to obtain water from Environmental Utilities' well. Therefore, Environmental Utilities will continue to receive revenue from the sale of that water, meaning that the term of the formal contract between Environmental Utilities and Osage Water is of little practical importance.

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[5] 154 S.W. 486, 246 Mo. 74 (1912), cert dismissed 235 U.S. 694, 35 S.Ct. 208, 59 L.Ed. 430, (1914).

[6] 192 S.W. 1006, 270 Mo. 193 (1917).

[7] See. Testimony of Dale Johansen, Transcript pages 618-620.

[8] Transcript page 618, Lines 13-18.

The contract that Environmental Utilities and Osage Water executed on September 1, 2002, is a valid contract for the purchase and delivery of water to Osage Water's customers in Eagle Woods. It establishes the price that Osage Water will pay for that water and it sets the terms by which that water will be supplied. The changes suggested by Staff might improve the contract in some respects but the changes are not necessary to satisfy the conditions established by the Commission for the issuance of a certificate of convenience and necessity to Environmental Utilities.

Since the September 1, 2002 Water Supply Agreement was executed at a time when Osage Water's corporate existence was not in question, the Commission does not need to address the issue of whether Osage Water would have the legal authority to enter into a revised contract after its corporate existence was dissolved.

Conditions Proposed by Public Counsel

In its brief filed on March 12, Public Counsel reluctantly concluded that the Commission should issue a certificate of convenience and necessity to Environmental Utilities. However, Public Counsel proposed three conditions that it recommended that the Commission impose before issuing such a certificate. First, Environmental Utilities, as manager of Osage Water, should be required to take such steps as are within its authority to correct the corporate status of Osage Water within 30 days of the effective date of this order. Second, as long as Environmental Utilities is the manager of Osage Water, Environmental Utilities should be forbidden to institute any collection proceeding, or take any action under the contract to stop providing water to Osage Water until it comes before the Commission and shows cause that the manager of Osage Water has not acted in bad faith by withholding payment for water service. Third, that within ten days after the effective date of this order, Environmental Utilities should be required to file documentation with the Commission establishing that Greg and Debra Williams have transferred ownership of the Golden Glade well to Environmental Utilities.

All of Public Counsel's proposed conditions relate to the convoluted relationship between Environmental Utilities, its owners, Greg and Debra Williams, and Osage Water. That relationship was explained in the June 27, 2002 Report and Order and will not be further addressed. The first two conditions also relate to a fact that has been developed in other related cases, but which has not been established by any evidence in this case. That fact is that Environmental Utilities is currently serving as manager of Osage Water as a result of a management contract between the two companies.

The first condition proposed by Public Counsel can be easily dismissed because there is no reason to believe that Environmental Utilities, as manager of Osage Water, would have any authority to correct the corporate status of Osage Water. The second condition is not so easily dismissed. Public Counsel is concerned that Environmental Utilities, as manager of Osage Water, could refuse to pay Environmental Utilities, as water supplier. Environmental Utilities, as water supplier, could then use its failure to pay itself as the basis for a collection or, eventually, a foreclosure action against Osage Water.

The Commission will not formally impose the condition requested by Public Counsel because the procedure it would require would be unwieldy and because it is based on facts not in evidence in this case. But the Commission will remind all parties that it will continue to regulate both Environmental Utilities and Osage Water and that it will not tolerate any questionable dealings that would harm either company.

The Commission will adopt Public Counsel's third condition. In its June 27, 2002 Report and Order, the Commission found that the well that Environmental Utilities will own was designed to provide service to Osage Water's customers in Eagle Woods. However, it was constructed, and paid for by Greg and Debra Williams, the owners of Environmental Utilities as individuals, and they refused to convey it to Osage Water when that company was unable to pay them for the cost of constructing the well. Greg and Debra Williams have promised to convey the well to Environmental Utilities after that entity receives a certificate of convenience and necessity. The Commission will hold them to that promise.

Environmental Utilities' Tariff

In its Recommendation and Memorandum filed on September 20, 2002, Staff indicated that the tariff Environmental Utilities filed was adequate and could be approved. Staff recommended against approval of the tariff at that time only because of its concerns about Osage Water's corporate status and the adequacy of the contract between Environmental Utilities and Osage Water. Neither Staff, nor any other party has expressed any other concern about the tariff. In this report and order, the Commission concludes that Environmental Utilities has satisfied the requirements set out in the June 27, 2002 Report and Order and will issue a certificate to Environmental Utilities. In these circumstances, the Commission will also approve Environmental Utilities' tariff.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Environmental Utilities is a Missouri Limited Liability Company. Upon the issuance and effectiveness of the Certificate of Convenience and Necessity that it was previously granted, it will be a public utility and a water corporation as those terms are defined in Section 386.020(42) and (58), RSMo 2000. As such, Environmental Utilities will be subject to the Commission's jurisdiction pursuant to Section 386.250(3), RSMo 2000.

Section 393.170, RSMo 2000, gives the Commission the authority to grant a certificate of convenience and necessity to a water corporation. Section 393.170(3), RSMo 2000, gives the Commission authority to impose any condition or conditions on that certificate that it deems reasonable and necessary.

The Commission granted a certificate of convenience and necessity to Environmental Utilities to provide water service to the Golden Glade subdivision in its Report and Order issued on June 27, 2002. However, the Commission ordered that the certificate would not be issued, and would not be effective, until Environmental Utilities filed a pleading proving to the satisfaction of the Commission that it has made arrangements to provide wholesale water to Osage Water for the use

of Osage Water's customers in the Eagle Woods subdivision. Environmental Utilities has now satisfied that precondition and the previously granted certificate will be issued and may take effect.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions:

1. That Environmental Utilities has established to the Commission's satisfaction that Environmental Utilities has made arrangements to sell wholesale water to Osage Water for the use of Osage Water's customers in the Eagle Woods subdivision.

2. That the tariff submitted by Environmental Utilities should be approved.

IT IS THEREFORE ORDERED:

1. That the certificate of convenience and necessity to provide water service to the Golden Glade subdivision granted to Environmental Utilities, LLC in the Commission's June 27, 2002 Report and Order is issued and shall become effective on the effective date of this report and order.

2. That the tariff issued by Environmental Utilities, LLC on September 1, 2002, and assigned tariff number JW-2003-0238, is approved to become effective on April 20, 2003. The tariff approved is:

P.S.C. MO No. 1

3. That not later than April 30, 2003, Environmental Utilities, LLC shall file documentation in this case file establishing that Greg and Debra Williams have transferred ownership of the well in the Golden Glade subdivision to Environmental Utilities, LLC.

4. That this Report and Order shall become effective on April 20, 2003.

Simmons, Ch., Lumpe and Forbis, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.
Gaw, C., not participating. Murray, C., absent

In the Matter of Laclede Gas Company's Purchased Gas Adjustment Tariff Revisions to be Reviewed in Its 2000-2001 Actual Cost Adjustment.*

In the Matter of Laclede Gas Company's Purchased Gas Adjustment Factors to be Reviewed in Its 1999-2000 Actual Cost Adjustment.

Case Nos. GR-2001-387 & GR-2000-622
Decided April 29, 2003

Gas §17.2. Gas company's withdrawal from one half of a price stabilization program also effectively canceled the remaining portions of the program where to allow the program to proceed would allow the company to share in illusory profits it made from trading call options while the price that consumers had to pay for natural gas soared.

Evidence, Practice and Procedure §25. The Commission refused to strike portions of Staff's proposed findings of fact and conclusions of law because of opposing party's allegation that they contained arguments not previously presented at the hearing. The Commission will decide in its report and order which arguments are supported by the law and facts.

Evidence, Practice and Procedure §6. An approved tariff has the same force and effect as a statute. Therefore, a tariff is to be analyzed in the same manner as a statute.

Evidence, Practice and Procedure §24. The Commission's decision on a theory not espoused by any party was not a denial of due process where the decision was based solely on an interpretation of a tariff and a written stipulation and agreement.

APPEARANCES

Michael D. Pendergast, Attorney at Law, and *Rick Zucker*, Attorney at Law, 720 Olive, Suite 1520, St. Louis, Missouri 63101, for Laclede Gas Company.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Bruce H. Bates, Associate General Counsel, and *Thomas R. Schwarz, Jr.*, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

* The Commission, in an order issued on May 22, 2003, denied an application for rehearing in this case. This case was appealed to Cole County Circuit Court (03CV324600) and the Missouri Court of Appeals-Western District (WD 63563).

REPORT AND ORDER

SUMMARY

In this Report and Order, the Commission finds that Laclede Gas Company is not entitled to retain approximately $4.9 million in proceeds from the sale of call options in the winter of 2000-2001, under the Overall Cost Reduction Incentive provisions of the Company's Price Stabilization Program.

PENDING MOTIONS

On April 21, 2003, Laclede Gas Company filed a motion asking the Commission to strike a portion of the Proposed Findings of Fact and Conclusions of Law submitted by the Commission's Staff on April 10, 2003. Staff filed a reply to Laclede's motion on April 22, and Laclede filed a response to Staff's reply on April 23.

In its motion, Laclede argued that Staff presented arguments in its Proposed Findings of Fact and Conclusions of Law that it had not previously presented during this proceeding. Laclede contended that Staff's new arguments are "fundamentally inconsistent with both the record as well as Staff's own prior positions and representations to the Commission in this case." On that basis, Laclede asked the Commission to strike the offending paragraphs from Staff's Proposed Findings of Fact and Conclusions of Law.

Staff's Proposed Findings of Fact and Conclusions of Law do assert positions that Staff has not previously asserted in this case. However, Laclede does not cite any Commission rule or any other principle of law that requires that Staff's filing be stricken. The mere fact that Staff makes an argument that may or may not be supported by the evidence does not harm Laclede. Staff is just another party to this case and it, like any other party, may make any argument that it wants to make in its post-hearing briefs. It is up to the Commission to decide which arguments are supported by the law and facts. Laclede's motion will be denied.

On April 28, 2003, Laclede filed a motion entitled Request for Oral Argument in Response to Consideration of and Reliance on New, Extra-Record Matters at Agenda Meeting and, if Necessary, Petition to Reopen the Record and Establish New Procedural Schedule. The title of this motion accuses the Commission of having relied on new extra-record matters in its discussion of the case at its agenda meeting on April 24, 2003. However, the only specific evidence that the motion mentions is found in paragraph 10 of the motion, where Laclede mentions what it calls "two, out-of-context, sentences of testimony from the record in Case No. GO-98-484." The evidence to which Laclede refers is a statement by Kenneth Neises - Laclede's Senior Vice-President - included in his testimony in GO-98-484. However, contrary to Laclede's assertion that the Commission is considering evidence from outside the record, that statement is included in the record in this case, both as quoted in the Rebuttal Testimony of David Sommerer,[1] and as Exhibit 19. The Commission has not considered any evidence in this case that is not in the record in this case!

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[1] Exhibit 2, Sommerer Rebuttal, Pages 9-10, Lines 26-32, 1-2.

Laclede's motion is really an argument that the Commission may not decide this case on a theory different from that proposed by the parties. That argument is addressed further in the Conclusions of Law section of this Report and Order. If Laclede believes that the Commission has decided this case incorrectly, it may request rehearing and may exercise its right to appeal the Commission's decision. There is no need for oral argument and Laclede's motion will be denied.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

Case Number GR-2000-622 was established on April 4, 2000, for the purpose of tracking the over-recovery or under-recovery of Laclede's natural gas costs for the Actual Cost Adjustment period for 1999-2000. Case Number GR-2001-387 was established on January 12, 2001, for the purpose of tracking the over-recovery or under-recovery of Laclede's natural gas costs for the Actual Cost Adjustment period for 2000-2001. On February 20, 2002, the Commission, in response to a joint request of the Commission's Staff and Laclede, ordered that Case Numbers GR-2001-387 and GR-2000-622 be consolidated for all purposes. On February 28, 2002, the Commission established a procedural schedule leading to a hearing beginning on February 10, 2003.

In compliance with the procedural schedule established by the Commission, Staff filed recommendations regarding Laclede's 1999-2000 Actual Cost Adjustment filing on March 15, 2002. Staff filed revised recommendations on May 9, 2002. Laclede filed a response to Staff's recommendation on May 31, 2002, and Staff filed a reply to Laclede's response on June 28, 2002. Ultimately, Staff and Laclede agreed upon all issues relating to the 1999-2000 Actual Cost Adjustment and nothing regarding that filing has been presented to the Commission for resolution.

Staff filed its recommendation regarding Laclede's 2000-2001 Actual Cost Adjustment filing on June 28, 2002. Along with some other recommendations that have not been disputed by Laclede, Staff recommended an adjustment regarding Laclede's Price Stabilization Program - sometimes referred to by the acronym PSP. Staff's recommendation with regard to the Price Stabilization Program is quoted in full as follows:

> The Staff reviewed the operation of the PSP. Based on that review, the Staff noted that approximately $5,000,000 was not distributed back to customers as a reduction to gas costs. According to documents reviewed by Staff, Laclede has proposed to book $4,872,997 as income. The Staff's position is that before Laclede is allowed to share any gains generated

> from the PSP, there must be real savings in gas costs, not simply proceeds resulting from trading activity. The Staff measured any benefit achieved by Laclede's trading activity against the objective standard of holding the financial instrument till near expiration. Overall, there were no savings to be shared between the Company and the customers based upon that comparison. Therefore, the Staff is proposing to flow back to customers the proceeds that were not distributed from the PSP account from the winter of 2000-2001.[2]

Laclede responded to Staff's recommendation on August 9, 2002. In that response, Laclede disagreed with Staff's proposal to flow back to customers the approximately $4.9 million it was claiming as its share of gains generated from the Price Stabilization Program.

Staff and Laclede filed direct testimony on September 27, 2002, rebuttal testimony on December 2, 2002, and surrebuttal testimony on January 10, 2003. A hearing was convened on February 10, 2003, continued until February 13, and concluded on February 14. The Office of the Public Counsel did not file testimony but did appear and participate in the hearing. Staff and Laclede filed initial briefs on March 25, 2003, and reply briefs and proposed findings of fact and conclusions of law on April 10, 2003. Public Counsel did not file any briefs.

The Price Stabilization Program

The dispute in this case regards Laclede's Price Stabilization Program. The Commission initially approved that program in 1997, and then extended and substantially modified the program in a Report and Order issued June 15, 1999, in Case Number GO-98-484.[3] The Price Stabilization Program set out in GO-98-484 was to be effective for three years, beginning with the heating season of 1999-2000. Under the program, Laclede was allowed to use up to $4 million per year of customer money - the Maximum Recoverable Amount (MRA) - to buy and sell call options as a means of hedging the price of its gas supply.

A call option is a financial instrument that gives the purchaser of the instrument the right, but not the obligation, to buy a futures contract for a specified price within a specified period of time. The purchaser buys the call option by paying a one-time premium. A call option will specify the price at which the underlying futures contract may be purchased if the call option is exercised. That price is known as the strike

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[2] Part of this paragraph was marked as "highly confidential" in Staff's memorandum. Testimony at the hearing indicated that only schedules 9-1 or 9-5 of Exhibit 1 and schedules 2 to 4 of Exhibit 3 are still considered confidential. All other testimony and exhibits are available to the public and will be quoted in this Report and Order without restriction.

[3] The Report and Order is Schedule 2-3 to Exhibit 1, Sommerer Direct.

price.[4] So, for example, a purchaser might pay a premium of $0.10 for the right to buy an MMBtu of natural gas at a strike price of $5.00 in December.[5]

The value of the call option will vary over time, depending in large part upon the market price of natural gas, and upon the market's expectations of where the price of gas will go in the future. If at the time the call option expires the price of gas is above the strike price, the call option has a positive value. In the previous example, if the call option has a strike price of $5.00 and natural gas is at $6.00, the sale of the option will bring a profit of $1.00, less the premium. On the other hand, if the price of natural gas is $4.00 the call option will expire without any value, and the purchaser will be out the cost of the premium.[6]

Because the market price of natural gas changes constantly, as does the market's expectations of where gas prices will go in the future, the value of a call option will also vary constantly. A valuable call option one day may be valueless the next, and valuable again the third day. The fluctuation in value can continue until the option expires.

The amount of premium that a purchaser must pay to buy a call option also will vary depending upon the volatility of the market, the strike price, and the length of time remaining until the option expires.[7] A lower strike price will require a larger premium because the odds are greater that the market price will end up above the strike price. Similarly, a highly volatile market - in which natural gas prices are fluctuating - will require a larger premium because of the increased risk to the seller of the call option that the market price will end up higher than the strike price.

For a natural gas distribution company such as Laclede, the trading of call options can be used to hedge the cost of natural gas, providing a measure of protection for its customers against increasing costs for gas. The hedging function of call option trading works this way. The gas company pays a premium to purchase a call option at a specified strike price. If the price of natural gas goes up above the strike price, the company can sell the call option at a profit and use the proceeds to offset the increased cost of natural gas. For that quantity of gas, the customer effectively pays the strike price, even if the actual cost of natural gas is higher. If the price of natural gas stays below the strike price and the call option expires valueless, the customer is out the cost of the premium but has obtained the value of having the price protection in place in case it were needed. The situation is similar to the purchase of car insurance. If a car owner purchases insurance and does not have an accident, the owner is out the cost of the premium. However, for the premium, the owner has received the intangible value associated with a reduction of risk.

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[4] Exhibit 1, Sommerer Direct, Page 8, Lines 7-12. For exhibit 1, the Commission has noted that the version of the testimony filed in the Commission's electronic filing system differs slightly from the paper version provided to the Commissioners and the parties. The difference is only a matter of the numbering of the lines of testimony. For this pre-EFIS case, the paper copy is the official file so the references to that exhibit will refer to the page and line numbers as they appear in the official paper copy.

[5] Transcript, Page 58, Lines 5-8.

[6] Transcript, Pages 58-59, Lines 19-25, 1-4.

[7] Transcript, Page 58, Lines 12-15.

The Price Stabilization Program that the Commission approved for Laclede permitted Laclede to spend up to $4 million per year of customer money on premiums to purchase call options to provide this protection to its customers. Obviously, Laclede's customers would benefit the most if Laclede purchased call options with low strike prices for low premiums. To ensure that Laclede used its customers' money wisely, the Price Stabilization Program contained two incentive components. The Price Protection Incentive was designed to encourage Laclede to get as low a strike price as it could.[8] The Overall Cost Reduction Incentive was designed to encourage Laclede to spend as little as necessary on premiums and to reduce the overall cost of the program.

The Price Protection Incentive worked this way. A target strike price was to be established in March of each year based on the March market price for natural gas. A catastrophic price level was established at the same time at a level $0.50 above the target strike price. March was chosen because normally the price of natural gas at that time is relatively low.[9] Once the target strike price and catastrophic price level were established, the Price Protection Incentive obligated Laclede to purchase call options to cover 70 percent of its gas supply purchase requirements for the following winter season. Specifically, it was required to have that level of coverage at "some point during the last three business days on which options for the applicable period can be traded on the New York Mercantile Exchange."[10] Laclede was obligated to purchase that 70 percent coverage, even if the available strike prices exceeded the target strike price and catastrophic price level. In that circumstance, Laclede's shareholders would be required to pay the costs in excess of the catastrophic price level.[11]

In return for assuming that risk, the Price Protection Incentive allowed Laclede to keep a portion of any proceeds that it might generate through the sale of call options during the last three days of trading in those options. The assumption was that by keeping call options until near maturity, Laclede would be providing price protection to its customers. The exact formula by which Laclede would calculate its share of the proceeds is set out in Laclede's tariff.

The Price Protection Incentive provision of the program contained a clause that permitted Laclede to, in effect, opt out of the Price Protection Incentive if, within the first 90 days after the establishment of the Target Strike Price, radical changes in the market would require Laclede to purchase call options at above the Catastrophic Price Level.[12] This provision would become very important in the second year of the program.

The second incentive provision in the Price Stabilization Program was the Overall Cost Reduction Incentive. That provision provided as follows:

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[8] Transcript, Page 154, Lines 17-19.

[9] Transcript, Pages 154-155, Lines 23-25, 1-4.

[10] Exhibit 4, Matthews Direct, schedule 1, Description of Incentive Price Stabilization Program.

[11] Transcript, Pages 380-381, Lines 18-25, 1-4.

[12] Exhibit 1, Sommerer Direct, Schedule 6.4, Description of Incentive Price Stabilization Program, Paragraph 2.B.ii. *See also* Transcript, Pages 76-77, Lines 23-25, 1-19.

> Savings achieved through reductions in the cost of the program below the MRA (Maximum Recoverable Amount) as a result of favorable option purchases or intermediate trading activity (prior to the last three business days of NYMEX option trading) shall be shared by the Company and its customers according to the following schedule.

Cost Saving Increment	Share of Savings	
	Customers	Company
Up to $6,666,666.66	60%	40%
Additional Savings	40%	60%[13]

The Overall Cost Reduction Incentive did not include an opt-out provision to match the provision found in the Price Reduction Incentive.

The Events of 2000

The Price Stabilization Program worked as planned in its first year of implementation. A Target Strike Price was established in March of 1999 and Laclede purchased the required call options needed to provide the 70 percent coverage required by the program. However, in the winter of 1999-2000, natural gas prices remained low and as a result the call options did not finish "in the money" and there were no revenues to share under the Price Reduction Incentive.[14] Laclede was able to obtain the necessary call options for slightly less than $4 million so it was able to claim a small amount of money - approximately $40,000 - under the Overall Cost Reduction Incentive.[15] In effect, Laclede's customers had purchased insurance but had not suffered a loss.

The second year of the Price Stabilization Program would cover the winter of 2000-2001. The Target Strike Price was established at $4.70 in March of 2000, with the Catastrophic Price Level set at $5.30. At that time, the future market price for natural gas was around $3.00. At that level, gas prices were higher than they had been during the previous winter. Indeed they were higher than they had been at any time during the previous four years.[16] Under those circumstances, Laclede did not immediately enter into the futures market, instead waiting to see if, as expected, the market price, and as a result, strike prices, would come down.[17] Unfortunately, the market did not come down. Instead, beginning around May 1, 2000, the price of natural gas shot up to unprecedented levels. By June 1, 2000, the market price for gas futures was in excess of $4.50.[18] At that price level, strike prices had risen to $10-12.[19]

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[13] Exhibit 1, Sommerer Direct, Schedule 6.4, Description of Incentive Price Stabilization Program, Paragraph 3.

[14] Transcript, Page 157, Lines 1-11.

[15] Transcript, Page 157, Lines 13-23.

[16] 2000-2001 Price Run-Up Chart, Exhibit 16.

[17] Transcript, Page 367, Lines 9-23.

[18] Daily Settlement Prices Chart, Exhibit 17.

[19] Transcript, Page 370, Lines 19-25.

On June 1, 2000, citing the radical changes in the market, Laclede, through its Senior Vice President, Kenneth J. Neises, sent a letter to the Secretary of the Commission indicating that Laclede was "exercising its right to declare the Price Protection Incentive component of the Program inoperable for the second year of the Program."[20] The letter went on to declare that:

> Laclede intends to do whatever it can to procure reasonable price protection for its customers outside the ambit of the Price Protection Incentive in the months that remain before the onset of the winter heating season. However, as a result of the Company's decision to declare the Price Protection Incentive component of the Program inoperable this year, the Company will retain no gains under that component of the Program or incur any losses resulting from the purchase of price protection above the catastrophic price level established by the program (i.e. $5.20 per MMBtu)."[21]

Following Laclede's decision to opt out of the Price Protection Incentive, Laclede met with Staff and Public Counsel to discuss how best to proceed under the changed circumstances. On July 7, 2000, Laclede filed a motion asking the Commission to make temporary revisions to the Price Stabilization Program for the 2000-2001 heating season. Laclede asked that the level of funding for the program be increased from $4 million to $10 million, that the requirement that Laclede obtain price protection on 70 percent of its supply requirements be eliminated, and that it be authorized to use other types of financial hedging instruments.[22] As a result of negotiations between Laclede, Staff, and Public Counsel, the parties filed a Unanimous Stipulation and Agreement on September 1, 2000.

Laclede had requested numerous changes to the existing Price Stabilization Program, but the parties to the Stipulation and Agreement - Laclede, Staff, and Public Counsel - were only able to agree that Laclede should be relieved of the obligation to procure price protection for 70 percent of its supplies. The Stipulation and Agreement also provided that "[s]ince the Parties were unable to agree on the Company's other proposed revisions to the PSP, all remaining provisions of the existing PSP currently in effect will remain in full force and effect."[23] The Commission subsequently approved that Stipulation and Agreement in an order issued September 28, 2000. As directed by the Commission, Laclede submitted a compliance tariff to reflect the change made by the Stipulation and Agreement. The Commission approved that tariff in an order issued on October 11, 2000, to be effective on October 12.

During the ensuing winter heating season, Laclede continued to buy and sell call options. Ultimately, that trading produced $33,499,000 in proceeds from the sale of call options. Laclede paid $8,922,450 in premiums to purchase those call

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[20] Exhibit 1, Sommerer Direct, Schedule 3.1.

[21] *Id.*

[22] Exhibit 56, Matthews Rebuttal, Page 15, Lines 1-9.

[23] Exhibit 1, Sommerer Direct, Schedule 4-4.

options. $33,499,000 - $8,922,450 = $24,576,550 in net proceeds. Using the formula specified in Sheet No. 28-f of its tariff[24] for calculating gains and costs in relation to the Overall Cost Reduction Incentive, Laclede calculated what it claims to be its share of those net proceeds. Laclede's witness, Michael Cline, provided the following explanation of those calculations:

> The Company spent $8,922,450 to purchase call options under the program for the 2000/2001 heating season. However, it also received $33,499,000 for those options that it sold. Thus the Company's net cost was a credit of $24,576,550, before deducting the savings the Company realized from the sale of options under the Price Protection Incentive component. Since the Company's Price Protection Incentive savings amounted to $11,566,00, the Company's net cost credit for purposes of the Overall Cost Reduction Incentive component was reduced from $24,576,550 to $13,010,550. At this point, Section G.4.b of the Company's tariff calls for a comparison of the positive $4 million MRA to the negative net cost of $13,010,550. The difference of $17,010,550 represents the Company's savings or cost reduction under the Overall Cost Reduction Incentive Component. …
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> Section G.4.b specifies that the Company is to retain 40% of the first $6,666,666.66 of cost reductions, or $2,666,666.66. In addition, Section G.4.c permits the Company to retain 60% of the $10,343,833 of cost reductions in excess of $6,666,666.66, which amounted to an additional $6,206,330. Thus, the total Company retention computed in accordance with Sections G.4.b and G.4.c of the Company's Experimental Price Stabilization Fund tariff entitled the Company to retain $8,872,996.66 under the Overall Cost Reduction Incentive component. Since the Company already contributed $4 million of this amount to supplement the third year of funding for the Experimental Price Stabilization Fund, it is the remaining difference of $4,872,997, or approximately $4.9 million, that was retained by the Company that is at issue in this proceeding.[25]

Staff does not challenge the accuracy of Laclede's calculations under the tariff, and the Commission finds that Laclede's calculation is an accurate description of the numbers that would be obtained by applying the language of the tariff.

While it does not challenge the accuracy of the calculation, Staff contends that the method for calculating savings set out in the tariff was no longer appropriate after Laclede opted out of the Price Protection Incentive portion of the Price Stabilization Program.

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[24] Exhibit 1, Sommerer Direct, Schedule 7-2.

[25] Exhibit 7, Cline Rebuttal, Pages 3-4.

According to Staff's witness, David D. Sommerer, the Price Protection Incentive and the Overall Cost Reduction Incentive were two, inseparable parts of a single program. The goal of that program, as implied by its name, was to stabilize prices for consumers. In order that consumers could have the benefit of stabilized prices, Laclede was authorized under the program to spend up to $4 million, collected from its ratepayers, to obtain financial instruments to protect those consumers from fluctuations in the market price for natural gas. Once Laclede had withdrawn from the Price Protection Incentive and after it was relieved of the obligation to cover 70 percent of its volume by the Stipulation and Agreement, it no longer had any obligation to provide price coverage for any volume of gas and no longer had any obligation to guarantee any price level. According to Staff, Laclede could no longer produce real cost savings for its customers because there was no longer a means to measure those cost savings. Indeed, Laclede now had a perverse incentive to trade call options before the last three days of trading so that it could share in the proceeds under the Overall Cost Reduction Incentive, rather than trade them in the last three days when the proceeds would be excluded from that incentive. Laclede, could, and did produce revenues by trading call options, but at the same time, the prices paid by Laclede's customers were unprotected and were soaring to astronomical levels.[26] Simply selling call options in a rapidly rising market and collecting the proceeds was not creating any benefit for consumers such that Laclede should be rewarded by being allowed to share in the proceeds

Staff proposed to correct this disconnection by imposing a new test to determine whether Laclede's intermediate trading in call options had, in fact, created any benefits for its customers. Staff reasoned that intermediate trading could really benefit consumers only if it brought a greater return than could have been obtained simply by holding the call options until the last three days of trading. Staff performed such a study and as reported in Schedule 9 to Sommerer's Direct Testimony, Staff concluded that Laclede could have obtained more proceeds by simply holding the call options until the last three trading days. Therefore, Laclede's intermediate trading did not generate any savings and did not reduce any costs for consumers. From that, Staff argued that Laclede should not be allowed to retain any proceeds from that intermediate trading through the Overall Cost Reduction Incentive provision.

Laclede responded to Staff's argument by pointing out that the method for calculating savings under the Overall Cost Reduction Incentive is established in Laclede's tariff that was approved by the Commission. Laclede suggested that the Commission could not now alter the terms of that tariff by imposing a new test devised by Staff.

Laclede also contended that Staff's test for determining whether Laclede should be allowed to retain proceeds from intermediate trading was unreliable. Laclede pointed out that it used intermediate trading to roll in and out of hedging positions, taking profits when they were available and using those profits to fund further purchases of call options, and thereby generating further profits, all to the

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[26] Exhibit 1, Sommerer Direct, Pages 12-13, Lines 13-22, 1-2.

benefit of consumers. According to Laclede, the end result was that consumers received millions of dollars more in additional proceeds than they would have received if Laclede had not engaged in intermediate trading activity.[27]

In response to Laclede's criticism, Staff, in the surrebuttal testimony of David Sommerer, presented the results of a study that purported to show what would have been achieved if Laclede had simply procured call options up to the initial funding level of $4 million and then held them until the last three days of trading. According to Staff, Laclede could have gained an additional $4.5 million by following that strategy.[28] In other words, Laclede's intermediate trading actually cost it and its customers $4.5 million. Since Laclede's intermediate trading did not produce any savings, Staff argued that Laclede should not be permitted to retain the $4.9 million it claims under the Overall Cost Reduction Incentive.

At the hearing, Laclede responded to Staff's revised calculations by pointing out that Staff's hypothetical calculation of a hypothetical buy and hold strategy did not bear any relation to the actual trading that was done by Laclede. Under Staff's hypothetical strategy, Laclede would have been able to purchase reasonable coverage only for the early winter months; the late winter months of February and March would have been left completely unhedged.[29] Staff's witness agreed that a strategy that left February and March uncovered would not be a reasonable strategy.[30] Laclede's point was that intermediate trading was necessary to enable it to provide coverage for the later winter months and that a hypothetical strategy that did not recognize that necessity was unreasonable.

Laclede also argued that Staff's hypothetical calculations of how Laclede might have obtained greater returns through its trading program are improperly based on hindsight. Laclede suggested for Staff to sit back two years after the fact, examine the results and find occasions where Laclede could have made more money by trading earlier or later. But Laclede was trading without the benefit of hindsight, and it contended that it did the best job that it could. Laclede argued that it should be allowed to keep the share of savings to which it would be entitled under the Overall Cost Reduction Incentive.

After carefully considering the question, the Commission finds that Laclede is correct. Staff's hypothetical calculations of what might have been the result if Laclede had chosen to trade call options differently is entirely based on hindsight and is not to be found anywhere in the description of the Price Stabilization Program or the tariff designed to implement that program. Staff was not able to provide a reasonable calculation to determine how savings could have been calculated under the Overall Cost Reduction Incentive after the Price Reduction Incentive was no longer operable. That is not a criticism of Staff or its witness because there is probably no formula that could create such a calculation with any certainty.

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[27] Exhibit 5, Matthews Rebuttal, Page 8, Lines 4-13.

[28] Exhibit 3, Sommerer Surrebuttal, Page 11, Lines 9-16.

[29] Transcript, Page 105, Lines 2-15.

[30] Transcript, Page 105, Lines 15-24.

The formula contained in Laclede's tariff indicates that Laclede is entitled to keep $4.9 million in proceeds under the Overall Cost Reduction Incentive. The question then becomes whether the Overall Cost Reduction Incentive of that tariff was still effective after Laclede opted out of the Price Reduction Incentive. The Commission will address that question in its Conclusions of Law.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Laclede Gas Company is a public utility, and a gas corporation as those terms are defined in Section 386.020(18) and (42), RSMo 2000. As such, Laclede is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo 2000.

A tariff that has been approved by the Commission becomes Missouri law. As a result, an approved tariff has the same force and effect as a statute. Therefore, a tariff is to be analyzed in the same manner as a statute.[31] In interpreting a statute, the purpose is to ascertain the intent of the legislature.[32] The words of a tariff, as the words of a statute, should be given their plain and ordinary meaning when possible, but a reviewing body may look elsewhere for interpretation when the meaning is ambiguous or would lead to an illogical result that would defeat the purpose of the legislature.[33]

Of course, when dealing with a tariff, there is no legislative intent to be discerned. However, when interpreting the meaning of the Price Stabilization Program and the tariff that implemented it, it is necessary to discern the intent of Laclede in creating the program, as well as the intent of the Commission in approving the program.

As should be clear from its name, the goal of the Price Stabilization Program was to stabilize prices paid by consumers for natural gas. To achieve that end, the approved program allowed Laclede to use $4 million provided by its customers to purchase financial instruments to provide price stability to those customers. The program contained two, closely interrelated incentive features that were designed to maximize the protection afforded to the customers, while minimizing the cost of that protection. As the program was designed, it was easy to determine the savings that Laclede was able to obtain for its customers. Those savings resulted from the sale of call options and that is all that the program and its implementing tariff were designed to measure.

When both incentive clauses were working the program and tariff made sense. Both Laclede and its customers could benefit from the sale of call options. Both could receive a share of profits, but more importantly, Laclede's customers received the benefit of having price protection against an unexpected increase in natural gas prices. Unfortunately, when natural gas prices skyrocketed beginning

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[31] *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Company*, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996)

[32] *State ex rel Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. Banc 1997)

[33] *State ex rel Maryland Heights Fire Protection District v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987)

in May of 2000, Laclede was in a position where it had to withdraw from the Price Protection Incentive portion of the Price Stabilization Program. Consumers were left without the price protection to which they were entitled under the program.

Laclede agrees that once it withdrew from the Price Protection Incentive portion of the program it was no longer entitled to receive its share of profits from the sale of call options in the last three days of trading. However, it claims that the other half of the program, the Overall Cost Reduction Incentive, was still in effect. Under the tariff's description of the operation of that incentive, Laclede would be allowed to retain a portion of the profits realized from intermediate trading of call options, in other words trading before the last three days of trading.

However, without the price protection function of the Price Protection Incentive element of the program, the Overall Cost Reduction Incentive was merely a meaningless vestige. Intermediate trading of call options did not necessarily provide any price protection to Laclede's customers. Laclede could sell its hedge positions at any time and collect and keep a portion of the proceeds. Meanwhile, the price of natural gas used by those customers could keep rising after Laclede had sold out of its hedge position, leaving the customers unprotected. For example, the selling price of natural gas may have been $1.00 above the strike price ten days before the expiration of the call option. If the call option is sold on that date, Laclede and its customers would get to share in a profit of $1.00. However, if by the expiration date of that call option the price of gas has risen to $3.00 above the strike price, can it still be said that Laclede's customers have profited? Laclede has its share of the profit from the sale of the call option and it can pass the increased cost of natural gas on to its customers. The customers, however, have to pay for the gas out of their own pockets.

What is more, when Laclede withdrew from the Price Protection Incentive clause it no longer had any incentive to hold call options until near their expiration, and thereby provide some protection to its customers against rising gas costs. Instead, Laclede actually had a perverse incentive to sell its call options early, before the last three trading days, when it could still share in the proceeds of the sale.

The Commission can only conclude that neither the Commission, nor Laclede intended to create such an unlikely and unfair outcome when they created the Price Stabilization Program. There is no reason to believe that Laclede was in any way blameworthy because of its decision to withdraw from the Price Protection Incentive element of the program. Certainly, Laclede was not responsible for the spike in natural gas prices that shocked consumers in the winter of 2000-2001. However, there is no reason to believe that Laclede should be allowed to share in the illusory profits it made from trading in call options while the price that consumers had to pay for natural gas soared.

There was only one Price Stabilization Program. To permit the Price Stabilization Program and its enabling tariff to operate as proposed by Laclede would frustrate the intent of the Commission and Laclede in creating the program and approving the tariff. Therefore, the Commission concludes that as a matter of law, the Overall Cost Reduction Incentive element of the Price Stabilization Program ceased to function at the same time that Laclede exercised its right to withdraw from

the Price Reduction Incentive element of the program. Therefore, Laclede is not entitled to claim a share of the proceeds from the sale of call options under the terms of that incentive element.

The Commission's conclusion that the Overall Cost Reduction Incentive element of the Price Stabilization Program ended when Laclede withdrew from the Price Reduction Incentive element of the program must bump up against the Stipulation and Agreement signed by the parties in September of 2000. Laclede contends that this Stipulation and Agreement means that all elements of the Price Stabilization Program remained in effect, except for the Price Reduction Incentive, and the requirement that Laclede provide hedging coverage for 70 percent of its flowing supplies of natural gas. However, a look at the actual language of the Stipulation and Agreement indicates otherwise. Paragraph 4 of the Stipulation and Agreement states that "[s]ince the parties were unable to agree on the Company's other proposed revisions to the PSP, all remaining provisions of the existing PSP currently in effect will remain in full force and effect." That language does not affirmatively state that any particular element of the Price Stabilization Program is in effect. It simply states that this Stipulation and Agreement does not change the effectiveness of any provision of the Program. Thus, if, as the Commission has found, the Overall Cost Reduction Incentive element became ineffective at the same time as did the Price Reduction Incentive element, then this Stipulation and Agreement does nothing to resuscitate that element.

The Commission is mindful of the fact that it is deciding this case on the basis of a theory that has not been argued by any party. Laclede, of course, argues that it should be allowed to retain its share of proceeds under the Overall Cost Reduction Incentive. Staff has consistently offered the theory that the Overall Cost Reduction Incentive remained in effect, but that savings under that incentive had to be calculated in a more restrictive manner. Laclede contends that by deciding this case on a different theory, the Commission has denied it an opportunity to present evidence to refute the allegations against it, thereby denying it its right to due process of law.

In other circumstances, Laclede might be correct. However, in this case the Commission is reaching its decision entirely upon the basis of its conclusions of law about the meaning of the words of a tariff and a stipulation and agreement. Those documents clearly are in the record of this case and both parties have presented extensive information about them. Laclede has presented evidence and argument about both documents, and no additional testimony could change the words of either the tariff or the Stipulation and Agreement. As a result, in this case, Laclede's due process rights have not been compromised.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

A. What were the controlling Price Stabilization Program ("PSP") Tariff and Program Description terms for the October 1, 2000 through September 30, 2001 ACA period?

The Commission has determined that the Overall Cost Reduction Incentive became inoperative at the same time as the Price Protection Incentive.

B. Do the controlling PSP Tariff and Program Description terms for the October 1, 2000 through September 30, 2001 ACA period entitle Laclede to retain approximately $4.9 million of the $33.5 million in financial proceeds received by the Company through its purchase and sale of call options during that period?

Since the Overall Cost Reduction Incentive was inoperable during the applicable ACA period, Laclede is not entitled to retain any portion of the proceeds received by the Company through its purchase and sale of call options during that period.

IT IS THEREFORE ORDERED:

1. That the recommendation of the Commission's Staff that Laclede Gas Company be required to flow back to its customers $4,872,997 in proceeds that were not previously distributed from the Price Stabilization Program account from the winter of 2000-2001 is adopted by the Commission.

2. That Laclede Gas Company shall establish the account balances in its next ACA filing in compliance with the recommendations of the Staff of the Commission.

3. That Laclede Gas Company's Motion to Strike, or, Alternatively, for Leave to Respond is denied.

4. That Laclede Gas Company's Request for Oral Argument in Response to Consideration of and Reliance on New, Extra-Record Matters at Agenda Meeting and, if Necessary, Petition to Reopen the Record and Establish New Procedural Schedule is denied.

5. That any pending motions that the Commission has not specifically ruled upon are denied.

6. That this Report and Order shall become effective on May 9, 2003.

Simmons, Ch., Lumpe and Gaw, CC., concur;
Murray and Forbis, CC., dissent; certify compliance
with the provisions of Section 536.080, RSMo 2000.

Staff of the Missouri Public Service Commission, Complainant, v. M.L.M. Telecommunications, Inc., Respondent.

Case No. TC-2003-0251
Decided June 3, 2003

Service §17. Because M.L.M. Telecommunications, Inc., d/b/a Ameritel, Your Phone Company erroneously began operating without an approved tariff and without indicating the use of a fictitious name, the Commission, pursuant to the terms of an agreement between Ameritel and the Commission's Staff, ordered the Company to remit a payment in the amount of $3,000.00 to the Public School Fund of the State of Missouri, under Section 166.011, RSMo 2000.

ORDER APPROVING STIPULATION AND SETTLEMENT AGREEMENT

Syllabus: This order approves the Stipulation and Settlement Agreement between the Staff of the Commission, M.L.M. Telecommunications, Inc., and the Office of the Public Counsel regarding a complaint filed by Staff against M.L.M. Staff alleged that M.L.M. began providing service without a tariff and that M.L.M. failed to obtain Commission approval to use a fictitious name.

Procedural History

On January 24, 2003, the Staff of the Missouri Public Service Commission filed a Complaint against M.L.M. Telecommunications, Inc. Because M.L.M. has an interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company, Staff requested that Southwestern Bell be joined as a party to this matter to facilitate the suspension of processing any service orders submitted by M.L.M. to Southwestern Bell.

On January 28, 2003, the Commission issued a Notice of Complaint to M.L.M. Also on this date, the Commission issued an Order directing that Southwestern Bell respond to Staff's request that Southwestern Bell be joined as a party. On February 10, 2003, Southwestern Bell filed its response, stating that it had no objection to being joined in this matter for the limited purpose of the Commission ordering Southwestern Bell to suspend processing service orders for M.L.M. In its reply filed on February 11, 2003, Staff requested that the Commission order Southwestern Bell to cease processing all service orders submitted by M.L.M.

On February 19, 2003, M.L.M. filed a pleading indicating that it had erroneously begun doing business in Missouri prior to filing its tariff and prior to indicating the use of a fictitious name. M.L.M. further informed the Commission that on January 31, 2003, M.L.M. filed its initial basic local tariff and submitted a request for approval of a name change. The Company also filed a motion to expedite the consideration of its tariff and name change. Lastly, M.L.M. requested that the Commission not order Southwestern Bell to cease processing all service orders submitted M.L.M.

On February 26, 2003, the Commission joined Southwestern Bell as a party and set the matter for a prehearing conference. Subsequently, Southwestern Bell requested that it be excused from participating in the prehearing conference. The Commission granted the request on March 27, 2003.

The prehearing conference was held on April 16, 2003. The Staff of the Commission and M.L.M. were present. During the prehearing, the Commission took judicial notice that in Case No. CN-2003-0266, M.L.M.'s tariff and fictitious name, Ameritel, Your Phone Company, were approved to be effective on March 17, 2003. The Commission encouraged the parties to settle the matter or file a proposed procedural schedule no later than April 30, 2003.

On April 28, 2003, Staff, M.L.M. and the Office of the Public Counsel filed a unanimous Stipulation and Settlement Agreement. Thereafter, Staff and Southwestern Bell filed suggestions in support thereof.

The Agreement

M.L.M., now operating under the name "Ameritel, Your Phone Company", acknowledged that it erroneously began providing service to customers in Missouri prior to the approval of its tariff and name change. However, on March 13, 2003, the Commission issued an order recognizing the name change and approving the tariff.

The parties agreed that Ameritel would remit a payment in the amount of $3,000.00 to the Public School Fund of the State of Missouri, under Section 166.011, RSMo 2000,[1] for the sole purpose of settling the Complaint. Upon Commission approval of the Agreement, the payment will be made and proof thereof filed with the Commission.

The Parties agreed that if the Commission accepts the specific terms of the Agreement, and upon compliance of the parties with the Agreement, the Complaint would be dismissed.

Discussion

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[2] The Commission notes that 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.[3] Consequently, the Commission need not make findings of fact or conclusions of law in this order.

IT IS THEREFORE ORDERED:

1. That the unanimous Stipulation and Settlement Agreement filed on April 28, 2003, is approved as a resolution of all issues in this case. A copy of the unanimous Stipulation and Settlement Agreement is attached as Attachment A.

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[1] Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri, revision of 2000.

[2] Section 536.060, RSMo 2000.

[3] Section 536.090, RSMo 2000.

2. That all parties to the Stipulation and Settlement Agreement are ordered to comply with the terms of the unanimous Stipulation and Settlement Agreement.

3. That this case shall remain open, pending the filing of report indicating compliance with the unanimous Stipulation and Settlement Agreement.

4. That if M.L.M. Telecommunications, Inc. d/b/a Ameritel, Your Phone Company, successfully meets the terms of the Agreement, the Staff of the Commission shall dismiss this Complaint in accordance with the terms of the Agreement. Staff shall accomplish the dismissal by filing in this case a notice of dismissal with prejudice.

5. That this order shall become effective on June 13, 2003.

Simmons, Ch., Murray, Gaw, and Forbis, CC., concur.
Clayton, C., not participating

Jones, Regulatory Law Judge

Editor's 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 Missouri Public Service Commission.

In the Matter of the Review of the Purchased Gas Adjustment Clauses in the Tariffs of Local Distribution Companies.

Case No. GO-2002-452
Decided June 5, 2003

Gas §17.1. The Commission accepted the parties' final report in which the parties agreed to implement certain changes in the PGA process by filing amendments to the companies' individual tariffs.

ORDER ACCEPTING FINAL REPORT AND CLOSING CASE

Syllabus: This order accepts the final report of the parties and closes the case.

The Commission established this case to review the purchased gas adjustment (PGA) clauses in the tariffs of local distribution companies. The parties used the case as a forum to discuss the PGA process as set out in the individual tariffs of the local distribution companies. On April 28, 2003, the parties filed their Final Status Report and Motion to Close Case.

The report contains the specific procedures that the local distribution companies, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel agree should be treated consistently throughout the PGA process. The parties agreed that the local distribution companies will implement the changes by filing amendments to their individual tariffs.[1] In addition, the report

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[1] This has been done in Case No. GT-2003-0302 by Union Electric Company, d/b/a AmerenUE.

states specifically that Laclede Gas Company's Deferred Carrying Cost Balance method of calculating interest on over- and under-recovery of gas cost will be reviewed in its next rate case. The parties all agree that any individual issues that remain are best handled in contested cases specific to that company. The parties requested that the Commission close this case without further action.

The specific changes to the process as presented in the Final Report are as follows:

A. The LDCs agreed to using the ACA balance every month to determine the amount upon which interest will be charged. This will simplify the calculation, and will base the calculation on factors consistent within the month of calculation (both volumes and unit costs). This ACA mechanism will be reviewed after two winters. Because of Laclede's concerns about lost revenue, Staff will examine Laclede's DCCB approach in Laclede's next rate case.

B. Generally, the final ending Deferred Carrying Cost Balance (both over- and under-recovery) that is calculated bears no interest. This has been called a "flashcut" of the ending DCCB. The parties agreed that in the ACA approach, the ACA balance will continue to bear interest until amortized, known as the "roll-over" approach.

C. Currently, under- or over-recoveries of gas costs do not earn interest until those costs exceed five or ten percent of gas costs depending on which LDC is involved. The parties agreed to eliminate these deadbands, and agreed that interest will accrue from the first dollar either way. The exception to this general rule is that for the small LDCs, Southern Missouri Gas Company and Fidelity Natural Gas Company, the interest balance calculation will include a mutually agreeable deadband.

D. The parties agreed that LDCs shall be allowed to make up to four PGA rate changes per year, one of which will be mandatory. Also, the filings can be no sooner than 60 days from the last PGA rate change. The parties have also agreed that the LDCs will provide workpapers in electronic format when PGA rates are changed. The parties have agreed that the factors used to calculate PGA rates will be stated in each LDC's tariff.

E. The parties agreed that, for purposes of the PGA/ACA process, interest shall be accrued at the prime interest rate, less two per cent, but not less than zero percent.

F. Currently, LDC tariffs provide that pipeline refunds to customers will be held until a stated amount is accumulated before the refunds will be flowed back to customers. The parties agreed

that pipeline refunds will be flowed back to system sales customers, and transportation customers as appropriate, without the need to accumulate a threshold amount and file a separate refund rate factor. This alternative method contemplates that the ACA approach has been implemented for the purposes of applying carrying costs.

The Commission has reviewed the report of the parties and finds that the agreements made by the parties are acceptable. The Commission prefers that the companies under its jurisdiction be governed by similar practices and procedures and that rates for customers across Missouri are consistently calculated. The Commission will expect that, unless there is good cause to do otherwise, the local distribution companies will amend their tariffs through an appropriate rate case, or other proceeding, so that the PGA process becomes consistent within the industry. The Commission will accept the final report of the parties.

The Commission finds that no further action is required and will therefore grant the motion to close this case.

IT IS THEREFORE ORDERED:

1. That the final report of the parties is accepted.

2. That the motion to close this case is granted.

3. That this order shall become effective on June 15, 2003.

4. That this case may be closed on June 16, 2003.

Murray, Gaw, and Forbis, CC., concur.
Simmons, Ch., concurs, with separate concurring opinion to follow.
Clayton, C., not participating.

Dippell, Senior Regulatory Law Judge

CONCURRING OPINION OF CHAIRMAN KELVIN L. SIMMONS

The Missouri Public Service Commission determined that the changes agreed upon by the parties to the current Purchased Gas Adjustment (PGA) process were acceptable, and this case should be closed. The Staff of the Commission, with the extensive involvement of the local distribution companies and the Office of the Public Counsel, can be praised for collaboratively working to refine the PGA process. I am convinced that if the PGA mechanism is to be used, that the changes recommended by the parties should be implemented and this case should be closed. Even though I concur with the decision, I remain seriously concerned about the PGA mechanism.

I continue to be somewhat skeptical of the PGA process because of the portion of the natural gas industry that is not regulated by this Commission. Even though the Missouri courts have recognized the PGA process,[1] the Missouri General Assembly has never addressed whether this is a good process for the citizens who purchase natural gas to heat their homes. Recent history has shown us that gas producers can manipulate the market. If the producers have manipulated the markets, the natural gas consumers suffer an immediate harm when they pay their gas bills. Under the current mechanism, however, the consumer cannot know at the time the bill is paid, if they are paying the correct amount and it may be months before any adjustments are made.

My concerns about the PGA mechanism are not new. During the 2000-2001 winter heating season, I dissented from the Commission decisions[2] that drastically, and almost automatically, raised the cost of natural gas to consumers in Missouri. In my dissents, I raised the issue that even though the Commission conducts a prudence review under the PGA mechanism, we could not be certain that the natural gas producers were not manipulating the gas markets.

As a result of that heating season, the Federal Energy Regulatory Commission (FERC) is currently investigating companies that could have contributed to the manipulation of the natural gas markets through questionable trading activity. In fact, the FERC has recently found that some producers did manipulate the market.

I believe the Staff and the other parties did the best they could to revise the current PGA process. For that reason, I concur in the decision but with the foregoing reservations about the PGA mechanism.

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[1] *See, Midwest Gas Users Association v. Public Service Commission of the State of Missouri,* 976 S.W.2d 485 (Mo. App. W.D.1998).

[2] *See*, Case Nos. GR-2001-382, GR-2001-387, GR-2001-388, GR-2001-394, GR-2001-396, and GR-2001-397.

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, 2003.

Case No. AO-2003-0573
Decided June 26, 2003

Public Utilities §§1, 5. The Commission assessed a total of $15,867,383 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2004.

ASSESSMENT ORDER FOR FISCAL YEAR 2004

Pursuant to the provision of Section 386.370, RSMo Supp. 2002, the Commission has made an estimate of the expenses to be incurred by it during the fiscal year commencing July 1, 2003, reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo. The Commission has also separately estimated the amount of such expenses directly attributable to such regulation of each of the following groups of public utilities: electrical utilities, gas utilities, heating utilities, water utilities, sewer utilities and telephone utilities, as well as the amount of such expenses not directly attributable to any such group. The estimated amount of expenses directly attributable to all groups of public utilities is $7,939,241. The estimated amount of expenses not attributable to any such group is $9,775,862. The Commission estimates its total revenue need to be $17,715,103.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be $307,500. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2003, is estimated to be $1,540,220. This estimated unexpended sum of $1,540,220 is hereby allocated to each group of public utilities above enumerated in proportion to the respective gross intrastate operating revenue of the respective groups during the calendar year of 2002 as provided by law. The reimbursement from the federal gas safety program is deducted from the gas utility group.

The Commission has allocated to each group of public utilities the estimated expenses directly attributable to the regulation of that group. An additional amount is allocated, equal to such proportion of the estimated expenses not directly attributable to any group as the gross intrastate operating revenues of such group during the preceding calendar year bear to the total gross intrastate operating revenues of all public utilities subject to the jurisdiction of the Commission, as aforesaid, during such calendar year. Those amounts are set out with more specificity in documents located on the Commission's web page at http://www.psc.state.mo.us.

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	$ 5,781,083
Gas	4,011,381
Heating	18,654
Water	1,025,306
Sewer	291,591
Telephone	4,739,368
Total	$15,867,383

The Commission assesses the amount of $15,867,383 to such groups of public utilities. Each public utility in each group is assessed in proportion to its respective gross intrastate operating revenues during the preceding calendar year. 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 Director of Administration shall render a statement of such assessment to each public utility on or before July 1, 2003. Said assessment will be due and payable on or before July 15, 2003, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2003, October 15, 2003, January 15, 2004, and April 15, 2004. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks should be made payable to the Director of Revenue, State of Missouri; however, these checks are to be sent to the Missouri Public Service Commission, Budget and Fiscal Services Department, P.O. Box 360, Jefferson City, MO 65102.

In order to provide sufficient time for preparation of the Fiscal Year 2005 assessment, staff shall place this matter on the Commission's public meeting Agenda for discussion not later than June, 10th, 2004. The discussion shall be supplemented by a summary of cost allocated to type of utility, a calculation of the estimated PSC assessment; estimated cash balance June 30, 2003, and an estimated FY2005 assessment.

IT IS THEREFORE ORDERED:

1. That the assessment for fiscal year 2004 shall be as set forth herein.

2. That the Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.

3. That the Commission's Director of Administration shall render a statement on behalf of the Commission of such assessment to each public utility on or before July 1, 2003.

4. That each public utility shall pay its assessment as set forth herein.

5. That the Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

6. That the Commission staff shall prepare and present its first estimated assessment package for Fiscal Year 2005 by June 10th, 2004

7. That this order shall become effective on July 1, 2003.

Simmons, Ch., Murray, Gaw,
Forbis and Clayton, CC., concur

Roberts, Chief Judge

In the Matter of Southern Missouri Gas Company, L.P.'s Purchased Gas Adjustment Factors to be Reviewed in its 1999-2000 and 2000-2001 Actual Cost Adjustment.

Case No. GR-2001-388
Decided July 1, 2003

Gas §17. The Commission found that a gas company violated its own tariffs when it provided gas supplies and transportation to two large customers in a manner that was not permitted by those tariffs.

Gas §§17, 17.1. The Commission rejected Staff's proposal to decrease a gas company's actual cost adjustment balance by $99,199 - even though the company had provided a service to two large customers that was not authorized by the company's tariffs - because Staff failed to show that ratepayers were actually harmed by the company's actions.

APPEARANCES

James M. Fischer and *Larry W. Dority,* Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri, 65101, for Southern Missouri Gas Company, L.P.

Douglas Micheel, Deputy Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Robert Franson, Assistant General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Bill Hopkins, Senior Regulatory Law Judge

REPORT AND ORDER

SYLLABUS

In the following Report and Order, the Missouri Public Service Commission adopts and approves the Unanimous Partial Stipulation and Agreement, attached as Attachment A, filed by the parties on March 7, 2003, resolving all but two of the issues. With regard to the remaining issues, the Commission finds and concludes that Southern Missouri Gas Company, L.P., violated its tariff provisions related to the provision of gas supplies and transportation service to two industrial customers. The Commission nonetheless finds and concludes that the Actual Cost Adjustment proposed by Staff and Public Counsel to reduce Southern Missouri's Actual Cost Adjustment balance by $99,199 should not be adopted.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence on the whole record, makes the following findings of fact. 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

Southern Missouri is a local distribution company, i.e., the local gas utility that distributes gas from the interstate or intrastate pipeline to end-use consumers of natural gas. This case involves Southern Missouri's Purchased Gas Adjustment/ Actual Cost Adjustment.

In addition to the basic rates which Southern Missouri charges its customers, the Company can also recover from its customers the costs that it incurs in obtaining gas from its own suppliers. These additional charges are recovered through a two-part process known as a Purchased Gas Adjustment/Actual Cost Adjustment. In the first half of this process, the Purchased Gas Adjustment, Southern Missouri files annual tariffs in which it estimates its cost of obtaining gas over the coming year. This part of the process is prospective or forward-looking, and the Purchased Gas Adjustment amounts are then included in the customers' bills over the ensuing twelve months. In the second half of the process, Southern Missouri submits Actual Cost Adjustment filings, which are meant to correct any discrepancies between the Purchased Gas Adjustment amounts which were prospectively billed to Southern Missouri's customers and the costs which, in retrospect, Southern Missouri actually incurred in obtaining gas from its suppliers.

Rates and services of Missouri's regulated local distribution companies come under the jurisdiction of the Missouri Public Service Commission. This proceeding was one in which Southern Missouri's actual gas costs were reconciled against the amounts it had collected from customers through its Purchased Gas Adjustment clause charges during the year. This clause is the provision in each local distribution company's tariff that permits it to recover prudently-incurred gas supply, transportation, and storage costs, on a dollar-for-dollar basis, from customers.

Brief Procedural History

This case deals with two separate Actual Cost Adjustment periods of Southern Missouri. Case number GR-2001-39 deals with the 1999-2000 Actual Cost Adjustment, and case number GR-2001-388 deals with the 2000-2001 Actual Cost Adjustment. On April 12, 2001, the Commission consolidated the cases and designated case number GR-2001-388 as the lead case.

On March 7, 2003, the parties filed a Unanimous Partial Stipulation and Agreement. This Stipulation settled all issues in the case, except two. The remaining issues are related to Southern Missouri's provision of transportation service and gas supplies to two large industrial customers that considered leaving the Southern Missouri natural gas system and switching to propane as their primary source of energy. As agreed by the parties, those two issues were:

> 1. Does Southern Missouri's provisioning of gas supplies and transportation for its "Transportation Service-Internal" customers, consisting of two large customers, constitute a violation of its tariffs?, and

> 2. Should the Commission adopt Staff's proposed adjustment to decrease the firm sales Actual Cost Adjustment balance by $105,809 (reduced by the time of the hearing to $99,199) to include revenues for "Transportation Service-Internal" customers, consisting of two large customers, at the amount the revenues would have been if the gas had been sold at the authorized Purchased Gas Adjustment adjusted rate?

A hearing was held on March 11, 2003. Scott Klemm, Vice-President of the Company, testified for Southern Missouri. Annell Bailey and James Russo testified for Staff. Public Counsel had no witnesses.

Unanimous Partial Stipulation and Agreement

Under Commission Rule 4 CSR 240-2.115, there is no need for a hearing on the Unanimous Partial Stipulation and Agreement since no party requested a hearing. If no party requests a hearing, the Commission may determine that a hearing is not necessary and that the Commission may make a decision based on the stipulation and agreement. The Commission finds that all but two issues were settled by the stipulation and agreement. The Commission has the legal authority to accept a stipulation and agreement offered by the parties as a resolution of issues raised in a case. Section 536.060[1] allows parties to dispose of cases by stipulation and agreement with summary action that waives procedural requirements, and states:

> Contested cases...may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

Thus, the Commission will approve the Unanimous Partial Stipulation and Agreement filed by the parties on March 7, 2003.

Statement of Facts

Southern Missouri, a Missouri limited partnership, is a local distribution company that provides service in south-central Missouri, particularly in the towns of West Plains, Cabool, Licking, Mansfield, and Marshfield.

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[1] All citations to statutory authority are to the year 2000 Revised Statutes of Missouri, as currently supplemented, unless otherwise indicated.

During the winter of the years 2000-2001, natural gas wholesale prices skyrocketed to unprecedented levels. According to the Commission's Task Force Report[2] on this problem, the wellhead price of gas had been relatively low with an average of around $2/Mcf[3] since deregulation in the 1980s. The price of gas began to rise in the summer of the year 2000 when it went above $4/Mcf in June, $5/Mcf in September, and in November over $6/Mcf. After two months of extraordinarily cold weather and continued reports of extreme storage withdrawals, the price spiked to near $10/Mcf in late December. The Report explained that

> [t]he increase in commodity cost was due to a number of factors but the primary factor was the record cold in November and December 2000 that affected most of the states east of the Rockies. This record cold occurred when the commodity price had already eclipsed $5/Mcf and led to the first sustained increase in space heating demand for natural gas nationally in five years. This increased demand caused nine weeks of sustained or increasing commodity prices from $4.50/Mcf the last week in October 2000 to $9.98/Mcf the last week of December 2000.[4]

When Southern Missouri increased its gas supply rates on February 1, 2001, to reflect the market changes, the Company's Purchased Gas Adjustment rate, including its under-collected Actual Cost Adjustment balance from previous Actual Cost Adjustment periods, resulted in a total Purchased Gas Adjustment rate of $0.8989 per Ccf (or $8.989 per Mcf). After Southern Missouri's customers received the bills that reflected the Purchased Gas Adjustment rate increase, three large volume service customers contacted Southern Missouri, expressing concerns over Southern Missouri's rates, and indicated to William A. Walker, Southern Missouri's Gas Control Manager, that they were considering switching to alternative sources of energy. At this time, the equivalent price for propane was approximately $0.71 per gallon, or $7.75 per MMBtu.

Southern Missouri considered its options for competing with the alternative sources of supply for these customers: (1) do nothing and risk losing the industrial companies as customers; (2) lower the industrial companies' commodity charges but continue to classify the industrial companies as gas sales customers (which Southern Missouri called the flex down option); (3) put the industrial companies in

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[2] *Final Report of the Missouri Public Service Commission's Natural Gas Commodity Price Task Force*, pp. 63-70.

[3] An Mcf is 1,000 cubic feet of gas, approximately equivalent to 1,000,000 British Thermal Units or Btu. An Mcf is not the unit of usage that appears on most customer bills, but it is a common unit for markets. Most customers are familiar with Ccfs or Therms, which represent about one tenth of an Mcf. A Ccf is equivalent to 100 cubic feet of gas and a Therm is equivalent to 100,000 Btu. A Ccf is often very close to the same as a Therm, assuming a heat output of about 1000 Btu/cubic foot.

[4] *Report* at 70.

touch with third-party marketers for their gas supply, where Southern Missouri would provide transportation service only; or (4) provide the industrial companies with transportation service where Southern Missouri would also provide the gas supply.

Southern Missouri concluded that Option 1 (i.e., do nothing and risk losing customers) was not feasible for keeping the industrial customers on its system. Southern Missouri stated its belief that the industrial customers would accept the lower-priced propane bids if Southern Missouri did nothing to make natural gas prices competitive with propane. As a result, Southern Missouri rejected the option of doing nothing to compete.

On review of Option 2 (i.e., the flex down option), Southern Missouri concluded that it could not compete with the propane alternative, since this option would allow a reduction of rates by only $0.50 per Mcf. This price would have continued to be substantially above the propane equivalent price. As a result, Southern Missouri rejected the flex down option.

Southern Missouri also considered Option 3 (i.e., transportation service with a third-party marketer providing gas supplies). Prices for natural gas had begun to drop precipitously beginning in mid-winter of the year 2001. Southern Missouri determined that natural gas supplies could be acquired by a third-party marketer at considerably less than its existing Purchased Gas Adjustment rate of $8.989 per Mcf. The possibility existed that gas could be obtained more cheaply than at the existing Purchased Gas Adjustment rate. Thus, under such a scheme, the customers could transport the gas using Southern Missouri's transportation service and the Company would render the service under its Transportation Tariff.

Two of the customers in question met the minimum usage thresholds in Southern Missouri's Transportation Tariff, so Southern Missouri decided that it could provide transportation services to these customers. The third customer in question did not qualify for transportation service since it did not meet the minimum usage threshold. Since the third customer did not qualify, Southern Missouri was unable to provide the transportation service option to this customer. As a result, Southern Missouri lost the customer after it accepted the lower-priced bid from the propane supplier.

Southern Missouri discussed the possibility of providing transportation service with a third-party marketer providing the gas supplies to the two remaining customers. Southern Missouri stated its belief that the customers were not comfortable dealing with a third-party marketer to obtain their gas supplies, and that they did not have the in-house expertise to acquire their own gas supplies.

As a result of the customers' apparent unwillingness or inability to deal with a marketer, Southern Missouri evaluated Option 4 (i.e., transportation service with Southern Missouri selling the gas supplies). Southern Missouri called this option "Transportation Service-Internal." The Company determined that Option 4 was the only viable option for keeping the large industrial customers on its system.

Included in the record were copies of the contracts that Southern Missouri entered into with these customers. In April 2001, William A. Walker, Southern Missouri's Gas Control Manager, discussed the fixed price purchase related to

these contracts in a memorandum to the file. In July 2001, he memorialized the events surrounding one customer's agreement in a second memorandum. In addition, Walker wrote down the events surrounding the other customer's agreement in a hand-written memorandum in August. These documents were also included in the record.

Since Southern Missouri purchased the gas supplies for a lower price than it sold the gas supplies to the two large volume service customers, there was a profit from the transactions. The total profit from the natural gas sales of $39,986.49 was treated by Southern Missouri as gas cost recovery to be included in its Actual Cost Adjustment, and the profit was used to reduce the amount that other ratepayers would have to pay for the uncollected Actual Cost Adjustment balance by $39,986.49. As a result, Southern Missouri posited that its remaining customers directly benefited by nearly $40,000, because the Company negotiated contracts that recovered its variable costs and made a contribution to the fixed costs of the system.

In addition, Southern Missouri stated that if the load of these industrial companies had left Southern Missouri's natural gas system, then the fixed transportation costs for remaining customers would have increased to approximately $0.132 per Ccf, or a 19% increase in fixed transportation costs. The impact on a typical residential customer using 750 Ccfs annually, according to Southern Missouri, would have been an additional cost of approximately $16 per customer. Although Southern Missouri claimed that its remaining ratepayers directly benefited from this contractual arrangement, Southern Missouri contended that its owners did not directly benefit since the Company did not retain any of the revenues from the gas supply contract as a fee for providing this service. The owners of Southern Missouri received the revenues associated with providing transportation service to these customers under the Company's Transportation Tariff.

The critical fact is that two large volume service customers entered into agreements with Southern Missouri during the Actual Cost Adjustment period under review to become "Transportation Service-Internal" customers. The question of whether these two "Transportation Service-Internal" agreements are permitted by Southern Missouri's tariffs is addressed in the conclusions of law.

CONCLUSIONS OF LAW

Does Southern Missouri's provisioning of gas supplies and transportation for its "Transportation Service-Internal" customers, consisting of two large volume service customers, constitute a violation of its tariffs?

Yes. The Commission concludes that Southern Missouri's provisioning of gas supplies and transportation for its "Transportation Service-Internal" customers, consisting of two large customers, constitutes a violation of its tariffs because the tariffs did not allow such actions and because the Transportation Tariff specifically prohibited such actions.

Southern Missouri's Actions are not Allowed by its Tariffs

Tariffs approved by the Commission are similar to statutes approved by the General Assembly. A tariff that has been approved by the Commission becomes

Missouri law with the same force and effect as a statute enacted by the legislature.[5] In order to change its tariffs, a regulated utility must first file a written application with the Commission seeking a change. Then, if successful, the utility will obtain an order of the Commission to make the change.[6]

Just as courts must give effect to a statute as written,[7] the Commission must give effect to a tariff as written. The responsibility of a court when it interprets a statute is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.[8] The legislature is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for statutory construction.[9]

Likewise, Southern Missouri is presumed to have intended what its tariffs say. Southern Missouri wrote, sought, and received Commission approval of its tariffs. Since the Company is presumed to have intended what its tariffs say, then if the Company's intent is apparent from the words used and no ambiguity exists, there is no room for tariff construction. The responsibility of the Commission when it interprets the Company's tariff is to ascertain the intent of the Company from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.

The Commission must therefore consider the words used in the Company's tariffs in their plain and ordinary meaning. Southern Missouri's Transportation Tariff specifies that natural gas transportation service is available

> [u]nder Transportation Contract with Company to any customer whose average monthly natural gas requirements in a twelve-month period exceed 2,000 MMBtus at a single address or location. Such transportation is subject to interruption or curtailment as further explained in the Character of Service Section.…

While the term "transportation" is not defined in the Transportation Tariff, the term means transportation on the Southern Missouri system only because the Company provides no other service under its Transportation Tariff. This is applying the plain and ordinary meaning of "transportation" since any other definition of the word would make the tariff meaningless. Specifically, the end-user transportation customer buys its gas either on its own or through a third-party marketer and arranges its own transportation over an interstate pipeline to the Southern Missouri distribution system. At that point, Southern Missouri's transportation service begins.

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[5] *A.C. Jacobs and Company v. Union Electric Company*, 17 S.W.3d 579, 581 (Mo. App., E.D. 2000); *State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri*, 286 S.W. 84, 86, 315 Mo. 312 (Mo. 1926).

[6] Section 393.140(11) RSMo 2002; *Deaconess Manor Association v. Public Service Commission of Missouri,* 994 S.W.2d 602, 611 (Mo. App., W.D. 1999).

[7] *Boone County v. County Employees Ret. Fund,* 26 S.W.3d 257, 264 (Mo. App., W.D. 2000).

[8] *State v. Rousseau,* 34 S.W.3d 254, 259 (Mo. App., W.D. 2000).

[9] *Id.*

Transportation service under the terms of the Transportation Tariff contemplates three separate entities: 1) Southern Missouri; 2) the transportation customer; and 3) a third-party marketer obtaining natural gas and interstate pipeline transportation services on behalf of the transportation customer. The tariff never authorizes Southern Missouri to act as a third-party marketer or in any other capacity to purchase gas; the tariff provides for the transportation of the commodity only.

According to Southern Missouri's Transportation Tariff, the Company is deemed to be in control and possession of transporter-owned gas from the time it is received at the Company's city gate, i.e., the point at which the local distribution company physically receives gas from a pipeline, until it is delivered to the transporter's point of receipt, i.e., the customer's gas meter. The tariff also mandates that the title to the gas must remain with the transporter at all times during transportation. The customers in question here, however, had title to the gas for a short time. Scott Klemm, Vice-President of Southern Missouri, testified on behalf of the Company:

> [W]e sold them gas at...[the pipeline], and we had a sales agreement for that. From that point, they took title very briefly, and then as the gas entered our distribution or our transmission system after that point, we had physical control of that gas until it ultimately got delivered at their meter.

Southern Missouri by its actions showed that it had decided to act as a third-party marketer. As part of his economic justification for the creation of Transportation Service-Internal, Klemm testified that Southern Missouri considered its four options, explained in the finding of facts above. The economic justification by the Company, though, does not authorize the creation of a new class of customers.

Economic justification notwithstanding, Southern Missouri's actions were unauthorized. Annell Bailey, testifying on behalf of Staff, described Transportation Service-Internal as follows:

> "Transportation Service-Internal" is an unauthorized service that Southern Missouri began providing to one industrial customer in April 2001, and to a second industrial customer in July 2001. Southern Missouri sells these customers gas at the...pipeline interconnect at a contractually agreed-upon rate. From that point, Southern Missouri provides transportation service. Each month Southern Missouri sends these customers two bills: one bill for transportation service at tariff-authorized rates and a separate bill for the gas commodity at the contractually agreed-upon rate.

Klemm agreed with this description of Transportation Service-Internal, but disagreed that it was an unauthorized service. At the hearing, Klemm stated that Transportation Service-Internal means to him, "…transportation customers in which their gas supply was provided by Southern Missouri rather than a third-party transport marketer." Klemm stated that Transportation Service-Internal is "unique" and "different" from the normal transportation in that Southern Missouri purchases

the gas. The evidence showed that Transportation Service-Internal was offered to only two large industrial customers that were large volume sales customers prior to taking this untariffed service. These two customers also met the volumetric thresholds to be transportation customers. This service was not offered to any other class of customers and, tellingly, was not offered to other large volume service customers.

Southern Missouri, by its actions, created a new class of customers. William A. Walker stated in his deposition that he heard the term "Transportation Service-Internal" in the Company's office. Klemm acknowledged that the use of the term Transportation Service-Internal came from Southern Missouri. Indeed, Klemm had to ask Staff what to do with revenues from this new class of customers. In other words, the term "Transportation Service-Internal" was created and used by Southern Missouri as a new customer class.

Southern Missouri further admitted that nothing in its tariffs specifically authorized Transportation Service-Internal. The Commission agrees that nothing in Southern Missouri's tariffs authorizes what it did. Where a statute or, in this case, a tariff, limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be done otherwise.[10] That is, if the tariff says, "Do it this way," what is also included in that statement is the directive, "And don't do it any other way." The mention of one thing in a statute implies the exclusion of another.[11] In the same manner, if its tariff sets out how a company should handle transportation customers, then doing other than what the tariff says is not allowed.

Southern Missouri's Actions are Specifically Prohibited by its Transportation Tariff

The Commission's decision on the preceding point alone is dispositive. Additionally, there is a provision in the Transportation Tariff that specifically prohibits the actions of Southern Missouri in making the "Transportation Service-Internal" agreements.

The provision states:

> Nominations
> Upon mutual written agreement, and at no additional charge to customer, the Company will act as customer's agent with regard to nominating transportation volumes. *In no event will the Company, in its role as agent, purchase transportation volumes on behalf of a customer.* (Emphasis supplied.)

While the Transportation Tariff specifically allows Southern Missouri to act as an agent for transportation customers and, on written agreement and at no additional charge, to nominate transportation volumes, it also specifically prohibits Southern Missouri, in its role as an agent, to purchase transportation volumes on behalf of a customer. Southern Missouri cannot buy gas while acting as an agent.

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[10] *State v. Ruch*, 926 S.W.2d 937, 939 (Mo. App., W.D. 1996).

[11] *Missouri Board of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 443 (Mo. App., W.D. 1991).

Klemm and Walker both conceded that Southern Missouri purchased the gas supply and provided the transportation capacity for the Transportation Service-Internal customers. Klemm nevertheless denied that Southern Missouri was acting as an agent for the two Transportation Service-Internal customers in purchasing their gas supply and providing transportation capacity for them. Walker was the Southern Missouri employee who entered into and signed the contracts for Southern Missouri for Transportation Service-Internal. Walker admitted in his deposition that Southern Missouri was, in fact, acting as an agent for the large industrial customers under Transportation Service-Internal in the purchasing of gas. Furthermore, Walker prepared a handwritten note at the direction of Klemm, which said, "[Southern Missouri] acts as agent for [the customer] in securing a gas supply, and makes [the customer] a transportation customer." In spite of this, Klemm later tried to deny the agency relationship. Klemm's denial that Southern Missouri was acting as an agent for Transportation Service-Internal customers is not credible. Southern Missouri specifically violated its Transportation Tariff by acting in this agency capacity.

The word "agent" is defined as "a business representative who handles contractual arrangements between the principal and third persons."[12] The standard definition of agent found in Black's Law Dictionary and accepted in Missouri is "a person authorized by another to act for [another person], one entrusted with another's business."[13]

Thus, the Commission concludes that Southern Missouri violated its Transportation Tariff by purchasing transportation volumes in its role as an agent, which was specifically prohibited.

Staff's Proposed Adjustment

The Commission must decide whether it should adopt Staff's proposed adjustment to decrease the firm sales Actual Cost Adjustment balance by $105,809 (now adjusted to $99,199) to include revenues for "Transportation Service-Internal" customers, consisting of two large customers, at the amount the revenues would have been if the gas had been sold to those customers at the authorized Purchased Gas Adjustment adjusted rate.

The Commission has determined not to adopt Staff's proposed adjustment to decrease the firm sales Actual Cost Adjustment balance by $99,199 because no party has effectively established that Southern Missouri's actions harmed its customers. In addition, the Commission concludes that the evidence is speculative that the industrial customers would have stayed on the Southern Missouri system and paid the large volume service tariffed rates if Southern Missouri had not agreed to provide them with gas supplies and transportation service at prices that were competitive with the propane alternative.

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[12] Bryan Garner, A Dictionary of Modern Legal Usage, 38 (Oxford University Press, Second Edition 2000).

[13] *State ex rel. Pagliara v. Stussie*, 549 S.W.2d 900, 903, (Mo.App. 1977).

The Commission concludes that Staff's proposed adjustment is based on two assumptions, the first valid, the second faulty: (1) that Southern Missouri violated its Transportation Tariff by its actions concerning the two industrial customers in question; and (2) the two industrial customers would have remained on the system as gas customers and would have purchased the same volume of gas at the substantially higher Purchased Gas Adjustment rate if Southern Missouri had not entered into gas supply agreements and transportation service agreements with them. While, as set out earlier in this order, the Commission has concluded that Southern Missouri violated its tariff, we cannot conclude that the two industrial customers would have purchased the same volume of gas at the substantially higher Purchased Gas Adjustment rate. Therefore the Commission cannot make the adjustment proposed by Staff. Since one of the assumptions is fatally flawed, the Commission will reject Staff's proposed adjustment.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1. Does Southern Missouri's provisioning of gas supplies and transportation for its "Transportation Service-Internal" customers, consisting of two large customers, constitute a violation of its tariffs?

Yes, because the Company's actions were not allowed and were specifically prohibited by its Transportation Tariff, the Commission holds that Southern Missouri's provisioning of gas supplies and transportation service to two large customers constitutes a violation of its tariff.

2. Should the Commission adopt Staff's proposed adjustment to decrease the firm sales Actual Cost Adjustment balance by $99,199 to include revenues for "Transportation Service-Internal," consisting of two large customers, at the amount the revenues would have been if the gas had been sold to the two customers at the authorized Purchased Gas Adjustment adjusted rate?

No, because no party has proven that ratepayers were damaged as a result of the tariff violations.

IT IS THEREFORE ORDERED:

1. That the recommendation by the Staff of the Missouri Public Service Commission that Southern Missouri Gas Company, L.P., be required to decrease the firm sales Actual Cost Adjustment balance by $99,199 to reflect imputed revenues from two transportation customers is rejected.

2. That Southern Missouri Gas Company, L.P., must establish the account balances in its next Actual Cost Adjustment filing in compliance with the Unanimous Partial Stipulation and Agreement filed by the parties on March 7, 2003, which is hereby approved.

3. That any objections or motions not specifically ruled on in this case are hereby overruled or denied as against the objecting or moving party.

4. That this order will become effective on July 11, 2003.

5. That this case may be closed on July 12, 2003.

Simmons, Ch., Murray, Gaw and Forbis, CC., concur;
certify compliance with the provisions of
Section 536.080, RSMo 2000.
Clayton, C., not participating

In the Matter of Southwestern Bell Telephone Company, d/b/a SBC Missouri's Proposed Revised Tariff Sheet Intended to Increase by Eight Percent the Rates for Line Status Verification and Busy Line Interrupt as Authorized by Section 392.245, RSMo,the Price Cap Statute.*

Case No. IT-2004-0015
Decided July 3, 2003

Telecommunications §1. The Commission suspended the proposed tariff of Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri. The proposed tariff was intended to increase by eight percent the rates for Line Status Verification and Busy Line Interrupt.

The Commission suspended the proposed tariff of Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri, in order to review whether the tariff is consistent with §392.245, RSMo 2000. At issue was whether an eight percent increase in the rates for nonbasic telecommunications services is just and reasonable.

Telecommunications §34. The Commission suspended the proposed tariff of Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri, in order to review whether the tariff is consistent with §392.245, RSMo 2000. The issue was whether an eight percent increase in the rates for nonbasic telecommunications services is just and reasonable at this time.

The Commission noted that rate increases of eight percent under the current economic conditions would appear to violate §392.185(4) because affected customers might pay unreasonable charges for telecommunications services.

The Commission stated that the Price Cap Statute, §392.245, RSMo 2000, does not exempt price-cap-regulated carriers from §392.230.3.

ORDER SUSPENDING TARIFF AND SETTING PREHEARING CONFERENCE

On June 10, 2003, Southwestern Bell Telephone Company, doing business as SBC Missouri, filed its proposed revised tariff sheet intended to increase by eight percent the rates for certain services contained in its Local Exchange Tariff, PSC Mo.-No. 24. The specific services in question are Line Status Verification and Busy Line Interrupt. The proposed revised sheet will become effective on July 10, 2003.

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* The Commission, in an order issued on November 25, 2003, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (03CV326406) and later appealed to the Missouri Court of Appeals - Western District (WD64502). See page 234 for another order in this case.

Bell is a large incumbent local exchange company that is subject to regulation under the Price Cap Statute,[1] Section 392.245, RSMo.[2] Section 392.245.11 provides:

> [T]he maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices. * * * An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.[3]

The Price Cap Statute permits an eligible local exchange carrier to increase its rates up to a specified level without undergoing a traditional rate case. The level up to which rates may be increased is the "price cap." The statute actually establishes two such caps, one for basic local and exchange access services and the other for all other services. The former is tied to objective measures of economic activity, such as the Consumer Price Index, and it therefore rises and falls as the national economy expands or contracts. However, the cap for nonbasic services apparently may be increased by as much as eight percent annually regardless of general economic conditions. Price-cap-regulated carriers must submit their tariffs to the Commission for approval.

The Commission notes that the condition of the national economy over the course of the past two years may not support an eight percent increase in rates for nonbasic telecommunications services. It is not at all clear that the legislature intended to permit annual rate increases of eight percent regardless of general economic conditions. The Price Cap Statute is complex and it has not yet been the subject of a reported decision by any Missouri appellate court. Section 392.245.11 expressly requires that rate changes for nonbasic services be "consistent" with Section 392.200. The latter statute, in turn, requires that charges for telecommunications services rendered be "just and reasonable and not more than allowed by law or by order or decision of the commission." The question is whether an eight percent increase in the rates for nonbasic telecommunications services at this time is just and reasonable.

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[1] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996,* Case No. TO-97-397 (*Report and Order,* issued September 16, 1997).

[2] All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[3] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996,* Case No. TO-97-397 (*Report and Order,* issued September 16, 1997).

The Commission is mindful that the legislature has provided an express statement of public policy to guide the Commission and the courts in implementing the provisions of Chapter 392, which includes the Price Cap Statute:[4]

> Section 392.185: The provisions of this chapter shall be construed to:
>
> (1) Promote universally available and widely affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
>
> (4) Ensure that customers pay only reasonable charges for telecommunications service;
>
> (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
>
> (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
>
> (7) Promote parity of urban and rural telecommunications services;
>
> (8) Promote economic, educational, health care and cultural enhancements; and
>
> (9) Protect consumer privacy.

Rate increases of eight percent under the current economic conditions would appear to violate Section 392.185(4) because affected customers might pay unreasonable charges for telecommunications services. Likewise, services subject to inappropriate rate increases cannot be said to be "widely affordable." Section 392.185. In particular, Section 392.185(6) conditions competition between carriers as a substitute for regulation upon "the protection of ratepayers" and "the public interest." This condition is equally applicable to the Price Cap Statute.

A large incumbent local exchange carrier, such as Bell, is subject to price cap regulation "upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area."[5] In other words, the existence of a single competitor in a single exchange converts a large local exchange carrier to price cap regulation throughout its service area. For this reason, competitive pressure sufficient to protect consumers from unreasonable rate increases may not exist. Viewed another way, sufficient alternatives may not be available to permit unhappy

[4] Section 392.185.

[5] Section 392.245(2).

consumers to seek less costly service from another carrier. With respect to the particular nonbasic services at issue here, Line Status Verification and Busy Line Interrupt, the Commission recently found them to be subject to effective competition in only two of Bell's 160 exchanges.[6] For these reasons, the Commission must take care that the implementation of the Price Cap Statute assures "the protection of ratepayers" and "the public interest."[7]

The Commission has reviewed the proposed revised tariff sheet and finds that significant questions exist such that the tariff should be suspended for further consideration. Section 392.230.3 authorizes the Commission to suspend tariffs raising rates for existing services of carriers other than small telephone companies for 120 days plus six months. The Price Cap Statute does not exempt price-cap-regulated carriers from Section 392.230.3. Bell is not a small telephone company. Therefore, the proposed revised tariff sheet will be suspended for a period of 120 days. If necessary, a further suspension will be ordered.

To ensure the prompt resolution of this matter, the Commission will set a prehearing conference.

IT IS THEREFORE ORDERED:

1. That the proposed revised tariff sheet filed by tariff filed by Southwestern Bell Telephone Company, doing business as SBC Missouri, on June 10, 1997, and assigned tariff tracking number JI-2003-2141, is hereby suspended for a period of 120 days beyond July 10, 2003, until November 7, 2003. The specific sheet suspended is:

P.S.C. Mo. No. 24

7th Revised Sheet 5.10, Replacing 6th Revised Sheet 5.10

2. That a prehearing conference shall be held on July 17, 2003, beginning at 10:00 a.m. The prehearing conference shall be held at the Commission's offices at the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, Room 305. The Governor Office Building is a facility that meets the accessibility requirements of the Americans with Disabilities Act. Any person who needs additional accommodations to participate in the prehearing conference should call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the prehearing conference.

3. That this order shall become effective on July 10, 2003.

Simmons, Ch., concurs, with separate
concurring opinion to follow.
Gaw and Clayton, CC., concur.
Murray, C., dissents, with separate
dissenting opinion attached.
Forbis, C., dissents.

Thompson, Deputy Chief Regulatory Law Judge

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[6] *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, Case No. TO-2001-467 (*Report & Order*, issued December 27, 2001), at 52-54. "'[E]ffective competition' is competition that exerts sustainable discipline on prices and moves them to the competitive level of true economic cost." *Id.*, at 11.

[7] Section 392.185(6).

CONCURRING OPINION OF CHAIRMAN KELVIN SIMMONS

I write today to explain my reasons for joining the majority in suspending SBC Missouri's proposed rate increases.

Missouri's Price Cap Statute, enacted in 1997, dissociates rates from costs and thereby abandons the principle that drives traditional rate-of-return regulation. Instead, "the premise of price cap regulation is that the focal point should be on the reasonableness of a company's *prices* for its services, generally in relationship to some economic indicator, but without relationship to a company's *earnings*."[1] Accordingly, the price cap at Section 392.245(4) for basic local and exchange access services is linked to the Consumer Price Index and rises and falls automatically as the national economy expands or contracts. However, the price cap at Section 392.245(11) for nonbasic services — the cap at issue today — appears to authorize annual rate increases of up to eight percent regardless of economic conditions. There is no link of this price cap to any objective economic indicator and thus no mechanism to ensure that prices remain reasonable. This eight percent annual increase is the largest in the nation. Further, the Missouri Price Cap Statute contains no sunset provision. This aspect, too, is unique. The Price Cap Statute requires that telephone companies lose any part of the authorized eight percent annual rate increase that they do not take. Thus, the statute ensures that every eligible carrier will take the maximum annual increase every year.

The Missouri Price Cap Statute is not clear. It has never been interpreted by an appellate court. Perhaps the legislature did not mean what the statute appears to say. If the courts do uphold the automatic eight percent annual increase, then the present legislature should re-examine the work done in 1997 by their predecessors. The recent legislative session was marked by the General Assembly's insistence that the state not raise taxes and fees. This principle should apply with equal force to the telephone companies that provide the basic services essential in today's world.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I disagree with the Commission policy that today's Order Suspending Tariff establishes. I believe its effect is to rewrite the Price Cap Statute and that it will not withstand judicial scrutiny. Furthermore, today's decision also results in the suspension of some very significant price reductions.

The majority points out that the cap for nonbasic services "apparently" may be increased by as much as eight percent annually regardless of general economic conditions. Nevertheless, the majority opines that the condition of the national economy over the course of the past two years does not support an eight percent increase in rates for nonbasic telecommunications services.

It is unclear how the majority supports an inquiry into the applicability of a clear legislative provision based upon changes in economic condition. If it is appropriate

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[1] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996,* Case No. TO-97-397 (*Report & Order,* issued September 16, 1997).

to change the law, then it is the prerogative of the Legislature, rather than the Commission to do so. The Legislature has not changed the law to accomplish what the majority prefers.

Furthermore, it is not adequate to cite the "just and reasonable" reference in section 392.200 to support a reduction in the maximum allowable price cap. The Price Cap Statute itself provides that the Commission "shall have the authority to ensure that rates . . . are just, reasonable and lawful *by employing price cap regulation*."[1]

The Legislature specifically provided that an incumbent local exchange company regulated under section 392.245 may seek and obtain an *increase* in the maximum allowable rates in certain situations. Chapter 392.246 provides for a petition for rate relief and for the Commission to grant rate relief to a company regulated under price cap, where the maximum rates chargeable by such a telecommunications company are insufficient to yield reasonable compensation for the service rendered. The statute expressly lists certain factors the Commission shall consider in determining the just and reasonable rates when *increasing* the maximum that may be charged.

The Legislature made no such provision for a *decrease* in the maximum allowable rates for an incumbent local exchange company regulated under section 392.245. Indeed, if the Commission were to determine the maximum allowable rates set by the Price Cap Statute to be unjustly and unreasonably high, there is no guidance from the Legislature concerning any factors that could or should be considered in such an analysis.

The majority cites Case No. TO-2001-467, where the Commission found Line Status Verification and Busy Line Interrupt to be subject to effective competition in only two of Bell's 160 exchanges, as support for its decision to examine the just and reasonable nature of an eight percent increase under the Price Cap Statute. A close reading of the Statute, however, makes it clear that any determination that effective competition does not exist requires that the maximum allowable prices established under the Price Cap Statute shall continue to apply.

Under section 392.245.5, there are two expressly-provided outcomes of a Commission investigation of the state of competition for various services in each exchange where a price-cap regulated carrier provides service. The Commission may determine that effective competition exists and the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it deems appropriate. Otherwise, the Commission may determine that effective competition does not exist in the exchange, as it did in TO-2001-467 for Line Status Verification and Busy Line Interrupt for 158 of Bell's exchanges, and the maximum allowable prices established by the Price Cap Statute shall continue to apply. There is absolutely no reference in the Price Cap Statute to a cap lower than that set out in the statute.

For these reasons, I respectfully dissent.

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[1] 392.245.1 emphasis added

OPINION OF COMMISSIONER BRYAN FORBIS

I disagree with the majority's position in suspending the tariff SBC submitted per the price cap statute. I do not believe this action is consistent with the legislative mandate of 392.245.

This dissent is not an endorsement of the current price cap statute. While other states allow a four to five percent automatic price increase, and sunset the provision after several years, Missouri's eight percent annual allowance with no sunset is among the most liberal in the nation. In the mid-1990's such latitude may have been appropriate. In today's economic landscape, and technologies or costs that can change rapidly, a more measured approach to pricing would better reflect the public interest.

In 1996, the Missouri General Assembly determined that the public interest review normally charged to the Public Service Commission would be replaced in certain instances with a statutory pricing structure. This approach is consistent with the history of price caps; legislatures nationwide have used them to protect consumers while guaranteeing companies stability as the market transitions to full competition. Section 392.245.2 states that "a large incumbent local exchange telecommunications company shall be subject to regulation under this price cap section" when the Commission determines that competition exists in any part of the ILEC's service area.

This is not to say the Commission is left with no role. Section 392.245.6 expressly maintains Commission authority over quality and conditions of service. However, 392.245.11 just as clearly states that, in matters of pricing, the maximum allowable prices for non-basic ILEC services may be increased by up to eight percent annually – providing the company gives notice to the Commission and files appropriate tariffs which do not exceed the eight percent cap. As for the Commission's general charge to ensure, per Section 392.200, that rates are just and reasonable, the price cap statute instructs the Commission to do so by employing price cap regulation. It is counter-intuitive that the legislature would go to such lengths to define the price cap structure and its application, and delineate specific Commission responsibility for quality assurance, if each rate increase request by a large, competitive ILEC were then subject to the same scrutiny as traditional rate of return companies.

Any change to the price cap statute is the responsibility of the legislature; their directives bind the Commission. Today's action, I believe, will not withstand judicial review. For that reason, I voted for the tariff and with the minority.

In the Matter of the Tariff Filing of Laclede Gas Company.

Case No. GT-2003-0032
Decided August 14, 2003

Gas §18. The Commission found that Laclede's proposed tariff making changes to its experimental school gas aggregation program was lawful and reasonable, and that the concerns of the Staff of the Commission and the Office of the Public Counsel were misplaced. The Commission accordingly approved the tariffs.

ORDER REGARDING TARIFFS

Syllabus: The Commission finds that Laclede's proposed tariff making changes to its experimental school gas aggregation program is lawful and reasonable, and that the concerns of the Staff of the Commission and the Office of the Public Counsel are misplaced. The Commission accordingly approves the tariffs.

On July 25, 2003, Laclede Gas Company filed revised tariff sheets to implement certain changes to its experimental school gas aggregation program after Governor Holden signed legislation affecting the gas aggregation statute. The tariff sheets bear an effective date of August 28. With the tariff, Laclede, together with the Missouri School Boards' Association and the Board of Education of the City of St. Louis, filed a motion for expedited treatment, requesting Commission approval by August 6.[1]

On July 28, the Office of the Public Counsel and the Staff of the Commission filed pleadings in which they raised concerns about the tariffs, particularly a provision that addresses recovery of certain costs associated with the gas aggregation program. On July 30, Staff filed another pleading in which it elaborated on its concerns, and on August 8, filed a recommendation in which it recommended the Commission suspend or reject Laclede's proposed tariff sheets. Laclede filed various responses to Public Counsel's and Staff's pleadings.

Any examination of Laclede's proposal must start with the premise that the legislature has required all regulated natural gas distribution utilities to implement experimental school gas aggregation programs, and required the Commission to approve them. This is not to say that a utility is free to propose an unreasonable program, nor that the Commission would be required to approve such a proposal. But the experiment designed by the legislature is mandatory, and it is incumbent on utilities and the Commission to try to carry out the mandate of the legislature.

In light of this mandate, some of the secondary concerns expressed by the Staff are less than compelling. The Commission will first discuss the main concern raised by Staff and Public Counsel, then address Staff's lesser concerns. The main concern is over the following phrase in Paragraph J: "[P]rovided further that the Company shall not be required to absorb the cost of any pipeline capacity formerly

[1] In a later pleading, the Missouri School Boards' Association stated that Commission action by August 15 is necessary for eligible school entities in Laclede's service territory to be able to participate in the program this year.

reserved to satisfy the requirements of the [eligible school entities] prior to the onset of the program."[2] Both Staff and Public Counsel argue strenuously that this language prevents them, and the Commission, from examining whether Laclede acted prudently with respect to these costs. They assert that, if the Commission approves the proposed tariff sheets with this phrase, it will have "pre-approved" the ratemaking treatment to be afforded these costs, and be unable to disallow costs (or impute revenue) with respect to them in a future proceeding. Both Staff and Public Counsel concede that their concerns lie more with the principle of pre-approval than with the specific costs at issue here; they admit themselves unlikely to seek an adjustment to Laclede's rates based on these costs. Staff does not argue that Laclede's proposed tariff is unlawful; Public Counsel, based on its reading of the newly enacted portions of Section 386.310(6), RSMo, argues that Laclede's proposed treatment of the costs at issue is unlawful. The Commission disagrees with Public Counsel's interpretation and finds that Laclede's proposed tariff is lawful.

The Commission agrees that approving a particular ratemaking treatment before considering all relevant factors is inadvisable, and may even be unlawful. But the Commission is not doing so here, and so finds Staff's and Public Counsel's concern with the disputed tariff language to be misplaced. By inserting into its tariff the phrase quoted above, Laclede has not insulated itself from the consequences of its imprudence; indeed, it cannot do so. A utility cannot simply tariff away the consequences of its own imprudence. A natural gas distribution utility has a continuing obligation to act in an almost-fiduciary role on behalf of its customers when arranging for gas purchasing and transportation. And the Commission has a continuing obligation to investigate utility actions and ensure the utility is acting consistently with its duty to its customers. Neither Laclede's nor the Commission's obligations are in any way relieved by the disputed tariff language, and the ability of Staff and Public Counsel to challenge an action (or a failure to act) of Laclede is unhindered.

All the proposed tariff language does is establish the parameters of the experiment: assuming Laclede acts prudently, it will not be required to absorb the cost of any pipeline capacity formerly reserved to satisfy the requirements of the eligible school entities that participate in the program. The Commission is in no way pre-approving any of Laclede's actions (or inactions). In approving the tariff as filed, the Commission is affirming that Laclede will not bear the costs of the capacity for which the participating eligible school entities have not contracted, so long as Laclede's efforts to minimize and mitigate these costs are prudent.

The Commission's action here is very different from pre-approving the costs of a utility-initiated transaction, like construction of utility plant, or a merger or acquisition. In this case, the Commission is charged with ensuring the implementation of a short-term experiment mandated by the legislature. While it is not the norm for the Commission to establish in advance the general ratemaking treatment to be afforded a particular event, it is far from unprecedented, and it is quite appropriate here. The Commission's approval of Laclede's tariffs should not be

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[2] This language is found on P.S.C. MO. No. 5 Consolidated, First Revised Sheet No. 45.

taken as any sort of precedent. The specific circumstances of this legislation, and this case, dictate the Commission's actions. In fact, approving Laclede's tariff with the disputed language is part of the experiment; allowing a trial of the agreement between Laclede and the Missouri School Boards' Association and the Board of Education of the City of St. Louis in the spirit of the legislatively authorized experiment will show the value of this tariff and whether its method should be repeated.

Turning to Staff's lesser concerns, the Commission notes that Public Counsel does not join in them, and also notes that Staff apparently does not consider them sufficient in themselves to disapprove of Laclede's proposed tariff.[3] The Commission agrees that, while not all of the proposed tariff language is a model of clarity, the other flaws noted by Staff are not sufficient to give cause to reject the proposed tariffs. Furthermore, to the extent disputes arise over the interpretation of the allegedly unclear language, such disputes may be brought to the Commission for resolution.

The Missouri School Boards' Association argued in pleadings and at the on-the-record presentation on August 12 that any significant delay in approving the proposed tariffs would make it impossible for its members to participate for the upcoming heating season. The Commission finds this argument credible and convincing, and finds that it constitutes good cause to approve the tariffs on less than thirty days' notice.

IT IS THEREFORE ORDERED:

1. That the following tariffs, filed on July 25, 2003, by Laclede Gas Company are approved for service on and after August 24, 2003:

P.S.C. MO. No. 5
6th Revised SHEET No. 1-a Cancelling 5th Revised SHEET No. 1-a
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
1st Revised SHEET No. 45 Cancelling Original SHEET No. 45

2. That this order shall become effective on August 24, 2003.

3. That this case may be closed after August 25, 2003.

Simmons, Ch., Murray, Gaw, Forbis and Clayton, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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[3] Staff's statements on this question at the August 12 on-the-record presentation were not entirely consistent.

In the Matter of Southern Missouri Gas Company's Purchased Gas Adjustment Factors to be Reviewed In Its 2001-2002 Actual Cost Adjustment.*

Case No. GR-2002-440
Decided August 19, 2003

Gas §17.1. Gas §21. The Commission required a gas company to adjust its ACA balance and implement changes to its reliability analysis as recommended by the Commission's Staff, and accepted by the company.

ORDER REQUIRING ADJUSTMENT OF ACA BALANCE AND REQUIRING ACTIONS RELATED TO THE COMPANY'S RELIABILITY ANALYSIS

This case was opened for the purpose of receiving the 2000-2001 Actual Cost Adjustment (ACA) filing of Southern Missouri Gas Company. On May 22, 2003, the Staff of the Public Service Commission filed a recommendation and memorandum indicating that it has reviewed the 2001-2002 Actual Cost Adjustment (ACA) filing of Southern Missouri. Staff indicated that it audited the billed revenues and actual gas costs for the period of September 1, 2001 to August 31, 2002, included in Southern Missouri's computation of the ACA rate. Staff also conducted a reliability analysis for Southern Missouri.

Staff filed two sets of recommendations. Staff indicated that the first set of recommendations should be applied if the Commission found in Staff's favor in GR-2001-388, the case established to consider Southern Missouri's 1999-2000 and 2000-2001 ACA filings. Staff included a second set of recommendations to be applied if the Commission found in favor of Southern Missouri in that case. On May 27, the Commission ordered Southern Missouri to respond to Staff's recommendations thirty days after the effective date of the Commission's report and order in GR-2001-388.

In GR-2001-388, Staff challenged Southern Missouri's provision of natural gas to certain large customers through a category of service known as Transportation Service – Internal. Staff contended that this service was not permitted under Southern Missouri's tariff and proposed to decrease Southern Missouri's ACA balance to include revenues that Southern Missouri would have obtained if it had complied with its tariff. Staff's proposed adjustment for those earlier ACA periods would have required further adjustments in the 2001-2002 ACA period.

On July 1, the Commission issued a Report and Order in GR-2001-388 in which it rejected the adjustments proposed by Staff. That Report and Order became

* See page 147 of this volume for Case No. GR-2001-388.

effective on July 11. On July 2, Southern Missouri was directed to file its response to Staff's recommendation no later than August 10. Southern Missouri filed its response to Staff's recommendation on July 30.

In its response, Southern Missouri indicated that it accepts Staff's alternate recommendations and resulting balances, made applicable when the Commission rejected Staff's proposed adjustments in GR-2001-388. More than ten days have passed since Southern Missouri accepted Staff's recommendations and Staff has not filed any further response. The Office of the Public Counsel, although a party to this case, has not participated or filed any pleadings.

Staff's proposed adjustments would increase a refunds balance and require Southern Missouri to take certain actions regarding its reliability analysis. Staff and Southern Missouri agree upon the adjustments and actions proposed by Staff and those adjustments and actions appear to be reasonable.

IT IS THEREFORE ORDERED:

1. That Southern Missouri Gas Company shall adjust the refunds beginning balance at August 31, 2001, by $61,764 to reimburse Southern Missouri Gas Company for a $62,345 refund it received in January 2000, net of accrued interest, related to Gas Supply Realignment Costs that was refunded to its customers for which costs were not reflected in the ACA audit process.

2. That Southern Missouri Gas Company shall take the following actions related to its reliability analysis by October 1, 2003:

a. Submit an updated reliability report showing the estimated demand and capacity to meet peak day requirements for the 2002-2003, 2003/2004 and 2004/2005 ACA periods and use the peak heating degree day estimate of 72 HDD in calculating peak day requirements;

b. Provide supporting detail in the updated reliability report for the customer numbers chosen for the peak day estimates;

c. Provide supporting information in the updated reliability report for how the baseload and heatload factors are calculated for the three customer types of optional, residential, and general. Additionally, for the large general and large volume customers explain how the estimated usage was determined for each of these customers. If a regression analysis of monthly data is used, it is recommended that Southern Missouri Gas Company analyze two to three years of data so that a sufficient number of data points are included in the analysis.

d. Submit to Staff an updated summary of actual usage, actual HDD and customer counts for five or more recent cold days. Compare the usage on the actual cold days to the usage estimated by Southern Missouri Gas Company's forecasting model for those days. Include a calculation of the percent over (under) estimation by the forecasting model. List firm and interruptible volumes separately or show how the model treats them. Provide an explanation when the modeled usage does not reasonably agree with the actual usage. If the model is re-evaluated based on these findings, please provide details of the re-evaluation.

e. In the updated reliability report, provide an estimate of the reserve margin for the 2002-2003 ACA period and for three years beyond that. Explain the rationale for the reserve margin for each of these years. For any negative reserve

margin shown, provide an explanation of the firm transportation capacity that will be used to meet demand requirements beyond the firm contract maximum daily quantities. For any shortfall of capacity, provide details about the actions Southern Missouri Gas Company will take for firm residential, commercial, and large volume customers whose demand will not be met should a peak day recur. Submit an economic analysis comparing the cost of additional firm capacity to the cost of the penalties for exceeding the contract maximum daily quantities by the amount of the negative reserve quantity. Also provide an economic analysis of any other options to be used by Southern Missouri Gas Company for minimizing the possibility of interruption of natural gas service to firm customers.

3. That this order shall become effective on August 29, 2003.

4. That this case may be closed on August 30, 2003.

Simmons, Ch., Murray, Gaw, Forbis and Clayton, CC., concur

Woodruff, Senior Regulatory Law Judge

In the Matter of the Master Interconnection and Resale Agreement by and Between Sprint Missouri, Inc., and Comm South Companies, Inc., d/b/a Missouri Comm South, Inc., Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996.

Case No. TK-2003-0540
Decided August 21, 2003

Telecommunications §36. The Commission approved an Interconnection and Resale Agreement between Sprint Missouri, Inc., and Comm South Company, Inc., d/b/a Missouri Comm South, Inc.

ORDER APPROVING INTERCONNECTION AND RESALE AGREEMENT

This order approves the Interconnection and Resale Agreement executed by the parties and filed by Sprint Missouri, Inc., d/b/a Sprint.

On June 5, 2003, Sprint Missouri, Inc. d/b/a Sprint filed an application with the Commission for approval of an Interconnection and Resale Agreement with Comm South Companies, Inc., d/b/a Missouri Comm South, Inc. The Agreement was filed pursuant to Section 252(e)(1) of the Telecommunications Act of 1996.[1] The Agreement would permit Comm South to provide telecommunications services by interconnecting its facilities with Sprint. Sprint holds a certificate to provide basic local service in Missouri. Comm South holds certificates to provide basic local and interexchange telecommunications services in Missouri.

Although Comm South is a party to the Agreement, it did not join in the application. On June 11, 2003, the Commission issued an order making Comm South a party in this case and directing that any party wishing to request a hearing do so no later than July 1, 2003. On June 19, 2003, members of the Missouri Independent Telephone Company Group filed an application to intervene and requested that a hearing be held. On June 23, 2003, members of the Small Telephone Company Group also filed an application to intervene and request for hearing. After considering responses and replies to the motion, the Commission issued an order granting intervention to both would-be intervenors. To address the concerns of the parties, a prehearing conference was held. Thereafter, the parties reconciled their differences and on July 24, 2003, filed an amendment to the interconnection agreement and the Intervenors withdrew their objections.

Although the Staff of the Commission filed a memorandum on July 2, 2003, recommending that the Agreement be approved, the Commission, in light of the amendment to the agreement, directed Staff to file a second memorandum. On August 12, 2003, Staff filed its memorandum, recommending that the amended agreement be approved.

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[1] *See* 47 U.S.C. § 251, *et seq.*

Discussion

Under Section 252(e) of the Act, any interconnection agreement adopted by negotiation must be submitted to the Commission for approval. The Commission may reject an agreement if it finds that the agreement is discriminatory or that it is not consistent with the public interest, convenience and necessity.

The Staff memorandum recommends that the Agreement be approved and notes that the Agreement meets the limited requirements of the Act in that it is not discriminatory toward nonparties and is not against the public interest. Staff recommends that the Commission direct the parties to submit any further modifications or amendments to the Commission for approval.

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.

The Commission has considered the application, the supporting documentation, and Staff's recommendation. Based upon that review, the Commission concludes that the Agreement meets the requirements of the Act in that it does not discriminate against a nonparty carrier and implementation of the Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that approval of the Agreement should be conditioned upon the parties submitting any modifications or amendments to the Commission for approval pursuant to the procedure set out below.

Modification Procedure

The Commission has a duty to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act.[2] In order for the Commission's role of review and approval to be effective, the Commission must also review and approve or recognize modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection.[3] This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission.[4]

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval or recognition, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

Modifications to an agreement must be submitted to the Staff for review. When approved or recognized, the modified pages will be substituted in the agreement, which should contain the number of the page being replaced in the lower right-hand

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[2] 47 U.S.C. § 252.

[3] 47 U.S.C. § 252(h).

[4] 4 CSR 240-3.545.

corner. Staff will date-stamp the pages when they are inserted into the agreement. The official record of the original agreement and all the modifications made will be maintained in the Commission's Data Center.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the Commission will take notice of the modification once Staff has verified that the provision is an approved provision and has prepared a recommendation. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission, under the provisions of Section 252(e)(1) of the federal Telecommunications Act of 1996,[5] is required to review negotiated interconnection agreements. It may only reject a negotiated agreement upon a finding that its implementation would be discriminatory to a nonparty or inconsistent with the public interest, convenience and necessity.[6] Based upon its review of the Agreement between Sprint and Comm South and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and should be approved.

The Commission notes that prior to providing telecommunications services in Missouri, a party shall possess the following: (1) an interconnection agreement approved by the Commission; (2) except for wireless providers, a certificate of service authority from the Commission to provide interexchange or basic local telecommunications services; and (3) except for wireless providers, a tariff approved by the Commission.

IT IS THEREFORE ORDERED:

1. That the Interconnection and Resale Agreement between Sprint Missouri, Inc., and Comm South Company, Inc., d/b/a Missouri Comm South, Inc., filed on June 5, 2003, is approved.

2. That any changes or modifications to this Agreement shall be filed with the Commission pursuant to the procedure outlined in this order.

3. That this order shall become effective on August 31, 2003.

4. That this case may be closed on September 1, 2003.

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[5] 47 U.S.C. § 252(e)(1).

[6] 47 U.S.C. § 252(e)(2)(A).

Simmons, Ch., Murray, Gaw, and Forbis, CC., concur. Clayton, C., absent.

Jones, Regulatory Law Judge

In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage, and Pulaski Counties, Missouri ("Callaway-Franks Line").*

Case No. EO-2002-351
Decided August 21, 2003

Certificates §1. The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate.

Certificates §21. The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate.

Certificates §21.1. The Commission determined that with certain conditions attached, the benefits of adding a 345-kV transmission line in the Callaway-Franks location outweighed the detriments and therefore, granting the certificate was in the public interest.

Certificates §22. The Commission found that it was reasonable and necessary to limit the construction to a certain route where easements had already been granted, add certain maintenance and construction requirements and restrictions, to require that absent a voluntary agreement to the contrary no currently occupied residential structure be moved, that owners of certain structures within 75 feet of the centerline be compensated, and that the company file a copy of its survey once the line is constructed.

Certificates §22. The Commission determined that certain conditions requested by the intervenors were not reasonable and necessary.

Certificates §42. The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate.

Electric §1. The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate.

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* The Commission, in an order issued on September 25, 2003, denied a motion for rehearing.

Electric §3. The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate.

APPEARANCES

Joseph H. Raybuck, Managing Assistant General Counsel, Ameren Services Company, Post Office Box 66149, St. Louis, Missouri 63166-6149, for Union Electric Company, d/b/a AmerenUE.

James B. Lowery, Smith Lewis, LLP, Suite 200, City Centre Building, 111 South 9th Street, Post Office Box 918, Columbia, Missouri 65205-0918, for Union Electric Company, d/b/a AmerenUE.

James B. Deutsch, Blitz, Bardgett & Deutsch, L.C., 308 East High Street, Suite 301, Jefferson City, Missouri 65101, for Intervenors, Concerned Citizens of Family Farms and Heritage.

John B. Coffman, Acting Public Counsel, and *Michael F. Dandino*, Senior Public Counsel, and *Ruth O'Neill*, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Bruce H. Bates, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus

This Report and Order grants the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attaches certain reasonable and necessary conditions to that certificate.

Procedural History

On January 18, 2002, AmerenUE filed an Application seeking approval to construct, operate, own, and maintain a 345-kilovolt electric transmission line in Maries, Osage, and Pulaski Counties in Missouri. That proposed line is referred to as the "Callaway-Franks Line." The Commission issued an Order and Notice of Application on February 8, 2002, directing interested parties to file requests to intervene no later than February 28, 2003. On March 4, 2002, the Osage County Commission, although not a party to the case, submitted a letter to the Commission requesting that a public hearing be held in Osage County. The Commission considered the request to be reasonable and a public hearing was scheduled and held on April 22, 2002, in Linn, Missouri. At the public hearing, sworn testimony was taken from members of the general public, but no cross-examination was allowed.

Mary Claire Kramer filed an Application for Intervention out of time on April 26, 2002. On April 29, 2002, Staff filed its Recommendation supporting AmerenUE's application. On April 30, 2002, an Application for Intervention was filed out of time on behalf of Concerned Citizens of Family Farms and Heritage[1] and Douglas McDaniel, Chairperson. On May 1, 2003, the Office of the Public Counsel requested an extension of the intervention period. The Commission granted the requests for intervention on May 30, 2002.

On August 8, 2003, Concerned Citizens filed a Motion to Dismiss claiming that AmerenUE's application was insufficient. The Commission determined that the application was sufficient and denied the motion. Concerned Citizens later filed a timely application for rehearing, which was also denied.

Thereafter, the Commission set a procedural schedule and written direct and rebuttal testimony were filed by the parties. On September 30 and October 1, 2002, an evidentiary hearing was held. At the hearing, all the parties were represented by counsel. Staff, AmerenUE, and Concerned Citizens each presented witnesses for cross-examination. Those parties also filed briefs and reply briefs on November 14, 2003, and December 6, 2003, respectively. Public Counsel did not file briefs. In addition, Staff and AmerenUE filed proposed findings of fact and conclusions of law.

On May 23, 2003, AmerenUE filed a Statement of Willingness to Voluntarily Agree to the Imposition of Conditions on Any Commission Order Approving Application. In its Statement, AmerenUE indicated its willingness to agree to certain conditions being placed on any certificate, and other conditions if a certificate was granted by July 15, 2003. Staff filed a response stating that it did not object to any of the proposed conditions. Concerned Citizens filed a response objecting to many of the conditions.

Throughout the proceeding, the Commission received numerous unsolicited *ex parte* communications. Notices of the *ex parte* communications were placed in the official file and given to all the parties.

Discussion

Pursuant to Commission practice and in compliance with the order adopting the procedural schedule, the parties jointly submitted a list of issues for determination by the Commission. The parties submitted that the Commission must determine if the application is in the public interest, and if so, should it be granted with any conditions.

AmerenUE's position is that the application is in the public interest and should be granted without conditions. AmerenUE argues that the electric transmission line is necessary to provide safe and reliable service, provides public benefits to

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[1] The members of Concerned Citizens are as follows: Darin Arbes, Larry May, Jill and Butch Drennen, Donna Hackmann, Edward Redel, Norbert Rudroff, Stanley Strope, Bernard Samson, Byron Baker, Leonard Keilholz, Felix Boehm, Douglas McDaniel, Francis Platt, Steve Boehm, Daniel Strope, Randy and Howard Doyle, Herbert Kramer, Tom Gentges, Paul J. Bexten, Ronald Baker, Joseph H. Knollmeyer, Stanley Dudenhoeffer, Mary Lois Arbes, Tom Knollmeyer, John Painter, Leo Brandt, Sean Hackmann, Dale Hackmann, Rhonda Mitchem, Dennis W. Bax, Darrell J. Bax, Mary Claire Kramer, and Mary C. Bexten.

its customers and others in the Mid-Missouri area, and is the best and least intrusive route for the proposed line.

Staff believes that the certificate of convenience and necessity is in the public interest and should be granted with no conditions.

Public Counsel states that the transmission line would provide benefits to the AmerenUE system. Public Counsel argues that the certificate is in the public interest if the Commission places conditions on the certificate that address the concerns of Concerned Citizens.

Concerned Citizens' position is that the application is not in the public interest and should not be granted.[2] Concerned Citizens argues that the application is insufficient and that the certificate is not in the public interest because the harm caused by the transmission line outweighs any benefits derived from it.

If the Commission grants the certificate, Concerned Citizens argues that the following conditions are reasonable and necessary and should be placed on the certificate:

> (1) no residential structure currently occupied by the property owners may be removed or placed in any easement if it would require such residential owner to move or relocate from such owner's property; (2) no easement shall be taken nor any line constructed within 300 feet of any existing structure on any property; (3) all pronouncements of AmerenUE concerning beneficial policies toward landowners on acquisition and maintenance of easements, contained in Applicant's Pre-Filed Direct Testimony, shall be warranted by Applicant as binding upon the performance of the Applicants and its agents; (4) property owners shall be held harmless from liability for injury to persons or property of AmerenUE during and after construction of the line; (5) AmerenUE will fully compensate property owners for any diminution in value to remaining property not taken by AmerenUE as easement for the line, and shall fully compensate property owners for economic losses caused by existence of the line; and (6) any property owner may complain to this Commission for breach of such conditions imposed, and any finding of such breach will void and nullify any Certificate previously issued for construction of Applicant's Callaway-Franks high voltage power line.[3]

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. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece

[2] Statement of Position of Intervenors Concerned Citizens of Family Farms and Heritage (filed September 19, 2002).

[3] Statement of Position of Intervenors Concerned Citizens of Family Farms and Heritage (filed September 19, 2002).

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.

The Parties and the Proposed Transmission Line

AmerenUE is a Missouri corporation with its principal office and place of business located in St. Louis, Missouri. AmerenUE is engaged in providing electric and gas services in portions of Missouri as a public utility under the jurisdiction of the Commission. AmerenUE is also engaged in providing electric and gas service in portions of Illinois.

AmerenUE is currently providing electric service within an area certificated by the Commission. AmerenUE filed a verified application in which it requested a certificate of public convenience and necessity to construct, operate, own, and maintain a 345-kilovolt (kV) transmission line under Section 393.170, RSMo. Included in its application was a general description of the route for the proposed line, a legal description of the proposed line location, a map showing roads, waterways, and the proposed route, and a map depicting AmerenUE's entire 115-kV and larger electric system with the proposed line illustrated. AmerenUE also provided copies of franchises needed and consent to construct the line across other utilities.

Marie Claire Kramer is an individual owning property in Dixon, Missouri, which will be affected by the proposed transmission line. Concerned Citizens is an unincorporated nonprofit association of landowners in Osage, Maries, and Pulaski counties in Missouri.

The proposed transmission line is approximately 54 miles in length with approximately 20 miles of the southernmost portion of the proposed line being outside of AmerenUE's certificated service area. The line would begin at a point near Chamois, Missouri, in Osage County, and extend south approximately 54 miles through Maries County to terminate in Pulaski County at the Franks Substation, near Franks, Missouri. The Franks Substation is a transmission substation located southeast of Dixon, Missouri, and is owned by Associated Electric Cooperative, Inc. The proposed line will be connected to AmerenUE's Callaway nuclear power plant via an existing six-mile segment of line from Chamois to Callaway. The line would provide a connection between AmerenUE's Callaway power plant transmission switchyard and the Franks Substation.

For approximately 43 of the 54 miles, the proposed line will parallel an existing 161-kV line on easements acquired in the late 1970s by Associated. Associated acquired the easements intending at that time to construct a 345-kV electric transmission line similar to the electric transmission line proposed by AmerenUE and substantially along the route proposed by AmerenUE. Associated deferred its construction because of an agreement with AmerenUE by which Associated acquired an ownership interest in an AmerenUE 345-kV line which met Associated's transmission needs at that time.

Associated has agreed to transfer its rights to 105 easements to AmerenUE in exchange for benefits it will receive from AmerenUE's proposed transmission line. If granted the certificate, AmerenUE will need to acquire the remaining right-of-way for the proposed line and will also need to purchase property for the

construction of a proposed Loose Creek Substation near Linn, Missouri. At the time of the hearing, AmerenUE required 70 additional easements to place the line in the proposed location.

Typically, a 345-kV line requires a right-of-way of 150 feet. Paralleling the existing Central Electric Power Cooperative line allows AmerenUE and Central Electric Power Cooperative to share right-of-way to minimize the physical impact of the new line. By paralleling the existing line, the 345-kV line will share 25 feet of right-of-way, reducing the impact of clearing trees, brush, or other vegetation that might interfere with the line.

The proposed line will be constructed using predominantly two-pole "H"-frame structures, with the structures averaging approximately 80 feet in height. These structures are similar to the structures Associated had planned for its 345-kV line in the late 1970s. AmerenUE will construct the line in compliance with the Commission's regulations set out in 4 CSR 240-18.010.

The estimated economic cost of the line, including right-of-way costs and connection costs at the substations, is $25 million. Financing for the line will come from AmerenUE's treasury and a portion may come from new financing that will require further Commission approval.

AmerenUE's proposed project will include equipment to accommodate the new line at AmerenUE's Callaway Substation, Associated's Franks Substation, and a new AmerenUE substation, to be known as the Loose Creek Substation, located southwest of Linn, Missouri. A 345-kV breaker position will be provided at AmerenUE's Loose Creek Substation for a connection by Associated to its Rich Fountain Substation site.

There was confusion among the affected landowners as to the exact placement of the proposed line. The confusion was in part caused by AmerenUE's attempts to work with the landowners to determine the most desirable location for the line. At the hearing, AmerenUE's witnesses testified that it was difficult to determine the precise location of the transmission line until construction has begun. For example, there may be geological or other obstacles that require the movement of the line slightly.

AmerenUE witnesses testified that one area, where the line would cross Highway 50, was an example of where AmerenUE had found the proposed path too congested to place the line as originally proposed. Another example was where AmerenUE had discussed with landowners about moving the line to the opposite side of the property so as to place it in a more convenient location for the landowner. However, this adjustment was problematic because it would require AmerenUE to obtain an easement from an unwilling landowner. AmerenUE showed that it is open to working with the landowners but admitted that it had not put any of its proposed adjustments in writing.

Necessity for a Transmission Line

AmerenUE currently owns and operates a 345-kV transmission line from its Bland Substation near Bland, Missouri, to Associated's Franks Substation (referred to as the "Bland-Franks Line"). The Bland-Franks Line is one of the few connections between the northern and southern parts of the 345-kV transmission

system in Missouri. The Bland-Franks Line carries power originating from several sources, including displaced power flows from AmerenUE's Callaway nuclear plant that move south via AmerenUE's Bland-Franks Line to the Franks Substation.

Since 1997 the Bland-Franks Line has experienced overloading conditions on many occasions, and the heavy loading on the Bland-Franks Line is expected to continue and worsen. Transmission lines and facilities are overloaded when they carry loads above their rated electrical capacity. Under such circumstances there exists an increased risk of failure of the overloaded lines and a risk of increased maintenance and replacement costs because of the strain placed on the lines and equipment by the overloading conditions.

The overloading conditions on the Bland-Franks Line have consistently resulted in transmission line loading relief (TLRs) being called on the Bland-Franks Line. TLRs are procedures that are implemented to relieve overloads on a transmission line. For example, it may be necessary for AmerenUE to curtail the flows on the line, rely on more expensive generation because of the necessity to cut back generation to relieve the overloads, and possibly curtail flows by interrupting customers. Overloaded lines and TLRs are indicative of a serious transmission line and system-overloading problem. TLRs should occur rarely, if at all, and cannot be allowed to continue because overloads compromise safety, damage equipment, and can result in interruptions of service.

The increased risk of failure and increased costs associated with overloading and TLRs may negatively affect AmerenUE's ratepayers. Also, if the overloading is not relieved, a potential safety hazard is created because overloaded lines tend to sag, thereby reducing ground clearances below those considered safe under the National Electric Safety Code.

No party disputes the fact that the overloading problem on the line needs to be addressed. Concerned Citizens, however, argues that none of the particular individuals physically impacted by the line nor any of the citizens in the three counties impacted by the line will benefit from it; that AmerenUE's motives for proposing the line are purely economic; and that the harm created by the project will outweigh the benefits of it. While Concerned Citizens made these arguments and presented testimony of 38 witnesses, and the Commission received similar arguments during testimony at the public hearing in Linn, Missouri, Concerned Citizens failed to provide any persuasive evidence for many of its allegations.

Benefits and Detriments of the Callaway-Franks Line

AmerenUE's evidence, particularly the testimony of Gary L. Fulks from Associated, proved that the proposed line would provide benefits to the rural electric cooperatives, including those that provide electric service to Concerned Citizens. Thus, Concerned Citizens' allegation that no area residents will benefit is clearly incorrect. The evidence showed that the Callaway-Franks Line will provide additional connections that allow both Associated, at Rich Fountain, and AmerenUE, at Loose Creek, to plan for future needs. The line will also "provide needed transmission support for the central Missouri area and minimize the risk of overloading the existing [Associated] transmission facilities in the area."[4] The

[4] Ex. 9, Fulks Sur. at p. 8, ln. 20-23; p. 9, ln. 1-11.

proposed Callaway-Franks Line will lessen the potential for safety hazards and for damaged facilities in the central Missouri area. The line will curtail service interruptions and increased costs to both AmerenUE and cooperative customers who would pay the costs of maintenance and replacement of failed system facilities. The Commission finds that by eliminating the overloading, the proposed Callaway-Franks Line will enhance the reliability of the entire electric grid, for AmerenUE, for cooperative customers in Missouri, and for electric utility customers outside of Missouri.

Concerned Citizens argued that AmerenUE's economic interest is the primary benefactor of the proposed line. AmerenUE's witnesses adamantly and consistently testified that the company did not consider the future economic advantages that the Callaway-Franks Line would provide to the company in making its decision to undertake this $25 million project. There was no evidence to suggest that AmerenUE's witnesses were not truthful about the reasons the project is needed and the benefits that the proposed line will provide.

Concerned Citizens through its cross-examination attempted to show that AmerenUE had the "evil" motive of profitability, and was somehow misleading the Commission. But the Commission was not misled by the proposed Loose Creek Substation and Jefferson City connection. The substation was clearly marked in the original application, all questions were answered regarding the future connection to the Jefferson City area, and the witnesses were consistent in denying that the future connection was a factor in AmerenUE's determination to place the line on the Callaway-Franks route.

The Commission finds that regardless of the motives for placement of the line, AmerenUE has shown that a problem exists and an additional 345-kV line is necessary for AmerenUE to provide reliable service to its customers, to relieve overloading of its electric transmission system, and to maintain safe conditions on its system.

Another benefit of the proposed line comes from the cooperation among utilities in the construction of new transmission. This cooperation is beneficial to the public interest because it reduces costs to the ultimate benefit of ratepayers, minimizes the duplication of facilities, minimizes the creation of additional utility corridors, and reduces the total number of landowners that are impacted by new lines and thus the overall impact on landowners as a whole.

Concerned Citizens attempted to prove that if the transmission line is built, their property values will decrease, they will lose the use of a portion of their land, the aesthetics of the area will be diminished, and the property owners will not be adequately compensated for these losses in a court of law. It is undisputed that if given a choice, the average citizen would prefer the same piece of property without a transmission line to the property with the transmission line. It is also undisputed that the aesthetic value of the property will be diminished. The Commission, however, cannot agree with the Concerned Citizens' other assertions.

Concerned Citizens claimed that after a 345-kV transmission line is built on it, the value of the properties will be so diminished as to make the properties unsaleable. AmerenUE provided the testimony of David A. Nunn, a licensed real estate appraiser with experience in the valuation of rural real estate. Mr. Nunn

testified convincingly that the property will retain value and will (with the possible exception of the Drennen property) continue to be saleable. The evidence also showed that the easement itself does not deter resale or transfer of the property. In fact, many of the current landowners have acquired this property since the easements were granted to Associated.

Several of the Concerned Citizens' witnesses testified about their fears of harm to their families' and livestock's health caused by the electromagnetic fields (EMFs) and noise produced by the transmission line. Ms. Kramer was also fearful of the effects on health of chemicals used for easement maintenance purposes.

Dr. Walter Gajda testified as an expert, over the objection of Concerned Citizens. Dr. Gajda is well-qualified in the field of electrical engineering and has done extensive study and research regarding EMFs. Dr. Gajda is not, however, a medical doctor and though he is well-read on the subject of the health effects to living organisms of EMFs, and has conducted research with biologists, the Commission did not consider him to be an expert with regard to the effects of EMFs on human or animal health. Nor did the Commission consider Ms. Kramer or the other Concerned Citizens experts in that field. The Commission did give great weight to Dr. Gajda's testimony regarding the existence of EMFs produced by a transmission line and also produced by the human body in everyday life activities and by the Earth itself. The Commission also considered Dr. Gajda's testimony that EMFs decrease exponentially as the distance increases from their source. There was, however, no substantial evidence from any party to lead the Commission to find that human or animal health is affected by the EMFs produced by a 345-kV transmission line built to the standards as proposed in the application.

Dr. Gajda admitted that some transmission lines may produce an audible noise, particularly in humid conditions. Again, however, the Commission was presented with no reliable evidence as to any harmful effects to a person's physical health produced by such a noise. General experience suggests that some audible noise may be disturbing to inhabitants near the source. However, without any evidence of the quantity or severity of the noise, the Commission cannot find that noise from the lines will be a detriment that carries much weight in this decision.

Regardless of the lack of evidence of harmful effects to human and animal health, the Commission recognizes that the fears of the Concerned Citizens are genuine and cause a detriment to those specific individuals.

As with the EMFs and the noise, no competent evidence was produced to show any harmful effects from chemical herbicides used by AmerenUE in its maintenance practices. However, the Commission does recognize the landowners' desire not to have the aesthetics of the properties degraded by unnecessary use of herbicides. In addition, AmerenUE's witnesses testified that AmerenUE would not spray herbicides on property without the consent of the landowner. The Commission finds that the potential for harm produced by the herbicides is mitigated by this promise from the company.

The Commission finds that the Drennen family will suffer the greatest harm of the individuals affected by this transmission line. Ms. Drennen testified, and Mr. Nunn confirmed, that if the transmission line is built on its current path, the Drennen family will be evicted from their home. The Concerned Citizens suggests

that if the Commission grants a certificate to AmerenUE, it should be required to build the line so that no occupants of residential structures will be required to relocate off of that owner's property. AmerenUE agreed to this condition in its Statement with the caveat that it be allowed to build the line as proposed if the property owner voluntarily agrees to a sale of the property rights. The Commission finds that a condition prohibiting the placement of the line so as to evict residents absent a voluntary agreement from those property owners for the sale of the property would greatly mitigate the detriments caused by the transmission line.

Concerned Citizens also indicated that the Commission should limit the construction of the transmission line so that it may not be built within 300 feet of any existing structure. AmerenUE indicated in its Statement that with regard to "structures located within the line path originally planned by AECI . . . and constructed after the AECI easement was granted,"[5] it agrees to a condition on the certificate that AmerenUE:

> will work with property owners to relocate or fairly compensate them for any structures located within 75' of the centerline(150' total width) of the new easement, unless both parties agree that the structure can remain within 75' of the centerline of the easement.[6]

Concerned Citizens argues that "[t]he evidence justifies a 300 foot set back."[7] The Commission, however, finds no evidence, other than the desire of Concerned Citizens, that a 300-foot set back will reduce the effects of any of the detriments of the transmission line. The evidence shows that the typical easement requirement for this type of transmission line is 150 feet. Thus, the Commission cannot find that a 300-foot set back from existing structures is necessary.

Another argument of detriment to the public interest made by Concerned Citizens is that AmerenUE will "abuse" its power of eminent domain. There was evidence that if AmerenUE was unable to reach an agreement with the landowners, AmerenUE fully intends to use its power of condemnation to acquire the easements. There was no evidence, however, that AmerenUE had in the past or will in the future "abuse" its power of condemnation. There is also no reason for the Commission to assume that the condemnation laws will not provide an adequate remedy for the harm created by the taking of these easements. AmerenUE did agree that it would follow certain right-of-way acquisition practices. Those are set out in Exhibit A attached to this order.

Concerned Citizens also argued that AmerenUE will continue to cause harm through its maintenance and construction activities. All the testimony regarding past maintenance practices, however, dealt with companies other than AmerenUE. AmerenUE witnesses testified that the company would practice reasonable and

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[5] AmerenUE's Statement of Willingness to Voluntarily Agree to the Imposition of Conditions on any Commission Order Approving Application, Ex. B, p. 1 (filed May 23, 2003).

[6] *Id.*

[7] Response of Intervenor Concerned Citizens of Family Farms and Heritage to Ameren UE's Statement of Willingness to Voluntarily Agree to the Imposition of Conditions on any Commission Order Approving Application, p. 5 (filed June 6, 2003).

considerate maintenance and construction practices and agreed to certain practices as set out in Exhibit A.

The building of a transmission line is a controversial and emotional proposal. As stated earlier, the average person would prefer not to have the transmission line on her property, and the time lapse between the original grant of the easements to Associated and this eventual project has added to the turmoil. The landowners are suspicious and mistrustful of AmerenUE.[8] One of the issues raised by the Concerned Citizens is the lack of communication between AmerenUE and the landowners regarding the location of the line, and the options for right-of-way acquisition. AmerenUE witnesses admitted that AmerenUE had not put any of its offers to adjust the location of the transmission line or for the relocation of structures in writing to the landowners.

AmerenUE has agreed in its Statement to certain specific maintenance, construction, and right-of-way acquisition practices which are enumerated in Exhibit A. The Commission finds that if AmerenUE honors its commitments with regard to maintenance, construction, and right-of-way acquisition practices, the impact on the landowners will be lessened.

Relations between the landowners and AmerenUE may have been irreparably damaged, but it is reasonable to expect that in addition to the practices enumerated in Exhibit A, the good-faith offers of AmerenUE will be made in writing. And, the negotiations anticipated should be made in advance of any action for condemnation.

Alternatives to the Callaway-Franks Line

Associated's 345-kV system is connected to AmerenUE's 345-kV system, including the Bland-Franks Line. Associated has also experienced overloading problems on its transmission facilities related to the overloads on the Bland-Franks Line. AmerenUE approached Associated about engaging in a joint study for the purpose of finding the best overall solution to the overloading problems. The report of the joint study was admitted into evidence.[9]

The joint study initially examined seven options, including adding a second 345-kV line from Bland-Franks, for solving the overloading problems. During the joint study, in approximately October 2000, Associated advised AmerenUE that it owned easements for Associated's previously planned 345-kV line from Chamois to Franks, and a possible line from Callaway to Franks was added to the study. AmerenUE and Associated had also studied a possible line from Callaway to Jefferson City to Huben or from Callaway to Jefferson City to Franks, but customer demand in the Jefferson City area did not justify a line of that length. The Callaway-Jefferson City-Franks option would also have had greater line losses due to increased impedance.

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[8] Although their feelings are perhaps misdirected as it is Associated, not AmerenUE, that acquired the original easements and made the alleged promises.

[9] At page 11 of its Initial Brief, Concerned Citizens argues "[t]he report has no relevance," does not comply with Commission rules requiring a "final" plan, and was prepared after the application was filed. Concerned Citizens is wrong on all counts. The study is most definitely relevant, the Commission rules do not require a "final" plan, and the testimony shows that the report was prepared prior to April 30, 2002.

AmerenUE and Associated also considered using inductors to restrict flow on the Bland-Franks Line as a mechanism to prevent overloads. That option was eliminated because use of inductors would have "pushed" the displaced power to other facilities, including lower voltage lines, and may have created overloads on those facilities.

Another alternative addressed in testimony was the possible combination of the proposed 345-kV line with the existing 161-kV line on a single structure. However, to complete the new construction, the 161-kV line would have to be taken out of service for approximately two years. This is not a reasonable alternative because Associated needs power on the 161-kV line to serve its customers.

Power flow studies, like those conducted for the other alternatives, were conducted for the proposed Callaway-Franks Line. Those studies revealed that the Callaway-Franks Line relieved the overloading problems and is the best electrical solution to those problems. After completing the power flow studies, AmerenUE and Associated agreed to proceed with the project that became the Callaway-Franks Line.

Mr. Fulks also testified that Associated could have initiated the construction of the line on its own, without having to seek approval from the Commission, but that the process of approvals for the cooperative were considered more difficult to accomplish.

The Bland-Franks Alternative

The Callaway-Franks Line has distinct electrical advantages over a second Bland-Franks Line. First, the Callaway-Franks route is 16 miles shorter than the Callaway-Bland-Franks route. Power to be carried on either a second Bland-Franks Line or on the proposed Callaway-Franks Line tends to be power that is displaced from the Callaway nuclear power plant. The displaced power will move a shorter distance on the Callaway-Franks Line than if transmitted to Franks via a second Bland-Franks Line. Shorter movements are more efficient because line losses are less. Therefore, the Callaway-Franks Line will perform better electrically than a second Bland-Franks Line would perform.

The second electrical advantage is that the Callaway-Franks Line will provide another 345-kV path in the event the Bland-Franks Line is out of service because of storm damage or for other maintenance. An outage on both lines at the same time would displace power to other lines and would overload those lines as discussed above. Using a second independent route makes it unlikely that a single event would cause a simultaneous outage on both the existing Bland-Franks Line and the new Callaway-Franks Line. The Commission finds that the proposed Callaway-Franks Line is the best electrical solution of the alternatives that were modeled, including a second Bland-Franks Line.

A new Callaway-Franks Line benefits Associated and ultimately cooperative customers in mid-Missouri, including landowners along the route of the Callaway-Franks Line who receive electric service from cooperatives. These benefits do not exist if a second Bland-Franks Line is built. The benefits include increased reliability for cooperative customers and obtaining a needed 345-kV supply in mid-Missouri to serve increasing cooperative customer loads. Associated has determined that to serve its customers, a new substation at Rich Fountain near

AmerenUE's proposed Loose Creek Substation site provides the best solution. If a second Bland-Franks Line were built, Associated would need a connection to the second Bland-Franks Line but would have to acquire right-of-way over additional properties and build a new 345-kV line to get the power Associated needs to its Rich Fountain Substation. This Associated line would be in addition to AmerenUE's new 345-kV line. The Commission finds that the Callaway-Franks Line is a better alternative for addressing Associated's needs than a second Bland-Franks Line would be.

Another advantage of the Callaway-Franks Line over the Bland-Franks Line is that the Bland-Franks Line would require the acquisition of approximately 160 easements from landowners to build an additional transmission line as opposed to only 70 remaining easements for the Callaway-Franks Line. This is an advantage because even though the Callaway-Franks Line impacts more property owners overall (175 versus 160 on the Bland-Franks Line) the evidence shows that utilizing the existing easements on the proposed route of the Callaway-Franks Line will result in approximately 90 fewer landowners who had not, or whose predecessors-in-title had not, already granted an easement.

One disadvantage of the Callaway-Franks Line compared to the Bland-Franks Line is that although the Callaway-Franks Line is the shorter route for the electricity to travel by 16 miles, the Bland-Franks Line would actually require ten less miles of construction. Although no cost estimates were provided for the construction of a Bland-Franks Line, it is obvious from the testimony and general knowledge that an additional ten miles of construction over similar property types will require additional costs and will cause a greater impact to the aesthetics and the natural environment.

When the easements were conveyed the landowners agreed to a similar proposed line being built. Many landowners testified that their local electric cooperative misrepresented the likelihood of such a line ever being built. AmerenUE was not involved in the negotiations for the easements. Thus, no credible evidence exists that in obtaining the rights to the easements AmerenUE engaged in illegal or unethical representations. Furthermore, the Commission has no authority to interpret the legality of the easements or to remedy an injustice done to the landowners more than 20 years ago by the cooperative of which those landowners were members. Sixty-eight of the 105 properties encumbered by the existing easements have changed hands; thus, in the transfer of those 68 properties the new owners of the property should have had the opportunity to discover that the existing easements existed.

The undisputed evidence shows that the types of properties and uses of properties along the route of the existing Bland-Franks Line are similar to the properties to be crossed by the proposed Callaway-Franks Line, consisting of family farms and rural residential properties, and that building a line along that route would simply impact a different group of property owners. AmerenUE witnesses admitted that AmerenUE had not done any study with regard to the impact on residences or other structures that would be impacted by the Bland-Franks Line. Mr. McDaniel, testifying on behalf of Concerned Citizens, stated that he flew over the Bland-Franks Line in a private airplane and noted that he believed approxi-

mately 6-10 structures would be impacted by the Bland-Franks construction. The Callaway-Franks Line, on the other hand, will impact approximately 24 structures, including one residence, the Drennen residence, which may not be able to be relocated on the parcel owned by the occupants.

Benefits of a Loose Creek Substation

In addition to determining that the Callaway-Franks Line was the best solution to the Bland-Franks overloading problems, AmerenUE determined that other overloading and supply problems on its existing transmission system in mid-Missouri could be solved by utilizing the new Loose Creek Substation for a future line to Cole County. Those problems include overloading conditions experienced on AmerenUE's Overton transformer and on AmerenUE's transmission line from Montgomery to Guthrie, both of which have experienced overloading problems and with respect to both of which TLRs have been called. Use of the new Loose Creek Substation relieves the Overton and Montgomery to Guthrie overloads because it provides a second path of electricity to AmerenUE's three main substations in the Jefferson City area, thereby enabling AmerenUE to unload those facilities.

Concerned Citizens argues that AmerenUE made its decision to build the Callaway-Franks Line chiefly because of the economic benefits AmerenUE would receive from building the Loose Creek Substation. The Commission finds that the studies provided by AmerenUE and supported by Associated were credible and reliable and that the Callaway-Franks Line is the superior line for electrical reasons. There are also numerous other reasons as cited in this order for the building of the Callaway-Franks Line over building the line in the other areas studied. In addition, if AmerenUE had intended to build the Callaway-Franks Line only because it would profit from the Loose Creek Substation, it would have proceeded with building the Callaway-Jefferson City Line without first coming to the Commission for approval of the project.

The fact that a regulated electric utility may profit from the building of the line in this particular location is not a detriment to the public interest. Because the Commission regulates AmerenUE's rates and earnings, the sound economic health of a utility is typically viewed as a benefit to the general public interest of the state. Even if profit were the motive behind AmerenUE's decision to use the Callaway-Franks Line, that motive would not show that the Callaway-Franks Line is detrimental to the public interest.

Staff's Evidence

Staff's witness, James L. Ketter, also reviewed AmerenUE's study and agreed that overloading is occurring, that the proposed line will fix the problem, and that the Callaway-Franks Line is the best electrical solution. Concerned Citizens argued that Mr. Ketter's testimony is biased and should be disregarded. During questioning from the Commission about the benefits to Associated's members, Mr. Ketter volunteered that as an Associated customer he may receive some benefits from the project as proposed by AmerenUE. The Commission does not find that Mr. Ketter's testimony was so biased as to not be truthful.[10] Mr. Ketter's

[10] The Commission also did not find Staff's opinion to be "crabbed" or "cold-blooded". *See*, Initial Brief of Intervenors Concerned Citizens of Family Farms and Heritage, p. 17 (filed November 14, 2002).

testimony, however, was not necessary for AmerenUE to prove that the proposed transmission line is "necessary or convenient for the public service." Therefore, in an abundance of caution, the Commission did not consider Mr. Ketter's testimony in making its decision.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction

AmerenUE is a public utility subject to the jurisdiction of this Commission.[11] AmerenUE is authorized to provide electric service within the geographic area set out in its electric service tariff.[12] The Commission takes notice of AmerenUE's tariff found in the Commission's official records.

The Commission is authorized to grant permission and authority for construction of an electric transmission line upon a finding that the line is necessary or convenient for the public service.[13] "The commission may by its order impose such condition or conditions as it may deem reasonable and necessary."[14]

The Application

One of the first arguments made by Concerned Citizens is that the Commission cannot grant the certificate because it cannot determine exactly where the line will physically be placed. The Application, however, lays out a legal description of the placement of the line, portions of what appears to be a highway map with the line clearly marked, and a map of AmerenUE's entire system of lines over 115-kV, including the proposed line. AmerenUE could have easily shown the proposed location of the line in more detail (for example, submitting all of the aerial photos from the Associated Electric Company easements, or submitting the proposed location on a map which details the property owners) but the location AmerenUE provided was adequate.

Authority for Transmission Lines within AmerenUE's Certificated Service Area

Concerned Citizens argues that AmerenUE is required to seek authority from the Commission for the entire project, including the area within its certificated service area. The Commission has held that "it is not necessary for electric utilities to come before us to obtain permission to build plant within their certificated areas."[15] In addition, the Missouri Court of Appeals in *Harline* has found that this

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[11] Sections 386.010(15), 386.010(42), and 386.250, RSMo.

[12] Union Electric Company, Electric Service, P.S.C. MO., Schedule No. 5, First Revised Sheet Nos. 2-6.

[13] Section 393.170, RSMo.

[14] *Id*.

[15] *In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate and Maintain Two Combustion Turbine Generating Units in the State of Missouri*, 24 Mo. P.S.C. (N.S.) 72, 78 (1980).

permission is not required.[16] The proposal presented by AmerenUE is one interconnected project which the Commission considered as a whole in making its public interest analysis. The Commission need not determine if AmerenUE could have built the portion of the line within its certificated area without seeking Commission authority, because that has not occurred.

Necessary and Convenient for the Public Service

The Court of Appeals has said that, "[f]or some reason, either intentional or otherwise, the General Assembly has not seen fit to statutorily spell out any specific criteria to aid in the determination of what is 'necessary or convenient for the public service' within the meaning of such language as employed in Section 393.170 . . ."[17] That same Court found that the safety and adequacy of facilities are criteria that may be considered, but that they are not the only criteria. The Court of Appeals has also stated that "the term 'necessity' does not mean 'essential' or 'absolutely indispensable', but that an additional service would be an improvement justifying its cost."[18]

> The dominant purpose in creation of the Commission is public welfare.[19] The administration of its authority should be directed to that purpose. In every case where it is called upon to grant a permit, or to authorize an additional service to be rendered by an authorized certificate holder, the Commission should be guided, primarily, by considerations of public interest.[20]

Thus, in determining whether the proposed transmission line is "necessary or convenient for the public service," the Commission must determine if granting a certificate to build the proposed transmission line is in the public interest.

Who are "the public"? Concerned Citizens argues that the Commission should not consider the benefits it admits exist for AmerenUE, Associated, or Associated's customers. Concerned Citizens would have the Commission consider only the interests of the affected landowners. However, this argument is contrary to the case law.

In the *Missouri Pacific Freight Transport Company* case, the Court stated that the "rights of an individual with respect to issuance of a certificate are subservient to the rights of the public . . ."[21] And, in a case affirming the Commission's grant of a certificate of convenience and necessity to a water utility, the Court in *Public*

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[16] *Harline v. Public Serv. Comm'n*, 343 S.W.2d 177 (Mo. App. K.C. 1960).

[17] *State ex rel. Ozark Elec. Co-op. v. Public Service Commission*, 527 S.W.2d 390, 394 (Mo. App. S.D. 1975).

[18] *State ex rel. Intercon Gas, Inc., v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993), *citing State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d at 219.

[19] *Citing, Alton R. Co. v. Public Service Commission*, 110 S.W.2d 1121, 1125 (Mo. App. 1937).

[20] *Missouri Pacific Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

[21] *Id.*, *citing State ex rel. Missouri, Kansas & Oklahoma Coach Lines v. Public Service Commission*, 179 S.W.2d 132; *State ex rel. Interstate Transit Lines v. Public Service Commission*, 132 S.W.2d 1082.

Water Supply District No. 8 stated, "the ultimate interest is that interest of the public as a whole . . . and not the potential hardship to individuals . . ."[22]

The Commission is also aided by zoning and eminent domain cases where the issue of public interest is often addressed. An examination of those cases in Missouri finds that the determination of public interest is a balancing test between public and private interests.[23] And further, "[n]o one factor is dispositive in balancing public versus private interests. Each case stands on its own facts and circumstances."[24]

Section 386.610, RSMo, which applies to the Commission's general regulatory power over electric corporations, supports this balancing test approach.[25] The relevant part of 386.610 states that "[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

The Commission must, therefore, balance all the relevant factors, both the benefits and detriments, and determine whether the public benefits of the project outweigh the individual detriments. It is not within the authority of this Commission to determine the monetary value or just compensation for such detriments other than to determine if the costs of the project outweigh the benefits provided by it.

Weighing the Benefits and Detriments

The basis of AmerenUE's case is that there is a need to add a 345-kV transmission line to relieve overloading on its Bland-Franks Line. Concerned Citizens argues that other options, especially the option of a parallel Bland-Franks Line, might also solve the problem. Concerned Citizens further argues that AmerenUE must not only prove the transmission line is in the public interest, but that AmerenUE must prove the Callaway-Franks Line is the "best" solution. Concerned Citizens do not support their "best solution" standard with any legal authority, but rather are hoping that the Commission is persuaded to adopt this standard because of the gravity of the harm to the individual landowners.

AmerenUE is a regulated monopoly. As such, the Commission sets the rates AmerenUE charges and limits the earnings of its shareholders. If AmerenUE did not consider all the reasonable alternatives and the profitability of the alternatives, the Commission may determine that those expenses are not prudent in the context of a rate case. In the context of this case, however, the Commission will not step into AmerenUE's shoes as to management decisions, but will only determine whether its request to build the transmission line is in the public interest.

After considering the application and all of the evidence filed and presented, the Commission concludes that AmerenUE's decision to build the proposed Callaway-

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[22] *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. W.D. 1980).

[23] *Rhein v. City of Frontenac*, 809 s.W.2d 107 (Mo. App. 1991). *See also, Hoffman v. City of Town and Country*, 831 S.W.2d 223 (Mo. App. E.D. 1992), and *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963).

[24] *Id.* at 110.

[25] Section 386.250, RSMo.

Franks Line is a reasonable and sound electrical solution to the overloading problems existing on AmerenUE's system. Furthermore, the Commission concludes that because it provides the shortest route with the least impedance, the Callaway-Franks Line is the best electrical solution of the reasonable alternatives.

Having found that the Callaway-Franks Line will lessen the potential for safety hazards and damaged facilities, avoid service interruptions, avoid increased maintenance costs, enhance the reliability of the electric grid, and promote cooperation between electric utilities, the Commission also concludes that AmerenUE's choice of the route from Callaway to Franks is a reasonable and sound route.

The Commission must weigh the benefits and detriments to all the groups affected by its decision. The Commission found many benefits provided by the proposed line including benefits to AmerenUE's customers, Associated's customers, and the entire electric power grid. The Commission gives great weight to these benefits. But the Commission also found the proposed line will harm a few individuals. Under the particular facts of this case, the Commission concludes that the gravity of the harm to the individuals counterbalances the public benefits. As explained more fully below, the Commission found several conditions, however, that if attached to the certificate will mitigate the detriments to the specific individuals. Therefore, the Commission concludes that these conditions are reasonable and necessary for the benefits to outweigh the detriments created by the transmission line. The Commission concludes that the construction and operation of the proposed Callaway-Franks Line and the substation facilities and other appurtenances thereto, as described in AmerenUE's Application, is necessary or convenient for the public service and is in the public interest if certain conditions are attached.

Reasonable and Necessary Conditions

In making its public interest determination, the Commission has relied heavily on the fact that the company had already acquired a substantial number of easements for building a similar transmission line, and representations have been made to the landowners granting those easements about where that line will run. Thus, the Commission finds that it is reasonable and necessary to limit the construction of this line to the location specified in the Application, and to the specific location represented to the landowners on the aerial photos provided by Associated, unless a written agreement from the landowner is obtained, or the company gets a variance from this order for a particular property.

Because the Commission has relied on the fact that these easements are already obtained, the Commission concludes that it is reasonable to condition the certificate upon the validity of the easements. Thus, if the easements are finally determined by a court to be invalid, the Commission will require AmerenUE to apply to the Commission for a variance from this order to place the line in a different location, or to show evidence that regardless of the reason the easement was determined to be invalid, the placement in the same location remains in the public interest.

AmerenUE argues that specific placement of the line by the Commission would exceed the Commission's authority unless there is evidence that AmerenUE's placement decision is unreasonable or unsound. The *Waggoner* case does state that, "in the absence of legislative restriction, the condemnor may determine the location and route of the improvement and of the land or easement to be taken for it."[26] The Missouri Supreme Court has also ruled that, at least with regard to interference with other utilities, "the determination of how and where an electrical line should be built" is a question for the Commission.[27]

Part of the confusion over the location of the line is the practical necessity for some degree of flexibility for AmerenUE in placing the final location of this line. It is not practical for the company to state with exact precision where each pole will be set and each line will run. Certain adjustments will be necessary, and preferable, to accommodate the physical structures and the use of the property by its owners. However, for the Commission to determine whether this transmission line is in the public interest, it must look to the location specified in the application.

The Commission has weighed the harm to the individual property owners and particularly the harm to the Drennen family against the many benefits to AmerenUE's customers, Associated's customers, and the safety and reliability of the electrical grid as a whole. The Commission concludes that this detriment can be mitigated if the placement of the line is limited as agreed by AmerenUE in its Statement so that, absent a voluntary agreement from the property owners for the sale of the property rights, no currently occupied residential structure is removed or that the owners are required to relocate from their property. Therefore, the Commission concludes that under the particular facts and evidence of this case, it will be reasonable to place such a condition on the certificate granted to AmerenUE.

With regard to the structures constructed within the easements after Associated obtained the easements, AmerenUE has agreed to relocate or compensate the owners of structures that fall within 75 feet of the centerline unless AmerenUE and the property owner agrees that the structure may remain. The Commission finds it reasonable to expect AmerenUE to honor its commitments to the Commission and the property owners. The Commission further finds that this agreement or compensation between AmerenUE and the property owners will mitigate the damage to those individuals. Therefore, the Commission will require this as a condition of the certificate.

So that there does not continue to be confusion over the proper placement of this transmission line, the Commission concludes that it is reasonable and necessary to require AmerenUE to survey the line once it is built and to record the specific easement location with the Recorder of Deeds in the appropriate counties. AmerenUE shall also file a copy of its survey with the Commission.

The Commission expects that AmerenUE will honor its commitments to closely supervise the maintenance and construction of this transmission line, and finds

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[26] *N.W. Electric Power Cooperative, Inc. v. Waggoner*, 319 S.W.2d 930, 934 (Mo. App. 1959). *See also, In re Application of Missouri Power & Light Co.*, 18 Mo. P.S.C. (N.S.) 116.

[27] *Public Service Commission v. Kansas City Power & Light Co.*, 325 Mo. 1217, 1227 (1930).

that without such reasonable practices this project would not be in the public interest. Thus, the Commission concludes that the construction and maintenance practices set out in Exhibit A are a reasonable and necessary condition on the certificate.

While it is not within this Commission's jurisdiction to determine the value of timber cleared from the right-of-way, and it cannot order AmerenUE to pay specific monetary damages, the Commission encourages AmerenUE to honor its offers with regard to payment for timber cleared and to limit the "blanket" easements to a fixed width. The Commission also encourages AmerenUE to evaluate its handling of this process and determine what it can do to repair relations with the landowners and how it might improve its handling of transmission line cases in the future.

Concerned Citizens requests that the Commission condition the grant of a certificate on the limitation "from liability for injury to persons or property of AmerenUE during and after construction of the line."[28] There was no evidence in the record to support such a condition as reasonable or necessary. Furthermore, the Commission has no authority to limit the liability of the Concerned Citizens in this regard.

Another condition proposed by Concerned Citizens is that AmerenUE be required to "compensate property owners for any diminution in value to remaining property not taken by AmerenUE as easement for the line, and . . . fully compensate property owners for economic losses caused by existence of the line."[29] This proposed condition is clearly a matter within the jurisdiction of the courts and not that of the Commission. The Commission has no authority to determine or grant monetary damages and furthermore, no evidence was presented as to what those damages might be. The court is the proper venue to determine the value of easements.

Concerned Citizens also requests that the Commission find that any breach of the conditions imposed on the certificate will result in the granting of the certificate to be null and void. The Commission cannot conclude that such a condition would be reasonable. The Missouri statutes provide that any person may complain to the Commission for violations of the Commission's orders.[30] Thus, there already exists a statutory mechanism to remedy such violations of the Commission's orders. If a violation occurs, the Commission has further set out in its rules the specific procedures for filing a complaint.[31] The Commission notes, however, that penalties sought by it in the Circuit Court are to be paid to the Public School Fund.[32] If the violation results in damage to the property owner sufficient to create a civil cause of action, the property owner would then have to seek a remedy for that damage with the courts.

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[28] Statement of Position of Intervenors, p. 4 (filed September 19, 2002).

[29] *Id.*

[30] Section 386.390, RSMo.

[31] 4 CSR 240-2.070.

[32] Section 166.011, RSMo.

Summary

The foregoing facts and conclusions demonstrate that the overloading conditions, increased risk of damage to or failure of lines and equipment, and safety concerns caused by overloading, as well as the increased maintenance and replacement costs, result in a less safe and reliable system which is detrimental to customers of AmerenUE and Associated. Electrical load on the existing AmerenUE transmission system has increased and an alternate line will provide greater load carrying capacity and reliability. The Commission finds that the proposed addition to the AmerenUE transmission system is necessary to provide reliable electric service by providing transmission capacity needed for the high-voltage system.

An addition to the system between Callaway and Franks will allow alternatives if other lines fail or are de-energized to perform maintenance. In addition, the Callaway-Franks Line is the best electrical solution to the overloading problems.

The best electrical solution to the problem is the Callaway-Franks Line. In addition, the Callaway-Franks Line provides many benefits to the public interest. This line also causes some detriments to the public interest, the greatest of which is the necessary removal of the Drennen home. When weighing these benefits and detriments the Commission finds that one counterbalances the other. If the conditions are added to the certificate, however, the balances tips back in favor of the public interest.

Thus, the Commission determines that granting a certificate to build the proposed transmission line with certain reasonable and necessary conditions is in necessary for the public service.

IT IS THEREFORE ORDERED:

1. That Union Electric Company, d/b/a AmerenUE, is granted a certificate of convenience and necessity to construct, operate, own, and maintain a 345-kilovolt electric transmission line in Maries, Osage, and Pulaski Counties in Missouri, is granted with the conditions set out in Paragraphs 2 through 7 below.

2. That the certificate is to limited to the construction of this line in the location specified in the application, and as represented to the landowners on the aerial photos provided by Associated, unless a written agreement from the landowner is obtained, or the company gets a variance from the Commission for a particular property.

3. That if the easements transferred to Union Electric Company, d/b/a AmerenUE, from Associated Electric Cooperative are finally determined by a court to be invalid, AmerenUE must apply to the Commission for a variance from this order to place the transmission line in a different location, or must show further evidence that regardless of the reason the easement was determined invalid, the placement of the line in this location remains in the public interest.

4. That absent a voluntary agreement for the purchase of the property rights, the transmission line shall not be located so that a residential structure currently occupied by the property owners will be removed or located in the easement requiring the owner to move or relocate from the property.

5. That with regard to structures located within the line path originally planned by Associated Electric Cooperative as depicted on the plats provided to property owners in connection with Associated's easement acquisition and constructed after the easement was granted, Union Electric Company, d/b/a AmerenUE, shall negotiate with the property owners

to relocate or fairly compensate the owners for any structures located within 75 feet of the centerline of the new easement, unless both parties agree that the structure can remain within 75 feet of the centerline.

6. That Union Electric Company, d/b/a AmerenUE, shall survey the transmission line location after construction and record the easement location with the Recorder of Deeds in the appropriate counties. AmerenUE shall also file a copy of its survey in this case.

7. That Union Electric Company, d/b/a AmerenUE, shall follow the construction, clearing, maintenance, repair, and right-of-way practices set out in Exhibit A attached to this order.

8. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions, and expenditures herein involved.

9. That the Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions, and expenditures herein involved in a later proceeding.

10. That any objection not ruled on is overruled, any motion not ruled on is denied, and any exhibit not admitted is excluded.

11. That this Report and Order shall become effective on September 1, 2003.

Simmons, Ch., and Murray, C., concur;
Gaw, C., dissents, with dissenting opinion
to follow; and certify compliance with the provisions
of Section 536.080, RSMo 2000.
Forbis, C., not participating.
Clayton, C., absent.

Exhibit A
Case No.: EO-2002-351

Construction and Clearing

1. Prior to construction, AmerenUE will notify all landowners in writing of the name and telephone number of AmerenUE's Construction Supervisor so that they may contact the Construction Supervisor with questions or concerns before, during, or after construction. Such notice will also advise the landowners of the expected start and end dates of construction on their properties.

2. Prior to construction, AmerenUE's Construction Supervisor will personally contact each landowner (or at least one owner of any parcel with multiple owners) to discuss access to the right-of-way on their parcel and any special concerns or requests about which the landowner desires to make AmerenUE aware.

3. If AECI reached a written agreement with a landowner when the original AECI easement was granted calling for a particular method of clearing or right-of-way maintenance, AmerenUE will honor that agreement unless now prohibited by law from doing so, or unless an alternate agreement is reached with the current property owner.

4. From the beginning of construction until end of construction and clean-up of the right-of-way is complete, AmerenUE's Construction Supervisor will be on-site, meaning at or in the vicinity of the route, or on-call, to respond to landowner questions or concerns.

5. If requested by the landowner, AmerenUE will cut logs 12" in diameter or more into 10 to 20 foot lengths and stack them just outside the right-of-way for handling by the landowner.

6. Stumps will be cut as close to the ground as practical, but in any event will be left no more than 4" above grade.

7. Unless otherwise directed by the landowner, stumps will be treated to prevent regrowth.

8. Unless the landowner does not want the area seeded, disturbed areas will be reseeded with a blend of K31 fescue, perennial rye, and wheat grasses, fertilized, and mulched with straw.

9. Best management practices will be followed to minimize erosion, with the particular practice employed at a given location depending upon terrain, soil, and other relevant factors.

10. Gates will be securely closed after use.

11. Should AmerenUE damage a gate, AmerenUE will repair that damage.

12. If AmerenUE installs a new gate, AmerenUE will either remove it after construction and repair the fence to its pre-construction condition, or will maintain the gate so that it is secure against the escape of livestock.

13. AmerenUE will utilize design techniques intended to minimize corona.

14. Should a landowner experience radio or tv interference issues believed by the landowner to be attributed to AmerenUE's line, AmerenUE will work with the landowner in good faith to attempt to solve the problem.

15. AmerenUE will clearly mark guy wires.

Maintenance and Repair

1. With regard to future maintenance or repair and right-of-way maintenance after construction is completed, AmerenUE will make reasonable efforts to contact landowners prior to entry onto the right-of-way on their property to advise the landowners of AmerenUE's presence, particularly if access is near their residence.

2. All AmerenUE contractors will be required to carry and maintain a minimum of one million dollars of liability insurance available to respond to damage claims of landowners. All contractors will be required to respond to any landowner damage claims within 24 hours. All contractors will be required to have all licenses required by state, federal, or local law.

3. All right-of-way maintenance contractors will employ foremen that are certified arborists.

4. If herbicides are used, only herbicides approved by the EPA and any applicable state authorities will be used, and herbicides will be used in strict compliance with all labeling directions.

5. Routine maintenance will not occur during wet conditions so as to prevent rutting.

6. Existing access roads will be used to access the right-of-way wherever available.

7. Prior to commencing any vegetation management on the right-of-way, AmerenUE will meet personally with all landowners to discuss AmerenUE's vegetation management program and plans for their property, and to determine if the landowner does or does not want herbicides used on their property. If the landowner does not want herbicides used, they will not be used.

Right-of-Way Acquisition

1. Every landowner from whom AmerenUE requires an easement will be contacted personally, and AmerenUE will negotiate with each such landowner in good faith on the terms and conditions of the easement, its location, and compensation therefor. They will be shown a specific, surveyed location for the easement and be given specific easement terms.

2. After construction is completed, every landowner will be contacted personally to ensure construction and clean-up was done properly, to discuss any concerns, and to settle any damages that may have occurred.

3. With regard to landowners over whose land an existing AECI easement exists, AmerenUE will honor the location shown on the plat given to the original grantor unless otherwise agreed by the landowner and will not treat the easement as a "blanket" easement over the rest of the property.

4. If a landowner so desires, AmerenUE will give the landowner a reasonable period of time in advance of construction to harvest any timber the landowner desires to harvest and sell.

5. AmerenUE's right-of-way acquisition policies and practices will not change regardless of whether AmerenUE does or does not yet possess a Certificate of Convenience or Necessity from the Commission.

Dissenting Opinion of Commissioner Steve Gaw

The taking of private property for a public purpose is one of the most troubling of cases. Such cases strike chords that ring deep into the traditions of America's roots – the balancing of the individuals' rights and freedoms from government interference against the common good of those who make up their communities,

states and nation. To have ignored the common good would have resulted in an America without a national defense, an interstate highway and rail system, and all government services that exist today. To not acknowledge individual rights is to ignore those pronouncements in this nation's Declaration of Independence and Constitution confirming and establishing our rights and freedoms. The property rights of an individual are not supreme. Neither are they merely measured in dollars and cents. Property, particularly land, often represents more - the home of a family, the place where hopes and dreams have become a reality after years of work, the place that holds the memories of fishing trips with a grandfather or where the first steps were taken by a child. Looking out across an otherwise unobstructed tree-lined sky as the sun sets in Missouri may be part of the reason why a farm in central Missouri was purchased by a family at a premium – and why it is not for sale at twice the fair market value.

Private property rights are protected in this country and may not be taken without adequate compensation and due process of law. The degree of scrutiny, however, has varied. In public interest and condemnation proceedings involving the placement of utilities such variation is significant.

Missouri has acknowledged the necessity of condemnation in order to deliver utility services to the residences and businesses within the state. The Missouri legislature made this a two-step process in the acquiring of property from unwilling sellers. First, a determination of convenience and necessity requiring an assessment of public interest is necessary, and if so found then second, a condemnation process to fix the price to be paid for the acquisition of the property or property right is required. It is the first stage of the process that is before this Commission. Missouri lacks significant guidance from the Courts and the Legislature in determining the public interest in these cases. It is my belief that this examination should include the following: First, is there a need for the construction from a financial and engineering standpoint? Second, do the benefits of the construction justify the costs? Within this question should be considered who is benefiting and who is paying. Finally, is the route proposed the better route in light of other alternatives? This comparison should examine the respective economic and human benefits and costs, the intrusion into private property interests, and environmental impacts. It is my belief that the Commission does not have the information needed to adequately answer these questions.

AmerenUE has presented a significant case for improvement of the transmission grid in the region at issue. As noted in the majority opinion, congestion exists in the area of interest which has resulted in transmission line loading relief (TLRs) being called in the last few years. Such congestion can result in difficulty in the proper functioning of the grid from an engineering standpoint. It can cause some generators otherwise available to be unavailable to service certain loads and lead to additional costs of electricity to those utilities and customers utilizing the grid in the area. At the extreme it can result in curtailments of load and unreliability. As such, relief of congestion is generally considered in the public interest. However, an evaluation of the need for new construction should not occur without an assessment of the cost of the new construction measured against the severity of the congestion problem. In other words, congestion carries a price, which must be measured against the price of construction.

Until the last few years, the evaluation of proposed construction done in the context of a utility expansion to serve native load was simpler. A utility had a good idea about the rate of return that might be available on new assets from their prior rate case. If the assets were necessary to serve the native load and financially advisable then the company would likely propose a build. Thus, the evaluation of the wisdom of new construction began with an assumption that it was in the company's best interest.

Today, the financial aspect of new transmission construction is in a state of transition and some might say confusion. The rules for reimbursement for new builds are themselves "under construction" at the Federal Energy Regulatory Commission (FERC) and within the Midwest Independent System Operator (MISO) footprint (which may include the area in issue). Transmission construction has been in a state of flux for several years now. This is in part due to the usurping by the federal government of what had been traditionally state jurisdiction. Formerly the states insured adequate electricity was available at reasonable prices to native load customers. This model served Missouri well, producing electric rates that are lower than average coupled with generally reliable service. FERC's orders opening the grid, built by public utility companies to service their assigned load, to independent power producers changed the dynamics of the system in many ways. The ability of others to use the grid and the push toward more wholesale power sales increased the physical pressure on the grid and decreased the certainty of adequate return to a utility investing in new construction. The uncertainty of adequate return on this proposed line is further enhanced because no rate case is likely to be filed by AmerenUE prior to 2007. Rates are fixed until then at specific levels. More information would have helped the Commission to understand AmerenUE's willingness to build in this environment.

It is not clear who ultimately will help pay for the costs of building the proposed transmission line even though it is clear that others buying and selling electricity in the market place, other than AmerenUE and the Cooperatives, will be benefiting from the line after construction. There was no evidence about how much income from others using the line AmerenUE is expecting. And, there was no analysis evaluating the benefit of this construction to the native load customers except in a very general sense.

In the new world of Standard Market Design (SMD), financial incentives to relieve constraints are supposed to be exhibited in the market. Thus the costs for congestion theoretically will appear and be available in determining whether it is financially advisable to construct new lines. No evidence was presented about how these markets might impact the area we examined in this case, even though the markets are to be implemented before this line will be completed. Such an analysis would have been helpful in determining whether the costs of the constraints in this area warrant the costs of the construction. Furthermore, no evidence was provided as to whether constraints on the line might be relieved by the implementation of a locational marginal pricing (LMP) market – which is an advertised benefit. In the future financial and economic analysis should be a necessary component of assessing public interest in new construction.

If the conclusion is reached that the public interest warrants construction of a new line then what more is required of the Commission? Some states seem to

say that a Commission should rarely interfere with a utility's judgment in determining the location of a route. Others, some by specific statutory direction, require an evaluation and balancing of alternative routes as a part of its decision-making. If the latter method is used there is insufficient evidence to render a decision.

AmerenUE, prior to filing this case, began with several possible routes, but abandoned them in favor of the proposed route on the basis of two factors – the availability of easements over a significant portion of the route and a slightly shorter point-to-point distance on completion of the line. The problem with this is not whether the factors are relevant. It is whether they are the only factors which should be examined.

AmerenUE presents little evidence comparing alternative routes. While acknowledging that other routes were worthy of study, there was little or no evidence given on comparative financial costs, economic viability, environmental impact, and human impact. Obviously, this Commission cannot weigh the benefits and detriments of different routes without this information.

It is helpful to AmerenUE's position that easements are available across a good portion of the proposed route. Such easements should help lessen the financial impact on AmerenUE and arguably lessen the impact on the property rights of others. Nevertheless, it could be inferred that building an adjoining line by the 345 kv line from Bland to Franks would be done by a widening of existing easements along that line. Furthermore, there are fewer miles of construction along the Bland-Franks line. Yet the comparative assessments of impact, financial and otherwise, were not fully developed. The public interest argument for this line interestingly, was helped more by witnesses from non-AmerenUE employees. The Coops, upon questions from the bench, shed some light on merits of this proposed line location that gave the Commission a glimpse of how public interest for this construction favored this site over others. Why AmerenUE did not develop this argument more fully itself is curious. Creating a complete and open picture would give this Commission the insight and judgment to assess the wisdom of a route. Unfortunately, that was not done in this case.

The placement of this line was never adequately delineated. With this case the Commission may establish a precedent that companies need not give specifics of line location in order to gain approval. While AmerenUE's line position is not stated, it is clear that it may proceed with condemnation and construction. The establishment of line location is important. It allows the Commission to fully evaluate and balance public interest and it puts landowners potentially impacted on clear notice. AmerenUE's highway map with an approximate location of the line should not be deemed sufficient.

AmerenUE's argument as to line length is not in and of itself convincing. While shorter line length can improve efficiency, no evidence was presented on the specific savings. Taken to the extreme all lines would be built to the shortest distance and often with unacceptable results. The grid is made up of many interconnecting lines – a simple point-to-point assessment of distance is not always the whole picture from an engineering standpoint. Neither does it fit the new market designs. Advisable or not, we are moving toward economic models that contemplate financial transactions over hundreds of miles often paying little attention to miles of transmission used.

My dissent from this order does not reflect a conclusion that this route is not in the public interest. Rather, it is my belief that the parties have not presented the full record upon which this Commission can properly evaluate and balance public interest. Public interest should not be deemed satisfied without a complete evaluation. Individuals and families deserve and have a right to a thorough examination of that interest before their property rights are taken from them. A thorough evaluation here may have produced the same result – but that we do not know. It does not change the duty of this Commission to give the private property owners and AmerenUE ratepayers that process. We should have a better record on the comparisons of the viable routes including the respective human, financial, and environmental impact and advantage. This Commission should examine the financial consequences of this proposal in light of the developing markets.

Finally, this Commission and the landowners impacted deserve to know where this line will go. Otherwise the public interest cannot be properly weighed. Therefore, I must dissent from this order.

In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri.*

Case No. TR-2001-65
Decided August 26, 2003

Telecommunications §39. Exchange access is a service provided by a local exchange telecommunications company that enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service.

Telecommunications §39. Exchange access service is a locational monopoly for which competitive pressure cannot exert sufficient market discipline to maintain access rates at a reasonable level.

Telecommunications §39. The Commission made permanent a cap on exchange access rates that required competitive local exchange carriers to charge access rates no higher than the rates charged by the incumbent local exchange carrier operating in the same exchange, unless the CLEC can prove to the Commission that a higher rate is cost-justified.

APPEARANCES

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* The Commission, in an order issued on October 2, 2003, denied rehearing and reconsideration in this case.

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and

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Kenneth A. Schiffman, Senior Attorney, Sprint Corporation, 6450 Sprint Parkway, Overland Park, Kansas 66251, for Sprint Missouri, Inc., and Sprint Communications Company, L.P.

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Mary Ann (Garr) Young, Attorney at Law, William D. Steinmeier, P.C., Post Office Box 104595, Jefferson City, Missouri 65110, for McLeod USA Telecom Services, Inc.

Stephen F. Morris, Attorney at Law, 721 Brazos, Suite 600, Austin, Texas 78701, for Brooks Fiber Communications, MCImetro Access Transmission Services, LLC, and MCI WorldCom Communications, Inc.

Sheldon K. Stock, Attorney at Law, and *Jason Ross,* Attorney at Law, Greensfelder, Hemker & Gale, 200 Equitable Building, 10 South Broadway, St. Louis, Missouri, for Fidelity Communications Services I, Inc., Fidelity Communications Services II, Inc., and Fidelity Communications Services I, Inc.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

This case was established on August 8, 2000, to "investigate all of the issues affecting exchange access service, including particularly the actual costs incurred in providing such service, in order to establish a long-term solution which will result

in just and reasonable rates for this service."[1] This investigation was established as a follow-up to an earlier case, Case No. TO-99-596, which was itself an investigation into certain language appearing in Stipulations and Agreements used with competitive local exchange telecommunications companies (CLECs):[2]

> Notwithstanding the provisions of §392.500 RSMo (1994), as a condition of certification and competitive classification, CLEC agrees that, unless otherwise ordered by the Commission, CLEC's originating and terminating access rates will be no greater than the lowest Commission approved corresponding access rates in effect at the date of certification for the large ILEC(s) within whose service areas CLEC seeks authority to provide service. [FN 3] In this case the relevant access rates are those of Southwestern Bell.

The effect of this language was to cap most CLEC access rates at the level of Southwestern Bell's access rates. The Commission was concerned that this language might be a barrier to market entry and might be anticompetitive. Therefore, the Commission opened a case to examine whether the use of this language was in the public interest.

On June 1, 2000, the Commission issued its Report and Order in Case No. TO-99-596. Therein, the Commission concluded that the subject language was indeed both a barrier to market entry and anticompetitive. The Commission determined, further, that a cap on competitive exchange access rates is necessary because, given the present state of the telecommunications industry, "exchange access is a 'bottleneck' service that confers a locational monopoly upon the company providing it."[3] However, the record in Case No. TO-99-596, which did not include detailed cost data, permitted the Commission only to adopt an interim solution. That solution was to permit CLECs to set their access rates at the same level as the incumbent local exchange carrier (ILEC) in each exchange:[4]

> The Commission finds that the public interest would be best served by reductions in exchange access rates rather than by increases. However, the present record does not include detailed evidence concerning the actual costs incurred in providing exchange access service. Therefore, the present order is an interim solution addressing only the so-called "standard stipulation" as a barrier to market entry and as a

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[1] *In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Telecommunications Companies in the State of Missouri*, Case No. TR-2001-65 (*Order Establishing Case and Adopting Protective Order*, issued August 8, 2000).

[2] *In the Matter of the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, Case No. TO-99-596 (*Report & Order*, issued June 1, 2000).

[3] *Id.*

[4] *Id.*

> competitive disadvantage to CLECs. The Commission will establish a separate case in which to examine all of the issues affecting exchange service and to establish a long-term solution which will result in just and reasonable rates for exchange access service.

In the present matter, as a Commission investigation, the Commission's Staff was necessarily assigned primary responsibility to "gather, compile and analyze such information as is necessary and useful, including particularly data concerning the actual costs incurred, to examine all of the issues affecting exchange access service in order to establish a long-term solution which will result in just and reasonable rates for this service[.]"[5] Staff was specifically authorized and directed to "select and devise methodologies, engage consultants, and obtain information from other parties to this action."[6] As to the scope of this investigation, the Commission stated:[7]

> The purpose of this proceeding is "to investigate all of the issues affecting exchange access service, including particularly the actual costs incurred in providing such service, in order to establish a long-term solution which will result in just and reasonable rates for this service." The Commission believes that this statement is clear. To the extent that access rates are an issue, this case includes that issue.
>
> Note, however, that the Commission's intention is simply to *investigate* all issues. "Investigate" implies the gathering, compilation and analysis of data, which is exactly what the Commission has directed its Staff to do. Questions as to the Commission's authority to modify the access rates of price-cap regulated ILECs and rate-of-return regulated ILECs are thus premature. The Commission has not, so far, announced any intention to do those things.

Staff conducted an investigation as directed, obtaining information from the other parties and hiring a consultant to compile and analyze this information. The consultant's report was filed in the form of direct testimony on July 1, 2002.

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[5] *In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Telecommunications Companies in the State of Missouri,* Case No. TR-2001-65 (*Order Establishing Case and Adopting Protective Order,* issued August 8, 2000).

[6] *In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Telecommunications Companies in the State of Missouri,* Case No. TR-2001-65 (*Order Granting Clarification,* issued December 12, 2000).

[7] *In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Telecommunications Companies in the State of Missouri,* Case No. TR-2001-65 (*Order Adopting Procedural Schedule, Clarifying the Scope of this Proceeding, and Concerning Motion to Waive Service Requirement and Motion to Compel Discovery*, issued March 14, 2002.

Thereafter, the other active parties filed testimony and a hearing was held from September 9, 2002, through September 13, 2002. The Commission heard testimony from 14 witnesses and received 54 exhibits. Thereafter, the parties filed briefs and reply briefs. The last brief was filed on January 24, 2003.

Upon review of the record made in this matter, including the active parties' written arguments, the Commission noted the recommendations made by its Staff for further action:

> [T]he first course of action recommended by the Staff is to adopt the Staff's cost study as an effective method for calculating the actual costs of switched access service for all Missouri carriers. The second course of action recommended by the Staff is for the Commission to initiate a second phase of this case to determine whether the current switched access rates are just and reasonable, taking into consideration the actual costs incurred, and to explore all possible solutions if the Commission determines that rate adjustments are necessary. The possible solutions include: rate adjustments under the existing statutes; petitioning the Legislature for changes to the statutes that will allow the Commission to further its goals; using the Missouri Universal Service Fund to achieve access charge reform; expanding calling scopes; and perhaps other solutions not yet explored.

Accordingly, on June 16, 2003, the Commission directed its Staff to file a written proposal for a second phase of this case. Staff filed its proposal on July 15 and the parties filed their responses on August 15, with one belated response filed on August 18.

Reclassification of Exhibit 54:

At the evidentiary hearing of this matter, on September 13, 2002, the work papers of AT&T witness Michael Pauls were received into the record as Exhibit 54 and classified as "Highly Confidential" based on the concern shared by several parties that those work papers might contain highly confidential or proprietary information within the intendments of the Protective Order entered in this case.[8] Because those concerns could not be resolved immediately, the exhibit was designated "Highly Confidential" and cross-examination of Mr. Pauls in regard to it was conducted *in camera.* On December 2, AT&T moved to reclassify Exhibit 54 as a public document. Bell responded on December 5 and indicated that it had no objection to the reclassification; no other party responded.

The Commission will grant AT&T's motion and reclassify Exhibit 54 as a public document.

Discussion

As required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its

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[8] Tr. 6:1179-1187; Tr. 7:1193-1208 (HC).

position with respect to each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

The issues formulated by the parties and their positions on each issue are as follows:

1. What is the appropriate cost methodology (i.e. TSLRIC, LRIC, embedded, stand alone, etc.) to be used in determining the cost of switched access?

2. Should the cost methodology (i.e. TSLRIC, LRIC, embedded, stand alone, etc) for determining switched access costs be uniform and consistent for all Missouri LECs?

3. Should loop costs be included in the determination of the cost of switched access, and if so, at what level?

4. What are the appropriate assumptions and/or the appropriate values for the following inputs:

   A. Cost of capital.
   B. Switch discounts.
   C. Depreciation.
   D. Maintenance factors.
   E. Common and shared costs.
   F. Fill factors.
   G. Other major assumptions and/or inputs.

5. Is the current capping mechanism for intrastate CLEC access rates appropriate and in the public interest?

6. Are there circumstances where a CLEC should not be bound by the cap on switched access rates?

7. What, if any, course of action can or should the Commission take with respect to switched access as a result of this case?

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. 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.

The Parties:

By its Order of September 21, 2000, the Commission made all 173 certificated basic local exchange telecommunications service providers in Missouri parties to this case. However, only a few parties actively participated in the proceedings.

Most of the active parties are telecommunications carriers. These fall naturally into four groups. The first group consists of the large incumbent local exchange carriers (ILECs). The three largest of these collectively serve over 90 percent of Missouri's access lines.[9]

[9] Ex. 33, at 11.

SBC Missouri, L.P., doing business as SBC Missouri, is Missouri's largest ILEC. SBC was formerly known as Southwestern Bell Telephone Company and is referred to in this order as "Bell." Bell has 160 local exchanges in Missouri and over 200 switches.[10] Bell also provides long distance services in Missouri as an IXC.

Sprint Missouri, Inc., is a large ILEC and an IXC. Sprint has about 270,000 access lines in Missouri.[11] Sprint serves a higher percentage of rural exchanges than Bell.[12]

CenturyTel Missouri, Inc., and Spectra Communications Group, L.P., both do business as CenturyTel in exchanges purchased from Verizon, formerly known as GTE. CenturyTel is a large ILEC and an IXC.

ALLTEL Missouri, Inc., is an ILEC that serves "relatively low density, rural areas in Missouri."[13] It is often classed as a small ILEC in Missouri, although it is a carrier of national scope. In this proceeding, ALLTEL has been classed with the large ILECs.

The second group of carriers is the small ILECs, which collectively serve only less than five percent of Missouri's access lines.[14]

The Small Telephone Company Group (STCG) consists of 25 small ILECs.[15]

The Missouri Independent Telephone Group (MITG) consists of seven small ILECs.[16]

Four other small ILECs actively participated in this case: Holway Telephone Company, KLM Telephone Company, IAMO Telephone Company, and Green Hills Telephone Corporation. These companies are referred to as the Holway Group.

The third group of carriers is the competitive local exchange carriers (CLECs). These are telecommunications companies that compete with ILECs in the provision of local exchange services. Missouri's CLECs collectively serve about five percent of Missouri's access lines.

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[10] Tr. 4:615-616.

[11] Tr. 5:775.

[12] Ex. 22, at 13; Ex. 23, at 8.

[13] Ex. 3, at 20; Ex. 44, at 1.

[14] Ex. 33, at 11.

[15] Including BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, Inc., New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

[16] Including Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc., Modern Telecommunications Company, and Northeast Missouri Rural Telephone Company. Ex. 29, at 3. Modern Telecommunication Company has since merged into its corporate parent, Northeast Missouri Rural Telephone Company.

AT&T of the Southwest, Inc., is an IXC and also provides local exchange service as a CLEC in portions of Missouri.[17] In the provision of local service, AT&T uses both its own facilities and unbundled switching purchased from Bell.[18] TCG Kansas City, Inc., and TCG St. Louis, Inc., are CLECs affiliated with AT&T that provide facilities-based, local exchange services to businesses in St, Louis and Kansas City.[19] TCG St. Louis and TCG Kansas City each have their own switches.[20]

The fourth and final group of carriers is the IXCs that provide long distance telephone service. Bell, Sprint, Verizon, and CenturyTel are IXCs as well as ILECs. AT&T is primarily an IXC; it is also a CLEC.

Other parties to this case are the Staff of the Missouri Public Service Commission and the Office of the Public Counsel.

Intrastate Switched Access Service:

Intrastate exchange access, or switched access, is a telecommunications service that permits interexchange calls between subscribers located in different local exchanges within the state of Missouri.[21] It is a wholesale service that local exchange telecommunications companies sell to other carriers to permit them to "access" their customers through their networks.[22] A long distance or "toll" call incurs access charges at each end, originating and terminating.[23] Switched access is not sold to end users, that is, residential and business customers, but to other telecommunications carriers.[24] The access charge regime came into existence in 1983 with the break up of AT&T.[25]

Switched access service is a locational monopoly.[26] Consequently, competitive pressure cannot exert sufficient market discipline to maintain access rates at a reasonable level in the absence of a cap.[27] For ILECs subject to price-cap regulation, the cap is provided by the provisions of Section 392.245, the Price Cap Statute. For ILECs subject to traditional rate-of-return regulation and for telephone cooperatives, the cap is found in the Commission's authority to directly set access rates. For CLECs, the cap is imposed by the Commission as a condition of competitive classification.

Historically, state commissions and the federal government have acted to keep residential telephone service rates low in order to encourage a high level of

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[17] Ex. 47, at 2; Tr. 6:1024-1025, 1033, 1096.

[18] Tr. 6:1034.

[19] Ex. 47, at 2.

[20] Tr. 6:1044.

[21] Ex. 18, at 4.

[22] Ex. 12, at 7. The aggregate switched access rates discussed in this proceeding were calculated by adding the tariffed terminating and originating access rates and dividing that sum, by 2. *See* Tr. 2:465.

[23] Ex. 12, at 7.

[24] Tr. 2:383.

[25] Tr. 4:525.

[26] Tr. 1:84; 2:262; Ex. 12, at 12 (Meisenheimer concurring); Ex. 48, at 20 (Kohly concurring).

[27] Ex. 12, at 12.

participation in the local telephone network by residential customers.[28] As a result, business rates, toll rates and access rates have historically been set high, in order to produce sufficient revenue to support the low residential rates.[29] In Missouri, urban areas provide such support to rural areas, business customers support residential customers, and heavy users of toll services support light users.[30] Additionally, high access rates provide important support in high cost, rural areas.[31]

IXCs, such as AT&T, have complained about high Missouri intrastate switched access rates for years.[32] High switched access rates impact the carriers that terminate toll calls to those exchanges and necessarily result in higher prices for toll services.[33] Some IXCs refuse to serve some rural areas because of high access rates.[34] Others have imposed access recovery surcharges in Missouri. Additionally, these high access rates discourage the small ILECs from cooperating to provide expanded local calling scopes to their subscribers.[35] For example, it is difficult for a carrier to offer its subscribers either an expanded calling scope plan or a block-of-time plan for a monthly charge when it has to pay high access charges per minute to another ILEC to terminate those calls.[36] Lower access rates would make plans of this sort more attractive.[37] High access rates also distort the IXC market, create disincentives for IXCs to serve certain markets, and provide opportunities for discriminatory pricing.[38] They are anti-competitive and deter local market entry by imposing increased business expenses on new entrants.[39]

The CLEC Access Rate Cap:

Staff's expert, Ben Johnson, testified that CLEC access rates should continue to be capped at the level of the access rates of the ILEC in whose territory it provides services.[40] He testified that this conclusion is supported by several considerations. First, the general failure of Missouri CLECs to participate actively in this case indicates, in Johnson's opinion, that they are content with the current cap.[41] Second,

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[28] Ex. 15, at 8; Tr. 1:226-229; 5:765.

[29] Tr. 1:226-229.

[30] Tr. 1:161, 229-230, 2:260.

[31] Tr. 2:273.

[32] Ex. 35, at 14.

[33] Ex. 16, at 7.

[34] Ex. 35, at 14.

[35] Ex. 16, at 7-8.

[36] Tr. 4:551.

[37] Tr. 4:551.

[38] Ex. 48, at 24.

[39] Ex. 48, at 25.

[40] Tr. 2:260; Tr. 2:482 and Ex. 12, at 11 (Meisenheimer concurring); Ex. 15, at 7 (Unruh concurring). Staihr testified that Johnson's studies were not useful for answering this question. Tr. 5:762.

[41] Tr. 2:260-261; Ex. 16, at 3, and Ex. 17, at 8 (Unruh concurring).

his cost studies show that the CLECs' costs are not dramatically different than those of the incumbents and that, consequently, their access rates are high when compared to their costs.[42] Several parties supported this position in addition to Staff, including Public Counsel, ALLTEL, Bell, Sprint, and AT&T.[43]

Sprint's witness, Mark Harper, testified that the Commission's current system of CLEC access rate caps is "very consistent with the 'safe harbor' rules for CLEC access rates that exist at the F.C.C. and in other states."[44] Harper testified that it permits a CLEC to earn an identical revenue stream if it prices its services at the same level as the competing ILEC and it reduces barriers to market entry by providing rate certainty and permit simplified tariff filings for CLECs.[45]

Kent Larsen, an expert witness for the small ILECs, recommended that CLECs competing against price-capped ILECs be subject to the same price cap as the ILEC, whether or not the ILEC's access rates are actually set at the cap or not.[46] Larsen admitted, however, that such a capping scheme might provide an incentive for the ILEC to set its rates as high as possible.[47]

Robert Schoonmaker, another expert witness for the small ILECs, testified that the access rates of the large ILECs are based upon their average, statewide costs.[48] Consequently, a CLEC competing with a large ILEC in a rural exchange might well be competitively disadvantaged if its rates are capped at the level of the large ILEC's because its actual costs might be higher.[49] The F.C.C.'s "safe harbor" rules provide an exception and alternative "safe harbor" for companies that compete only in rural areas.[50] Schoonmaker recommended that the Commission establish an alternative cap for rural CLECs at the level of the National Exchange Carrier Association (NECA) rates for each access element.[51] CLECs operating only in rural areas would then be permitted to use the NECA rates without making a cost showing.[52] Schoonmaker admitted, however, that he had not reviewed the NECA rates to determine whether they were significantly higher than the access rates of the large ILECs.[53]

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[42] Tr. 2:260-261.

[43] Ex. 17, at 8. Sprint offers the *caveat* that the CLEC must have the opportunity to submit a cost study in support of a higher rate cap. Ex. 27, at 5.

[44] Ex. 27, at 6.

[45] Ex. 27, at 6-7.

[46] Ex. 29, at 21; Tr. 5:935. *See* Ex. 48, at 20 (Kohly apparently concurring).

[47] Tr. 5:935-936.

[48] Ex. 43, at 6.

[49] Ex. 43, at 6; Tr. 5:922-924.

[50] Ex. 43, at 6-7.

[51] Ex. 43, at 6-7; Tr. 5:895-896.

[52] Tr. 5:924.

[53] Tr. 5:930.

AT&T's expert witness, Matt Kohly, testified that the present cap should be retained with three exceptions.[54] First, a CLEC should be permitted higher rates on a showing that its costs are higher than the cap.[55] Second, a CLEC should be permitted higher rates in cases in which the ILEC has lowered its access rates but replaced the lost revenue with Universal Service support or some other revenue source inaccessible to the CLEC.[56] As the third exception, Kohly proposed a scheme of reciprocal access charges similar to the system of reciprocal charges for local traffic.[57] Kohly suggested that such a system would provide an incentive for the ILECs to reduce their access rates.[58]

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The Commission has jurisdiction over this matter pursuant to Section 386.250, which provides that the "jurisdiction, supervision, powers and duties" of the Missouri Public Service Commission shall extend[59]

> To all telecommunications facilities, telecommunications services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide telecommunications service between one point and another within this state or so far as such telecommunications services are offered or provided by a telecommunications company between one point and another within this state, except that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the rates charged by a telephone cooperative for providing telecommunications service within an exchange or within a local calling scope as determined by the commission, except for exchange access service[.]

The Scope of This Case:

As noted previously, the Commission opened this case in order to determine whether the interim cap on CLEC access rates imposed in Case No. TO-99-596 was cost-justified. The Commission also sought to investigate all other issues relating to exchange access service, and the parties responded by bringing many

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[54] Ex. 48, at 1-2, 20; Tr. 6:1047-1051, 1117-1124.

[55] Ex. 48, at 1-2, 20.

[56] Ex. 48, at 1-2, 20-21.

[57] Ex. 48, at 1-2, 21-23; Tr. 6:1025-1026.

[58] Ex. 48, at 22-23.

[59] Section 386.250(2), RSMo 2000. All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

issues to the Commission's attention. Further proceedings with respect to those issues, if any, will occur in other cases.

Of the several issues formulated by the parties, the Commission will address only two, namely, issues 5 and 6, that relate to the cap on CLEC access rates. The Commission will not address the issues relating to what sort of costing methodology should be used, whether the same method should be applied to all carriers, whether loop costs should be included in reckoning access costs, and if so, to what extent, or what specific values and assumptions should be used as inputs. The Commission will also not address the issue of what further action to take, other than to note that no further action will be taken in this case, at least.

The Cap on CLEC Access Rates:

The parties formulated two issues relating to the cap on CLEC access rates:

> **5. Is the current capping mechanism for intrastate CLEC access rates appropriate and in the public interest?**
>
> **6. Are there circumstances where a CLEC should not be bound by the cap on switched access rates?**

Exchange access is a distinct telecommunications service under Missouri law, defined as "a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service[.]"[60] A local exchange telecommunications company (LEC),[61] in turn, is "any company engaged in the provision of local exchange telecommunications service,"[62] which is "telecommunications service between points within an exchange[.]"[63] An exchange is "a geographical area for the administration of telecommunications services, established and described by the tariff of a telecommunications company providing basic local telecommunications service[.]"[64]

LECs are of several sorts. Incumbent LECs, or ILECs, are LECs "authorized to provide basic local telecommunications service in a specific geographic area as of December 31, 1995, or a successor in interest to such a company[.]"[65] Basic local telecommunications service is "two-way switched voice service within a local calling scope as determined by the commission," and any of several services such as local emergency (911) service, local operator service, local directory assistance, and a white pages listing.[66] Basic local telecommunications service is sometimes referred to as "Plain Old Telephone Service (POTS)." The Missouri statutes do not

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[60] Section 386.020(17).

[61] "LEC" is local exchange carrier or local exchange company.

[62] Section 386.020(30).

[63] Section 386.020(31).

[64] Section 386.020(16).

[65] Section 386.020(22).

[66] Section 386.020(4).

refer to CLECs, but rather to the "alternative local exchange company" which is "a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service or switched exchange access service, or any combination of such services, in a specific geographic area subsequent to December 31, 1995[.]"[67]

The Missouri statutes also provide for the classification of distinct services, or companies, as competitive.[68] Competitive classification can be granted to a company only if all of the services it offers are found to be competitive.[69] Where competitive classification is granted, the Commission is authorized to waive the application of its rules and of certain statutory provisions to the competitive service or company.[70] The Commission is authorized to impose "any conditions reasonably . . . necessary to protect the public interest" where it has suspended the application of a statutory provision consequent to the classification of a carrier or service as competitive.[71] The cap imposed on the access rates of competitive carriers by the Commission is authorized by this provision.

The cap on CLEC access rates proved to be the least contentious issue raised in this proceeding. Based on the evidence adduced herein, the Commission concludes that a cap of some kind on CLEC access rates continues to be necessary and thus in the public interest. Without such a cap, and in the absence of any market forces operating on this locational monopoly, a CLEC could set its access rates unduly high. This potential rate-setting freedom, further, is not available to other LECs: the Commission sets the access rates of telephone cooperatives and rate-of-return regulated LECs and price-cap-regulated LECs cannot exceed the maximum allowable prices calculated under Section 392.245.

Most of the active parties to this case support the continued application of the interim cap imposed in Case No. TO-99-596. None of the active parties took the position that a cap is not required. There were suggestions that the cap be set higher than the rates of the competing ILEC in certain circumstances, such as in rural exchanges, or where a price-cap-regulated ILEC has set its rates below the maximum allowable price, or where the ILEC is receiving revenue support unavailable to the CLEC. Several parties suggested that a CLEC should be permitted rates above the cap where it can show cost-justification.

Having considered the evidence and the arguments of the parties, the Commission will make the interim cap permanent. The cost studies received in this case show that the interim cap is, if anything, high in comparison to costs. That is only fair, in view of the fact that the evidence is persuasive that access rates are high in comparison to costs for all of the LECs. In any event, the Commission finds the lack of active participation by Missouri CLECs to constitute eloquent testimony that they are satisfied, by and large, with the current situation.

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[67] Section 386.020(1).

[68] Section 392.361.

[69] Section 392.361.3.

[70] Section 392.361.5.

[71] Section 392.361.6.

The Commission will adopt the suggestion that a CLEC may petition the Commission for access rates above the cap upon a showing that the same are cost-justified. The Commission will not adopt any of the other exceptions proposed in this case.

IT IS THEREFORE ORDERED:

1. That the Motion to Reclassify Exhibit 54 as a Public Document, filed on December 2, 2002, by AT&T Communications of the Southwest, Inc., is granted. Exhibit 54 is hereby reclassified as a public (NP) document.

2. That the Staff of the Missouri Public Service Commission need not file a reply by August 29, 2003, as previously directed by the Commission in its Order of June 16, 2003.

3. That any pending motions not expressly granted are denied.

4. That applications for certificates of service authority to provide basic local telecommunications service as a competitive company shall be granted only on condition that the applicant shall not charge rates for exchange access service in excess of those charged by the incumbent local exchange carrier in each exchange within its service area, except as the Commission may otherwise authorize upon a showing that higher access rates are justified by costs.

5. That this Report and Order shall become effective on September 5, 2003.

6. That this case may be closed on September 6, 2003.

Simmons, Ch., Gaw and Forbis, CC.,
concur and certify compliance with the
provisions of Section 536.080, RSMo 2000.
Clayton, C., not participating.
Murray, C., absent.

In the Matter of the Investigation into the Earnings of Steelville Telephone Exchange, Inc.

Case No. IR-2004-0061
Decided September 25, 2003

Telephone §14. Based upon an audit, the Staff of the Commission concluded that Steelville Telephone Exchange, Inc., had excess earnings. Thereupon, the Commission approved a Stipulation and Agreement between Staff, Steelville and the Office of the Public Counsel whereby Steelville agreed to: (1) a rate reduction of $330,411; (2) improve its system in accordance with the Communications Assistance for Law Enforcement Act; (3) a three-year amortization of rate-case expenses of $22,677 per year; and (4) other miscellaneous corrections and changes.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves a stipulation and agreement submitted by the parties regarding the Staff of the Commission's audit of the earnings of Steelville Telephone Exchange, Inc.

Procedural History

The Staff of the Missouri Public Service Commission conducted an investigation into the earnings of Steelville Telephone Exchange, Inc. The audit was based upon the twelve months ending December 31, 2001, and updated for known and measurable changes occurring during 2002. After negotiations, Staff filed a motion on July 23, 2003, requesting that the Commission open a case to consider the Stipulation and Agreement between Staff, the Office of the Public Counsel and Steelville Telephone. Thereupon, the Commission granted the motion, directed that proper parties be given an opportunity to intervene and, as agreed to in paragraph 8 of the agreement, directed that Staff file suggestions in support of the agreement.

Interested parties wishing to intervene were required to do so no later than August 26, 2003. No requests for intervention were filed. Staff, on September 10, 2003, filed suggestions in support of the Stipulation and Agreement. No other party to the agreement filed a response.

The Stipulation and Agreement

The parties agreed to reduce the gross intrastate revenues of Steelville Telephone by $330,441 on an annual basis. The reduction was accomplished by reducing intraLATA and interLATA terminating rates and through a reduction in charges for 9-1-1 related services. Additionally, upon the effective date of this order, Steelville Telephone will begin to accrue depreciation expenses based on rates delineated in an attachment to the Agreement.

In its suggestions supporting the Stipulation and Agreement, Staff states that after an audit, its initial Accounting Schedule showed an earnings excess by

Steelville Telephone of $715,621. Through negotiations, Staff agreed to include in its revenue requirement calculation of rate base additions the costs of Steelville Telephone's system improvements associated with the Communications Assistance for Law Enforcement Act. This reduced Steelville's excess earnings by $332,555. The Communications Assistance for Law Enforcement Act of 1994 was intended to assist law enforcement in executing electronic surveillance and requires carriers to design or modify their systems to ensure that lawfully authorized electronic surveillance can be performed. Additionally, Staff agreed to a three-year amortization of the rate case expenses of $22,677 per year, incurred by Steelville in this proceeding. Other miscellaneous corrections and changes reduced the excess earnings by $29,948. The resulting balance was $330,441.

Discussion

As part of the Stipulation and Agreement, contingent upon the Commission's acceptance of the agreement, the parties waived their rights to present testimony, cross-examine witnesses, to present oral argument, to have the transcript read by the Commission, and to rehearing and judicial review. The Commission has the legal authority, under Section 536.060, RSMo 2000, to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case. The Commission notes that 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.[1] Consequently, the Commission need not make findings of fact or conclusions of law in this order.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on July 22, 2003, by the Staff of the Missouri Public Service Commission, the Office of the Public Counsel and Steelville Telephone Exchange, Inc., is approved as a resolution of all issues in this case. A copy of the Stipulation and Settlement Agreement is attached as Attachment A.

2. That all parties to the Stipulation and Settlement Agreement are ordered to comply with the terms of the Stipulation and Agreement.

3. That this order shall become effective on October 5, 2003.

4. That this case may be closed on October 6, 2003.

Simmons, Ch., Murray, Gaw,
Forbis, and Clayton, CC., concur.

Jones, Regulatory Law Judge

Editor's 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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[1] Section 536.090, RSMo 2000.

In the Matter of Aquila Networks – L&P's Purchased Gas Adjustment Factors to be Reviewed in its Actual Cost Adjustment for 2001-2002.

Case No. GR-2002-468
Decided September 25, 2003

Gas §17.1. The Commission required a natural gas utility to adjust its ACA balances to comply with the uncontested recommendations of the Commission's Staff.

ORDER REQUIRING ADJUSTMENT OF ACA BALANCE AND REQUIRING ACTIONS RELATED TO THE COMPANY'S RELIABILITY ANALYSIS

This case was opened for the purpose of receiving the 2001-2002 Actual Cost Adjustment (ACA) filing of Aquila, Inc., d/b/a Aquila Networks – L&P (ANLP). On August 7, 2003, the Staff of the Public Service Commission filed a recommendation and memorandum indicating that it has reviewed ANLP's 2001-2002 ACA filing. Staff indicated that it audited the billed revenues and actual gas costs for the period of September 1, 2001 to August 31, 2002, included in ANLP's computation of the ACA rate. Staff also conducted a reliability analysis for ANLP.

On August 8, the Commission ordered ANLP to respond to Staff's recommendations no later than September 8. ANLP filed its response to Staff's recommendation on September 8. In that response, ANLP accepts Staff's recommendations and resulting balances. More than ten days have passed since ANLP accepted Staff's recommendations and Staff has not filed any response. The Office of the Public Counsel, although a party to this case, has not participated or filed any pleadings.

Staff's proposed adjustments would make various adjustments to ANLP's revenues and costs and would require ANLP to take certain actions regarding its reliability analysis. Staff and ANLP agree upon the adjustments and actions proposed by Staff and those adjustments and actions appear to be reasonable.

IT IS THEREFORE ORDERED:

1. That Aquila, Inc., d/b/a Aquila Networks – L&P shall increase the August 31, 2001 under-recovered ACA balance by $6,862.33 to reflect the interest accrued on the Deferred Carrying Cost Balance during the 2000-2001 ACA period.

2. That Aquila, Inc., d/b/a Aquila Networks – L&P shall increase its PGA/ACA Revenues by $177,730 and increase gas costs by $105,265 to reflect its corrections to its filing per its reconciliation of those accounts.

3. That Aquila, Inc., d/b/a Aquila Networks – L&P shall decrease gas cost by $24,552 in order to correct the calculation of the monthly imbalances and monthly storage injection and withdrawal amounts.

4. That Aquila, Inc., d/b/a Aquila Networks – L&P shall decrease the amount of Deferred Carrying Cost Balance interest credited to customers by $3,998.

5. That Aquila, Inc., d/b/a Aquila Networks – L&P shall reduce the reported amount of billed transition costs by the amount of $1,571.

6. That Aquila, Inc., d/b/a Aquila Networks – L&P shall take the following actions related to its reliability analysis by November 1, 2003:

a. Provide growth estimates to Staff for the ACA periods requested by Staff;

b. Review its procedures of use of heating-degree-days in its usage estimates;

c. Estimate the peak day reserve margin for the 2002/2003 ACA period and for two years beyond that, explain any planned changes in contract volumes, submit details of its evaluation for its plans to extend/modify/replace the transportation and storage contracts, and explain the rationale for the reserve margin for each of these years;

d. Identify the minimum storage inventories that must be in place at the end of each winter month to assure sufficient storage volumes are available in later winter months; and

e. Continue to provide Staff with comparisons of actual usage to that estimated by the modeled usage for each service area, especially as occurrences with higher heating-degree-days are experienced.

7. That this order shall become effective on October 5, 2003.

8. That this case may be closed on October 6, 2003.

Simmons, Ch., Murray, Gaw, Forbis and Clayton, CC., concur

Woodruff, Senior Regulatory Law Judge

In the Matter of a Commission Inquiry into the Possibility of Impairment without Unbundled Local Circuit Switching When Serving the Enterprise Market.

TW-2004-0148
Decided October 8, 2003

Telephone §§14, 36. Based on the Federal Communication Commission's triennial review order, and the comments received in response to the Commission's request for comments, the Commission accepted the FCC's finding that no impairment exists in the Enterprise Market even without unbundled local circuit switching.

NOTICE CLOSING CASE

On September 5, 2003, the Commission issued a notice setting a deadline for comments of October 6, 2003. The notice was sent to all certificated incumbent local exchange carriers and competitive local exchange carriers (CLECs), as well as the Commission Staff and the Office of the Public Counsel.

The Commission requested comments on whether it should begin a proceeding to take evidence on the possibility that competitive local exchange carriers may be impaired without unbundled local circuit switching when serving the enterprise market, or whether this Commission should accept the Federal Communications Commission's finding that no such impairment exists.[1]

Comments were submitted by Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, the Staff of the Commission, the Office of the Public Counsel, and Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of Missouri, LLC. All of the commenters recommend that the Commission not proceed to take evidence on this question, but rather should accept the FCC's finding of no impairment.

The FCC studied this question at length in the triennial review process, and found that CLECs will not be impaired in competing for business customers (the enterprise market) if the CLECs do not have access to unbundled local circuit switching. The FCC's decision allows state commissions to rebut this finding if they adduce evidence that the finding does not apply in a particular state.

The Commission posed the question of whether it should take evidence to all CLECs and all incumbent local exchange carriers certificated in Missouri. Only two telecommunications companies provided comments, and both of them answered that the Commission should not take evidence. The Office of the Public Counsel and the Staff of the Commission took the same position.

Based on the FCC's triennial review order, and the comments received in response to the Commission's request for comments, the Commission will

[1] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* Released August 21, 2003 in Federal Communications Commission (FCC) docket numbers 01-338, 96-98, and 98-147.

accept the FCC's finding that no impairment exists. No further activity will take place in this case, and it may be closed.

Mills, Deputy Chief Regulatory Law Judge

In the Matter of Missouri Gas Energy's Request for Approval of Tariff Sheets Concerning Daily Balancing of Natural Gas for Large Volume Customers.

Case No. GT-2004-0049
Decided October 21, 2003

Gas §§40, 41. The Commission approved a unanimous stipulation and agreement concerning tariff changes proposed by a natural gas utility to permit daily allocations of natural gas among its large volume transport customers to match daily allocations from the supplying pipeline company.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

On July 1, 2003, Missouri Gas Energy, a division of Southern Union Company, (MGE) filed a tariff that would implement a system of daily balance management for MGE's Large Volume Transport customers. That tariff carried an effective date of August 1. On July 31, acting in response to motions to suspend filed by the Commission's Staff and by Midwest Gas Users' Association – a group of large volume transport customers – the Commission suspended MGE's tariff until May 29, 2004. The matter was set for hearing on November 3 and 4, 2003.

On October 14, MGE, Staff, Midwest Gas Users' Association, Kansas City Power & Light Company, and the Office of the Public Counsel filed a unanimous stipulation and agreement that purports to resolve all contested issues. A copy of the stipulation and agreement is attached to this order. In the stipulation and agreement, the parties agree that after the Commission approves the stipulation and agreement, MGE will submit revised, agreed-upon, tariff sheets that will be acceptable to all parties. The parties also ask the Commission to take expedited action to approve those revised tariffs in time for them to take effect on November 1.

Contingent upon the Commission's acceptance of the stipulation and agreement, the parties waive their rights to call, examine, and cross-examine witnesses; to present oral argument or briefs; to have the transcript read by the Commission; to rehearing; and to judicial review. Section 536.060, RSMo 2000, gives the Commission the authority to accept a stipulation and agreement offered by the parties as a resolution of the issues raised in this case.

Staff filed suggestions in support of the stipulation and agreement on October 17. Staff indicates that MGE has filed its tariff revisions in response to actions taken by Southern Star Pipeline, which delivers more than 60 percent of MGE's natural gas supplies. The Federal Energy Regulatory Commission (FERC) has

approved Southern Star's tariff that will allow it to implement a system of daily allocation of natural gas on its system. Southern Star's tariff will become effective on November 1. MGE's tariff changes are needed to permit daily allocations among its large volume transport customers to match the allocations coming from the pipeline company. Staff does not oppose MGE's efforts to tighten the controls on its distribution system because those controls will allow MGE to maintain a proper balance and ensure the integrity of its distribution system.

After reviewing the unanimous stipulation and agreement and Staff's suggestions in support, the Commission finds that the stipulation and agreement filed on October 14 should be approved.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on October 14, 2003, is approved, and the signatory parties are ordered to comply with its terms.

2. That this order shall become effective on October 31, 2003.

Simmons, Ch., Murray, Gaw, Forbis and Clayton, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's 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 Union Electric Company for Permission and Authority to Construct, Operate, Own, and Maintain a 34.5 Kilovolt Distribution Line in New Madrid County, Missouri and Mississippi County, Missouri ("Matthews-East Prairie Line").

Case No. EA-2004-0077
Decided October 21, 2003

Electric §30. The Commission granted an electric utility's uncontested request for authority to construct an electric distribution line outside its certificated service area.

Electric §30. A utility need not seek Commission approval to construct an additional transmission line within its own certificated service territory.

ORDER GRANTING APPLICATION FOR AUTHORITY TO CONSTRUCT 34.5 KILOVOLT DISTRIBUTION LINE

On August 4, 2003, Union Electric Company d/b/a AmerenUE filed an application asking the Commission for authority to construct a 43.5-kilovolt-distribution line in New Madrid and Mississippi counties in Missouri. The application indicates

that the proposed distribution line will be approximately 12.6 miles long and will run from the Matthews Substation in New Madrid County to the East Prairie Substation in Mississippi County. Approximately 5.5 miles of the proposed line are outside AmerenUE's certified service area. It is for those 5.5 miles of line that AmerenUE seeks authorization from the Commission.

The application indicates that the proposed distribution line will be constructed using single pole wood structures averaging 50 feet in height. No razing of any man-made structures is anticipated as a result of the construction. AmerenUE estimates that the project, including the proposed line, right-of-way costs, and substation construction, will cost $2.9 million and will be financed from funds available in its treasury, a portion of which may be obtained by new financing. The amount and nature of any new financing subject to the jurisdiction of the Commission will be submitted to the Commission for approval. The application indicates that the other utilities having facilities that will be crossed by the proposed line have waived any objection to the proposed construction.

AmerenUE's application indicates that the proposed distribution line has multiple benefits that are necessary to comply with good utility practice. AmerenUE indicates that construction of this line will permit a quick restoration of service during an outage of the major area supply 161-34.5 kV transformer near Charleston. It will also allow for quick restoration of service in the event of outages on three separate overhead line. These three overhead lines are: a 161 kV 10.5-mile line from Miner to Charleston; a 34.5 kV 10.6-mile line from Charleston to East Prairie; and a 34.5 kV 16.0-mile line from Miner to Matthews. During an outage of any one of these lines, nearly 1,460 customers could be without service during a 6-24 hour window. AmerenUE indicates that with the new line in place these customers would not be out of service.

On August 7, the Commission issued an order directing that notice of AmerenUE's application be given to the general public and to interested parties. That order also directed that any person wishing to intervene file an application to do so not later than August 27. No applications to intervene have been received. No party has requested a hearing.

AmerenUE's application indicates that it proposes to have the new line in service in June 2004. In order to have the line in service by that date, it must begin construction by November 1, 2003. For that reason AmerenUE asked the Commission to approve its application by November 1. In response to AmerenUE's request, the Commission issued an order on September 3 requiring the Commission's Staff to file a recommendation by October 14. The order also permitted any other interested party to file a recommendation by October 14. Staff filed its recommendation on October 15, along with a motion requesting leave to late file. Although the Office of the Public Counsel is a party to this case, it did not file a recommendation. No party has requested a hearing.

Staff's recommendation indicates that the route chosen for the distribution line is a short and direct route along existing roadways and will minimize the impact on existing residential structures and farming operations. Staff states that the proposed distribution line will benefit the electric customers in this area by

providing a quick restoration in the event of an outage. Staff recommends that AmerenUE's application be granted.

Section 393.170.1, RSMo 2000, provides that no electric corporation may begin construction of an electric plant without first having obtained the permission and approval of the Commission. Section 393.170.3, RSMo 2000, gives the Commission the power to grant that permission and approval if it determines that such construction is necessary or convenient for the public service. In *Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177 (Mo. App. 1960), the court held that a public utility was not required to obtain an additional certificate of convenience and necessity to construct an additional transmission line within a territory already allocated to it. Therefore, AmerenUE is only required to seek authority for the 5.5 miles of transmission line that it seeks to build outside its certificated service territory.

After reviewing AmerenUE's verified application, Staff's recommendation, and having heard no objections, the Commission finds that construction of the distribution line proposed by AmerenUE will serve the public convenience and necessity. As a result, AmerenUE's application should be approved.

IT IS THEREFORE ORDERED:

1. That the application filed by Union Electric Company d/b/a AmerenUE for permission and authority to construct, operate, own, and maintain a 34.5 kilovolt distribution line in New Madrid County and Mississippi County, Missouri, is granted.

2. That Staff's motion to late file its recommendation is granted.

3. That nothing in this order shall be considered a finding of the Commission of the reasonableness of the expenditures herein involved, the value for ratemaking purposes of the facilities herein involved, or as an acquiescence in the value placed upon those facilities by Union Electric Company d/b/a AmerenUE. Furthermore, the Commission reserves the right to consider the ratemaking treatment to be afforded these expenditures in any later proceeding.

4. That this order shall become effective on October 31, 2003.

5. That this case shall be closed on November 1, 2003.

Simmons, Ch., Murray, Gaw, Forbis and Clayton, CC., concur

Woodruff, Senior Regulatory Law Judge

In the Matter of the Tariff Filing of Sprint Missouri, Inc. d/b/a Sprint to Increase the Rate for the Metropolitan Calling Area Plan.*

Case No. IT-2003-0292
Decided November 4, 2003

Telecommunications §§14, 45. The Commission determined that, whether the price cap statute creates a rebuttable or an unrebuttable presumption that a properly calculated price cap increase is just and reasonable, the increase proposed by Sprint should be approved.

ORDER APPROVING TARIFFS

Syllabus:

The Commission determines that, whether the price cap statute creates a rebuttable or an unrebuttable presumption that a properly calculated price cap increase is just and reasonable, the increase proposed by Sprint should be approved.

Procedural History:

On January 28, 2003, Sprint Missouri, Inc. d/b/a Sprint filed a tariff sheet to increase the residential and business monthly rate for the Metropolitan Calling Area (MCA) Plan. The tariff bears an effective date of February 28, 2003. In order to further investigate the proposed tariff, in an order issued February 20, 2003, the Commission suspended it until November 28, 2003.

Pursuant to an agreed-upon procedural schedule, the parties[1] submitted the case to the Commission on stipulated facts and briefs. The Commission adopts the stipulated facts and makes them its findings for the purposes of this case.

Stipulated Facts:

1. Under Section 386.020 (30), RSMo. 2000, Sprint Missouri, Inc. ("Sprint")[2] is a large "Local Exchange Telecommunications Company."

2. On December 23, 1992, the Commission issued an order in Case No. TO-92-306 approving a Joint Recommendation, in which Sprint concurred, that provided that Sprint would offer an extended calling plan in its service territory under the name of the Metropolitan Calling Area ("MCA") Plan. The MCA Plan was structured so that it would be offered by the local exchange companies operating in and around Kansas City, St. Louis and Springfield. In the Kansas City area, the MCA Plan was structured so that it would be offered in five tiers. Sprint is a basic

* The Commission, in an order issued December 2, 2003, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (03CV326644) and later appealed to the Missouri Court of Appeals - Western District (WD64737)

[1] In addition to Sprint, the parties are the Staff of the Commission, the Office of the Public Counsel, and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (an intervenor price-cap-regulated incumbent local exchange carrier).

[2] Sprint Missouri, Inc. previously operated under the name United Telephone Company of Missouri.

local exchange company for some of the areas served in optional Tier 3, optional Tier 4, and optional Tier 5 of the Kansas City area MCA Plan. The December 23, 1992 order also approved the following rates for the MCA Plan offering for the tiers in Sprint's territory:

Kansas City MCA-3
Residence $12.35
Business $24.80

Kansas City MCA-4
Residence $21.55
Business $46.75

Kansas City MCA-5
Residence $32.50
Business $70.70

3. Effective January 8, 1994, Sprint began offering the MCA Plan in its service territories in tiers 3-5 in the Kansas City area. The terms, conditions, and rates for Sprint's MCA Plan were placed in Sprint' P.S.C. Mo. No 22. The rates set in Sprint's tariff were the rates established in the Commission's 1992 order in Case No. TO-92-306.

4. The service offered under Sprint's MCA Plan is a "non-basic telecommunications service" as that term is defined in Section 386.020(34), RSMo.

5. On August 21, 1999, the Commission determined that Sprint satisfied the requirements to become subject to price cap regulation pursuant to Section 392.245, RSMo, in its Order Approving Price Cap Application in Case No. TO-99-359.

6. On January 28, 2003, Sprint filed the tariff revisions that initiated this case. The Sprint tariff revisions seek to increase residential and business prices for its optional Metropolitan Calling Area (MCA) service in optional tiers 3-5 by an amount up to or equal to eight percent over the rates set in 1994, which remain in effect today. The proposed effective date for the tariff was February 28, 2003. In the tariff filing, Sprint seeks to increase actual rates for its optional MCA service to the following amounts:

		Residence	Business
1.	Kansas City MCA-3 Flat Rate Option	***$13.00***	***$26.78***
2.	Kansas City MCA-4 Flat Rate Option	***$23.00***	***$50.49***
3.	Kansas City MCA-5 Flat Rate Option	***$35.00***	***$76.35***

7. On February 20, 2003, the Commission suspended the tariff revisions until November 28, 2003.

Discussion:

Whether the Commission should approve Sprint's proposed tariff hinges on two questions: 1) Did the Commission in previous cases "cap" MCA rates? and 2) Does the price-cap statute require the Commission to approve a properly-calculated rate increase for non-basic services without any further inquiry?

The Commission will first address the question of whether the Commission has frozen MCA rates. In Case No. TO-92-306, the Commission approved Sprint's rates for MCA service. The Commission next addressed MCA rates generally in Case No. TO-99-483. The parties all debate the meaning of the following language in the Report and Order in that case:

> However, while the Commission finds that both the ILECs and the CLECs should be given flexibility to set rates lower than the rates set out in Case No. TO-92-306, the evidence also suggested that it would be reasonable, necessary and in the public interest to place a cap on those rates to protect consumers from price increases. The rates set in 1992 were found to be just and reasonable and were not based on cost to the carriers; thus, those rates are still a just and reasonable cap on the price of MCA service to consumers.[3]

All the parties, with the exception of the Office of the Public Counsel, agree that the Commission did not intend to cap MCA rates for all time at the level set in 1992. The Commission does not believe that the Report and Order in Case No. TO-99-483 intended to preclude any increase in MCA rates regardless of future circumstances. Indeed, to have done so would have been beyond the Commission's authority. The Western District Court of Missouri has observed of the Commission that:

> Its supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.[4]

More recently the same court, faced with the question of whether the Commission could change or abrogate an order in which it approved a moratorium on rate increases, quoted with approval the passage above from the *Chicago, Rock Island* case. It went on to hold that, since "the very purpose of having the Commission is to have an agency with such expertise as to be sensitive to changing conditions," any order of the Commission is subject to abrogation at the Commission's discretion.[5] Public Counsel, the only party arguing that the Commission is bound today by its September 7, 2000 Report and Order in Case No. TO-99-483, does not

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[3] Case No. TO-99-483, Report and Order issued September 7, 2000, pp. 23-24.

[4] *State ex rel. Chicago, R.I. & P.RR Co. v. Public Service Commission*, 312 S.W.2d 791, at 796 (Mo.1958).

[5] *State ex rel. Jackson County v. P.S.C.*, 532 S.W.2d 20, at 29-30 (Mo. banc 1976).

address the long-standing case law that clearly – and wisely – states that a prior Commission order cannot serve to prevent the Commission from exercising its discretion.

The Commission concludes that there is no reason to approach the tariffs at issue here differently than it would approach any increase under the price cap scheme of regulation; the fact that they would raise MCA rates and that the Commission considered MCA rates in TO-99-483 does not control.

The Commission now turns to the issue of whether the proposed tariffs should be approved pursuant to the price cap statute.[6] There is not unanimity within the Commission on the proper interpretation of the price cap statute; two different interpretations are followed. However, in this case, the Commission concludes that the tariffs should be approved under either interpretation. Under the circumstances of this case, the similarities between the two interpretations (a presumption that a properly-calculated price cap increase is just and reasonable) are controlling, and the differences (a rebuttable presumption as opposed to an unrebuttable presumption) do not come into play.

Under the first interpretation, the price cap statute creates an unrebuttable presumption that a properly calculated price cap increase is just and reasonable. In this case, there is no question that the tariffs at issue were properly calculated, and therefore, according to this reading of the price cap statute, the Commission must approve them.

Under the second interpretation of the price cap statute, a properly calculated increase is afforded a rebuttable presumption of being just and reasonable. In this case, no party has presented evidence that the proposed increase is not just and reasonable. Public Counsel, the only party that urges the Commission to reject the proposed tariffs, does not allege that it is unjust or unreasonable to implement an eight percent (or less) increase after ten years. Public Counsel's main argument is that the Commission intended to cap MCA rates in its Report and Order in Case No. TO-99-483, an argument that the Commission has already rejected. Under this second interpretation of the price cap statute, the Commission concludes that there is no reason to find that Sprint's proposed increase is not just and reasonable, that it is consistent with Section 392.200, RSMo, and indeed there is reason to find that it is just and reasonable.

Conclusion:

The Commission has examined the contentions that these tariffs should not approved because they affect MCA rates, and found them to be erroneous. Under either interpretation of the price cap statute, the tariffs at issue should be approved. Accordingly, this order approves the tariffs.

IT IS THEREFORE ORDERED:

1. That the following tariff sheet filed by Sprint Missouri, Inc. d/b/a Sprint on January 28, 2003, and assigned tracking number JI-2003-1401, is approved for service on and after November 14, 2003:

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[6] Section 392.245, RSMo Supp. 2002. All subsequent statutory references, except where otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

P.S.C. MO. - No. 22 Section 48
Second Revised Page 4 canceling First Revised Page 4

2. That this order shall become effective on November 14, 2003.

3. That this case may be closed after November 15, 2003.

Murray and Forbis, CC., concur, Clayton, C., concurs,
concurring opinion to follow
Gaw, Ch., and Simmons, C., dissent, dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

Dissenting Opinion of Commissioners Gaw and Simmons

We respectfully dissent from the result reached by the majority. But we agree with the portion of the majority opinion that reads the price cap statute to give the Commission discretion to reject a properly calculated price cap increase if it is shown to not be just and reasonable. In particular, we agree with the analysis of the price cap statute presented in the concurring opinion of Commissioner Clayton.

We do not agree with the majority's analysis of the status of the proposed MCA increase. MCA service is a creation of this Commission. It is not a service like, for example, call waiting that has been developed and proposed by telecommunications companies. The Commission determined that MCA service should be offered, determined the parameters of the service, ordered local exchange carriers to offer it, and established prices for it. Furthermore, for most people MCA service is much more like basic service than a typical non-basic service like call waiting. We do not agree that a price cap company should be able to increase rates for this unique service without more Commission oversight than is afforded to other non-basic services under the price cap statute.

Concurring Opinion of Commissioner Clayton

I join in the majority in approving the tariffs at issue. In this concurrence, I explain the reasoning that leads me to conclude that the price cap statute[1] establishes only a rebuttable presumption that a properly calculated increase is just and reasonable.

The Commission is vested with broad powers and a great deal of discretion to regulate public utilities. The Commission retains whatever powers and discretion it is accorded by other statutes except to the extent that the price cap statute revokes or limits them by express language or unavoidable implication. It is beyond question that, absent the price cap statute, the Commission would have the power and the discretion – and even a duty – to examine Sprint's proposed tariffs to

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[1] Section 392.245, RSMo Supp. 2002. All subsequent statutory references, except where otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

determine if the increase they would implement is just and reasonable. Does the price cap statute strip the Commission of its ability to examine the justness and reasonableness of a proposed increase by a price cap company? I conclude that while it does not strip the Commission of all power, it does somewhat constrain the Commission.

SBC Missouri and Sprint argue that the Commission's role under the price cap statute is limited to confirming the arithmetic of the increase.[2] This argument is based almost exclusively on Section 392.245(11).

> [T]he maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices…. An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.

Sprint and SBC Missouri focus on the portions that allow an eight percent increase, but give short shrift to the statutory requirement that any price cap increase must be "consistent with the provisions of Section 392.200." That section provides (in part): "All charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission."[3] Two of the primary principles of statutory construction are that all related provisions must be given effect (that is, problematic provisions cannot simply be ignored), and that apparently-conflicting provisions must be reconciled if possible.[4] The task is therefore to give effect to the "eight percent every year" provision in Section 292.245.11 as well as to the "just and reasonable" standard in Section 392.200.1.

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[2] The arithmetic is not at issue here; the parties stipulated and the Commission found that Sprint's proposed increases are eight percent or less.

[3] Section 392.200.1.

[4] Generally, statutes relating to the same subject are considered in pari materia, even if those statutes were enacted at different times. *Andresen v. Bd. of Regents of Mo. W. State Coll.*, 58 S.W.3d 581, 587 (Mo.App.2001) (quoting *Farmers' & Laborers' Co-op. Ins. Ass'n v. Dir. of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987)). "Where two statutes concerning the same subject matter, when read individually, are unambiguous, but conflict when read together, [this court] will attempt to reconcile them and give effect to both." *Habjan v. Earnest*, 2 S.W.3d 875, 881 (Mo.App.1999).

I reconcile these two sections thus: when a price cap company files an increase pursuant to Section 392.245.11, and that increase is not more than eight percent, the increase is presumed to be just and reasonable. But this presumption is rebuttable, otherwise the reference to Section 392.200 and the requirement that rates be "just and reasonable and not more than allowed by law or by order or decision of the commission" would have no meaning.

Another principle of statutory construction is that it is to be presumed that the legislature did not intend an absurd result.[5] Surely the legislature did not intend to allow price-cap-regulated telephone companies to increase their rates by eight percent every year forever without giving the Commission any power to examine the reasonableness of those increases. My reconciliation of Section 292.245.11 and Section 392.200.1 avoids this result; the construction urged by Sprint and SBC Missouri does not.

Yet another principle of statutory construction is that the court (or, as here, the Commission) should endeavor to give effect to the intent of the legislature.[6] With respect to the regulation of telecommunications companies, the legislature has explicitly stated its intent. Section 392.185 provides an explicit framework in which the provisions of all of Chapter 392 are to be construed:

> (1) Promote universally available and widely affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
>
> (4) Ensure that customers pay only reasonable charges for telecommunications service;
>
> (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
>
> (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
>
> (7) Promote parity of urban and rural telecommunications services;

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[5] "In addition, we will not construe the statute so as to work unreasonable, oppressive or absurd results." *Jenkins v. Missouri Farmers Ass'n, Inc.*, 851 S.W.2d 542, 545 (Mo. App. 1993).

[6] "The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Eminence R-1 School Dist. v. Hodge*, 635 S.W.2d 10, at 13 (Mo. 1982).

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

The way that I have reconciled Section 329.245.11 with Section 392.200 is consistent with this framework; the narrow interpretation advanced by Sprint and SBC Missouri is not. Allowing a price cap company to increase rates by eight percent every year forever with no regulatory oversight would not "[e]nsure that customers pay only reasonable charges for telecommunications service," nor would it be "consistent with the protection of ratepayers and otherwise consistent with the public interest." I conclude that every applicable principle of statutory construction supports its conclusion that Section 392.245.11 creates only a rebuttable presumption that an eight percent increase is just and reasonable; it does not afford a price cap company the unfettered right to eight percent yearly increases in perpetuity.

Having established that Sprint enjoys a rebuttable presumption that its proposed increase is lawful, the next question is whether there is any reason in this instance to challenge that presumption. Sprint and SBC Missouri do not address the question of reasonableness; they take the position that the question of whether the increased rates are just and reasonable is not within the Commission's purview. Staff addresses the question at length, arguing persuasively that, since Sprint has not increased the rates for these services for ten years, increases up to eight percent are reasonable. Public Counsel, the only party that urges the Commission to reject the proposed tariffs, does not allege that it is unjust or unreasonable to implement an eight percent (or less) increase after ten years. Public Counsel's main argument is that the Commission intended to cap MCA rates in its Report and Order in Case No. TO-99-483, an argument that the Commission has already rejected.

I conclude that there is no reason to find that Sprint's proposed increase is not just and reasonable, and indeed there is reason to find that it is just and reasonable and consistent with Section 392.200, as required by Section 392.245(11). Based on this analysis, I have joined in the majority opinion approving the tariffs.

Staff of the Public Service Commission of Missouri Complainant, v. Southern Missouri Gas Company, L.P. Respondent.

Case No. GC-2003-0314
Decided November 6, 2003

Gas §21. The Commission approved a unanimous stipulation and agreement that resolved a complaint brought by Staff against a gas company alleging that the company had violated its tariffs by providing natural gas to certain large customers through an unauthorized service denoted as Transportation Service-Internal.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves a stipulation and agreement resolving a complaint filed by the Staff of the Commission against Southern Missouri Gas Company.

On March 7, 2003, Staff filed a complaint against Southern Missouri Gas Company. Staff's complaint alleged that Southern Missouri Gas was violating its tariffs by providing natural gas to certain customers through an unauthorized service denoted by Southern Missouri Gas as Transportation Service-Internal. The complaint asked the Commission to find that Southern Missouri Gas was violating its tariffs and to authorize Staff to file a petition in Circuit Court seeking penalties against Southern Missouri Gas under Section 386.570, RSMo 2000. Southern Missouri Gas filed its answer on April 9. At the same time, it filed a motion asking the Commission to hold the complaint in abeyance pending the outcome of Case No. GR-2001-388. On May 6, the Commission ordered that this complaint be held in abeyance pending resolution of GR-2001-388.

GR-2001-388 was a Purchased Gas Adjustment – Actual Cost Adjustment (PGA-ACA) case in which the Staff sought to decrease Southern Missouri Gas' allowable gas costs because of the alleged violation of its tariff resulting from Southern Missouri Gas' offering of Transportation Service-Internal. On July 1, the Commission issued a Report and Order in GR-2001-388 in which it held that Southern Missouri Gas did violate its tariff when it offered Transportation Service-Internal to two of its large industrial customers. The Commission, however, refused to reduce Southern Missouri Gas' gas costs by $99,199 – the amount that Staff contended Southern Missouri Gas would have realized if the gas in question had been sold at tariffed rates – because it found no evidence to show that Southern Missouri Gas' customers had been harmed by Southern Missouri Gas' actions.

Following the Commission's issuance of a Report and Order in GR-2001-388, Staff filed a Second Amended Complaint on July 22. Southern Missouri Gas responded with an Answer and Motion to Dismiss on August 21.

On September 30, Southern Missouri Gas, the Office of the Public Counsel, and Staff filed a unanimous stipulation and agreement that purports to resolve all contested issues. A copy of the stipulation and agreement is attached to this order. In the stipulation and agreement, the parties agree that Southern Missouri Gas will stop offering Transportation Service-Internal within 30 days of the effective date of

a Commission order approving the stipulation and agreement. Southern Missouri Gas will not again offer Transportation Service-Internal, or a similar service, unless authorized to do so by the Commission. In addition, Southern Missouri Gas will contribute $30,000 in cash to various Community Action Agencies throughout its Missouri service area, for the specific purpose of assisting natural gas customers who have difficulty paying their gas bills. In return, Staff and Public Counsel agree that they will not propose any disallowance, revenue imputation, or other adjustment in any ACA case involving Southern Missouri Gas related to the provision of Transportation Service-Internal of the type rejected by the Commission in its Report and Order in GR-2001-388. That provision indicates that neither Staff nor Public Counsel will be prohibited from reviewing the prudence of Southern Missouri Gas' actions regarding Transportation Service-Internal.

Staff filed suggestions in support of the unanimous stipulation and agreement on October 1. Staff explained that, in its view, the stipulation and agreement effectively stopped Southern Missouri Gas from further violating its tariff and sufficiently penalized Southern Missouri Gas for its past actions, while benefiting the Community Action Agencies within its service territory. Staff also indicated that it interpreted the stipulation to mean that Staff and Public Counsel could not in future PGA-ACA cases propose adjustments of the type specifically rejected by the Commission in GR-2001-388. Staff claims the right to propose any prudence adjustments that might be necessary regarding Transportation Service-Internal. No party filed a response to Staff's suggestions.

The Commission had questions about the ability of Staff and Public Counsel to propose adjustments regarding Transportation Service – Internal in future PGA-ACA cases. The Commission directed the parties to appear for an on-the-record presentation so that those questions could be answered.

The on-the-record presentation was held on November 3. In response to questions from the Commission, the parties clarified that the stipulation and agreement would preclude Staff and Public Counsel from proposing an adjustment in a future ACA-PGA case that would impute revenue to Southern Missouri Gas based on the assumption that the Transportation Service – Internal customers would otherwise have purchased gas from Southern Missouri Gas at the regular tariffed rates. The parties agreed that the stipulation and agreement would not prevent Staff and Public Counsel from proposing adjustments based on the prudence of Southern Missouri Gas' operations and purchases related to Transportation Service – Internal.

The parties also clarified that Southern Missouri Gas will no longer offer Transportation Service – Internal beginning 30 days after the Commission approves this stipulation and agreement. That means that the only ACA-PGA periods in which Transportation Service – Internal can be an issue are the 2002-2003 period, and the first few months of the 2003-2004 period.

Contingent upon the Commission's acceptance of the stipulation and agreement, the parties waive their rights to call, examine, and cross-examine witnesses; to present oral argument or briefs; to have the transcript read by the Commission; to rehearing; and to judicial review. Section 536.060, RSMo 2000, gives the Commission the authority to accept a stipulation and agreement offered by the parties as a resolution of the issues raised in this case.

After reviewing the unanimous stipulation and agreement and Staff's suggestions in support, and after hearing the explanations offered by the parties, the Commission finds that the stipulation and agreement filed on September 30 should be approved.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on September 30, 2003, is approved, and the signatory parties are ordered to comply with its terms.

2. That this order shall become effective on November 16, 2003.

3. That this case may be closed on November 17, 2003.

Gaw, Ch., Murray, Simmons, Forbis and Clayton, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's 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 SBC Missouri's Proposed Revised Tariff Sheet Intended to Increase by Eight Percent the Rates for Line Status Verification and Busy Line Interrupt as Authorized by Section 392.245, RSMo, the Price Cap Statute.*

IT-2004-0015
Decided November 6, 2003

Rates §110. The Commission found that SBC Missouri could not use the price-cap statute to increase its' charges for line status verification and for busy line interrupt. The Commission found that because SBC Missouri's rates are tied to the Consumer Price Index for Telephone Services, and the CPI-TS and SBC Missouri's rates have actually declined in the last few years.

Telecommunications §7. The Commission has authority to reject price changes for non-basic services that do not exceed the maximum allowable prices under Section 392.245.11. That statute requires that the Commission approve a price-cap change if the change is consistent with the provisions of Section 392.200. It follows that the Commission may reject such a change if that change is inconsistent with the provisions of Section 392.200.

Telecommunications §14. The price-cap statute allows an eligible company to change its rates without going through a traditional rate case. A company is regulated by the price-cap statute if an alternative local exchange company provides basic local services in the incumbent local exchange carrier's service area. The company remains price-cap regulated until the Commission declares the company competitive, or until the company asks for a return to traditional rate-of-return regulation.

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* The Commission, in an order issued on November 25, 2003, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (03CV326406) and later appealed to the Missouri Court of Appeals - Western District (WD64502). See page 158 for another order in this case.

APPEARANCES

Paul G. Lane, Leo J. Bub, Robert J. Gryzmala, and *Mimi B. MacDonald*, Attorneys at Law, One SBC Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., doing business as SBC Missouri.

James M. Fischer and *Larry W. Dority*, Attorneys at Law, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Spectra Communications Group, L.L.C., and CenturyTel of Missouri, L.L.C., both doing business as CenturyTel.

Lisa Creighton Hendricks, Attorney at Law, 6450 Sprint Parkway, Disney A, KSOPHN0212-2A253, Overland Park, Kansas 66251,
and

Paul H. Gardner, Attorney at Law, Goller, Gardner & Feather, 131 East High Street, Jefferson City, Missouri 65101, for Sprint Missouri, Inc.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

David A. Meyer, Associate Attorney, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

On June 10, 2003, Southwestern Bell Telephone Company, L.P., doing business as SBC Missouri, filed its proposed revised tariff sheet intended to increase by eight percent the rates for certain services contained in its Local Exchange Tariff, PSC Mo. No. 24. The specific services in question are Line Status Verification and Busy Line Interrupt. The Commission suspended the proposed sheet on its own motion on July 3, for 120 days, until November 7, 2003, to permit an opportunity to consider whether or not approval of the sheet would be in the public interest.

The Commission convened a prehearing conference on July 17. At that time, the unopposed intervention applications of Sprint Missouri, Inc., Spectra Communications Group, L.L.C., and CenturyTel of Missouri, L.L.C., were granted. The latter two companies both do business as CenturyTel and have acted as a single entity throughout this proceeding.

On July 24, the Commission's Staff filed its Motion to Establish Procedural Schedule. Also on July 24, several other parties, including Bell, CenturyTel, Sprint, and the Office of the Public Counsel, filed an alternative proposed procedural schedule. The Commission adopted the procedural schedule proposed by Staff, but declined to further suspend the tariff. The Commission noted that there are three scheduled Agenda dates between the close of the hearing, on Staff's

proposed schedule, and the operation of law date on November 7. Posthearing briefing is not necessary if oral arguments are permitted at the close of the hearing.[1] Additionally, the Commission directed the parties to provide memoranda on the legal issues raised by this case prior to the hearing.

Pursuant to the procedural schedule, the parties filed prepared testimony and memoranda of law. The parties also formulated a list of contested issues and filed position statements with respect to those issues. The Commission convened an evidentiary hearing on October 27 and 28, 2003. All of the parties were represented by counsel at the hearing. The Commission heard testimony from four witnesses and received six exhibits. Following the close of the evidence, the Commission heard oral argument from the parties. Posthearing briefing was not permitted.

Discussion

As required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

The issues formulated by the parties and their positions on each issue are as follows:

1. Does the Commission have the authority to reject price changes for non-basic telecommunications services that do not exceed the maximum allowable prices under Section 392.245.11, RSMo 2000?

The Public Counsel asserted that the Commission does have such authority. The other parties took the position that the Commission lacks such authority.

2. If the Commission determines it has such authority, should the Commission approve or reject SBC Missouri's proposed price increases for Line Status Verification and Busy Line Interrupt?

The Public Counsel asserted that the Commission should reject the proposed price increases. Staff took no position on this issue. The remaining parties took the position that the Commission should approve the proposed price increases.

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. 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.

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[1] Section 536.080.1, RSMo 2000.

The Parties:

Southwestern Bell Telephone Company, L.P., doing business as SBC Missouri, is a large incumbent local exchange carrier (ILEC) subject to regulation under the Missouri Price Cap Statute.[2] Sprint Missouri, Inc., is also a large ILEC subject to regulation under the Missouri Price Cap Statute. Spectra Communications Group, L.L.C., and CenturyTel of Missouri, L.L.C., both of which do business as CenturyTel, are also large ILECs subject to regulation under the Missouri Price Cap Statute.

The Proposed Price Increases:

Bell filed its proposed revised tariff sheet that is the subject of this proceeding on June 10, 2003. The proposed revised sheet displayed an effective date of July 10, 2003. The sheet will increase by eight percent the rates for certain non-basic services contained in Bell's Local Exchange Tariff, PSC Mo. No. 24. The specific services in question are Line Status Verification (LSV) and Busy Line Interrupt (BLI). Bell is proposing to raise the price for LSV by 12 cents, from $1.50 to $1.62.[3] Bell is proposing to raise the rate for BLI by 18 cents, from $2.31 to $2.49.[4]

Line Status Verification and Busy Line Interrupt:

LSV and BLI are non-basic telecommunications services.[5] The proposed price increases do not exceed the eight percent annual maximum increase permitted by the Price Cap Statute.[6] LSV is a service in which a customer, receiving a busy signal, requests a Bell operator to determine whether a conversation is taking place over the line in question.[7] BLI is similar, but includes the interruption of the ongoing conversation by the operator to determine whether the called party is willing to receive a call from the calling party.[8] These are services that might well be used in emergencies.[9]

The current rates for these services became effective on July 10, 2002, exactly one year prior to the proposed effective date of the revised tariff sheet that is the subject of this proceeding.[10] The rates for these services did not change between 1986 and 1999.[11] Starting in 2000, Bell has raised these rates by approximately eight percent each year.[12] The present proposed eight percent price increase would be the fourth successive such annual increase.[13] Bell did not raise the rates

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[2] Thomas Rebuttal, 13.

[3] Peters Rebuttal, 6.

[4] Peters Rebuttal, 6.

[5] Unruh Direct, 2.

[6] Unruh Direct, 2.

[7] Unruh Direct, 3; Peters Rebuttal, 3.

[8] Unruh Direct, 3; Peters Rebuttal, 3-4.

[9] Tr. 349.

[10] Unruh Direct, 3.

[11] Peters Rebuttal, 6.

[12] Peters Rebuttal, 6.

[13] Peters Rebuttal, 6.

for these services in 1999, although it could have done so.[14] Bell bases such price increases upon an overall evaluation of the marketplace.[15] Ultimately, it is an estimation of the price that customers are willing to pay for the service.[16] LSV and BLI do not produce a large amount of revenue annually for Bell.[17]

The Commission examined the state of competition in Bell's Missouri service area in another case.[18] With respect to LSV and BLI, the Commission concluded:

> The Commission finds that Southwestern Bell's busy line verification and busy line verification interrupt services face effective competition and are hereby classified as competitive pursuant to Section 392.245.5 for business customers in only the Kansas City and St. Louis exchanges and for residential customers in only the St. Charles and Harvester exchanges. It also follows that because Southwestern Bell's business and residential services have not been shown to face effective competition in its other exchanges, that its busy line verification and busy line verification interrupt services do not face effective competition in its other exchanges either.

Public Counsel's witness, Barbara Meisenheimer, testified that "[g]iven the lack of competitive pressure which might otherwise moderate the price for line status verification and busy line interrupt, it is imperative at this time that the Commission have sufficient evidence that shows that the currently proposed increases of approximately 8%, consumers will pay only just and reasonable rates for these services."[19] Meisenheimer suggested that the Commission should review cost data to determine whether the proposed increases are reasonable.[20] Meisenheimer testified that, in her opinion, the Commission has discretion to make such an inquiry in cases like the present where competition does not exist to moderate prices and "economic data suggests that the prices may be out of line."[21] However, Meisenheimer agreed that the proposed price increases were between incremental costs and stand-alone costs.[22]

Bell's witness, Craig Unruh, testified that many customers do not pay the tariffed rates for LSV and BLI because of promotions, discounts and service packages or "bundles" offered by Bell.[23] Although competition may not exist for LSV

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[14] Tr. 123.

[15] Tr. 146.

[16] Tr. 146.

[17] CenturyTel earns less than $6,000 annually from these services. Tr. 164.

[18] *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company,* Case No. TO-2001-467 (*Report & Order,* issued December 27, 2001).

[19] Meisenheimer Rebuttal, 15.

[20] Meisenheimer Rebuttal, 15.

[21] Meisenheimer Rebuttal, 16.

[22] Tr. 361.

[23] Tr. 120-121.

and BLI, Bell is subject to competitive pressure in general. For example, competitive local exchange companies (CLECs) serve approximately 34 percent of the business access lines in Bell's Missouri service area.[24] And, with respect to LSV and BLI, a Bell customer can dial "00" to access his or her interexchange carrier (IXC) operator and obtain those services from the IXC carrier rather than from Bell.[25]

Prices, Costs and Revenues:

Prices for these LSV and BLI vary widely by carrier and by state.[26] The highest Missouri rates for these services are $9.99 (LSV) and $19.98 (BLI); the lowest are $0.45 (LSV) and $0.95 (BLI).[27] Bell's proposed rates for these services are low in comparison to those charged by some Missouri IXC carriers:

Missouri Rates for LSV and BLI (Dollars)[28]			
Carrier	**LSV**	**BLI**	**LSV+BLI**
AT&T	19.98	9.99	19.98
CenturyTel Long Distance	19.98	9.99	19.98
Sprint Communications Co.	6.50	6.50	13.00
Bell Atlantic Communications	2.75	2.25	5.00
SBC Missouri	2.49	1.62	4.11
MCI WorldCom	1.85	1.20	1.85

However, among CLECs, only one charges more than Bell for these services.[29] Bell itself charges more for these services in some states. For example, in Arkansas, Bell charges $6.00 (LSV) and $7.00 (BLI).[30] However, there are also states in which Bell charges less, such as Nevada: $0.50 (LSV) and $1.00 (BLI).[31] In Missouri, Bell's rates for these services are the highest of any ILEC, and are almost double those of the next highest carrier.[32] CenturyTel and Sprint, which are both large ILECs subject to price cap regulation, have rates for these services that are less than half the rates Bell is proposing.[33]

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[24] Tr. 130.

[25] Tr. 150-151.

[26] Peters Rebuttal, 7.

[27] Peters Rebuttal, 7.

[28] Peters Rebuttal, 8.

[29] Peters Rebuttal, 9.

[30] Peters Rebuttal, 10.

[31] Peters Rebuttal, 10.

[32] Peters Rebuttal, 11, 22-23.

[33] Peters Rebuttal, 11.

Chris Thomas, an expert economist employed by the Commission's Staff, testified that increases in cost are the most relevant reasons for determining the reasonableness of a price increase.[34] Economic theory states that, in the presence of competition, rates will be driven close to cost.[35] In general, costs have been declining in the telecommunications industry.[36] The Producer Price Index is a proxy model suggestive of how Bell's cost structures may have changed:

Changes in Costs[37]			
Index	**Last 2 Years**	**Annual Average**	**Data**
PPI-Telephone[38]	-2.98 %	-1.68 %	8 years
PPI-Local Service[39]	0.65 %	0.50 %	8 years
PPI-Private Lines[40]	0.43 %	0.15 %	8 years
PPI-Other Telephone[41]	0.24%	0.23%	8 years

Another way to judge the possible cost increases that Bell may have experienced is to review changes in labor costs.[42] LSV and BLI are operator services and are both heavily labor dependent.[43] Changes in labor costs must be considered together with changes in productivity, that is, the output of a particular unit of labor.[44] Thomas testified that "[t]he net effect of simultaneously rising labor costs and productivity growth has actually decreased employment costs during the last two years."[45] On the other hand, Public Counsel's witness Meisenheimer testified that Bell has probably experienced annual increases in labor costs of about five percent, net of productivity gains.[46]

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[34] Thomas Rebuttal, 6.

[35] Thomas Rebuttal, 6, 12; *see* Meisenheimer Rebuttal, 6-7.

[36] Tr. 328.

[37] Thomas Rebuttal, 7.

[38] All telephone except radiotelephone. Thomas Rebuttal, 7.

[39] Local telephone services excluding private lines. Thomas Rebuttal, 7.

[40] Private lines. Thomas Rebuttal, 7.

[41] Certain other telephone services. Thomas Rebuttal, 7.

[42] Thomas Rebuttal, 7-8.

[43] Tr. 182.

[44] Thomas Rebuttal, 7-8.

[45] Thomas Rebuttal, 9.

[46] Tr. 300-301.

Changes in Labor Costs[47]			
Index	**Last 2 Years**	**Annual Average**	**Data**
ECI[48]	3.97 %	4.82 %	10 years
BLS NFB[49]	4.20 %	2.68 %	10 years
ECI-NFB[50]	-0.23 %	2.14 %	--

Information from the U.S. Bureau of Labor Statistics shows that operator labor rates increased by about five percent annually between 1999 and 2001, the latest information available.

Another reason why Bell might seek to raise its prices is because of an increased cost of capital.[51] The cost of capital refers to the return expected by investors; the return actually produced by a company must be in line with investor expectations so that the company can continue to attract the capital it needs.[52] Thomas testified that Bell's cost of capital, based on Bell's own proposals in recent Commission cases, has apparently increased at an average annual rate of 2.81 percent over the past five years.[53]

A service should be priced so that the revenues realized from the service cover the cost of providing it.[54] Bell's long-run incremental costs (LRIC) for providing LSV and BLI are designated Highly Confidential.[55] The prices Bell is proposing are greater than its LRIC costs.[56] Bell reports decreasing demand for both LSV and BLI.[57] Decreasing demand necessarily means decreasing revenue.[58]

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[47] Thomas Rebuttal, 8.

[48] The Employment Cost Index (ECI), measuring quarterly changes in wages and salaries in the communications industry. Thomas Rebuttal, 7-8.

[49] Bureau of Labor Statistics (BLS) Non-farm Business (NFB), a measure of increased productivity. Thomas Rebuttal, 8.

[50] Compensation net productivity. Thomas Rebuttal, 8.

[51] Thomas Rebuttal, 9-10.

[52] Thomas Rebuttal, 9-10.

[53] Thomas Rebuttal, 10.

[54] Peters Rebuttal, 13.

[55] Peters Rebuttal, 13.

[56] Peters Rebuttal, 14, 16, based on a cost study based on the period 1997-1999. *And see* Meisenheimer Rebuttal, 14. "LRIC" is "long-run incremental costs," a costing approach that focuses on the cost of producing a specified increment of a product or service and in which all costs are assumed to be variable.

[57] Peters Rebuttal, 17.

[58] Peters Rebuttal, 17.

Rate-of-Return Regulation:

Thomas testified that, in determining whether or not the proposed price increases at issue in this case are just and reasonable, the Commission might want to consider the proposed increases in the context of "the impact that legacy rate setting, and price cap regulation have had on SBC's bottom line."[59] By "legacy rate setting," Thomas explained that he meant the rate-of-return regulation of Bell's rates prior to the implementation of price cap regulation.[60]

Rate-of-return regulation is a two-step process.[61] In the first step, the "revenue requirement" is determined, that is, the annual amount of revenue necessary to cover the utility's prudent operating expenses, the depreciation of its plant, and to provide a reasonable return on the value of its plant in service.[62] This is done by reviewing the company's historical operating costs over a selected test year.[63] The second step is to design rates that will, given the expected level of demand, generate the necessary level of annual revenue.[64] The goal is to equitably balance the interests of the utility's investors and its customers.[65]

Under rate-of-return regulation, Bell's rates were set as described in Case No. 18,309, issued on May 27, 1977.[66] Bell's services were classed in three categories.[67] Competitive services were classed in Category 1.[68] These services were priced to generate the largest practical contribution to joint and common costs.[69] Non-basic and discretionary services were classed in Category 3.[70] These services were priced based upon LRIC, adjusted upwards for social and economic factors.[71] Basic services were classed as Category 2.[72] Basic services were priced residually, taking into account the contribution from competitive and discretionary services, in order to keep rates for basic services as low as possible.[73] Within Category 2, business services were priced at a level two or three times higher than residential services.[74] The effect, according to Thomas, was "removing the

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[59] Thomas Rebuttal, 11.

[60] Thomas Rebuttal, 11.

[61] Meisenheimer Rebuttal, 8-10. "Rate of return regulation" is also referred to as "cost of service regulation." *See* Meisenheimer Rebuttal, 7.

[62] Meisenheimer Rebuttal, 8-10.

[63] Meisenheimer Rebuttal, 8-10.

[64] Meisenheimer Rebuttal, 8-10.

[65] Meisenheimer Rebuttal, 8-10.

[66] Unruh Direct, 2.

[67] Unruh Direct, 5-6; Peters Rebuttal, 15.

[68] Unruh Direct, 5-6; Peters Rebuttal, 15.

[69] Unruh Direct, 5-6; Peters Rebuttal, 15.

[70] Unruh Direct, 5-6; Peters Rebuttal, 15.

[71] Unruh Direct, 5-6; Peters Rebuttal, 15.

[72] Unruh Direct, 5-6; Peters Rebuttal, 15.

[73] Unruh Direct, 2, 5; Peters Rebuttal, 15; Thomas Rebuttal, 11.

[74] Unruh Direct, 5.

relationship between rates and their cost."[75] It is not clear which category LSV and BLI should be assigned to.[76]

Under rate-of-return regulation, some of Bell's services were set "well above their cost" while others were priced below cost in order to promote the goal of universal service.[77] Prices set in this manner became the initial maximum allowable prices when Bell became subject to regulation under the Price Cap Statute.[78] No rebalancing or other adjustments of rates to costs were permitted when price cap regulation was imposed on Bell.[79] Consequently, the pricing principles of Case No. 18,309 continue to affect Bell's rates today.[80]

Price Cap Regulation:

Price cap regulation is an alternative form of regulation.[81] It is a transitional stage between traditional rate-of-return regulation and competition.[82] Several different schemes of price cap regulation exist.[83] Meisenheimer testified that the goal of price cap regulation is the same as that of rate-of-return regulation, "to produce prices that are aligned with the costs of an efficient producer in an effectively competitive market."[84] Meisenheimer further testified that both forms of regulation include an incentive for efficiency gains, namely, the producer's temporary retention of the increased profits thereby realized.[85] Staff witness Bill Peters agreed that the principle underlying price cap regulation is to encourage investment and innovation by the utility by allowing it to retain more of its revenues as profits.[86] Meisenheimer testified that another purpose of price cap regulation is to give ILECs the flexibility to match the price decreases of competitors.[87]

Bell's rates, set by the Commission under rate-of-return regulation, became the starting point for its prices under price cap regulation.[88] Consequently, the regime of some services priced well above cost and others priced well below cost, characteristic of rates set under rate-of-return regulation, has persisted. The effect of services priced below cost is to discourage competition.[89] Additionally, the lack of relationship between prices and costs makes it difficult to determine whether or

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[75] Thomas Rebuttal, 11.

[76] Peters Rebuttal, 15.

[77] Thomas Rebuttal, 11, 12.

[78] Unruh Direct, 2.

[79] Tr. 184-185, 376.

[80] Tr. 167.

[81] Meisenheimer Rebuttal, 9.

[82] Tr. 345.

[83] Meisenheimer Rebuttal, 9.

[84] Meisenheimer Rebuttal, 10.

[85] Meisenheimer Rebuttal, 10.

[86] Tr. 291, 379.

[87] Tr. 298.

[88] Unruh Direct, 2.

[89] Thomas Rebuttal, 12.

not a proposed price increase, such as the present one, is reasonable.[90] Craig Unruh, testifying for Bell, stated that "[t]he 8% price increase component for non-basic, or optional, services is a reasonable trade-off when viewed in the context of the more stringent pricing control over basic local services and exchange access service."[91] Unruh further testified that Bell has not sought an eight rate percent increase for every non-basic service each year, despite its belief that it could do so.[92] In 2003, for example, Bell increased rates for only four percent of eligible services.[93]

Bell became subject to price cap regulation through a Commission decision in Case No. TO-97-397, issued on September 16, 1997.[94] Under the Price Cap Statute, rates for basic and exchange access services are tied to an objective measure of economic activity.[95] For Bell, this measure is the Consumer Price Index, Telephone Services (CPI-TS).[96] Once Bell became Price Cap regulated, its basic and exchange access rates were initially frozen until December 2000.[97] In that month, the rates decreased by 0.92 percent.[98] In December 2001, they decreased by 0.75 percent.[99] In December 2002, they decreased by 0.90 percent.[100] Overall, these rates have declined by 0.77 percent from their December 31, 1996, level.[101] They are now lower than they were in 1984.[102]

Bell's basic local and exchange access rates have decreased over the past several years even though the local service component of the Consumer Price Index (CPI-LS) has risen.[103] Faced with declining revenues from basic local and exchange access services, Bell's only option for producing additional revenues is to raise rates for non-basic services.[104]

General Economic Conditions:

There are many different indices that can be used to measure changes in economic activity. Perhaps the best known, and one specifically referenced by the Missouri Price Cap Statute, is the Consumer Price Index (CPI).[105] The CPI is a measure of the change in price, over time, paid by urban consumers for a "market

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[90] Thomas Rebuttal, 12.

[91] Unruh Surrebuttal, 2, 5.

[92] Tr. 122-123.

[93] Tr. 161.

[94] Thomas Rebuttal, 13.

[95] Unruh Direct, 7.

[96] Unruh Direct, 7; Thomas Rebuttal, 5; Unruh Surrebuttal, 4.

[97] Unruh Direct, 8.

[98] Unruh Direct, 8.

[99] Unruh Direct, 8.

[100] Unruh Direct, 8.

[101] Unruh Direct, 8. The effect of this decrease on Bell's overall profitability is unknown. Tr. 282.

[102] Unruh Direct, 8.

[103] Tr. 180-181.

[104] Tr. 180-181, 250.

[105] Thomas Rebuttal, 5.

basket" of goods and services.[106] The CPI-TS, to which Bell's local and exchange access services are tied, measures the price change for telephone services.[107] Another economic index specifically referred to in the Missouri Price Cap Statute is the Gross Domestic Product Price Index (GDP-PI).[108] This measure is an index of the market value of goods and services produced by labor and property in the United States.[109]

Changes in Economic Indices[110]			
Index	**Last 2 Years**	**Annual Average**	**Data**
CPI[111]	1.73 %	2.74 %	10 years
CPI-TS[112]	-0.72 %	-0.34 %	6 years
CPI-LS[113]	4.17 %	2.73 %	10 years
GDP-PI[114]	1.76 %	1.77 %	10 years

Chris Thomas, Staff's expert witness, testified that the CPI-TS has fallen over the past several years because competition has caused wireless rates to fall and the reduction of interstate exchange access rates has caused long distance rates to fall.[115]

Barbara Meisenheimer is an expert economist employed by the Office of the Public Counsel.[116] Meisenheimer testified that "[j]ust and reasonable rates have a rational basis founded on economic considerations that include the cost of the service."[117] The linking of rates and costs results in payments that are sufficient to induce production at efficient levels and by efficient methods.[118] Telecommunications markets historically have exhibited significant barriers to competition, leaving consumers subject to the exercise of market power by only a few, or even a single,

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[106] Thomas Rebuttal, 5.

[107] Thomas Rebuttal, 5.

[108] Thomas Rebuttal, 5.

[109] Thomas Rebuttal, 5.

[110] Thomas Rebuttal, 6.

[111] The Consumer Price Index.

[112] The Consumer Price Index—Telephone Services. This measure is based on interstate and intrastate long distance rates, wireless rates, and local exchange rates. Tr. 179-180.

[113] The Consumer Price Index—Local (Telephone) Service Charges.

[114] The Gross Domestic Product Price Index.

[115] Tr. 179.

[116] Meisenheimer Rebuttal, 1-2.

[117] Meisenheimer Rebuttal, 6.

[118] Meisenheimer Rebuttal, 6-7.

producer.[119] However, the disconnect of rates and costs under price cap regulation means that whether or not a particular non-basic service is priced above cost is meaningless from an overall cost-recovery perspective.[120]

Bell's witness, Unruh, testified that it is not appropriate to focus simply on the eight percent annual price-cap increase permitted for non-basic services.[121] Unruh testified that the eight percent increase must be understood in the context of the Price Cap Statute as a whole.[122] Unruh testified that the legislature created "integrated components" intended to "create the proper incentives to increase efficiency for the ultimate benefit of consumers."[123] Unruh testified, "The legislature . . . established the framework the Commission is to follow as it regulates the ILECs who face increased competition due to the market opening measures of SB 507 and the federal Telecommunications Act of 1996."[124]

Reviewing Proposed Price Increases for Reasonableness:

Staff's witness Bill Peters testified that "[d]emonstrating the reasonableness of rates can be difficult."[125] Peters listed the factors we considered significant as rate comparisons with other companies, the cost of providing the services, the revenues received from the services, the demand for the services, the competitiveness of the services, and the critical nature of the services.[126]

Chris Thomas, an expert economist on the Commission's Staff, testified that it is not clear whether, in determining whether Bell's proposed price increases are reasonable, the Commission should look at each service in isolation or in the context of all of Bell's services, its profitability, and its costs.[127] Thomas testified that the latter determination requires consideration of all relevant factors.[128] These factors include the cost of providing the service, the rates charged for the service by other carriers in the marketplace, the contribution made by revenues realized from the service to the carrier's overhead, and the reasonableness of that contribution.[129] Thomas testified that the Commission may also need to consider Bell's profitability.[130] Thomas agreed that such an investigation would be very similar to traditional rate-of-return regulation.[131] Thomas also agreed that Bell would likely not earn a "normal profit" overall if its rates for basic services were

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[119] Meisenheimer Rebuttal, 7.

[120] Tr. 185-186.

[121] Unruh Surrebuttal, 3.

[122] Unruh Surrebuttal, 3.

[123] Unruh Surrebuttal, 3; Tr. 125-126.

[124] Unruh Surrebuttal, 3.

[125] Peters Rebuttal, 7.

[126] Peters Rebuttal, 7.

[127] Tr. 175.

[128] Tr. 171-172.

[129] Tr. 174.

[130] Tr. 169-170. Meisenheimer, *contra,* Tr. 306-307.

[131] Tr. 169-170.

capped at less than cost while its non-basic services were priced at cost plus a "normal profit."[132] Staff witness Peters testified that the present record is insufficient if the Commission must perform an analysis equivalent to a traditional rate-of-return proceeding.[133] Peters offered the opinion that only a full-blown rate-of-return proceeding would be "fair" to the company.[134]

However, if the Commission can consider each service in isolation, then both Thomas and Peters believe that the present record contains the necessary information for the Commission to make a determination.[135] With respect to how the Commission should review the proposed price increase to determine whether it is reasonable, Thomas testified that[136]

> from a economist's perspective like you asked the question, I think that you'd look at the overall general sense of inflation in the economy and say 8 percent seems to be a very generous increase, given the overall inflation we've seen in the economy, and considering the fact that these specific rates are already making a contribution to overhead in the firm, which I think is SBC's largest concern. Because you don't have any idea how their revenue streams are decreasing, and I don't think it's your responsibility; it becomes their responsibility.

The services in question are already priced well above their cost and are not subject to any price moderation from competition.[137] Thomas testified that the proposed eight percent increase exceeds the current inflation rate.[138] It exceeds the Consumer Price Index, the Gross Domestic Product Price Index, the various cost of labor indices presented by Thomas, and Bell's estimated cost of capital.[139] Thomas testified that he considered the proposed eight percent increase to be excessive.[140]

Public Counsel's witness, Barbara Meisenheimer, testified that there is no "one size fits all" yardstick for the Commission to use in determining whether a proposed price increase by a price-cap-regulated carrier is just and reasonable.[141] Where competition exists, a comparison to the prices charged by competitors would be a useful analysis.[142] Where competition does not exist, as in the present

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[132] Tr. 170-171.

[133] Tr. 281.

[134] Tr. 282-283.

[135] Tr. 175-176 (Thomas); Tr. 281 (Peters).

[136] Tr. 193.

[137] Tr. 205, 208.

[138] Tr. 201.

[139] Tr. 201.

[140] Tr. 202.

[141] Tr. 333, 372.

[142] Tr. 333.

case, proposed price increases should be measured against the cost of providing the service.[143] In Meisenheimer's view, prices should approximate costs.[144] Other factors to consider are demand and the critical nature of the service at issue.[145] The Commission need not conduct a full-blown rate case in order to make this determination.[146] Based on the record in this case, Meisenheimer's opinion is that the proposed price increases "may be in excess of what's just and reasonable."[147]

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

Bell is a telecommunications company and a public utility.[148] The Commission thus has jurisdiction over Bell's services, activities, and rates.[149]

The Price Cap Statute:

Bell is a large ILEC[150] that is subject to regulation under the Price Cap Statute.[151] Price cap regulation of a large ILEC is mandatory whenever the Commission determines that an "alternative local exchange telecommunications company"[152] is both certified to provide basic local services within the ILEC's service area and is actually providing such services.[153] Once an ILEC such as Bell becomes subject to regulation under the Price Cap Statute, such regulation continues until either competitive classification is achieved[154] or the ILEC seeks the re-imposition of traditional rate-of-return regulation.[155] The statute does not provide for any re-balancing or other rate adjustment process upon the imposition of price cap regulation.[156]

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[143] Tr. 333-334, 346.

[144] Tr. 342.

[145] Tr. 346.

[146] Tr. 342, 344.

[147] Tr. 342.

[148] Sections 386.020(51) and 386.020(42), RSMo Supp. 2002. All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[149] Section 386.250(2) and Chapter 392, RSMo.

[150] Section 386.020(22) and Section 386.020(30).

[151] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996,* Case No. TO-97-397 (*Report and Order,* issued September 16, 1997). The Price Cap Statute is Section 392.245.

[152] Better known as a "CLEC."

[153] Section 392.245.2.

[154] Section 392.245.5.

[155] Section 392.246.

[156] *See* Section 392.245.2.

The Price Cap Statute permits an eligible ILEC to increase its rates up to a specified level, or to decrease its rates, without undergoing a traditional rate case. The level up to which rates may be increased is the "maximum allowable price" or price cap. The statute actually establishes two such caps, one for basic local and exchange access services[157] and the other for non-basic services.[158] The former is tied to one of two specified measures of economic activity, either the Consumer Price Index-Telephone Services (CPI-TS) or the Gross Domestic Product Price Index (GDP-PI). In Bell's case, the cap on basic local and exchange access rates is tied to the CPI-TS.[159] While rate increases are permissive up to the cap, rate decreases are mandatory if the CPI-TS declines below prices.[160] Accordingly, Bell's basic local and exchange access rates have decreased by 0.77 percent since December, 1996, until they are now lower than they were in 1984.[161]

The services at issue in this case, LSV and BLI, are non-basic telecommunications services.[162] Consequently, they are subject to the second of the Price Cap Statute's capping mechanisms:[163]

> [T]he maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices. * * * An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.[164]

The Price Cap Statute provides that price changes for both basic local and exchange access services under Section 392.245.4 and for non-basic services under Section 392.245.11 must be submitted to the Commission for approval in

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[157] Section 392.245.4.

[158] Section 392.245.11.

[159] Unruh Direct, 7; Thomas Rebuttal, 5; Unruh Surrebuttal, 4.

[160] Section 392.245.4(2).

[161] Unruh Direct, 8.

[162] Section 386.020(35).

[163] Section 392.245.11.

[164] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996,* Case No. TO-97-397 (*Report and Order,* issued September 16, 1997).

the form of a tariff.[165] The statute requires the Commission to approve any such proposed tariff so long as the prices in question are (1) "consistent with the provisions of section 392.200" and (2) "not in excess of the maximum allowable price established for such service under this section."[166] The present dispute concerns this language in Section 392.245.11.

Just and Reasonable Rates Under the Price Cap Statute:

The parties ask in their first issue, "Does the Commission have the authority to reject price changes for non-basic telecommunications services that do not exceed the maximum allowable prices under Section 392.245.11 RSMo. 2000?" As noted above, only the Public Counsel believes that the Commission has such authority. All of the other parties, including the Commission's Staff, argue that the Commission lacks such authority.

The Price Cap Statute, in identical words at both Section 392.245.4 and Section 392.245.11, plainly sets out two conditions for tariff approval. Both of them must be met. The tariff must be "consistent" with the provisions of Section 392.200. The tariff must also contain prices that do not exceed the "maximum allowable price." If either condition is not met, the statute requires that the Commission reject the tariff.[167]

What does the phrase "consistent with the provisions of Section 392.200" mean? That lengthy section provides:

> 1. Every telecommunications company shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order or decision of the commission is prohibited and declared to be unlawful.
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> 2. No telecommunications company shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives

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[165] Section 392.245.4(5) and Section 392.245.11.

[166] Section 392.245.4(5) and Section 392.245.11.

[167] The Price Cap Statute does not expressly require the rejection of a proposed tariff that fails to meet one or both of the two conditions discussed above. However, that is the necessary and unavoidable implication of the language that requires approval where two specified conditions are met.

from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. Promotional programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission. Neither this subsection nor subsection 3 of this section shall be construed to prohibit an economy rate telephone service offering. This section and section 392.220 to the contrary notwithstanding, the commission is authorized to approve tariffs filed by local exchange telecommunications companies which elect to provide reduced charges for residential telecommunications connection services pursuant to the lifeline connection assistance plan as promulgated by the federal communications commission. Eligible subscribers for such connection services shall be those as defined by participating local exchange telecommunications company tariffs.

3. No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

4. (1) No telecommunications company may define a telecommunications service as a different telecommunications service based on the geographic area or other market segmentation within which such telecommunications service is offered or provided, unless the telecommunications company makes application and files a tariff or tariffs which propose relief from this subsection. Any such tariff shall be subject to the provisions of sections 392.220 and 392.230 and in any hearing thereon the burden shall be on the telecommunications company to show, by clear and convincing evidence, that the definition of such service based on the geographic area or other market within which such service is offered is reasonably necessary to promote the public interest and the purposes and policies of this chapter.

(2) It is the intent of this act to bring the benefits of competition to all customers and to ensure that incumbent and alternative local exchange telecommunications companies

have the opportunity to price and market telecommunications services to all prospective customers in any geographic area in which they compete. To promote the goals of the federal Telecommunications Act of 1996, for an incumbent local exchange telecommunications company in any exchange where an alternative local exchange telecommunications company has been certified and is providing basic local telecommunications services or switched exchange access services, or for an alternative local exchange telecommunications company, the commission shall review and approve or reject, within forty-five days of filing, tariffs for proposed different services as follows:

(a) For services proposed on an exchange-wide basis, it shall be presumed that a tariff which defines and establishes prices for a local exchange telecommunications service or exchange access service as a different telecommunications service in the geographic area, no smaller than an exchange, within which such local exchange telecommunications service or exchange access service is offered is reasonably necessary to promote the public interest and the purposes and policies of this chapter;

(b) For services proposed in a geographic area smaller than an exchange or other market segmentation within which or to whom such telecommunications service is proposed to be offered, a local exchange telecommunications company may petition the commission to define and establish a local exchange telecommunications service or exchange access service as a different local exchange telecommunications service or exchange access service. The commission shall approve such a proposal if it finds, based upon clear and convincing evidence, that such service in a smaller geographic area or such other market segmentation is in the public interest and is reasonably necessary to promote competition and the purposes of this chapter. Upon approval of such a smaller geographic area or such other market segmentation for a different service for one local exchange telecommunications company, all other local exchange telecommunications companies certified to provide service in that exchange may file a tariff to use such smaller geographic area or such other market segmentation to provide that service;

(c) For proposed different services described in paragraphs (a) and (b) of this subdivision, the local exchange telecommunications company which files a tariff to provide such service shall provide the service to all similarly situated customers, upon request in accordance with that

company's approved tariff, in the exchange or geographic area smaller than an exchange or such other market segmentation for which the tariff was filed, and no price proposed for such service by an incumbent local exchange telecommunications company, other than for a competitive service, shall be lower than its long run incremental cost, as defined in section 386.020, RSMo.

(3) The commission, on its own motion or upon motion of the public counsel, may by order, after notice and hearing, define a telecommunications service offered or provided by a telecommunications company as a different telecommunications service dependent upon the geographic area or other market within which such telecommunications service is offered or provided and apply different service classifications to such service only upon a finding, based on clear and convincing evidence, that such different treatment is reasonably necessary to promote the public interest and the purposes and policies of this chapter.

5. No telecommunications company may charge a different price per minute or other unit of measure for the same, substitutable, or equivalent interexchange telecommunications service provided over the same or equivalent distance between two points without filing a tariff for the offer or provision of such service pursuant to sections 392.220 and 392.230. In any proceeding under sections 392.220 and 392.230 wherein a telecommunications company seeks to charge a different price per minute or other unit of measure for the same, substitutable, or equivalent interexchange service, the burden shall be on the subject telecommunications company to show that such charges are in the public interest and consistent with the provisions and purposes of this chapter. The commission may modify or prohibit such charges if the subject telecommunications company fails to show that such charges are in the public interest and consistent with the provisions and purposes of this chapter. This subsection shall not apply to reasonable price discounts based on the volume of service provided, so long as such discounts are nondiscriminatory and offered under the same rates, terms, and conditions throughout a telecommunications company's certificated or service area.

6. Every telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the conversations and messages of every other telecommunications company with whose facilities a connection may have been made.

> 7. The commission shall have power to provide the limits within which telecommunications messages shall be delivered without extra charge.
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> 8. Customer specific pricing is authorized for dedicated, nonswitched, private line and special access services and for central office-based switching systems which substitute for customer premise, private branch exchange (PBX) services, provided such customer specific pricing shall be equally available to incumbent and alternative local exchange telecommunications companies.
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> 9. This act shall not be construed to prohibit the commission, upon determining that it is in the public interest, from altering local exchange boundaries, provided that the incumbent local exchange telecommunications company or companies serving each exchange for which the boundaries are altered provide notice to the commission that the companies approves the alteration of exchange boundaries.

In understanding and implementing the Price Cap Statute, the Commission seeks to determine the intent of the legislature and to give effect to that intent.[168] "Legislative intent is derived from the statute's words 'used in their plain and ordinary meaning.'"[169] The plain language of the Price Cap Statute at Sections 392.245.4 and 392.245.11 requires that the Commission, before approving a tariff submitted under either of those sections, determine whether or not the proposed tariff is "consistent with the provisions of section 392.200[.]" A tariff that is consistent with Section 392.200 must be approved if it contains prices that do not exceed the maximum allowable price.[170] It follows that a tariff that is not consistent with Section 392.200 cannot be approved, even if it contains prices that do not exceed the maximum allowable price. The Price Cap Statute only authorizes the Commission to approve tariffs that meet both of the conditions specifically expressed in the statute.

Section 392.200.1 requires, among other things, that "[a]ll charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission." Several of the parties argue that this language, although contained in Section 392.200, nonetheless does not apply to tariffs submitted by price-cap-regulated carriers. They contend that the language of Section 392.245.1 requires this conclusion. That provision states:

> The commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services

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[168] *Sermchief v. Gonzales,* 660 S.W.2d 683, 688-89 (Mo. banc 1983) (citations omitted).

[169] *Id.*

[170] Sections 392.245.4 and 392.245.11.

> are just, reasonable and lawful by employing price cap regulation. As used in this chapter, "price cap regulation" shall mean establishment of maximum allowable prices for telecommunications services offered by an incumbent local exchange telecommunications company, which maximum allowable prices shall not be subject to increase except as otherwise provided in this section.

However, the argument that the cited language in Section 392.200.1 does not apply to price-cap-regulated carriers is contrary to the plain language of the Price Cap Statute itself. As noted, it specifies without reservation or exception that tariffs must be "consistent with the provisions of section 392.200[.]"[171] At Section 392.245.7, the legislature provided a list of the provisions in Chapter 392 that do not apply to price-cap-regulated carriers. That list does not include Section 392.200.1.

The plain language of Section 392.245.1 also does not support the argument that the cited language in Section 392.200.1 does not apply to price-cap-regulated carriers. Several parties contend that the first sentence of Section 392.245.1 constitutes a declaration that prices set under the Price Cap Statute are just and reasonable as a matter of law. However, that is not what the sentence in question actually says. Instead, the sentence plainly confers authority on the Commission to employ "price cap regulation" in order to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful[.]"[172] "Just, reasonable and lawful" rates are thus identified by the legislature as the intended goal of the Commission's authorized activities under the Price Cap Statute. That authorized activity includes, as discussed above, Commission review of proposed tariffs to determine consistency with the provisions of Section 392.200. Thus, the Price Cap Statute does not forbid the Commission from reviewing proposed tariffs to ensure that rates are just and reasonable; in fact, it requires such review.

Commission Review for Consistency with Section 392.200:

The parties ask in their second issue, "If the Commission determines it has such authority, should the Commission approve or reject SBC Missouri's proposed price increases for Line Status Verification and Busy Line Interrupt?" Only the Public Counsel believes that the Commission has authority to review the prices in question to determine whether they are just and reasonable. Public Counsel further believes that the prices in question are not just and reasonable and should be rejected. All of the other parties, including the Commission's Staff, argue that the Commission lacks the authority to either review or reject the prices and so must approve the tariffs.

As discussed above, the Price Cap Statute requires that the Commission review tariffs submitted by price-cap-regulated carriers to ensure that prices are just and reasonable. How shall the Commission conduct such a review? Certainly not by conducting a traditional rate case or anything like a traditional rate case. This conclusion is inescapable in view of the language of Section 392.245.7, which

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[171] Sections 392.245.4 and 392.245.11.

[172] Section 392.245.1.

provides that "[a] company regulated under this section shall not be subject to regulation under subsection 1 of section 392.240." That section, in turn, provides for traditional cost-of-service ratemaking:[173]

> Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon a complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telecommunications company for the transmission of messages or communications, or for the rental or use of any telecommunications facilities or that the rules, regulations or practices of any telecommunications company affecting such rates, charges, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law, or that the maximum rates, charges or rentals chargeable by any such telecommunications company are insufficient to yield reasonable compensation for the service rendered, the commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and shall fix the same by order to be served upon all telecommunications companies by which such rates, charges and rentals are thereafter to be observed, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission.

The legislature has thus expressly provided that price-cap-regulated carriers are not subject to traditional cost-of-service ratemaking. Consequently, the Commission's review of a tariff proposed by such a carrier may not take the form of a traditional rate case. This conclusion is further supported by the existence of

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[173] Section 392.240.1.

Section 392.246, under which a price-cap-regulated carrier can choose to petition for a return to traditional ratemaking.[174]

By excluding traditional cost-based ratemaking, the Price Cap Statute has dissociated rates from costs.[175] Instead, as this Commission has stated previously, "the premise of price cap regulation is that the focal point should be on the reasonableness of a company's *prices* for its services, generally in relationship to some economic indicator, but without relationship to a company's *earnings*."[176] The plain language of the Price Cap Statute supports the conclusion that the Commission's review is directed at the reasonableness of the proposed prices rather than at the relationship of revenues and costs. Section 392.245.11 provides that "the maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices." Thus, an annual price increase in excess of eight percent is prohibited, regardless of the magnitude of any increase in the carrier's costs. An increase of eight percent or less is permitted if the Commission concludes that the proposed increase is just and reasonable. Thus, the Price Cap Statute essentially creates presumptions. It creates a conclusive presumption that an increase of more than eight percent is not just and reasonable. It creates a rebuttable presumption that an increase of eight percent or less is just and reasonable.

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[174] Section 392.246 provides: "Notwithstanding the provisions of subsection 2 of section 392.245, an incumbent local exchange telecommunications company regulated under section 392.245 may petition the commission for rate relief under the provisions of sections 392.220 and 392.230, and the commission may grant such rate relief if it determines that the financial condition of such incumbent local exchange telecommunications company's Missouri jurisdictional operations is such that the company cannot attract capital on reasonable terms or that the ability of that incumbent local exchange telecommunications company to continue to provide safe and adequate universal telecommunications service is threatened. If the commission shall be of the opinion that the maximum rates, charges or rentals chargeable by such telecommunications company are insufficient to yield reasonable compensation for the service rendered, the commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and shall fix the same by order served upon such incumbent local exchange telecommunications company, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission."

[175] *See* Thomas Rebuttal, 12.

[176] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996,* Case No. TO-97-397 (*Report & Order,* issued September 16, 1997).

What yardstick should the Commission use in determining whether a proposed price increase of eight percent or less is just and reasonable? Section 392.245.4 ties rates to one of two objective economic indicators, the CPI-TS and the GDP-PI. Although Section 392.245.11 does not specifically refer to either the CPI-TS or the GDP-PI, it is reasonable to look to Section 392.245.4 for guidance in the implementation of Section 392.245.11. In the first instance, then, the Commission should look to either the CPI-TS or the GDP-PI, depending on which measure the subject carrier's basic rates are tied to. However, the Commission may consider whatever competent and substantial evidence the parties may adduce as to the reasonableness of the proposed prices.

Bell's basic local and exchange access rates are tied to the CPI-TS.[177] The record shows that the CPI-TS has declined by an average of 0.34 percent over the past six years, and declined by a steeper average of 0.72 percent over the past two years.[178] The record further shows that Bell's basic local and exchange access rates, which are tied to the CPI-TS, have declined by 0.77 percent from their December 31, 1996, level and are now lower than they were in 1984.[179] Using the CPI-TS as its measure, the Commission can only conclude that the proposed eight percent increase is not just and reasonable.

The record contains other, similar economic measures that the Commission can use as yardsticks. The record shows that the CPI-LS increased by an annual average of 2.73 percent over the past ten years, and more steeply by an annual average of 4.17 percent over the last two years.[180] The GDP-PI increased by an annual average of 1.77 percent over the past ten years.[181] An eight percent increase greatly exceeds the increase observed in either of these measures. By these measures, too, the Commission must conclude that the proposed eight percent increase is not just and reasonable.

The record contains other pertinent evidence as well. In another proceeding, the Commission found that LSV and BLI are each subject to effective competition in only two of Bell's exchanges.[182] Consequently, there is no reason to expect that competitive pressure will moderate Bell's price increases and that a lesser degree of regulation is justified.[183] The record shows that both services are priced above their incremental costs.[184] Prior to the imposition of price cap regulation, the record

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[177] Unruh Direct, 7; Thomas Rebuttal, 5; Unruh Surrebuttal, 4.

[178] Thomas Rebuttal, 6.

[179] Unruh Direct, 8.

[180] Thomas Rebuttal, 6. The CPI-LS is the Consumer Price Index—Local (Telephone) Service Charges.

[181] Thomas Rebuttal, 6.

[182] *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company,* Case No. TO-2001-467 (*Report & Order,* issued December 27, 2001).

[183] Section 392.185(6).

[184] Peters Rebuttal, 14, 16, based on a cost study based on the period 1997-1999. Meisenheimer Rebuttal, 14.

shows that services such as these would have been priced above cost in order to produce as much revenue as possible, moderated by social concerns.[185] With respect to costs, the Producer Price Index-Local Service, as a proxy for Bell's cost experience, rose by an annual average of 0.50 percent over the past eight years, with a steeper average annual increase of 0.65 percent for the past two years.[186] Both LSV and BLI are very labor dependent.[187] Consequently, these services are particularly sensitive to labor cost fluctuations. The record shows that Bell has probably experienced annual increases in its labor costs, net of productivity gains, of about 5.0 percent.[188] Staff witness Thomas, an expert economist, offered his opinion that the proposed price increases are excessive.[189] This evidence also suggests that the magnitude of the proposed price increases is excessive and the Commission so finds.

Conclusion:

Based on the consideration of the proposed sheet, the filings and arguments of the parties, and the evidence adduced at the hearing, the Commission concludes that it is authorized and required to determine whether or not the prices contained in a tariff filed under Section 392.245.11 are just and reasonable. In the present case and on the present record, the Commission concludes that the proposed eight percent price increases for LSV and BLI are not just and reasonable. Consequently, the Price Cap Statute requires the Commission to reject the proposed sheet.

IT IS THEREFORE ORDERED:

1. That the proposed revised tariff sheet filed by Southwestern Bell Telephone Company, doing business as SBC Missouri, on June 10, 2003, and assigned tariff tracking number JI-2003-2141, is hereby rejected. The specific sheet rejected is:

P.S.C. Mo. No. 24
7th Revised Sheet 5.10, Replacing 6th Revised Sheet 5.10

2. That this Report and Order shall become effective on November 17, 2003.

Gaw, Ch., and Simmons, C., concur, with separate concurring opinion(s) to follow;
Clayton, C., concurs;
Murray and Forbis, CC., dissent, with separate dissenting opinions attached;
all certify compliance with the provisions of Section 536.080, RSMo.

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[185] *Supra,* at pages 11-13.

[186] Thomas Rebuttal, 7.

[187] Tr. 182.

[188] Tr. 300-301.

[189] Tr. 202.

CONCURRING OPINION OF CHAIRMAN STEVE GAW AND COMMISSIONER KELVIN SIMMONS

I agree with the action taken by the Commission in this matter, although I do not believe that the factual record created by the parties is very strong. This is particularly so in light of prices for similar services by IXCs that are substantially higher than the prices proposed by SBC. However, I believe there is evidence in the record to support the findings of the order. Furthermore, it is important that the legal issue of the Commission's authority be resolved.

In addition, I want to address a legal point that the majority opinion ignores. Section 392.245.5, RSMo Supp. 2002, provides for price-cap-regulated carriers to become competitive on an exchange-by-exchange basis. The mechanism provided for this transformation is an investigation by the Commission of the state of competition in the subject carrier's service area. The statute provides as follows:

If the commission determines that effective competition does not exist in the exchange, the provisions of paragraph (c) of subdivision (2) of subsection 4 of section 392.200 and the maximum allowable prices established by the provisions of subsections 4 and 11 of this section shall continue to apply.

SBC and the intervenors argue that this language, specifying only Subsection 4(2)(c) of Section 392.200, RSMo Supp. 2002, shows that the remainder of Section 392.200 does not apply to price-cap-regulated carriers. The specific reference to Section 392.200.4(2)(c) is intended to make it abundantly clear that geographic de-averaging is prohibited for carriers that become price-cap-regulated after having been competitive. This is necessary because competitive classification on an exchange-by-exchange basis necessarily means that prices for services will be geographically de-averaged, that is, not the same in all exchanges. Section 392.245.5 references more than Section 392.200.4(2)(c), however. It also states that maximum allowable prices are governed by Subsections 4 and 11 of Section 392.245. As the majority opinion states, these subsections indicate that prices should be consistent with the just and reasonable provisions of Section 392.200.

For these reasons, I respectfully concur in the decision.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I find it incredulous that the majority has taken the position of effectively re-writing the price-cap statute[1] to read as the majority wishes it were written.[2] Furthermore, the conclusion to reject the tariff is unsupportable, even if the fatally flawed reasoning about the price-cap statute acting only as a rebuttable presumption were accepted as true.

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[1] Section 392.245 RSMo. 2000.

[2] See my Dissenting Opinion of July 3, 2003, from the Order Suspending Tariff in this case for a discussion of the meaning of the price cap statute.

The Report and Order is replete with inconsistencies and illogical reasoning. For example, it states that the highest Missouri rates for LSV are $19.98 and for BLI are $9.99. Yet, the majority finds that it would be unjust and unreasonable for SBC to charge $1.62 for LSV and $2.49 for BLI.

Another example of the majority's illogic is its attempt to use the CPI-TS as a measure of just and reasonable increases for non-basic services. The majority conveniently extracts that indicator from the statutory provision which relates only to basic local and exchange access rates.[3] Then the majority uses that indicator in a totally different manner than it is used in that provision. Taking the majority's analysis to its logical conclusion would require a finding that anything other than a decrease in rates for non-basic services to levels below those in effect on December 31, 1996 is not just and reasonable.

Next, the majority makes the leap in reasoning that other economic measures, such as the CPI-LS and the GDP-PI, may serve as yardsticks for the determination of just and reasonable. From that leap is drawn the conclusion that, because neither index has increased close to eight-percent over the past ten years,[4] the proposed eight-percent increase is not just and reasonable.

Although not specifically termed a yardstick, the majority references as "other pertinent evidence" that "Bell has *probably* (emphasis added) experienced annual increases in its labor costs, net of productivity gains, of about 5.0 percent." Also included as "other pertinent evidence . . . that suggests that the magnitude of the proposed price increases is excessive" is the opinion offered by Staff witness Thomas that the proposed increases are excessive in his opinion. None of the majority's "pertinent evidence" has any factual basis in the record.

Today's decision is a huge step backwards for this Commission and for the telecommunications industry and its consumers in Missouri. I deeply regret the delays, inconveniences and unnecessary expenses that have occurred and that will necessarily continue until the courts direct the Commission to implement the law. For all of these reasons, I respectfully dissent.

DISSENTING OPINION OF COMMISSIONER BRYAN FORBIS

I must disagree with the majority's position in rejecting this tariff submitted by Southwestern Bell Telephone Company per the price cap statute. I do not believe this action is consistent with the legislative mandate of 392.245.

In its order, the commission asks and answers two questions: first, does the Commission have jurisdiction to reject a proposed increase which does not exceed the maximum allowable price and; second, if it has jurisdiction, is the instant tariff just and reasonable?

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[3] Section 392.245.4(a) RSMo. 2000.

[4] No explanation was given regarding the relevance of a ten-year period.

My dissent does not address the second question. Indeed, it is my opinion that the question is irrelevant, given that the Commission does not have jurisdiction in the matter beyond making the eight percent price cap determination. In 1996, the Missouri General Assembly decided that the public interest review normally charged to the Public Service Commission would be replaced in certain instances with a statutory pricing structure. The first sentence of the price cap statute, 392.245.1, reads: "The Commission shall…ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." This approach is consistent with the history of price caps; legislatures nationwide have used them to protect consumers while guaranteeing companies stability as the market transitions to full competition. Section 392.245.2 states that "a large incumbent local exchange telecommunications company shall be subject to regulation under this price cap section" when the Commission determines that alternate service exists in any part of the ILEC's service area.

I am not endorsing the price cap statute through this dissent. The authorization of an eight percent annual increase with no sunset and review provisions is outdated public policy in today's economic and technological environment. However, revision of the price cap is a change only the legislature can make.

Nonetheless, the jurisdictional debate has vexed members of the Commission for some months. It is my hope that today's decision, expected by some, including myself, to be the genesis of a "test case," will result in judicial review which can finally resolve this question, providing regulatory clarity and certainty for all parties in the future.

In the Matter of BPS Telephone Company's Election to be Regulated under Price Cap Regulation as Provided in Section 392.245, RSMo 2000.*

Case No. IO-2003-0012
Decided November 13, 2003

Telecommunications §1. The Commission found that BPS Telephone Company's notice of election to become a price cap carrier under Section 392.245.2 was invalid.

Telecommunications §1. The Commission found that where the interconnection agreement between the small incumbent local exchange carrier and the competitive local exchange carrier contained a "do not compete" clause, the competitive company was not providing basic local telecommunications service as contemplated by the price cap statute.

Telecommunications §36. The Commission found that where the interconnection agreement between the small incumbent local exchange carrier and the competitive local exchange carrier contained a "do not compete" clause, the competitive company was not providing basic local telecommunications service as contemplated by the price cap statute.

Telecommunications §40. The Commission found that where the interconnection agreement between the small incumbent local exchange carrier and the competitive local exchange carrier contained a "do not compete" clause, the competitive company was not providing basic local telecommunications service as contemplated by the price cap statute.

APPEARANCES

W.R. England, III, and *Sondra B. Morgan*, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for BPS Telephone Company.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Cliff E. Snodgrass, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus

This order finds that BPS Telephone Company's notice of election to become a price cap carrier under Section 392.245.2, RSMo 2000[1] is invalid.

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* The Commission, in an order issued on December 30, 2003, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (04CV323251) and later appealed to the Missouri Court of Appeals - Western District (WD64749).

[1] All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

Procedural History

By letter to the Commission on March 13, 2002, BPS Telephone Company notified the Commission that it was electing to be regulated under the "price cap" provisions of Section 392.245.2. BPS provided a second written notice of its intent to be regulated under the price cap statute on July 17, 2002. The Commission issued a Notice of Price Cap Election on July 22, 2002, and set a time for responses to the price cap election.

The Staff of the Missouri Public Service Commission filed a motion requesting that the Commission reject BPS's price cap election. The Office of Public Counsel also objected to BPS's election and requested that the Commission hold an evidentiary hearing.

Prior to BPS's price cap election notice, the Staff had informally been conducting an overearnings investigation. Staff also filed a formal request to conduct an overearnings investigation and to file a complaint.[2]

On January 24, 2003, the parties filed a joint issues list describing the issues to be resolved to by the Commission. On that same date, each of the parties filed a statement describing their position on each issue. An evidentiary hearing, with all the parties present, was held on February 7, 2003.

Initial briefs of the parties were filed on April 4, 2003, and reply briefs were submitted on April 24, 2003. Also on April 4, 2003, ALLTEL Missouri, Inc., filed a petition for leave to file its brief as *amicus curiae*. ALLTEL simultaneously filed its brief. The Commission granted the petition on April 15, 2003.

Discussion

The parties presented the Commission with the following issues for determination and stated the following positions[3] on each issue:

1. Is Missouri State Discount Telephone providing basic local telecommunications service in BPS's service area?

> BPS: Yes. MSDT provides basic local telecommunications service in BPS's service area in accordance with the definition of basic local telecommunications service found in Section 386.020(4), RSMo 2000.
>
> Staff: No. MSDT is not providing the minimum standards for basic local telecommunications service established in Commission Rule 4 CSR 240 32.100. Section 386.020(4) only provides a general outline of what constitutes basic local telecommunications service The statute defers to the Commission to determine such things as local calling scope, and whether or not touch tone, access to operator services, as well as other features are included as part of basic local telecommunications service.

[2] *Staff of the Missouri Public Service Commission, Complainant, v. BPS Telephone Company, Respondent*, Case No. TC-2002-1076.

[3] Each of the parties' positions was taken from their Statements of Position filed on January 24, 2003. ALLTEL in its Amicus Curiae Brief agrees with the position of BPS.

Public Counsel: No. MSDT, as a prepaid provider, does not provide many of the services that are defined as basic local service.

2. Would the type or level of competition that MSDT provides BPS be a relevant consideration in determining whether BPS is subject to price cap regulation?

BPS: No. Section 392.245.2, sets out the requirements to be met by a small incumbent local exchange telecommunications company before it can elect to be regulated under price cap regulation. This statute does not reference any type or level of competition that must be met before the incumbent LEC is eligible to elect price cap regulation. The Commission previously rejected the "effective competition" argument in the Southwestern Bell Telephone Company price cap case.[4] Thus, competition, no matter what the level or type, is not a consideration.

Staff Position: Yes. The type of competition required for a valid election to price cap status is that an alternative local exchange carrier is certificated to provide basic local telecommunications service, and is, in fact, providing basic local telecommunications service in the service area of BPS.

Public Counsel: Yes. It would be absurd for the General Assembly to use the presence of an alternative local exchange telecommunications company certified and providing services in the ILECs exchanges as a price cap election trigger if the ALEC does not compete with the ILEC for customers. Competition is the essential reason for permitting price cap regulation as an alternative form of regulation from rate of return regulation. The provisions of the interconnection agreement amount to a pact not to compete and therefore MSDT cannot reasonably be said to be offering competitive services to BPS. MSDT as a prepaid company does not provide basic local service to compete with BPS even absent the interconnection agreement.

3. Does BPS qualify for price cap regulation under Section 392.245 RSMo 2000?

BPS: Yes. BPS has shown that it meets all of the statutory criteria for election of price cap regulation. BPS is a small incumbent local exchange company; it filed a written notice to the Commission of its election to be regulated under the price

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[4] *In the Matter of the Petition of Southwestern Bell Telehpone Company for a Determination that It is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, Case No. TO-97-397.

cap statute; MSDT is an alternative local exchange telecommunications company; MSDT holds a certificate of service authority to provide basic local telecommunications service in BPS's service area; and MSDT is providing basic local telecommunications service in BPS's service area.

Staff: No. BPS does not qualify for price cap regulatory status because MSDT is not providing basic local telecommunications service as required by Commission Rule 4 CSR 240-32.100 and as is required by the election provisions of this statute.

Public Counsel: No. Allowing BPS to elect price cap regulation under the facts here would be inconsistent and contrary to the clear intent and purpose of Section 392.245, RSMo and Chapter 392. MSDT does not offer many of the basic local telecommunications services defined by Section 386.020(4). Also, MSDT and BPS have entered into a non-compete pact as part of their interconnection agreement. To allow price cap regulation election under these circumstances is contrary to the intent and purpose of the law to have competition as a substitute for regulation and to provide just and reasonable prices for services.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

BPS is a small incumbent local exchange company serving approximately 3900 access lines in Missouri.[5] BPS first provided written notice to the Commission of its intent to be regulated under the price cap statute[6] on March 13, 2002.[7] BPS provided a second written notice of its intent to be regulated under the price cap statute on July 17, 2002.[8]

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[5] Exh. 1, pp. 3-4; Exh. 2, p. 4; Exh. 3, pg. 2; Tr. 118; 241.

[6] Section 392.245, RSMo.

[7] Exh. 1, p. 4 ; Sched. DC I ; Tr. 118; 242.

[8] Exh. 1, p.4; Sched. DC 2.

MSDT was certified to provide basic local telecommunications service by the Commission in Case No. TA-2001-334, effective March 26, 2001.[9] MSDT's tariff for the provision of basic local telecommunications service was approved by the Commission on June 26, 2001, and became effective on July 2, 2001.[10] MSDT's original tariff did not specifically list that it would be providing service in any of BPS's exchanges. MSDT amended its tariff effective June 21, 2002, to include the service territory of several small company exchanges including BPS.

MSDT resells the telecommunications service of BPS. BPS and MSDT entered into a Resale Agreement that was approved by the Commission in Case No. TO-2002-62, effective October 26, 2001.[11] That agreement included the following restriction on service to be provided by MSDT:

> **6.1 Restrictions.**
>
> 6.1.1 The resale of services under this Agreement shall be limited to users and uses conforming to class of service restrictions. All services provided under this Agreement shall be toll restricted, so that the services cannot be used to incur direct dial toll charges. . . . Missouri State Discount shall not target Telephone Company's current customers or new customers to Telephone Company's service area, for services to be resold by Missouri State Discount. Missouri State Discount's target market shall be individuals and entities which are not current customers of Telephone Company and have been disconnected for nonpayment of Telephone Company's telecommunication charges. . . . [12]

MSDT provides telecommunications service to a few customers within the BPS service area.[13] MSDT provides service by reselling through its interconnection agreement, the services of BPS. The type of service offered by MSDT is often referred to as "prepaid" service. This term is derived from the fact that in order to receive service, the customer must pay in full for the month of service. In addition, consumers of "prepaid" service usually are limited to basic local services and have no access to toll or fee services. MSDT's customers are restricted in this manner.

MSDT provides "two-way switched voice service within a local calling scope"[14] comprised of the following services:[15]

(a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges;

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[9] Exh. 1, p. 4; Exh. 2, p. 12; Exh. 3, p. 7 ; Tr. 118; 241.

[10] Exh. 1, p. 4.

[11] Exh. l, p. 4-5 ; Exh. 6.

[12] Exh. 6, p. 6.

[13] Exh. 1, p. 6; Exh. 3, p . 3; Tr. p. 51, ln. 4-9.

[14] Section 386.020(4), RSMo.

[15] Exh. 5, pp. 12-13 ; Tr. pp. 119-21.

(b) Access to local emergency services including 911 service, if available;

(c) Standard intercept service; and

(d) Standard white pages directory listings.

MSDT does not provide the other services as listed in Section 386.020(4) including assistance programs such as lifeline, link up, and dual party relay services; access to basic local operator services; access to basic local directory assistance; and equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.[16] The current price for service from MSDT is $50 per month and for similar services from BPS the charge is approximately $20.[17]

The current agreement between BPS and MSDT limits MSDT's ability to compete with BPS. The testimony of David Carson corroborated this fact. Mr. Carson testified that even though a BPS customer could request service from MSDT, under the terms of the agreement, MSDT could do very little to try to gain those customers until they have their service disconnected from BPS.[18] It is at that point that the agreement allows MSDT to seek BPS's customers. Based on its review of the agreement, Mr. Carson's testimony cited above, and Mr. Carson's confidential testimony during the *in camera* session of the hearing,[19] the Commission finds that the agreement is designed to prohibit competition between the companies. The Commission also finds that BPS is not subject to any competition from MSDT.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

BPS is a telecommunications company and public utility as defined in Sections 386.020(51) and 386.020(42). The Commission has jurisdiction over the services, activities, and rates of BPS under Chapters 386 and 392. BPS is also an incumbent local exchange telecommunications company as defined in Section 386.020(22), and a small local exchange telecommunications company as defined in Section 386.020(30).

Section 392.245 authorizes the Commission to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

> A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local

[16] Exh. 5, pp. 12-13.

[17] Tr. p. 67, ln. 1-9.

[18] Tr. p.62-65; Tr. p. 69, ln. 10-14.

[19] Tr. p. 51.

> exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area . . . .

An "alternative local exchange telecommunications company" is defined as "a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service. . .in a specific geographic area."[20] MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-334, effective March 26, 2001. A telecommunications company is required to specify in which exchanges it will provide service.[21] As of June 21, 2002, MSDT's tariff specified that it would provide service in BPS's service area. BPS also has provided written notice of its election to be regulated pursuant to the price cap statute on March 13, 2002, and again on July 17, 2002.

Thus, BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service in competition with BPS. Even though MSDT provides two way switched voice service within a local calling scope and provides four of the services listed in Section 386.020(4), it is not providing basic local service in a manner as intended by the legislature that would allow BPS to elect price cap regulation.

"It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature."[22] Section 392.245 contains no reference to competition; however, the legislature has mandated that every provision in Chapter 392, whether ambiguous or not, be construed with certain principles in mind.[23] Section 392.185 states:

The provisions of this chapter shall be construed to:

> (1) Promote universally available and widely affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
>
> (4) Ensure that customers pay only reasonable charges for telecommunications service;

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[20] Section 386.020(1), RSMo.

[21] Section 392.220.1, RSMo. *See also*, 4 CSR 240-3.545(12)(C) (this rule was formerly 4 CSR 240-30.010(12)(C) but was relocated within the Code of State Regulations effective April 30, 2003).

[22] *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 386-387 (Mo. banc 1987). (citations omitted)

[23] Section 392.185, RSMo.

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in the construction and application of the Price Cap Statute. Section 392.185(6) states that one public policy to be implemented through the construction of Chapter 392 is to "[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest." Another is "flexible regulation of competitive telecommunications companies and competitive telecommunications services."[24] Price cap regulation, a transitional status between traditional rate-of-return regulation and deregulated competition, permits ratemaking without the traditional oversight and regulation of the Commission. This is the principal benefit that the legislature intended to confer on qualifying carriers through the Price Cap Statute.

The Commission has examined the Price Cap Statute in the context of the principles set out by the legislature and the entire deregulation scheme put forth in Chapter 392 to implement the federal Telecommunications Act of 1996. It is clear from the statutes that the legislature intended to promote competition while maintaining protection for the ratepayers by allowing competition to substitute for regulation. BPS and MSDT have agreed that MSDT will not compete for BPS's customers. Therefore, to find that MSDT is providing competitive pressure on BPS that will substitute for regulation, would be to leave the ratepayers with inadequate protections to ensure that the rates they pay are reasonable. Neither competition nor the Commission would regulate the prices charged by BPS. The Commission agrees with the Office of the Public Counsel that allowing BPS to elect price cap status under this completely noncompetitive circumstance would be an absurd result that the legislature did not intend and would not be "consistent with the public interest."[25]

The Commission concludes that MSDT is not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status. The Commission further concludes that BPS's price cap election is invalid, and that BPS maintains its status as a traditional rate-of-return regulated company.

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[24] Section 392.185(5).

[25] Section 392.185(6), RSMo.

The Commission need not address the issue of what level of competition is necessary for price cap election because BPS is not subject to any competition from MSDT. The Commission also does not reach the issue of whether a prepaid service provider can be considered to be providing basic local telecommunications service under Section 386.020(4). It is not necessary to decide this issue because BPS does not qualify for price cap status for the reasons stated above.

Conclusion

The legislature stated that Chapter 392 "shall be construed" so that "full and fair competition . . . [may] substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest."[26] MSDT and BPS have entered into a contract by which MSDT agrees not to compete with BPS and BPS is not subject to any competition from MSDT. The legislature could not have intended such a noncompetitive situation to qualify as "providing . . . [basic local telecommunications] service" under Chapter 392 and thereby allow the small incumbent local exchange carrier to reap the benefits of a competitive environment and a lesser degree of regulation. For these reasons, the Commission determines that BPS is not eligible for price cap status and that its price cap election is invalid.

IT IS THEREFORE ORDERED:

1. That BPS Telephone Company is ineligible to elect price cap status.
2. That any motion not ruled on is denied and that any objection not ruled on is overruled.
3. That this Report and Order shall become effective on November 24, 2003.

Gaw, Ch., Murray, Simmons, Forbis, and Clayton, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

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[26] *Id.*

Petition for Suspension of the Federal Communications Commission Requirement to Implement Number Portability.*

Case No. IO-2004-0231
Decided November 20, 2003

Telecommunications §1. Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Green Hills Telephone Company, KLM Telephone Company, and Lathrop Telephone Company filed a petition for suspension of the Federal Communications Commission's (FCC) November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, insofar as that order requires the petitioners to implement local number portability by November 24, 2003. The petitioners also requested expedited treatment, asking that the Commission issue its order by November 21, 2003.

In order to allow additional time to review the request, the Commission issued an order granting a temporary suspension, until January 24, 2004, of the intermodal porting obligations of the FCC's November 10, 2003 order.

Telecommunications §36. Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Green Hills Telephone Company, KLM Telephone Company, and Lathrop Telephone Company filed a petition for suspension of the Federal Communications Commission's (FCC) November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, insofar as that order requires the petitioners to implement local number portability by November 24, 2003. The petitioners also requested expedited treatment, asking that the Commission issue its order by November 21, 2003.

In order to allow additional time to review the request, the Commission issued an order granting a temporary suspension, until January 24, 2004, of the intermodal porting obligations of the FCC's November 10, 2003 order.

ORDER GRANTING TEMPORARY SUSPENSION

On November 19, 2003, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri Inc., Green Hills Telephone Corporation, KLM Telephone Company, and Lathrop Telephone Company filed a Petition for Suspension and Motion for Expedited Treatment. Petitioners indicate that pursuant to Section 251(f) of the Telecommunications Act of 1996 (the Act), they petition the Missouri Public Service Commission for a suspension of the Federal Communications Commission's November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, insofar as that order requires Petitioners to implement local number portability (LNP) by November 24, 2003. Petitioners also ask for expedited treatment, requesting that the Commission issue an order by November 21, 2003, the last business day before the FCC's November 24, 2003 deadline.

*The Commission, in an order issued on January 22, 2004, granted a second temporary suspension, until February 23, 2004, of the intermodal porting obligations of the Federal Communication Commission's November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking.*

Also see Case No. TO-2004-0232.

Petitioners note that the FCC's November 10 Order addresses wireline-to-wireless (i.e., intermodal) number portability. The Order concludes that as of November 24, 2003, local exchange carriers providing service within the Nation's 100 largest Metropolitan Statistical Areas (MSAs) must port numbers to wireless carriers where the requesting wireless carrier's "coverage area" overlaps the geographic location of the rate center in which the customer's wireline number is provisioned. Petitioners state that they seek suspension and waiver of the FCC decision because it is technically infeasible for them to comply with the Order by November 24, 2003. Petitioners claim that they are not presently LNP-capable, and that becoming LNP-capable will require a significant investment in central office switching equipment. Petitioners request that the Commission grant a temporary suspension of the FCC Order's intermodal obligations until May 24, 2004.

Petitioners indicate that Section 251(f)(2) of the Act allows a rural local exchange carrier with fewer than two percent of the Nation's subscriber lines installed in the aggregate nationwide to petition a state commission for a suspension or modification of the application of a requirement or requirements found in Subsections (b) and (c) of Section 251.[1] Subsection (b)(2) of Section 251 contains the duty to provide number portability in accordance with FCC requirements.[2] Petitioners state that they are subject to the Commission's jurisdiction, and that they meet the definition of a "rural telephone company" as defined in Section 3 of the federal Telecommunications Act.[3] In addition, the access lines of each Petitioner are below two percent of the approximately 188 million access lines in the United States.[4]

According to the Petitioners, if the Commission does not grant the Petition for Suspension and Motion for Expedited Treatment, the Petitioners will be violation of the FCC Order because they are not technically able to meet the requirements of the Order. Petitioners claim that since the FCC has not yet set guidelines for intermodal porting, granting the Petition will be consistent with the public interest, convenience and necessity.

On November 20, 2003, the Office of the Public Counsel filed a pleading indicating that Public Counsel has no objection to the Commission granting expedited consideration of the Petition and no objection to the approval of the requested waiver. Due to the timing of the Petition, the Commission's Staff has not yet filed a response.

The Commission notes that the FCC's Order acknowledges that carriers inside the 100 largest MSAs may file petitions for waiver of their obligation to port numbers to wireless carriers if they can provide evidence that it is technically infeasible for them to comply with the Order. The Petition, including the attached Verifications, alleges that compliance with the FCC Order is technically infeasible. The Commission also notes that prior to the FCC Order, the FCC's rules did not require rural carriers, such as Petitioners, to implement LNP until they had received

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[1] 47 U.S.C. Section 251(f)(2).

[2] 47 U.S.C. Section 251(b)(2).

[3] 47 U.S.C. Section 153(37).

[4] From the FCC's *Trends in Telephone Service Report* released on August 7, 2003.

a bona fide request from a requesting carrier. And once a rural carrier received a bona fide request to implement LNP, it had six months within which to become LNP-capable. The Commission further notes that due to the timing of the Petition, Staff has not had an opportunity to file a response and the Commission has not had adequate time to thoroughly review the Petition. Based on these circumstances, the Commission finds a short suspension, until January 23, 2004, is appropriate. The Commission will also direct its Staff to expeditiously file its response and recommendation regarding the Petition.

IT IS THEREFORE ORDERED:

1. That the request for Expedited Treatment, filed on November 19, 2003, is granted.

2. That Petitioners are granted a temporary suspension, until January 24, 2004, of the intermodal porting obligations of the Federal Communication Commission's November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*.

3. That the Staff of the Commission shall file its response and recommendation no later than December 4, 2004.

4. That this order shall become effective on November 24, 2003.

Gaw, Ch., Murray, Simmons,
Forbis, and Clayton, CC., concur.

Ruth, Senior Regulatory Law Judge

In the Matter of the Joint Application of Missouri-American Water Company and Warren County Water & Sewer Company for Authority for Missouri-American Water Company to Acquire Certain Assets of Warren County Water & Sewer Company and, in Connection Therewith, Certain Other Related Transactions.*

Case No. WM-2004-0122
Decided November 20, 2003

Water §2. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and granted a certificate of convenience and necessity for Warren County Water & Sewer's service area to Missouri-American.

Water §4. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company with certain conditions including that a portion of the proceeds of the sale be placed in escrow for payment of overdue assessment, fees, and any other penalties or fines owed by the Seller.

Water §16. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and also approved a moratorium on rates.

Water §16. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered.

Sewer §2. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and granted a certificate of convenience and necessity for Warren County Water & Sewer's service area to Missouri-American.

Sewer §4. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company with certain conditions including that a portion of the proceeds of the sale be placed in escrow for payment of overdue assessment, fees, and any other penalties or fines owed by the Seller.

Sewer §14. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and also approved a moratorium on rates.

Sewer §14. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered.

Evidence, Practice and Procedure §6. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that there was not sufficient evidence to finally determine if an acquisition premium exists.

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*The Commission issued an order of correction and extending the effective date of the order on November 26, 2003. This order reflects those changes. In addition, the Commission issued an order of clarification on December 18, 2003. For another order in this case, see page 465.

Rates §18. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered.

Rates §111. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered.

Rates §112. The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered.

APPEARANCES

David P. Abernathy, Vice-President, General Counsel and Secretary, Missouri-American Water Company, 535 North New Ballas Road, St. Louis, Missouri 63141, for Missouri-American Water Company.

Paul S. DeFord, Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108,

and

Kurt U. Schaefer and *David A. Shorr*, Lathrop & Gage, L.C., 326 East Capitol Avenue, Jefferson City, Missouri 65101, for Warren County Water & Sewer Company.

M. Ruth O'Neill, Assistant Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Keith R. Krueger, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge

REPORT AND ORDER

Syllabus: This order approves the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company with certain conditions. The order also approves a moratorium on rates, denies setting the rate base for the assets at the purchase price, and directs further notices and tariff filings be made. Finally, the order grants a certificate of convenience and necessity to Missouri-American to operate in the service territory of Warren County Water & Sewer.

Procedural History

On September 4, 2003, Warren County Water & Sewer Company, Warren-Lincoln Investments, Inc. d/b/a Warren County Water & Sewer, and Gary Smith and A. Lynn Smith, and Missouri-American Water Company filed their Joint Application and Motion for Expedited Treatment seeking authority for Warren County Water &

Sewer to sell its assets to Missouri-American. The Joint Applicants also requested that the Commission expedite its decision so that the sale could proceed to closing no later than October 31, 2003.

The Commission issued its Order Directing Notice and Order Directing Filing on September 11, 2003. In that Order, the Commission set a date for requests to intervene and for a preliminary response from Staff.

Staff and Public Counsel filed preliminary responses. In its response, Staff requested that the motion for expedited treatment be denied and that it be allowed until December 1, 2003, to file its recommendation.

A prehearing conference was held on October 1, 2003, with all the parties present. On October 2, 2003, the Commission issued an order determining that expedited process was necessary and directed that Staff file its recommendation no later than October 17, 2003. The Commission also directed that replies be filed no later than October 24, 2003. After receiving Staff's recommendation and replies from the Office of the Public Counsel and Missouri-American, the Commission set the matter for an expedited hearing.

The evidentiary hearing was held on November 12 and 13, 2003, with all parties represented. The hearing concluded with oral arguments in lieu of briefs.

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. 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.

The Parties

Missouri-American is a Missouri corporation with its principal place of business in St. Louis, Missouri. Missouri-American currently provides water service to approximately 445,000 customers in the cities of St. Joseph, Joplin, Brunswick, Mexico, Warrensburg, Parkville, Riverside, Jefferson City, as well as parts of St. Charles, St. Louis, and Platte Counties in Missouri. In addition, Missouri-American provides sewer service to approximately 100 customers near Parkville, Missouri. Missouri-American has been granted certificates of convenience and necessity to operate as a water and sewer utility.

Warren County Water & Sewer holds a certificate of convenience and necessity from the Commission to operate water and sewer utilities in certain areas of Warren, Lincoln, and St. Charles Counties in Missouri.[1] Warren County Water & Sewer has 393 water customers and 374 sewer customers.[2] Most of these customers, all but approximately 50, live in a development known as Incline Village.[3]

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[1] *Joint Application ad Motion for Expedited Treatment*, filed September 4, 2003.

[2] Tr. p. 168, ln. 1.

[3] Tr. p. 92, ln. 9.

Warren County Water & Sewer was originally owned and operated by Incline Village Water Company and Incline Village Sewer Company. These utilities were formed by the real estate development company that began Incline Village. In 1992, Gary L. Smith obtained the utility assets through a property tax delinquency sale.[4] In June of 1998, Mr. Smith was granted authority to operate the utilities, Warren County Water & Sewer was granted a certificate of convenience and necessity, and Incline Village Water and Sewer were granted authority to transfer the utilities to Warren County Water & Sewer.[5]

Warren County Water & Sewer is a Missouri corporation with its principal offices in Foristell, Missouri. Warren County Water & Sewer has been administratively dissolved under Missouri law.[6] The stock and all of the assets of Warren County Water & Sewer are currently owned and controlled by Gary Smith and A. Lynn Smith, or Warren-Lincoln Investments, Inc. All of the common stock of Warren-Lincoln Investments., a Missouri corporation, is also owned by Gary Smith and A. Lynn Smith.[7]

Events Leading up to the Sale of the Assets

Currently, Warren County Water & Sewer is the subject of a proceeding in Warren County Circuit Court in which the Missouri Public Service Commission has sought the appointment of a receiver.[8] That proceeding began after the Commission found in a Complaint case[9] that Warren County Water & Sewer had a history of violations of Missouri Department of Natural Resources regulations, poor business practices, and failure to pay assessments to the Commission, fees to DNR, and its property taxes. In addition, the Commission found evidence of poor water quality, water pressure, customer service, and sewer smells. The Commission determined that the flagrant violations of the company warranted seeking the appointment of a receiver. The Circuit Court proceeding has been continued to allow the Joint Applicants an opportunity to file this application with the Commission and sell the assets of the company.

During the hearing, the Commission also took notice of the criminal proceeding in the United States District Court for the Eastern District of Missouri.[10] In that proceeding, Mr. Smith was found guilty of felony violations of the Clean Water Act and was ordered to sell the company.[11] Furthermore, testimony at the hearing

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[4] Exhibit 10.

[5] *Order Approving Stipulation and Agreement*, Case No. WA-96-449 (issued June 18, 1998).

[6] *Joint Application*.

[7] *Id.* (For purposes of this order, Gary Smith, A. Lynn Smith, Warren-Lincoln Investments, and Warren County Water & Sewer are collectively referred to as Warren County Water & Sewer.)

[8] *Public Service Commission v. Warren County Water & Sewer Company*, Warren County Circuit Court Case No. 02CV155901.

[9] *Office of the Public Counsel v. Warren County Water and Sewer Company and Gary L. Smith*, Case No. WC-2002-155, *Report and Order*, issued October 8, 2002.

[10] Docket No.: 4:01-CR-00195-ERW-AL.

[11] Tr. p. 12.

showed that Warren County Water & Sewer Company owes approximately $25,000 in outstanding fines to the Missouri DNR.[12]

Sale of the Assets

Missouri-American and Warren County Water & Sewer entered into a contract for the sale of assets. Missouri-American has offered to purchase the assets for $335,000. All of the parties, as well as the customers of Warren County Water & Sewer who testified at the hearing, support the application for sale of assets. The only contest is to whether the Commission should set the value of the assets for ratemaking treatment at the purchase price.

None of the parties dispute the following facts and the Commission finds these facts to be true:

Currently, the customers of Warren County Water & Sewer are not receiving safe, adequate, and reliable water and sewer service. Because of a lack of water pressure, sewer problems, and other deficiencies in the system, property values for the customers of Warren County Water & Sewer have declined. The sale of property in the area has become stagnant, but would improve if the sale were approved.[13] In addition, the Board of Trustees of Incline Village has placed a moratorium on any further development in Incline Village.[14] The Board would immediately lift the moratorium on building if this sale were approved.[15]

Missouri-American has expertise in providing water and sewer services in Missouri and is capable of providing safe, reliable, and affordable service to Warren County Water & Sewer's customers. The customers of Warren County Water & Sewer will experience an improvement in the quality of their service if Missouri-American becomes their provider.

Missouri-American plans to make significant improvements to the system.[16] The improvements include a new sewer treatment plant, a sewer lift station upgrade, a sewer system study, an elevated water storage tank, and a SCADA upgrade.[17] For the system to operate safely and adequately, most of these improvements will have to be made no matter who owns the system.[18] The estimated cost of the necessary improvements is $550,000.[19] Some of the improvements can be made in the first year with the rest being made within a five-year period.[20]

The Commission finds that the safety, quality, service, and reliability of the system will improve if Missouri-American takes ownership of the system. The Commission further finds that further delay of a change of ownership of the system will be detrimental to the customers and the general public.

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[12] Tr. p. 122, ln. 12-14.

[13] Tr. pp. 71-103.

[14] Tr. pp. 92-93.

[15] Tr. p. 94.

[16] Tr. pp. 111-114.

[17] Tr. pp. 111-114; *Response to Staff Recommendation*, Appendix A, filed October 24, 2003.

[18] Tr. p. 154, ln. 13.

[19] Tr. p. 141, ln. 20; Tr. p. 262, ln. 16.

[20] Tr. p. 142, ln. 9-13.

Rate Moratorium

Along with its application for approval of the sale of assets, Missouri-American requests that the rates for service remain the same as those existing at the time of the acquisition and "continue in effect until the operation of law date associated with MAWC's next general rate filing after May 1, 2004, and/or thereafter, until changed as a result of a Commission Order."[21] Missouri-American also requests that neither "Staff nor the Office of the Public Counsel . . . [may] before May 1, 2004 file a case to change the rates in effect at the time of this acquisition"[22] except under certain extraordinary circumstances. Missouri-American further requests that nothing in this order prohibit rate filings for its other operating districts.

None of the parties opposes this request. In addition, witnesses for Missouri-American, Staff, and Public Counsel all testified that the current rates were sufficient to operate and maintain the system during the term of such a moratorium. The Commission finds that the rates are sufficient during the time of the moratorium. The Commission further finds that the request for a rate moratorium is reasonable and should be granted.

Value of the Assets for Ratemaking Treatment

Both Staff and Public Counsel opine that the sale is not detrimental to the public interest and should be approved. Staff and Public Counsel disagree with Missouri-American that the value of the assets for ratemaking purposes should be set at the purchase price. Staff's subject matter experts have reviewed the provisions of the Joint Application, the provisions of the purchase agreement between Warren County Water & Sewer and Missouri-American, and investigated the current rate base of Warren County Water & Sewer. During its investigation, Staff determined that the current rate base is $53,150.[23] Staff determined this amount using its theory that "a great deal of utility plant that is used to provide service to customers . . . has no value for ratemaking purposes"[24] because of the way in which the capital was contributed and because of the lack of any verifiable record-keeping.

Missouri-American will operate the assets of Warren County Water & Sewer as a separate district within its system.[25] Because of the relative size of this purchase to the Missouri-American system as a whole, the purchase will have no significant effect on Missouri-American's customers. Staff's witness testified that if the value of the assets for ratemaking purposes is set at the purchase price, and assuming no growth in the system, rates for Warren County Water & Sewer's customers would increase by approximately 15%.[26] Staff argued that this increase would be paid by

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[21] *Joint Application and Motion for Expedited Treatment*, filed Sept. 4, 2003, p. 5.

[22] *Id*.

[23] Tr. p. 321, ln. 19-22; Exhibit 11.

[24] *Staff Recommendation Regarding Joint Application for Authority for Missouri-American Water Company to Acquire Assets of Warren County Water & Sewer Company*, filed Oct. 17, 2003, Appendix A, page 3.

[25] Tr. pp. 434-435.

[26] Exhibit 11. The actual percentage calculated by Staff was 14.63%.

the customers as an acquisition premium. Staff and Public Counsel argue that the ratepayers should not bear the burden of an acquisition premium.

Missouri-American presented evidence that with improvements to the system, assuming no growth, a future rate increase over a three-year period, and depending on the amount of operating expenses, the necessary increase in rates may be as much as 27.20% - 61.64%.[27] However, assuming 5% growth, Missouri-American presented evidence that the increase may only be 9.88% - 39.63%.[28]

For customers currently paying a combined water and sewer rate of $40 per month, the worst-case scenario in terms of rate increases under the above scenarios would be an increase of $25 per month.[29] Regardless of the owner of the system, the cost of the improvements will cause customer rates to increase. Testimony from the property owners at the hearing indicated that those customers feel that a failure to approve the sale would be more detrimental to their interests than a rate increase.

At the hearing, Staff agreed that rate base may be greater than $53,150.[30] Staff's witness testified that until the hearing, he had not been aware of a new pump being installed at a cost of approximately $15,000,[31] and that two parcels of land were included in the sale. The two parcels of land are rumored to have cost $65,000 and $30,000.[32] All parties agreed that the verified costs of these items should be included in rate base, but at the time of the hearing, none of the parties could produce verification of these amounts. If the costs of the two parcels of land and the new pump are verified as estimated, the rate base value would be no less than $163,150.

Missouri-American disagrees with Staff's reasoning that an acquisition premium exists. Missouri-American argues that there may be no acquisition premium because the actual costs of the assets may be as much as or more than the purchase price. Missouri-American also argues that even if the cost of the assets is less than the purchase price, the Commission may have policy reasons for setting the rate base at the purchase price under these circumstances. Missouri-American argues that the rate base estimate provided by Staff "is so low that the system could not possibly be operated profitably."[33]

Missouri-American presented a cost study of the original cost of the system.[34] The cost study was compiled on an expedited basis by the engineering consulting firm Black & Veatch. Mr. Kiser testified that given more time, his firm could have provided an even more comprehensive and detailed cost study. While the Commission finds the cost study to provide valuable information, it was admittedly based on estimates of estimates.

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[27] Exhibit 14.

[28] *Id.*

[29] *Id.*

[30] Tr. p. 389.

[31] Tr. p. 317, ln. 16-23.

[32] Tr. p. 371-372.

[33] *Id.* at p. 6.

[34] Exhibit 2.

Staff also provided evidence of the original cost by providing the 1985 Annual Report filed by Incline Village Water and Sewer.[35]

None of the evidence of the original cost was complete. The testimony suggested that given additional time, better evidence of costs could be provided. Thus, the Commission finds that it does not have sufficient evidence to determine the original cost of the assets.

Conditions

The Staff recommends that the Commission condition the sale on the payment of Warren County Water & Sewer's past due assessments to the Commission, and upon a commitment from Missouri-American to complete "necessary system improvements with [*sic*] a reasonable time after the sale is consummated."[36] Public Counsel supports conditioning the approval of the sale upon the payment by Warren County Water & Sewer of the past due assessments from the proceeds of the sale.

The Commission takes notice of its orders assessing Warren County Water & Sewer fees in the fiscal years 2001 through 2004 as follows:

Fiscal Year	Case No.	Amount
2001	OO-2000-846	$3,338.57
2002	11,110	$3,889.02
2003	AO-2002-1156	$4,321.37
2004	AO-2003-0573	$7,013.27

The fiscal year begins on July 1 of the calendar year preceding and runs through June 30 of the following year.[37] Payment of the amount assessed is due on July 15 of the fiscal year or may be made in equal quarterly payments on July 15, October 15, January 15, and April 15. Staff presented uncontested evidence that Warren County Water & Sewer owes past due assessments to the Commission in the amount of $15,966.75.[38] The Commission finds that Warren County Water & Sewer Company has failed to pay its assessments in the amount of $2,965.75 in Fiscal Year 2001, $1666.36 in Fiscal Year 2002, $4321.37 in Fiscal Year 2003, and $7,013.27 in Fiscal Year 2004.[39]

The Commission also takes notice of its official records which show that Warren County Water & Sewer has not filed an Annual Report for the calendar year 2002.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

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[35] Exhibit 15.

[36] *Staff Recommendation*, paragraph 13.

[37] For example, Fiscal Year 2001 is the period from July 1, 2000, through June 30, 2001.

[38] Exhibit 12.

[39] *Id.*

Jurisdiction

Missouri-American is a "water corporation," a "sewer corporation," and a "public utility" as those terms are defined in Section 386.020, RSMo,[40] and is subject to the jurisdiction and supervision of the Commission. Warren County Water & Sewer is a "water corporation," a "sewer corporation," and a "public utility" as defined in Section 386.020, and is subject to the jurisdiction and supervision of the Commission.

Approval of the Sale

Section 393.190 requires approval by the Commission before a regulated utility disposes of all or any part of its system. The statute does not contain a standard to guide the Commission in the exercise of its discretion. A court has said of Section 393.190, "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."[41] In the Commission's rules, an applicant for authority to transfer assets must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."[42] To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently.[43]

The Commission has reviewed the Joint Application, the recommendations and responses of the parties, and the evidence and arguments presented at the hearing. Based on these materials, the Commission determines that the proposed transaction is not detrimental to the public interest and should be approved. Missouri-American is already in the business of providing public water and sewer service and is capable of operating Warren County Water & Sewer's system. Missouri-American is a large water and sewer utility within the state of Missouri and will operate the Warren County Water & Sewer assets as a separate "district" within its system. According to the financial statements attached to the application, the effects of the transaction on Missouri-American's financial health and its ratepayers will not be substantial.

Value of the Assets for Ratemaking

Generally, Staff and Public Counsel support the proposed transaction. The only dispute is to whether the value of the assets for ratemaking treatment should be set at the purchase price. One thing that all the parties agree upon is that there was insufficient record-keeping by Warren County Water & Sewer to determine the cost of building the system. Missouri-American presented a cost study to attempt to show the original cost of the system. It was also generally agreed, however, that

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[40] All statutory citations are to the Revised Statutes of Missouri 2000 unless otherwise noted.

[41] *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

[42] Commission Rules 4 CSR 240-3.310(1)(D) and 3.605(1)(D).

[43] *See In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220.

the cost study contained estimates of estimates. And, while the study was comprehensive and thoughtful, Missouri-American's witness admitted the study could have been more detailed and precise under less expedited circumstances. Finally, the parties all agree that because of the current state of the system, a sale of the assets will be beneficial to the ratepayers.

The Joint Applicants requested expedited proceedings and that request was granted. Even after the hearing, the Commission has insufficient information to decide the value of these assets for ratemaking purposes. The Commission can only determine that the value of the assets for ratemaking purposes is between $53,150 and $335,000. If the cost of the pump is proved to be $15,000, and the cost of the two parcels of land is proved to be $30,000 and $65,000, the original cost would be at least $163,150. With further verification and study, or even for policy reasons, the Commission may determine the value of these assets for ratemaking treatment to be as much as $335,000.

Determining the value of these assets for ratemaking treatment is a proper issue for Missouri-American's next rate case. By considering the value of the assets in the context of a rate case, the Commission can be assured of considering all the necessary factors in determining just and reasonable rates. The Commission will deny the request in this case to set the rate base at the purchase price for ratemaking purposes.

The Missouri Supreme Court has recently declared that the Commission must consider the effects on rates of an acquisition premium when approving the acquisition.[44] The Commission does not have sufficient evidence before it to finally determine if an acquisition premium exists. The Commission does, however, have enough facts to consider the effects on the ratepayers if Missouri-American's request is ultimately granted. Because of the severe problems with the current system, the Commission finds that even if the Commission ultimately determines that rate base should be set at the purchase price, the probable increase in rates would not be detrimental to these ratepayers under the circumstances.

Warren County Water & Sewer simply cannot continue to function as a public utility. It does not provide reliable and adequate service to its customers and a sale of the assets is the only reasonable solution. The Commission finds that a sale of these assets is in the best interest of the ratepayers and the general public.

"The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."[45] No detriment to the public interest appears on the present record. Therefore, the Commission will approve the proposed sale of assets with the conditions set out below.

Delinquent Assessments and Annual Report

Warren County Water & Sewer is currently delinquent in the payment of its fees assessed by the Commission. Warren County Water & Sewer has delinquent

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[44] *State ex rel. AG Processing, Inc. v. Public Service Commission,* 2003 WL 22434720 (Mo. banc 2003).

[45] *Fee Fee Trunk Sewer*, 596 S.W.2d at 468.

assessments totaling $15,966.75. None of the parties disagree that these fees are owed. Staff recommends that the sale be conditioned on the payment of these fees.

The Commission has authority under Section 386.370 to assess each water and sewer corporation a fee. The Commission has found that Warren County Water & Sewer has failed to pay its assessments for the fiscal years 2001-2004. A person or public utility which fails to comply with an order of the Commission "is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."[46] And, each day the violation continues is a separate offense.[47] The Commission finds that Warren County Water & Sewer is in violation of the Commission's orders for failing to pay its annual assessments. Thus, the Commission concludes that Warren County Water & Sewer is subject to a penalty of not less than $400, and may be subject to a penalty of up to $2,000 a day for each day the violations have continued.[48]

The Commission finds that the sale should be conditioned on the payment from the sale proceeds of the delinquent fees owed to the Public Service Commission. Furthermore, the Commission will direct its General Counsel and Staff to take whatever measures are necessary in order to properly secure the payment of any penalties associated with the failure of Warren County Water & Sewer to comply with the Missouri statutes and with the orders of this Commission.

The Commission has also found that Warren County Water & Sewer has failed to pay fines of approximately $25,000 to the Missouri DNR. The Commission finds that the sale should also be conditioned on the payment from the sale proceeds of these fines.

Section 393.140(6) authorizes the Commission to require the filing of annual reports by water and sewer corporations. The Commission has required these reports to be filed by April 15 of each year for the preceding calendar year.[49] The statute[50] further states:

> "Any such person or corporation which shall neglect to make any such report . . . within the time prescribed by the commission shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file . . . the same . . ."

The Commission has taken notice of its official records which show that no annual reports have been filed for the calendar year 2002. Thus, the Commission concludes that Warren County Water & Sewer has failed to comply with Section 393.140(6) and Commission Rules 4 CSR 240-3.335(1) and 4 CSR 240-

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[46] Section 386.570.1, RSMo.

[47] Section 386.570.2, RSMo.

[48] The violations began on July 15, 2000, July 15, 2001, July 15, 2002, and July 15, 2003.

[49] 4 CSR 240-3.335(1) [sewer] and 3.640(1) [water]. A similar requirement was previously found at 4 CSR 240-10.080(1), but was transferred to its current location in the Code of State Regulations effective April 30, 2003.

[50] Section 393.140(6), RSMo.

3.640(1). The Commission concludes that Warren County Water & Sewer is liable for a minimum penalty of $100 plus an additional penalty of up to $21,900.[51]

Improvements

The Commission would not find the sale to be in the public interest unless it were assured that Missouri-American is capable of operating the system in a safe and adequate manner. The parties all agree that the system cannot be operated adequately without some improvements being made and that the major improvements will be made no matter what entity owns the system. Therefore, the Commission does not find it necessary to condition the sale on the improvements being made. The Commission will, however, direct Missouri-American to keep Staff and Public Counsel informed of improvements it makes to the system.

Rate Moratorium

No party objects to the rates remaining constant, and no evidence has been presented to demonstrate a need for the rates to change. Therefore, the Commission will approve a moratorium on the rates for Warren County Water & Sewer customers as agreed by the parties. The Commission will direct Missouri-American to file proposed tariffs that incorporate or adopt the tariffs of Warren County Water & Sewer.

Certificate of Convenience and Necessity

In order for Missouri-American to operate these assets as a public utility, it must hold a certificate of public convenience and necessity.[52] The Joint Applicants requested that the Commission grant any relief that it deemed to be necessary. Thus, the Commission determines that Missouri-American has included a request for a certificate of convenience and necessity to operate in the service area of Warren County Water & Sewer. In addition, when the transactions are completed and new tariffs become effective, the Commission will cancel Warren County Water & Sewer's authority.

Missouri-American has shown that it has the financial and management resources available to provide safe, reliable, and adequate service to the ratepayers of the Warren County Water & Sewer system. The Commission finds it is in the public interest for Missouri-American to own, operate, control, manage and maintain the water and sewer system under the same terms and conditions as the certificate of convenience and necessity granted to Warren County Water & Sewer in Case No. WA-96-449.

IT IS THEREFORE ORDERED:

1. That the joint application for sale of assets filed on September 4, 2003, by Warren County Water & Sewer Company and Missouri-American Water Company, is approved with the exception of the request for ratemaking treatment and with the conditions specified below.

2. That Warren County Water & Sewer Company, Warren-Lincoln Investments, Inc. d/b/a Warren County Water & Sewer, and Gary Smith and A. Lynn Smith, and Missouri-

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[51] 219 delinquent days x $100 per day = $21,900.

[52] Section 393.170.2, RSMo.

American Water Company, are authorized to take any and all lawful actions necessary to carry out the proposed sale of assets.

3. That the sale is approved conditioned on a portion of the sale proceeds being placed in escrow at closing for payment of $15,966.75 in overdue Public Service Commission assessments, approximately $25,000 in fees to the Missouri Department of Natural Resources, and any other penalties, fines, debts, or taxes owed.

4. That Missouri-American Water Company shall file a report in this case of the status of the transactions no later than December 22, 2003, and continuing every 90 days until it has notified the Commission that all the transactions have been completed.

5. That after the transactions have been completed, the Commission will relieve Warren County Water & Sewer Company of its obligation to provide water and sewer service to the public in its assigned service area and will cancel its certificate and tariff.

6. That Missouri-American Water Company is granted a certificate of public convenience and necessity to provide water and sewer service in the current service territory of Warren County Water & Sewer Company.

7. That the certificate of convenience and necessity referenced in ordered paragraph 6 shall become effective on the effective date of this order.

8. That within 30 days of the effective date of this order, Missouri-American Water Company shall file with the Commission tariff sheets consistent with this order adopting the same rates, terms, and conditions as in the currently effective tariffs of Warren County Water & Sewer Company. The tariff sheets shall bear an effective date that is at least 30 days after the date the tariff sheets are filed with the Commission; however, Missouri-American Water Company may request an expedited effective date.

9. That Warren County Water & Sewer Company, Warren-Lincoln Investments, Inc. d/b/a Warren County Water & Sewer, and Gary Smith and A. Lynn Smith, and Missouri-American Water Company shall ensure that the customers of Warren County Water & Sewer Company do not have a break in service as a result of the sale.

10. That the rates currently in effect for Warren County Water & Sewer Company shall remain the same as those existing at the time of the acquisition and continue in effect until the operation of law date associated with Missouri-American Water Company's next general rate filing after May 1, 2004, or, until changed as a result of a Commission Order.

11. That neither the Staff of the Missouri Public Service Commission nor the Office of the Public Counsel may file a case before May 1, 2004, to change the rates in effect at the time of this acquisition except under certain extraordinary circumstances as listed in the application.

12. That nothing in this order shall prohibit rate filings for any of Missouri-American Water Company's other operating districts.

13. That the Commission does not waive its right to seek penalties under Sections 394.140(6) and 386.570, RSMo, for failure to comply with any laws of the state of Missouri or any orders of the Commission.

14. That this Report and Order shall become effective on December 5, 2003.

Gaw, Ch., Murray, Simmons, Clayton, and
Forbis, CC., concur; all certify compliance
with the provisions of Section 536.080, RSMo 2000.

In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint Missouri, Inc.

Case No. IO-2003-0281
Decided December 4, 2003

Telecommunications §45. The Commission found that effective, facilities-based competition exists in three local exchanges and therefore removed price-cap-regulation restrictions from a large incumbent local exchange carrier for those three exchanges.

Telecommunications §45. The Commission found that effective competition exists for several non-local, statewide services and therefore removed price-cap-regulation restrictions from a large incumbent local exchange carrier for those services in all the exchanges it serves.

Telecommunications §45. The controlling statute provides that each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified and has provided basic local telecommunications services for at least five years, unless the Commission determines that effective competition does not exist in the exchange for such service.

Telecommunications §45. The controlling statute requires that the Commission investigate the state of competition in each exchange where an alternative local exchange telecommunications company has been certified to provide local exchange service and determine no later than five years following the first certification of a competitor whether effective competition exists in that exchange for those services.

Telecommunications §45. The controlling statute requires that the commission determine whether competition exists based on the following considerations:

(a) The extent to which services are available from alternative providers in the relevant market;

(b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

(c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, RSMo, are being advanced;

(d) Existing economic or regulatory barriers to entry; and

(e) Any other factor deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo.

Telecommunications §45. Rates do not always fall in a competitive market and the fact that rates have not fallen does not preclude a finding that a market is competitive.

Telecommunications §45. The existence of a single effective competitor is enough to justify a finding that a market is competitive.

Telecommunications §45. As the party asserting that effective competition exists in its exchanges, the incumbent local exchange carrier has the burden of proving that assertion.

APPEARANCES

W.R. England, III, Attorney at Law, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Green Hills Telecommunications Services.

Anthony K. Conroy, Senior Counsel, One Bell Center, Room 3516, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

Lisa Creighton Hendricks, Attorney at Law, 6450 Sprint Parkway, Overland Park, Kansas 66251, for Sprint Missouri, Inc.

Jason L. Ross, Attorney at Law, Greensfelder, Hemker & Gale, 10 S. Broadway, 2000 Equitable Building, St. Louis, Missouri 63102, for Fidelity Communications Services I, Inc.

Rachel Lipman Reiber, Attorney at Law, 9647 Lackman Road, Lenexa, Kansas 66219, for Ex Op of Missouri, Inc., d/b/a Unite.

J. Steve Weber, Attorney at Law, 101 W. McCarty Street, Jefferson City, Missouri 65101, for AT&T Communications of the Southwest, Inc.

Michael F. Dandino, Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

William K. Haas, Deputy General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

In this report and order, the Commission finds that many of the services that Sprint offers in its Kearney, Rolla, and Norborne exchanges are subject to effective competition and may be classified as competitive and no longer subject to price cap regulation. The Commission also finds that some of the non-local services that Sprint offers throughout its Missouri exchanges are subject to effective statewide competition and may be classified as competitive and no longer subject to price cap regulation.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

This case was opened on February 10, 2003, when the Staff of the Commission filed a Motion to Open Case. Staff's motion indicated that ExOp of Missouri, Inc., an alternative local exchange telecommunications company, was authorized to begin providing services in an exchange of Sprint Missouri, Inc., an incumbent local

exchange telecommunications company, on December 15, 1998. Staff's motion indicated that the fifth-year anniversary of that authorization would trigger the statutory requirement that the Commission investigate the state of competition in the exchanges served by Sprint to determine whether effective competition exists in those exchanges. Staff asked the Commission to open a case to conduct the investigation mandated by statute.

On February 14, the Commission issued an order establishing this case and, at the request of Sprint, joining three competitive local exchange companies as parties. The parties joined at that time were: Fidelity Communications Services, Inc.; Green Hills Telecommunications Services; and ExOp of Missouri, Inc. The Commission also indicated that any other interested party wishing to intervene would need to file an application to intervene on or before March 6.

After timely applications to intervene were received, the Commission, on March 17, issued an order that allowed the following companies to intervene: Southwestern Bell Telephone, L.P. d/b/a SBC Missouri; AT&T Communications of the Southwest, Inc.; MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc.; and the National ALEC Association/Prepaid Communications Association.[1]

On March 26, the Commission adopted a procedural schedule leading to a hearing set for July 14 through 18, 2003. Sprint filed direct testimony on April 25. Staff, the Office of the Public Counsel, Fidelity, AT&T, and ExOp filed rebuttal testimony on June 10. Sprint, Staff, and Public Counsel filed surrebuttal testimony on July 7.

The hearing commenced on July 14. Counsel for Sprint, Staff, Public Counsel, Green Hills, Southwestern Bell, Fidelity, ExOp, and AT&T appeared at the hearing. Counsel for the MCI WorldCom group of companies was excused from appearing at the hearing and the companies thereby waived their rights to participate in the hearing. AT&T's motion to withdraw as a party was sustained at the beginning of the hearing and AT&T did not participate further in the hearing. Counsel for Green Hills and Southwestern Bell offered opening statements but then withdrew from further participation in the hearing. The hearing concluded on July 15. Sprint, Staff, Public Counsel, ExOp, and Fidelity submitted initial briefs on September 3 and reply briefs on September 24.

The State of Competition

This case was opened for the purpose of investigating the state of competition in the areas served by Sprint. If the Commission finds that Sprint faces effective competition in a particular exchange or in the provisioning of a particular statewide service, then Sprint will be freed from the constraints imposed by price cap regulation for those exchanges or services. In other words, Sprint will be able to establish prices for those exchanges and services based on market conditions.

Sprint operates in 80, mostly rural, exchanges throughout Missouri but contends that it faces effective competition in only five specific exchanges. Sprint also contends that it faces effective competition for several non-local services that it

[1] AT&T and the National ALEC Association/Prepaid Communications Association subsequently withdrew from the case.

offers statewide. The Commission will first address the question of competition in each of the five exchanges.

The State of Competition in Specific Exchanges

Kearney

Kearney is a small suburban community at the northern edge of the Kansas City metropolitan area. Sprint's records indicate that in 2001, it served 3,394 residential access lines and 696 nonresidential access lines, for a total of 4,090 access lines in the Kearney exchange.[2] In addition to Sprint, the incumbent local exchange carrier, Kearney is served by five competitive carriers that offer local exchange service.

Those five carriers are: 1) 877-RingAgain; 2) EZtalk; 3) Max-Tel; 4) State Telephone; and 5) ExOp of Missouri d/b/a Unite.[3] The first four companies on that list offer only resold service. Resellers offer service to their customers by repackaging and repricing the services offered by the incumbent local exchange carrier. The Commission has previously found that "the mere presence of resellers is not substantial evidence for the Commission to determine that effective competition exists."[4] Sprint indicates that it agrees with that finding and does not rely on the presence of the resellers as the basis for its request for competitive classification.[5]

The fifth carrier offering competitive services in the Kearney exchange is ExOp. Unlike the others, ExOp offers 100 percent facilities-based service. ExOp also owns a cable television franchise in Kearney[6] and has been able to use its cable facilities to offer telephone service to its customers. ExOp indicates that its business plan is predicated on customers subscribing to a bundle of local telephone service with cable television service and DSL Internet service.[7] In addition, ExOp has been able to offer its services at prices somewhat lower than those charged by Sprint.[8] Using this business plan, ExOp has been able to gain a substantial share of the local exchange market in Kearney.

ExOp's precise share of the market in Kearney is not easily determined. However, measured by the number of access lines served by the two companies, ExOp has been able to gain a significant portion of the market since it began offering services in the exchange in February 1999. The exact number of lines currently

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[2] Exhibit 1, Idoux Direct, Schedule JRI-3

[3] Exhibit 1, Idoux Direct, Page 28, Lines 19-23.

[4] *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, Case No. TO-2001-467, Report and Order issued December 27, 2001, Page 23. The Report and Order was admitted into evidence in this case as Exhibit 20.

[5] Exhibit 1, Idoux Direct, Page 13, lines 20-24.

[6] Transcript p. 360, lines 12-14.

[7] Exhibit 11, Devoy Rebuttal, Page 6, lines 9-14.

[8] Exhibit 6, McKinnie Rebuttal, Page 22, Lines 18-22. A chart showing a side-by-side comparison of the rates charged by Sprint and ExOp may be found at Exhibit 1, Idoux Direct, Pages 33-34.

served by the competing companies is a proprietary number and for that reason will not be set out in this report and order.[9] However, line counts for December 2001 are not proprietary and indicate that at that time Sprint served 3,394 residential lines and 696 business lines in the Kearney exchange. At the same time, ExOp served 1,110 residential lines and 476 business lines in that exchange.[10] Since that time the number of lines served by ExOp has increased while the number of lines served by Sprint has continued to decrease.

Although ExOp has secured a substantial share of the market, there are still areas within the exchange for which it has not constructed facilities and for which it does not anticipate constructing facilities in the near future.[11] ExOp indicated that it was hesitant to construct new facilities because its parent corporation, Aquila, Inc., was experiencing financial difficulties and was not willing to invest additional capital in ExOp's expansion plans.[12] However, ExOp announced at the hearing that an agreement had been reached for ExOp to be sold by Aquila to a former general manager of ExOp. There is no evidence in the record to indicate how this sale would affect ExOp's ability to compete in the Kearney exchange.

While ExOp currently does not have facilities available to serve every potential customer in the Kearney exchange, it has been designated by the Commission as a telecommunications carrier eligible to receive universal service support – an ETC – in that exchange.[13] As an ETC, ExOp is required to offer its services to customers throughout the exchange.[14] It need not have facilities in place to immediately serve all customers, but it is required to "extend its network to serve new customers upon reasonable request."[15] ExOp has not, however, received any universal service funding for the Kearney exchange.[16]

Platte City

Like Kearney, Platte City is a small suburban community at the northern edge of the Kansas City metropolitan area. In 2001, Sprint served 2,852 residential access lines and 1,384 nonresidential access lines, for a total of 4,236 access lines in the Platte City exchange. Platte City is served by the same five competitive carriers that offer service in Kearney. Again, ExOp is the only competitive carrier that is offering facilities-based service.

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[9] The proprietary numbers for December 2002 are set out in Exhibit 6, McKinnie Rebuttal, Schedule ACM-5.

[10] Exhibit 6, McKinnie Rebuttal, Schedule ACM-5.

[11] Exhibit 11, Devoy Rebuttal, Page 3, Lines 22-24.

[12] Exhibit 11, Devoy Rebuttal, Page 3, Lines 24-25.

[13] *Order Granting Designation as an Eligible Carrier Pursuant to Section 254 of the Telecommunications Act of 1996,* Case No. TA-2001-251, May 15, 2001.

[14] 47 U.S.C. Section 214(e)(1).

[15] Exhibit 13, *Declaratory Ruling* FCC Docket No. 96-45, August 10, 2000, Page 8.

[16] Transcript, Page 354, Lines 9-12.

However, the situation in Platte City differs from that in Kearney in that ExOp does not have a franchise to offer cable television service in Platte City and, due to build out requirements imposed by the City of Platte City, ExOp does not anticipate obtaining a cable television franchise in that city.[17] As a result, ExOp is not able to offer the bundles of services in Platte City that it is able to offer in Kearney. Furthermore, ExOp only began offering service in the Platte City exchange in August 2002.[18]

Not surprisingly, given these differences, ExOp's share of the market in Platte City is much smaller than its share of the market in Kearney. At the end of 2002, ExOp served 55 residential lines and 148 business access lines in Platte City.[19] That compares to 4,236 lines served by Sprint in that exchange in 2001. No evidence was presented to indicate how many lines ExOp was serving in 2003. However, during the first six months of 2003, Sprint lost 116 access lines in the Platte City exchange. That represents a six percent annualized decrease in access lines for that exchange.[20] Sprint expects that rate of line loss to accelerate as ExOp serves more customers in the exchange.[21]

ExOp is an ETC in the Platte City exchange, as it is in Kearney.[22] ExOp does not currently have facilities in place to serve most of the Platte City exchange. But, in the areas that it does serve, ExOp offers rates that are comparable to the rates offered by Sprint.[23] ExOp has recently signed a contract to replace Sprint as the provider of telephone service to the City of Platte City.[24]

Rolla

Rolla has a population of approximately 14,000, and is located in East-Central Missouri. It is not associated with any metropolitan area. Sprint's records indicate that in 2001, it served 10,465 residential access lines and 8,111 nonresidential access lines, for a total of 18,576 access lines in the Rolla exchange.[25] In addition to Sprint, which is the incumbent local exchange carrier, nine competitive carriers offer local exchange service in Rolla.

The nine competitive carriers that offer local exchange service in Rolla are as follows:

1) Buy-Tel Communications;
2) 877-RingAgain;

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[17] Transcript, Page 360, Lines 15-25.

[18] Exhibit 11, Devoy Rebuttal, Page 6, Lines 18-21.

[19] Exhibit 11, Devoy Rebuttal, Page 7, Lines 1-6.

[20] Exhibit 2, Idoux Surrebuttal, Page 17, Lines 1-7.

[21] Exhibit 2, Idoux Surrebuttal, Page 17, Lines 1-7.

[22] *Order Granting Designation as an Eligible Carrier Pursuant to Section 254 of the Telecommunications Act of 1996*, Case No. CO-2003-0252, April 10, 2003.

[23] Exhibit 2, Idoux Surrebuttal, Page 18, Lines 12-16. Sprint and ExOp both offer the same rates in Platte City as they do in Kearney.

[24] Exhibit 2, Idoux Surrebuttal, Page 18, Lines 9-10.

[25] Exhibit 1, Idoux Direct, Schedule JRI-3.

3) eztalk;
4) Fidelity Communications Services I;
5) Max-Tel Communications;
6) Metro Teleconnect Companies;
7) 1-800 RECONEX;
8) State Discount Telephone; and
9) Universal Telecom.[26]

Of those nine companies, only Fidelity is operating as a facilities-based carrier.[27] The other eight carriers operate only as pre-paid resellers.[28]

Fidelity is a competitive local exchange carrier certified to provide basic local telecommunications services in Sprint's exchanges. Fidelity is a subsidiary of Fidelity Communications Co., which also owns Fidelity Telephone Company, an incumbent local exchange carrier headquartered in Sullivan, Missouri.[29] Importantly, Fidelity Communications Co. also owns Fidelity Cablevision, Inc., which provides cable television service in Rolla.[30]

Fidelity has been able to use its affiliated cable television system to provide telecommunication services to customers in Rolla at rates that are comparable to those offered by Sprint.[31] Fidelity started providing telecommunications services in Rolla in July 2000.[32] However, Fidelity Cablevision has been providing cable television services in Rolla for approximately eight years. Fidelity's witness indicated that this gave Fidelity an advantage in entering the telecommunications market in that it had name recognition and a positive reputation for quality of service within the Rolla community, as well as an existing local business office and other synergies.[33]

Fidelity has been able to use the advantages afforded by its affiliation with a cable television system to claim a substantial portion of the market in the Rolla exchange. The exact number of lines currently served by the competing companies is a proprietary number and for that reason will not be set out in this report and order.[34] However, line counts for December 2001 are not proprietary and indicate that at that time Sprint served 10,465 residential lines and 8,111 business lines in the Rolla exchange. At the same time, Fidelity served 1,066 residential lines and

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[26] Exhibit 1, Idoux Direct, Page 40, Lines 4-19.

[27] Exhibit 1, Idoux Direct, Page 42, Lines 8-9. See also Exhibit 12, Taylor Rebuttal, Page 3, Lines 54-58.

[28] Exhibit 12, Taylor Rebuttal, Page 4, Lines 75-80.

[29] Exhibit 12, Taylor Rebuttal, Page 2, Lines 40-47.

[30] Exhibit 12, Taylor Rebuttal, Page 3, Lines 50-52.

[31] Exhibit 6, McKinnie Rebuttal, Page 25, Lines 6-10. A chart showing a side-by-side comparison of the rates charged by Sprint and Fidelity I may be found at Exhibit 1, Idoux Direct, Pages 43-44.

[32] Exhibit 12, Taylor Rebuttal, Page 3, Lines 53-54.

[33] Exhibit 12, Taylor Rebuttal, Page 8, Lines 176-182.

[34] The proprietary numbers for December 2002 are set out in Exhibit 6, McKinnie Rebuttal, Schedule ACM-6.

1,129 lines. Since December 2001, Fidelity's share of the market has increased substantially.[35] At the time of the hearing, Fidelity served over 25 percent of the access lines in Rolla.[36] As was the case with ExOp in the Kearney and Platte City exchanges, Fidelity has been designated as an ETC in the Rolla exchange.[37]

St. Robert

St. Robert is a small town located 25 miles west of Rolla. It is not associated with any metropolitan area. Sprint's records indicate that in 2001 it served 3,466 residential access lines and 2,461 nonresidential access lines, for a total of 5,927 access lines in the St. Robert exchange.[38] In addition to Sprint, which is the incumbent local exchange carrier, St. Robert is served by the same nine competitive carriers that offer local exchange service in Rolla.[39] Once again, Fidelity is the only competitive carrier offering facilities-based services in St. Robert.

Fidelity began offering service in St. Robert in February 2003, utilizing the switch it owns in Rolla.[40] Since it has only started to compete in that exchange, Fidelity has not yet gained a significant share of the market in St. Robert. As of June 30, 2003, Fidelity was serving only 69 access lines in St. Robert. Forty-nine of those lines are being provided to the City of St. Robert, with the remainder divided between two other business customers.[41] That is about one percent of the total market.[42]

While Fidelity intends to continue to compete in St. Robert, it does not have all the advantages in that exchange that it has in Rolla. Most importantly, Fidelity does not operate a cable television system in St. Robert. As a result, Fidelity indicates that its business plan in St. Robert is to provide services only to selected business customers that it can easily reach with its existing facilities. Fidelity estimates that with its current facilities it could reach about three to five percent of the business market in St. Robert.[43] Fidelity does not intend, in the foreseeable future, to completely overbuild Sprint's network in St. Robert as it has attempted to do in Rolla.[44] No evidence was offered indicating that Fidelity is an ETC in the St. Robert exchange.

Norborne

Norborne is a rural exchange located 60 miles northeast of Kansas City. It is not associated with any metropolitan area. There are only about 600 access lines

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[35] Exhibit 6, McKinnie Rebuttal, Schedule ACM-6.

[36] Exhibit 2, Idoux Surrebuttal, Page 32, Lines 6-8.

[37] *Order Granting Designation as an Eligible Carrier Pursuant to Section 254 of the Telecommunications Act of 1996*, Case No. TA-2002-122, November 6, 2001.

[38] Exhibit 1, Idoux Direct, Schedule JRI-3.

[39] Exhibit 1, Idoux Direct, Page 46, Lines 7-8.

[40] Exhibit 1, Idoux Direct, Page 46, Lines 12-19.

[41] Transcript, Page 379, Lines 1-5.

[42] Transcript, Page 372, Lines 15-17.

[43] Transcript, Page 372, Lines 2-15.

[44] Transcript, Page 371-372, Lines 23-25, 1.

in the exchange.[45] In addition to Sprint, which is the incumbent local exchange carrier, nine competitive carriers offer local exchange service in Norborne.

The nine competitive carriers that offer local exchange service in Norborne are as follows:

1) Buy-Tel Communications;
2) 877-RingAgain;
3) eztalk;
4) Green Hills Telecommunication Services;
5) Max-Tel Communications;
6) Metro Teleconnect Companies;
7) 1-800 Reconnex;
8) State Discount Telephone; and
9) Universal Telecom.[46]

Of those nine companies, only Green Hills is operating as a facilities-based carrier.[47]

Green Hills began offering services in the Norborne exchange in November 1999.[48] By offering rates substantially below those offered by Sprint for essentially identical products,[49] Green Hills has quickly gained nearly two-thirds of the market in the Norborne exchange.[50] Green Hills has been granted ETC status in the Norborne exchange.[51]

Other Issues Affecting the State of Competition in Local Exchanges

Wireless telecommunication exists as a competitor to Sprint's landline service throughout all of its exchanges in Missouri. Sixteen wireless carriers have interconnection agreements with Sprint.[52] Sprint indicates that it may have lost some access lines to wireless competition but indicates that it has no way of determining exactly how many lines it may have lost.[53] No specific evidence was offered by any party regarding how much competition wireless carriers offer Sprint in any of its exchanges. Moreover, Sprint acknowledges that it does not rely on competition from wireless providers in its argument for competitive classification for specific exchanges. Under the circumstances, the Commission can make no findings of fact regarding the impact of wireless telecommunications on competition in Sprint's exchanges.

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[45] Exhibit 6, McKinnie Rebuttal, Schedule ACM-4.

[46] Exhibit 1, Idoux Direct, Page 22, Lines 2-19.

[47] Exhibit 6, McKinnie Rebuttal, Page 20, Lines 13-14.

[48] Exhibit 1, Idoux Direct, Page 24, Lines 15-16.

[49] Exhibit 1, Idoux Direct, Page 25, Lines 4-11.

[50] Exhibit 6, McKinnie Rebuttal, Schedule ACM-4.

[51] *Order Approving Stipulation and Agreement*, Case No. CO-2003-0162, March 4, 2003.

[52] Exhibit 1, Idoux Direct, Page 14, Lines 2-3.

[53] Exhibit 1, Idoux Direct, Page 14, Lines 25-26.

Competition for Specific Non-local Statewide Services

Sprint has requested competitive classification for several services that it offers statewide. These requests are not limited to any specific exchanges and would, instead, apply in all exchanges served by Sprint. Each service for which Sprint seeks competitive classification will be addressed separately.

Centrex Services

Sprint's Centrex service is described as "a central office based system that allows business customers to use Sprint's central office technology instead of purchasing their own switching equipment."[54] Other competitive local exchange companies can offer this service in competition with Sprint, but much of Sprint's competition comes from companies that sell switching equipment, such as PBX (Primary Branch Exchange) and key system hardware, to individual customers.[55] Such customer owned equipment manages calls between stations on the customer's premises without utilizing the central office switch, and handles calls to and from the public switched network.[56] The availability of such equipment allows a business customer to choose to pay Sprint to provide a Centrex service for its switching needs; or it can choose to satisfy its need for that function by purchasing the necessary equipment from any one of several companies willing to sell that equipment. Among the companies that sell such equipment are SBC, Verizon, Intertel, Siemens, Avaya, and Towner Communications.[57]

The competition offered by customer premise equipment is apparently effective competition. Since June of 2001, Sprint has lost over 7,000 Centrex lines, 20 percent of its business.[58] The Missouri legislature recognized the potential effectiveness of this form of competition in 1996 when it authorized customer-specific pricing for central office-based services that substitute for PBX services.[59] Sprint currently uses customer specific pricing for its Centrex service offerings.[60]

Because Sprint's competition for its Centrex service is coming from equipment sellers rather than competing service providers, that competition is not limited to specific exchanges. For that reason, Sprint is seeking statewide competitive classification for its Centrex service.

IntraLATA Private Line Services

Private line services allow a customer to transport data, voice, or video between specific points using a dedicated line.[61] Sprint's competition for this service comes from facilities based competitive local exchange carriers, such as ExOp and

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[54] Exhibit 3, Harper Direct, Page 21, Lines 15-17.

[55] Exhibit 6, McKinnie Rebuttal, Page 7, Lines 18-20.

[56] Exhibit 3, Harper Direct, Page 22, Lines 20-22.

[57] Exhibit 3, Harper Direct, Page 22, Lines 11-13.

[58] Transcript, Page 223, Lines 4-8.

[59] Section 392.200.8, RSMo 2000.

[60] Transcript, Page 219, Lines 5-16.

[61] Exhibit 3, Harper Direct, Page 24, Lines 1-6.

Fidelity; but also from interexchange carriers and fiber network providers.[62] The legislature has recognized the existence of competition for this service by allowing for customer-specific pricing for private line services.[63]

Because Sprint's competition for intraLATA private line services is coming from competitors that are not limited to a specific exchange, Sprint is seeking statewide competitive classification for that service.

ATM and Frame Relay Services

ATM (Asynchronous Transfer Mode) and Frame Relay services allow a customer to transport data, voice, or video between specific points using a dedicated line.[64] Sprint's competition for this service comes from facilities based competitive local exchange carriers, such as ExOp and Fidelity; but also from interexchange carriers and fiber network providers.[65] The legislature has recognized the existence of competition for this service by allowing for customer-specific pricing.[66]

Because Sprint's competition for intraLATA private line services is coming from competitors that are not limited to a specific exchange, Sprint is seeking statewide competitive classification for that service.

IntraLATA MTS

IntraLATA MTS (message toll services) is essentially Sprint's intraLATA toll service.[67] In other words, it is the service used by a residential or business customer when that customer dials a number in another exchange located within the LATA. Sprint faces a great deal of competition for the provisioning of this service. There are at least 586 interexchange carriers certified in Missouri that can offer this service in competition with Sprint.[68] In December 2002, 52 different carriers were actually providing intrastate toll services to Sprint's local customers.[69] As a result of intraLATA presubscription, which Sprint instituted in August 1997, Sprint's local customers can utilize the interexchange carrier of their choice without dialing any extra numbers.[70] Not surprisingly, given this level of competition, Sprint's intraLATA toll minutes and revenues have declined by three-fourths since 1999.[71]

Because Sprint's competition for intraLATA MTS is coming from competitors that are not limited to a specific exchange, Sprint is seeking statewide competitive classification for that service.

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[62] Exhibit 3, Harper Direct, Pages 24-25, Lines 15-23, 1-6; Exhibit 6, McKinnie Rebuttal, Page 8, Lines 1-15.

[63] Section 392.200.8, RSMo 2000.

[64] Exhibit 3, Harper Direct, Page 24, Lines 1-6.

[65] Exhibit 3, Harper Direct, Pages 24-25, Lines 15-23, 1-6; Exhibit 6, McKinnie Rebuttal, Page 8, Lines 1-15.

[66] Section 392.200.8, RSMo 2000.

[67] Exhibit 3, Harper Direct, Page 6, Lines 17-18.

[68] Exhibit 3, Harper Direct, Page 7, Lines 1-2.

[69] Exhibit 3, Harper Direct, Page 9, Lines 11-12.

[70] Exhibit 3, Harper Direct, Page 8, Lines 12-14.

[71] Exhibit 3, Harper Direct, Page 9, Lines 10-11.

IntraLATA WATS and 800 Services

IntraLATA WATS (Wide Area Telecommunications Services) includes both 800 service and outward WATS (OUTWATS). 800 service allows incoming calls to be toll-free for the calling party. OUTWATS allows for outgoing calls to be billed on a usage sensitive basis.[72] These services are essentially intraLATA toll services billed in a different way. As such they are subject to competition from the same competitors as intraLATA toll services. Because Sprint's competition for intraLATA WATS and 800 services is coming from competitors that are not limited to a specific exchange, Sprint is seeking statewide competitive classification for those services.

Line Information Data Base (LIDB) Access

This issue concerns SS7 (signaling system 7) service and Line Information Data Base services. These are technical services for which the customers are other telecommunications carriers.[73] SS7 service provides a dedicated two-way signaling path between a customer and Sprint's Signal Transfer Point. SS7 signaling is used to carry the signals and associated information for switched access calls in a path that is separate from the voice call. SS7 is also utilized to access call processing databases such as LIDB (Line Information Data Base).[74] As its name indicates, LIDB is a database. Access to that database allows a customer to query a database before completion of an alternate billed call, such as calling card, collect and third number billing calls, to determine that the call is authorized and billed to the proper party.[75]

Sprint faces competition for these services from several carriers possessing their own nationwide SS7 network and LIDB databases.[76] Specifically, Sprint faces nationwide competition from SNET, an SBC subsidiary; Illuminet (now called Verisign); and TSI Telecommunications Services, each of which can offer these services to any carrier.[77] Because Sprint's competition for SS7 and LIDB services is coming from competitors that are not limited to a specific exchange, Sprint is seeking statewide competitive classification for those services.

Speed Dial Services

Sprint's speed dial services allow a customer to create a speed-dialing list utilizing storage in the company's central office.[78] The existence of such a list allows a customer to dial one of the preset numbers by pushing only two or three buttons.[79] A customer can attain exactly the same result using the function built into many

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[72] Exhibit 3, Harper Direct, Page 10, Lines 26-28.

[73] Exhibit 3, Harper Direct, Page 25, Line 20.

[74] Exhibit 3, Harper Direct, Pages 25-26, Lines 20-23, 1-2.

[75] Exhibit 3, Harper Direct, Page 26, Lines 3-6.[76] Exhibit 6, McKinnie Rebuttal, Page 8, Line 23.

[77] Exhibit 3, Harper Direct, Page 26, Lines 9-12.

[78] Exhibit 3, Harper Direct, Page 26, Lines 20-22.

[79] Exhibit 6, McKinnie Direct, Page 9, Lines 9-12.

telephones. Telephone sets including this function are only slightly more expensive than sets that do not include this function.[80] As a result, Sprint faces competition for speed dial service from every retail store in Missouri that sells telephone sets. Because Sprint's competition for speed dial services is coming from competitors that are not limited to a specific exchange, Sprint is seeking statewide competitive classification for those services.

Directory Assistance Services

Sprint is seeking statewide competitive classification for three categories of directory assistance services: 1) directory assistance, which is assistance in finding a local number; 2) national directory assistance, which is assistance in finding a number outside the customer's local service area; and 3) directory assistance call completion, which is an optional service by which a customer can have their call to the requested number completed automatically by the operator.[81] A basic local customer of Sprint can access directory assistance from Sprint by dialing 1-411. Dialing that number will allow the Sprint customer to obtain telephone numbers anywhere in the United States.[82]

A Sprint customer does have alternatives to obtaining directory assistance services from Sprint. By dialing 1-area code-555-1212, or 00, the customer can access directory assistance service from his or her pre-subscribed long distance toll provider.[83] However, if the Sprint customer simply dials 555-1212, without including the area code, they will reach the Sprint operator.[84] A Sprint customer may also access directory assistance services by using his or her wireless phone or by looking up the number by using an Internet search engine.[85]

Sprint indicates that since 1998 the volume of directory assistance calls handled by Sprint has declined by 36 percent, and ascribes this decline to competition from alternative sources for assistance.[86] However, Sprint has not lowered its directory assistance rates to meet that competition.[87] In fact, Sprint's rate for directory assistance for a non-coin call has increased by 14.6 percent since 1999.[88]

Local Operator Services

Operator services refer to those services, using live operators or automated systems, that provide customers with various call completion options.[89] Sprint is seeking statewide competitive classification for three specific local operator

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[80] Exhibit 6, McKinnie Rebuttal, Page 9, Lines 13-21.

[81] Exhibit 3, Harper Direct, Pages 12-13, Lines 11, 1-15.

[82] Exhibit 6, McKinnie Rebuttal, Page 13, Lines 10-22.

[83] Exhibit 3, Harper Direct, Page 15, Lines 14-21.

[84] Exhibit 6, McKinnie Rebuttal, Page 14, Lines 20-22.

[85] Exhibit 3, Harper Direct, Page 16, Lines 1-16.

[86] Exhibit 3, Harper Direct, Page 17, Lines 1-15.

[87] Transcript, Page 200, Lines 7-12.

[88] Transcript, Page 227-228, Lines 24-25, 1-2. *See also*, Exhibit 16, Page 3 of 52, Line 40.II.C.1.

[89] Exhibit 3, Harper Direct, Page 18, Lines 1-2.

services. Those three services are: 1) station-to-station calls with automatic recording equipment; 2) station-to-station calls with operator assistance; and 3) person-to-person calls.[90] These services would include calls using a calling card, collect calls, calls billed to a third number, sent-paid calls, and person-to-person calls using an operator.[91] A customer can utilize these services by dialing 0 or 0+ from any telephone.[92]

Sprint is not the only source for operator services in the exchanges in which it operates. Those services are offered statewide by interexchange service providers, wireless carriers, pay telephone providers, and prepaid calling card providers.[93] In addition, competitive local exchange carriers offer such services in the exchanges in which they operate.

While customers do have the ability to access operator services from other sources, when a Sprint customer dials 0 or 411, the most familiar way to reach an operator, the customer will be connected to a Sprint operator unless the customer has chosen a different intraLATA toll carrier.[94] Furthermore, the statewide competition that Sprint faces for operator services, has not held down Sprint's rates for those services. Instead, Sprint's rate for a station-to-station operator assisted call has increased by 13.6 percent since 1999.[95] For a person-to-person call the rate has increased by 15.7 percent.[96]

Competition for Other Services:

Payphone Services

A provider of payphone service must have three things in order to provide payphone service: 1) an access line; 2) coin control; and 3) answer supervision.[97] The first requirement, an access line, can be obtained either from the incumbent local exchange carrier, such as Sprint, or from a competing facilities-based competitive local exchange carrier in those exchanges where a facilities-based competitive local exchange carrier is operating.[98] The payphone service provider also has a choice on how to obtain the other two requirements, coin control and answer supervision. Those functions can be purchased from the incumbent local exchange carrier or from a competitive local exchange carrier. Alternatively, they may be obtained by purchasing what is referred to as a "smart phone." A "smart phone" includes coin control and answer supervision as a function built into the phone.[99] Therefore, in an exchange where competition exists, Sprint faces

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[90] Exhibit 3, Harper Direct, Page 18, Lines 10-13.

[91] Exhibit 3, Harper Direct, Page 18, Lines 15-17.

[92] Exhibit 3, Harper Direct, Page 18-19, Lines 17, 1.

[93] Exhibit 3, Harper Direct, Page 20, Lines 6-8.

[94] Exhibit 6, McKinnie Rebuttal, Page 10, Lines 11-13.

[95] Exhibit 16, Page 3 of 52, Line 40.V.B.2.

[96] Exhibit 16, Page 3 of 52, Line 40.V.B.3.

[97] Exhibit 2, Idoux Surrebuttal, Page 14, Lines 9-10.

[98] Exhibit 2, Idoux Surrebuttal, Page 14, Lines 10-11.

[99] Exhibit 2, Idoux Surrebuttal, Page 14, Lines 14-16.

competition from both the competing competitive local exchange carriers, and from customer premises equipment sold by many vendors.

ISDN Services

ISDN stands for Integrated Services Digital Network and is a means for simultaneously transmitting integrated voice and data over a single exchange access line.[100] Sprint initially sought competitive classification for this service in the Norborne, Kearney, Platte City, Rolla, and St. Robert exchanges, the exchanges for which it is seeking competitive classification. Green Hills does not offer ISDN service in the Norborne exchange. Fidelity and ExOp offer that service in the exchanges they serve at rates that are lower than those offered by Sprint.[101] In response to the testimony filed by Staff, Sprint agreed that ISDN is not competitive in the Norborne exchange and withdrew its request for competitive classification in that exchange.[102]

Optional MCA Services

MCA is an optional interexchange plan that allows a basic local customer to have expanded calling scopes in the three major metropolitan areas in Missouri: St. Louis, Kansas City, and Springfield. Of the five exchanges for which Sprint is seeking competitive classification, MCA is available only in the Kearney and Platte City exchanges.[103] Therefore, Sprint is seeking competitive classification for these services only in those two exchanges.

A customer cannot receive MCA services unless the customer also subscribes to basic local service from either Sprint or a competitive local exchange carrier. ExOp also offers Optional MCA services in the Kearney and Platte City exchanges and does so at a rate that is lower than the rate offered by Sprint.[104]

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Sprint is a public utility, and a telecommunications company, as those terms are defined in Section 386.020(42) and (51), RSMo 2000.[105] As such, Sprint is subject to the Commission's jurisdiction pursuant to Chapters 386 and 392.

Section 392.245.1 provides that "[t]he commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." Sprint is a large incumbent local exchange telecommunications company and is subject to Price Cap Regulation under Section 392.245. Under Price Cap Regulation, the maxi-

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[100] Exhibit 1, Idoux Direct, Exhibit JRI-7.

[101] Exhibit 1, Idoux Direct, Pages 33-34, Line 17 and Pages 43-44, Line 11.

[102] Exhibit 2, Idoux Surrebuttal, Page 15, Lines 13-15.

[103] Exhibit 1, Idoux Direct, Exhibit JRI-7.

[104] Exhibit 1, Idoux Direct, Pages 33-34, Line 17.

[105] All references to Missouri statutes will be to RSMo 2000, unless otherwise indicated.

mum rates that Sprint may charge its customers are capped and can be changed only through compliance with the limitations and procedures found in Section 392.245.4.

If the Commission determines that effective competition exists in an exchange or for a particular service offered in an exchange, then the rates charged by the incumbent local exchange telecommunications company may no longer be subject to the price cap. The company may thereafter "adjust its rates for such competitive services upward or downward as it determines appropriate in its competitive environment."[106]

The Missouri legislature has established standards for when services are to be considered competitive. Section 392.245.5 provides as follows:

> Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, unless the commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service.

The legislature has also obligated the Commission to periodically investigate the state of competition in the exchanges served by incumbent local exchange companies. Section 392.245.5 provides as follows:

> The commission shall, from time to time, on its own motion or motion by an incumbent local exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunications company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunication company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company.

It is under this provision that the Commission has undertaken a review of the status of competition in the exchanges served by Sprint.

If the Commission determines that effective competition does exist in certain exchanges or for certain services, Sprint will then be able to adjust its rates upward or downward in response to the competitive market. If the Commission determines that an exchange or a particular service is not subject to effective competition, then Sprint's rates for those exchanges or services will remain subject to price cap regulation.[107]

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[106] Section 392.245.5.

[107] Section 392.245.5.

The Commission's determination regarding the existence of competition is not permanent and immutable. The legislature has also required the Commission to review, at least once every five years, the state of competition in those exchanges and for those services that it has found to be competitive, to determine whether effective competition continues to exist. If there is no longer effective competition, the exchange or service will once again be subject to price cap regulation.[108]

The legislature has provided some guidance for the Commission in determining whether effective competition exists. Section 386.020(13) requires the Commission to determine whether effective competition exists based on the following considerations:

> (a) The extent to which services are available from alternative providers in the relevant market;
>
> (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;
>
> (c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, RSMo, are being advanced;
>
> (d) Existing economic or regulatory barriers to entry; and
>
> (e) Any other factors deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo.

In making its determination if whether effective competition exists, the Commission is also guided by Section 392.185, which indicates that the provisions of chapter 392 are to be construed to:

> (1) Promote universally available and widely affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
>
> (4) Ensure that customers pay only reasonable charges for telecommunications service;
>
> (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

[108] Section 392.245.5.

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

As a carrier subject to price cap regulation, Sprint's rates are not established on an exchange-by-exchange basis. It cannot reduce the rates in one exchange to meet competition in that exchange without reducing rates in other exchanges where it may not be facing competition, unless it applies to the Commission for a waiver.[109] The Commission cannot allow such pricing unless it finds by clear and convincing evidence that such pricing is reasonably necessary to promote the public interest and the purposes and policies of Chapter 392.[110]

As the party asserting that there is effective competition in its exchanges, Sprint bears the burden of proof. That allocation of the burden of proof is consistent with the Commission's decision on that issue in a recent case regarding competition in the exchanges of Southwestern Bell Telephone Company.[111] Sprint accepts that burden of proof and it is not an issue in this case.[112]

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

Issue 1: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its residence core access line services (i.e., local exchange service, local operating service, directory listing, extension service, extended area service, local measured service and PBX service) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's residence core access line services be classified as competitive?

Sprint asserts that effective competition exists in only 5 of its 80 exchanges in Missouri. The Commission will consider the state of competition in each of those five exchanges in turn. But first, the Commission will address several general arguments that apply to each of the exchanges in question.

[109] Section 392.200.

[110] Section 392.200.4(1).

[111] Exhibit 20, Page 9. *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, Report and Order, Case No. TO-2001-467, December 27, 2001.

[112] Transcript, Page 37, Lines 17-22.

First, in each of these five exchanges, Sprint is facing only one facilities-based competitor: ExOp in Kearney and Platte City; Fidelity in Rolla and St. Robert; and Green Hills in Norborne. That means that the basic local service market in those exchanges is still highly concentrated. In discussing that concentration, Public Counsel's witness, Barbara Meisenheimer, referred to the Herfindahl-Hirschman Index (HHI), which is used by the Department of Justice in evaluating how concentrated a market is when it is evaluating a proposed merger.[113] Ms. Meisenheimer argued that with only a single competitor, each of the exchanges in question would have an unacceptable level of market concentration, resulting in a potential exercise of market power between the two firms.[114] From this, Public Counsel argues that the Commission cannot find effective competition in an exchange that has only two facilities-based competitors.

Clearly, with only two effective competitors, the market in these five exchanges is highly concentrated. Perhaps, if the Department of Justice were relying on the Herfindahl-Hirschman Index, it would not approve a merger between competitors in those markets. However, this case is not before the Department of Justice and this Commission has not been asked to approve a merger. The Herfindahl-Hirschman Index is perhaps a good tool for measuring market concentration; but it does not control the Commission's decision in this case.

Instead, this Commission must rely on the guidance offered by the Missouri legislature when it enacted the controlling statutes. Those statutes do not preclude a finding of effective competition where there is only one competitor challenging the incumbent local exchange carrier. Indeed, Section 392.245.5 creates a presumption that effective competition exists in an exchange when at least one alternative local exchange telecommunications company has been providing service in that exchange for at least five years. The fact that the basic local service market in these five exchanges is highly concentrated is a factor for the Commission to consider. That single factor is not, however, conclusive.

A second general argument raised by Public Counsel and Fidelity concerns an alleged lack of price discipline imposed on Sprint's rates by the existence of competition in these five exchanges. Public Counsel points out that Sprint's statewide basic local rates have continued to rise within the confines of price cap regulation. From this Public Counsel argues that since prices have continued to rise, Sprint has not had to respond to competitive pressures by decreasing its prices, and therefore, effective competition must not exist.

This argument is not persuasive for two reasons. First, although falling rates are often touted as an argument for establishing a competitive market, there is no economic, or logical reason why prices must always fall in a competitive market. Sometime prices do rise in markets that are clearly competitive. Any motorist that observes the price fluctuations in the competitive retail gasoline market is aware that competition does not always result in falling prices. In fact, it is possible that

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[113] Exhibit 8, Meisenheimer Rebuttal, Page 17, Lines 10-15.

[114] Exhibit 8, Meisenheimer Rebuttal, Page 19, Lines 1-12.

the competitive market rates for telephone service are higher than the rates imposed on that market under rate of return regulation and carried through under price cap regulation. If that is the case, then rates will rise in a competitive market. This means that the fact that rates may not have fallen is not conclusive proof that effective competition does not exist.

Second, when the legislature established, in Section 386.020(13), the factors that the Commission should consider when determining whether effective competition exists in a specific exchange or for a specific service, it did not include a requirement that the competition must have been effective in imposing price discipline on the market. Indeed, as a company subject to price cap regulation, Sprint's ability to change its prices in specific exchanges in response to localized competition is restricted by statute.[115] Therefore, the Commission cannot expect competition to have imposed price discipline in specific exchanges until after Sprint, as the incumbent provider, has been freed to make a competitive pricing response in those exchanges.

The third general argument, this time raised by Sprint, as well as by those parties opposing competitive classification, concerns the existence of wireless communications as a form of competition in Sprint's exchanges. The parties offered arguments, but very little evidence, about the weight that the Commission should give to the presence of wireless competitors as a factor in whether effective competition exists in any particular exchange.

Clearly, there are wireless service providers operating in all of the exchanges served by Sprint. But Sprint did not offer any evidence that would establish exactly how effective that wireless competition was in any specific exchange. However, there is no need for the Commission to reach a conclusion about the effectiveness of that competition. Sprint made it clear that it was not relying on the existence of wireless competitors as the basis for its claim that effective competition exists in 5 of its 80 exchanges. Whatever wireless competition may exist, its effects are not restricted to only five exchanges. Rather, wireless competition is a sort of background effect in all of Sprint's exchanges. In deciding whether effective competition exists in the five exchanges named by Sprint, the Commission must examine the factors that make, or do not make, those five exchanges different from Sprint's other exchanges. The Commission will do so for each of the five exchanges in turn.

Kearney: The factor that leads Sprint to argue that effective competition exists in the Kearney exchange, as well as in the other four exchanges in question, is the presence of a competitor offering facilities-based competition. In other words, a competitor is offering services through the use of its own facilities, thus avoiding the bottleneck represented by Sprint's ownership of the loop bringing service into the customers home or business. ExOp is a facilities-based competitor for Sprint in the Kearney exchange.

The controlling statute requires the Commission to consider five factors in determining whether effective competition exists. The first factor is the extent to

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[115] Section 392.200.4.

which services are available from alternative providers in the relevant market. Sprint's facilities based competitor, ExOp, operates a cable television system in Kearney. By bundling local phone service with cable TV service and high-speed Internet access, ExOp has been able to take about one-third of the local telephone market. ExOp has been providing services in Kearney for nearly five years and its market share has continued to increase. ExOp does not have facilities in place to serve every customer in the Kearney exchange, but it has been designated by the Commission as an ETC – an eligible telecommunications carrier – and is eligible to receive universal service support in that exchange. ExOp currently serves a substantial portion of the available market in the Kearney exchange and there is no reason to believe that it will not be able to maintain and perhaps increase that market share in the future. The Commission concludes that services are available from an alternative provider in the Kearney exchange and that the first factor favors a finding of effective competition.

The second factor is the extent to which services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions. ExOp offers essentially the same services to its customers that are offered by Sprint and it does so at prices that are generally lower than those charged by Sprint. The Commission concludes that the second factor favors a finding of effective competition.

The third factor is the extent to which the purpose and policies of Chapter 392, RSMo, including the reasonableness of rates, as set out in Section 392.185, RSMo, are being advanced. As previously indicated, the rates charged by ExOp in the Kearney exchange are lower than the rates charged by Sprint. Sprint is not currently able to lower its rates on an exchange-by-exchange basis to meet that competition. But it will be able to do so once the exchange is declared to be competitive. At that point, Sprint, as well as ExOp, will be pressured to lower rates by the forces of competition, thus benefiting consumers and ensuring that rates remain reasonable. The Commission concludes that the third factor favors a finding of effective competition.

The fourth factor is whether there are any existing economic or regulatory barriers to entry. The parties have identified no regulatory barriers to the entry of competing companies into the Kearney exchange. Kearney is not located in a dense urban area and for that reason it may be economically more difficult for competitors to enter the market. However, the fact that ExOp is offering services in the exchange and has gained a substantial share of the market indicates that whatever economic barriers to competition may exist are not insurmountable. In successfully entering the market, ExOp was substantially aided by the fact that it operates a cable television system in the exchange and can use those existing facilities to help establish its market position. The Commission concludes that the fourth factor favors a finding of effective competition.

The fifth factor is whether there are any other factors deemed relevant by the Commission and necessary to implement the purposes and policies of Chapter 392, RSMo. The Commission is not aware of any relevant factors that it has not already considered.

After considering each of the factors set out in the controlling statute, the Commission concludes that effective competition exists in the Kearney exchange.

Platte City: As with Kearney, Platte City is served by a facilities-based competitor, ExOp. However, a consideration of the five factors leads to a different conclusion with regard to the state of competition in this exchange. Unlike the Kearney exchange, ExOp has only recently begun offering service in the Platte City exchange and has not yet gained a substantial share of the market. Importantly, ExOp does not operate a cable television system in Platte City and cannot use that system to enable it to overcome any economic barriers to the provisioning of facilities-based service to a non-urban area. For the customers that it does serve in Platte City, ExOp is able to offer lower rates than Sprint. However, it currently does not have facilities in place to serve more than a few customers in the Platte City exchange. Although ExOp is an ETC in Platte City, and may someday be able to serve a larger proportion of the customers in that exchange, its status as an ETC does not immediately make it an effective competitor for Sprint. The Commission must decide whether there is effective competition now, not whether there will be competition someday. The Commission concludes that effective competition does not exist in the Platte City exchange.

Rolla: Fidelity is a facilities-based competitor for Sprint in the Rolla exchange. Like ExOp in Kearney, Fidelity operates a cable television system in Rolla and has used its ability to offer bundled services to obtain about one fourth of the market. Fidelity has been offering telephone service in Rolla for approximately three years and has been offering cable television service for about eight years. As an affiliate of an established incumbent local exchange carrier in a nearby service area, Fidelity is a firmly established competitor. Fidelity is an ETC in Rolla and it should be able to maintain, if not increase, its market share in the future. The Commission concludes that services are available from an alternative provider in the Rolla market.

Fidelity offers essentially the same services to its customers that are offered by Sprint at prices that are competitive with those charged by Sprint. The Commission concludes that the services offered by the alternative provider are functionally equivalent and are offered at comparable rates, terms, and conditions.

As the Commission found in the Kearney exchange, once the Rolla exchange is declared to be competitive, Sprint and Fidelity will be under pressure to reduce rates to meet the challenges of competition, thus benefiting consumers and ensuring that rates remain reasonable. Therefore, the Commission concludes that the purposes and policies of Chapter 392 will be advanced.

The parties have not identified any regulatory barriers to the entry of competitors into the Rolla exchange. The fact that Fidelity, aided by its operation of a cable television system, has been able to gain a substantial share of the market indicates that any existing economic barriers to competition are not insurmountable.

The Commission is not aware of any other relevant factors that it has not already considered and concludes that effective competition exists in the Rolla exchange.

St. Robert: Fidelity also competes with Sprint in the St. Robert exchange using its own facilities. However, Fidelity only began offering service in that exchange in February 2003. As a result, it does not yet have a significant market share, although

it is winning some business customers away from Sprint. Fidelity is not an ETC in St. Robert and instead its market plan in St. Robert is simply to cherry-pick a few profitable business customers that it can easily serve with its existing facilities. Fidelity does not have a cable TV franchise in St. Robert and as a result does not have facilities available to serve a significant proportion of the potential customers in that exchange. Fidelity does offer competitively priced service to those customers that it chooses to serve in the St. Robert exchange, but those services simply are not available to must potential customers. The Commission concludes that effective competition does not exist in the St. Robert exchange.

Norborne: Green Hills is a facilities-based competitor for Sprint in the Norborne exchange. Green Hills began offering services in the Norborne exchange approximately four years ago. By offering the same services offered by Sprint at substantially lower rates, Green Hills has taken approximately two-thirds of the market in that small, rural exchange. Green Hills has been granted ETC status in the Norborne exchange and has not opposed Sprint's request for competitive status in that exchange. The Commission concludes that effective competition exists in the Norborne exchange.

Issue 2: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its residence access line-related services (i.e. Sprint Solutions, busy line verification service, customer calling services, express touch, network service packages) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's residence access line-related services be classified as competitive?

The positions and arguments of the parties for this issue are the same as for issue 1. The Commission will reach the same result as for issue 1. The Commission concludes that effective competition exists in the Kearney, Rolla, and Norborne exchanges. The Commission concludes that effective competition does not exist in the Platte City and St. Robert exchanges.

Issue 3: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its business core access line services (i.e. local exchange service, local operating service, directory listing, extension service, extended area service, local measured service and PBX service) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's business core access line services be classified as competitive?

The positions and arguments of the parties for this issue are the same as for issue 1. The Commission will reach the same result as for issue 1. The Commission concludes that effective competition exists in the Kearney, Rolla, and Norborne exchanges. The Commission concludes that effective competition does not exist in the Platte City and St. Robert exchanges.

Issue 4: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its business access line-related services (i.e. Sprint Solutions, busy line verification service, customer calling services, express touch, network service packages) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's business access line-related services be classified as competitive?

The positions and arguments of the parties for this issue are the same as for issue 1. The Commission will reach the same result as for issue 1. The Commission concludes that effective competition exists in the Kearney, Rolla, and Norborne exchanges. The Commission concludes that effective competition does not exist in the Platte City and St. Robert exchanges.

Issue 5: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its high capacity exchange access line services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's high capacity exchange access line services be classified as competitive?

Sprint withdrew its request to have these services classified as competitive.[116] As a result, the Commission does not need to decide this issue.

Issue 6: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its CENTREX services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's CENTREX services be classified as competitive?

Sprint's CENTREX services allow a business customer to use Sprint's central office technology to provide switching services to meet the customer's needs. Similar services are offered by competing local exchange companies but a customer can also meet its switching needs by buying the necessary hardware and installing the switching equipment on its own premises. The customer can obtain the necessary switching hardware from several unregulated suppliers. Sprint contends, and Staff agrees, that the ready availability of the necessary hardware provides effective competition for Sprint's CENTREX services. Since the suppliers of switching hardware can install their equipment for a customer in any of Sprint's exchanges, Sprint asks that the Commission find that there is effective competition for CENTREX services in all of its exchanges in Missouri.

Fidelity and Public Counsel oppose competitive classification for CENTREX services. They contend that customer premise equipment systems are not functionally equivalent to CENTREX because they still require purchase of dial tone from the local phone service provider. They also claim that Sprint failed to present evidence showing the existence of customer premise equipment systems competitors on an exchange-by-exchange basis.

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[116] Exhibit 2, Idoux Surrebuttal, Page 2, Lines 20-21.

The five considerations that the legislature directed the Commission to consider when deciding whether there is effective competition in an exchange also apply when the Commission is deciding whether a particular service is effectively competitive. The evidence establishes that switching services are available to customers through either purchase of service from Sprint or a competitive local exchange carrier, or by purchasing equipment from a non-regulated supplier. Therefore, the first consideration is satisfied.

The second consideration is whether the services of alternative providers are functionally equivalent or substitutable for the services of Sprint. Sprint's witness, Brian Staihr, testified that goods or services are substitutable when they satisfy the same demand. In other words, they are substitutable if they have the actual or potential ability to take away significant amounts of business from each other.[117] The evidence indicates that Sprint has lost 20 percent of it CENTREX business since June of 2001. It is reasonable to attribute most of this business loss to competition from customer-owned equipment. Although there are differences between Sprint's CENTREX services and switching services provided through customer-owned equipment, for example, a purchaser of customer-owned equipment must still purchase dial tone service from Sprint or some other local service provider, potential customers realize that they can use either alternative to satisfy their demand for switching services. As a result, customer-owned equipment is substitutable for Sprint's CENTREX service and satisfies the second consideration.

Customer-owned switching equipment is sold by unregulated competitors in an unregulated market. Therefore, the market determines the price charged for that equipment. If Sprint wishes to compete for that business, the prices it can charge for its services will be determined by that market as well. The third consideration is therefore satisfied.

Since the competition for Sprint's CENTREX service is coming from the unregulated market for equipment, there are no economic or regulatory barriers to entry and the fourth consideration is satisfied.

Sprint has not provided any exchange-by-exchange analysis of the competition for CENTREX service. But since its competitors are not limited to any single exchange – a supplier of customer-owned switching equipment can sell its hardware in one exchange as well as the next – there is no need for any such exchange-by-exchange analysis.

The Commission concludes that effective competition for Sprint's CENTREX services exists in each of its exchanges.

Issue 7: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its intraLATA private line services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's intraLATA private line services be classified as competitive?

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[117] Exhibit 5, Staihr Surrebuttal, Page 17-18, Lines 22-23, 1-2.

Sprint's competition for these services comes not only from facilities-based competitive local exchange carriers but also from interexchange carriers and fiber network providers. These competitors can provide the same services as Sprint at comparable prices, thus controlling the rates that Sprint can charge for these services. Again, the other suppliers of intraLATA private line services are not limited to a single exchange. They can and do offer their services to customers in any of Sprint's exchanges. Therefore, there is no need for Sprint to make an exchange-by-exchange analysis of competition for these services. The Commission concludes that effective competition exists for these services in each of Sprint's exchanges.

Issue 8: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its ATM and Frame Relay services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's ATM and Frame Relay services be classified as competitive?

Sprint's competition for these services comes not only from facilities-based competitive local exchange carriers but also from interexchange carriers and fiber network providers. These competitors can provide the same services as Sprint at comparable prices, thus controlling the rates that Sprint can charge for these services. Again, the other suppliers of ATM and Frame Relay services are not limited to a single exchange. They can and do offer their services to customers in any of Sprint's exchanges. Therefore, there is no need for Sprint to make an exchange-by-exchange analysis of competition for these services. The Commission concludes that effective competition exists for these services in each of Sprint's exchanges.

Issue 9: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its special access services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's special access services be classified as competitive?

Sprint withdrew its request to have these services classified as competitive.[118] As a result, the Commission does not need to decide this issue.

Issue 10: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its intraLATA MTS services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's intraLATA MTS services be classified as competitive?

Sprint's competition for these services comes not only from facilities-based competitive local exchange carriers but also from interexchange carriers. These competitors can provide the same services as Sprint at comparable prices, thus controlling the rates that Sprint can charge for these services. Again, the other suppliers of intraLATA MTS services are not limited to a single exchange. They can

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[118] Exhibit 2, Idoux Surrebuttal, Page 2, Lines 20-21.

and do offer their services to customers in any of Sprint's exchanges. Therefore, there is no need for Sprint to make an exchange-by-exchange analysis of competition for these services. The Commission concludes that effective competition exists for these services in each of Sprint's exchanges.

Issue 11: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its intraLATA WATS services and 800 services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's intraLATA WATS services and 800 services be classified as competitive?

Sprint's competition for these services comes not only from facilities-based competitive local exchange carriers but also from interexchange carriers. These competitors can provide the same services as Sprint at comparable prices, thus controlling the rates that Sprint can charge for these services. Again, the other suppliers of intraLATA WATS services and 800 services are not limited to a single exchange. They can and do offer their services to customers in any of Sprint's exchanges. Therefore, there is no need for Sprint to make an exchange-by-exchange analysis of competition for these services. The Commission concludes that effective competition exists for these services in each of Sprint's exchanges.

Issue 12: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its Line Information Data Base Access (LIDB) services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's LIDB services be classified as competitive?

Sprint's competition for these services comes from several nation-wide carriers that own their own SS7 network and LIDB databases. These competitors can provide the same services as Sprint at comparable prices, thus controlling the rates that Sprint can charge for these services. Again, the other suppliers of SS7 and LIDB services are not limited to a single exchange. They can and do offer their services to customers in any of Sprint's exchanges. Therefore, there is no need for Sprint to make an exchange-by-exchange analysis of competition for these services. The Commission concludes that effective competition exists for these services in each of Sprint's exchanges.

Issue 13: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its Speed Dial services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's Speed Dial services be classified as competitive?

Sprint's competition for its speed dial services comes from every retail store in Missouri that sells telephone sets. Speed dial services can be duplicated by inexpensive telephone sets that are fully substitutable for the services offered by Sprint. The competition from customer owned equipment controls the rates that Sprint can charge for these services. Clearly telephone sets can be sold and used in any exchange in Missouri. Therefore, there is no need for Sprint to make an

exchange-by-exchange analysis of competition for these services. The Commission concludes that effective competition exists for these services in each of Sprint's exchanges.

Issue 14: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its Payphone services offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's Payphone services be classified as competitive?

The payphone service that is at issue is the provision of an access line and related services to a payphone provider that will provide a phone for use by the public. Sprint's competition for payphone service can come either from a competitive local exchange company able to sell services to the payphone provider, or from sellers of equipment that the payphone provider can use to duplicate the service provided by Sprint or a competing telephone carrier. Sprint has requested that its payphone service be classified as competitive in those five exchanges in which it contends effective competition exists. Staff agrees that payphone services are competitive in those exchanges where basic local services are otherwise competitive. The Commission agrees that payphone services are competitive in those exchanges that are otherwise competitive. Therefore, the Commission concludes that payphone services are competitive in the Kearney, Rolla, and Norborne exchanges. Since it has found that effective competition does not exist in the Platte City and St. Robert exchanges, the Commission concludes that effective competition for payphone services does not exist in the Platte City and St. Robert exchanges.

Issue 15: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its Directory Assistance services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's Directory Assistance services be classified as competitive?

Facilities-based providers of basic local service compete with Sprint in providing directory assistance services in those exchanges where they provide service. However, Sprint contends that it faces effective competition for this service in all of its exchanges from interexchange carriers, which also provide directory assistance services and are not restricted to providing services within a particular exchange.

A Sprint local service customer can access directory assistance services from his or her pre-subscribed long distance carrier by dialing 1 plus the desired area code plus 555-1212, or by dialing 00. However, that same Sprint customer, by dialing 1-411 or 555-1212 without the desired area code, will automatically be connected with Sprint. This does provide a distinct advantage to Sprint in those exchanges where it does not face effective competition for basic local service. A competitive local exchange company that offers facilities-based basic local service would enjoy the same advantage as Sprint with regard to directory assistance calls from its basic local customers. In other words, directory assistance services are

closely tied to basic local services. Where there is effective competition for basic local services, there will also be effective competition for directory assistance calls.

Sprint also argues that it faces competition for directory assistance services from wholly non-regulated directory assistance search engines on the Internet. While such search engines certainly exist and can be used to look up phone numbers from around the country, Sprint failed to produce sufficient evidence to show what impact such non-regulated competition may have on the service it provides, and the Commission is not willing to speculate on such matters.

While Sprint's witness did testify that the volume of directory assistance calls that Sprint handles has decreased since 1998, Sprint was not able to establish the reason for that decline. It is clear, however, that the rates Sprint charges for directory assistance services have not declined in the face of competition, but rather have increased by 14.6 percent since 1999. The Commission earlier in this report and order indicated that rising rates do not necessarily preclude a finding of effective competition. In part that holding was based on the fact that Sprint could not easily reduce rates for those few exchanges where it faced competition without reducing rates in those exchanges where it has no competitors. For this service, however, Sprint is alleging that it is facing competition across all of its exchanges. Therefore, it should have no difficulty in decreasing its statewide rates for directory assistance services if it believes that it must do so to meet competition. That Sprint has not been compelled to do so indicates that what competition does exist is not yet sufficient to discipline Sprint's rates.

The Commission finds that effective competition for Sprint's directory assistance services does not exist; except in those three exchanges where effective competition for other basic local services has been found to exist. Therefore, the Commission concludes that effective competition for Sprint's directory assistance services exists in the Kearney, Rolla, and Norborne exchanges but does not exist in any other Sprint exchange.

Issue 16: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its Local Operator services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's Local Operator services be classified as competitive?

Sprint is seeking statewide competitive classification for three specific local operator services: 1) station-to-station calls with automatic recording equipment; 2) station-to-station calls with operator assistance; and 3) person-to-person calls. Sprint contends that it faces effective competition for these services in all of its exchanges from interexchange carriers that offer their own operator services.

Operator services are closely tied to basic local service in the same way that directory assistance services are closely tied to that service. Operator services can be obtained from interexchange carriers but if a basic local customer uses the most familiar means of reaching an operator, dialing 0 or 411, the customer will be connected to his or her basic local service provider, unless the customer has chosen a different intraLATA toll carrier. Similarly, whatever competition does exist has not disciplined Sprint's rates for operator services. Instead, Sprint's rates for those services have increased since 1999.

As it did for directory assistance services, the Commission finds that operator services are closely tied to basic local service and can be competitive only in those exchanges where effective competition for basic local service exists. Therefore, the Commission concludes that effective competition for operator services exists in the Kearney, Rolla, and Norborne exchanges, and that effective competition for operator services does not exist in any other Sprint exchange.

Issue 17: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its ISDN services offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified at competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's ISDN services be classified as competitive?

Sprint's request assumes that ISDN services are closely tied to basic local service and can only be competitive in those exchanges where effective competition for basic local service exists. As a result, Sprint is seeking competitive classification for those services only in the exchanges that are otherwise competitive. Fidelity offers ISDN services in Rolla and St. Robert, and ExOp offers those services in Kearney and Platte City. Both offer that service at rates that are lower than those offered by Sprint. However, Green Hills does not offer that service in Norborne. Sprint conceded that it does not face competition for ISDN service in the Norborne exchange and withdrew its request for competitive classification of ISDN service in that exchange. The Commission has found that the Rolla and Kearney exchanges are subject to effective competition and therefore concludes that there is effective competition for ISDN service in the Rolla and Kearney exchanges. The Commission has found that the St. Robert and Platte City exchanges are not subject to effective competition and therefore concludes that there is no effective competition for ISDN service in the St. Robert and Platte City exchanges.

Issue 18: Section 392.245.5, RSMo, allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its Optional MCA services offered in the Kearney exchange be classified as competitive. Should Sprint's Optional MCA services be classified as competitive in that Sprint Missouri, Inc. exchange?

Sprint is seeking competitive classification for this service in the Kearney and Platte City exchanges where it offers Optional MCA and it contends its services are otherwise competitive. ExOp also offers Optional MCA service in the Kearney and Platte City exchanges and does so at rates that are lower than the rates offered by Sprint. Sprint does not offer MCA services in the Rolla, St. Robert, or Norborne exchanges so this issue does not apply to those exchanges. Optional MCA service can only be offered to a customer who is already receiving basic local service either from Sprint or from a competitive local exchange carrier. Optional MCA service is, therefore, closely tied to basic local service and can only be effectively competitive where basic local service is effectively competitive. The only exchange in which Sprint offers Optional MCA service and in which the Commission has found that effective competition exists is Kearney. The Commission concludes that effective competition for Optional MCA service exists in the Kearney exchange. Conversely,

the Commission has found that effective competition does not exist in the Platte City exchange so the Commission concludes that effective competition for Optional MCA service does not exist in the Platte City exchange.

Issue 19: In absence of a request by Sprint Missouri, Inc. for the reclassification of a service in an exchange pursuant to Section 392.245.5 RSMo from price cap regulation to competitive status, should the Commission make a finding that effective competition does not exist and order that the current price cap regulation continue to apply?

In its testimony and arguments before the Commission, Sprint requested that the Commission make a finding that only 5 of its 80 exchanges and only a few of its statewide services were subject to effective competition. This issue concerns what should be done about the other exchanges and services for which Sprint has not requested a finding of effective competition.

Sprint argues that the Commission need not make an affirmative finding that competition does not exist in those exchanges and for those services. Rather, Sprint would have the Commission merely find that there was no evidence presented that would justify a finding that effective competition does, or does not, exist for those exchanges and services. Price Cap regulation would then continue to apply for those exchanges and services. Staff and Public Counsel argue that the Commission should make an affirmative finding that price cap regulation should continue to apply in exchanges, and for services, where Sprint has not proved that effective competition exists.

This issue exists because of the provision in Section 392.245.5 that requires that the services of an incumbent local exchange telecommunications company are to be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been providing basic local telecommunications services for at least five years. That competitive classification of exchanges and services occurs automatically unless the Commission determines, after notice and hearing, that effective competition does not exist in that exchange for those services.

Staff and Public Counsel would like to be able to use this proceeding to foreclose any argument that exchanges and services not specifically addressed in this proceeding will at some point be automatically deemed effectively competitive without a finding of effective competition by the Commission. Sprint, on the other hand, would like to keep that possibility open.

The Commission indicated in the order creating this case that the case was established to "investigate the state of competition in Sprint's exchanges." That statement indicates that the Commission intended to make a finding about the existence of competition in all of Sprint's exchanges. Sprint chose to argue that effective competition exists only in five exchanges and chose to present evidence about only those five exchanges. The record does not include an exchange-by-exchange history of activity by competitive carriers in Sprint's exchanges. But by Sprint's silence on its other 75 exchanges, the Commission would be justified in presuming that there is no evidence to support a finding of effective competition in those exchanges.

In any event, the Commission is not required to make that presumption. Sprint has the burden of proving that effective competition exists in its exchanges. It presented evidence to attempt to meet that burden of proof in only five exchanges. The Commission found that it actually met its burden in only three exchanges. That means that for its other 77 exchanges, Sprint has not met its burden of proving that effective competition exists. Therefore, the Commission will find that effective competition does not exist in those 77 exchanges.

Issue 20: Section 392.245.5, RSMo, provides that the Commission shall investigate the state of competition in Sprint's exchanges within five years of an alternative local exchange telecommunications company first being certified. ExOp of Missouri Inc.'s certification was effective December 15, 1998. If the Commission does not issue a decision in this case by December 15, 2003, will any of Sprint Missouri Inc.'s telecommunications services in any Sprint Missouri, Inc. exchange be automatically reclassified or reclassified by default from price cap regulation to a competitive status?

All parties agree that December 15, 2003, is the fifth anniversary of ExOp being the first alternative local exchange telecommunications company certified to provide service in Sprint's territory. However, ExOp did not actually start offering services in a Sprint exchange until February 1999. Therefore, the parties agree that the Commission does not have to issue a decision by December 15.

IT IS THEREFORE ORDERED:

1. That Sprint Missouri, Inc. d/b/a Sprint's residence core access line services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

2. That Sprint Missouri, Inc. d/b/a Sprint's residence access line-related services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

3. That Sprint Missouri, Inc. d/b/a Sprint's business core access line services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

4. That Sprint Missouri, Inc. d/b/a Sprint's business access line-related services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

5. That Sprint Missouri, Inc. d/b/a Sprint's CENTREX services are classified as competitive in all of Sprint's exchanges.

6. That Sprint Missouri, Inc. d/b/a Sprint's intraLATA private line services are classified as competitive in all of Sprint's exchanges.

7. That Sprint Missouri, Inc. d/b/a Sprint's ATM and Frame Relay services are classified as competitive in all of Sprint's exchanges.

8. That Sprint Missouri, Inc. d/b/a Sprint's intraLATA MTS services are classified as competitive in all of Sprint's exchanges.

9. That Sprint Missouri, Inc. d/b/a Sprint's intraLATA WATS Services and 800 services are classified as competitive in all of Sprint's exchanges.

10. That Sprint Missouri, Inc. d/b/a Sprint's Line Information Data Base Access (LIDB) services are classified as competitive in all of Sprint's exchanges.

11. That Sprint Missouri, Inc. d/b/a Sprint's Speed Dial services are classified as competitive in all of Sprint's exchanges.

12. That Sprint Missouri, Inc. d/b/a Sprint's Payphone services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

13. That Sprint Missouri, Inc. d/b/a Sprint's Directory Assistance services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

14. That Sprint Missouri, Inc. d/b/a Sprint's Local Operator services offered in the Kearney, Rolla and Norborne exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

15. That Sprint Missouri, Inc. d/b/a Sprint's ISDN services offered in the Kearney and Rolla exchanges are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

16. That Sprint Missouri, Inc. d/b/a Sprint's Optional MCA services offered in the Kearney exchange are classified as competitive. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

17. That for all other exchanges served by Sprint, the Commission finds that effective competition does not exist and that for those exchanges, Sprint remains subject to price cap regulation.

18. That any pending motions that the Commission has not specifically ruled upon are denied.

19. That this Report and Order shall become effective on December 14, 2003.

Simmons, Forbis, and Clayton, CC., concur;
Gaw, Ch., concurs in part and dissents in part, with separate concurring opinion to follow;
Murray, C., concurs, with separate concurring opinion attached;
all certify compliance with the provisions of Section 536.080, RSMo 2000.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

I generally concur in today's decision but I write separately to indicate that I would have reached a different result as to Sprint's directory assistance and local operator services. I believe that Sprint submitted sufficient evidence to establish that it faces effective competition for those services on a statewide basis and I would have found that those services are competitive in each of Sprint's exchanges instead of only in the Kearney, Rolla and Norborne exchanges.

For that reason I respectfully concur in the decision.

CONCURRING OPINION OF CHAIRMAN STEVE GAW

Although I generally concur in today's decision, I disagree with several findings about whether a single competitor in a rural exchange can provide healthy, sustainable, competition. The evidence presented to the Commission indicates that a competing company has taken a significant share of the local service market in three of Sprint's exchanges. However, I question whether the presence of that competition will be an effective restraint on Sprint's pricing decisions. I fear that rather than acting to meet competition, Sprint could choose to effectively abandon a small exchange by raising its prices. This is particularly a concern in a very small exchange, such as Norborne. If that were to happen, a small, rural exchange could find itself served essentially only by a minimally regulated competitive local exchange carrier that is not subject to effective price competition. Thus, I would not designate that the rural markets were competitive without significant assurance that competition were likely to continue. Additional competitors would improve that outlook. Any of the other decision points that rely on a finding about competitive designation I would also alter consistent with the designation.

I agree with the remainder of the opinion.

In the Matter of the Application of Richard K. Smith for Change of Electric Supplier.

Case No. EO-2003-0543
Decided December 4, 2003

Electric §4.1. Osage Valley Electric Cooperative served the applicant's land. Then, a city annexed that land. That annexation meant Aquila must now serve it. Mr. Smith wanted the Commission to approve a change of suppliers both for his existing structure, as well as for structures he planned to build.

The Commission allowed a change of suppliers only for the existing structure. In contrast, the Commission required the parties to file a territorial agreement before Osage Valley can serve the undeveloped land.

ORDER CONCERNING REQUEST FOR CHANGE OF SUPPLIER

Syllabus

This order grants in part and denies in part Richard K. Smith's Application for Change of Electric Service Provider. The order also allows Mr. Smith to retain Osage Valley Electric Cooperative as his electrical supplier if the Commission approves a territorial agreement between Osage Valley Electric Cooperative and Aquila, Inc., for Mr. Smith's property.

Procedural History

On June 9, 2003, Richard K. Smith filed an Application for Change of Electric Service Provider.[1] Osage Valley, a rural electric cooperative, currently serves Mr. Smith's property. Mr. Smith explained that he wants Osage Valley to continue to serve that property, but that it has been annexed by the City of Peculiar. Because of the annexation, Aquila, Inc., must serve the property, and not Osage Valley, unless the Commission orders otherwise.

On June 13, the Commission ordered Aquila to respond to Mr. Smith's application. Aquila responded on June 23, stating that it did not object. Then, on June 27, the Commission ordered Staff to file its Recommendation or Status Report by July 28.

Staff responded with a Status Report on July 28, stating Staff would file its Recommendation by August 13. Staff then filed its Recommendation on August 15, in which it objected to Mr. Smith's application. Staff pointed out that Mr. Smith does not want a change of supplier, but wants to keep his current supplier, Osage Valley, for his residence, and wants the Commission to authorize Osage Valley to serve a subdivision of homes that are not yet constructed. Staff stated that a territorial agreement, and not a request for a change of supplier, is the appropriate method for Mr. Smith to get the relief he requests.

[1] Aquila, Inc., filed Mr. Smith's application.

Aquila responded on August 25. Aquila stated that it does not wish to enter into a territorial agreement with Osage Valley because of the permanence and costs associated with the agreement. Aquila claimed the Commission has granted similar relief in a recent case,[2] and that the Commission should grant Mr. Smith's pending application.

Staff responded on September 4. Staff stated that Commission Rule 4 CSR 240-3.140(1) allows applicants to receive a "change" in electrical supplier for "structures" currently receiving service. Mr. Smith, according to Staff, cannot receive a change in supplier for his current structure because he simply wants to keep Osage Valley as his supplier. Also, Mr. Smith wants Osage Valley to serve a residential subdivision that has not yet been built, and that because those "structures" do not exist, and are therefore not currently receiving service, Mr. Smith is not eligible for a change in electrical supplier.

Staff further distinguished *Hudlemeyer* from this case on several grounds. First, in *Hudlemeyer*, the applicant asked for expedited treatment because his house was already being built. Aquila consented to the change in *Hudlemeyer*, saying it was a unique situation in which the applicant could otherwise be without electrical service.[3] Also, Mr. Hudlemeyer was already in the midst of constructing his home, which was tantamount to an existing "structure," in contrast to Mr. Smith, who wishes to build a subdivision of some 24 homes, but has not yet started construction.

On September 23, the Commission ordered Staff to clarify its Recommendation. The Commission noted that Staff did not object to Mr. Smith having Osage Valley as his electrical supplier.

Staff responded on October 3. Staff stated that it did not object to Mr. Smith having Osage Valley as his electrical supplier, but that the Commission could not grant Mr. Smith a change in suppliers. Staff repeated that Mr. Smith wants Osage Valley to serve approximately 24 structures that have not yet been built. Therefore, a territorial agreement, and not a change of supplier, is the proper method for Mr. Smith to obtain relief.

Discussion

Mr. Smith asks for a change of electric service provider. Mr. Smith asks for that "change" at a fixed address, as well as a "change" for houses that have not yet been built in the Harvest Hill subdivision of Peculiar, Missouri. Sections 393.106 and 394.315 and Commission Rule 4 CSR 240-3.140 give the standards Mr. Smith must meet to receive that relief.

Change for Fixed Address

Osage Valley currently serves Mr. Smith's address of 12601 E. 211th Street, Peculiar, Missouri. Sections 393.106 and 394.315 permit the Commission to order a change of supplier if the change is in the public interest for a reason other than a rate differential.

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[2] *In the Matter of the Application of Gary Hudlemeyer for Change of Electric Supplier,* Case No. EO-2002-1105, Order Granting Change of Electric Service Provider (issued June 20, 2002).

[3] See *id.,* Verified Statement of Aquila, Inc., Paragraph 8 (filed June 4, 2002).

Commission Rule 4 CSR 240-3.140 requires an applicant for a change of supplier to list both the current supplier and the supplier to which the applicant wishes to change. Mr. Smith does not wish to change suppliers, but wishes to keep the one he has. The Commission, however, sees little practical difference in this case and the *Hudlemeyer* case, in which the Commission granted an application for change of supplier.

In *Hudlemeyer*, the Commission granted a "change" of suppliers for a structure not yet completed, and therefore not yet receiving electrical service. If the Commission did not grant that relief, Mr. Hudlemeyer's structure would have been without electrical service.

Here, the Commission will grant a "change" for Mr. Smith's residence. If the Commission does not grant that relief, Osage Valley will have to remove its lines and Aquila will have to construct new lines, at a great cost to the utilities, as well as to Mr. Smith. Then, Mr. Smith might again apply to the Commission for a change of suppliers from Aquila back to Osage Valley, which would require Aquila to tear out the lines it constructed, and would require Osage Valley to re-install the lines it removed. The net effect of this activity would be to put Mr. Smith right back where he is now, as a customer of Osage Valley, after he, Osage Valley, and Aquila spent a substantial amount of money.

The Commission finds that it is in the public interest for a reason other than a rate differential for Mr. Smith to have Osage Valley as his electrical supplier for 12601 E. 211th Street, Peculiar, Missouri. The Commission will, therefore, grant that portion of his application.

"Change" for potential new structures

Mr. Smith also wants Osage Valley to serve approximately 24 homes to be built in the Harvest Hill subdivision. Again, this property is in the City of Peculiar, which is in Aquila's service territory.

A prerequisite to receiving a change of suppliers pursuant to Section 393.106.2 is that an electrical corporation has lawfully commenced supplying electricity to a structure. The homes do not exist, so there is no "structure" to which electricity is currently being supplied. Therefore, Section 394.315 does not authorize the Commission to give Mr. Smith a "change" of suppliers.

The Commission recognizes the potential cost and delay of negotiating a territorial agreement, but that cost and delay does not allow the Commission to ignore the plain language of the statute. Furthermore, unlike *Hudlemeyer*, this case does not involve one, nearly completed structure, but a possibility of twenty-four, yet to be started structures. The Commission finds *Hudlemeyer* and this case are vastly different, and that the Commission should not rely on *Hudlemeyer* as authority for granting Mr. Smith's request for a change of suppliers to his not yet begun subdivision.

The Commission does not view Mr. Smith's request for Osage Valley to serve a potential new subdivision as a request of change of suppliers. The Commission will, therefore, deny that portion of the application.

IT IS THEREFORE ORDERED:

1. That Richard K. Smith's Application for Change of Electric Service Provider is granted in part and denied in part.

2. That the Commission grants Richard K. Smith's Application for Change of Electric Service Provider only for 12601 E. 211th Street, Peculiar, Missouri.

3. That the Commission denies the remainder of Richard K. Smith's Application for Change of Electric Service Provider.

4. That the Commission will take no further action in this case until Osage Valley Electric Cooperative and Aquila, Inc. file a territorial agreement.

5. That this order shall become effective on December 14, 2003.

Gaw, Ch., Murray, Simmons,
Forbis, and Clayton, CC., concur.

Pridgin, Regulatory Law Judge

In the Matter of the Application of Missouri-American Water Company for Approval to Establish an Infrastructure System Replacement Surcharge (ISRS).

Case No. WO-2004-0116
Decided December 16, 2003

Water §16. Rates §§81, 111. The Commission approved a water company's request to establish an Infrastructure System Replacement Surcharge (ISRS).

Water §16. Rates §§ 81, 111. An eligible water company is authorized by statute to establish a special surcharge – an ISRS – to recover the cost of replacing eligible infrastructure system equipment and plant until a final rate is established in the company's next rate case.

Water §16. Rates §§81, 111. The proper measure of accumulated depreciation used in calculating an Infrastructure System Replacement Surcharge is the actual accumulated depreciation recorded on the books of the company for each item of eligible plant.

Water §16. Rates §§81, 111. The net cost of removal of old, non-ISRS plant may not be included in the company's calculation of the Infrastructure System Replacement Surcharge.

Water §16. Rates §§ 81, 111. Costs that may be recovered through an Infrastructure System Replacement Surcharge include property taxes on eligible plant that will be due within twelve months of the ISRS filing. Property taxes that are payable more than twelve months after the ISRS filing may not be recovered.

APPEARANCES

W.R. England, III, Attorney at Law, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Missouri-American Water Company.

Diana M. Vuylsteke, Attorney at Law, 211 North Broadway, Suite 3600, St. Louis, Missouri 63102, for Missouri Industrial Energy Consumers.

Lisa C. Langeneckert, Attorney at Law, 720 Olive Street, Suite 2400, St. Louis, Missouri 63101, for Missouri Energy Group

M. Ruth O'Neill, Public Counsel, P.O. Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Keith R. Krueger and Thomas R. Schwarz, Jr., Deputy General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

After reviewing Missouri-American Water Company's application for establishment of an Infrastructure System Replacement Surcharge, the Commission concludes that Missouri-American correctly calculated the amount of accumulated depreciation used in the company's calculation of its ISRS revenue requirement. However, the Commission concludes that Missouri-American should not have included net cost of removal of the non-ISRS property in those calculations. In addition, the Commission concludes that those calculations should not include property taxes for plant placed in service after January 1, 2003. Missouri-American's proposed tariff to institute an ISRS is rejected, but Missouri-American is advised to submit a revised tariff consistent with this report and order.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

On September 2, 2003, Missouri-American Water Company filed an Application and Petition for Establishment of an Infrastructure System Replacement Surcharge. For convenience the surcharge is referred to by the acronym ISRS. A proposed tariff implementing the ISRS – with an effective date of October 2 – accompanied Missouri-American's application.

On September 9, the Commission suspended Missouri-American's tariff until December 31, the maximum amount of time allowed by the controlling statute.[1] Also on September 9, the Commission issued an Order Directing Notice and Setting Date for Submission of Intervention Requests. That order directed that notice of Missouri-American's application be given to the county commission of St. Louis County, to the media serving St. Louis County, and to the members of the general assembly that represent St. Louis County. The Commission's order also established September 29 as the deadline for submission of applications to intervene.

A timely application to intervene was filed by the Missouri Energy Group (MEG),[2] an *ad hoc* group of not-for-profit hospital systems and a large industrial company that purchase substantial amounts of water from Missouri-American in St. Louis

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[1] Section 393.1006.1(3), RSMo

[2] The members of MEG are: Barnes-Jewish Hospital; Emerson Electric Company; SSM HealthCare; and St. John's Mercy Health Care.

County. MEG's application to intervene was granted on September 30. On October 31, the Missouri Industrial Energy Consumers (MIEC),[3] another *ad hoc* group of large customers in St. Louis County, filed an application to intervene out of time. MIEC's application was granted on November 3.

On September 29, the Office of the Public Counsel filed a motion asking the Commission to set a procedural schedule and to hold an evidentiary hearing regarding Missouri-American's application. To that end, a prehearing conference was held on October 8. Following that conference, on October 14, the parties submitted a proposed procedural schedule that was adopted by the Commission on October 16. The procedural schedule did not call for the pre-filing of testimony but instead required the parties to file reports and responses to those reports. It also called for an on-the-record presentation to be held on November 21, at which the Commission could question the parties about their reports. The parties indicated that this schedule would be appropriate because the issues before the Commission were likely to be legal rather than factual and because of the tight time constraints imposed by statute.

Staff filed its report on October 31. Staff agreed that Missouri-American should be allowed to establish an ISRS but argued that the annual revenue requirement for calculation of the ISRS should be set at $1,887,301. Staff's calculation of the appropriate annual revenue requirement was substantially smaller than the $4,038,923 calculated by Missouri-American. Missouri-American filed a response to Staff's report on November 10, agreeing with some of Staff's modifications, but disagreeing with many of Staff's assumptions. Missouri-American now contends that the appropriate annual revenue requirement is $3,813,222. Staff, MEG, and MIEC filed replies to Missouri-American's report on November 14. Public Counsel filed its reply on November 17. Public Counsel's reply was filed late and was accompanied by a motion asking the Commission to accept its late filing. That motion was not opposed by any party and will be granted.

At the direction of the Commission, Staff filed a list of issues on November 13. A prehearing conference was held on November 19. As a result of discussions among the parties at that conference, an amended list of issues was filed on November 20.

A hearing was held on November 21, at which time the parties presented evidence and testimony. Missouri-American, Staff, Public Counsel, and MEG submitted post-hearing briefs on December 4. In addition, the Missouri Energy Development Association[4] filed an amicus brief, accompanied by a Petition for Leave to File Amicus Brief. That petition was not opposed by any party and will be granted. MIEC did not submit a brief.

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[3] The members of MIEC are: The Boeing Company; DaimlerChrysler; Ford Motor Company; Hussman Refrigeration; Monsanto Company; and Pfizer.

[4] The members of the association include: Aquila, Inc.; Atmos Energy Corporation; Empire District Electric Company; Kansas City Power & Light Company; Laclede Gas Company; Missouri-American Water Company; Missouri Gas Energy, a division of Southern Union Company; and Union Electric Company d/b/a AmerenUE.

What is an ISRS?

Missouri-American's ability to establish an ISRS was created by the Missouri legislature during its 2003 session. In House Bill 208, the applicable portions of which were codified at Sections 393.1000 through 393.1006, RSMo, the legislature permitted Missouri-American to petition the Commission to allow it to establish a special surcharge, the ISRS, to recover the cost of replacing eligible infrastructure system equipment and plant, which is defined as: replacement mains, and associated valves and hydrants; main cleaning and relining projects; and unreimbursed facilities relocations mandated by governmental entities. Missouri-American would then recover the special surcharge from its customers for a limited time until the Commission establishes its new rates in a general rate case. In effect, the ISRS would allow Missouri-American to begin recovering the cost of infrastructure replacement without having to wait for the Commission to review and approve a general rate case.

Missouri-American currently has a general rate case pending before the Commission in Case Number WR-2003-0500. Missouri-American's tariff that would implement its revised rates is suspended until April 16, 2004. Because the ISRS would only remain in effect until it is replaced by the rates established in a general rate case, Missouri-American's proposed ISRS would be in effect from the effective date of this order until the effective date of the Commission's order establishing new general rates, approximately April 16, 2004.

What is the appropriate amount of the ISRS?

In appendix A to its verified application,[5] Missouri-American provides a detailed list of the facility relocations, and mains, hydrants and valve replacements made after its last rate case, for which it is seeking ISRS eligibility. Missouri-American indicated that it did not undertake any eligible main cleaning or relining projects during the applicable period. For each individual item of plant, Missouri-American lists the investment value, depreciation rate, date that the item was placed in service, accumulated depreciation and depreciation expense. Beginning with the actual investment it made in this eligible plant, Missouri-American identified the actual accumulated depreciation on those investments since they were placed into service, as well as the actual deferred taxes on those investments, and deducted those amounts – along with any contribution in aid of construction and reimbursement received for facility relocations – to arrive at a net original cost, or ISRS Rate Base. Missouri-American then applied the rate of return authorized in its last rate case to this ISRS Rate Base, and identified the annual expenses attributable to depreciation, property tax and state and federal income tax to arrive at a total annual ISRS revenue requirement of $3,813,222.[6] Missouri-American would recover that amount, on an annual basis, from ratepayers through the proposed ISRS.

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[5] The application was admitted into evidence as Exhibit 5.

[6] Missouri-American's calculations are shown on Exhibit 6.

No party challenged Missouri-American's identification of the plant that is eligible for consideration under the ISRS statute and the Commission will accept those amounts as correct. Staff does, however, challenge three elements of Missouri-American's calculation of the ISRS revenue requirement: First, Staff argues that accumulated depreciation applied to facilities relocations and replacement mains and associated valves and hydrants should total $15,550,171 instead of $792,177 as determined by Missouri-American; second, Staff excluded accumulated depreciation – net cost of removal of the retired plant being replaced from its calculations; and third, Staff excluded property taxes on ISRS plant placed in service in calendar year 2003. After making these modifications, Staff determined that the Missouri-American's ISRS revenue requirement is $1,887,301.[7]

MEG's expert witness, Billie LaConte, testified that MEG agreed with Missouri-American on the question of accumulated depreciation. However, she testified that accumulated depreciation – net cost of removal of the non-ISRS plant, as well as property taxes for ISRS plant added after January 1, 2003, should not be included in the ISRS revenue requirement.[8] Using those assumptions MEG calculated that Missouri-American was entitled to an ISRS revenue requirement of $3,628,576.[9]

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Missouri-American is a public utility, and a water corporation, as those terms are defined in Section 386.020(42) and (58), RSMo 2000. As such, Missouri-American is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Section 393.1003.1, RSMo provides as follows:

> Notwithstanding any provisions of chapter 386, RSMo, and this chapter to the contrary, as of August 28, 2003, a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants may file a petition and proposed rate schedules with the commission to establish or change ISRS rate schedules that will allow for the adjustment of the water corporation's rates and charges to provide for the recovery of costs for eligible infrastructure system replacements made in such county with a charter form of government and with more than one million inhabitants; provided that an ISRS, on an annualized basis, must produce ISRS revenues of at least one million dollars but not in excess of ten percent of the water corporation's base revenue level approved by the commission in the water corporation's most

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[7] Staff's calculations are shown as attachment B to its October 31, 2003 Memorandum, which was admitted into evidence as Exhibit 1.

[8] Transcript, Pages 223-224, Lines 21-25, 1-2.

[9] MEG's calculations may be found as a schedule to its Reply to Missouri-American Water Company's Response to Staff Report and Recommendations. That reply was filed on November 14, 2003.

> recent general rate proceeding. An ISRS and any future changes thereto shall be calculated and implemented in accordance with the provisions of sections 393.1000 to 393.1006. ISRS revenues shall be subject to refund upon a finding and order of the commission, to the extent provided in subsection 5 and 8 of 393.1006.

Missouri-American provides water service in St. Louis County, which has a charter form of government and more than one million inhabitants. Therefore, Missouri-American is eligible for an ISRS under this statute. Missouri-American's proposed ISRS would produce revenues of at least one million dollars but not in excess of ten percent of its base revenue level and that requirement of the statute is met.

Section 393.1003.3, RSMo, provides as follows:

> In no event shall a water corporation collect an ISRS for a period exceeding three years unless the water corporation has filed for or is the subject of a new general rate proceeding; provided that the ISRS may be collected until the effective date of new rate schedules established as a result of the new general rate proceeding, or until the subject general rate proceeding is otherwise decided or dismissed by issuance of a commission order without new rates being established.

Missouri-American currently has a general rate case pending before the Commission. Therefore, the ISRS Missouri-American seeks in this case will remain in effect only until new rates are established, which will occur approximately April 16, 2004.

Section 393.1006.2, RSMo, provides as follows:

> (1) When a petition, along with any associated proposed rate schedules, is filed pursuant to the provisions of sections 393.1000 to 393.1006, the commission shall conduct an examination of the proposed ISRS.
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> (2) The staff of the commission may examine information of the water corporation to confirm that the underlying costs are in accordance with the provisions of sections 393.1000 to 393.1006, and to confirm proper calculation of the proposed charge, and may submit a report regarding its examination to the commission not later than sixty days after the petition is filed. No other revenue requirements or ratemaking issues shall be examined in consideration of the petition or associated rate schedules filed pursuant to the provisions of sections 393.1000 to 393.1006.
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> (3) The commission may hold a hearing on the petition and any associated rate schedules and shall issue an order to become effective not later than one hundred twenty days after the petition is filed.

> (4) If the commission finds that a petition complies with the requirements of sections 393.1000 to 393.1006, the commission shall enter an order authorizing the water corporation to impose an ISRS that is sufficient to recover appropriate pretax revenues, as determined by the commission pursuant to the provisions of sections 393.1000 to 39.31006.

Section 393.1006.4 establishes the factors that the Commission may consider when establishing the appropriate pretax revenues that Missouri-American can recover through its ISRS. That section provides as follows:

> In determining the appropriate pretax revenues, the commission shall consider only the following factors:
>
> (1) The current state, federal, and local income or excise tax rates;
>
> (2) The water corporation's actual regulatory capital structure as determined during the most recent general rate proceeding of the water corporation;
>
> (3) The actual cost rates for the water corporation's debt and preferred stock as determined during the most recent general rate proceeding of the water corporation;
>
> (4) The water corporation's cost of common equity as determined during the most recent general rate proceeding of the water corporation;
>
> (5) The current property tax rate or rates applicable to the eligible infrastructure system replacements;
>
> (6) The current depreciation rates applicable to the eligible infrastructure system replacements;
>
> (7) In the event information called for in subdivision (2), (3), and (4) is unavailable and the commission is not provided with such information on an agreed-upon basis, the commission shall refer to the testimony submitted during the most recent general rate proceeding of the water corporation and use, in lieu of any such unavailable information, the recommended capital structure, recommended cost rates for debt and preferred stock, and recommended cost of common equity that would produce the average weighted cost of capital based upon the various recommendations contained in such testimony.

The Commission's determination of Missouri-American's appropriate pretax revenues is also restricted by Section 393.1000(1), which defines "appropriate pretax revenues" as:

> The revenues necessary to produce net operating income equal to:
>
> (a) The water corporation's weighted cost of capital multiplied by the net original cost of eligible infrastructure system replacements, including recognition of accumulated deferred income taxes and accumulated depreciation associated with eligible infrastructure system replacements which are included in a currently effective ISRS; and
>
> (b) Recover state, federal, and local income or excise taxes applicable to such income; and
>
> (c) Recover all other ISRS costs;

ISRS costs, referred to in (c), are further defined by Section 393.1000(5) as "depreciation expenses, and property taxes that will be due within twelve months of the ISRS filing."

Not all infrastructure systems replacements are eligible for inclusion in the ISRS. Section 393.1000(3) defines "Eligible infrastructure system replacements" as:

> Water utility plant projects that:
>
> (a) Replace or extend the useful life of existing infrastructure;
>
> (b) Are in service and used and useful;
>
> (c) Do not increase revenues by directly connecting the infrastructure replacement to new customers; and
>
> (d) Were not included in the water corporation's rate base in its most recent general rate case;

"Water utility plant projects," as used in the previous definition, is further defined by Section 393.1000(8) as consisting only of the following:

> (a) Mains, and associated valves and hydrants, installed as replacements for existing facilities that have worn out or are in deteriorating condition;
>
> (b) Main cleaning and relining projects; and
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> (c) Facilities relocations required due to construction or improvement of a highway, road, street, public way, or other public work by or on behalf of the United States, this state, a political subdivision of this state, or another entity having the power of eminent domain provided that the costs related to such projects have not been reimbursed to the water corporation.

Section 137.075, RSMo 2000, provides that property taxes for a given year are assessed based on the property owned on January 1 of that year. Property taxes

on property placed in service after January 1, 2003, will not be assessed until January 1, 2004. Such taxes need not be paid until December 31, 2004.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

Accumulated Depreciation

Missouri-American contends that the proper measure of accumulated depreciation is the actual accumulated depreciation recorded on the books of the company for each item of ISRS plant. In arriving at the measure of accumulated depreciation that it used in its calculations, Missouri-American simply totaled the accumulated depreciation on each item of ISRS plant.

No party disagrees with Missouri-American's calculation of the total accumulated depreciation on the ISRS plant. Staff's witness, in fact, agreed that Missouri-American had correctly calculated total accumulated depreciation on the plant.[10] Staff, however, contends that the amount calculated by Missouri-American should not be used in calculating the appropriate pretax revenue requirement for the ISRS. Instead, Staff compared the total amount of ISRS investment to the total change in invested plant since the last rate case.[11] Staff calculated that Missouri-American's total invested plant increased by $93,315,958 between its last rate case and July 2003.[12] Missouri-American's infrastructure replacement investment since its last rate case is $20,723,376.[13] Staff then determined the ratio of total invested plant to infrastructure replacement investment, approximately 22%, and applied that ratio to the increase in the company's depreciation reserve since its last rate case, $53,573,609. $53,573,609 multiplied by Staff's ratio equals $11,897,494. It is this amount that Staff contends should be used as accumulated depreciation for mains, and associated valves and hydrants, in the calculation of Missouri-American's appropriate pretax revenues for purposes of its ISRS application. Staff performed the same calculations to arrive at $3,652,677 as the amount of accumulated depreciation for facilities relocations for purposes of Missouri-American's ISRS application.[14]

Staff explains that it used this ratio approach rather than simply using the actual total depreciation because Missouri-American has accumulated $53 million in depreciation since its last rate case and Staff argues that the company should be required to use a portion of that depreciation to offset the cost of constructing the ISRS plant.[15]

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[10] Transcript, Pages 125, Lines 7-16 and 144-145, Lines 18-25, 1-5.

[11] Transcript, Page 112, Lines 21-24.

[12] These figures are taken from Exhibit 1, Appendix B, Attachment B, Page 2 of 4.

[13] This is the amount of eligible investment in replacement mains, and associated valves and hydrants reported by Missouri-American in Exhibit 6, Line 3.

[14] Transcript, Page 117, Lines 1-17.

[15] Transcript, Page 116, Lines 16-25.

Staff also contends that its ratio approach should be used to offset what it claims to be the effect of regulatory lag that favors the company. Staff explains that the total value of a company's plant investment is used to establish a company's rates in a rate case. Those rates then remain unchanged until the company's next rate case when depreciation and new investment in plant are included in the company's rate base for consideration in rates. Staff points out that if all other factors remain equal – in other words, there were no new plant investment, no retirements, no change in revenue and expenses, etc. – then, because of depreciation, the company's rate base would decline and its revenue requirements would decrease. However, because rates do not change between rate cases, the company would be in a position to be earning more than its authorized return because of regulatory lag. Staff is concerned that unless its ratio approach to depreciation is adopted, Missouri- American could be imposing a surcharge on its customers while it is already over-earning.

Staff's argument must fail because it is contrary to the clear language of the statute. Section 393.1000(1)(a) requires that the company's ISRS revenue requirement is to be calculated by multiplying the company's weighted cost of capital by the "net original cost of eligible infrastructure system replacement, including recognition of accumulated deferred income taxes and accumulated depreciation associated with eligible infrastructure system replacements which are included in a currently effective ISRS." That definition clearly directs the Commission to consider "accumulated depreciation associated with eligible infrastructure system replacements." That is exactly what Missouri-American does in its calculation of its revenue requirement when it simply totals the depreciation that accumulated on the eligible infrastructure system replacements.

Staff, however, points to the last clause of the definition – "which are included in a currently effective ISRS" – to argue that since Missouri-American's initial ISRS application has not yet been approved, there is no currently effective ISRS. Therefore, Staff would ignore the definition's admonition to consider "accumulated depreciation associated with eligible infrastructure system replacements." Instead, Staff would consider only the first part of the definition, "the weighted cost of capital multiplied by the net original cost of eligible infrastructure system replacement."[16] According to Staff, this truncated definition is telling the Commission to net the original cost of eligible infrastructure system replacement against something. Staff chooses to net it against the total change in the amount of the company's investment in plant-in-service since its last rate case, thus arriving at its ratio approach. Staff's interpretation of the statute's definition of appropriate pretax revenues is incorrect.

Staff's proposed method of determining the ISRS revenue requirement clearly and explicitly considers depreciation that is in no way associated with ISRS plant. In fact, Staff's witness explained that under Staff's method of calculation, the ISRS revenue requirement would go up or down depending upon the amount of non-ISRS investment made by the company, independent of the company's ISRS

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[16] *See.* Staff's Brief at Page 8-9.

investments.[17] That same witness conceded that there is nothing in the statute that authorizes the consideration of non-ISRS investments when calculating the appropriate ISRS revenue requirement.[18]

Furthermore, a reading of the entire ISRS statute makes it clear that the legislature was directing the Commission to conduct a narrow review of an application for an ISRS. Section 393.1006.2(2) specifically states that the Staff of the Commission may examine information of the water corporation to confirm that underlying costs are in accordance with the provisions of the law and to confirm proper calculation of the proposed charge. The section then states, "no other revenue requirement or ratemaking issues shall be examined." The approach advocated by Staff violates this provision by seeking to examine underlying rate case issues as part of the ISRS.

Staff states that it is very concerned that Missouri-American may be over-earning and argues that it would not be appropriate to allow the company to impose an ISRS under those circumstances. But the controlling statute does not allow the Commission to consider other ratemaking issues in this proceeding. The legislature, by enacting a statute, has determined that Missouri-American is entitled to impose an ISRS on its customers to encourage the company to make needed infrastructure improvements. Missouri-American's method of calculating accumulated depreciation complies with that statute. Staff's method of calculating accumulated depreciation does not comply with that statute. The Commission concludes that Missouri-American's ISRS revenue requirement must be calculated using the accumulated depreciation calculated by Missouri-American for the ISRS plant.

Accumulated Depreciation – Net Cost of Removal

Missouri-American's calculation of accumulated depreciation to be offset against the original cost of the ISRS plant included a further adjustment to its total accumulated depreciation to recognize the cost of removing the old plant that was replaced with ISRS plant. If the replaced plant has any salvage value, the salvage value is deducted from the cost of removal. However, in most cases, the salvage value is less than the cost to remove the old plant, leaving a "net cost of removal." Missouri-American calculated its net cost of removal associated with ISRS plant as $1,036,533.75.

MEG's expert witness stated that the net cost of removal of non-ISRS property should not be included in the ISRS calculations. Because the adjustment that Missouri-American would make to the accumulated depreciation account for net salvage is due to the removal of non-ISRS infrastructure, it should not be part of the calculation of an ISRS.[19]

The Commission agrees that net cost of removal of the non-ISRS plant should not be included in the ISRS calculations. The statute narrowly prescribes the factors

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[17] Transcript, Pages 183-185.

[18] Transcript, Page 185, Lines 20-22.

[19] Transcript, Page 225-226, Lines 2-25,1-6. *See also* Brief of Missouri Energy Group at page 3-4.

that the Commission may consider when calculating the ISRS. The Commission is persuaded by the argument of MEG's expert witness. The net cost of removal that Missouri-American seeks to include in the ISRS calculations is associated with the depreciation accumulated on the old non-ISRS plant. Missouri-American should not be allowed to adjust the accumulated depreciation account for ISRS property due to the removal of non-ISRS infrastructure.

Property Taxes

Section 393.1000(5) defines "ISRS costs" as "depreciation expenses, and property taxes that will be due within twelve months of the ISRS filing" (emphasis added). In its calculation of its ISRS revenue requirement, Missouri-American included the cost of property taxes for all ISRS plant. In its calculations, Staff excluded property taxes on ISRS plant placed in service after January 1, 2003.

Staff reasoned that plant placed in service after January 1, 2003, will not be assessed until January 1, 2004. That means that property taxes on that plant will not be "due" until December 31, 2004. That is more than twelve months after Missouri-American filed its ISRS petition. Under the plain language of the statute, those property taxes are not due within twelve months of the ISRS filing and are, therefore, not ISRS costs.

Missouri-American countered that it accounted for taxes on plant added in 2003 on its books within twelve months of the filing of the ISRS petition. It contended that the statute should be read broadly to permit recovery of costs that the legislature intended to be recovered.

The Commission agrees with Staff's calculation of property taxes. A plain reading of the statute indicates that ISRS costs include property taxes that will be due within twelve months of the ISRS filing. Property taxes on plant added after January 1, 2003, are not due until more than twelve months after the ISRS filing. Therefore, they are not an ISRS expense and may not be included in the calculations of Missouri-American's ISRS revenue requirements.

Other Issues

In the course of their negotiations, the parties have reached agreement on several other adjustments to Missouri-American's original ISRS application. The Commission need not address those adjustments in this report and order. However, Missouri-American must adjust its ISRS calculations based on this report and order and those agreements. As a result, Missouri-American's tariff that implemented its ISRS, as originally calculated, is incorrect. That tariff will be rejected and Missouri-American will be allowed an opportunity to submit a revised tariff that conforms to the decisions made in this report and order and to the adjustments agreed to among the parties.

IT IS THEREFORE ORDERED:

1. That the tariff sheet filed by Missouri-American Water Company on September 2, 2003, and assigned tariff number YW-2004-0274, is rejected. The tariff sheet rejected is:

P.S.C. Mo. No. 6

Original Sheet No. RT 18.0

2. That Missouri-American Water Company is authorized to file a tariff to impose an Infrastructure System Replacement Surcharge that is sufficient to recover appropriate pre-tax revenues as determined by the Commission in this order.

3. That Public Counsel's Request to Accept Reply Filed One Business Day Late is granted.

4. That the Missouri Energy Development Association's Petition for Leave to File Amicus Brief is granted.

5. That any pending motions that the Commission has not specifically ruled upon are denied.

6. That this Report and Order shall become effective on December 26, 2003.

Murray and Forbis, CC., concur;
Gaw, Ch., and Clayton, C., concur, with separate concurring opinion to follow;
and certify compliance with the provisions of Section 536.080, RSMo 2000.

CONCURRING OPINION OF CHAIRMAN STEVE GAW AND COMMISSIONER ROBERT M. CLAYTON III

Although I concur in today's decision, I write separately to express my belief that Staff has correctly identified the unfairness in Missouri-American's method of calculating accumulated depreciation. The statute that permits Missouri-American to impose an ISRS is designed to alleviate the effects of regulatory lag on the company's cost of replacing infrastructure by requiring the Commission to engage in narrow, single-issue ratemaking. But by looking only at the aspect of regulatory lag that harms the company's bottom line, the Commission is unable to examine and consider the other aspect of regulatory lag that harms consumers. Staff points out that depreciation of Missouri-American's plant has the effect of decreasing Missouri-American's revenue requirements while rates remain constant between rate cases, meaning that Missouri-American will, to that extent, be over-earning. Staff has attempted to develop a method to balance that over-earning against the potential for under-earning that the statute addresses.

The new statute upsets the balance traditional ratemaking attempted to strike. There, investments in new plant were not included in the ratebase until the next rate case. However, the depreciation of assets occurring after the last case similarly did not lower rates for consumers. Such is a likely result of single issue ratemaking, which the legislation approves and is one of the reasons courts in Missouri have disapproved such ratemaking.

Although Staff's method of calculating accumulated depreciation is offered with the good intention of calculating a fair rate for Missouri-American's customers, that method does not appear to be permitted by the controlling statute. Because the legislature appears to have been clear in its desire for the majority opinion's result, I feel I must concur in the decision.

I join in the concurrence of Chairman Gaw.

Office of the Public Counsel, Complainant, v. Warren County Water and Sewer Company, Respondent.*

Case No. WC-2004-0215
Decided January 6, 2004

Evidence, Practice And Procedure §23. The Commission will default a party that has not timely answered a complaint. But the Commission may set aside the order if the defaulted party asks the Commission to do so within seven days.

ORDER GRANTING DEFAULT

On November 7, 2003, the Office of the Public Counsel filed a complaint against Warren County Water and Sewer Company. On November 10, Public Counsel amended his complaint. The Commission issued its Notice of Complaint on November 12, 2003, advising Respondent of various options open to it and further advising Respondent that it must pursue one of these options by December 12, 2003. That date has come and gone and the Commission has received no response or any other contact from Respondent.

Commission Rule 4 CSR 240-2.070 governs complaints. That rule, at section (9), provides:

> 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. The respondent has seven (7) days from the issue date of the order granting default to file a motion to set aside the order of default and extend the filing date of the answer. The commission may grant the motion to set aside the order of default and grant the respondent additional time to answer if it finds good cause.

Respondent has failed to file an answer and the Commission will enter its order granting default and deeming the averments of the Complaint to be admitted.

Respondent shall have seven days from the effective date of this order within which to move the Commission to set aside the order of default. Any such motion must be supported by a showing of good cause for Respondent's failure to answer by December 12. If Respondent does not petition the Commission within seven days to set aside the default, the Commission will find as facts the allegations in the Complaint and will grant such relief as those facts may support.

IT IS THEREFORE ORDERED:

1. That default is hereby entered against Respondent Warren County Water and Sewer Company and the averments of the Complaint are deemed admitted.

2. That this order shall become effective on January 16, 2004.

Gaw, Ch., Murray and
Clayton, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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* See page 433 for another order in this case.

In the Matter of Union Electric Company d/b/a AmerenUE and Its Tariff Filing to Implement a General Rate Increase for Natural Gas Service.

Case No. GR-2003-0517
Decided January 13, 2004

Rates §81. AmerenUE, the Staff of the Commission, the Office of the Public Counsel, and the Department of Natural Resources entered into a Stipulation and Agreement. Part of that agreement forbids AmerenUE from filing for an Infrastructure System Replacement Surcharge (ISRS) before January 1, 2006. Also, the agreement forbids AmerenUE from filing for a Purchased Gas Adjustment (PGA) before April 1, 2004.

Expense §27. AmerenUE agreed to invest $15-$25 million to replace its cast iron main lines and its unprotected steel service lines. AmerenUE agreed to invest that money between July 1, 2003 and December 31, 2006. Also, AmerenUE agreed not to attempt to recover those costs through an Infrastructure System Replacement Surcharge before January 1, 2006.

Service §27. AmerenUE agreed to give $100,000 annually for an experimental weatherization/low-income program for Stoddard and Scott Counties.

REPORT AND ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves a Unanimous Stipulation and Agreement that, among other things, authorizes Union Electric Company d/b/a AmerenUE to file revised tariff sheets designed to produce an increase in overall Missouri jurisdictional gross annual gas revenues of $13 million.

On May 23, 2003, AmerenUE filed tariff sheets to implement a general rate increase of approximately $26.7 million. The Commission issued a Suspension Order and Notice on June 3, and suspended the tariffs until April 20, 2004. The Suspension Order and Notice set local public hearings in October and November, and an evidentiary hearing in January.

On December 10, the parties submitted a Unanimous Stipulation and Agreement, which is attached to this order as Exhibit A and incorporated by reference. The parties are the Staff of the Commission, the Office of the Public Counsel, the Missouri Department of Natural Resources, and AmerenUE. The main components of the agreement are as follows:

Rates

AmerenUE shall be authorized to file revised tariff sheets with rate schedules designed to increase AmerenUE's Missouri jurisdictional gross annual gas revenues by $13 million. Those tariffs will become effective on February 15, 2004.

AmerenUE will be allowed to increase the monthly residential customer charge from $9.00 to $10.20, rather than the $16.00 AmerenUE requested. Also, AmerenUE will increase the residential delivery charge from 19.56 cents per Ccf to 28.53 cents per Ccf, rather than the 35.066 cents per Ccf AmerenUE requested.

In addition, the revenue requirement the Unanimous Stipulation and Agreement uses will include $155,000 for the annual funding of a weatherization program. The agreement also states that AmerenUE will provide $100,000 annually for an experimental weatherization/low-income program.

Moratorium

AmerenUE shall not file a rate case to increase its gas rates before January 1, 2006, barring a significant, unusual event that has a major impact on AmerenUE.[1] The parties will not file a rate complaint case before January 1, 2006.[2] AmerenUE also will not make an infrastructure system replacement surcharge (ISRS) filing before January 1, 2006, or a purchased gas adjustment (PGA) filing before April 1, 2004.

Investments and Funding

AmerenUE will make ISRS qualifying investments of $15 million to $25 million between July 1, 2003 and December 31, 2006. Those investments include, but are not limited to AmerenUE's cast iron main and unprotected steel service line replacement programs. AmerenUE will give Staff and the Office of the Public Counsel quarterly updates of its ISRS qualifying investments.

AmerenUE will continue to fund its existing weatherization program at the rate of $155,000 per year. AmerenUE will forward the money to social service agencies to use for residential weatherization or energy audits. The funding will continue until the Commission sets new rates for AmerenUE.

AmerenUE will provide $100,000 annually for an experimental weatherization/ low-income program for Stoddard and Scott Counties. The Delta Area Economic Opportunity Corporation will join the parties in implementing this program. Also, AmerenUE will provide $55,000 per year in 2004-2006 for the energy-efficient-equipment program recommended in the Department of Natural Resources' direct testimony.

Reporting Requirements

Every three months, AmerenUE will give Staff and OPC: all of Ameren Corporation's (including all affiliates and subsidiaries) transaction activity; AmerenUE's call center measurement data; the *Ameren Services Company Monthly Billing Service Request Allocations* report; and AmerenUE's operating expenses and expanded bill frequency analysis report applicable to the Missouri Gas General Service class.

Discussion

Section 393.270 allows the Commission to set just and reasonable rates. Section 536.060 and Commission Rule 4 CSR 240-2.115 allow the Commission to resolve this case by approving the parties' stipulation and agreement.

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[1] In Staff's Memorandum in Support, Staff listed a terrorist attack or an act of God as examples of those significant events.

[2] The Unanimous Stipulation and Agreement exempts the Office of the Attorney General from this moratorium. The issue of whether the Attorney General has authority to file a rate complaint case is not before the Commission at this time.

Upon review of the Unanimous Stipulation and Agreement, and considering the various interests the parties to the agreement represent, the Commission finds approving the agreement would result in just and reasonable rates. The Commission will therefore approve the agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on December 10, 2003, is hereby approved as a resolution of all issues in this case.

2. That the parties are ordered to comply with the terms of the Unanimous Stipulation and Agreement.

3. That the parties shall file a report with the Commission no later than June 1, 2004, and an additional report no later than June 1, 2005, detailing the implementation and progress of the weatherization/low-income experimental program for Stoddard and Scott Counties.

4. That all pending motions are denied as moot.

5. That the proposed tariff sheets filed by Union Electric Company d/b/a AmerenUE on May 23, 2003, Tariff No. YG-2003-2058, are rejected.

6. That Union Electric Company d/b/a AmerenUE may file tariff sheets that are the same as or substantially similar to the specimen tariffs attached to the Unanimous Stipulation and Agreement.

7. That this order shall become effective on January 23, 2004.

Gaw, Ch., Murray and Clayton, CC., concur

Pridgin, Regulatory Law Judge

Editor's 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 Sewer and Water Tariff Filings Made by Osage Water Company.

Case No. ST-2003-0562
Decided January 20, 2004

Evidence, Practice and Procedure §24. A directed verdict is not a summary disposition within the meaning of 4 CSR 240-2.117, and the procedural requirements of that rule do not prevent the Commission from considering a motion for directed verdict at any time.

Evidence, Practice and Procedure §24. A directed verdict is simply a determination by the tribunal that the party having the burden of proof has failed to present sufficient evidence to carry its burden.

Evidence, Practice and Procedure §24. A motion for directed verdict is appropriate at any time after a party having the burden of proof has submitted its prefiled direct testimony.

Evidence, Practice and Procedure §24. A water and sewer company's failure to establish its costs in its direct testimony justified a directed verdict against the company and the dismissal of the company's request for a rate increase.

Rates §§13, 23. Sewer §14. Water §16. The Commission will not allow a company to increase its rates while it is unable or unwilling to provide safe and adequate service to its customers.

Rates §§13, 23. Sewer §14. Water §16. It is the obligation of the owner of a public utility to provide the plant and make the necessary investments in that plant in order to give public utility service, and it is not the obligation of the subscribers to pay rates which will permit the owner of the utility to build a plant upon which it can then base a request for further increases.

ORDER REGARDING MOTION TO DISMISS AND REJECT TARIFFS

On January 14, 2004, the Office of the Public Counsel filed a motion asking the Commission to dismiss and reject the sewer and water tariffs, filed by Osage Water Company, that are the basis for this rate case. Public Counsel's motion is based on two premises. First, that Osage Water has failed to establish a prima facie case that its cost of service exceeds the revenue it receives under its current water and sewer tariffs. Second, that Osage Water continues to fail to provide its customers with safe and adequate service and as a result should not be allowed to increase its rates until it does provide safe and adequate service.

On January 15, the Commission issued an order informing the parties that the Commission would consider Public Counsel's motion to dismiss and reject tariffs at the prehearing conference already scheduled for January 20. The parties were directed to present their arguments regarding Public Counsel's motion at the prehearing conference, and were advised that if they wished to present written arguments, such arguments should be submitted at that time.

Counsel for Osage Water, the Staff of the Commission, and Public Counsel appeared at the prehearing conference on January 20 and presented arguments. Staff argued that the Commission's rule on summary disposition – 4 CSR 240-2.117 – precludes the granting of a motion for summary determination in a rate case because it specifically provides that the rule does not apply in a case seeking a rate

increase. Staff also points out that Section 393.150, RSMo 2000, requires that the Commission provide a full hearing before making a ruling on a suspended tariff that would increase rates. Osage Water agreed with Staff's position.

Public Counsel's motion contains two separate arguments. If either is found to be correct, Osage Water's tariffs should be rejected. First, Public Counsel argues that Osage Water has failed to present a prima facie case to justify its request to increase its water and sewer rates. According to the affidavit of Public Counsel's witness, Kimberly K. Bolin, the direct and rebuttal testimony of William P. Mitchell does not contain any evidence of the actual cost the company incurred to provide service to its customers during the test year and does not contain any documented evidence regarding the company's proposed capital structure or rate of return.

Section 393.150.2, RSMo 2000, provides that "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 … water corporation or sewer corporation." Commission rule 4 CSR 240-2.130(7)(A) provides that a party's prefiled direct testimony shall include "all testimony and exhibits asserting and explaining the party's entire case-in-chief." Therefore, if Osage Water's direct testimony fails to show that the increased rate that it proposes is just and reasonable, it has failed to meet its burden of proof. In essence, Public Counsel is asking for a directed verdict.

A directed verdict is not a summary disposition within the meaning of 4 CSR 240-2.117, and therefore that regulation does not preclude the Commission from considering Public Counsel's motion. In fact, the Commission does not have a specific procedural rule dealing with such a motion. A directed verdict is simply a determination by the tribunal that the party having the burden of proof has failed to present sufficient evidence to carry its burden. In a civil court, a motion for directed verdict would be appropriate at the close of the case in chief of the party having the burden of proof. In a Commission case, direct testimony is prefiled and, in this case, has been before the Commission for months. 4 CSR 240-2.130(7)(A) requires that direct testimony include "all testimony and exhibits asserting and explaining that party's entire case-in chief." 4 CSR 240-2.130(8) provides that no party is permitted to supplement its prefiled direct testimony without leave of the Commission. Therefore, even though the hearing has not yet physically convened, Osage Water's case-in-chief has already been submitted to the Commission. Therefore, a motion for directed verdict is appropriate at this time.

An examination of the testimony offered by Osage Water indicates that it has indeed failed to present sufficient evidence to justify a rate increase. Much of the testimony that has been offered is taken up with arguing that the Commission should allow Osage Water to recover in its rates for the cost of additional services and employees that Osage Water claims it would like to use to provide better service to its customers. It presents hypothetical budgets that it asks the Commission to fund through a rate increase. But a rate case before this Commission is based on the costs incurred by the company in a past test year. In this case, the test year used in the testimony of Staff and Public Counsel was the twelve months ending June 30, 2003. Osage Water acknowledged at the prehearing conference on January 20, 2004, that the twelve months ending June 30, 2003, was the appropriate test

year. Since Osage Water has not established its costs incurred in that test year, it has not met its burden of proof and is not entitled to a rate increase.

In addition to its failure to meet its burden of proof, Osage Water has failed to comply with Commission rule 4 CSR 240-2.130(7)(A) in that it failed to present its entire case-in-chief in its direct testimony. This requirement is necessary to allow all parties to prepare for hearing and to avoid unfair surprise. It is not enough to speculate that holes in its case can be patched through rebuttal or surrebuttal testimony or through cross-examination of witnesses of other parties. Osage Water's failure to present its case in direct testimony is a further and independent basis for dismissing this case and rejecting Osage Water's tariffs.

The second argument in Public Counsel's motion is that Osage Water is currently not providing safe and adequate services to its customers and that until it does so it should not be allowed to receive a rate increase. In most cases, the determination of whether a company is providing safe and adequate service would be a question of fact to be determined at hearing. However, the Commission has already determined, in a complaint case brought by Staff, that Osage Water is not able to provide safe and adequate service to its customers.[1] As a result of that complaint, the Commission directed its Staff to file apetition in the Circuit Court of Camden County seeking the appointment of a receiver to assume control of Osage Water. That case is currently awaiting trial in circuit court.[2] Osage Water presented no evidence to even suggest that the service it provides to its customers has improved since the Commission determined that it was providing substandard service. Indeed, the comments received from Osage Water's customers at a local public hearing held on January 13, 2004, indicate that the service Osage Water provides to its customers has not improved.

The Commission will not allow a company to increase its rates while it is unable or unwilling to provide safe and adequate service to its customers. In order for a rate to be just and reasonable, it must be fair to both the company and its customers.[3] The Commission has previously allowed this company to increase its rates while providing poor service to its customers. That rate increase did not result in an improvement in service and there is no reason to believe that a further rate increase will improve service to Osage Water's customers. Allowing a company to charge even more for what is already inadequate service is not fair to the customers and will not be allowed.

This is not a new position for the Commission. As Public Counsel points out in its motion, in a 1963 case regarding North Missouri Telephone Company,[4] the Commission held that a local telephone company that had not modernized its plant – or increased its rates – for forty years was not providing adequate service for its customers. In refusing to allow the company to increase its rates until it was able to provide adequate service, the Commission stated the following principle:

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[1] *The Staff of the Missouri Pub. Serv. Comm'n v. Osage Water Co.*, Case No. WC-2003-0134, Report and Order issued December 10, 2002.

[2] Case No. CV102-965CC.

[3] *State ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n,* 515 S.W.2d 845 (Mo. App. W.D. 1974).

[4] *Re North Missouri Tel. Co., Inc.,* 49 PUR 3d 313 (Mo PSC Case No. 15,054) (1963).

> All utilities are entitled to a fair return on investment but the utility and the commission should never lose sight of the cardinal principal of regulation, that the public should and must receive adequate service. Until the subscribers and the general public who may subscribe to telephone service from North Missouri Telephone Company receive the adequate service to which they are entitled, this commission would be derelict in its duty in imposing a higher monthly rate for the antiquated service now being furnished.[5]

The *North Missouri* case is not the only occasion in which this Commission has refused to allow a rate increase for a company that was providing inadequate services. In a 1955 case, *In re Western Light and Tel. Co., Inc.,*[6] the Commission refused to allow a company to increase rates for a community that was receiving substandard telephone service. Similarly, in *In re Middle States Util. Co. of Missouri,*[7] the Commission held that a telephone company would not be allowed to increase rates when the service it provided its customers was inefficient and inadequate.

Nor is it only this Commission that has refused to allow a company to increase rates while failing to provide safe and adequate service. Other regulatory bodies in other states have taken the same position. For example, the Pennsylvania Public Utility Commission refused to allow a rate increase for a water company that was providing inadequate and unreasonable service to its customers.[8] The Pennsylvania P.U.C. has followed that principle in several subsequent cases.[9] Similarly, the Idaho Commission refused to allow a rate increase for a company that was providing inadequate service.[10] In a 1972 case, the United States Court of Appeals upheld a decision by the Washington Metropolitan Area Transit Commission that refused a rate increase until service improved.[11]

The Commission is mindful of the argument that a company providing poor service, such as Osage Water, needs a rate increase to be able to afford to provide better service. However, that argument is not persuasive. As this Commission has previously held:

> The applicant should bear in mind that it is the obligation of the owner of a public utility to provide the plant and make the necessary investments in that plant in order to give public utility service, and it is not the obligation of the subscribers to pay

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[5] *Id*. at 318.

[6] 6 Mo P.S.C. (N.S.) 251 (1955).

[7] 1 Mo P.S.C. (N.S.) 110 (1947).

[8] *Pennsylvania Pub. Util. Comm'n v. Pennsylvania Gas and Water Co.,* 74 PUR 4th 238, 61 Pa. P.U.C. 409 (1986).

[9] *See e.g. Clinical Trial Services v. Audubon Water Co.*, 2002 WL 1849777 (Pa. P.U.C.) (2003)

[10] *In re Citizens Util. Co*., 35 PUR 4th 378 (Idaho P.U.C 1980).

[11] *D.C. Transit System, Inc. v. Washington Metro. Area Transit Comm'n*, 466 F.2d 394, 151 U.S. App. D.C. 223 (1972) *cert. denied* 409 U.S. 1086 (1972).

> rates which will permit the owner of the utility to build a plant upon which it can then base a request for further increases.

Osage Water has gotten itself into a difficult financial position, but its customers are not obliged to rescue the company by paying higher rates for unsafe and inadequate service.

After considering Public Counsel's motion and the arguments of the parties, the Commission concludes that the tariffs submitted by Osage Water must be rejected. Osage Water currently has four tariffs pending before the Commission as a part of this case. Two were submitted in June of 2003 and were suspended until May 3, 2004. The other two were submitted on September 4, 2003, along with the direct testimony of William Mitchell, and would have further increased Osage Water's rates. Those tariffs indicated that they would not become effective until July 6, 2004, and have not been suspended. All four tariffs will be rejected.

IT IS THEREFORE ORDERED:

1. That the Office of the Public Counsel's Motion to Dismiss and to Reject Tariffs is granted.

2. That the tariffs issued by Osage Water Company to increase rates – Tariff Nos. JS-2003-2115, JW-2003-2114, YW-2004-0278, & YS-2004-0279 – are rejected. The tariffs rejected are:

P.S.C. MO No. 1

3rd Revised Sheet No. 10, Canceling 2nd Revised Sheet No. 10
4th Revised Sheet No. 5, Canceling 3rd Revised Sheet No. 5
4th Revised Sheet No. 10, Canceling 3rd Revised Sheet No. 10
5th Revised Sheet No. 5, Canceling 4th Revised Sheet No. 5

3. That the hearing scheduled to begin on February 9, 2004, is canceled.

4. That this order shall become effective on January 30, 2004.

Murray and Clayton, CC., concur Gaw, Ch., not participating

Woodruff, Senior Regulatory Law Judge

Edward K. Moses, Sr., Complainant, v. Kansas City Power & Light Company, Respondent.

Case No. EC-2003-0508
Decided January 27, 2004

Evidence, Practice and Procedure §8. Where a Complainant sought damages resulting from the disconnection of electric service, the Commission approved a Stipulation and Agreement requiring that Kansas City Power & Light apply a $270 credit to Complainant's account and that KCP&L file tariff sheets, for Commission approval, listing the dollar amounts of the Company's reconnection fees.

ORDER APPROVING STIPULATION AND SETTLEMENT AGREEMENT

Syllabus: This order approves the Stipulation and Settlement Agreement between Edward K. Moses, Sr., and Kansas City Power & Light Company regarding a complaint filed by Edward K. Moses, Sr., against the Company. Complainant sought relief for damages arising from the disconnection of residential electric service.

Procedural History

Edward K. Moses, Sr., filed a complaint with the Missouri Public Service Commission on May 21, 2003. The Commission issued its Notice of Complaint to which Kansas City Power & Light Company timely responded. The Commission then issued an order directing that the Staff of the Commission investigate this matter and file a report. Staff filed its report on August 1, 2003, and recommended that the matter be set for prehearing conference.

The Commission held a prehearing conference on October 14, 2003. Complainant did not attend. Hence, the Commission issued an order directing that Complainant file a statement indicating why this matter should not be dismissed. Complainant was further notified that if he did not respond to the order, then his complaint would be dismissed. Complainant did not respond and on November 6, 2003, the Commission issued an order dismissing the complaint. On the same day, Complainant filed a letter requesting that his complaint not be dismissed. In support of his request, Complainant stated that he had not received the Commission's order directing him to file a statement of why his complaint should not be dismissed. Thereupon, the Commission granted Complainant's request and held a second prehearing conference on December 4, 2003.

As a result of the second prehearing conference, the parties filed a Stipulation and Agreement on December 22, 2003.

The Complaint

Complainant alleged in his complaint that on April 29, 2003, he found a disconnection notice attached to his door. He paid the required amount of $143.00 and a $25.00 reconnection fee. His service was not restored within the 24-hour time frame that he was told it would be restored. On several occasions he spoke with

representatives from KCPL but remained without service from April 29 through the time of filing this complaint. Complainant requested that he be awarded damages for: (1) costs associated with having to use a generator; (2) spoiled fish and meat; (3) the loss of use of his home; (4) mental frustration; and (5) during disconnection, Internet service for which Complainant was being billed but was unable to use.

Staff Investigation and Report

In its report, Staff stated that Complainant's service was disconnected for nonpayment and that on April 29, 2003, Complainant paid the required amount to ensure reconnection. However, the following day the Company went to Complainant's residence to reconnect the service but found that the meter seal had been cut and the service already reconnected. Thereupon, the Company disconnected the meter and required Complainant to pay a tampering fee of $150.00. On July 22, 2003, Complainant's electric service was restored after KCPL waived its request for a deposit and Complainant paid the balance and the tampering charge.

Staff informs the Commission that the Commission can not grant Complainant's requested relief; that the relief sought by Complainant may be awarded in Circuit Court. Staff further notes that, although the Company has not violated any terms of its tariff, KCPL is the only electric utility regulated by the Commission that does not include the amount of its reconnection fees in the tariff. Hence, Staff suggests that the Commission require the Company to file tariff sheets, for the Commission's approval, listing the dollar amount its reconnection fee.

The Agreement

A prehearing conference was held on December 4, 2003. Both parties and representatives from the Staff of the Commission and the Office of the Public Counsel participated in the prehearing conference. After discussions during the prehearing conference, the parties negotiated the following terms of the agreement:

A. KCPL agrees to apply a $270 credit to Mr. Moses' electrical service account (Account Number 4973-46-3217) as his only and complete relief in this case.

B. In return for the credit described above, Mr. Moses releases and discharges KCPL from any and all claims for damages, which Mr. Moses has or may have against KCPL and Mr. Moses further agrees not to pursue any claim for other relief in any court of proper jurisdiction.

Discussion

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[1] The Commission notes that every decision and order in a contested case shall be in

[1] Section 536.060, RSMo 2000.

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.[2] Consequently, the Commission need not make findings of fact or conclusions of law in this order.

The Commission has reviewed the facts of this case and the Stipulation and Settlement Agreement and finds that the Agreement is reasonable. The Commission will approve the Agreement and direct that the parties to the Agreement comply with its terms.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on December 22, 2003, is approved as a resolution of all issues in this case. A copy of the Stipulation and Agreement is attached as Attachment A.

2. That all parties to the Stipulation and Agreement are ordered to comply with the terms of the Stipulation and Agreement.

3. That Kansas City Power and Light Company shall file with the Commission, for Commission approval, tariff sheets listing the dollar amounts of the Company's reconnection fees.

4. That this order shall become effective on February 6, 2004.

5. That this case may be closed on February 7, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.

Jones, Regulatory Law Judge

Editor's 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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[2] Section 536.090, RSMo 2000.

In the Matter of Southwestern Bell Telephone, L.P. d/b/a SBC Missouri's Proposed Tariff Revisions Restricting Commingling of Unbundled Network Elements with Wholesale Facilities and Services.

Case No. TT-2004-0245
Decided January 27, 2004

Telecommunications § 2. The Commission determined that SBC Missouri's proposed tariff revisions contained language, which created a limitation on the requirement to permit commingling which made the tariff unreasonable and unjust.

Telecommunications §2. The Commission determined that the tariff was subject to unnecessary ambiguity and confusion, making it unreasonable and unjust because it did not specify which other tariffs were incorporated.

Telecommunications §2. The Commission determined that the tariff should be rejected because the footnote did not comply with Section 392.220, RSMo, by providing 30-days notice to the Commission of a change.

ORDER REJECTING TARIFF

Syllabus: This order rejects the tariff filed by Southwestern Bell Telephone Company, d/b/a SBC Missouri.

Procedural History

On November 12, 2003, SBC Missouri submitted revised tariff sheets to the Commission. The proposed tariff revisions had an original effective date of December 12, 2003. On December 5, 2003, MCImetro Access Transmission Services, LLC, moved to suspend or reject the tariffs. SBC Missouri responded to the motion, and on December 9, 2003, the Commission suspended the tariff until January 11, 2004, for further review. The Staff of the Missouri Public Service Commission filed a response and recommendation on December 16, 2003, to which both SBC Missouri and MCI responded.

On December 23, 2003, AT&T Communications of the Southwest, Inc., filed an application to intervene and a motion to suspend the tariffs. On December 31, 2003, the Commission further suspended the tariffs until February 11, 2003, and set the matter for oral arguments. SBC responded in opposition to AT&T's intervention. The Commission granted AT&T's request for intervention on January 8, 2004.

Oral arguments were held on January 14, 2004, at which all the parties were represented.

Discussion

The FCC in its Triennial Review Order and new rules, directed incumbent local exchange carriers "to permit commingling of unbundled network elements or a combination of unbundled network elements with wholesale services obtained

from an . . . [incumbent local exchange carrier]."[1] SBC Missouri argues that its tariff revisions are being made to implement the new FCC rules allowing commingling.

MCI and AT&T object to two parts of the tariff revisions: the reference to commingling provisions in the current interconnection agreements and applicable tariffs found in Section 5.1.1 of the proposed tariff; and, the footnotes regarding future changes of law. MCI and AT&T have three basic objections.

A. The reference to interconnection agreements unlawfully restricts commingling.

First, MCI and AT&T argue that the tariff revisions in Section 5.1.1 create unlawful limitations and conditions on commingling by authorizing only commingling that is permitted in the interconnection agreements. MCI and AT&T argue that no such limitation is authorized by the FCC's Triennial Review Order or the federal rules. The controversial language of Section 5.1.1 of the tariff is:

> Except as provided below, the Telephone Company shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from the Telephone Company, *to the extent provided by and subject to the terms and conditions of the requesting telecommunications carrier's interconnection agreement with the Telephone Company (or, if applicable, of the Telephone Company intrastate tariffs.)*
>
> Emphasis added.

SBC Missouri responds that the Missouri filing is virtually identical to the interstate access tariff authorized by the Federal Communications Commission. Thus, the reasonable inference is that the language complies with the FCC requirements. In addition, SBC Missouri argues that the reference to interconnection agreements is reasonable because the Triennial Review Order contemplates that the new federal rules[2] will be implemented by making revisions to the interconnection agreements.[3]

The Triennial Review Order requires ILECs "to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations."[4] In the Triennial Review Order, the FCC goes on to explain, however, that rather than set a firm transition period to allow the ILECs time to implement billing and operational changes, those issues "can be addressed through the same process that applies for other changes in our unbun-

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[1] 47 C.F.R. §51.309(e).

[2] 47 CFR § 51.309(e).

[3] *See*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket No. 01-338, FCC 03-36, para. 582 (released August 21, 2003), at ¶¶ 583, 700-706.

[4] *Triennial Review Order* at ¶ 581.

dling requirement adopted herein, *i.e.*, through change of law provisions in interconnection agreements."[5]

SBC Missouri is correct that the FCC contemplated in the Triennial Review Order that billing and operational issues would be placed in interconnection agreements. However, that does not explain, and SBC Missouri did not articulate, why there is a need to express in the tariff that commingling is limited "to the extent provided by" the interconnection agreements. Under SBC Missouri's contract theory expressed during oral arguments, if the tariffs simply state that commingling is permitted, the terms and conditions of the commingling will have to be implemented through interconnection agreements. By adding the "to the extent provided" language and by not defining which specific tariffs are being referenced, SBC Missouri may be creating a limitation that would not otherwise exist. At the very least, SBC Missouri is creating future disputes over the interpretation of that tariff language.

SBC Missouri agreed during oral arguments that the tariff reference could be more specific. MCI and AT&T agreed during the oral arguments that their concerns would be alleviated if the tariff language ended with the words, "obtained from the Telephone Company." The Commission finds that the reference to interconnection agreements as written, and the general reference to other applicable tariffs is unnecessary and confusing, causing the proposed tariffs to be unjust and unreasonable. The tariff will, therefore, be rejected.

2. The footnotes automatically cancel the commingling provisions with out first seeking Commission authority.

The second objection to the tariff revision is the footnotes. MCI and AT&T argue that the footnotes effectively allow SBC Missouri to unilaterally interpret the law and automatically cancel part of its tariffs. MCI and AT&T argue that SBC Missouri should first have to seek Commission approval before a provision of its tariff is withdrawn.

Staff does not object to the footnote and interprets it as requiring a court or federal regulation to "clearly eliminate . . . [the] commingling obligation before SBC [Missouri] could no longer permit commingling."[6] MCI and AT&T argue that the language is not that clear. In addition, AT&T states that the language is contrary to the "change of law" provision in its interconnection agreement with SBC Missouri. That provision, according to AT&T, allows for either party to the agreement to require renegotiation of the terms of the agreement upon a "legally binding" change of law. SBC Missouri responds that the intervenors will still have the remedy of filing a complaint with the Commission if SBC Missouri errs in its interpretation of the law.

AT&T also argues that the Commission rejected such automatic changes to a tariff in the past.[7] The Commission actually rejected the Local Plus tariff for other reasons, but stated in *dicta*, "that . . . for a company to withdraw a tariff, it must follow

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[5] *Id*. at ¶ 583.

[6] *Staff Response and Recommendation*, at ¶ 5.

[7] *In the Matter of Southwestern Bell Telephone Company's Tariff Revisions Designed to Introduce a LATA-wide Extended Area Service (EAS) Called Local Plus, and a One-Way COS Plan*, Case No. TT-98-351.

Commission procedures, including obtaining approval for discontinuance of the service."[8] The Commission later approved a Local Plus tariff with the same provision.[9] The Local Plus tariff did not, however, completely withdraw a service, but instead made it so that no new customer could receive the service if the law changed.

The most persuasive argument for rejecting the tariffs is that the footnotes violate the requirement of Section 392.220, RSMo, for 30-days notice to the Commission before changes may be made to a tariff. The statute authorizes "[t]he commission for good cause shown"[10] to allow changes on less than 30-days notice. This provision has typically only been used to allow a tariff change to become effective in fewer than 30 days, not to completely exempt a company from providing notice of the change. To approve the proposed footnote, the Commission would have to find that good cause exists to exempt SBC Missouri from providing future notice to the Commission.

Again SBC argues that the FCC allowed a similar provision to become effective. This Commission, however, is not bound by that policy decision of the FCC to allow automatic cancellation of a portion of the tariff. The Commission finds that such a provision would violate Section 392.220, RSMo, by causing a change to the tariff without providing notice to the Commission. The Commission does not find that good cause exists to remove the requirement to notify the Commission when this tariff changes. Thus, the Commission determines that this tariff should be rejected.

SBC Missouri should file its tariff revisions with the Commission as required by the statute and the Commission rules. Should good cause exist for SBC Missouri to make a change on an expedited basis, the Commission has procedures in place to handle this type of request.

3. The cross-reference to other tariffs and to the interconnection agreements is not clear and understandable.

The final argument of MCI is that the cross-references to interconnection agreements and intrastate tariffs are not clear and understandable, and thus violate Commission requirements for what is to be included in a tariff. The Commission's rules cited by MCI require that all the conditions that govern rates shall be included in the tariff.[11] MCI stated that if the specific tariffs were cited, it would no longer have concerns about the reference to intrastate tariffs. The Commission finds that if other tariffs are referenced, they should be explicitly named.

MCI also argued that the reference to interconnection agreements violates the statute and the Commission's rules because it does not state the specific provisions of the agreements to which it refers. Because the Commission has

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[8] *Id*. at p. 40.

[9] *Order Denying Motion to Suspend*, Case No. TT-99-191, *In the Matter of Southwestern Bell Telephone Company's Tariff Proposing to Refile Its Local Plus® Service and Requesting Expedited Approval.*

[10] Section 392.220.2, RSMo. 2000.

[11] 4 CSR 240-3.545(12)(L).

determined that the reference to interconnection agreements should not be included and the tariff should be rejected for other reasons, the Commission need not reach a decision on this point.

Conclusion

The Commission determines that SBC Missouri's proposed tariff revisions contain language creating a limitation on the requirement to permit commingling. The tariff language also does not specify which other tariffs are incorporated. This language in Section 5.1.1 makes the tariff subject to unnecessary ambiguity and confusion, making it unreasonable and unjust and it therefore should be rejected.

The Commission also finds that the tariff should be rejected because the footnotes do not comply with Section 392.220, RSMo, requiring 30-days notice to the Commission. Therefore, the tariff is rejected.

SBC Missouri is authorized to file new tariffs in accordance with this order to implement the commingling requirements.

IT IS THEREFORE ORDERED:

1. That the following tariff sheets filed on November 12, 2003, by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, and assigned Tariff File No. JI-2004-0654, are rejected:

PSC Mo. - No 36
Access Services Tariff
Section 2
6th Revised Sheet 61, Replacing 5th Revised Sheet 61
2nd Revised Sheet 61.01, Replacing 1st Revised Sheet 61.01
4th Revised Sheet 74, Replacing 3rd Revised Sheet 74
5th Revised Sheet 75, Replacing 4th Revised Sheet 75
2nd Revised Sheet 76, Replacing 1st Revised Sheet 76
Section 5
3rd Revised Sheet 1.01, Replacing 2nd Revised Sheet 1.01
Original Sheet 1.02
Original Sheet 1.03
Original Sheet 1.04

2. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is authorized to file tariff pages designed to implement the new Federal Communication Commission provisions requiring commingling.

3. That this order shall become effective on February 6, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.

Dippell, Senior Regulatory Law Judge

In the Matter of the Application of Envirowater Company, LLC, for Permission, Approval, and a Certificate of Convenience and Necessity.

Case No. SA-2004-0159
Decided January 27, 2004

Certificates §22. The Commission granted - subject to conditions regarding regulatory, economic and safety concerns - a certificate of convenience and necessity to construct and operate a sewer system to Envirowater Company.

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Syllabus: In this order, the Commission finds it necessary and convenient for the public interest for Envirowater Company, LLC, to install, own, acquire, construct, operate, control and manage a sewer system in an unincorporated area in Lincoln County, Missouri, and so grants Envirowater a certificate of convenience and necessity.

On September 24, 2003, Envirowater Company, LLC, applied for a certificate of convenience and necessity to construct and operate a sewer system in an unincorporated area of Lincoln County, Missouri. The Company states that there is no sewer service being offered in the proposed area, which is being developed into a subdivision consisting primarily of single-family residential homes. Because there is no service, there is a public need for adequate sewer service in the proposed area. It is anticipated that occupancy of the subdivision will begin in the first quarter of 2004.

On September 30, 2003, the Commission issued an order directing that the Company submit statements regarding unsatisfied judgments, past due assessments and annual reports and an affidavit to support the application. The Company complied with the Commission's order on October 20, 2003. Also on September 30, 2003, the Commission issued an order that notice be given to potentially interested entities, allowing opportunities for intervention. There were no requests for intervention.

On December 29, 2003, the Staff of the Commission filed its memorandum recommending that the Commission approve the application. In its memorandum, Staff noted that the Company's description of the service area did not correspond to section or survey lines as shown on a United States Geological Survey map. Staff therefore suggested that the Company revise the description and submit it as part of its tariff. Additionally, after discussions and modifications of the estimated expenses associated with providing the sewer service, Staff and the Company arrived at a monthly residential rate of $26.48 to serve 160 lots. It is Staff's opinion that there is a need for sewer service in the subdivision and that the Company's proposal, as modified, is reasonable. Staff believes that the Company has the technical, managerial and financial capacity to own and operate the sewer service and recommends that the Commission issue an order that:

> 1. Approves a Certificate of Convenience and Necessity for Envirowater Company, LLC for sewer service to its requested service area, consisting of the River Bluff subdivision in Lincoln County, Missouri;
>
> 2. Requires the Company to submit a complete tariff, including language similar to the draft in its Application, a monthly rate of $26.48, and a map and service area description that is consistent with the area requested in the application;
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> 3. Approves the schedule of depreciation rates attached to [Staff's] memorandum for use by the Company;
>
> 4. Requires the Company to submit semi-annual customer connection reports to the Manager of the [Commission's] Water & Sewer Department, with the first such report to be submitted six months after the effective date of the Company's tariff; and
>
> 5. Recognizes that nothing in this [Memorandum], or in any order issued by the Commission in this case, shall bind the Commission on any ratemaking issue in any future rate proceeding.

The Commission has reviewed the Company's application and Staff's memorandum and finds it is necessary and convenient for the public interest for Envirowater to install, own, acquire, construct, operate, control and manage a sewer system. The Commission will therefore grant a certificate of convenience and necessity consistent with Staff's Memorandum.

The Commission places Envirowater on notice that failure to comply with certain obligations pursuant to law may result in penalties assessed against the Company. These obligations include, but are not limited to, the following:

> 1. The requirement to file an annual report, subject to a penalty of $100 and an additional $100 per day for each day the Company remains in noncompliance, pursuant to Section 393.140(6), RSMo 2000.
>
> 2. The requirement to pay an annual assessment fee, pursuant to Section 386.370. 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 $2000 per each day of noncompliance, pursuant to Section 386.570, RSMo 2000.
>
> 3. The requirement to provide safe and adequate service at just and reasonable rates, pursuant to Section 393.130, RSMo 2000.

4. That the Company comply with all relevant state and federal statutes and rules, including but not limited to, rules of this Commission, the Department of Natural Resources and the Environmental Protection Agency.

5. That the Company comply with all orders of this Commission, subject to penalties for noncompliance ranging from $100 to $2000 per day, pursuant to Section 386.570.

This certificate is granted conditioned upon the compliance of the Company with the obligations listed above.

Moreover, if the Commission finds, upon conducting a hearing, that Envirowater 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. (*See* Section 393.145, RSMo 2000). 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.

Envirowater is also placed on notice 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." (*See* Section 386.310, RSMo 2000).

IT IS THEREFORE ORDERED:

1. That Envirowater Company, LLC, is granted a certificate of public convenience and necessity to install, own, acquire, construct, operate, control and manage a sewer system in the River Bluff subdivision in Lincoln County, Missouri.

2. This certificate is granted upon the conditions set out in the body of this order.

3. That Envirowater Company, LLC, shall submit in this case a complete tariff, including; language similar to the draft in its application, a monthly rate of $26.48, and a map and service area description that is consistent with the area requested in the application.

4. That depreciation rates, attached to the Staff of the Commission's Memorandum, are approved and shall be used by Envirowater Company, LLC.

5. That Envirowater Company, LLC, shall submit semiannual customer connection reports to the manager of the Commission's Water and Sewer Department, with the first such report to be submitted six months after the effective date of the Company's tariff.

6. That nothing in the Staff of the Commission's Memorandum, or in any order issued by the Commission in this case, shall bind the Commission on any ratemaking issue in any future rate proceeding.

7. That Envirowater Company, LLC, is ordered to comply with the all Missouri statutes and Commission Rules.

8. That this order shall become effective on February 6, 2004.

9. That this case may be closed on February 7, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.

Jones, Regulatory Law Judge

In the Matter of a Study of Voice over Internet Protocol.

Case No. TW-2004-0324
Decided February 3, 2004

Telecommunications §44. The Commission issued an order establishing a working group to study Voice over Internet Protocol; more particularly, the ways VoIP technology is used in the marketplace and how widespread deployment of VoIP might affect telecommunications services in Missouri.

ORDER ESTABLISHING CASE

The Federal Communications Commission (FCC) has indicated that it will soon issue a Notice of Proposed Rulemaking concerning Voice over Internet Protocol (VoIP) technology. VoIP technology is a relatively new technology and there are indications that VoIP related services may be on the verge of being mass-marketed to the general public. It is expected that the FCC's rulemaking will have an impact on telecommunications service in Missouri. The Commission will open this case to further its knowledge of VoIP technology and to assist in its preparation of comments to the FCC. The Commission's jurisdiction, supervision, powers, and duties extend to all telecommunications facilities, telecommunications services, and to all telecommunications companies for telecommunications service between one point and another within the state. Section 386.250(2), RSMo 2000. The Commission shall have the general supervision of all telephone corporations and shall have power to and shall examine them not only with respect to the adequacy afforded by their service, but also with respect to their compliance with all provisions of law. Section 386.320, RSMo 2000.

The Commission is aware that the U.S. District Court for the District of Minnesota held that the broadband IP telephony provided by Vonage Holdings Corporation is an information service and therefore not subject to state regulation. The opening of this case should not be read as indicating a Commission opinion for or against the lawfulness of state regulation of VoIP telephony.

To ensure extensive dissemination of this order, the Commission will direct the Data Center to send a copy of this order to every certificated local exchange company and every certificated interexchange carrier in the State of Missouri. In addition, the Commission will direct the Information Office to send a copy of this order to all members of the General Assembly and to all newspapers in the State of Missouri as listed in the Newspaper Directory of the *Official Manual of the State of Missouri*.

The Commission recognizes the creation of this case as an instance where the Commission is exercising its quasi-legislative powers to establish working groups and to inquire into policy matters. This is not a contested case scenario which requires the participants to be represented by licensed attorneys. Therefore, the Commission will designate this case as a "TW" indicating a telephone working-group case. Any entity interested in participating in this docket shall file a "Notice of Participation." At the conclusion of the period for registration of interested

participants, the Commission will publish a list of all active participants to this case for the purpose of providing service of documents on all participants. Although this is not a contested case, the participants to this case shall be expected to provide copies of all filings and documents in this case to every other participant to this case. Because the FCC is expected to issue its NPRM in the near future, the Commission will direct its Staff to expeditiously proceed with this case.

IT IS THEREFORE ORDERED:

1. That this case is established to study Voice over Internet telephony.

2. That notice of this order shall be issued by the Information Office and the Data Center as set out herein.

3. That any interested participant shall file its notice of participation in this case not later than February 10, 2004. Every such notice shall list the participant's name, address, telephone number, FAX number, and e-mail address.

4. That the Telecommunications Department (Staff) shall schedule and facilitate a workshop, and shall provide a minimum of ten days notice to all participants. The Staff and other participants may suggest topics for the workshop's agenda. The parties are encouraged to address specific topics related to VoIP technology; however, the Commission will permit the parties to address other topics that may be tangential to VoIP technology, such as the use of Virtual NXX codes. If needed, the Staff may conduct further workshops as it deems necessary in order to gather sufficient information.

5. That the participants shall prepare a report by March 15, 2004. The Staff shall assume principal responsibility for drafting the report. In its report, the participants should be prepared to discuss the different ways VoIP technology is used in the marketplace, and what, if any, significance widespread deployment of VoIP technology may have on telecommunications service in Missouri. The parties should also address to what extent, if any, VoIP technologies may uniquely affect Missouri. The Commission encourages all participants to work with the Staff to develop the report. The Commission also encourages the Staff to afford opportunity to all potential divergent viewpoints regarding VoIP technology and related issues.

6. That the Staff shall schedule and facilitate a roundtable and shall provide a minimum of ten days notice to all participants. The Staff and other participants may suggest topics for the roundtable's agenda.

7. That the Staff shall provide monthly status reports beginning one month after the effective date of this order concerning progress in this case and also concerning related developments at the FCC.

8. That the Staff shall maintain information regarding this case on the Commission's website.

9. That this order shall become effective on February 3, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.

Jones, Regulatory Law Judge

The Staff of the Missouri Public Service Commission, Complainant, v. Missouri Gas Energy, Respondent.*

Case No. GC-2004-0132
Decided February 5, 2004

Gas §35. The Commission approved a Stipulation and Agreement between the Staff of the Commission and Missouri Gas Energy, whereby an explosion at a residence was found to have been the result of a service person not following procedure and the incident was used an example in training other service persons.

ORDER APPROVING SETTLEMENT AGREEMENT AND SATISFACTION OF COMPLAINT

Syllabus: On September 12, 2003, the Staff of the Missouri Public Service Commission filed a complaint against Missouri Gas Energy. On November 6, 2003, the parties filed a Settlement Agreement and Satisfaction of Complaint. Staff filed its memorandum in support of the agreement on January 15, 2004. This order approves the Settlement Agreement and Satisfaction of the Complaint.

Background

On March 9, 2003, a natural gas explosion occurred at 3441 Chestnut in Kansas City, Missouri. Although the home sustained severe fire damage, there were no injuries resulting from the incident. After an investigation, Staff "concluded that the probable cause of the incident was the migration of natural gas from a fractured main into the premises at 3441 Chestnut and ignition by an unidentified source." On September 12, 2003, Staff prepared and filed a Gas Incident Report in Case No. GS-2003-0468.

During its investigation, Staff discovered that, prior to the explosion, an MGE service person responded to a report of gas odor at 3433 Chestnut Avenue. As Staff alleged in its complaint, the service person took a reading of 20% gas-in-air at 3433 Chestnut, then went to the basement of the residence and turned off the inlet meter valve. While taking a reading at the basement floor drain, which also resulted in a 20% gas-in-air reading, the service person heard a loud explosion. Upon hearing the explosion, the service person instructed the residents to immediately evacuate the home.

Commission Rule 4 CSR 240-40.030(12)(J) requires that MGE establish and maintain emergency response procedures for entering hazardous atmospheres. In its complaint, Staff alleged that MGE's emergency response procedures dictate that the service person should have initiated an evacuation of the home at 3433 Chestnut upon taking a gas-in-air reading in excess of 1%. Staff filed its complaint because the MGE service person did not follow MGE's emergency response procedures.

* Also see Case No. GS-2003-0468.

The Settlement Agreement and Satisfaction of Complaint

The Parties inform the Commission that MGE "has used the circumstances of March 9, 2003, at 3441 Chestnut as a training aid." The failure of the service person to properly evacuate the home at 3433 Chestnut has been discussed with the service person and in training exercises in all of the Company's service areas. The Parties agree that the actions taken by MGE, in response to the service person not following the Company's emergency response procedures, "form a reasonable basis for settlement of [this complaint]." The Parties further state that this settlement "shall not be construed to operate as a waiver or release of Staff's right to conduct follow-up evaluations of [MGE's training efforts]." Also, as part of the Agreement, Staff is required to file a memorandum in support of the Agreement with any response to be filed five days thereafter.

Staff filed its supporting memorandum on January 15, 2004. In its memorandum, Staff states that it "does not believe that the actions of the service person in this instance were the result of poor training by MGE, but rather the service person . . . not following proper procedure." Staff further stated that although the service person's failure to follow procedure placed the customer at 3433 Chestnut and himself in potential danger, his failure did not contribute to the explosion at 3441 Chestnut. Staff recommended that the Commission approve the Settlement Agreement and Satisfaction and suspend the filing of any response by MGE.

On January 30, 2004, the Commission issued an Order directing MGE to file a pleading setting forth the frequency and nature of training required for its service persons. MGE and Staff filed a joint response on February 2, 2004. The parties stated as follows:

> Per Commission rule, MGE provides annual refresher training over the emergency plan, which includes safety procedures governing evacuation of premises when hazardous concentrations of gas are detected. This refresher training is provided by field supervisors as a part of regular monthly training sessions . . . ."
>
> Also per Commission rule, every three years, the MGE training department conducts operator qualification training and testing to verify that service persons are qualified to perform their required functions. Every service person goes through this operator training, testing and verification which includes, among other things, safety procedures governing evacuation of premises when hazardous concentrations of gas are detected.

Subsequent to the incident described in this order, MGE continues to conduct training as outlined above; however, "[s]hortly after the incident, MGE conducted training exercises in every service area discussing this incident and what [the] service person did that placed himself and the customer in jeopardy."

Discussion

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[1] The Commission notes that 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.[2] Consequently, the Commission need not make findings of fact or conclusions of law in this order.

The Commission has reviewed the facts of this case and the Settlement Agreement and Satisfaction of Complaint and finds that the Agreement is reasonable. The Commission will approve the Settlement Agreement and Satisfaction of Complaint and direct that the parties to the Agreement comply with its terms.

IT IS THEREFORE ORDERED:

1. That the Settlement Agreement and Satisfaction of Complaint between the Staff of the Missouri Public Service Commission and Missouri Gas Energy is approved. A copy of the Stipulation and Settlement Agreement is attached as Attachment A.

2. That Missouri Gas Energy shall not be required to file a response to the Staff of the Commission's memorandum in support of the Agreement.

2. That all parties to the Stipulation and Settlement Agreement are ordered to comply with the terms of the Stipulation and Settlement Agreement.

3. That this order shall become effective on February 15, 2004.

4. That this case may be closed on February 16, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.

Jones, Regulatory Law Judge

Editor's 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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[1] Section 536.060, RSMo 2000.

[2] 536.090 RSMo 2000.

In the Matter of Tariff Revisions of Missouri Gas Energy, a Division of Southern Union Company, Designed to Increase Rates for Natural Gas Service to Customers in the Missouri Service Area of the Company.

Case No. GR-2001-292
Decided February 10, 2004

Gas §18, Rates §79. The Commission approved an extension of an experimental low-income rate designed to assist low-income customers in paying their natural gas bills.

ORDER EXTENDING AN EXPERIMENTAL LOW-INCOME RATE AND AUTHORIZING DISBURSEMENT OF FUNDS

On January 9, 2004, Missouri Gas Energy filed a motion seeking clarification regarding its experimental low-income rate. MGE's motion explained that the experimental low-income rate was authorized when the Commission approved a revised stipulation and agreement resolving the company's last general rate case. MGE indicated that there is some ambiguity in the stipulation and agreement regarding exactly when the low-income rate will expire. The motion asked the Commission to clarify that the low-income rate is to remain operational until at least April 1, 2004, and no later than the effective date of the Commission's order in MGE's ongoing general rate case, Case No. GR-2004-0209.

On January 13, the Commission ordered its Staff to file a recommendation by January 21, and directed that any other party wishing to respond to MGE's motion do so by January 21. Staff filed its recommendation on January 20 and the Office of the Public Counsel filed a response on January 21. No other party filed a response.

The experimental low-income rate – referred to by the acronym ELIR – about which MGE seeks clarification, went into effect on November 1, 2001, when the Commission approved MGE's implementing tariffs. The ELIR was funded by a rate element of $0.08 per month on residential customer bills, commencing on August 6, 2001. The stipulation and agreement provided that the rate element would remain in place for two years. As a result, it terminated on August 6, 2003. MGE does not ask that the rate element be extended.

The stipulation and agreement also provided that the ELIR would remain in effect for two years. The ELIR became operational in 2002 and the first customers began taking service under the ELIR in January 2002, with more ELIR customers being added in February, March, and April 2002. MGE indicates that with ELIR customers having entered into the experimental program at different times, it is not clear when the two years expire and the program should end.

MGE indicates that the 8-cent per month rate element has generated more than enough income to extend the ELIR for a few more months. In fact, MGE indicates that it has approximately $568,000 of ELIR funding remaining. MGE recommends that the ELIR not be discontinued during the remainder of the winter heating season. That would mean that the ELIR would continue at least through April 1. MGE also suggests that the ELIR be allowed to remain in effect until the Commission issues its final order in MGE's current rate case, GR-2004-0209. The operation of law date for that case is October 2, 2004. Extending the ELIR until the effective date of the new rate order will allow the Commission to review the effectiveness of the experimental rate and possibly extend it without disrupting the program.

The stipulation and agreement that authorized the ELIR also provided that any money generated by the 8-cent per month rate element that was not used to fund the ELIR would be contributed to the Mid America Assistance Coalition – MAAC – to assist customers in MGE's service territory who have difficulty paying their gas bills. Since there is excess money generated by the rate element, and not all of that excess is needed to fund the extension of the ELIR, MGE requested that it be authorized to immediately disburse $250,000 of the excess funds to MAAC.

Both Staff and Public Counsel replied to MGE's motion. Staff recommended that operation of the ELIR be extended until the effective date of the Commission's report and order in MGE's current rate case. Staff also agreed that MGE should be authorized to distribute $250,000 to MAAC for low-income energy assistance. Staff asked the Commission to require MGE to submit for Commission approval a contract with MAAC to prescribe the manner of distributing those funds, as well as to cover funding of MAAC's work in the process. Public Counsel's reply indicated that it does not oppose MGE's motion.

On January 28, acting in response to Staff's recommendation, MGE submitted a proposed contract with MAAC. Staff and Public Counsel respond to the proposed contract on February 3, indicating that they generally approved of the contract but requested that changes be made to three paragraphs. MGE responded to Staff and Public Counsel's suggested revisions on February 6, indicating that it has discussed the changes with MAAC and that they are willing to revise the contract as requested, with some further modifications that Staff and Public Counsel indicate are acceptable. MGE states that when the Commission approves the proposed modification, it and MAAC will execute the revised contract and file it with the Commission.

The Commission finds that MGE's proposal for extension of the ELIR is reasonable and will benefit MGE's low-income customers by allowing an assistance program to remain in effect through the remainder of the winter heating season. The Commission will extend the ELIR to the effective date of the Commission's report and order in Case No. GR-2004-0209. The Commission further finds that the contract between MGE and MAAC, as modified in accord with MGE's Reply to Proposed Contract Modifications filed on February 6, is acceptable.

IT IS THEREFORE ORDERED:

1. That the experimental low-income rate – ELIR – established in Case No. GR-2001-292 shall remain in effect until the effective date of the Commission's report and order in Missouri Gas Energy's current general rate case, GR-2004-0209.

2. That Missouri Gas Energy is authorized to disburse $250,000 in ELIR funds to the Mid America Assistance Coalition – MAAC – for the specific purpose of assisting customers in Missouri Gas Energy's service territory who have difficulty in paying their gas bills.

3. That Missouri Gas Energy's contract with Mid America Assistance Coalition to prescribe the manner of distributing ELIR funds and to cover funding of MAAC's work in the process, is approved, as modified as proposed by Missouri Gas Energy in its Reply to Proposed Contract Modifications filed February 6, 2004.

4. That after the modified contract between Missouri Gas Energy and Mid America Assistance Coalition is signed, Missouri Gas Energy shall submit a copy of the executed contract to the Commission's Staff and to the Office of the Public Counsel. The executed contract does not need to be filed in this case.

5. That this order shall become effective on February 20, 2004.

Gaw, Ch., Murray and Clayton, CC., concur.

Woodruff, Senior Regulatory Law Judge

In the Matter of a Commission Inquiry into the Possibility of Impairment without Unbundled Local Circuit Switching When Serving the Mass Market.

Case No. TO-2004-0207
Decided February 24, 2004

Telecommunications §§14, 36. The Commission established the exchange as the appropriate geographic market over which to conduct the impairment analysis. It also established that the DS0 cutoff is ten DS0 lines (that is, it is more economical to serve a customer with a DS1 line than with ten or more DS0 lines).

ORDER ESTABLISHING GEOGRAPHIC MARKETS AND ENTERPRISE MARKET CUTOFF

Syllabus:

This order establishes the exchange as the appropriate geographic market over which to conduct the impairment analysis. It also establishes that the DS0 cutoff is ten DS0 lines (that is, it is more economical to serve a customer with a DS1 line than with ten or more DS0 lines).

Background:

The purpose of this case is to make certain determinations about the state of competition (and perhaps the potential for competition) to provide basic local telecommunications service to residential and small business customers in Missouri. The Federal Communications Commission (FCC), in its Triennial Review Order,[1] made a general finding that Competitive Local Exchange Carriers (CLECs) would be impaired in their ability to compete for these customers if the CLECs were not able to purchase unbundled local switching capacity from Incumbent Local Exchange Carriers (ILECs). But the FCC did not make this finding unrebuttable; rather it left it up to state commissions to examine the markets in detail to determine if this general finding is not valid in specific markets. In addition to determining the geographic market, the FCC also left it to the state commissions to determine the demarcation (in terms of the number of lines) between mass market customers and enterprise customers. Armed with these two determinations, the state commissions are then to conduct an analysis to find whether impairment exists in specific markets.

Given the nature of the task allotted to this Commission by the FCC, this case was split into three phases. In this first phase, the parties addressed and the Commission will decide the following two issues:

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[1] REPORT AND ORDER AND ORDER ON REMAND AND FURTHER NOTICE OF PROPOSED RULEMAKING adopted February 20, 2003, released August 21, 2003 and corrected September 17, 2003 entered in CC Docket Nos. 01-338, 96-98 and 98-147 (the "TRO").

> 1) For purposes of examining whether there is "non-impairment" in the provision of unbundled local switching to serve mass-market customers, what are the relevant geographic markets within the state of Missouri?
>
> 2) For purposes of the 47 CFR 51.319(d)(2)(iii)(B)(3) analysis, how many DS0 lines must be supplied to a multi-line DS0 customer before that customer is considered to be an enterprise customer rather than a mass market customer?

By making an early determination on these two issues, the Commission will be able to pursue a more focused impairment analysis, and ultimately be able to make a better, more informed final decision.

The Issues:

Geographic Market Area:

The FCC, in the TRO, has sent two general directives on this issue: it said 1) the geographic area has to be "granular," but 2) not so small that a potential competitor serving that market alone cannot take advantage of economies of scale and scope. The FCC's guidance on this issue is found at paragraphs 495-496:

> 495. The triggers and analysis described below must be applied on a granular basis to each identifiable market. State commissions must first define the markets in which they will evaluate impairment by determining the relevant geographic area to include in each market.[1536] State commissions

[1536] Chairman Powell's criticism of the discretion we give states to define the relevant geographic market for purposes of the switching analysis is misplaced. *See Chairman Powell Statement* at 6-7. It is fundamental to our general impairment analysis to consider whether alternative facilities deployment shows a lack of impairment in serving a particular market. Indeed, we adopt triggers for the states to apply to measure impairment by considering this alternative facilities deployment in our analysis of loops, transport, and switching. Although the incumbent LECs argue that we should apply a zone approach to transport and loops, we define the relevant geographic market for transport as route-by-route, and the relevant geographic market for enterprise loops as customer-by-customer, because of the economic and operational issues associated with alternative transport and loops deployment. As Chairman Powell recognizes, a switch can theoretically serve wide areas (provided that the costs of transporting traffic back to the switch are not cost prohibitive), so one would expect a broader market definition for switching than for loops or transport. *Chairman Powell Statement* at 7. Indeed, because we measure alternative "switching" in a given market, not switches located in that market, the physical location of the switch is not necessarily relevant to defining the geographic market. For example, a switch located in Rhode Island could satisfy the switching trigger in Massachusetts if it is serving customers in the relevant market in Massachusetts. *Chairman Powell Statement* at 7. To the extent the states define a geographic market broadly, it is more likely that such geographic market will capture sufficient switching alternatives to satisfy the trigger, thus resulting in removal of the particular UNE in that geographic market (a result the dissents would seem to endorse). The exact parameters of these geographic markets, however, cannot be defined nationally for switching because, as both incumbent LECs and competitive LECs agree, there are extreme variations in population density, and thus wire center line densities, across the country. *See generally* AT&T Jan. 17, 2003 *Ex Parte* Letter; SBC Jan. 14, 2003 UNE P *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter. States are, therefore, better positioned to draw these lines.

> have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state. Rather, state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors,[1537] the variation in factors affecting competitors' ability to serve each group of customers,[1538] and competitors' ability to target[1539] and serve specific markets economically and efficiently using currently available technologies. While a more granular analysis is generally preferable, states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commission must use the same market definitions for all of its analysis.[1540]

Because states are more familiar with how these variations have affected competitive entry, and because there was no credible record evidence to show how we could establish these boundaries based on a national rule, we ask the states to create these boundaries. We do, however, provide the states significant guidance. We require state commissions to define each geographic market on a granular level and direct them to take into consideration the locations of customers actually being served by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies. We make clear that state commissions cannot define a market as encompassing an entire state and that they should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.

[1537] For example, if competitors with their own switches are only serving certain geographic areas, the state commission should consider establishing those areas to constitute separate markets.

[1538] For example, if UNE loop rates vary substantially across a state, and this variation is likely to lead to a different finding concerning the existence of impairment in different parts of the state, the state commission should consider separating zones with high and low UNE loop rates for purposes of assessing impairment.

[1539] For example, competitors often are able to target particular sets of customers, or customers in particular wire centers or rate zones.

[1540] Therefore the market definitions used for the analysis of the triggers must also be used for the second step of the analysis, if the triggers are not satisfied.

> 496. Thus, for example, a state commission may choose to consider how UNE loop rates vary across the state, how retail rates vary geographically, how the number of high-revenue customers[1541] varies geographically, how the cost of serving customers varies according to the size of the wire center and the location of the wire center, and variations in the capabilities of wire centers to provide adequate collocation space and handle large numbers of hot cuts. We recognize that many states have implemented varied administrative tools to distinguish among certain markets within a state on a geographic basis for other purposes including retail ratemaking, the establishment of UNE loop rate zones, and the development of intrastate universal service mechanisms. If a state determines, after considering the factors just described, that these already-defined markets would be appropriate to use in this context as well, it may choose to use these market definitions.

The FCC's repeated use of the word "granular" cannot be ignored. It is clear from reading the TRO that the FCC favors a granular geographic market, and the only lower limit is that it should not be so small that "a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market." In other words, the market should be the smallest area in which economies of scope and scale are obtainable. There are three fully-developed geographic market proposals[2] on the record in this case, and only two of them can plausibly be considered granular: the wire center and the exchange. The third proposal, the MSA, simply does not meet the FCC's definition. It is not at all granular, and it does not take into account the factors the FCC discussed at paragraph 496:

> how the number of high-revenue customers [footnote omitted] varies geographically, how the cost of serving customers varies according to the size of the wire center and the location of the wire center, and variations in the capabilities of wire centers to provide adequate collocation space and handle large numbers of hot cuts.

[1541] These include, for example, business customers, as well as those residential customers likely to take vertical features and ancillary services such as data and voice mail service.

[2] The three fully-developed proposals are the Metropolitan Statistical Areas (MSAs), wire centers, and exchanges. The Commission-created Metropolitan Calling Areas in the St. Louis, Kansas City, and Springfield regions were discussed as a possibility during the course of the Phase I evidentiary hearing, but there was no prefiled testimony detailing the use of MCAs, and no party affirmatively supported them. There was also some testimony about the use of Local Access and Transport Areas (LATAs), but the affirmative evidence in support of LATAs was high-level and superficial, and much of the evidence concerning LATAs simply serves to point out the shortcomings of other proposals. The Commission will not discuss MCAs and LATAs in any great detail; the flaws found in the MSA proposal are found in the MCA and LATA proposals as well.

Of the two proposals that do advance a granular market definition, the wire center proposal is arguably too granular: there is no credible evidence that a competitor serving a single wire center could take advantage of economies of scale and scope. The exchange proposal does not suffer from this flaw, and in fact is the one proposal on the record that best meets the FCC's directives on defining a market area. For example:

> · A competitor could take advantages of economies of scale and scope when serving a single exchange.
>
> · Defining the market as an exchange will allow the Commission to take into consideration the locations of customers actually being served (if any) by competitors.
>
> · Defining the market as an exchange will allow the Commission to take into consideration the variation in factors affecting competitors' ability to serve each group of customers.
>
> · Defining the market as an exchange will allow the Commission to take into consideration how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically.
>
> · Defining the market as an exchange will allow the Commission to take into consideration how retail rates vary geographically.
>
> · The FCC recognizes that states have implemented varied administrative tools to distinguish among certain markets within a state on a geographic basis for other purposes including retail ratemaking. This Commission has used the exchange as the geographic area for retail ratemaking, for the determination of the existence of competition, for the determination of whether community of interest exists for expanded calling scopes, and for other purposes. The TRO provides that: "If a state determines … that these already-defined markets would be appropriate to use in this context as well, it may choose to use these market definitions."

The Commission therefore concludes that using exchanges as the geographic markets best meets the FCC's directives, and will order the parties to present their Phase II testimony on that basis.

Enterprise Market Cutoff:

The FCC's directives on this issue are found primarily at paragraph 497:

> 497. For purposes of the examination described here, mass market customers are analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops. Some mass

market customers (i.e., very small businesses) purchase multiple DS0s at a single location. The previous Commission determined that incumbent LECs that make the EEL combination available are not obligated to provide unbundled local circuit switching to requesting carriers for serving customers with four or more DS0 loops in density zone one of the top fifty MSAs.[1542] The previous Commission found that under such circumstances, lack of access to unbundled local circuit switching would not impair requesting carriers in these specific areas.[1543] At some point, customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above for enterprise customers – that is, voice services provided over one or several DS1s,[1544] including the same variety and quality of services and customer care that enterprise customers receive. Therefore, as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multi-line DS0 customers as part of its more granular review. This cross over point may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop. We expect that in those areas where the switching carve-out was applicable (i.e., density zone 1 of the top 50 MSAs), the appropriate cutoff will be four lines absent significant evidence to the contrary. We are not persuaded, based on this record, that we should alter the Commission's previous determination on this point.[1545]

[1542] *UNE Remand Order*, 15 FCC Rcd at 3822-31, paras. 276-98.

[1543] *Id.*

[1544] The evidence in the record indicates that it may be viable to aggregate loops at a customer location and provide service at a DS1 capacity or higher. Specifically, if a customer has enough lines to justify the expense of purchasing multiplexing equipment and a high-capacity line, it makes sense to aggregate the customer's loops at the customer's premises, which avoids the need for hot cuts at the incumbent LEC's central office.

[1545] Because the previous carve out only applied where "new" EELs were made available and because this Commission allowed state commissions to require switching to be unbundled even in areas where the carve-out test was met, it appears that the four-line carve-out was adhered to in very few areas in the country. SBC Reply at 30; BellSouth NERA Reply Decl. at 51-52. As part of their analysis, we expect states to make a finding of whether or not the carve out was in effect.

> Accordingly, we authorize the states, within nine months of the effective date of this Order, to determine the appropriate cross over point.[1546]

The FCC essentially lays out two options for determining the cutoff: 1) the point where it makes economic sense for a multi-line customer to be served via a DS1 loop; or 2) the "carve-out" exception of four lines, where that carve out was in effect. In Missouri, there is no evidence that the carve out was ever put in effect, and plenty of evidence that it was not.[3] Based on the evidence of record, the Commission finds that the carve out was not in effect.

Having made this finding, the carve-out number of four lines becomes irrelevant, and the Commission's only choice is the economic analysis. The purpose of this analysis is to determine the point at which it makes economic sense for a multi-line customer to be served with a DS1 loop. The only witness that presented a credible analysis to this effect was Sprint witness Maples. Mr. Maples' analysis demonstrates that it is economical to serve a customer with ten or fewer DS0 lines; at eleven DS0s or more, it is more economical to serve that customer with a DS1 line. As Sprint points out in its brief, this analysis is clear, straightforward, and objective.

Based on this analysis, the Commission concludes that customers served with ten or fewer DS0 loops at a particular location are mass-market customers.

IT IS THEREFORE ORDERED:

1. That, for the purposes of conducting the impairment analysis in Phase II of this proceeding, the appropriate geographic market is the exchange.

[1546] Commissioner Abernathy claims that our decision not to preserve the previous Commission's four-line carve-out represents a "potentially massive expansion" of unbundled switching. *Commissioner Abernathy Statement* at 8 n.27. This claim makes no sense. If a state finds that the appropriate cut-off for distinguishing enterprise from mass market customers in density zone 1 of the top 50 MSAs is four lines, there will be no more unbundled switching available than there was under the previous carve-out. Indeed, since the previous carve-out was conditioned on the availability of EELs and appears to have actually been in effect in very few areas of the country, *see supra* note 1545, setting the cut-off at an unconditional four lines would result in more customers being treated as enterprise customers subject to our finding of no impairment. If, on the other hand, a state finds based on record evidence that a cut-off of more than four lines is appropriate, more multi-line customers will be treated as mass market customers. But in no way will this result in an "expansion" of unbundled switching. To the contrary, as Commissioner Abernathy points out, "dozens of CLECs serve business customers of such size using their own switches." *Commissioner Abernathy Statement* at 8 n.27. Such widespread deployment of competitive switches would be considered under our mass market triggers. In such markets, then, it is more likely that there will be a finding of no impairment for the entire market, leading to significantly less unbundled switching than was available under the previous four-line carve-out.

[3] Witness Fleming testified that the carve-out was "applicable" because it could have been put in effect, even though it was not. This is sophistry; if the FCC had meant for state commissions to use the four line carve-out everywhere it could have been put into effect whether or not it was actually in effect, it would not have been concerned with whether the carve-out was adhered to, and it would not have directed state commissions to make a finding as to whether it was in effect.

2. That, for the purposes of conducting the impairment analysis in Phase II of this proceeding, a mass market customer is defined as a customer with ten or fewer DS0 lines at a particular location.

3. That this order shall become effective on February 24, 2004.

Gaw, Ch., and Clayton, CC., concur
Murray, C., dissents, dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER MURRAY

I respectfully dissent from the result reached by the majority. I believe that the Metropolitan Statistical Areas are the appropriate geographic area, and that the DS0 cutoff should be four DS0 lines.

MSAs, by definition, have a high degree of integration with a recognized population nucleus and recognized economic linkages between urban cores and outlying, integrated areas. In short, they **are** markets. The majority's decision to use exchanges as the geographic market areas does not comply with the FCC's rules. An exchange, which in most instances is equivalent to a wire center, is simply too small for a competitor serving that area alone to be able to take advantage of scale and scope economies.

MSAs best meet the FCC's criteria for a geographic market because CLECs are actually serving Missouri mass market customers throughout the MSA; there is little variation across the MSAs in factors that might substantively affect a competitor's ability to serve mass market customers; and where CLECs have entered an MSA using their own switches, they have the ability to use them to serve mass market customers in most, if not all, of the MSA if they choose.

I also disagree with the majority on the appropriate DS0 cutoff. The FCC established a four-DS0 default cutoff in areas where the switching carve out was applicable (i.e., density Zone 1 of the top 50 MSAs). SBC Missouri's witness Gary Fleming analysis showed that it would be economic and efficient for a CLEC to use a DS1 to serve small business customers that have as few as four DS0 lines.

Furthermore, the analyses proposed by Sprint and AT&T (and accepted by the majority) are flawed because they fail to take into account the increased revenue opportunities, particularly those from providing data services, that come from serving a customer over a DS1 loop rather than multiple DS0s.

For the foregoing reasons, I dissent from the majority opinion.

In the Matter of the Application of Aquila, Inc. for Authority to Assign, Transfer, Mortgage or Encumber Its Utility Franchise, Works or System in Order to Secure Revised Bank Financing Arrangements.

Case No. EF-2003-0465
Decided February 24, 2004

Evidence, Practice & Procedure §4. Aquila asked the Commission to approve its application to encumber its Missouri regulated assets. The Commission should approve Aquila's application if doing so would not be detrimental to the public interest. The parties opposing Aquila wanted the Commission to find the affirmative of that issue; that is, that the application is detrimental to the public interest. The parties that want the affirmative of the issue have the burden of proof.

Security Issues §69. Aquila wished to encumber its Missouri regulated assets to secure a loan it had already received. Aquila had asked utility commission in other states for similar permission. Those other states had allowed Aquila to encumber a sufficient value of assets to satisfy the lender. If Aquila also pledged Missouri assets, then the Missouri assets could become the only collateral supporting the loan. In turn, those Missouri regulated assets would support Aquila's unregulated, and therefore riskier, operations. For those reasons, the Commission found the application detrimental to the public interest.

Service §32. Aquila asked the Commission for authority to encumber its Missouri regulated assets. Aquila wished to do so because of its security agreement with its lender. That security agreement allowed the lender to bypass Commission approval and immediately foreclose upon the property if Aquila defaulted. The Commission found such a possibility to be detrimental to the public interest.

APPEARANCES

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REGULATORY LAW JUDGE: Ronald D. Pridgin

REPORT AND ORDER

Procedural History

On April 30, 2003, Aquila, Inc., filed its Application. Aquila asked the Commission to allow it to pledge its Missouri regulated assets to support a $430 million, three-year Term Loan, and a $100 million, 364-day Term Loan. Aquila has already received the loan proceeds. Aquila filed a Motion for Protective Order on April 30, and the Commission granted it on May 13.

On May 5, in response to the application, AG Processing Inc., and Sedalia Industrial Energy Users' Association asked to intervene. They claimed to be major industrial electric and steam customers of Aquila, thus having a vital interest different from that of the general public. The Commission granted AG Processing and SIEUA's request on May 28.

Also, the Office of the Public Counsel filed a request for hearing on June 6. On June 12, the Commission set a prehearing conference for July 1, and allowed potential parties until June 27 to intervene. The State of Missouri and Kansas City Power & Light asked to intervene. The Commission approved the State's request on June 30. KCP&L withdrew its request.

Then, following a prehearing conference, the Commission adopted the parties' proposed procedural schedule. According to the Commission's usual practice, the parties prefiled written testimony. They also filed issues they wanted the Commission to decide, and their respective positions on each issue. The Commission held an evidentiary hearing on October 20-23. The parties filed briefs on December 8, and reply briefs on December 23.

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. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

Aquila is a Delaware corporation with its principal place of business in Kansas City, Missouri. Aquila operates in Missouri as Aquila Networks – MPS and Aquila Networks – L&P. Aquila is a public utility in Missouri, and is an electrical corporation, a gas corporation, and a heating company under the Commission's jurisdiction.

Also, Sedalia Industrial Energy Users' Association is an unincorporated voluntary association consisting of large commercial and industrial users of electricity and natural gas.[1] AG Processing Inc., is an agricultural cooperative. AGP is, and SIEUA's members are, major electric and steam customers of Aquila. The Staff of the Commission is a neutral third-party that represents the Commission. The Office of the Public Counsel represents the public. The State of Missouri is a major electrical consumer.

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[1] Its members are: Pittsburgh Corning Corporation, Waterloo Industries, Hayes Lemmerz International, Hawker Industries, Inc., Alcan Cable Co., Gardner Denver Corporation, American Compressed Steel Corporation, Stahl Specialty Company.

These parties are here because Aquila asked the Commission to authorize it to pledge its Missouri regulated assets to help support a $430 million, three-year Term Loan, and a $100 million, 364-day Term Loan it received. Aquila secured the loan by pledging its Michigan, Nebraska, and Canadian utility assets, as well as a silent second lien on the equity interest of Aquila's Independent Power Plant investments.[2] Aquila wishes to sell its Canadian utility assets.[3] Aquila asked the Commission to approve its pledge of Missouri regulated assets so it could release the lien on the Canadian assets' stock, and avoid a prepayment penalty.

Aquila needed this loan to meet its working capital needs. Aquila forecasted that it needs $250 million to meet its peak day U.S. utility working capital needs. Aquila's loan agreement requires that Aquila pledge at least 1.67 times the $250 million, which is $417.5 million, of its utility assets as collateral.

In addition to Missouri, Aquila asked the state utility commissions in Kansas, Colorado, Iowa, and Minnesota to permit it to encumber its regulated assets. After Aquila filed its Missouri application, Iowa and Colorado permitted Aquila to pledge its regulated assets in those states.[4] Adding the Iowa and Colorado assets to the collateral pool means Aquila has pledged at least $417.5 million of its regulated assets.[5]

Nonetheless, Aquila wishes to pledge its Missouri regulated assets. Roughly half of Aquila's $2.2 billion worth of regulated assets are in Missouri.[6] Aquila's mortgage and deed of trust would allow Aquila to release collateral, as long as Aquila continues to meet the lender's collateral ratio of 1.67 to 1.[7] Aquila's Missouri regulated assets, worth about $1.1 billion dollars, alone are enough to support the entire $430 million loan. Therefore, because Aquila could release collateral from other jurisdictions, Missouri's regulated assets could be the only assets supporting the entire loan. The security agreement allows the trustee to immediately repossess and sell the collateral if Aquila defaults.[8]

Furthermore, Staff requests that the Commission impose extra reporting requirements on Aquila. Staff seeks the same information in Aquila's currently pending rate cases.[9]

Conclusions of Law

Jurisdiction:

The Missouri Public Service Commission has reached the following conclusions of law: The Commission has jurisdiction over Aquila pursuant to Section

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[2] See *Application*, paragraph 14 (filed April 30, 2003).

[3] See *id.* at paragraph 15.

[4] See *Robertson Rebuttal*, Ex. 35, Sch TJR-12; see also Ex. 59.

[5] See *Dobson Cross-examination*, Tr. 482, l. 20 to Tr. 483, l. 4.

[6] See *id.* at Tr. 491, l. 21 to Tr. 492, l. 6; see *Empson Cross-examination,* Tr. 609, l. 9-13.

[7] See *Dobson Direct, Ex. 4, Sch. RD-10*, p. 58ff.

[8] See *id., pp. 71-81.*

[9] See *Commission Cases No. ER-2004-0034, HR-2004-0024, Kremer Direct, pp. 30-31* (filed December 9, 2003).

386.250 and Chapter 393, RSMo. According to Section 393.190, the Commission must permit Aquila to encumber its Missouri regulated assets before Aquila can do so.

Standard and Burden of Proof:

The Commission has already concluded that it should approve Aquila's request if doing so would not be detrimental to the public interest.[10] The parties opposing Aquila want the Commission to find the affirmative of that issue. That is, if the Commission approved Aquila's application, a detriment to the public interest would occur. Therefore, those parties have the burden of proof.[11]

The Commission concludes a detriment to the public interest includes a risk of harm to ratepayers. In reviewing a recent merger case involving the same parties, the Supreme Court of Missouri ruled that . . . "(w)hile (the Commission) may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered (the premium) . . . when evaluating whether the proposed merger was detrimental to the public."[12] In other words, the Commission could not have known whether the acquisition premium would result in rate increases. But it should have looked at the premium's reasonableness. Likewise, the Commission cannot know whether the encumbrances will result in rate increases. But the Commission should look at the reasonableness of the risk of the increases. This analysis conforms to the concept that . . . "(n)o one can lawfully do that which has a **tendency** to be injurious to the public welfare."[13]

Discussion:

Applying this standard, the Commission concludes that granting Aquila's application would be detrimental to the public interest. The detriment to the public interest is the unreasonable risk of harm to Missouri ratepayers compared to the minimal benefit Aquila would receive.

The unreasonable risk of harm includes the possibility that Missouri's regulated assets alone would support Aquila's $430 million dollar loan. That loan includes money for Aquila's non-regulated businesses. Aquila's Missouri ratepayers alone might shoulder the burden of Aquila's financial difficulty, including a potential default on the note, or even bankruptcy. That burden could include a loss of service, since the loan agreement arguably allows the creditor to bypass the Commission, and immediately foreclose upon and sell the assets. In contrast, Aquila would receive little, if any, benefit. That is because other states have already

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[10] See *Order Denying Motion for Summary Disposition* (issued October 9, 2003)(Gaw, C., concurring).

[11] See *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.,* 803 S.W.2d 23, 30 (Mo.banc 1991).

[12] *State ex rel. AG Processing Inc., v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo.banc 2003).

[13] *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo.banc 1934)(emphasis supplied).

allowed Aquila to pledge enough regulated assets to meet the collateral ratio in the term loan agreement, and to receive the 75 basis point reduction.

The public would also suffer a detriment because the pledge would over-collateralize the loan. Aquila intends to sell its unregulated assets. Once the loan is over-collateralized, and Aquila sells an unregulated asset, then Aquila has two choices: either use the proceeds to pay down the $430 million loan, or use it for another purpose.

If Aquila uses the funds to pay down the loan, which it has committed to do if Aquila does not have enough unregulated assets in the collateral pool,[14] then Aquila would have to pay a Make Whole Premium.[15] The Make Whole Premium ensures that the lender will receive the full value of all expected future interest and principal payments.[16] Over-collateralization, therefore, would result in Aquila paying more to its creditors than it would have to pay if it did not over-collateralize the loan. If the creditors receive more money, then that leaves less money for an already financially unstable Aquila. Thus, if Aquila fulfills its promise to pay down the loan, then paying down the loan would be detrimental to the public interest.

On the other hand, if Aquila uses the sale proceeds in another manner, then regulated assets would replace the unregulated assets in the collateral pool. Those regulated assets would support debt Aquila incurred for its unregulated activities. But Aquila's unregulated activities are the source of its financial peril.[17] The Commission finds that Missouri ratepayers would suffer a detriment if Aquila used its Missouri regulated assets to support debt for its riskier, unregulated operations.

Along with its request that the Commission deny the application, Staff also requests that the Commission order Aquila to report its call center data to the Commission on a monthly basis. Because Staff is pursuing even more stringent reporting requirements against Aquila in its currently pending rate cases, the Commission concludes it will deny Staff's request and defer the question to Aquila's rate cases.

IT IS THEREFORE ORDERED:

1. That the authority Aquila, Inc., seeks to encumber its Missouri regulated assets to secure its three-year $430 million Term Loan Facility and related First Mortgage Bonds is denied.

2. That the request of the Staff of the Commission for the Commission to order Aquila, Inc. to submit to the Staff on a monthly basis within 21 days of the last day of each month (except on a quarterly basis for MAIFI), until Aquila, Inc.'s financial condition attains investment grade and the Staff determines that reporting is no longer necessary, the quality measurements it requested is denied.

3. That all pending motions are denied as moot.

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[14] See *Dobson Cross-examination, Tr. 371,* l. 1-9.

[15] See *Burdette Rebuttal*, *Ex. 31*, pp. 16-20.

[16] See *Id.* at 19, see also *Ex. 4*, Sch. RD-9, pp. 14-15, 35.

[17] See *Dobson Direct, Ex. 4,* pp. 2-8.

4. That this Report and Order shall become effective on March 5, 2004.

5. That this case may be closed on March 6, 2004.

Gaw, Ch., Murray and Clayton, CC., concur and certify compliance with the provision of Section 536.080, RSMo 2000.

In the Matter of an Investigation into a Pending Sale of Assets of Aquila, Inc.

Case No. EO-2004-0224
Decided February 26, 2004

Electric §1. The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc. The Commission denied Staff's request, finding that Staff's suggestions as to how the Commission *might* have jurisdiction over the proposed transaction to be extremely tenuous. The Commission determined that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction.

Electric §4. The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc.

Electric §7. The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc. The Commission determined that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction.

Electric §9. The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc. The Commission determined that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction.

APPEARANCES

Paul A. Boudreau, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Aquila, Inc.

M. Ruth O'Neill, Assistant Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steven Dottheim, Chief Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus

This order denies Staff's request that the Commission order Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC (MEPPH), an unregulated subsidiary of Aquila, Inc. MEPPH is the lessee/operator of a gas-fired electrical generating facility in Pleasant Hill, Missouri, known as the Aries Power Project (Aries).

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. 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 omitted material was not dispositive of this decision.

The Staff of the Missouri Public Service Commission filed a Motion to Open Case on November 14, 2003. Staff requested that it be directed to investigate whether the Commission has jurisdiction with respect to the anticipated sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation of Aquila's remaining 50 percent ownership interest in Merchant Energy Partners Pleasant Hill, LLC (hereinafter, the "transaction").

Aquila objects to Staff's motion, arguing that the Commission does not have jurisdiction over the proposed transaction. Aquila notes that MEPPH is an unregulated subsidiary of the company; MEPPH is also the lessee/operator of the gas-fired electrical generating facility in Pleasant Hill, Missouri, known as the Aries Power Project. Aquila has entered into a Power Sales Agreement (PSA) with MEPPH. The PSA is not part of the contemplated sale. Aries is an exempt wholesale generator (EWG). The power generated by Aries is sold exclusively in transactions at the wholesale level. Aries is not in the regulated rate base of a utility subject to Missouri regulation.

The parties subsequently filed several rounds of pleadings regarding the Commission's jurisdiction in this matter.[1] On February 20, 2004, Aquila filed a

[1] The pleadings and the transcript contain much information that the parties have designated as "highly confidential." This order, however, includes only public information.

Motion for Expedited Treatment, requesting that the Commission resolve this matter as soon as possible. Aquila states that it filed the motion as soon as it could, given that the informal negotiations between Staff and Aquila concerning a possible settlement of this matter have just concluded without a mutually satisfactory resolution. Aquila also indicates that the regulatory uncertainty created by Staff's motion is preventing Aquila from accomplishing the proposed transaction and that this is harmful to the company's efforts to obtain financial security by exiting the merchant energy business. Aquila requests that if the Commission is going to schedule an on-the-record presentation, that it be scheduled for February 24 or February 25, 2004, during the time currently set aside for Aquila's pending rate case in Case No. ER-2004-0034. The Commission finds that Aquila's motion for expedited treatment should be granted.

On February 23, 2004, the Commission issued an order scheduling an on-the-record presentation for February 24, 2004. The Commission conducted the on-the-record presentation on that date as scheduled. Staff, Aquila, and the Office of the Public Counsel participated in the proceeding. Due to the highly confidential nature of the matters discussed, much of the proceeding was conducted during in camera, or closed, sessions. During the proceeding, Aquila agreed to expeditiously review the transcript and file a notice regarding which parts of the transcript designated as highly confidential could be made public.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Aquila is an electrical corporation as defined in Section 386.020(15), RSMo 2000, and, as such, is a public utility subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo. Aquila provides electric service in and about Kansas City and St. Joseph, Missouri.

Aquila currently owns a 50 percent interest in MEPPH, the lessee and operator of the Aries Power Project. MEPPH is an unregulated subsidiary of Aquila. Aries is an exempt wholesale generator.

Calpine Corporation owns the remaining 50 percent interest in MEPPH. Calpine is not an entity regulated by the Missouri Public Service Commission. Aquila contemplates selling its 50 percent interest in MEPPH to Calpine.

Staff's suggestions as to how the Commission *might* have jurisdiction over the proposed transaction are extremely tenuous. Neither Staff nor Public Counsel were able to clearly articulate any statutory authority under which the Commission could assert jurisdiction over the proposed transaction. Instead, Staff largely focuses on the potential harm that could result if the Commission does not have jurisdiction. The potential harm includes, but is not limited to, concerns regarding future access to certain books and records, along with concerns over resource planning and cost issues.

This proposed transaction is but part of a larger history involving the Aries facility. Staff did not seek a determination that the Commission had jurisdiction when MEPPH and Aries were created. Staff did not seek jurisdiction to approve the PSA

between Aquila and MEPPH.[2] Furthermore, Staff did not seek jurisdiction over the earlier transfer of 50 percent of Aquila's interest in MEPPH to Calpine. Thus, Staff has not sought to be, nor has the Commission been, involved with this series of transactions at any stage, other than the Commission's limited involvement under Section 32(k) of the PUHCA. The applicable law has not changed during this series of transactions, and there is no legal basis upon which to find jurisdiction now.

The Commission is an administrative body of limited powers, and created by statute. As such, the Commission has only those powers as are expressly conferred upon it by the statutes and are reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (1943); *State ex rel. City of West Plains. v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). Although the Public Service Commission law is remedial in nature, and should be construed liberally, neither convenience, expediency nor necessity are proper matters for consideration in the determination of whether an act of the Commission is authorized by law. *State ex. rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

The Commission has reviewed the arguments of the parties, the relevant case law, and the statutes, along with the proposed transaction. The Commission shares Staff's concerns that resource planning be adequate. Nonetheless, the Commission finds that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction. The Commission emphasizes that this decision is one based on the law, not upon policy considerations. In making this determination, the Commission is not sanctioning or approving the proposed transaction. The Commission recognizes that resource adequacy considerations are addressed in other forums, and the Commission reaches no conclusions regarding resource adequacy here. As noted by Staff, there may be questions regarding resource adequacy that Aquila will have to answer in some other proceeding in the future. Since it has no jurisdiction over the proposed transaction, the Commission will deny Staff's motion and will close this case.

IT IS THEREFORE ORDERED:

1. That the Motion for Expedited Treatment, filed by Aquila Inc., d/b/a Aquila Networks - MPS, on February 20, 2004, is granted.

2. That no later than March 1, 2004, Aquila Inc., d/b/a Aquila Networks - MPS, is directed to file either (1) a notice regarding which portions of the transcript currently designated as highly confidential may be made public; or (2) a statement indicating when Aquila expects to file the required notice.

3. That Staff's Motion to Open Case is denied and this case is dismissed.

4. That this Report and Order shall become effective on March 7, 2004.

Murray and Clayton, CC., concur.
Gaw, Ch., dissents, with separate dissenting opinion to follow.

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[2] The Commission did make certain determinations regarding the PSA pursuant to Section 32(k) of the Federal Public Utility Holding Company Act.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I write this dissent to express my concern about the sale of the Aries generation unit owned in part by Aquila's subsidiary, without additional scrutiny. While I acknowledge that a significant argument exists that this asset is not within the jurisdiction of the Commission, factors appear to be present in this case which may place the generation facility and property within the Commission's purview.

Aries is a natural gas combined cycle generator, which is a significant part of providing electricity needed to meet the legal obligations of Aquila to provide safe and reliable service. Its location in Cass County is close to Aquila's load. Combined cycle generators provide intermediate cost generation and can be an important element of a utilities generation portfolio. The sole question in this case is whether this Commission has jurisdiction over the sale of this generation facility. The on-the-record presentation made in this case raised significant questions which demand further inquiry. Because much of the presentation was designated as Highly Confidential (HC), it is not possible to delineate here the items of concern. Inquiry in this case established that there are important transactions by Aquila and between Aquila and its affiliates, which could mean that this Commission has jurisdiction over the sale of Aries, especially in light of the historical use of the plant.

It is a certainty that this decision impacts ratepayers. The generation unit can no longer be counted on as a reliable component of service to Aquila's native load. The Company is moving toward more susceptibility to the whims of the market with this decision. This question arises about whether Aquila's decision is in the best interest of ratepayers and in general. No inquiry will be done in this case.

The Missouri Supreme Court, in *State ex rel. Atmos Energy Corp. v. PSC*, 103 S.W.3d 753 (Mo. banc 2003), affirms the Commission's authority to enact affiliate transactions rules. This authority includes the ability to gain access to records of certain non-regulated affiliates of a regulated company. The *Atmos* decision is an indication that the limit of this Commission's authority is not simply answered by what is or is not housed under the regulated division of a corporation.[3] In Atmos, Court stated that an important factor is whether an affiliate is substantially kept separate and apart. The transactions and history in the current case give cause to believe this Commission may have authority over the sale of Aries. Once the facility is sold, the only possible cure of a poor decision will be review in a rate case. But rate cases will not bring back a generation facility that might have been the best resource of needed generation for Aquila's customers. We will not be able to do anything about that then. The horse will be gone from the corral. I believe that sufficient question exists to cause further inquiry into this transaction and its effect on Aquila's consumers.

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[3] The majority seems to infer that failure by the Staff to raise issues on this plant during construction or when its 50% interest was sold to Calpine somehow impacts jurisdiction. Jurisdiction of the Public Service Commission is not determined by a failure of Staff to exercise it, however. It is determined by the Commission's authority under statute.

In the Matter of the Application of Union Electric Company for Authority to Participate in the Midwest ISO through a Contractual Relationship with GridAmerica.

Case No. EO-2003-0271
Decided February 26, 2004

Electric §§ 7, 42. The Commission approved a Stipulation and Agreement and approved, with conditions, AmerenUE's participation in the Midwest Independent System Operator (MISO) through a contractual arrangement with GridAmerica, LLC.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: The Commission approves a Stipulation and Agreement and approves, with conditions, AmerenUE's participation in the Midwest Independent System Operator (MISO) through a contractual arrangement with GridAmerica, LLC.

On February 3, 2003, Union Electric Company d/b/a AmerenUE filed a pleading seeking Commission authority to participate in the MISO through a contractual arrangement with GridAmerica. The Commission ordered notice and an opportunity to intervene be given, and subsequently granted intervention to a number of entities. A number of pleadings were filed (including testimony both supporting and opposing the relief requested by AmerenUE). As the evidentiary hearing approached, on June 17, 2003, the parties announced that they were seriously pursuing settlement discussions, and asked for a general continuance to allow them to continue those discussions. The Commission granted the continuance, the parties by all accounts diligently continued settlement discussions, and on February 9, 2004, filed a Stipulation and Agreement ("the agreement").

This agreement was signed by Staff of the Missouri Public Service Commission, the Office of the Public Counsel, AmerenUE, the MISO, National Grid USA, and the Missouri Industrial Energy Consumers (MIEC). Although the other parties to the case[1] did not sign the agreement, they all filed pleadings stating that they did not oppose it, and none requested a hearing. Pursuant to 4 CSR 240-2.115(1), the Commission will treat the agreement as unanimous.

In the agreement, the signatories ask the Commission to approve, with conditions and safeguards, the participation of AmerenUE in the MISO through a contractual arrangement with GridAmerica. The signatories agree that this participation is not detrimental to the public interest, and indeed is prudent and reasonable. The approval sought is interim, for a period of approximately five years. Some of the salient provisions are as follows:

- The agreement is conditional on the approval by the Federal Energy Regulatory Commission (FERC) of a Service Agreement between AmerenUE and the MISO. The Service

[1] The Empire District Electric Company, Aquila, Inc., Kansas City Power & Light Company and the Missouri Energy Group.

Agreement's primary function is to ensure that the Commission continues to set the transmission component of AmerenUE's rates to serve its Bundled Retail Load. If the FERC orders changes or modifications to the Service Agreement, AmerenUE will seek further authority from this Commission. If the FERC does not approve the Service Agreement, this Commission's approval of the agreement is null and void.

· Approximately a year and a half before the end of the five-year term of approval sought in the agreement, AmerenUE will file a pleading regarding its continued participation in the MISO, including a cost/benefit allowance.

· AmerenUE agrees to immediately notify the Commission and the Office of the Public Counsel if the FERC issues any order, rule or regulation amending, modifying, changing, or abrogating any term or condition of the Service Agreement.

· The MISO agrees to use its best efforts to establish joint operating agreements with the respective transmission providers at the MISO's Missouri seams or at MISO seams with any transmission provider doing business in Missouri.

· The agreement provides that the Commission will be provided an analysis of congestion prices and firm transmission rights in the MISO's energy market.

· AmerenUE agrees that it will not divest itself of any of its transmission assets, nor securitize any of its transmission assets without approval by the Commission.

· AmerenUE agrees that, if it decides to seek any fundamental change in its participation in the MISO through a contractual relationship with GridAmerica, it will seek prior approval from the Commission no later than five business days after the date of its filing with the FERC for FERC authorization of this change.

After the filing of the agreement, the Commission scheduled an on-the-record presentation to allow the parties to present and explain the agreement, and to allow the Commission to ask questions about it. This presentation was held on February 20, 2004. The parties satisfactorily addressed any Commission concerns. The parties urged the Commission to approve the agreement expeditiously.

At the presentation, the Commission asked the parties a number of questions about the effect of the agreement on the Commission's continuing jurisdiction and authority over AmerenUE. The Commission reads the agreement as not limiting its jurisdiction or authority in any way, and the parties agreed with that reading. In particular, the Commission reads the agreement as giving it continuing oversight over AmerenUE's participation in the MISO, and the authority to require AmerenUE

to modify or terminate its participation if circumstances change and AmerenUE's participation becomes detrimental to the public interest. Such changed circumstances could include (but are not limited to) significant changes in state or federal law. Of course, the Commission could require changes or termination of AmerenUE's participation only consistent with due process, including, if necessary, a contested case proceeding. It is an essential component of the Commission's approval that it retains this jurisdiction and authority; otherwise, the Commission would not approve the agreement. The Commission's approval is contingent on retaining this oversight, and if the parties do not agree, this approval is null and void.

In addition, on February 13, 2004, the Staff filed suggestions in support of the agreement. Staff concludes "that the parties have crafted a Stipulation that accommodates AmerenUE's request to participate in the Midwest ISO through a contractual arrangement with GridAmerica while protecting the public interest."

The Commission agrees. After reviewing the stipulation and the entire record in this case, the Commission finds the stipulation to be reasonable and in the public interest and will, therefore, approve it. Pursuant to Section 536.060, RSMo 2000, the Commission may accept the stipulation as a resolution of the issues.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on February 9, 2004, is approved, and all parties shall comply with its terms.

2. That this order shall become effective on March 7, 2004.

3. That this case may be closed after March 8, 2004.

Gaw, Ch., and Clayton, C., concur;
Murray, C., concurs, with concurring opinion attached.

Mills, Deputy Chief Regulatory Law Judge

Editor's 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.

CONCURRING OPINION OF COMMISSIONER MURRAY

I concur with the decision of the majority to approve the Stipulation and Agreement, but disagree with certain statements in the majority opinion.

In particular, I would not have conditioned my approval on the Commission's retention of complete jurisdiction and authority over AmerenUE's participation in the MISO. I cannot say, as does the majority, that I would not otherwise approve the agreement. It is arguable for example, that FERC should exercise more authority over RTO participation.

Therefore, while I do not totally share the majority's position on retention of jurisdiction in all circumstances, I do concur with the approval of the Stipulation and Agreement.

In the Matter of the Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Company for Authority to Merge St. Joseph Light & Power Company with and into UtiliCorp United Inc., and, in Connection Therewith, Certain Other Related Transactions.*

Case No. EM-2000-292
Decided February 26, 2004

Valuation §15. As a general rule, only the original cost of utility plant to the first owner devoting the property to public service, adjusted for depreciation, should be included in the utility's rate base. That principle is known as the net original cost rule.

Valuation §15. The Missouri Commission has consistently applied the net original cost standard when placing a value on assets for purposes of establishing a utility's rates.

Electric §4. The Commission determined that the acquiring utility would not be allowed to recover any acquisition premium from its ratepayers, and therefore, the existence of an acquisition premium could not alter the Commission's evaluation of whether the merger would be detrimental to the public.

SECOND REPORT AND ORDER

PROCEDURAL HISTORY

On October 19, 1999, UtiliCorp United Inc. (UtiliCorp)[1] and St. Joseph Light & Power Company (SJLP) filed a Joint Application seeking authority to merge SJLP with and into UtiliCorp. Following an evidentiary hearing that began July 10 and continued through July 14, 2000, the Commission issued a Report and Order on December 14, 2000. In that Report and Order, the Commission authorized the merger of SJLP and UtiliCorp to proceed as proposed by the applicants. The Commission, however, rejected a Regulatory Plan proposed by UtiliCorp that would have predetermined various matters regarding how the costs of the merger would be treated by the Commission in future UtiliCorp rate cases.

The Commission's Report and Order went into effect on December 27, 2000. Two intervenors, the City of Springfield and AG Processing, filed applications for rehearing on December 22, 2000. Both applications for rehearing were denied on January 9, 2001. AG Processing appealed from the decision of the Commission. The Circuit Court of Cole County affirmed the decision of the Commission, but on October 28, 2003, the Supreme Court of Missouri handed down a decision that

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* See page 454, Volume 9, MPSC 3d for another order in this case.

[1] Since the Commission issued its first Report and Order, UtiliCorp has changed its name to Aquila, Inc. To avoid confusion, the Commission will continue to refer to the co-applicant as UtiliCorp in this Second Report and Order.

reversed the judgment of the Circuit Court and directed that the case be remanded to the Commission to "consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public."[2] The Circuit Court of Cole County issued an order and mandate remanding the case to the Commission on January 7, 2004.

On February 25, 2004, Aquila, Inc. f/k/a UtiliCorp filed a statement of position in which it stated that it will not seek to recoup or recover through rates the acquisition premium or the merger savings or synergies in connection with the merger transaction in its pending rate cases or in any future rate cases before the Commission.

FINDINGS OF FACT

The Commission adopts all the Findings of Fact from its initial Report and Order, except as modified in this Second Report and Order.

When UtiliCorp's shareholders agreed to acquire SJLP's stock, its offer created an acquisition premium of an estimated $92 million. UtiliCorp has never asked the Commission to allow it to directly recover the entire $92 million acquisition premium. Instead, UtiliCorp's proposed regulatory plan asked that the Commission find, in this case, that UtiliCorp should be allowed to include in the rate bases of the SJLP division's retail electric, gas and steam operations in a future rate case, up to fifty percent of the unamortized balance of the acquisition premium paid by UtiliCorp for SJLP. UtiliCorp proposed that this recovery would be contingent upon UtiliCorp proving to the Commission in a future rate case that merger synergies are equal to fifty percent of the premium costs and other costs to achieve the synergies. In other words, UtiliCorp asked that it be allowed to recover from SJLP's ratepayers, through its rates, the acquisition premium it paid to purchase SJLP, to the extent that the ratepayers would benefit from the savings arising from the merger.

For regulatory purposes, an acquisition adjustment is simply the difference between the consideration that the purchaser pays for the assets and the net book value of those assets.[3] As a general rule, only the original cost of utility plant to the first owner devoting the property to public service, adjusted for depreciation, should be included in the utility's rate base. That principle is known as the net original cost rule.

The net original cost rule was developed in order to protect ratepayers from having to pay higher rates simply because ownership of utility plant has changed, without any actual change in the usefulness of the plant. If a utility were allowed to revalue its assets each time they changed hands, it could artificially inflate its rate base by selling and repurchasing assets at a higher cost, while recovering those costs from its ratepayers.[4] Thus, ratepayers would be required to pay for the same utility plant over and over again. The sale of assets to artificially inflate rate base

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[2] *State ex rel. AG Processing Inc. v. PSC*, 120 S.W.3d 732,737 (Mo banc 2003).

[3] McKinney Direct, Page 15, Lines 6-8.

[4] Hyneman Rebuttal, Page 43.

was an abuse that was prevalent in the 1920s and 1930s and such abuses could still occur.[5]

An acquisition adjustment can be either positive or negative. In other words, when a utility purchases an asset, it may pay more or less than the net original cost of the asset. When the utility pays more than net original cost, it is said to have paid an acquisition premium. But, in some circumstances, a utility may be able to purchase assets at less than net original cost. In that situation, the utility has a negative acquisition adjustment.

Missouri has traditionally applied the net original cost standard when considering the ratemaking treatment of acquisition adjustments. That means that the purchasing utility has not been allowed to recover an acquisition premium from its ratepayers. But it also means that ratepayers do not receive lower rates through a decreased rate base when the utility receives a negative acquisition adjustment. Even if a company acquires an asset at a bargain price, it is allowed to put the asset into its rate base at its net original cost. Similarly, ratepayers do not share in the gains a utility may realize from selling assets at prices above their net original cost. Those gains flow only to the utility's shareholders.

CONCLUSIONS OF LAW

The Commission adopts all the Conclusions of Law from its initial Report and Order, except as modified in this Second Report and Order.

DECISION

In its decision remanding this case to the Commission, the Missouri Supreme Court found that the Commission's original Report and Order was lawful, but not reasonable, because it did not decide whether the acquisition premium was reasonable and whether the inclusion of the acquisition premium in the Commission's cost analysis of the merger would make the merger detrimental to the public. The Supreme Court held that "the PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium."[6] The purpose of this report and order on remand is thus to determine whether UtiliCorp should be allowed to recoup the acquisition premium and whether its ability, or inability, to recoup the premium will have any effect on the Commission's determination that the merger is not detrimental to the public interest.

This Commission has consistently applied the net original cost standard when placing a value on assets for purposes of establishing a utility's rates. No party has cited a single instance in which the Commission has allowed a utility to directly recover an acquisition premium through its rates. In support of its request for recovery of the acquisition premium, UtiliCorp cites two Commission cases for the proposition that this Commission is not unalterably opposed to a utility's recovery

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[5] Featherstone Rebuttal, Page 32.

[6] *State ex rel. AG Processing v. PSC*, 120 S.W.3d 732, 736 (Mo banc 2003).

of an acquisition premium. In both cited cases, *In re Missouri-American Water Company* [7] and *In re Kansas Power and Light Company*,[8] the Commission did make statements suggesting that it was not unalterably opposed to the recovery of an acquisition premium in an appropriate case. However, in both cases, the Commission refused to allow the requesting utility to recover the premium in question.

UtiliCorp also cites two Commission cases in which it argues that the Commission has allowed for the indirect recovery of acquisition premium. UtiliCorp indicates that in the case in which the Commission approved Union Electric Company's merger with Central Illinois Public Service Company,[9] it allowed for the recovery of the acquisition premium through operation of an earnings-sharing grid. UtiliCorp also points out that in the case in which the Commission approved Kansas City Power & Light Company's plan to merge with Western Resources, Inc.,[10] it approved a rate freeze that would allow enough time for the company to recover the acquisition premium through the operation of regulatory lag. While what UtiliCorp says about those two cases is correct, it is important to note that both cases were resolved through unanimous stipulations and agreement that were approved by the Commission. In neither case did the Commission purport to establish any policy that would apply to UtiliCorp's request to recover its acquisition premium in this case.

UtiliCorp also cites *State ex rel. Martigney Creek Sewer Company v. PSC*,[11] for the proposition that Missouri case law supports the idea that in some circumstances, a utility should be allowed to recover an acquisition premium in its rates. The Supreme Court's opinion in the *Martigney Creek* case included a quotation from Priest, *Principles of Public Utility Regulation*, which acknowledges that the majority of regulatory agencies do not allow for the recovery of an acquisition premium but suggests that there is "much respectable authority to the contrary."[12] However, a reading of the *Martigney Creek* case indicates that the quotation from Priest is purely dicta. The *Martigney Creek* case did not even involve a merger or an acquisition premium. Instead, it concerned the Commission's disallowance of depreciation on company property that had been contributed in aid of construction. The Supreme Court indicates in its opinion that it included the Priest quotation merely to rebut a suggestion in oral argument that the purchase price of property automatically established its rate base. The quotation from the *Martigney Creek* case, while probably a fair overall statement of the law, does not indicate that the Missouri Supreme Court has expressed any support for the recovery of acquisition premium from ratepayers.

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[7] 4 Mo P.S.C. 3d 205 (1995).

[8] 1 Mo P.S.C. 3d 150 (1991).

[9] *In re the Application of Union Electric Company*, 6 Mo. P.S.C. 3d 28 (1997).

[10] *In re the Joint Application of Western Resources, Inc., and Kansas City Power & Light Company,* 8 Mo. P.S.C. 3d 306 (1999).

[11] 537 S.W.2d 388 (Mo. banc 1976).

[12] *Id*. at 399.

For many years, the Commission has used a net original cost standard to place a value on utility plant after a merger. That standard has proven to be fair to utilities as well as to ratepayers. There is no reason to vary from that standard in this case. The Commission concludes that UtiliCorp should not be allowed to recover any of the acquisition premium in its rates.

The Supreme Court's decision remanding this case to the Commission also states that the Commission should determine whether the acquisition premium was "reasonable." All evidence before the Commission indicates that UtiliCorp's acquisition of SJLP was an arms-length transaction between a competent and informed buyer and seller. There is no evidence in the record by which the Commission could determine that the price UtiliCorp chose to pay to acquire SJLP was not reasonable. Much of UtiliCorp's interest in acquiring SJLP may have been based on unregulated properties and businesses over which the Commission has no authority. Indeed, since today's decision makes it clear that it is the responsibility of UtiliCorp's shareholders to pay any acquisition premium, there is no need for the Commission to determine whether the price that UtiliCorp chose to pay for SJLP is reasonable.

With the Commission having decided that UtiliCorp will not be allowed to recover any acquisition premium from its ratepayers, the existence of an acquisition premium cannot alter the Commission's evaluation of whether the merger would be detrimental to the public. Therefore, the Commission will reaffirm its determination from its initial Report and Order that the merger between UtiliCorp and SJLP is in the public interest because it is not detrimental to the public.

IT IS THEREFORE ORDERED:

1. That the Commission adopts the Ordered Paragraphs from its initial Report and Order except as modified in this Second Report and Order.

2. That UtiliCorp United Inc. shall not be allowed to recover from its ratepayers the acquisition premium arising from the transaction that is approved in this Report and Order.

3. That this Report and Order shall become effective on March 7, 2004.

Gaw, Ch., Murray and Clayton, CC., concur and certify compliance with the provision of Section 536.080, RSMo 2000.

12 Mo. P.S.C. 3d

In the Matter of a Commission Inquiry into Affordable Heating Energy for Customers of Regulated Missouri Utilities and Possible Changes to the Cold Weather Rule.

Case No. GW-2004-0452
Decided March 3, 2004

Gas §§1, 4. The Commission opened an investigatory case to examine possible programs for improving long term energy affordability for those in need of assistance, and to examine the Commission's Cold Weather Rule. The Commission also established a task force to accomplish the objectives of the investigation.

ORDER ESTABLISHING CASE AND CREATING TASK FORCE

Since 2000, the wholesale price of natural gas has more than doubled, from less than $2.50 per thousand cubic feet (Mcf) to more than $5.00 per Mcf. High natural gas prices and recent cold weather have contributed to customer heating bills that may be 20% to 25% higher during the winter of 2003/2004 than the winter of 2002/2003.

The impact of high natural gas prices coupled with cold winter weather has had a harsh impact on Missouri utility customers. The Missouri Department of Social Services notes a dramatic increase in the number of consumers who have, for the first time, applied for Low Income Home Energy Assistance Program grants.

The Missouri Public Service Commission first established the Cold Weather Rule in 1977. Since its inception, the rule has helped more than 2 million needy Missourians maintain heat-related service during the winter.

The Commission, through rulemaking proceedings, modified the Cold Weather Rule[1] in 1984. The revisions to the rule in 1984 included new reconnection provisions, additional notice requirements to customers before discontinuance of service and allowed more customers to register for special notice requirements if they are elderly or handicapped. In 1993, the Commission again modified the rule expanding the time the rule is in effect, adopting a temperature moratorium and implementing additional notification procedures.

In an effort to assist those customers who were disconnected from their natural gas service due to non-payment or who faced disconnection for non-payment due to natural gas price spikes in the winter of 2000-2001, the Commission approved an emergency amendment to the Cold Weather Rule that took effect on November 18, 2001. That emergency amendment expired when the Cold Weather Rule period ended on March 31, 2002.

[1] 4 CSR 240-13.055.

The Commission has also thoroughly examined and modified the reporting requirements of the utility companies that are required to comply with the Cold Weather Rule. These reporting requirements are designed to provide the Commission with the necessary information to closely monitor the rule's effect.

While the Commission continues to closely monitor the Cold Weather Rule and its effect on Missouri consumers, the Commission has not substantially changed the provisions of the rule, on a permanent basis, since 1993. Given these facts, the Commission believes it is imperative that the rule be closely examined again to determine if it continues to adequately address consumer needs.

Given these current circumstances, the Missouri Public Service Commission will open an investigatory case to examine possible programs for improving long term energy affordability for those in need of assistance, and to propose any immediate amendments to the Commission's current Cold Weather Rule that may provide short term help. The Commission will establish a task force to accomplish the objectives of this investigation.

The task force is to explore measures and programs that could have a long-term impact on the affordability of heat related bills, such as energy efficient appliances and weatherization in homes that currently are not energy efficient. This inquiry should include an evaluation of possible funding sources and mechanisms that can be used effectively by those struggling with energy bills. The task force will report its findings, and any recommendations on this subject no later than March 31, 2005.

The task force will also consider possible changes to the Cold Weather Rule, and submit any proposed changes to the Commission for possible implementation in the 2004-05 heating season. Any such amendments must be submitted to the Commission by April 14, 2004. The task force may also explore additional topics of concern regarding low-income customers.

The task force will be co-chaired by Warren Wood, Manager of the PSC Energy Department and Gay Fred, Manager of the PSC Consumer Services Department. The Commission will assign to this task force one representative from the Office of the Public Counsel; one low-income advocate representative and one utility representative from the Committee to Keep Missourian's Warm; one representative from the Department of Natural Resources; two representatives from heat related utility companies in Missouri; and four representatives from the Missouri Legislature. The Commission encourages the task force to seek further input from affected utility consumers.

IT IS THEREFORE ORDERED:

1. That case number GW-2004-0452 shall be docketed for the purpose of documenting and coordinating the progression of this investigation.

2. That this case shall be docketed as a W, or working, case and thus is not a contested case under chapter 536 of the Missouri Administrative Procedures Act or under the provisions of 4 CSR 240-2. The requirement to be represented by legal counsel does not apply to participants in this case nor does the prohibition against *ex parte* communications apply in this case.

3. That any person or organization wishing to receive notice of hearings and other developments in this matter shall so indicate by submitting a request to the Commission on the form attached to this order.

4. That this order shall be effective on March 3, 2004.

Dale Hardy Roberts, Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Editor's Note: The Request for Notification form 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 Verified Application of Laclede Gas Company for an Order Establishing Replacement Requirements for the Final Phase of its Unprotected Steel Main Replacement Program Previously Approved Pursuant to Rule 4 CSR 240-40.030(15)(E).

Case No. GO-2003-0506
Decided March 5, 2004

Gas §1. The Commission approved Laclede Gas Company's request that the Commission establish certain replacement requirements for the final phase of the company's unprotected steel main replacement program.

Gas §11. The Commission established certain replacement requirements for the final phase of Laclede Gas Company's unprotected steel main replacement program. The approved requirements reduce Laclede's annual replacement requirements for unprotected steel mains that meet the criteria in paragraphs (15)(E)3 through (15)(E)6 of Commission Rule 4 CSR 240-40.030 from an average of 20,000 feet per year to an average annual rate of 10,000 feet, until all remaining mains identified by this section have been replaced.

Gas §35. The Commission approved Laclede Gas Company's request that the Commission establish certain replacement requirements for the final phase of the company's unprotected steel main replacement program. The approved requirements reduce Laclede's annual replacement requirements for unprotected steel mains that meet the criteria in paragraphs (15)(E)3 through (15)(E)6 of Commission Rule 4 CSR 240-40.030 from an average of 20,000 feet per year to an average annual rate of 10,000 feet, until all remaining mains identified by this section have been replaced.

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, Missouri 63101, for Laclede Gas Company.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Lera L. Shemwell, Senior Counsel, and *Robert S. Berlin*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus: This order approves Laclede Gas Company's request for a modification of its schedule for the replacement of unprotected steel main lines.

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. 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 omitted material was not dispositive of this decision.

Background and Procedural History:

In Case No. GO-91-239, the Commission issued an order on April 12, 1990, approving Laclede's initial formal replacement program for unprotected steel mains. Among other things, the program provided for the replacement of 30,000 feet per year in fiscal years 1991-1995 for those unprotected steel mains that fall within categories 3 through 6 of 4 CSR 240-40.030(15)(E).[1] The Commission later approved a revision to the program, effective October 13, 1994, establishing a modified replacement schedule based on the declining corrosion rate of unprotected steel mains remaining in service. The revised schedule required an average annual replacement level of 20,000 (for the mains in categories 3 through 6) for the years 1996 through 1998. The revised schedule did not specify an average annual

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[1] 4 CSR 240-40.030(15)(E) 3-6 reads, in relevant part, as follows:

> (15) Replacement/Cathodic Protection Program—Unprotected Steel Transmission Lines, Feeder Lines and Mains. Operators who have unprotected steel transmission lines, feeder lines or mains shall develop a program to be submitted with an explanation to the commission by May 1, 1990, for commission review and approval. This program shall be prioritized to identify and cathodically protect or replace pipelines in those areas that present the greatest potential for hazard in an expedited manner. These high priority areas should include, but not be limited to:
>
> * * * * *
>
> 3. Areas where extensive excavation, blasting or construction activities have occurred in close proximity to unprotected steel pipelines;
> 4. Sections of unprotected steel pipeline that lie in areas of planned future development projects, such as city, county or state highway construction/ relocations, urban renewal, etc.;
> 5. Sections of unprotected steel pipeline that exhibit a history of leakage or corrosion
> 6. Sections of unprotected steel pipeline subject to stray current.

footage replacement requirement for unprotected steel mains for periods beyond fiscal year 1998. In fiscal years 1999, 2000, and 2001, however, Laclede elected to continue its replacement of these mains at the historical average annual replacement rate of 20,000 feet per year.

On May 21, 2003, Laclede filed a verified application requesting that the Commission establish replacement requirements for the final phase of Laclede's unprotected steel main replacement program, pursuant to Commission Rule 4 CSR 240-40.030(15)(E)3-6. Laclede requests that the Commission issue an order establishing a replacement schedule of 10,000 feet per year for mains in categories 3 through 6.

The Staff of the Commission filed its recommendation and memorandum on June 13, 2003. Staff recommends that the Commission grant Laclede's application and issue an order establishing the replacement requirements for the final phase of Laclede's unprotected steel main replacement program, specifically establishing an annual replacement requirement of 10,000 feet per year for all unprotected steel mains now or hereinafter identified as meeting the criteria in Rule 4 CSR 240-40.030(15)(E)3-6.

On December 5, 2003, the Commission conducted a joint hearing for this case and Case No. GO-99-155.[2] The hearing was conducted as a question-and-answer session instead of a traditional evidentiary hearing. Joseph Schulte, although not a party to the case, appeared and testified at the invitation of the Commission. Although Mr. Schulte expressed concern regarding Laclede's replacement programs in general, he did not offer any legally relevant, first-hand testimony regarding Laclede's current unprotected steel main replacement program. In response to the Commission's questions, Staff witnesses Robert Leonberger and John Kottwitz, along with Laclede witnesses Mark Lauber and Craig Hoeferlin, testified at the hearing in support of Laclede's application. Staff and Laclede filed briefs in January 2004.

Laclede's Current Application:

Laclede requests that the Commission issue an order establishing replacement requirements for the final phase of the company's unprotected steel main replacement program. Specifically, Laclede requests the Commission's approval to reduce its annual replacement requirements for unprotected steel mains that meet the criteria in paragraphs (15)(E)3 through (15)(E)6 of Rule 4 CSR 240-40.030, from an average 20,000 feet per year to an average annual rate of 10,000 feet, until all remaining mains identified by this section have been replaced. Both Laclede and Staff state that the adoption of such a requirement will not compromise public safety.

Laclede notes that although the 1994 revised schedule did not specify a replacement requirement beyond fiscal year 1998, Laclede continued replacing the mains at an average rate of 20,000 feet per year during fiscal years 1999 through 2002. Laclede states that it has accelerated replacement when public safety required it.

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[2] Although the hearings were conducted jointly, the cases are not consolidated.

Since the 1994 revisions, Laclede has experienced a continuing and significant decline in the corrosion leak rates in the mains. Laclede believes that the leak rate has declined to where replacements can be done safely at the rate of 10,000 feet per year. This replacement schedule exceeds the existing requirements of the previously approved replacement program in that it would mandate, for the first time, that the entire quantity of unprotected steel main footage identified in this section be replaced, pursuant to 4 CSR 240-40.030(15)(E)3-6.

Staff's Recommendation:

Staff recommends that the Commission approve Laclede's request. Staff emphasizes that the application is not a waiver request of any pipeline safety rule. Instead, Laclede is requesting that the Commission approve the company's final phase of its unprotected steel main replacement program that has been submitted in accordance with 4 CSR 240-40-030(15)(E). Staff notes that even though the proposed annual replacement rate is reduced from 20,000 to 10,000 feet per year, a large majority of unprotected steel mains with corrosion history have already been replaced.

According to Staff, this reduced replacement rate for unprotected steel mains will reinforce the resources needed to continue Laclede's other, higher-priority replacement programs for cast iron mains, unprotected steel service/yard lines, and copper service lines.

Public Counsel's Position:

Public Counsel did not take a position in support of or in opposition to Laclede's pending application.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Laclede is a "gas corporation" and a "public utility" pursuant to the Missouri Public Service Commission law.[3] The Missouri Public Service Commission has the jurisdiction and statutory authority to require a public utility to "maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public . . ." and to promote and safeguard the public.[4]

Pursuant to rule 4 CSR 240-40.030(15)(E), Laclede is required to establish a written program to implement a replacement program for unprotected steel mains. The rule also requires the company to file its replacement program with the Commission.

Decision

The Commission finds that the information presented suggests that Laclede has experienced a continuing and significant decline in the corrosion leak rates for the mains at issue. Staff and Laclede agree that the leak rate has declined to the

[3] Sections 386.020(18) and 386.020(42), RSMo 2000. Unless otherwise noted, all subsequent statutory references are to the Revised Statutes of Missouri, revision of 2000.

[4] Section 386.310.

point where replacements can be safely done at the rate of 10,000 feet per year. The Commission notes that this modified replacement schedule still exceeds the existing requirements of the previously approved replacement program in that it would mandate, for the first time, that the entire quantity of unprotected steel main footage identified in this section be replaced, pursuant to 4 CSR 240-40.030(15)(E)3-6. The Commission finds that Laclede's request to revise the final phase of its Unprotected Steel Main Replacement Program is reasonable. Therefore, the Commission will approve Laclede's application and will allow the company to adopt a replacement schedule of 10,000 feet per year for all unprotected steel mains now or hereinafter identified as meeting the criteria in Rule 4 CSR 240-40.030(15)(E)3-6.

IT IS THEREFORE ORDERED:

1. That the application filed by Laclede Gas Company on May 21, 2003, establishing replacement requirements for the final phase of Laclede Gas Company's unprotected steel main replacement program, is approved.

2. That the replacement program, approved and later modified in Case No. GO-91-239, is again modified as follows:

> For unprotected steel mains that meet the criteria in Commission Rule 4 CSR 240-40.030(15)(E)3 through (15)(E)6, Laclede Gas Company shall replace such mains at an average annual rate of 10,000 feet until all remaining mains identified by this section have been replaced.

3. That the Replacement Program requirements established in Ordered Paragraph 2 are subject to the condition that Laclede Gas Company must submit an annual summary of corrosion leaks on unprotected steel mains after each fiscal year, until all replacements are completed, and that Laclede must submit the results thereof to the Staff of the Missouri Public Service Commission within 30 days after completing the summary.

4. That the Staff of the Commission shall file annual status reports regarding Laclede Gas Company's progress with regards to the unprotected steel main replacement program. The first report shall be filed no later than May 5, 2004.

5. That this Report and Order will become effective on March 15, 2004.

Murray and Clayton, CC., concur;
Gaw, Ch., dissents;
certify compliance with the provisions
of Section 536.080, RSMo 2000.

In the Matter of the Adequacy of Laclede Gas Company's Service Line Replacement Program and Leak Survey Procedures.

Case No. GO-99-155
Decided March 5, 2004

Gas §1. The Commission adopted Staff's recommendation that the Commission continue the current requirements of the previously-approved Stipulation and Agreement, which addressed the adequacy of Laclede Gas Company's copper service line replacement program.

Gas §35. The Commission adopted Staff's recommendation that the Commission continue the current requirements of the previously-approved Stipulation and Agreement, which addressed the adequacy of Laclede Gas Company's copper service line replacement program.

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, Missouri 63101, for Laclede Gas Company.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Lera L. Shemwell, Senior Counsel, and *Robert S. Berlin*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge

REPORT AND ORDER

Syllabus:

This order approves the Staff of the Commission's recommendation that the Commission continue the current requirements of the previously approved Stipulation and Agreement, with annual reporting from Staff to the Commission.

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. 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 omitted material was not dispositive of this decision.

Procedural History:

The Commission opened this case on October 30, 1998, as a general investigatory case to receive information relevant to the adequacy of Laclede Gas Company's direct-buried copper service line replacement program and the effectiveness of Laclede's leak survey procedures.[1] On February 18, 2000, Laclede, Staff, and the Office of the Public Counsel filed a Unanimous Stipulation and Agreement. As part of the Agreement, Laclede agreed to submit annual reports to Staff detailing direct-buried copper service line renewals and relays[2] completed, and agreed to submit additional reports confirming the achievement of other milestones under the Agreement. The Agreement provided that after the third year of the program, Laclede and Staff would review the progress and results of the program to determine future relay/renewal plans, including the rate of such future actions, and potential modifications to survey techniques and other related matters. On May 18, 2000, the Commission issued an order approving the Unanimous Stipulation and Agreement.

On August 1, 2003, Staff filed its Three-Year Summary Report. Laclede and Public Counsel filed their responses on September 4, 2003, and November 25, 2003, respectively.

The Commission conducted a limited hearing on December 5, 2003.[3] The format of the hearing was largely that of a Question and Answer Session, although Joseph Schulte appeared and testified at the invitation of the Commission. Mr. Schulte is not a party to this case. In response to Commission questions, Staff witnesses Robert Leonberger and John Kottwitz, along with Laclede witnesses Mark Lauber and Craig Hoeferlin, testified at the hearing. The parties filed briefs in January 2004.

Staff's Three-Year Summary Report:

Staff requests that the Commission continue the current requirements of the Unanimous Stipulation and Agreement, with annual reporting from Staff. Staff states that the requirements of the Copper Service Line Replacement Program reflect the overall goals of protecting the public, achieving a substantial number of replacements annually, using effective leak detection methods, and making timely repairs, while also being mindful of ratepayers' costs. Staff suggests that Laclede has met or exceeded the guidelines of the Stipulation and that the crucial goal of public safety is being maintained. The Stipulation's guidelines are outlined under three headings in Staff's Report: (1) Priority Replacements; (2) Leak Surveys; and (3) Timely Leak Repairs.

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[1] Staff's investigation into the Pralle Lane (Case No. GS-98-422) and Bergerac Drive (Case No. GS-98-423) natural gas incidents led to Staff filing, on October 14, 1998, a motion to open this case.

[2] As used in this order, the term "renewal" refers to a main to meter replacement of a service line and the term "relay" refers to the replacement of a specific segment of a service line.

[3] The Commission indicated that the purpose of the hearing was to determine whether Staff's recommendations should be approved without the necessity for further hearings. The Commission also noted that if it does not approve Staff's recommendations, it would establish a procedural schedule.

1. Priority Replacements: Copper Service Line Relay/Renewals

At the start of the program, Laclede recorded an official count of 76,966 direct-buried copper service lines as qualifying for replacement in accordance with the Stipulation. Although the Stipulation permitted Laclede to do partial replacement of certain copper lines, Laclede chose to do complete main-to-meter copper service line replacements for program years two and three. Staff commends Laclede for its preference for renewals (main to meter replacement) of copper service line in lieu of qualifying relays (partial replacements). Staff notes that this results in more actual feet of copper piping being removed and replaced than is required under the Stipulation. Laclede has replaced or eliminated a total of 26,246 direct-buried copper service lines during the first three years of the program, which represents approximately 34 percent of the program's beginning total qualifying lines.

Staff notes that unless otherwise ordered by the Commission, Laclede must continue to relay a minimum of 8,000 direct-buried copper service lines annually. Staff recommends that this annual requirement be maintained as the results to date support this rate as a viable solution.

2. Leak Surveys

The Stipulation requires Laclede to perform bar-hole surveys for the first three years of the program. Laclede successfully completed an annual bar-hole survey for each of the first three program years. Bar-holes were strategically made over each qualifying copper service line to facilitate both the venting and detection of any subsurface leaks. Staff states that no prior replacement program requiring an annual leak survey has required this enhanced form of leak surveys.

Staff recommends that the annual bar-hole leak surveys continue, thus allowing for consistent measurement of leak detection trends. Staff notes that in 1999, Laclede completed a bar-hole survey producing a 3.4 percent leak rate covering approximately 85,000 service lines in Pressure Regions I and II. Over the same two pressure regions in 2002, Laclede found a leak rate of 1.1 percent when it bar-hole leak surveyed approximately 60,000 service lines, a 68 percent reduction in discovery of new leaks during annual bar-hole surveys. This reduction moves the overall leak discovery rate towards common industry leak rates for nonreplacement program pipelines. In 2003, Laclede completed bar-hole surveys of approximately 52,000 direct-buried copper service lines, with a new leak discovery rate that remains slightly over 1 percent, but below the year 2002 rates.

Staff believes that this trend will continue and that the number of leaks found will soon be at, or better than, the industry standard. Staff further notes that leak detection enhancements, such as: (1) providing descriptive measures of mains and services to leak surveyors, (2) better placement of surveyors' leak detection instruments in close proximity to the pipelines, and (3) requiring strategic bar-holes, have not been limited to the company's annual bar-hole survey. Staff states that nothing has been shown to be superior in the detection of sub-surface leaks than strategically placing bar-holes over certain service line locations. Staff recommends that Laclede continue to perform an annual bar-hole survey as provided for in the Stipulation.

3. Leak Repairs

For the first three program years, a downward trend of detected leaks during the annual bar-hole survey has confirmed the parties' expectations and the program's goals. Staff notes that the leak repair requirements in the Stipulation Guidelines are more aggressive than those of the state and federal requirements and those of previous successful replacement programs. Laclede repairs most Class 3 leaks in Pressure Region I within an average time of three to four months from discovery, instead of the six months allowed under the Program. While Class 3 leaks in Pressure Region II require repair within one year of discovery, Laclede averages seven to nine months for these repairs.

Staff recommends maintaining the timely repair requirements of six months for Pressure Region I leaks, and one year for Pressure Region II leaks, as stated in the Stipulation.

Responses of Laclede and Public Counsel:

Laclede generally concurs in Staff's recommendations. Laclede notes that if the Commission does maintain the Program's current annual replacement requirements, the Program, like any other safety obligation mandated by the Commission, will continue to be subject to potential revision by the Commission as new information concerning the Program's operation and impact on public safety is gathered and evaluated.

Public Counsel indicates that it also generally agrees with Staff's recommendations in this matter. Thus, none of the parties to this case have objected to the recommendations set forth in Staff's Three-Year Summary Report.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Laclede is a "gas corporation" and a "public utility" pursuant to the Missouri Public Service Commission law.[4] The Missouri Public Service Commission has the jurisdiction and statutory authority to require a public utility to "maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public . . ." and to promote and safeguard the public safety.[5]

The information presented suggests that the Copper Service Line Replacement Program is working as intended, and that many of the Program's goals have been achieved at a pace that exceeds the Program's original requirements. The Commission finds that Laclede should continue the current requirements of the Stipulation and Agreement, which was approved on May 18, 2000. The Commission also finds that its Staff should continue its annual reporting to the Commission.

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[4] Section 386.020(18) and 386.020(42), RSMo 2000. Unless otherwise noted, all subsequent statutory references are to the Revised Statutes of Missouri, 2000.

[5] Section 386.310.

IT IS THEREFORE ORDERED:

1. That Staff's recommendation is approved. Until ordered otherwise, Laclede Gas Company shall continue to meet or exceed the requirements of the Unanimous Stipulation and Agreement.

2. That the Commission's Staff shall continue its annual reporting to the Commission until otherwise ordered.

3. That this Report and Order shall become effective on March 15, 2004.

Gaw, Ch., Murray and Clayton, CC.,
concur and certify compliance with the
provisions of Section 536.080, RSMo 2000.

In the Matter of the Investigation of the Status of Prepaid Local Service Providers as Alternative Local Exchange Competitors Under Section 392.245, RSMo.

Case No. CO-2002-1078
Decided March 5, 2004

Telecommunications §1. The Commission decided to deny the request to hold a generic investigation into whether a reseller or prepaid provider could provide sufficient competition to justify price cap election by a small incumbent telecommunication carrier, because the Commission found such an investigation would be duplicative given the more specific cases pending before it.

Telecommunications §7. The Commission determined that it had jurisdiction under its general supervisory powers to hold a generic investigation into whether a prepaid provider or reseller was providing competition sufficient for price cap election; however, the Commission declined to open such an investigation.

ORDER DENYING MOTION TO INVESTIGATE COMPETITION OF PREPAID AND RESOLD SERVICES

Syllabus: This order denies the motion of the Office of the Public Counsel to open a generic investigation into the status of competition of prepaid and resold telecommunications service providers for the purposes of small company price cap election.

The Office of the Public Counsel filed a motion asking that a case be established to investigate whether prepaid local service providers are actually offering basic local service in any exchange of an incumbent local exchange company's territory.

Public Counsel cited the Commission's general jurisdiction statutes and to the powers under the price cap statute as the Commission's authority to conduct such an investigation.[1] The Commission received responses from interested parties including the Staff of the Missouri Public Service Commission, ALLTEL Missouri, Inc., Fidelity Telephone Company, the Missouri Independent Company Group, and the Small Telephone Company Group. Staff supported the request, Fidelity did not take a position, and the other intervenors opposed beginning such an investigation. Public Counsel later filed a request to include all types of resellers of local service in the investigation.

The issue of whether a prepaid reseller of telecommunications services provides competition sufficient to allow election of price cap status was an issue in the *BPS Telephone Company* price cap case.[2] The Commission decided to postpone a decision in the current case until after a decision in the *BPS* case. The Commission ultimately decided that BPS was not price cap eligible because of the noncompete clause in BPS's interconnection agreement with Missouri State Discount Telephone Company. The Commission did not decide the issue of whether MSDT as a reseller or prepaid provider could provide competition for purposes of price cap election. The BPS case is currently being appealed to the Cole County Circuit Court.[3]

ALLTEL has also filed a notice of election to be regulated as a price cap company. That case is currently pending in Case No. IO-2002-1083. ALLTEL does not have a noncompete clause in its interconnection agreement, but is electing price cap status based on competition from a reseller. Thus, the major subject of the proposed investigation is pending before the Commission.

The Commission has authority under its general jurisdiction and supervision statutes[4] to conduct this type of investigation. The Commission determines, however, that because a case that may be resolved on specific facts is pending before the Commission, it would be duplicative to proceed with a generic investigation to set a Commission policy that may not be binding on the parties, nor on any future Commission. The Commission has not had an avalanche of cases regarding small company price cap elections, as was anticipated by Public Counsel and Staff when proposing that the investigation be conducted. Thus, the Commission finds that no generic investigation of this matter is necessary at this time and the motions to conduct an investigation should be denied.

IT IS THEREFORE ORDERED:

1. That the motions of the Office of the Public Counsel to open an investigation into the status of competition by prepaid and resold telecommunications service providers for the purposes of the election of price cap status by small telephone companies are denied.

2. That this order shall become effective in March 15, 2004.

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[1] Sections 386.250(2), 386.320, and 392.245, RSMo.

[2] Case No. IO-2003-0012.

[3] *State ex rel. BPS Telephone Company v. Missouri Public Service Commission*, 19th Judicial Circuit, Case Number 04CV323251 (filed January 27, 2004).

[4] Sections 386.250(2) and 386.320, RSMo.

3. That this case may be closed in March 16, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.

Dippell, Senior Regulatory Law Judge

In the Matter of a Commission Inquiry into the Metropolitan Calling Area Plan and Calling Scopes in Missouri.

Case No. TW-2004-0471
Decided March 18, 2004

Telecommunications §1. The Commission established a working group and directed it to investigate, consider, and report on the Metropolitan Calling Area (MCA) plan and calling scope matters. The Commission directed the working group to consider whether the MCA plan and calling scopes in general, particularly rural calling scopes, should be amended, and if so, how. The Commission indicated that it would issue a separate order appointing the members of the working group or task force.

ORDER DIRECTING NOTICE AND ESTABLISHING WORKING GROUP

On January 18, 2001, the Commission established, in Case No. TO-2001-391, an Industry Task Force to consider issues surrounding Metropolitan Calling Area (MCA) service in the St. Louis, Kansas City, and Springfield metropolitan areas. The Commission instructed the Task Force to investigate the following: (1) issues related to the pricing of MCA service; (2) the effects of an expanded MCA on pricing; and (3) whether the Local Exchange Routing Guide (LERG) is the appropriate mechanism to identify the MCA NXX codes in the future. The Commission's Staff submitted the Final Status Report of the Industry Task Force on January 24, 2002. Although the Industry Task Force submitted its Final Report, the parties disagreed as to whether or not the Task Force adequately addressed certain matters and whether additional Task Force meetings were necessary. For example, the Task Force acknowledged that it did not fully explore item (2), the effects of an expanded MCA on pricing. At least one of the parties suggested that certain issues might be more appropriately addressed in a less formal setting, such as a roundtable meeting, instead of in Case No. TO-2001-391.

The parties appeared for a prehearing conference in Case No. TO-2001-391 on May 22, 2002, an on-the-record presentation on July 15, 2002, and another prehearing conference on November 24, 2003. Supplemental briefs were filed on

January 16, 2004, and January 26, 2004. Staff recommends that the Commission pursue the adoption of Staff's proposed MCA-2 plan. The MCA-2 is a one-way outgoing calling plan that would enable mandatory and optional tier MCA subscribers to call all telephone numbers within the current MCA geographic area, regardless of whether or not the called party also participates in the MCA plan. Several parties oppose the proposed MCA-2. Some parties expressed concern that modifying the current MCA could actually lead to its demise.[1] Others, like the Office of the Public Counsel, contend that the Commission should go beyond what Staff proposed and adopt a geographically-expanded MCA.

The Commission has reviewed the briefs and the Task Force Final Report, along with the official file of Case No. TO-2001-391. The Commission notes that the record in that case leaves several important questions unanswered. For example, there is not an adequate record in Case No. TO-2001-391 to determine whether the consumers in Missouri desire a modified MCA plan such as the proposed MCA-2 or a geographically-expanded MCA, and if so, at what cost would consumers find such plans attractive. In addition, the Task Force did not thoroughly investigate the pricing and costing issues associated with the MCA-2 or any other proposed revision to the current MCA. And most importantly, there is the unresolved threshold question of whether or not the Commission has the authority to order changes to the MCA. Statutory changes may be necessary before the Commission can require certain modifications to the MCA. Many of the parties, however, have indicated a willingness to work toward voluntary modifications to the MCA.

The Commission finds that it would be most beneficial to address these, and other, questions regarding potential changes to the MCA and calling scopes in a working group setting. The working group format will facilitate the free exchange of ideas between the Commission, the public, and the industry. Therefore, the Commission will establish a working group and will direct it to investigate, consider, and report on MCA and calling scope matters. The Commission recognizes the creation of this case as an instance where the Commission is exercising its quasi-legislative powers to establish working groups and to inquire into policy matters. This is not a contested case scenario that requires the participants to be represented by licensed attorneys. The Commission will appoint the members of the working group by means of a separate order.

The Commission anticipates that this working group or Task Force will investigate and consider whether the MCA plan, and calling scopes in general, should be amended, and if so, how. Included in this review must be a thorough analysis of whether, and if so, what type of, changes should be made to rural calling scopes. Thus, the Commission envisions that the Task Force's analysis will include a review of the various consumer petitions, filed in Case No. TO-2001-391, involving the communities of Greenwood, Lexington, Warrensburg, Grain Valley, Innsbrook/Wright City, and Ozark County. The Commission also expects the Task

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[1] For example, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, indicates that if the Commission orders implementation of the MCA-2 Plan, such action could violate, among other things, Sections 392.200.9 and 392.245.11, Revised Statutes of Missouri, and Missouri case law.

Force to address the issues raised by the Office of the Public Counsel in Case No. TO 2003-0297, regarding expanded local calling plans in rural areas of Missouri, and TO-2003-0298, involving the Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, local exchanges of Washington, Union, St. Clair, Beaufort, and around Franklin County. The Commission anticipates scheduling a roundtable or other informal meeting with interested entities to further define the scope and charge of this Task Force.

The Commission will direct its Data Center to send a copy of this order to every certificated local exchange carrier and interexchange carrier in the state of Missouri. In addition, the Commission will direct the Information Office to send a copy of this order to all members of the General Assembly and to all newspapers in the state of Missouri as listed in the Newspaper Directory of the *Official Manual* of the State of Missouri.

IT IS THEREFORE ORDERED:

1. That Case No. TW-2004-0471 is established to investigate the Metropolitan Calling Area Plan and calling scopes in Missouri.

2. That a Metropolitan Calling Area Plan and Calling Scope Task Force is hereby established.

3. That the members of the Task Force shall be appointed in a separate order.

4. That the Data Center of the Missouri Public Service Commission shall serve a copy of this order upon the certificated local exchange carriers and interexchange carriers in the state of Missouri.

5. That the Commission's Public Information Office shall make notice of this order available to the members of the General Assembly and all newspapers in the state of Missouri as directed above.

6. That this order shall become effective on March 18, 2004.

Gaw, Ch., Murray, and
Clayton, CC., concur.

Ruth, Senior Regulatory Law Judge

In the Matter of Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules.

Case No. WR-2003-0500
Decided April 6, 2004

Sewer §1. Missouri-American Water Company filed proposed tariff sheets designed to implement a general rate increase for water and sewer service. Staff later filed an excessive earnings complaint against Missouri-American Water Company, which was consolidated into this case. The parties subsequently filed three stipulations and agreements, which, among other things, do not provide for an increased revenue requirement in any district. In fact, the revenue requirement stipulation and agreement has a neutral impact in every district except Joplin, where there is a decrease of $350,000, exclusive of taxes. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the rate design stipulation and agreement.

Sewer §14. Missouri-American Water Company filed proposed tariff sheets designed to implement a general rate increase for water and sewer service. Staff later filed an excessive earnings complaint against Missouri-American Water Company, which was consolidated into this case. The parties subsequently filed three stipulations and agreements, which, among other things, do not provide for an increased revenue requirement in any district. In fact, the revenue requirement stipulation and agreement has a neutral impact in every district except Joplin, where there is a decrease of $350,000, exclusive of taxes. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the rate design stipulation and agreement.

The revenue requirement stipulation and agreement provides that the current Infrastructure Replacement Surcharge (ISRS) would be set to zero on April 16, 2004. It also provides that the company will not file a tariff seeking a new ISRS prior to December 16, 2005, and provides that in any ISRS filing after that date, the company will use a specified weighted cost of capital (common equity 3.91%, preferred equity 0.39%, debt 3.4%, total: 7.70%).

Sewer §18. The revenue requirement stipulation and agreement provides that the company will implement certain new depreciation rates and provides that the company will develop new district-specific historical databases for use in future rate cases. It also provides that as of January 1, 2004, the company will begin expensing cost of removal and salvage and will discontinue the reserve deficiency amortizations currently in effect.

Water §1. Missouri-American Water Company filed proposed tariff sheets designed to implement a general rate increase for water and sewer service. Staff later filed an excessive earnings complaint against Missouri-American Water Company, which was consolidated into this case. The parties subsequently filed three stipulations and agreements, which, among other things, do not provide for an increased revenue requirement in any district. In fact, the revenue requirement stipulation and agreement has a neutral impact in every district except Joplin, where there is a decrease of $350,000, exclusive of taxes. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the rate design stipulation and agreement.

Water §16. The revenue requirement agreed to in the stipulation and agreement has a neutral impact on every district except Joplin, where there is a decrease. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to shifts contained in the rate design stipulation and agreement.

The revenue requirement stipulation and agreement provides that the current Infrastructure Replacement Surcharge (ISRS) will be set to zero on April 16, 2004. It also provides that the company will not file a tariff seeking a new ISRS prior to December 16, 2005, and provides that in any ISRS filing after that date, the company will use a specified weighted cost of capital (common equity 3.91%, preferred equity 0.39%, debt 3.4%, total: 7.70%).

Water §20. The revenue requirement stipulation and agreement provides that the company will implement certain new depreciation rates and provides that the company will develop new district-specific historical databases for use in future rate cases. It also provides that as of January 1, 2004, the company will begin expensing cost of removal and salvage and will discontinue the reserve deficiency amortizations currently in effect.

ORDER APPROVING STIPULATIONS AND AGREEMENTS

Syllabus:

This order approves the settlement by the parties of Missouri-American Water Company's general rate case.

Procedural History:

On May 19, 2003, Missouri-American Water Company submitted to the Missouri Public Service Commission its proposed tariff sheets intended to implement a general rate increase for water and sewer service. The proposed tariff sheets were issued on May 19, 2003, with a requested effective date of June 18, 2003. The proposed water service tariffs are designed to produce approximately $20 million in additional gross annual water revenues excluding gross receipts and sales taxes, about a 12.2% increase over existing water revenues. The proposed sewer service tariffs are designed to produce an additional $1,637 in gross annual sewer revenues (excluding gross receipts and sales taxes), a 3.3% increase over existing sewer revenues. On May 29, 2003, the Commission suspended the proposed tariff sheets for a period of 120 days plus an additional six months, until April 16, 2004.

On June 30, the Commission granted the unopposed applications to intervene of AG Processing, Inc.; the Cities of Jefferson, Joplin, Riverside, and Warrensburg; Public Water Supply Districts Nos. 1 and 2 of Andrew County and No. 1 of DeKalb County; Empire District Electric Company; the Missouri Energy Group, consisting of three hospital systems and a manufacturer;[1] the Missouri Industrial Energy Consumers, an association of six St. Louis area manufacturers;[2] and the St. Joseph Water Rate Coalition, a group of twelve St. Joseph-area governmental, commercial and industrial water users.[3] On July 2, the Commission also granted intervention to Local 335 of the Utility Workers Union of America, AFL-CIO.

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[1] Barnes-Jewish Hospital, Emerson Electric Company, SSM HealthCare System and St. Johns Mercy Health Care.

[2] Boeing, Daimler Chrysler, Ford Motor Company, Hussman Refrigeration, Monsanto, and Pharmacia.

[3] City of St. Joseph, Buchanan County, St. Joseph School District, St. Joseph Chamber of Commerce, AG Processing, Artesian Ice & Cold Storage, Heartland Health, Hillyard Companies, Johnson Controls, Phoenix Scientific, Prime Tanning Corp., and Sara Lee.

The Commission adopted a procedural schedule on July 17. The Commission convened Local Public Hearings on the proposed rate increases at Riverside and St. Joseph on October 15; at Jefferson City on October 22; at Warrensburg on October 29; at Brunswick and Mexico on November 5; at Joplin on November 12; and at St. Charles and Chesterfield on December 3. The Commission heard the testimony of 65 witnesses and received four exhibits at the local public hearings.

In its Suspension Order of May 29, as is its practice, the Commission authorized its Staff to file an excessive earnings complaint against Missouri-American if the results of its audit suggested that the company was earning more than its authorized rate of return. Accordingly, Staff filed an excessive earnings complaint against Missouri-American on October 1; the complaint action was consolidated into the present case on October 2. In its complaint, Staff alleged that the Company is earning excessive water service revenues amounting to between $19 million and $21 million annually on a total company basis.

The Commission scheduled an evidentiary hearing on December 15 through 23, 2003, and on January 5 through January 9, 2004. The evidentiary hearing began as scheduled on December 15. However, the Commission recessed the scheduled hearings on January 5 and 6 in order to permit settlement discussions to go forward, resulting in the first of the three Stipulations and Agreements filed in this case, filed on January 7, 2004. The hearing then resumed on January 7 and continued through January 12. At the evidentiary hearing, the Commission heard testimony from 25 witnesses and received 108 exhibits.

A true-up hearing was scheduled on February 5 and 6, 2004. However, the true-up hearing was first postponed and then canceled at the request of the parties upon settlement of the remaining contested issues. That settlement is embodied in the second and third Stipulations and Agreements filed herein, on February 24 and on March 4, respectively. Staff filed suggestions in support of each of the three Stipulations and Agreements, on January 7, on March 4, and on March 9.

An on-the-record presentation was set for March 19 and was held that day as scheduled. Thereafter, the Commission requested additional information from the Company, which was provided on March 24.

Discussion:

As described above, the parties have presented their settlement agreement to the Commission in the form of three separate stipulations and agreements. None of these stipulations and agreements were executed by all of the parties to this case; however, under its practice rules, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement if no party requests a hearing within seven days of its filing.[4] No party in this case responded to the filing of a stipulation and agreement with a request for hearing. Consequently, the Commission will deem the proposed settlement to be unanimous.

The stipulations and agreements each contains various standard provisions commonly included in stipulations and agreements filed with the Commission, including the parties' reservation of the right to take contradictory positions in other cases; an assertion of the interdependence of all of the terms and consequent

[4] Commission Rule 4 CSR 240-2.115.

vacation of the agreement if modified by the Commission; the parties' waiver of their rights, contingent on Commission approval of the agreement, to present testimony, to cross-examine witnesses, to present oral argument or written briefs, to a reading of the full transcript by the members of the Commission, and to seek judicial review; that prefiled testimony relating to issues resolved by the agreement shall be received into the record; that Staff shall prepare and file supporting suggestions; and that Staff may provide oral explanations of the agreement as requested by the Commission at an Agenda session.

The Rate Design Stipulation and Agreement

The Rate Design Stipulation and Agreement filed on January 7 addressed, in addition to rate design, inter-district subsidies, consolidated billing, a customer class study, an interruptible industrial rate for the Joplin District, and elimination of the minimum usage amount from the Jefferson City District tariffs and some corresponding adjustments to the volumetric rates for that district. The agreed rate design is based on the current rate design, with certain adjustments. No rate adjustments will be made in the St. Louis County District, the St. Charles County District, and the Jefferson City District. Only the customer classes receiving adjustments are referred to below. A copy of the Rate Design Stipulation and Agreement is attached hereto as Attachment A.

The agreed rate design is revenue-neutral, that is, it redistributes the current revenue requirement for each district. Any increase or decrease in district-specific revenue requirements must be evenly distributed across the classes in the form of equal percentage changes to each revenue classification for each customer class and by applying a uniform change to each volumetric rate component for each revenue classification.

The Rate Design Stipulation and Agreement provides that the Brunswick District will receive a subsidy of $213,000 from the St. Louis County District. There will be no other inter district subsidies. Rates for Sale-for-Resale (that is, rates for sales to Public Water Supply Districts) in the Brunswick District will be reduced by 5% and the rates for Residential and Commercial customers will be increased by 3.78% in order to more accurately reflect the true cost of providing water service to these customer classes.

The Rate Design Stipulation and Agreement provides that the rates for Sale-for-Resale (Public Water Supply Districts) in Joplin will be reduced by 10% and the rates for Residential and Commercial will be increased by 1.38% in order to more accurately reflect the true cost of providing water service to these customer classes. It also provides that an interruptible rate may be tariffed in Joplin under conditions that will effectively limit it to the Empire District Electric Company.

The Rate Design Stipulation and Agreement provides that the rates for Sale-for-Resale (Public Water Supply Districts) in Mexico will be reduced by 10% and the rates for Residential and Commercial will be increased by 2.64% in order to more accurately reflect the true cost of providing water service to these customer classes.

In the Platte County District, the Rate Design Stipulation and Agreement provides that a single, declining-block rate structure will be implemented, reducing rates for Sale-for-Resale (Public Water Supply Districts) by 26.5%, reducing rates for Other Public Authority by 8.22%, and raising Residential rates by 2.96%,

Commercial rates by 4.45%, and Industrial rates by 48.09%, in order to more accurately reflect the true cost of providing water service to these customer classes.

The Rate Design Stipulation and Agreement provides that the rates for Sale-for-Resale (Public Water Supply Districts) in St. Joseph will be reduced by 14.57% and rates for Industrial customers will be reduced by 11.22%, and the rates for Residential customers will be increased by 7.7% and the rates for Commercial customers will be increased by 5.7%, in order to more accurately reflect the true cost of providing water service to these customer classes. It further provides that the property tax surcharge will remain unchanged.

The Rate Design Stipulation and Agreement provides that the rates for Sale-for -Resale (Public Water Supply Districts) in Warrensburg will be reduced by 10% and the rates for Residential and Commercial customers will be increased by 1.77%, in order to more accurately reflect the true cost of providing water service to these customer classes.

The Rate Design Stipulation and Agreement provides that no public fire hydrant charges will be applied in any district where they don't already exist; however, they will continue in districts where they do already exist.

The Rate Design Stipulation and Agreement provides that the Company will collect data sufficient to allow a study of current customer classes and will share the data with the other parties prior to the next rate case. It provides that the Company will also perform and share with the parties a study on the reasonableness of consolidated billing for owners of contiguous, owner-operated properties.

The Rate Design Stipulation and Agreement provides that the volumetric rates in Jefferson City will be adjusted to eliminate the minimum usage amount presently contained in the monthly service charge.

The Rate Design Stipulation and Agreement provides that the Company may implement the connection fees for new service proposed in its initial filing. These are an increase for a 3/4 inch single meter line from $425 to $552 and an increase for a 3/4 inch dual service line from $600 to $778. These charges had not changed since 1993.

The Revenue Requirement Stipulation and Agreement

The Revenue Requirement Stipulation and Agreement was filed on February 24. The Revenue Requirement Stipulation and Agreement resolves many of the 31 issues relating to revenue requirement and to miscellaneous matters defined by the parties. In addition to revenue requirement, the agreement resolves issues relating to depreciation, reporting of data to Staff and Public Counsel, infrastructure replacement, and customer service. A copy of the Revenue Requirement Stipulation and Agreement is attached hereto as Attachment B.

The Revenue Requirement Stipulation and Agreement does not provide for an increased revenue requirement in any district; however, it does provide for a decrease of $350,000, exclusive of taxes, in the Joplin District. Thus, the agreed revenue requirement has a neutral impact in every district except Joplin, where there is a decrease. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the Rate Design Stipulation and Agreement, discussed above.

The Revenue Requirement Stipulation and Agreement provides that, as of January 1, 2004, the Company will implement new depreciation rates as set out in Appendix 1 to the Revenue Requirement Stipulation and Agreement. It further provides that Staff and the Company will collaborate to develop new district-specific historical databases for use in future rate cases. It also provides that, as of January 1, 2004, the Company will begin expensing cost of removal and salvage and will discontinue the reserve deficiency amortizations currently in effect.

The Revenue Requirement Stipulation and Agreement provides that the current Infrastructure Replacement Surcharge (ISRS) will be set to Zero on April 16, 2004. It provides that the Company will not file a tariff seeking a new ISRS prior to December 16, 2005. It also provides that, in any ISRS filing after December 16, 2005, the Company will use a specified weighted cost of capital (Common Equity 3.91%, Preferred Equity 0.39%, Debt 3.40%, Total: 7.70%). The parties' agreement restricts any ISRS filing after December 15, 2005, to only include investments made after November 30, 2003, and, further, may not include any investments with respect to Rate J customers until after the date rates become effective in the Company's *next* rate case. In addition, the Company may not seek to recover the foregone Rate J investments from any other customer class, either by an ISRS or in a rate case.

The Revenue Requirement Stipulation and Agreement provides that the Company will spend at least the following amounts in the St. Louis District for infrastructure replacement for water utility plant projects:

2004: 12 million dollars
2005: 18 million dollars
2006: 25 million dollars

It provides that neither the Company, Staff nor Public Counsel may file a general rate increase or decrease case for Missouri-American before December 31, 2005, unless a significant and unusual event occurs that has a major impact on the Company.

It also provides that the Company, Staff and the Public Counsel will cooperate to obtain promulgation of a Commission rule on affiliate transactions applicable to Company and its affiliates by April 16, 2005. The Company will provide copies to Staff and Public Counsel of all statutes and rules relating to affiliate transactions now in effect in any state in which American Water Works or a subsidiary operates.

The Revenue Requirement Stipulation and Agreement provides that the Company will provide its updated Cost Allocation Manual (CAM) to Staff and Public Counsel by March 16 each year, including various monthly and annual reports. The Company will provide monthly/quarterly billing aggregates data to Staff. The Company will respond to inquiries from the Commission's Consumer Services Department within three business days, except that it will respond within 24 hours in cases involving service interruption. The Company will continue, and will also expand, its Call Center performance reporting. The Company will include bill consolidation in the St. Louis District in the tariffs it files in its next general rate case.

The Company explained, in its filing of March 24, that a strong inducement for accepting the settlement, that includes a slight rate decrease, is the beneficial effect on earnings produced by the agreed reduction in depreciation expense.

The Fire Suppression Stipulation and Agreement

The Fire Suppression Stipulation and Agreement was filed on March 4. It resolves a single issue relating only to the Jefferson City District. A copy of the Fire Suppression Stipulation and Agreement is attached hereto as Attachment C.

The Fire Suppression Stipulation and Agreement provides that the Company, Staff and Jefferson City will cooperate in making a fire suppression study of Missouri-American's Jefferson City District facilities, commencing within 30 days of the effective date of the final order in this case. Jointly, if possible, and separately if necessary, the parties to the study will report their findings to the Commission within twelve months of the effective date of the final order in this case.

Staff's Suggestions

As noted, Staff filed Suggestions in Support of each of the three Stipulations and Agreements. Staff noted that each of the three includes important concessions from the Company to the benefit of ratepayers and the public in general. Staff further pointed out that the Stipulations and Agreements resulted from extensive negotiations among the parties. Each of the Stipulations and Agreements states that its terms are interdependent and the Commission must approve it in its entirety. It is Staff's opinion, with respect to each Stipulation and Agreement, that the settlement is in the public interest and should be approved.

The parties urge the Commission to approve the settlement contained in the three Stipulations and Agreements herein described. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[5] In reviewing the various stipulations submitted by the parties, the Commission notes that[6]

> Every decision and order in a contested case shall be in writing, and, except in default 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. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. Additionally, the Commission makes no findings or conclusions concerning any ratemaking or procedural principle or any methodology adopted in the stipulations and agreements.

The Commission has considered the settlement agreement of the parties as contained in the three Stipulations and Agreements filed herein, together with Staff's suggestions, the Company's filing of March 24, and the comments made at the on-the-record presentation, and concludes that the settlement agreement is just and reasonable and should be approved.

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[5] Section 536.060, RSMo Supp. 2001.

[6] Section 536.090, RSMo Supp. 2001. 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., W.D. 1998).

IT IS THEREFORE ORDERED:

1. That the settlement reached by the parties, as contained in the Rate Design Stipulation and Agreement filed on January 7, 2004 (Attachment A), the Revenue Requirement Stipulation and Agreement filed on February 24, 2004 (Attachment B), and the Fire Suppression Stipulation and Agreement filed on March 4, 2004 (Attachment C), is hereby approved as a resolution of this case.

2. That the parties are ordered to comply with the terms of the settlement agreement of the parties as contained in the Rate Design Stipulation and Agreement filed on January 7, 2004 (Attachment A), the Revenue Requirement Stipulation and Agreement filed on February 24, 2004 (Attachment B), and the Fire Suppression Stipulation and Agreement filed on March 4, 2004 (Attachment C).

3. That the proposed water and sewer service tariff sheets submitted under tariff numbers YW-2003-2012, YW-2003-2013, YW-2003-2014, YW-2003-2015, YS-2003-2060, and YW-2003-2061 on May 19, 2003, by Missouri-American Water Company for the purpose of increasing rates for water and sewer service to customers are hereby rejected. The specific sheets rejected are:

P.S.C. MO. NO. 2, 8th Revised Sheet No. A-1, Canceling 7th Revised Sheet No. A-1
P.S.C. MO. NO. 2, 6th Revised Sheet No. A-2, Canceling 5th Revised Sheet No. A-2
P.S.C. MO. NO. 2, 6th Revised Sheet No. A-3, Canceling 5th Revised Sheet No. A-3
P.S.C. MO. No. 2, Original Sheet No. A-4
P.S.C. MO. NO. 3, 9th Revised Sheet No. 1, Canceling, 8th Revised Sheet No. 1
P.S.C. MO. NO. 3, Original Sheet No. 1a
P.S.C. MO. NO. 3, 7th Revised Sheet No. 2, Canceling 6th Revised Sheet No. 2
P.S.C. MO. NO. 3, 4th Revised Sheet No. 2A, Canceling 3rd Revised Sheet No. 2A
P.S.C. MO. NO. 3, 8th Revised Sheet No. 3, Canceling 7th Revised Sheet No. 3
P.S.C. MO. NO. 3, 9th Revised Sheet No. 4, Canceling 8th Revised Sheet No. 4
P.S.C. MO. NO. 3, 4th Revised Sheet No. 5, Canceling 3rd Revised Sheet No. 5
P.S.C. MO. No. 2, Original Sheet No. 6
P.S.C. MO. NO. 2, 11th Revised Sheet No. 3, Canceling 10th Revised Sheet No. 3
P.S.C. MO. NO. 2, 2nd Revised Sheet No. 21, Canceling 1st Revised Sheet No. 21
P.S.C. MO. No. 2, Original Sheet No. 6
P.S.C. MO. NO. 2, 7th Revised Sheet No. 5, Canceling 6th Revised Sheet No. 5
P.S.C. MO. NO. 2, 8th Revised Sheet No. B-1, Canceling 7th Revised Sheet No. B-1
P.S.C. MO. NO. 2, 6th Revised Sheet No. B-2, Canceling 5th Revised Sheet No. B-2
P.S.C. MO. NO. 2, 6th Revised Sheet No. B-3, Canceling 5th Revised Sheet No. B-3
P.S.C. MO. No. 2, Original Sheet No. B-8
P.S.C. MO. NO. 2, 8th Revised Sheet No. C-1, Canceling 7th Revised Sheet No. C-1
P.S.C. MO. NO. 2, 6th Revised Sheet No. C-2, Canceling 5th Revised Sheet No. C-2
P.S.C. MO. NO. 2, 6th Revised Sheet No. C-3, Canceling 5th Revised Sheet No. C-3
P.S.C. MO. No. 2, Original Sheet No. C-9
P.S.C. MO. NO. 2, 8th Revised Sheet No. E-1, Canceling 7th Revised Sheet No. E-1
P.S.C. MO. NO. 2, 6th Revised Sheet No. E-2, Canceling 5th Revised Sheet No. E-2
P.S.C. MO. NO. 2, 6th Revised Sheet No. E-3, Canceling 5th Revised Sheet No. E-3
P.S.C. MO. No. 2, Original Sheet No. E-10
P.S.C. MO. NO. 1, 11th Revised Sheet No. 1, Canceling 10th Revised Sheet No. 1
P.S.C. MO. NO. 1, 1st Revised Sheet No. 1b, Canceling Original Sheet No. 1b
P.S.C. MO. NO. 1, 9th Revised Sheet No. 2, Canceling 8th Revised Sheet No. 2
P.S.C. MO. NO. 1, 1st Revised Sheet No. 17A, Canceling Original Sheet No. 17A
P.S.C. MO. No. 2, Original Sheet No. 2B

P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT1.0,
Canceling Twelfth Revised Sheet No. RT1.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT2.0,
Canceling Twelfth Revised Sheet No. RT2.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT2.1,
Canceling Twelfth Revised Sheet No. RT2.1
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT2.2,
Canceling Twelfth Revised Sheet No. RT2.2
P.S.C. MO. No. 6, Tenth Revised Sheet No. RT2.3,
Canceling Ninth Revised Sheet No. RT2.3
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT2.6,
Canceling Twelfth Revised Sheet No. RT2.6
P.S.C. MO. No. 6, Eleventh Revised Sheet No. RT4.0,
Canceling Tenth Revised Sheet No. RT4.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT5.2,
Canceling Twelfth Revised Sheet No. RT5.2
P.S.C. MO. No. 6, Twelfth Revised Sheet No. RT6.0,
Canceling Eleventh Revised Sheet No. RT6.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT7.0,
Canceling Twelfth Revised Sheet No. RT7.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT8.0,
Canceling Twelfth Revised Sheet No. RT8.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT9.0,
Canceling Twelfth Revised Sheet No. RT9.0
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT5.1,
Canceling Twelfth Revised Sheet No. RT5.1
P.S.C. MO. No. 6, Thirteenth Revised Sheet No. RT5.0,
Canceling Twelfth Revised Sheet No. RT5.0
P.S.C. MO. No. 2, 9th Revised Sheet No. D-1,
Canceling 8th Revised Sheet No. D-1
P.S.C. MO. No. 2, 6th Revised Sheet No. D-2,
Canceling 5th Revised Sheet No. D-2
P.S.C. MO. No. 2, 6th Revised Sheet No. D-3, Canceling 5th Revised Sheet No. D-3
P.S.C. MO. No. 2, Original Sheet No. D-9
P.S.C. MO. No. 2, 4th Revised Sheet No. 12, Canceling 3rd Revised Sheet No. 12
P.S.C. MO. No. 2, 3rd Revised Sheet No. 4, Canceling 2nd Revised Sheet No. 4

4. That Missouri-American Water Company shall file as soon as practicable, but in no case later than the 15th day after the issue date of this Order, proposed tariff sheets in compliance with the settlement agreement of the parties approved herein.

5. That this order shall become effective on April 16, 2004.

Gaw, Ch., and Clayton, C., concur;
Murray, C., concurs, with separate
concurring opinion attached.

Thompson, Deputy Chief Regulatory Law Judge

Editor's Note: The Rate Design Stipulation and Agreement (Attachment A), the Revenue Requirement Stipulation and Agreement (Attachment B) and the Fire Suppression Stipulation and Agreement (Attachment C) have not been published. If needed, these documents are available in the official case files of the Public Service Commission.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

Although I agree that the Stipulation and Agreement results in just and reasonable rates to current customers and concur in today's order, I am not comfortable with the method adopted for treatment of net salvage/cost of removal. It is my hope, however, that any potential generational inequity created thereby will be corrected in the next general rate case. A return to the traditional rate base treatment of net salvage/cost of removal would appropriately match the cost of the assets to the ratepayers responsible for causing the cost.

In the Matter of the Request of Aquila, Inc. d/b/a Aquila Networks - L&P to Implement a General Rate increase in Electricity.

Case No. ER-2004-0034
Decided April 13, 2004

Rates §104. The Commission issued an order approving a Stipulation and Agreement wherein the parties agreed that the tariff sheets initially filed by Aquila should be rejected and that the Company should be authorized to file revised tariff sheets designed to produce an increase in overall gross annual electric revenue of $14.5 million, for its MPS service area, and $3.25 million for its L&P service area.

Depreciation §12. The Commission issued an order approving a Stipulation and Agreement wherein the parties agreed that Aquila would adopt the Staff of the Commission's method of depreciation, which is "cost of removal less salvage."

Steam §20. The Commission issued an order approving a Stipulation and Agreement wherein the parties agreed that the tariff sheets initially filed by Aquila should be rejected and that the Company should be authorized to file revised tariff sheets designed to produce an increase in overall gross annual revenue of $1.3 million.

ORDER APPROVING STIPULATION AND AGREEMENT

On July 7, 2003, Aquila, Inc., d/b/a Aquila Networks - L&P and Aquila Networks - MPS, submitted to the Missouri Public Service Commission tariff sheets intended to implement general rate increases in electric service of $65 million for MPS and $14.64 million for the L&P division. Also on this date, in a separate matter, Aquila Networks - L&P submitted tariff sheets intended to implement a general rate increase in steam heat service of $1.34 million. With August 4, 2003, as the effective date of both tariffs, the Commission suspended both proposed tariff sheets for 120 days plus six months, until June 2, 2004. The Commission then consolidated both matters with the lead case being ER-2004-0034.

On August 22, 2004, the Commission granted the unopposed applications to intervene of the following entities: Sedalia Industrial Energy User's Association; AG Processing, Inc.; the City of Kansas City, Missouri; the United States Department of Defense and other Federal Executive Agencies; and the Missouri Department

of Natural Resources. The Commission conducted Local Public Hearings in St. Joseph and Raytown, Missouri, and on February 23, 2004, convened the evidentiary hearing. Near the conclusion of the evidentiary hearing, the Commission stayed the proceedings to allow the parties an opportunity to reach an agreement. On March 16, 2004, the parties filed a Unanimous Stipulation and Agreement, which is summarized below. On March 30, 2004, the Staff of the Commission filed suggestions in support of the agreement. And on April 5, 2004, the Commission held an on-the-record presentation of the agreement.

THE AGREEMENT

Revenue Requirement

The parties agree that the proposed tariff sheets filed by Aquila should be rejected and that the Company should be authorized to file revised tariff sheets designed to produce an increase in overall gross annual electric revenues of $14.5 million, for its MPS service area, and $3.25 million for its L&P service area. With regard to the steam portion of the L&P service area, the parties agree that Aquila should be authorized to file revised tariff sheets designed to produce an increase in overall gross annual revenue of $1.3 million.

AG Processing Special Contract

Aquila agrees to grant AG Processing, an industrial steam customer, a five-year contract whereby AG Processing will pay the applicable tariff amount and receive a $35,000 credit, not to exceed the amount billed for that month. As a condition of the credit, AG Processing must maintain a 70% load factor for the month. After five years, either party may cancel the contract with written notice provided 12 months prior to the intended termination.

Interim Energy Charge

The parties agree that the fuel and purchased power expense issues in this case be resolved by implementation of an Interim Energy Charge. The charge is to include a specific, permanent annual amount of the Missouri jurisdictional electric costs of fuel and purchased power. The charge will also include an additional amount of variable fuel and purchased power cost on an interim basis, subject to true-up and refund.

The permanent amount for MPS electric operations is $87,700,206. The amount subject to true-up and refund is $16.1 million. The permanent amount for L&P electric is $22,705,656. And the amount subject to true-up and refund is $2.4 million. The specific amount to be included in retail rates on a permanent basis for L&P industrial steam operations is $4,374,480, with no amount subject to refund.

Tariff and Implementation

The parties attached illustrative tariff sheets to the Stipulation and Agreement. The parties agree that, in its order approving the agreement, the Commission is to order Aquila to file tariff sheets to become effective on the effective date of the order approving the agreement.

Reliability Reporting

Aquila agrees to provide to the Staff of the Commission certain Call Center data within 21 days after the last day of the month to which the information relates. Aquila also agrees to provide to any party in this matter, on a quarterly basis, Momentary Average Interruption Frequency Index data. Aquila agrees to provide this monthly information until Aquila's financial condition reaches investment grade and the Staff determines that Aquila's customer service and reliability performance no longer require monthly reporting to Staff. Thereafter, Aquila will provide the information on a quarterly basis.

Depreciation

The parties agree that Aquila shall adopt Staff's recommended method of depreciation - cost of removal less salvage. For ratemaking purposes, the net cost of removal is $1,471,339 for MPS, $454,995 for L&P electric and $24,382 for L&P steam. Aquila is to record the difference between these amounts and Aquila's actual net costs of removal in its accumulated depreciation reserve. In Aquila's next general rate case, the parties agree to review this method to determine if this is how Aquila will continue to treat depreciation.

Miscellaneous Service Matters

The parties agree that for Aquila's electric and steam operation the following shall apply:

a. The late payment charge will be ½ percent per month of the original net amount due on the delinquent bill.

b. The customer deposit interest for the year will be one percentage point above the prime rate as published in the *Wall Street Journal*.

c. With the exception of special meter reading, temporary meter sets and collection charges, the miscellaneous charges for electric service will be as outlined in the rebuttal testimony of Staff witness William McDuffey.

d. The special meter reading charges will be $12 for MPS and $16 for L&P service areas.

e. The temporary meter set charge for electric service will be $100 for MPS and L&P service areas

f. The collection charge for electric service will be $25 for both MPS and L&P service area.

Weatherization

Aquila agrees that prior to January 1, 2005, it will supply, through shareholder funds, a one-time funding of $75,000 to conduct tall tower wind assessments as described in the direct testimony of Missouri Department of Natural Resources' witness Anita Randolph. Aquila also agrees to fund, on an annual basis until its

next general electric rate case, $93,500 that may be used for a low-income weatherization program. Aquila agrees to work with MDNR to apply for any federal grant opportunities and with MDNR and the City of Kansas to explore processes and implementations already in place in Iowa or Minnesota.

Tax Study

Aquila will continue, for purposes of this Stipulation and Agreement, to calculate straight-line tax depreciation in accordance with Staff's method.

Customer Service Inquiries

Aquila agrees to respond to inquiries from Staff's Customer Service Department within three business days. Aquila agrees to respond to Staff's inquiries concerning interruption of service within 24 hours.

Billing Determinants

The parties agree to use Staff's billing determinants to develop the rates in this case.

Aries Information

Aquila agrees to store all information regarding the Aries plant and to make the information reasonably available for inspection.

Pensions

The parties agree that the amounts to be included in rates for annual provision of pensions, prior to capitalization, shall be: $1,470,509 for MPS; $8,858 for L&P electric; and $261 for L&P steam. The parties agree that Aquila will record the difference between the ERISA minimum and the annual provision for pension cost as a regulatory assets or liability to be amortized over a five-year period and included in Aquila's next rate case.

The parties further agree that MPS rates include a $2,110,436 annual provision for MPS electric jurisdictional prepaid pension amortization, $2,252,742 for L&P electric and $98,687 for L&P steam. For MPS the amortization period will be 5 1/2 years. For L&P the amortization will be 9 1/4 years.

Integrated Resource Planning

Aquila agrees to conduct a presentation concerning its resources plans to Staff, the Office of the Public Counsel and the Missouri Department of Natural Resources. All other parties to this matter will also be invited. Additionally, Aquila agrees to file every two years details of its resource planning covering at least a ten-year time frame.

Steam Operation

The parties agree that expenses for L&P steam operation will be allocated for ratemaking. The parties also agree that Aquila should be granted a waiver from the Commission requirement that such expenses be booked monthly. Aquila shall conduct annual studies of its steam operations and report the same to Staff and AG Processing.

Books and Record-Keeping

Aquila and the Office of the Public Counsel agree to meet each month over the next six months to resolve concerns regarding Aquila's books and records.

Cost of Capital

Until Aquila attains an investment grade rating and a company-specific discounted cash flow analysis can be performed on Aquila, Aquila agrees not to seek a cost of capital that is higher than comparable electric utilities with an investment grade rating.

Litigation

Upon an order approving this Stipulation and Agreement becoming final, AG Processing and Public Counsel agree to dismiss any pending actions regarding the merger of UtiliCorp United and St. Joseph Light & Power.

Moratorium

Aquila agrees not to seek a general rate increase within 13 months after the effective date of the tariffs in this rate case. Aquila further agrees that no increase in rates shall become effective prior to the termination of the Interim Energy Charge.

DISCUSSION

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[1] In reviewing the Unanimous Stipulation and Agreement submitted by the parties, the Commission notes that Section 536.090, RSMo 2000, provides that the Commission need not make either findings of fact or conclusions of law in this order. Additionally, the Commission makes no findings or conclusions concerning any ratemaking or procedural principle or any methodology adopted in the stipulation and agreement.

Upon review of the Unanimous Stipulation and Agreement and considering the various interests the parties to the agreement represent, the Commission finds the agreement would result in just and reasonable rates. The Commission will therefore approve the agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on March 16, 2004, is approved as a resolution of all issues in this case.

2. That the parties are ordered to comply with the terms of the Unanimous and Agreement.

3. That all pending motions are denied as moot.

4. That the proposed tariff sheets filed on July 3, 2003, by Aquila, Inc. d/b/a Aquila Networks - MPS are rejected.

5. That the proposed tariff sheets filed on July 3, 2003, by Aquila, Inc. d/b/a Aquila Networks - L&P are rejected.

6. That Aquila Inc., d/b/a Aquila Networks - MPS shall file tariff sheets in the form of the tariff sheets included with the Unanimous Stipulation and Agreement.

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[1] Section 536.060, RSMo 2000.

7. That Aquila, Inc. d/b/a Aquila Networks - L&P shall file tariff sheets in the form of the tariff sheets included with the Unanimous Stipulation and Agreement.

8. That the tariff sheets filed in the form of the tariff sheets attached to the Unanimous Stipulation and Agreement are to be filed with an effective date of April 22, 2004.

9. That this case shall become effective on April 22, 2004.

Gaw, Ch., concurs, with separate concurring opinion to follow;
Murray, C., concurs, with separate concurring opinion attached;
Clayton, C., concurs.

Jones, Regulatory Law Judge

Editor's 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 Missouri Public Service Commission.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

Although I agree that the Stipulation and Agreement results in just and reasonable rates to current customers and concur in today's order, I am not comfortable with the method adopted for treatment of net salvage/cost of removal. It is my hope, however, that any potential generational inequity created thereby will be corrected in the next general rate case. A return to the traditional rate base treatment of net salvage/cost of removal would appropriately match the cost of the assets to the ratepayers responsible for causing the cost.

In the Matter of the Joint Application of Union Electric Company d/b/a AmerenUE, Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P for an Order Authorizing Sale and Transfer of Certain Assets of Aquila, Inc. Located in Missouri to AmerenUE and Either Authorizing the Transfer of Existing Certificates of Public Convenience and Necessity, or Granting a New Certificate of Public Convenience and Necessity to AmerenUE in Conjunction with Same.

Case No. GM-2004-0244
Decided April 20, 2004

Gas §6. The Commission determined that the sale and transfer of Aquila's Eastern System from Aquila to AmerenUE was not detrimental to the public interest, and approved the sale.

ORDER APPROVING STIPULATION AND AGREEMENT

On December 3, 2003, the Union Electric Company d/b/a AmerenUE, Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P filed an application for authority to transfer certain assets from Aquila to Ameren. The transaction basically consists of the sale of Aquila's Eastern System to AmerenUE. Notice and the opportunity to intervene was provided, and no entity sought intervention.

On March 30, 2004, the parties[1] filed a unanimous stipulation and agreement. In the agreement, the parties state that as a result of discussions at and after the prehearing conference, they have reached an agreement that they believe to be reasonable, and recommend the Commission approve as being in the public interest. The parties state that they have structured their agreement so that the sale and transfer of the Eastern System from Aquila to AmerenUE is not detrimental to the public interest. On April 8, 2004, Staff filed suggestions in support of the agreement. Staff stated that:

> This Stipulation assures that the current customers of AmerenUE, and those customers currently identified as Aquila's Eastern System customers are protected from detriment. Aquila Networks - MPS and L&P customers are not expected to suffer any detriment as a result of this transfer, and will continue to receive safe and reliable service from Aquila. Those customers currently identified as Aquila's Eastern System customers will, upon transfer, receive safe and reliable service from AmerenUE.
>
> …
>
> This Stipulation and Agreement addresses any concerns of the Staff regarding this sale and transfer and this agreement has been structured in such a way that the sale and transfer of the Eastern System from Aquila to AmerenUE is not detrimental to the public interest. All known detriments with regard to rates and service have been addressed at this time and there are sufficient benefits for Staff to recommend approval of this transfer.

On April 20, Staff filed a pleading in which it clarified that the assets involved in this transaction "will be transferred at the net book value at the time of the closing, so there will be no acquisition adjustment as a result of this transfer."

The Commission has considered the unanimous stipulation and agreement, the pleadings and the prefiled testimony, and the Staff Memorandum. The Commission finds that the agreement is a reasonable resolution of the issues

[1] The parties to this case are Union Electric Company d/b/a AmerenUE, Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P, the Staff of the Commission, and the Office of the Public Counsel.

raised and also finds that the transfer will not be detrimental to the public interest, and will approve it.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on March 30, 2004, is approved, and the parties shall carry out the terms and requirements therein.

2. That Union Electric Company d/b/a AmerenUE is authorized to file tariffs in conformance with the illustrative tariffs attached to the Stipulation and Agreement.

3. That this order shall become effective on April 30, 2004.

Gaw, Chm., Murray and Clayton, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Editor's 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 Fidelity Telephone Company for Authority to File, Establish, and Put into Effect New, Increased, or Revised Rates and Charges for Telephone Service.

Case No. IR-2004-0272
Decided April 20, 2004

Telephone §14. Although Fidelity Telephone Company initially sought a rate increase that would increase its annual revenue by $2,359,972, the Commission approved a unanimous Stipulation and Agreement between the Staff of the Commission and Fidelity whereby an increase in Fidelity's rates would result in a $1,625,000 increase in the company's annual revenue.

Evidence, Practice and Procedure §30. Where no party files a timely objection thereto, the Commission may treat a Stipulation and Agreement as unanimous even though all of the parties to the matter have not entered into the Agreement.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus:

This order approves the settlement by the parties of Fidelity Telephone Company's general rate case.

Procedural History:

On December 30, 2003, Fidelity Telephone Company submitted to the Missouri Public Service Commission proposed tariff sheets intended to implement a general rate increase for telephone service provided to customers in the Missouri service area of the Company. The requested effective date was January 29, 2004. The proposed sheets were designed to produce an annual revenue increase of $2,359,972, an increase of approximately 29.93 percent. With its tariff sheets,

Fidelity also filed prepared direct testimony in support of its requested rate increases. On May 29, 2003, the Commission suspended the proposed tariff sheets for a period of 150 days beyond January 29, 2004, until June 27, 2004.

On January 30, the Commission convened a Prehearing Conference. At the Prehearing Conference, the Presiding Officer took up and granted the unopposed applications to intervene of Southwestern Bell Telephone, L.P., doing business as SBC Missouri, and AT&T Communications of the Southwest, Inc.

The Commission adopted a procedural schedule on February 25. Pursuant to the procedural schedule, the parties prepared and filed prefiled testimony. The Commission convened Local Public Hearings on the proposed rate increases at Gerald and Sullivan on March 9, and heard testimony from ratepayers. The Commission scheduled an evidentiary hearing on April 7 through 9, 2004. However, on March 26, Fidelity moved on behalf of all parties to cancel the remaining procedural schedule because a settlement had been reached. That settlement is embodied in the Stipulation and Agreement filed herein on March 29. Staff filed suggestions in support of the Stipulation and Agreement on April 5.

Discussion:

As described above, the parties have presented their settlement agreement to the Commission in the form of a stipulation and agreement. The stipulation and agreement was not executed by all of the parties to this case; however, under its practice rules, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement if no party requests a hearing within seven days of its filing.[1] No party in this case responded to the filing of the stipulation and agreement with a request for hearing. Consequently, the Commission will deem the proposed settlement to be unanimous.

The stipulation and agreement contains various standard provisions commonly included in stipulations and agreements filed with the Commission, including the parties' reservation of the right to take contradictory positions in other cases; an assertion of the interdependence of all of the terms and consequent vacation of the agreement if modified by the Commission; the parties' waiver of their rights, contingent on Commission approval of the agreement, to present testimony, to cross-examine witnesses, to present oral argument or written briefs, to a reading of the full transcript by the members of the Commission, and to seek judicial review; that prefiled testimony relating to issues resolved by the agreement shall be received into the record; that Staff shall prepare and file supporting suggestions; and that Staff may provide oral explanations of the agreement as requested by the Commission at an Agenda session.

The Stipulation and Agreement

The Stipulation and Agreement filed on March 29 provides for a revenue increase on an annual basis of $1,625,000, a figure substantially less than the $2,359,972 originally sought by Fidelity. Consequently, Fidelity will raise its rates for various local and access services as detailed on Attachment 1 to the Stipulation and Agreement. Additionally, Fidelity has agreed to implement new depreciation

[1] Commission Rule 4 CSR 240-2.115.

rates as suggested by Staff and detailed on Attachment 2 to the Stipulation and Agreement. Fidelity has also agreed to notify all of its customers by bill insert of the availability of Lifeline and Linkup services. Finally, the Stipulation and Agreement specifies that Intervenors SBC and AT&T, while not signatories, have no objection to the settlement.

Staff's Suggestions

As noted, Staff filed Suggestions in Support of the Stipulation and Agreement. Staff noted that it includes important concessions from the Company to the benefit of ratepayers and the public in general. Staff further pointed out that the Stipulation and Agreement resulted from extensive negotiations among the parties. The Stipulation and Agreement states that its terms are interdependent and the Commission must approve it in its entirety. It is Staff's opinion, with respect to the Stipulation and Agreement, that the settlement is in the public interest and should be approved.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[2] In reviewing the stipulation and agreement submitted by the parties, the Commission notes that[3]

> Every decision and order in a contested case shall be in writing, and, except in default 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. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. Additionally, the Commission makes no findings or conclusions concerning any ratemaking or procedural principle or any methodology adopted in the stipulation and agreement.

The Commission has considered the settlement agreement of the parties as contained in the Stipulation and Agreement filed herein, together with Staff's suggestions, and concludes that the settlement agreement is just and reasonable and should be approved.

IT IS THEREFORE ORDERED:

1. That the settlement reached by the parties, as contained in the Stipulation and Agreement filed on March 29, 2004 (Attachment A), is hereby approved as a resolution of this case.

2. That the parties are ordered to comply with the terms of the settlement agreement of the parties as contained in the Stipulation and Agreement filed on March 29, 2004 (Attachment A).

3. That the proposed telephone service tariff sheets submitted on December 30, 2003, by Fidelity Telephone Company, for the purpose of increasing rates for telephone service to customers, are hereby rejected. The specific sheets rejected are:

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[2] Section 536.060, RSMo Supp. 2001.

[3] Section 536.090, RSMo Supp. 2001. 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., W.D. 1998).

P.S.C. MO No. 1

10th Revised Sheet No. A, Cancels 9th Revised Sheet No. A
3rd Revised Sheet No. 10, Cancels 2nd Revised Sheet No. 10
8th Revised Sheet No. 13, Cancels 7th Revised Sheet No. 13
3rd Revised Sheet No. 13.1, Cancels 2nd Revised Sheet No. 13.1
8th Revised Sheet No. 15.2, Cancels 7th Revised Sheet No. 15.2
8th Revised Sheet No. 15.3, Cancels 7th Revised Sheet No. 15.3
1st Revised Sheet No. 19.1, Cancels Original Sheet No. 19.1
2nd Revised Sheet No. 28.6, Cancels 1st Revised Sheet No. 28.6
5th Revised Sheet No. 29, Cancels 4th Revised Sheet No. 29
2nd Revised Sheet no. 28.8, Cancels 1st Revised Sheet No. 28.8
5th Revised Sheet No. 29, Cancels 4th Revised Sheet No. 29
3rd Revised Sheet No. 29.1, Cancels 2nd Revised Sheet No. 29.1
1st Revised Sheet No. 29.2, Cancels Original Sheet No. 29.2
1st Revised Sheet No. 35, Cancels Original Sheet No. 35
1st Revised Sheet No. 40.1, Cancels Original Sheet No. 40.1;

P.S.C. MO No. 2

1st Revised Sheet 37, Cancels Original Sheet 37;

P.S.C. MO No. 6

5th Revised Page 1, Cancels 4th Revised page 1
5th Revised Page 1.1, Cancels 4th Revised page 1.1
1st Revised Page 7, Cancels Original Page 7
4th Revised Page 51, Cancels 3rd Revised Page 51
7th Revised Page 51.1, Cancels 6th Revised page 51.1
1st Revised page 78, Cancels Original Page 78
1st Revised Page 79, Cancels Original Page 79
1st Revised Page 95, Cancels Original Page 95
1st Revised Page 96, Cancels Original Page 96
2nd Revised Page 101, Cancels 1st Revised Page 101
3rd Revised Page 102, Cancels 2nd Revised Page 102

and

P.S.C. MO No. 9

2nd Revised Sheet No. 11, Cancels 1st Revised Sheet No. 11
2nd Revised Sheet No. 13, Cancels 1st Revised Sheet No. 13

4. That Fidelity Telephone Company may file proposed tariff sheets in compliance with the settlement agreement of the parties approved herein.

5. That this order shall become effective on April 30, 2004.

Gaw, Ch., and Clayton, C., concur;
Murray, C., concurs, with separate
concurring opinion to follow.

Thompson, Deputy Chief Regulatory Law Judge

Editor's 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.

Concurring Opinion of Commissioner Murray

Although I voted for the order, I write today to express my concern and disappointment at the parties' agreement to raise Fidelity's access rates. While Fidelity's access rates are not among the highest in the state, I believe that Missouri's access rates are generally too high and, for many rural carriers, create a barrier to competition. When additional revenue is needed, I prefer that it be found elsewhere.

In the Matter of Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P, Natural Gas General Rate Increase.

Case No. GR-2004-0072
Decided April 22, 2004

Gas §1. The Commission approved the unanimous Stipulation and Agreement of the parties, finding that it was just and reasonable and should be approved. The Stipulation and Agreement provides for a revenue increase on an annual basis of $2,600,000, exclusive of applicable fees and taxes, for the Northern System and the Southern System of the company's MPS service areas. The Stipulation and Agreement also provides for a revenue increase, on an annual basis, exclusive of applicable taxes and fees, of $836,542 for the L&P service areas.

Gas §7. The Commission found that it has the legal authority, pursuant to Section 536.060, RSMo 2000, to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in the case.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus:

This order approves the settlement by the parties of rate case of Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P.

Procedural History:

On August 1, 2003, Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P, submitted to the Commission proposed tariff sheets intended to implement a general rate increase for natural gas service provided to customers in the Missouri service area of the company. The proposed natural gas service sheets bore an effective date of September 1, 2003, and were designed to produce an annual increase in revenue of $5.6 million for Aquila Networks -MPS and an annual increase in revenues of $.08 million for Aquila Networks - L&P. [1] On August 20, 2003, the Commission suspended the proposed tariff sheets until June 30, 2004.

On September 10, 2003, the Commission granted the unopposed applications to intervene of the Sedalia Industrial Energy Users Association, Cornerstone Energy, Inc., and the Missouri Department of Natural Resources. The Commission later granted, over Aquila's objections, intervention to the City of Kansas City. The

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[1] Aquila later amended its proposed rate increase to $6,403,984 in its MPS North and South service areas; $1,418,328 in its Eastern System servicing Rolla, Salem and adjacent areas; and $810,000 plus miscellaneous fee increases in its L&P service area.

Commission conducted local public hearings in Marshall, Maryville, Nevada, Platte City, Rolla, and Sedalia.

On March 24, 2004, the parties filed a unanimous Stipulation and Agreement. Staff filed its Suggestions in Support of Stipulation and Agreement on March 29, 2004. The Commission conducted an On-the-Record Presentation regarding the Agreement on March 30, 2004.

The Stipulation and Agreement:

The Stipulation and Agreement filed on March 24 provides for a revenue increase on an annual basis of $2,600,000, exclusive of applicable fees and taxes, for the Northern System and the Southern System of the company's MPS service areas. The Agreement also provides for a revenue increase on an annual basis, exclusive of applicable fees and taxes, of $836,542 for the L&P service areas. The parties attached illustrious tariff sheets to the Stipulation and Agreement. The Agreement indicates that the parties agree to use their best efforts to achieve implementation of the Stipulation and Agreement with tariffs effective on April 15, 2004, for the MPS service areas and tariffs effective July 1, 2004, for the L&P service areas. [2] The Agreement also provides that it is conditioned upon the Commission's grant of authority to sell and transfer certain assets from Aquila to Union Electric Company d/b/a AmerenUE, which is the subject of Commission Case No. GM-2004-0244. The Commission issued an order in that case on April 20, 2004, approving the parties' settlement agreement regarding the sale of Aquila's Eastern System to AmerenUE.

As noted above, Staff filed its Suggestions in Support of Stipulation and Agreement on March 29. Staff contends that the settlement is reasonable and should be approved by the Commission. The settlement includes the following provisions: it requires Aquila to report quality of service data to the Commission's Staff and to the Office of the Public Counsel; it requires Aquila to use Staff's average service lives and depreciation rates for purposes of depreciation; it provides funding for implementation of experimental programs to assist low-income customers; and it binds Aquila to respond to inquiries from the Commission's Consumer Services Department generally within three business days, but within 24 hours on matters involving interruption of service. Furthermore, Aquila agrees not to make an Infrastructure System Replacement Surcharge (ISRS) filing prior to the effective date of its next natural gas rate case, and agrees that in future rate cases it will not seek a cost of capital that is higher than a group of comparable gas companies with an investment grade rating.

Staff also notes that pursuant to the settlement, the illustrative tariffs continue to allow for separate customer and energy charges for the company's MPS customers and its L&P customers. However, the illustrative tariff sheets do consolidate many of the tariffed rules, regulations, and miscellaneous charges. In

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[2] The Agreement appears to suggest that it must be approved in time to have tariffs effective by April 15, 2004, for the MPS service areas. At the On-the-Record Presentation, however, the parties agreed that the April 15th date was not meant to force the Commission to issue its order by that date. The parties agreed to amend the Stipulation and Agreement to remove that apparent requirement.

addition, Staff indicates that the Residential rates were designed so that, to the extent possible, all residential customers would receive the same percentage increase in their total bill. And as for Aquila's commercial and industrial customers, Staff states that the new tariff classes should allow for rates that more accurately reflect the cost to serve these customers by creating rate classes that group customers with similar characteristics.

Decision:

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.[3] The Commission has considered the settlement agreement of the parties as contained in the Stipulation and Agreement, together with Staff's suggestions, and concludes that the settlement agreement is just and reasonable and should be approved.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement (Attachment A), filed on March 24, 2004, is approved as a resolution of this case.

2. That the parties are ordered to comply with the terms of the settlement agreement of the parties as contained in the Stipulation and Agreement filed on March 24, 2004 (Attachment A).

3. That the proposed natural gas service tariff sheets (Tariff File No. YG-2004-1281) submitted by Aquila, Inc., d/b/a Aquila Networks - L&P and Aquila Networks - MPS, on August 1, 2003, are hereby rejected.

4. That Aquila, Inc., d/b/a Aquila Networks - L&P and Aquila Networks - MPS, may file proposed tariff sheets in compliance with the settlement agreement approved herein.

5. That this order shall become effective on May 1, 2004.

Gaw, Ch., Murray, and
Clayton, CC., concur.

Ruth, Senior Regulatory Law Judge

Editor's 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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[3] Section 536.060, RSMo 2000.

In the Matter of the Investigation into the Earnings of Cass County Telephone Company.

Case No. IR-2004-0354
Decided April 29, 2004

Telecommunications §14. The Commission approved a unanimous stipulation and agreement that resolved Staff's earnings investigation by reducing the company's annual gross intrastate revenues through rate reductions.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

On February 5, 2004, the Staff of the Commission, Cass County Telephone Company, and the Office of the Public Counsel filed a unanimous stipulation and agreement that would resolve Staff's earning investigation by reducing Cass County Telephone's gross intrastate revenues by approximately $319,998 per year. Local ratepayers would receive a $154,948 reduction in Tier 4 and Tier 5 MCA rates, interexchange carriers would receive a $154,948 reduction in terminating carrier common line rates, and local governments would receive a $10,102 rate reduction for enhanced E911 service. The stipulation and agreement also establishes revised depreciation rates for the company's use and establishes a three-year rate moratorium. A copy of the stipulation and agreement is attached to this order.

Staff filed suggestions in support of the stipulation and agreement on March 12. Public Counsel filed a pleading supporting the stipulation and agreement on March 19. Staff and Public Counsel both indicate that after they entered into and filed the stipulation and agreement they became aware of a federal criminal indictment against USP&C, a company with alleged ties to Cass County Telephone. Staff indicated that it investigated the allegations and found no evidence that would justify delaying the effectiveness of the agreed upon rate reductions for the customers of Cass County Telephone. Staff stated that its audit of Cass County Telephone's books did not reveal any misconduct by Cass County Telephone. Staff further indicated that there is nothing in the stipulation and agreement that would preclude it from further investigating Cass County Telephone if such an investigation is needed.

The Commission had further questions about the stipulation and agreement and on April 19 heard an on-the-record presentation from Staff, Public Counsel, and Cass County Telephone regarding the stipulation and agreement. Staff's witness explained the allegations of corruption and illegal activity that have been made against some other telecommunications companies that have ties to Cass County Telephone. Staff stated that Cass County has done a good job of using its profits to modernize its system and improve service to its customers. The president of Cass County Telephone also testified and sought to reassure the Commission that neither he nor Cass County Telephone have been involved in any corrupt or illegal activities.

After reviewing the unanimous stipulation and agreement, Staff and Public Counsel's suggestions in support, and after hearing testimony at the on-the-record presentation, the Commission finds that the stipulation and agreement filed on February 5 should be approved to allow the rate reduction to go into effect. The Commission is still concerned about the allegations surrounding the company and will consider opening a separate case to monitor developments regarding those allegations.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on February 5, 2004, is approved, and the signatory parties are ordered to comply with its terms.

2. That this order shall become effective on May 9, 2004.

Gaw, Ch., Murray and Clayton, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's 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.

Office of the Public Counsel, Complainant, v. Warren County Water and Sewer Company, Respondent.*

Case No. WC-2004-0215
Decided May 13, 2004

Evidence, Practice And Procedure §2. The Commission has the jurisdiction to hear complaints against water and sewer companies. The Commission cannot award damages to a complainant. But the Commission can order a water or sewer company to not disconnect a customer for failure to pay disputed charges.

Evidence, Practice And Procedure §24. When a party does not answer a complaint, the Commission deems the complaint to be true.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, AND ORDER CLOSING CASE

Procedural History:

On November 7, 2003, the Office of the Public Counsel filed a complaint against Warren County Water and Sewer Company, charging that Warren County had violated the Commission's rules by threatening to discontinue service to a customer due to non-payment of certain disputed charges. On November 10, Public Counsel amended his complaint. The Commission issued its Notice of Complaint on November 12, 2003, advising Respondent of various options open

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* See page 339 for another order in this case.

to it and further advising Respondent that it must pursue one of these options by December 12, 2003. Respondent did not reply to the Notice of Complaint and the Commission issued its Order Granting Default on January 6, 2004.

Pursuant to the Commission's rules regarding complaints, a default may be set aside if, within seven days of the issue date of the order granting default, the respondent files a motion stating good cause to aside the default and extend the time within which to answer.[1] Respondent did not file any such motion or any other response. Warren County's default has thus become final.

Findings of Fact:

The Commission finds that all of the allegations in the Complaint are deemed to be true by reason of default. Although Public Counsel brought this Complaint, the real parties in interest are Michael and Patricia Houk, who reside at 2864 Ricky Drive in the Shady Oaks subdivision near Foristell, Missouri. The Houks purchase drinking water and sewer service from Respondent Warren County Water and Sewer Company. On or about October 30, 2003, Respondent Warren County mailed a bill dated October 30, 2003, to the Houks for water and sewer service for the period September 25, 2003, through October 30, 2003:

Service	Present	Previous	Used	Charge
Water	536000	533000	3000	$ 14.76
Sewage				$ 18.14
Late Charge				$ 2.00
Reconnect Fee				$ 20.00
Total due upon receipt:				$ 54.90
Late charge if paid after 11/21/03:				$ 2.00
Total Due:				$ 56.90

The Commission finds that the Houks objected to this bill. The Houks objected, first, because the bill included a late charge and they believed they had timely paid the prior month's bill in full. Second, the Houks objected because the bill included a "Reconnect Fee" and they had never been disconnected or reconnected.

The Commission finds that despite the Houks' objection, Respondent Warren County subsequently mailed a disconnection notice to the Houks. This notice - denominated a "Final Notice" - stated that their service would be disconnected on November 10, 2003, absent a payment of $22.00, of which $2.00 was a "Late Fee." The Houks objected to this bill as well.

The Commission finds that Respondent's ledger sheet for the Houk's account from the period July through October 29, 2003, is as follows:

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[1] Rule 4 CSR 240-2.070(9).

07-01-03	Balance Forward:	$ 67.38	09-10-03	Payment	$-60.28
07-20-03	Payment	$-50.00	09-24-03	Late Charge	$ 2.00
07-25-03	Water	$ 14.76	09-25-03	Water	$ 17.18
07-25-03	Sewage	$ 18.14	09-25-03	Sewage	$ 18.14
08-01-03	Balance Forward:	$ 50.28	10-01-03	Balance Forward:	$ 72.22
08-23-03	Late Charge	$ 2.00	10-08-03	Payment	$-56.90
08-25-03	Water	$ 14.76	10-08-03	Reconnect Fee	$ 20.00
08-25-03	Sewage	$ 18.14	10-29-03	Late Charge	$ 2.00
08-29-03	Reconnect Fee	$ 10.00	10-29-03	Payment	$-15.32
09-01-03	Balance Forward:	$ 95.18	**10-29-03**	**Balance Forward**	**$ 22.00**

The Commission finds that the ledger sheet includes the following hand-written notation:

> Amount past due $22.00. The PSC allows a disconnect fee for each trip to your home to collect - given the disconnect was a day prior to our collection effort, the fee stands - you actually had an extra 24 hours to make the required payment.

The Commission finds that a second hand-written notation on the ledger sheet was added by Patricia Houk and states: "There was no disconnection notice for Oct 2003 Before they came."

Conclusions of Law:

Warren County Water and Sewer Company sells drinking water and sewer services to the public at retail and is thus a "sewer corporation," a "water corporation" and a "public utility" subject to the jurisdiction of this Commission.[2]

Section 386.390.1 authorizes the Commission to determine complaints as to "any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]" Such a complaint may be brought by anyone[3], and must include an allegation of a violation of a law or of a Commission

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[2] Section 386.020, RSMo Supp. 2003, (42), (48) and (58).

[3] Specifically, "[c]omplaint may be made by the commission on its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation[.]" Section 386.390.1, RSMo 2000.

rule, order or decision.[4] However, although the Commission has jurisdiction to hear this complaint, the Commission lacks authority to award money to a Complainant.[5]

Warren County is in default and the Commission, consequently, will deem the allegations in the Complaint to be true. The Public Counsel alleges that the Houks owe neither Reconnect Fees nor Late Charges and the Commission so finds. Warren County should amend its records to remove the Reconnect Fees and Late Charges assessed against the Houks.

As for Public Counsel's prayer that Warren County and the Houks be referred to mediation, the Commission concludes that such an order would be futile where, as here, the utility has refused to even respond to the Notice of Complaint.

IT IS THEREFORE ORDERED:

1. That Warren County Water and Sewer Company is prohibited from discontinuing service to Michael and Patricia Houk at 2864 Ricky Drive in the Shady Oaks subdivision near Foristell, Missouri, for nonpayment of the Reconnect Fees and Late Charges assessed against the Houks between August and October, 2003.

2. That this order shall become effective on May 23, 2004.

3. That this case may be closed on May 24, 2004.

Gaw, Ch., Murray, and
Clayton, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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[4] *St. ex rel. Ozark Border Electric Cooperative v. PSC*, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

[5] *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943).

In the Matter of a Commission Inquiry into the Metropolitan Calling Area Plan and Calling Scopes in Missouri.

Case No. TW-2004-0471
Decided May 25, 2004

Telecommunications §1. The Commission appointed 11 members to the Metropolitan Calling Area (MCA)/Calling Scope Task Force. The Task Force members include legislators, industry representatives, Commission Staff, and a representative from the Office of the Public Counsel. Other interested persons or entities were encouraged to participate in the various meetings, although they will not be members of the Task Force itself.

The order also clarified that the scope of the Task Force should be broader than simply evaluating the current MCA plans and Staff's MCA-2 proposal. Instead, the Task Force should also evaluate the need to make changes to Missouri's calling scopes in general.

Telecommunications §30. The order clarified that the scope of the Task Force should be broader than simply evaluating the current MCA plans and Staff's MCA-2 proposal. Instead, the Task Force should also evaluate the need to make changes to Missouri's calling scopes in general.

ORDER APPOINTING TASK FORCE MEMBERS AND SCHEDULING MEETING

On March 18, 2004, the Commission issued an order establishing a task force or working group to investigate whether, and if so, what type, of changes should be made to the Metropolitan Calling Area (MCA) Plans and to calling scopes in general. The Commission indicated that it would appoint the members of the Task Force by means of a separate order. The Commission concludes that the MCA/Calling Scopes Task Force shall consist of 11 members appointed by the Commission. Other interested persons or entities are encouraged to participate in the various meetings but will not be members of the Task Force itself. The Task Force members shall be responsible for filing periodic status reports and a Final Report and Recommendation to the Commission. The Task Force shall be composed of the following members:

- Senator Jim Matthewson, State Capitol Building, Room 319, Jefferson City, Missouri 65101;
- Senator John Griesheimer, State Capitol Building, Room 226, Jefferson City, Missouri 65101;
- Representative Robert Thane Johnson, Missouri House of Representatives, 201 West Capitol Avenue, Room 400, Jefferson City, Missouri 65101;
- Representative Rachel L. Bringer, Missouri House of Representatives, 201 West Capitol Avenue, Room 116A2, Jefferson City, Missouri 65101;
- 4 persons to be nominated by the Missouri Telephone Industry Association (MTIA), 312 East Capitol Avenue, P.O. Box 785, Jefferson City, Missouri 65102;

- 1 person to be nominated by the Missouri Municipal League, 1727 Southridge Drive, Jefferson City, Missouri 65109;
- 1 person from the Office of the Public Counsel; and
- 3 persons from the Staff of the Missouri Public Service Commission. One of the Staff members shall be John Van Eschen, who will serve as the chairman of the Task Force.

The Commission will direct the MTIA, the Missouri Municipal League, Public Counsel, and the Commission's Staff to promptly file the names of their Task Force representatives.

The Commission acknowledges the work of the Task Force in Case No. TO-2001-391. In that case, the Task Force's Final Status Report included a proposal from Staff that was designated as the "MCA-2" plan. Although the Commission is not yet willing to order the implementation of Staff's proposed "MCA-2 plan," the Commission does believe that the MCA-2 proposal merits further investigation and review. The Commission is particularly interested in the MCA-2's elimination of the need for customers located in optional MCA areas to change their telephone numbers if they decide to either subscribe or unsubscribe to MCA service. The Commission, however, is unwilling to implement any changes to the MCA plan at this time without also reviewing whether there is a need to make changes to calling scopes in general.

Therefore, the Commission finds that the scope of the Task Force in this case, TW-2004-0471, should be broader than simply evaluating the current MCA plans and Staff's MCA-2 proposal. The Task Force should also evaluate the need to make changes to Missouri's calling scopes in general. Thus, the Commission will direct the Task Force to focus on the following topics:

1) In urban and suburban settings, what type of calling scopes, prices, and plans are desired by customers?

2) In rural settings, what type of calling scopes, prices and plans are desired by customers?

3) What changes, if any, should be made to the current MCA plan? This review should include an evaluation of Staff's proposed MCA-2 plan, along with an evaluation of whether additional revisions or expansions should be made to the MCA plan.

4) What changes, if any, should be taken to expand calling scopes in rural areas?

In addressing these questions, the Task Force should consider the popularity and impact of existing calling plans and alternative forms of communication, including long distance calling plans, wireless telephones, Voice-over-Internet technologies and other items. Also, the Task Force should evaluate how the recent phenomenon of local number portability impacts the provision of MCA. If the Task Force recommends any specific Commission action, the Task Force should evaluate whether legislation is needed in order for the Commission to take such action. The Commission expects the Task Force to conduct public meetings across the state of Missouri in order to assist the Task Force in measuring the level

of demand for various changes to the MCA plan and to calling scopes in general. The Task Force may wish to consider using surveys for this purpose. The Task Force should also evaluate whether the MCA is accomplishing the goals for which it was created. The Task Force shall be responsible for filing monthly progress reports and a final Task Force Report. The first Task Force meeting shall be held on June 15, 2004, at the offices of the Missouri Public Service Commission, Governor Office Building, 200 Madison Street, Room 315, Jefferson City, Missouri. At this initial meeting, the Staff of the Commission shall provide an overview of the history and basic issues relating to the MCA plans and calling scopes in general.

In order to help the Task Force and the public evaluate various options, including the MCA-2 proposal contemplated in the Final Status Report in Case No. TO-2001-391, the Commission will direct any telecommunications company participating in the MCA plan to submit illustrative tariff revisions with the Task Force Chairman. The illustrative tariff revisions should primarily attempt to reflect any rate adjustments and other changes the company believes are necessary in order to implement the MCA-2 proposal. The Task Force Chairman should receive these illustrative tariffs within 30 days of the issuance of this order. If the company wishes, it may also offer an alternative proposal. However, any alternative proposal must be accompanied by illustrative tariff revisions.

IT IS THEREFORE ORDERED:

1. That the following persons are appointed as members of the Task Force in this case: Senator Jim Matthewson, Senator John Griesheimer, Representative Robert Thane Johnson, and Representative Rachel L. Bringer.

2. That the Missouri Telephone Industry Association (MTIA) shall nominate four persons to the Task Force. The MTIA shall submit the names and addresses of its nominees no later than June 4, 2004.

3. That the Missouri Municipal League shall nominate one person to the Task Force. The Missouri Municipal League shall submit the name and address of its nominee no later than June 4, 2004.

4. That the Office of the Public Counsel shall nominate one person to the Task Force. The Office of the Public Counsel shall submit the name and address of its nominee no later than June 4, 2004.

5. That John Van Eschen of the Commission's Staff is appointed as Chairman of the Task Force. The Commission's Staff shall nominate two additional Staff members to the Task Force no later than June 4, 2004.

6. That the Task Force shall conduct its first meeting on June 15, 2004, beginning at 10:00 a.m., at the offices of the Missouri Public Service Commission, Governor Office Building, 200 Madison Street, Room 315, Jefferson City, Missouri. This facility meets accessibility standards required by the Americans with Disabilities Act. Anyone needing additional accommodations to participate in the meeting should call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or Relay Missouri at 711 prior to the meeting.

7. That the Task Force shall file periodic status reports regarding the progress and activities of the Task Force. The first status report shall be due by July 15, 2004, with subsequent status reports due every 30 days thereafter.

8. The Task Force shall file its Final Report and Recommendations no later than October 15, 2004.

9. That the Data Center of the Missouri Public Service Commission shall serve a copy of this order upon the certificated local exchange carriers and interexchange carriers in the state of Missouri.

10. That the Commission's Public Information Office shall make notice of this order available to the members of the General Assembly and all newspapers in the state of Missouri as directed above.

11. That no later than June 25, 2004, any telecommunications company currently participating in the MCA plan shall submit to the Chairman of the Task Force illustrative tariff revisions to implement the MCA-2 proposal. The illustrative tariff revisions will be considered informational tariff filings and should be sent directly to John Van Eschen, Chairman of the MCA/Calling Scopes Task Force, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. The illustrative tariff revisions should not be filed in this case.

12. That if any interested telecommunications company offers a proposal for revisions to the MCA or the MCA-2, that company shall simultaneously submit, to the Chairman of the MCA/Calling Scopes Task Force, illustrative tariff provisions to implement any such proposal.

13. That this order shall become effective on June 4, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Ruth, Senior Regulatory Law Judge

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. A&G Commercial Trucking, Inc., Respondent.*

Case No. MC-2004-0078
Decided May 25, 2004

Manufactured Housing §1. Finding it to be inappropriate if it were true that A&G sold manufactured homes without the proper registration, the Commission rejected a Stipulation and Agreement that required A&G to register as a dealer of manufactured homes because it encouraged A&G to function as a dealer of manufactured homes.

ORDER REJECTING STIPULATION AND AGREEMENT

On August 5, 2003, the Director of the Manufactured Housing and Modular Units program of the Missouri Public Service Commission filed a complaint with the Commission against A&G Commercial Trucking, Inc. The matter was referred to a mediator and, on March 19, 2004, the parties entered into a Stipulation and Agreement. The parties submitted the Stipulation and Agreement to the Commission for approval and, on April 13, 2004, the Commission held an on-the-record presentation regarding the agreement.

In its complaint, the Staff of the Commission alleged that A&G sold manufactured homes without the required registration, ignoring the Director's instructions not to sell the homes until the Commission's Staff reviewed and approved the homes. As part of the agreement, A&G is required to register and qualify as a dealer of manufactured homes. If the allegations of the complaint are true, it would not be appropriate for the Commission to approve a settlement, which encourages A&G to function as a dealer of manufactured homes. The Commission will therefore reject the Stipulation.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement entered into by the Staff of the Commission and A&G Commercial Trucking, Inc., is hereby rejected.

2. That this order shall become effective on June 4, 2004.

Gaw, Ch., Murray, Clayton, Davis, and Appling, CC., concur.

Jones, Regulatory Law Judge

* This case was appealed to Cole County Circuit Court (04CV324666). This case was later appealed to the Missouri Court of Appeals - Western District (WD64472).

In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increases for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company.*

Case No. WR-2000-281
Decided May 27, 2004

Evidence, Practice and Procedure §1. A case is moot when a tribunal's decision would not have any practical effect upon any live controversy. Issues under old, superseded tariffs are moot and therefore not subject to consideration.

Rates §74. The Commission's ratemaking authority is prospective in nature and the Commission has no power to retroactively phase-in rates.

Rates §37. Money collected by a utility under an approved rate becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.

APPEARANCES

W.R. England, III, Dean L. Cooper, and *Richard T. Ciottone,* of Counsel, Attorneys at Law, Brydon, Swearengen & England, P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for Missouri-American Water Company.

Leland B. Curtis, Attorney at Law, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, St. Louis, Missouri 63105, for the Cities of Warrensburg, St. Peters, O'Fallon, and Weldon Spring, for St. Charles County, and for Central Missouri State University, Hawker Energy, Harmon Industries, Stahl Manufacturing, and Swisher Mower and Machine.

James B. Deutsch and *Henry T. Herschel*, Attorneys at Law, Blitz, Bardgett & Deutsch, 308 East High Street, Suite 301, Jefferson City, Missouri 65101, for the City of Joplin.

Jeremiah D. Finnegan and *Stuart W. Conrad*, Attorneys at Law, Finnegan, Conrad & Peterson, L.C., 3100 Broadway, Kansas City, Missouri 64111, for AG Processing, Inc. (a cooperative), Wire Rope Corporation of America, Inc., and Friskies Petcare, a division of Nestle USA.

James M. Fischer and *Larry W. Dority*, Attorneys at Law, Fischer & Dority, 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Public Water Supply Districts 1 and 2 of Andrew County, Missouri, Public Water Supply District 1 of Buchanan County, Missouri, and Public Water Supply District 1 of DeKalb County, Missouri.

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* The Commission, in an order issued on June 17, 2004, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (04CV325262 - see also 02CV324028). This case was later appealed to the Missouri Court of Appeals - Western District (WD64944). See Volume 9, MPSC 3d pages 78, 254 and 322 for other orders in this case.

Charles Brent Stewart and *Jeffrey Keevil*, Attorneys at Law, Stewart & Keevil, 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for Public Water Supply District No. 2 of St. Charles County.

Diana M. Vuylsteke and *Edward F. Downey*, Attorneys at Law, Bryan Cave, L.L.P., 211 North Broadway, Suite 3600, St. Louis, Missouri 63102, for the association of Missouri Industrial Energy Consumers, being Boeing, Ford Motor Company and Hussman Refrigeration.

Martin W. Walter, Attorney at Law, Blake & Uhlig, P.A., 2500 Holmes Road, Kansas City, Missouri 64108, for the St. Joseph Building and Construction Trades Council.

Karl Zobrist, Attorney at Law, Blackwell, Sanders, Peper & Martin, 2300 Main Street, Suite 1100, Kansas City, Missouri 64108, for the City of St. Joseph.

John B. Coffman, Deputy Public Counsel, and *Shannon Cook*, Assistant Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102-7800, for the Office of the Public Counsel and the public.

Keith R. Krueger, Deputy General Counsel, *Cliff E. Snodgrass*, Senior Counsel, and *Robert Franson*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102-0360, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER ON REMAND

Procedural History

Following decisions by the Circuit Court of Cole County and the Missouri Court of Appeals, this matter now comes before the Commission on remand.[1]

The Missouri Public Service Commission issued its Report and Order in this general rate case on August 31, 2000, and the associated tariffs of Missouri-American Water Company became effective on September 20, 2000. After the Commission denied various requests for rehearing, ten petitions for writ of review were filed in three different counties.[2] Eventually, the Missouri Supreme Court issued its writ of prohibition, allowing only the seven petitions filed in Cole County to proceed.[3]

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[1] *St. ex rel. AG Processing, Inc., et al., v. Kevin A. Thompson*, 100 S.W. 3d 915 (Mo. App., W.D. 2003).

[2] These counties were Cole, Buchanan and Jasper.

[3] *St. ex rel. Public Service Commission v. Dally*, 50 S.W.3d 774 (Mo. banc 2001); *St. ex rel. Public Service Commission v. Jackson*, 50 S.W.3d 250 (Mo. banc 2001). The Cole County petitions were filed first.

The Circuit Court of Cole County took the seven petitions up in two groups, one of four petitions and the other of three.[4] The Circuit Court entered judgment on the group of four consolidated petitions on May 25, 2001.[5] It entered judgment on the remaining group of three petitions on September 19, 2001, and amended that judgment on October 3, 2001.[6] In each judgment, the Circuit Court disposed of most issues on the merits and remanded some others to the Commission to provide more extensive findings of fact.

Appeals followed. The Western District of the Missouri Court of Appeals dismissed the appeals on December 13, 2001, holding that the circuit court judgments were not final and thus not subject to appeal. Mandate issued on February 28, 2002.

Thereafter, the Commission held a prehearing conference and sought the advice of the parties on how to proceed. The St. Joseph Industrial Intervenors moved to disqualify the presiding officer on the basis of Section 536.083, RSMo 2000.[7] That motion was denied, whereupon those parties obtained a writ of prohibition from the Cole County Circuit Court on April 3, 2002. The writ was eventually dissolved by the Western District of the Missouri Court of Appeals on April 1, 2003. Mandate issued on April 23, 2003, and the circuit court entered its judgment in conformity with the mandate and opinion of the Court of Appeals on May 12, 2003.[8]

Thereafter, on May 19, 2003, Missouri American Water Company filed proposed tariff sheets and initiated a new general rate case, Case No. WR-2003-0500. That case was eventually settled through a series of three unanimous Stipulations and Agreements which the Commission approved on April 6, 2004. The associated tariffs became effective on April 21, 2004, superseding the tariffs approved in September of 2000. No party filed a timely Application for Rehearing in Case No. WR-2003-0500.

Discussion

There are only three issues before the Commission on remand, being the three issues remanded by the Circuit Court of Cole County for additional findings of fact and conclusions of law:

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[4] Originally, the circuit court did consolidate all seven petitions, but later severed the three filed by the parties that had also filed in Buchanan and Jasper Counties. The group of four petitions included those filed by Missouri-American Water Company, the City of St. Joseph, the Public Counsel, and a group of four public water supply districts: PWSD No. 1 of Andrew County, PWSD No. 2 of Andrew County, PWSD No. 1 of Buchanan County, and PWSD No. 1 of DeKalb County. The group of three petitions included those filed by the City of Joplin, Gilster Mary-Lee Corporation, and a group of three industrial water customers located in St. Joseph, Missouri: AG Processing, Inc., Wire Rope Corporation of America, Inc., and Friskies Petcare, a Division of Nestle USA. The latter three parties shall be referred to herein as the St. Joseph Industrial Intervenors.

[5] Case Nos. 00CV325014, 00CV325196, 00CV325206, and 00CV325218.

[6] Case Nos. 00CV325217, 00CV325220, and 00CV325222.

[7] All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[8] *St. ex rel. AG Processing, Inc., et al., v. Kevin A. Thompson*, 100 S.W.3d 915 (Mo. App., W.D. 2003).

1. Whether or not the increased rates should be phased-in to minimize "rate shock";

2. Whether the level of rates for the Joplin District should be increased, decreased, or remain the same;

3. Whether or not larger and smaller distribution mains should be distinguished in the rate design for the St. Joseph District.

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. 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. The Commission notes that it may take notice of facts outside the record in determining mootness.[9]

The Commission finds that the water and sewer service rates approved in Case No. WR-2000-281 became effective on September 20, 2000. Those rates remained in effect until April 21, 2004, when they were superseded by the water and sewer service rates approved by the Commission in Case No. WR-2003-0500, which rates remain in effect today.

The Commission finds that no part of the water and sewer service rates approved by this Commission in Case No. WR-2000-281 was ever stayed by this Commission or by any court. The water and sewer service revenues produced by those rates were paid by Missouri-American's customers directly to Missouri-American. None of those revenues were paid into the registry of any court.

The Commission finds that no timely application for rehearing was ever filed in Case No. WR-2003-0500.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The Commission has jurisdiction over Missouri-American's services, activities, and rates pursuant to Section 386.250 and Chapter 393, RSMo 2000.

Jurisdiction on Remand:

In its judgment of May 25, 2001, the Cole County Circuit Court affirmed the Commission's Report and Order of August 31, 2000, in part and reversed and remanded in part. The court affirmed the Commission with respect to the prudency

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[9] *State ex rel. Monsanto Co. v. Public Service Commission*, 716 S.W.2d 791, 793 (Mo. banc 1986); *State ex rel. Donnell v. Searcy*, 347 Mo. 1052, 152 S.W.2d 8, 10 (Mo. banc 1941).

of the new St. Joseph water treatment plant, the switch from single-tariff pricing to district-specific pricing, and the class-cost-of-service shift and rate design. The court reversed the Commission on the merits and remanded with respect to the issue of the premature retirement of the old St. Joseph water treatment plant. The court also reversed and remanded with respect to the phase-in issue and directed the Commission to make further findings of fact and conclusions of law on this issue, sufficient to permit the court to review the Commission's resolution of the issue.

In its amended judgment of October 3, 2001, the Cole County Circuit Court affirmed the Commission with respect to the prudency of the new St. Joseph water treatment plant and its inclusion in rate base. The court reversed and remanded for additional findings of fact with respect to the phase-in issue, the level of rates set for the Joplin District and the treatment of larger and smaller distribution mains in the St. Joseph District.

The judgments of the Cole County Circuit Court are not final judgments because they did not resolve all issues, they left three issues for future decision.[10]

> [R]emand to an agency for more complete findings and conclusions as required by section 536.090, whether the agency simply reformulates such findings and conclusions based on the evidence already presented to it or chooses to reopen the hearing and have additional evidence presented to it, is not a rehearing or appeal within the context of section 536.083 but is a continuation of the original hearing.[11]

This case is before the Commission, therefore, for the limited purpose of completing the original hearing process.

Mootness:

A case is moot when a tribunal's decision would not have any practical effect upon any live controversy.[12] Where an event occurs that makes granting effectual relief impossible, the case is moot and generally should be dismissed.[13] This rule applies to contested cases before administrative agencies just as it applies to courts. With respect to utility matters, the general rule is that "issues under old, superseded tariffs are moot and therefore not subject to consideration."[14]

The Phase-in

The first issue concerns a requested phase-in of increased rates in order to avoid "rate shock." Certain parties argued that the new rates set by the Commission in this case in August of 2000 should be phased-in over a period of time rather than implemented all at once. The Commission decided against a phase-in, but made

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[10] *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997); *Boley v. Knowles*, 905 S.W.2d 86, 88 (Mo. banc 1995).

[11] *St. ex rel. AG Processing, supra*, 100 S.W.3d at 921-922.

[12] *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001).

[13] *Id.; and see Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo. App., W.D. 1999).

[14] *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. App., W.D. 1981).

no findings of fact or conclusions of law in support of that decision. The Commission decided against a phase-in for several reasons. First, it is not clear that the Commission has the authority to order a phase-in of water and sewer rates where the utility is unwilling. Second, a phase-in is actually a loan by the Company to the ratepayers, and, like any loan, it must be paid back with interest; the net result is that the ratepayers must ultimately pay more.

The tariffs in question became effective on September 20, 2000, and remained in effect until April 21, 2004, when they were superseded by new tariffs. The Commission is a creature of statute and possesses only such authority as has been affirmatively granted to it by statute.[15] The Commission's ratemaking authority is prospective in nature and the Commission has no power to retroactively phase-in rates.[16] Furthermore, the tariffs in question are no longer in effect. There is no practical action that can be taken by way of correction. Consequently, the Commission concludes that the Phase-in Issue has become moot.

Joplin Rates

The second issue concerns the rates for the Joplin District. Faced with extremely high rates in Brunswick and certain other districts resulting from the shift to a district-specific rate design, the Commission decided to hold the rates in the Joplin District at their existing level, thus producing an excess of revenue over costs in that district, and to use the surplus revenue to ameliorate the extremely high rates imposed in Brunswick and the other high cost districts. The City of Joplin contested this decision on behalf of its ratepaying citizens and businesses.

As noted, new tariffs became effective on April 21, 2004. Those tariffs provided for a rate decrease in the Joplin District, thus affording prospective relief to Joplin and its citizens. However, there is no lawful possibility of any refund with respect to the monies paid under the tariffs in effect between September 20, 2000, and April 21, 2004. Although the law provides for the impoundment of disputed funds during the review of a Commission decision, no such impoundment ever occurred in this case.[17] Therefore, the funds in question, duly paid under tariffs approved by the Commission, became the property of Missouri-American when it received them: "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions."[18]

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[15] *St. ex rel. Uiltity Consumers Council of Missouri, Inc., v. Public Service Commission of Missouri*, 585 S.W.2d 41, 47 (Mo. banc 1979).[16] *Lightfoot v. City of Springfield*, 361 Mo. 659, 669, 236 S.W.2d 348, 353 (1951).

[17] Section 386.520.2, RSMo 2000.

[18] *Straube, et al., v. Bowling Green Gas Company*, 360 Mo. 132, 142, 227 S.W.2d 666, 671 (1950).

The Missouri Supreme Court considered this question with respect to a Fuel Adjustment Clause ("FAC") contained in the tariffs of certain electric utilities.[19] The Court concluded that the FAC was illegal and that the Commission had erred in approving the tariffs containing it.[20] Nonetheless, no refund of the monies paid under the illegal FAC was possible, where the funds were paid directly to the utilities and not into the registry of a court:[21]

> The Commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery[.] It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

However, the Court reached a different result where money was paid under protest and held in a separate fund by a court pending the resolution of the controversy: "*Lightfoot* does not control the present case because the Industrials did contest the PSC order and they did establish a stay fund. Their money was not unconditionally paid and therefore it did not become the property of [the utility]."[22]

In the present case, the excess revenue produced by the Joplin District was paid directly to Missouri-American, unconditionally, pursuant to tariffs approved by the Commission. This revenue became the property of Missouri-American and no part of it can lawfully be refunded or returned to the ratepayers. Neither the Commission nor any court can retroactively determine what a just and reasonable rate for Joplin should have been.[23] Therefore, the Commission determines that the Joplin issue is moot.

Larger and Smaller Mains in the St. Joseph District

Certain industrial intervenors in the St. Joseph District argued that the Industrial Customer Class was assigned an over-large proportion of the costs of the distribution system because such customers were served directly by large transmission mains and therefore made little or no use of the bulk of the distribution system. The Commission adopted the Class-Cost-of-Service Study prepared by its Staff which did not make this distinction between the Industrial Customer Class and the other customer classes.

As noted, new tariffs became effective on April 21, 2004. The tariffs complained of are no longer in effect. The Commission's ratemaking authority is prospective in nature and the Commission has no power to retroactively determine what a just

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[19] *Utility Consumers Council, supra*.

[20] *Id.*, at 56-8.

[21] *Id.*, at 58 (emphasis in the original; internal citations omitted).

[22] *Monsanto, supra*, 716 S.W.2d at 794.

[23] *Utility Consumers Council, supra*.

and reasonable rate should have been.[24] There is no practical action that can be taken by way of correction. Again, money paid under those tariffs became the property of Missouri-American.[25] Therefore, the issue concerning distribution mains in Joplin is also moot.

IT IS THEREFORE ORDERED:

1. That the issues relating to the requested phase-in of rates, the revenue requirement for the Joplin District, and the rate design for the St. Joseph District are moot.

2. That this Report and Order shall become effective on June 6, 2004.

3. That this case may be closed on June 7, 2004.

Gaw, Ch., Murray, and Clayton, CC., concur.
Davis, and Appling, CC., not participating.

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[24] *Lightfoot, supra; Utility Consumers Council, supra*.

[25] *Straube, supra.*

In the Matter of the Verified Application and Petition of Laclede Gas Company for Establishment of an Infrastructure System Replacement Surcharge.

Case No. GO-2004-0443
Decided June 1, 2004

Gas §§13, 18. The Commission approved an agreement between Laclede Gas Company and the Staff of the Commission that established an infrastructure replacement surcharge for Laclede.

ORDER APPROVING STIPULATION AND AGREEMENT

On March 1, 2004, Laclede filed an application with the Missouri Public Service Commission pursuant to sections 393.1009, 393.1012, and 393.1015, RSMo (HB-208, 2003), requesting that the Commission authorize it to establish an Infrastructure System Replacement Surcharge (ISRS).

On May 27, 2004, the Staff of the Commission and Laclede filed a stipulation and agreement. The agreement provides that Laclede will be authorized to implement an ISRS designed to recover $3,560,000 annually. The agreement also provides that:

> Staff and Laclede agree to meet in advance of the Company's next ISRS or rate case filing, whichever is earlier, to discuss whether they can resolve their differences regarding the sole issue raised in this proceeding, namely the appropriate way to calculate income taxes for purposes of determining ISRS revenues.

Laclede requests that the Commission approve a tariff sheet implementing its ISRS to be effective on June 10, 2004. The agreement states that the other parties[1] have been provided a copy of the agreement, and have no objections.

The Commission has considered the stipulation and agreement, the pleadings and the prefiled testimony. The Commission finds that the agreement is a reasonable resolution of the issues raised, and will approve it. The Commission is interested in being kept informed of the discussions between Staff and Laclede, and will order a status report be filed.

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[1] The Office of the Public Counsel, the Missouri Energy Group (Barnes-Jewish Hospital, Emerson Electric Company, SSM HealthCare, and St. John's Mercy Health Care), and the Missouri Industrial Energy Consumers (Alcoa Foil Products, Anheuser-Busch Companies, Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, Monsanto Company, Pfizer, Precoat Metals, Proctor & Gamble Manufacturing, Nestle Purina and Solutia).

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on May 27, 2004, is approved, and the parties shall carry out the terms and requirements therein.

2. That the Staff of the Commission, no later than September 2, 2004, shall file a report on the status of the discussions of the appropriate way to calculate income taxes.

3. That the pre-filed testimony is received into evidence.

4. That this order shall become effective on June 10, 2004.

Murray, Clayton, Davis and Appling, CC., concur
Gaw, Ch., dissents, with dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

Editor's 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.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I dissent from this order because I believe the Commission could provide policy guidance if the issue itself was presented for decision. Instead the parties have evidently resolved their differences on money alone. If this issue were a one-time question, the argument for approval of the agreement would be stronger. But since it appears the issue will arise again in Laclede's next ISRS application, I dissent from the majority decision disposing of the issue on a dollar-value compromise without resolving the underlying policy question.

In the Matter of the Assignment of the 2-1-1 Abbreviated Dialing Code in the State of Missouri.

Case No. AO-2004-0036
Decided June 8, 2004

Telecommunications §1. The Commission approved a unanimous stipulation and agreement that established the 2-1-1 dialing code for direct access to community information and referral services and designated the Heart of America United Way as the provider of that service for sixteen counties in the Kansas City area.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

On July 11, 2003, the Heart of America United Way, Inc. filed an application asking the Commission to designate 2-1-1 as a dialing code for access to community information and referral (I & R) and volunteer services in accordance with the Federal Communications Commission's decision in its Third Report and Order on Reconsideration, released on July 31, 2000, in CC Docket 92-105. The

Heart of America United Way also asks that it be designated as the holder for the 2-1-1 number to serve areas in 16 Missouri counties in the Kansas City area.

On February 19, 2004, a group of incumbent local exchange carriers: Green Hills Telephone Corporation; Citizens Telephone Company of Higginsville, Missouri; Cass County Telephone; Lathrop Telephone Company; and KLM Telephone Company, collectively known as the ILECs, filed an application to intervene. That application was granted on March 2 and a procedural schedule was established, leading to a hearing scheduled for June 9 and 10.

On May 25, the parties filed a Unanimous Stipulation and Agreement that purports to resolve all issues before the Commission. Staff filed suggestions in support of the stipulation and agreement on May 27. Although the stipulation and agreement is called unanimous and is signed by all parties, its terms refer to the ILECs as nonsignatories and indicate that they do not join in the stipulation and agreement. It does, however, indicate that they do not oppose the stipulation and agreement and do not request a hearing concerning the issues addressed in the stipulation and agreement. In any event, Commission rule 4 CSR 240-2.115(2) provides that if no party objects to a stipulation and agreement within seven days the stipulation and agreement will be treated as unanimous. No party has objected to the stipulation and agreement and it will be treated as unanimous.

After reviewing the unanimous stipulation and agreement and Staff's suggestions in support, the Commission finds that the stipulation and agreement filed on May 25 should be approved. The Commission notes that the parties have applied the standards and criteria set forth in Emergency Rule 4 CSR 240-32.200 in determining whether the Heart of America United Way's application should be approved.

Based upon the stipulation of the parties, the Commission finds and concludes as follows:

A) The 2-1-1 dialing code is a three-digit, easy to remember telephone number that, when available, connects citizens with important community services and volunteer opportunities. As a service, 2-1-1 is a comprehensive information and referral program that responds to callers' non-emergency inquiries 24 hours a day, 365 days a year. The 2-1-1 dialing code is known primarily for connecting people with health and human service referrals for every day needs. It also serves as a vital coordinating point and follow-up to organizations that provide first line response during local, regional or national emergencies or disasters. It also centralizes the community's system for recruiting and connecting individuals who wish to volunteer their time or donate goods to non-profit organizations. Finally, a 2-1-1 service generates data important to the community's larger needs assessment and resource allocation decisions.

B) In its Third Report and Order on Reconsideration released July 31, 2000, the FCC designated the 2-1-1 number for "direct access to organizations providing community I & R (Information and Referral) services; such as housing assistance, counseling and hospice services that are not currently available through the 9-1-1 emergency code or the 3-1-1 police non-emergency code."

C) Establishing the 2-1-1 dialing code for direct access to I & R services in Missouri is in the public interest.

D) The Heart of America United Way is a nonprofit corporation as defined in, and exempt from taxation, pursuant to 26 USCA §501(c)(3). Heart of America United Way is organized and existing under the laws of the State of Missouri and is specifically organized and operated to conduct community-wide fundraising efforts; allocate financial resources to member health and human service organizations; and connect citizens to service and volunteer opportunities.

E) The Heart of America United Way adheres to the Standards for Professional Information and Referral established by the Alliance of Information and Referral Systems, Incorporated (AIRS).

F) The Heart of America United Way will initiate the application process for AIRS accreditation after approval of its application, and shall become accredited within three years if not sooner.

G) The Heart of America United Way will offer comprehensive services pursuant to the AIRS standards.

H) The Heart of America United Way will remove or exclude human services entities from the Missouri I & R Providers' database for failure to deliver services; for commission of fraud, misrepresentation or unlawful discrimination.

I) The Heart of America United Way will provide teletype (TTY) services for speech and hearing impaired individual and multi-lingual accessibility either on-site, or through access to translators.

J) The Heart of America United Way is able and willing to abide by Commission rules and regulations.

K) The Heart of America United Way possesses sufficient experience, and sufficient technical, financial and managerial resources and abilities to become the I & R Provider for the telephone exchanges within the counties identified in its application.

L) Granting the Heart of America United Way's request to act as the 2-1-1 provider in the exchanges identified in the stipulation and agreement will serve the public interest.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on May 25, 2004, is approved, and the signatory parties are ordered to comply with its terms.

2. That the 2-1-1 dialing code for direct access to information and referral services is established in Missouri.

3. That the Heart of America United Way is authorized to serve as a Missouri Information and Referral Provider for all exchanges listed on Schedule 1 to the Unanimous Stipulation and Agreement, in accord with all applicable Commission rules and Missouri statutes, and so long as it complies with those rules and statutes.

4. That, as provided by Emergency Rule 4 CSR 240-32.200, Heart of America United Way, as a Missouri Information and Referral Provider, is entitled to use the three digit 2-1-1 abbreviated dialing code to serve the community for a period of three years.

5. That this order shall become effective on June 18, 2004.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's 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 Petition of Mid-Missouri Telephone Company for Suspension of the Federal Communications Commission Requirement to Implement Number Portability.*

Case No. TO-2004-0455
Decided June 24, 2004

Telecommunications §§36, 45. The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that if wireline-to-wireless local number portability is requested the small rural exchange carrier is to notify the wireless carrier that local number portability is available but that it is not the responsibility of the small rural exchange carrier to establish facilities or arrangements, or both, with third-party carriers to transport calls on a local basis to a point outside its local service area.

Telecommunications §§36, 45. The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that the small rural exchange carrier will not be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside its local service area.

Telecommunications §§36, 45. The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that the small rural exchange carrier will establish an intercept message for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed and, if possible, provide information about how to complete the call.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

On March 4, 2004, Mid-Missouri Telephone Company filed a petition asking the Commission to suspend and modify the Federal Communications Commission's local number portability requirements that were to go into effect on May 24, 2004. On May 11, the Commission ordered that the enforcement of the FCC's requirements be suspended until August 7, to allow the Commission time to consider the petition.

* Also see cases IO-2004-0545, CO-2004-0469, IO-2004-0468, TO-2004-0491, TO-2004-0493, TO-2004-0494, TO-2004-0487, TO-2004-0490, TO-2004-0489, TO-2004-0486, and IO-2004-0467.

On June 10, 2004, the Staff of the Commission, the Office of the Public Counsel, and the Petitioner filed a unanimous stipulation and agreement regarding the Petition for Suspension and Modification of Local Number Portability Obligations. The stipulation and agreement asks the Commission to modify the wireline to wireless local number portability requirements established by the FCC to avoid an undue economic burden on the Petitioner.

The stipulation and agreement, and the petition, concern a November 10, 2003 order issued by the FCC that required small rural local exchange carriers, such as the Petitioner, to implement local number portability between themselves and wireless telecommunications carriers. Local number portability would allow a customer of the petitioner to change their local service from the petitioner to a wireless carrier by porting their wireline number to the wireless carrier, thus keeping the use of their old phone number.

The FCC required that local exchange carriers, such as the Petitioner, port numbers to requesting wireless carriers where the wireless carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned. This requirement applies even though the wireless carrier's point of presence is in another rate center and has no physical interconnection with the wireline carrier. The problem facing the Petitioner, and other local exchange carriers, is how to make, and how to pay for, that interconnection with the wireless carrier's point of presence.

The Petitioner's switch is capable of providing local number portability. And, the required interconnection between the wireline and wireless carriers can be made by establishing appropriate facilities, or by making arrangements with third-party carriers to transport the ported number and the associated call to the wireless carrier's point of presence. The question is, who should have to pay to establish those facilities or to make those arrangements?

The FCC did not resolve that "rating and routing" issue in its local number portability order. However, 47 U.S.C. §251(f)(2), a provision of the Telecommunications Act of 1996, provides that a state commission may suspend or modify number portability requirements for rural carriers, if suspension or modification is necessary to avoid imposing: a significant adverse economic impact on users of telecommunications services generally; a requirement that is unduly economically burdensome; or a requirement that is technically infeasible.

The unanimous stipulation and agreement represents that delivering calls outside of Petitioner's local exchange boundaries could impose a substantial economic burden upon Petitioner. If Petitioner is required to provide service outside of its certificated local service area, then additional legal and regulatory issues will arise related to modifying existing certificates and tariffs, and obtaining - through negotiation, and, if necessary, arbitration - facilities or arrangements with third-party carriers to port numbers and transport associated calls to remote locations outside of Petitioner's local exchange service area. The parties agree that a modification is required to avoid an undue economic burden on the Petitioner.

The parties agree that the Commission should enter an order granting Petitioner's requested modification of the FCC's local number portability requirements until such time as the FCC addresses the call rating and routing issues

presented by the FCC's November 10, 2003 local number portability order. Specifically, the parties agree that the Commission should grant modification such that if wireline-to-wireless local number portability is requested, Petitioner would notify the wireless carrier that Petitioner is fully local number portability capable but that it is not the responsibility of the Petitioner to establish facilities or arrangements, or both, with third-party carriers to transport calls on a local basis to a point outside of its local service area. This would also apply to a situation where a wireless carrier that has established facilities or arrangements, or both, with third-party carriers to transport calls to a point outside of the Petitioner's local serving area is requested to port numbers to another wireless carrier that has not established such facilities or arrangements.

The parties also agree that neither Petitioner, nor its wireline customers, will be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside Petitioner's local service area. The parties further agree that the Commission should authorize the Petitioner to establish an intercept message for seven-digit dialed calls to ported numbers where the facilities or the appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed, and, if possible, provide information about how to complete the call. The parties agreed at the on-the-record presentation that the Commission could go beyond authorizing Petitioner to establish an intercept message, and require Petitioner to establish the message. The Commission will do so.

Staff filed suggestions in support of the stipulation and agreement on June 14. Public Counsel also filed a pleading supporting the stipulation and agreement on June 14. However, Public Counsel argues that, while it supports the stipulation and agreement, it would prefer that the Commission simply suspend the entire local number portability requirement for rural local exchange carriers until the FCC further addresses the rating and routing issues that it avoided in its implementing order. Public Counsel contends that, if the Commission is not willing to take that step, then the stipulation and agreement is the best available alternative.

Wanting more information about the stipulation and agreement, the Commission, on June 17, held an on-the-record presentation, at which it questioned Staff, Public Counsel, and the Petitioner about the stipulation and agreement.

The Commission is mindful of Public Counsel's argument for a suspension of the entire requirement for rural local exchange carriers to provide local number portability to wireless carriers. However, the Commission believes that local number portability may be a valuable step toward bringing the benefits of competition to Missouri's rural exchanges. Therefore, the Commission is unwilling to completely suspend the porting requirement in the absence of compelling evidence to justify such an action.

After reviewing the unanimous stipulation and agreement, Staff and Public Counsel's suggestions in support, and after hearing the arguments and explanations of the parties at the on-the-record presentation, the Commission finds that the stipulation and agreement filed on June 10 should be approved.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on June 10, 2004, is approved, and the signatory parties are ordered to comply with its terms.

2. That the Federal Communications Commission's local number portability requirements for small rural local exchange carriers are modified to provide that if wireline-to-wireless local number portability is requested, the Petitioner shall notify the wireless carrier that Petitioner is fully local number portability capable but that it is not the responsibility of the Petitioner to establish facilities or arrangements, or both, with third- party carriers to transport calls on a local basis to a point outside of its local service area. This also applies to a situation where a wireless carrier that has established facilities or arrangements, or both, with third-party carriers to transport calls to a point outside of the Petitioner's local service area is requested to port numbers to another wireless carrier that has not established such facilities or arrangements.

3. That neither Petitioner, nor its wireline customers, will be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside Petitioner's local service area.

4. That Petitioner shall establish an intercept message for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed and, if possible, provide information about how to complete the call.

5. That the modifications made in this order will remain in effect only until the Federal Communications Commission further addresses the rating and routing issues associated with porting numbers.

6. That Petitioner shall notify the Commission ten days from the date the Federal Communications Commission issues any further decisions addressing the rating and routing issues associated with porting numbers.

7. That the Commission's suspension of the Federal Communications Commission's local number portability requirements until August 7, 2004, is lifted concurrent with the effective date of this order.

8. That this order shall become effective on July 4, 2004.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's Note: The Unanimous Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

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, 2004.*

Case No. AO-2004-0610
Decided June 24, 2004

Public Utilities §§1, 5. The Commission assessed a total of $15,525,475 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2005.

ASSESSMENT ORDER FOR FISCAL YEAR 2005

Pursuant to 386.370, RSMo Supp. 2003, the Commission has made an estimate of the expenses to be incurred by it during the fiscal year commencing July 1, 2004. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo. The Commission has also separately estimated the amount of the expenses directly attributable to the regulation of each of the following groups of public utilities: electrical utilities, gas utilities, heating utilities, water utilities, sewer utilities and telephone utilities, as well as the amount of such expenses not directly attributable to any such group. The estimated amount of expenses directly attributable to all groups of public utilities is $9,322,314. The estimated amount of expenses not attributable to any specific group is $9,168,637. The Commission estimates its total revenue need to be $18,490,951.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be $307,500. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2004, is estimated to be $2,657,976. The Commission hereby deducts these amounts and estimates its Fiscal Year 2005 Assessment to be $15,525,475. The estimated unexpended sum of $2,657,976 is hereby allocated as a deduction to each group of public utilities above enumerated in proportion to the respective gross intrastate operating revenue of the respective groups during the calendar year of 2003 as provided by law. The reimbursement from the federal gas safety program is deducted from the gas utility group.

The Commission has allocated to each group of public utilities the estimated expenses directly attributable to the regulation of that group. An additional amount has been allocated which is equal to the proportion of those estimated expenses not directly attributable to any one group. These expenses are administrative and other costs that occur in the overall regulation of the utility companies as a whole and are not directly attributable to any particular utility group. These common costs are assessed according to the group's proportion of the total gross intrastate operating revenue of all public utilities subject to the Commission's jurisdiction. Those amounts are set out with more specificity in documents located on the Commission's web page at http://www.psc.mo.gov.

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* The Commission, in an order issued on July 14, 2004, granted an application for rehearing in this case. On October 29, 2004, the Commission issued an order closing this case.

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	$ 5,204,391
Gas	$ 4,453,556
Heating	$ 88,450
Water	$ 1,256,812
Sewer	$ 294,196
Telephone	$ 4,228,070
Total	$15,525,475

The Commission allocates a proportionate share of the $15,525,475 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, 2004. The assessment shall be due and payable on or before July 15, 2004, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2004, October 15, 2004, January 15, 2005, and April 15, 2005. 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

IT IS THEREFORE ORDERED:

1. That the assessment for fiscal year 2005 shall be as set forth herein.

2. That the Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.

3. That, 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, 2004.

4. That each public utility shall pay its assessment as set forth herein.

5. That the Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

6. That this order shall become effective on July 1, 2004.

Gaw, Ch., Murray, Clayton,
Davis and Appling, CC., concur
Roberts, Chief Judge

In the Matter of a Commission Inquiry into the Metropolitan Calling Area Plan and Calling Scopes in Missouri.

Case No. TW-2004-0471
Decided July 8, 2004

Telecommunications §1. The Commission acknowledged certain nominations to the Task Force. The Commission also granted the Missouri Telecommunications Industry Association's (MTIA) request to nominate five members to the Task Force instead of four members. In order to maintain balance in the membership, the Commission authorized the Office of the Public Counsel to nominate two members instead of one member.

Telecommunications §30. The Commission made certain modifications to the makeup of the Task Force charged with investigating the Metropolitan Calling Area plan and calling scopes in general.

ORDER ADDING TASK FORCE MEMBERS AND SUSPENDING REQUIREMENT TO SUBMIT ILLUSTRATIVE TARIFFS

Syllabus: This order accepts certain nominations to the Task Force and adds two additional Task Force members. The order also suspends the requirement for certain parties to submit illustrative tariffs to the Task Force Chairman.

Task Force Membership:

On May 25, 2004, the Commission issued its Order Appointing Task Force Members and Scheduling Meeting. The order directed that the Task Force was to consist of 14 members; some members were named in the order, and other members were to be nominated by the Missouri Telephone Industry Association (MTIA), the Missouri Municipal League, the Office of the Public Counsel, and the Commission's Staff. In compliance with that order, the Missouri Municipal League nominated Karen Messerli, Mayor of the City of Lee's Summit, and the Commission's Staff nominated William Voight and Natelle Dietrich; the Commission hereby formally names these individuals, in their representative capacity, to the Task Force.

The MTIA, however, requested that it be allowed to nominate five members to the Task Force, instead of the four authorized by the Commission's order. MTIA believes that the five suggested nominees will be better able to represent the interests and viewpoints of Missouri's small telecommunications providers and the state's three largest incumbent local exchange companies, as well as the interests and viewpoints of competitive local exchange carriers and interexchange carriers. MTIA suggest that expanding the Task Force to include all five of its nominees will likely result in a more comprehensive review of the issues and a more detailed and responsive final report. The Commission has reviewed MTIA's request and finds that it is reasonable and should be granted. However, in order to maintain a balance in the membership of the Task Force, the Commission will allow the Office of the Public Counsel to nominate two members instead of one.

As Public Counsel has not yet filed the name of its first Task Force representative, the Commission will direct Public Counsel to do so at the same time as it nominates a second Task Force member. Public Counsel's nominees are not required to be members of that agency.

Illustrative Tariff Submissions:

The Commission's May 25th order also directed certain entities to submit, no later than June 25, 2004, illustrative tariff filings to the Chairman of the Task Force. On June 21, 2004, the Staff of the Commission filed, on behalf of the Task Force, a Motion to Suspend Requirement to Submit Illustrative Tariff Revisions. Staff notes that the Task Force met on June 15, 2004. The majority of the Task Force voted to request that the Commission suspend the requirement that certain parties submit illustrative tariff revisions. Staff indicates that some Task Force members are concerned that it is premature for the companies to submit illustrative tariffs at this time because it may lead to the incorrect conclusion that the Task Force has already narrowed the focus of its investigation to the MCA-2 proposal. Staff states that the Task Force will likely request the submission of illustrative tariff revisions in the future.

On June 23, 2004, the presiding officer issued an order extending, from June 25 to July 9, the deadline for the submission of the illustrative tariffs in order to provide the Commission with additional time to consider Staff's request. Upon further review, the Commission finds that Staff's motion should be granted in part. The Commission will suspend, until July 30, 2004, the requirement, found in ordered paragraphs 11 and 12 of the Commission's May 25, 2004 order, that certain entities submit illustrative tariffs.

IT IS THEREFORE ORDERED;

1. That Karen Messerli, Mayor of the City of Lee's Summit, representing the Missouri Municipal League, is acknowledged as a Task Force member.

2. That Bill Voight and Natelle Dietrich, representing the Commission's Staff, are acknowledged Task Force members. As previously ordered, John Van Eschen of the Commission's Staff shall serve as the Commission's third Task Force member and as the Chairman of the Task Force.

3. That the Missouri Telecommunications Industry Association's (MTIA) request to nominate five members to the Task Force instead of four members is granted. MTIA's representatives are as follows:

- Bill Biere, Chariton Valley Telephone Company
- John R. Idoux, Sprint
- R. Matthew Kohly, AT&T
- Arthur Martinez, CenturyTel
- Craig Unruh, SBC Missouri

4. That no later than July 15, 2004, the Office of the Public Counsel shall file a letter or pleading indicating the name of its two nominees to the Task Force.

5. That the requirement, found in ordered paragraphs 11 and 12 of the Commission's May 25, 2004 order, that certain parties file illustrative tariffs is suspended until July 30, 2004.

6. That this order shall become effective on July 15, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Ruth, Senior Regulatory Law Judge

Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc., Respondent.*

Case No. MC-2004-0271
Decided July 8, 2004

Manufactured Housing §1. The Commission approved a Stipulation and Agreement that required Coachman Homes of Eureka, Inc., to pay certain penalties, to inspect and correct the anchoring of homes at the company's expense, to discontinue the use of a subcontractor and to pay restitution and remove a damaged home from a customers' property.

Manufactured Housing §19. The Commission approved a Stipulation and Agreement that required Coachman Homes of Eureka, Inc., to pay a penalty of $2000.00.

ORDER REJECTING STIPULATED AGREEMENT AND SETTING PREHEARING CONFERENCE

Syllabus: This order rejects the Stipulated Agreement filed by the parties and directs the parties to appear at a prehearing conference.

On May 18, 2004, the Manager of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission and Coachman Homes of Eureka, Inc., filed a Stipulated Agreement. The parties have participated in mediation and present the Agreement to the Commission as a resolution of the issues in this case.

The Agreement requires the payment of certain penalties, further inspection and correction, if needed, of the anchoring of homes, the discontinuance of the use of a subcontractor for Coachman, and a provision for future penalties in exchange for the Manager dismissing the Complaint and no action being taken against the dealer's license. The Agreement is contingent upon the Commission's approval.

The Commission held a hearing regarding the Stipulated Agreement on June 9, 2004, at which all the parties were represented. The Commission has reviewed the Agreement and determines that it should be rejected for the reasons stated below. The Commission also indicates the type of items necessary for it to consider a settlement of this matter.

The Complaint alleges that Coachman Homes failed to properly anchor a manufactured home. According to the Complaint, that home was later destroyed

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* See pages 553, 555 and 579 for other orders in this case.

because of that failure. The Commission considers this allegation to be a very serious violation of Section 700.100.3(6), RSMo, which states that the failure of "a dealer . . . to arrange the proper setup of any new manufactured home or modular unit" constitutes "grounds for the suspension, revocation or placing on probation of a . . . dealer's registration."

The Agreement provides for penalties and further inspection of a sample number of the homes set up by the contractor used by Coachman. The Agreement does not, however, provide for restitution to Ms. Hatfield, the owner of the home that is the subject of the Complaint. At the hearing, Coachman indicated that no effort had been made to contact its insurance carrier or the contractor's insurance carrier to determine if those carriers were liable for part of Ms. Hatfield's damages. In fact, at the hearing, Coachman could not even tell the Commission who its insurance carrier was, nor did Coachman respond to the direction of the Commission to report back to it within a week regarding the status of its discussions with its insurance carrier. The Commission finds it difficult to determine this Agreement is in the public interest when the Agreement does not provide for restitution to Ms. Hatfield and to the other homeowners who have been or may be affected by these alleged violations.

Also, at the hearing, it was unclear how many homes the particular contractor had set up and whether the lesser of 25 homes or 10 percent is actually a representative sample that will ensure that other homes were set up in the proper manner. While the Commission appreciates the deterrent effect of the penalties provided for future or past violations by this company, without knowing the number of homeowners potentially affected, the Commission cannot find that the agreement is structured in a manner consistent with the public interest.

In addition, the Commission finds that if this home has been improperly set up, it would be in the public interest to alert other homeowners for whom this setup contractor was used of a potential problem so that they may request inspection of their homes. The Commission also finds that for a settlement of this matter to be in the public interest it would be necessary for the company to pay the costs of providing such notice and inspections. Finally, if this particular incident turns out not to be an isolated event, the Commission may find it necessary to direct its Staff to inform other manufactured housing dealers in the area that this setup contractor has used improper methods.

For all of these reasons, the Commission cannot determine that the Agreement is the appropriate remedy in this case. Therefore, the Commission will reject the Stipulated Agreement.

The Commission will also set this matter for a prehearing conference and direct the parties to file a proposed procedural schedule. The parties shall meet in a prehearing conference in order to discuss possible settlement of these issues and a procedural schedule.

The parties shall jointly or separately file a proposed procedural schedule. The proposed procedural schedule shall establish dates for the filing of a list of the issues to be determined by the Commission and statements by the parties of their position on each such issue. The proposed procedural schedule shall also include a date for the filing of a list of the witnesses to be called on each day of

hearing, the order in which they shall appear and the order of cross-examination agreed upon by the parties. The proposed procedural schedule shall also establish dates for the hearing of this matter.

IT IS THEREFORE ORDERED:

1. That the Stipulated Agreement filed on May 18, 2004, is rejected.

2. That the parties shall appear at a prehearing conference to be held on July 20, 2004, beginning at 8:30 a.m. in Room 305 of the Governor Office Building, 200 Madison Street, Jefferson City, Missouri. This conference will be held in a building that meets accessibility standards required by the Americans with Disabilities Act. If you need additional accommodations to participate in this scheduling conference, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or Relay Missouri at 711 prior to the conference.

3. That the parties shall jointly or separately file a proposed procedural schedule no later than July 27, 2004.

4. That this order shall become effective on July 18, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Dippell, Senior Regulatory Law Judge

In the Matter of the Joint Application of Missouri-American Water Company and Warren County Water & Sewer Company for Authority for Missouri-American Water Company to Acquire Certain Assets of Warren County Water & Sewer Company and, in Connection Therewith, Certain Other Related Transactions.*

Case No. WM-2004-0122
Decided July 20, 2004

Water §4. In a previous order, issued November 20, 2003, the Commission approved the application for the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company. On July 13, 2004, Missouri-American notified the Commission that one of the assets approved for transfer, a .3 acre parcel of land, was not available for sale. The parties subsequently modified the terms of the purchase price, removing that parcel from the assets to be purchased and reducing the purchase price by $30,000. The Commission subsequently approved the modified transaction in this order, noting that the removal of the parcel of land was not material to the approval of the sale of assets.

ORDER APPROVING SALE AS MODIFIED

Syllabus: This order approves the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company as modified.

On November 20, 2003, by Report and Order the Commission approved the sale of the assets of Warren County Water & Sewer to Missouri-American. That order was clarified by further order on December 18, 2003. One of the assets approved for transfer was a .3-acre parcel of land planned to be used for future expansion.

On July 13, 2004, Missouri-American notified the Commission that the parcel of land "was not owned by Warren County Water & Sewer Company and is encumbered in such a way that it is not available for purchase by MAWC." Missouri-American further explains that the purchase price will be reduced by $30,000 to reflect the removal of the land from the transaction.

The Office of the Public Counsel filed a response in which it urges the Commission to accept the status report of Missouri-American and to direct the parties to complete the transaction.

The Commission issued an Order Directing Filing on July 15, 2004, in which it took notice of receivership proceedings pending in Warren County Circuit Court, Case No. 02CV155901, where Warren County Water & Sewer Company has been placed in receivership. In addition, the Commission directed its Staff to provide an update on those proceedings and to respond to Missouri-American's Second Status Report. The Commission specifically directed its Staff to give the status of the proceedings, whether the Receiver has approved the sale as proposed in

* See previous order in this case on page 275 of this volume.

Missouri-American's Second Status Report, how the proceeds of the sale will be distributed, whether Staff has any objection to the sale as proposed, and the proposed closing date, if known.

Staff filed a response on July 16, 2004. In its response, Staff states that the Receiver has filed a motion with the Warren County Circuit Court requesting the approval of the sale of Warren County Water & Sewer to Missouri-American as described in the Second Status Report and consistent with a stipulation signed by the parties to the receivership case. The proceeds from the sale will be paid to and distributed by the Court, in accordance with a Schedule of Distribution to be recommended by the Receiver and approved by the Court.

Staff has no objection to the sale as proposed and believes the Commission approving the sale as modified will serve the public interest. Staff indicated that the parcel of land removed from the sale was not being used by Warren County Water & Sewer to provide service and the reduction in sale price is consistent with the value placed on the land in the earlier proceedings. Staff indicated that the closing is expected to take place as early as July 20, 2004, and no later than July 23, 2004. Staff recommended the Commission issue an order approving the sale as modified.

The Commission has reviewed its Report and Order, the Second Status Report, and the Response to Order Directing Filing. The Commission finds that the removal of the parcel of land is not material to the approval of the sale of assets. In addition, the proceeds of the sale and distribution of those proceeds will be governed by the Warren County Circuit Court and upon the recommendation of the Court-appointed Receiver. Therefore, the Commission determines that the transaction should be approved as amended. The parties may proceed expeditiously with the sale of assets as directed by the Court.

IT IS THEREFORE ORDERED:

1. That the sale of assets of Warren County Water & Sewer Company to Missouri American Water Company is approved as amended by the removal of one parcel of land, the related reduction in the sale price, and to be completed in compliance with the orders of the Warren County Circuit Court.

2. That all other conditions and provisions of the Report and Order issued November 20, 2003, and effective on December 5, 2003, remain in effect.

3. That the parties shall proceed expeditiously with the sale of the assets and are authorized to take any and all lawful actions necessary to carry out the proposed sale.

4. That this order shall become effective on July 30, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Dippell, Senior Regulatory Law Judge

In the Matter of the Notice of Election of ALLTEL Missouri, Inc., to be Price-Cap-Regulated under Section 392.245, RSMo 2000.*

Case No. IO-2002-1083
Decided July 20, 2004

Rates §110. The Commission found that ALLTEL could not elect price-cap status because the alternative local exchange companies were not providing basic local service as contemplated by the statute. Basic local service means that the alternative local exchange company offers **all** essential services required in the Commission's rules.

Telecommunications §3. To receive a certificate of service authority to provide basic local service, an applicant must show that it will provide **all** the services that the Commission has deemed essential to qualify for state universal service fund support.

Telecommunications §45. Effective competition is not required for a company to become price-cap regulated. Instead, an alternative local exchange company must provide **all** essential basic local services before the price-cap statute is triggered.

APPEARANCES

Larry W. Dority, FISCHER & DORITY, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for ALLTEL, Missouri, Inc.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus: This order finds that ALLTEL Missouri, Inc.'s notice of election to become a price cap-regulated carrier under Section 392.245.2, RSMo 2000,[1] is invalid.

Procedural History

On May 20, 2002, ALLTEL Missouri, Inc., notified the Commission that it was electing to be regulated under the "price cap" provisions of Section 392.245.2. The Staff of the Missouri Public Service Commission filed a motion requesting that the

* The Commission, in an order issued on October 28, 2004, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (04CV326591).

[1] All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

Commission reject ALLTEL's price cap election. A Prehearing Conference was held on July 1, 2002. Thereafter, the parties jointly requested that this proceeding be suspended until similar issues were decided in two other pending Commission cases.[2]

The Commission decided the BPS Telephone Company case based on specific facts[3] and dismissed the Investigation case. On January 21, 2004, the Commission adopted a procedural schedule in this matter. On February 20, 2004, the parties filed a Stipulation of Facts. The parties later submitted Initial Briefs and Reply Briefs. No request for hearing was made.

Discussion

Because the parties stipulated to the facts of this case, the only issue for Commission determination is whether Missouri State Discount Telephone and Universal Telecom, Inc., are providing basic local telecommunications service in ALLTEL's service area?

Findings of Fact

The parties stipulated to the facts and agreed that "the Commission may take official notice of Commission rules, tariffs, orders, and any other information contained in a document on file as a public record with the Commission."[4] 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. Thus, the Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission takes official notice of its official case files, tariffs, and orders cited herein.

ALLTEL is a small incumbent local exchange company serving approximately 69,000 access lines in Missouri.[5] ALLTEL provided written notice to the Commission of its intent to be regulated under the price cap statute[6] on May 17, 2002.[7]

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[2] *In the mater of BPS Telephone Company's Election to be Regulated Under Price-cap regulation as Provided in Section 392.245, RSMo 2000,* Case No. IO-2003-0012, and *In the Matter of the Investigation of the Status of Prepaid Local Service Providers As Alternative Local Exchange Competitors Under Section 392.245, RSMo.,* Case No. CO-2002-1078.

[3] The Commission decided that BPS was not a price cap company, but based its decision on the non-compete clause in the BPS-MSDT interconnection agreement and did not decide the issue of whether a reseller was providing basic local service.

[4] *Joint Response to Order Granting Extension of Time*, filed February 20, 2004, Attachment 1 (referred to hereafter as "Stipulation of Facts"), para. 13.

[5] Stipulation of Facts, para 1.

[6] Section 392.245, RSMo.

[7] *Notice of Election To Be Price-cap regulated,* filed May 17, 2002; *See also,* Stipulation of Facts, para. 2.

Universal was granted a certificate of service authority to provide basic local exchange telecommunications services by the Commission effective March 31, 2002.[8] At the time ALLTEL notified the Commission of its election to be price-cap regulated, Universal provided telecommunications service to customers within the ALLTEL service area pursuant to its lawfully approved tariff.[9] Universal also provided service under its Commission-approved Interconnection Agreement with ALLTEL.[10] The Interconnection Agreement between Universal and ALLTEL does not contain a provision similar to the one determined to be a non-compete clause in the *BPS Telephone Company* case.[11]

MSDT was granted a certificate of service authority to provide basic local exchange telecommunications services by the Commission effective March 26, 2001.[12] At the time ALLTEL notified the Commission of its election to be price-cap regulated, MSDT provided telecommunications service to customers within the ALLTEL service area pursuant to its lawfully approved tariff.[13] MSDT also provided service under its Commission-approved Interconnection Agreement with ALLTEL.[14] The Interconnection Agreement between MSDT and ALLTEL does not contain a provision similar to the one determined to be a non compete clause in the *BPS Telephone Company* case.[15]

ALLTEL provides two-way switched voice service within a local calling scope as determined by the Commission including all the basic local services set out in Section 386.020(4).[16]

MSDT and Universal each provide two-way switched voice service within a local calling scope as determined by the Commission comprised of the following services:[17]

(a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges.

(b) Access to local emergency services including, but not limited to, 911 service established by local authorities.

(c) Standard intercept service.

(d) One standard white pages directory listing.

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[8] *Order Granting Certificate to Provide Basic Local Exchange Service,* Case No. TA-2002-183, effective March 31, 2002; *See also,* Stipulation of Facts, para. 4.

[9] Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1.

[10] *Order Approving Interconnection Agreement,* Case No. TO-2001-360, effective February 1, 2001; *See also,* Stipulation of Facts, para. 5.

[11] Case No. IO-2003-0012; *see also,* Stipulation of Facts, para. 5.

[12] *Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service,* Case No. TA-2001-334, effective March 26, 2001; *See also,* Stipulation of Facts, para. 8.

[13] Missouri State Discounty Telephone, P.S.C. No. 1.

[14] *Order Approving Interconnection Agreement,* Case No. TO-2000-469, effective May 2, 2000; *See also,* Stipulation of Facts, para. 10.

[15] Case No. IO-2003-0012; Stipulation of Facts, para. 10.

[16] ALLTEL Missouri, Inc., P.S.C. Missouri No. 2.

[17] Stipulation of Facts, para. 7 and 12.

Neither MSDT or Universal provide the following services:[18]

(a) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired or speech impaired.

(b) Access to basic local operator services.

(c) Access to basic local directory assistance.

(d) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.

(e) Equal access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (a.k.a. intraLATA and interLATA presubscription).

The type of service offered by MSDT and Universal is often referred to as "prepaid" service. This term is derived from the fact that in order to receive service, the customer must pay in advance in full for the month of service. In addition, consumers of "prepaid" service usually are limited to basic local services and have no access to toll or fee services. MSDT and Universal's customers are limited in this manner.[19]

MSDT requires a one-time activation fee of $30.00 and the monthly recurring charge of $50.00 per month plus applicable taxes and fees.[20] Universal requires a one-time activation fee of $40.00 and the monthly recurring charge of $49.00 per month plus applicable taxes and fees.[21] For comparable residential service, ALLTEL charges a monthly recurring charge of $7.35 or $7.85, depending on the rate group, plus applicable taxes and fees.[22]

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

ALLTEL is a telecommunications company[23] and public utility.[24] ALLTEL is also an incumbent local exchange telecommunications company[25] and a small local exchange telecommunications company.[26] The Commission has jurisdiction over the services, activities, and rates of ALLTEL under Chapters 386 and 392.

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[18] *Id.*

[19] Missouri State Discount Telephone, P.S.C. No. 1, Original Sheet No. 17; Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1, Original Sheet No. 18.

[20] Missouri State Discount Telephone, P.S.C. No. 1, Original Sheet 17.

[21] Universal Telecom, Inc., P.S.C. Mo. Tarif No. 1, Original Sheet 18.

[22] ALLTEL Missouri, Inc., P.S.C. Missouri No. 2, Section 25, Second Revised Sheet 2.

[23] Section 386.020(51).

[24] Section 386.020(42).

[25] Section 386.020(22).

[26] Section 386.020(30).

The Commission is authorized to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price-cap regulation."[27] Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

> A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area . . . .

An "alternative local exchange telecommunications company" is defined as "a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service . . . in a specific geographic area."[28] MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-334, effective March 26, 2001. Universal Telecom was certificated to provide basic local telecommunications service in Case No. TA-2002-183, effective March 31, 2001. Both MSDT and Universal's tariffs specify that those companies will provide service in ALLTEL's service area.[29] MSDT and Universal are alternative local exchange telecommunications companies.[30]

ALLTEL has provided written notice of its election to be regulated pursuant to the price cap statute on May 17, 2002. Thus, ALLTEL has shown all the required elements of Section 392.245.2 except that MSDT and Universal are *providing* basic local telecommunications service. Even though MSDT and Universal provide two-way switched voice service within a local calling scope and provide four of the services listed in Section 386.020(4), they are not providing basic local service in a manner as intended by the legislature that authorizes ALLTEL to elect price-cap regulation under Section 392.245.

ALLTEL argues that the price cap statute[31] and the definition of basic local services[32] are clear and no interpretation of legislative intent is needed. ALLTEL's position is that the Staff of the Missouri Public Service Commission and the Office of the Public Counsel are "proposing a standard not consistent with the plain reading of the price cap statute and the standard definition of 'basic local telecommunications service'"[33] as found in Section 386.020(4). That statute defines basic local service as being comprised of "any" of a number of services.

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[27] Section 392.245.1.

[28] Section 386.020(1), RSMo.

[29] *See*, Missouri State Discount Telephone, P.S.C. No. 1, and Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1.

[30] Section 386.020(1).

[31] Section 392.245.2, RSMo.

[32] Section 386.020(4), RSMo.

[33] Initial Brief of ALLTEL Missouri, Inc., filed March 26, 2004, p. 14.

In addition, ALLTEL argues that the Commission has previously found the presence of a reseller of basic local services to be sufficient for price cap election for a large ILEC in the *Southwestern Bell* case.[34] ALLTEL believes that to find differently for a small ILEC would be discriminatory treatment.

"It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature."[35] Section 392.245 contains no reference to competition. The legislature has mandated, however, that every provision in Chapter 392, whether ambiguous or not, be construed with certain principles in mind.[36] Section 392.185 states:

The provisions of this chapter shall be construed to:

> (1) Promote universally available and widely affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
>
> (4) Ensure that customers pay only reasonable charges for telecommunications service;
>
> (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
>
> (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
>
> (7) Promote parity of urban and rural telecommunications services;
>
> (8) Promote economic, educational, health care and cultural enhancements; and
>
> (9) Protect consumer privacy.

The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in the construction and application of the price cap statute.

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[34] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price-cap regulation Under Section 392.245 RSMo (1996),* Case No. TO-97-397.

[35] *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 386-387 (Mo. banc 1987). (citations omitted)

[36] Section 392.185, RSMo.

Section 392.185(6) states that one public policy to be implemented through the construction of Chapter 392 is to "[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest." Another is "flexible regulation of competitive telecommunications companies and competitive telecommunications services."[37] Price-cap regulation, a transitional status between traditional rate-of-return regulation and deregulated competition, permits ratemaking without the traditional oversight and regulation of the Commission. This is the principal benefit that the legislature intended to confer on qualifying carriers through the price cap statute.

The Commission has examined the price cap statute in the context of the principles set out by the legislature and the entire deregulation scheme put forth in Chapter 392 to implement the federal Telecommunications Act of 1996.[38] It is clear from the statutes that the legislature intended to promote competition while maintaining protection for the ratepayers by allowing competition to substitute for regulation.

The legislature did not intend the presence of a provider of only a few basic local services to trigger price-cap regulation. When taken in the context of the entire Chapter 392, competition is a necessary element for the change in regulation to a lesser degree of oversight. For instance, in order to receive a certificate to provide basic local services, Section 392.451.1 requires a competitive company to show that it will "offer *all* telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support."[39] The Commission has defined these essential services in two of its rules.[40]

The Commission is also supported in this interpretation by the statutory distinction between "providing basic local" and "the resale of basic local" found in the certification statutes.[41] Those statutes provide the standards for granting a "certificate of local exchange service authority *to provide* basic local telecommunications service *or for the resale* of basic local telecommunications service."[42]

The Commission previously rejected this second argument in the *Southwestern Bell* price cap case.[43] Southwestern Bell was the first large incumbent local exchange carrier to request price cap status. The *Southwestern Bell* case was appealed to the Circuit Court of Cole County. The Circuit Court affirmed the Commission's decision to grant price cap status but agreed that "it is a possible

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[37] Section 392.185(5).

[38] 47 U.S.C. §254, et seq.

[39] (emphasis added).

[40] 4 CSR 240-31.010(6) and 4 CSR 240-32.010.

[41] Section 392.450 and 392.451.

[42] Section 392.450. (emphasis added)

[43] *In the Matter of the Petition of Southwetern Bell Telephone Company for a Determination that it is Subject to Price-cap regulation Under Section 392.245 RSMo (1996)*, Case No. TO-97-397.

interpretation" that resellers can be distinguished from facilities-based providers.[44]

Furthermore, a distinction on the facts can be made between the current case and the large ILEC cases. The facts of the *Southwestern Bell* case may be distinguished because the alternative carrier in that case was providing different basic local services including equal access to interexchange services. Also, the focus of the findings in that order is on whether effective competition must exist. In this case, the Commission is not finding that "effective competition" must exist before a company becomes price-cap regulated. Instead, the Commission is finding that MSDT and Universal Telecom do not "provide basic local service" as the statute intends and, therefore, ALLTEL does not meet the statutory requirements to be price-cap regulated.

The other large ILEC cases that the Commission has determined can also be distinguished. In the Sprint price cap case,[45] the alternative carrier was a facilities-based provider. In the only other large ILEC price cap case,[46] no party alleged that the alternative carrier was not providing service.

MSDT and Universal provide only a few basic local services. MSDT and Universal are not providing all the essential services and minimum service features required in the Commission rules. They do not provide such basic services as access to local operator services, directory assistance, equal access to interexchange carriers, or assistance programs for economically disadvantaged or disabled customers. At rates that are more than five times the cost of similar residential service from ALLTEL and very restricted, the services offered by MSDT and Universal are in no way a substitute or competitive service to ALLTEL's customers.

The Commission concludes that to allow ALLTEL to elect price cap status under these circumstances, where prepaid providers offer such minimal services at such a high cost, "would lead to an illogical result defeating the purpose of the legislature"[47] and would not be "consistent with the public interest."[48] Thus, the Commission concludes that MSDT and Universal are not providing basic local telecommunications services in a manner that would allow ALLTEL to elect price cap status. The Commission further concludes that ALLTEL's price cap election is invalid, and that ALLTEL maintains its status as a traditional rate-of-return regulated company.

Conclusion

The parties have stipulated to the facts and the only issue for Commission decision is whether the alternative local exchange carriers are providing basic local

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[44] *State of Missouri ex rel. Public Counsel v. Public Service Commission, et al.*, Case No. CV197-1795CC, Revised Findings of Fact and Conclusions of Law and Judgment (issued August 6, 1998).[45] *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price-cap regulation Under RSMo Section 392.245 (1996),* Case No. TO-99-359.

[46] *In the Matter of the Petition of GTE Midwest Incorporated Regarding Price-cap regulation Under RSMo Section 392.245 (1996),* Case No. TO-99-294.

[47] *State ex rel. Maryland Heights Fire Protection Dist.,* supra.

[48] Section 392.185(6), RSMo.

telecommunication service. The legislature stated that Chapter 392 "shall be construed" so that "full and fair competition . . . [may] substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest."[49] The types of services that MSDT and Universal provide are not what the legislature intended as basic local services necessary to invoke a lesser degree of regulation for small incumbent local exchange carriers. For these reasons, the Commission determines that ALLTEL is not eligible for price cap status and that its price cap election is invalid.

IT IS THEREFORE ORDERED:

1. That ALLTEL Missouri, Inc., is ineligible to elect price cap status.
2. That any motion not ruled on is denied and that any objection not ruled on is overruled.
3. That this Report and Order shall become effective on July 30, 2004.

Gaw, Ch., Clayton, Davis, and
Appling, CC., concur;
Murray, C., dissents, with separate
dissenting opinion attached;
and certify compliance with the
provisions of Section 536.080,
RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I do not necessarily believe that a strict application of the price cap statute (392.245.2) provides a well-reasoned result. Nevertheless, I cannot find any statutory construction that gives the Commission discretion to reject the price cap election of ALLTEL.

I am particularly concerned that price cap election may delay or circumvent access charge reform. It is also possible that price cap election may allow incumbents to freeze rates at levels that would be disallowed pursuant to an earnings investigation.

The statute, however, does not give the Commission discretion to reject a price cap election by an incumbent local exchange telecommunications company such as ALLTEL where, as here, an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service as defined by § 386.020(4), and is providing such service in any part of the incumbent company's service area.

For these reasons, I dissent from today's Report and Order which finds ALLTEL ineligible to elect price cap status.

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[49] *Id.*

In the Matter of the Petition of New London Telephone Company, Orchard Farm Telephone Company, and Stoutland Telephone Company for Suspension of the Federal Communications Commission Requirement to Implement Number Portability.*

Case No. TO-2004-0370
Decided July 20, 2004

Telecommunications §36. The Commission approved a unanimous stipulation and agreement and thereby suspended, until November 24, 2004, the companies' obligation to implement local number portability (LNP). The stipulation and agreement also modified the local number portability requirements for small rural local exchange carriers such that if wireline-to-wireless local number portability is requested after the petitioners have become fully LNP-capable, then the petitioners shall notify the wireless carrier that they are not responsible for establishing facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of the petitioners' local service areas.

The Commission also required the petitioners to establish intercept messages for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established.

Telecommunications §45. The Commission approved a unanimous stipulation and agreement and thereby suspended, until November 24, 2004, the companies' obligation to implement local number portability (LNP). The stipulation and agreement also modified the local number portability requirements for small rural local exchange carriers such that if wireline-to-wireless local number portability is requested after the petitioners have become fully LNP-capable, then the petitioners shall notify the wireless carrier that they are not responsible for establishing facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of the petitioners' local service areas.

The Commission also required the petitioners to establish intercept messages for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

Syllabus: This order approves the Unanimous Stipulation and Agreement filed by the parties on June 18, 2004. As a result, the Petitioners are granted a suspension until November 24, 2004, of the intermodal porting obligations of the Federal Communication Commission's November 24, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*.[1] The Petitioners are also granted certain modifications regarding rating and routing issues.

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* See also Case Nos. TO-2004-0403, TO-2004-0438, TO-2004-0503, TO-2004-0453, TO-2004-0511, TO-2004-0437, TO-2004-0428, TO-2004-0439, IO-2004-0453, TO-2004-0454, TO-2004-0456, TO-2004-0457, TO-2004-0458, TO-2004-0459, TO-2004-0480, TO-2004-0484, and TO-2004-0526.

[1] *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, issued Nov. 10, 2003.

Background

On November 10, 2003, the Federal Communications Commission (FCC) issued a *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (the LNP Order) addressing local number portability (LNP) between wireline and wireless telecommunications carriers.[2] Among other things, the LNP Order concludes that, by May 24, 2004, local exchange carriers must port numbers to wireless carriers where the requesting wireless carrier's "coverage area" overlaps the geographic location of the rate center in which the customer's wireline number is provisioned. This requirement applies even though the wireless carrier's point of presence is in another rate center and has no physical interconnection with the wireline carrier. Although the LNP Order recognized the problem of designating different routing and rating points on LNP for small rural local exchange carriers, the FCC did not resolve these issues in its decision.

Procedural History

On February 9, 2004, New London Telephone Company, Orchard Farm Telephone Company, and Stoutland Telephone Company (Petitioners) filed a Petition with the Missouri Public Service Commission requesting a two-year suspension of Petitioners' obligations under Section 251(b) of the Telecommunications Act of 1996 to provide LNP to requesting commercial mobile radio service providers.

On February 19, 2004, the Commission's Staff filed a Staff Recommendation suggesting, among other things, that the Commission grant Petitioners a temporary six-month suspension, until November 24, 2004, of the intermodal porting obligations. Attached to Staff's Recommendation was a Memorandum further explaining Staff's position. On February 23, 2004, Petitioners filed their Reply to Staff's Recommendation. Petitioners state that unless the Commission chooses to grant their request for a two-year suspension outright, Petitioners recommend that the Commission adopt Staff's proposal as a reasonable compromise.

On April 29, 2004, Petitioners filed a Supplemental Petition in which they request not only a two-year suspension of the LNP requirements, but also certain modifications regarding call rating and routing issues.

The Commission held an On-the-Record Presentation regarding the Petition on May 5, 2004. During a prehearing conference on May 11, 2004, the Commission ordered that the enforcement of the FCC's requirements be suspended until August 7, to allow the Commission additional time to consider the petition. The Commission adopted a procedural schedule by an order issued on May 25, 2004.

On June 18, 2004, Petitioners, the Commission Staff, and the Office of the Public Counsel filed a Unanimous Stipulation and Agreement resolving all issues in this case. Also on June 18, 2004, Staff filed suggestions in support of the Stipulation and Agreement and the direct testimony of Natelle Dietrich. On the same date, the Office of the Public Counsel filed Supporting Comments Regarding the Unanimous Stipulation and Agreement.

On July 7, 2004, the Commission conducted an On-the-Record Presentation regarding the Stipulation and Agreement. The transcript for the hearing was filed

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[2] Id.

on July 9, 2004. The Commission did not receive any objections to post-hearing Exhibit 26, entitled "Local Number Portability Intercept Information," or to post-hearing Exhibit 27, regarding the intercept message. Exhibits 26 and 27 are therefore received into the record.

On July 19, 2004, Petitioners filed a supplemental response regarding the length and content of the intercept message that can be recorded for each of the Petitioners.

Discussion

The Stipulation and Agreement:

The Stipulation and Agreement asks the Commission to *suspend,* until November 24, 2004, and *modify* the wireline-to-wireless local number portability requirements established by the FCC.

The parties note that the FCC's LNP Order requires small rural local exchange carriers, such as the Petitioners, to implement local number portability between themselves and wireless telecommunications carriers. Local number portability would allow customers of one of the Petitioners to change their local service from the Petitioner to a wireless carrier by porting their wireline numbers to the wireless carrier, thus keeping the use of their old phone numbers.

The FCC's LNP Order also requires that local exchange carriers, such as the Petitioners, port numbers to requesting wireless carriers where the wireless carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned. This requirement applies even though the wireless carrier's point of presence is in another rate center and the wireless carrier has no physical interconnection with the wireline carrier. The problems facing the Petitioners, and other local exchange carriers, are whether to upgrade or replace their current switches in order to make them LNP capable, and how to make, and how to pay for, the interconnection with the wireless carrier's point of presence.

1) Suspension:

Petitioners' facilities are not LNP-capable. Therefore, implementing wireline to wireless LNP will require Petitioners to incur costly implementation expenses and will result in substantial ongoing costs. Petitioners seek suspension in order to analyze the costs and benefits of switch upgrades versus switch replacements. Although Petitioners have already sent out Requests for Proposals, they indicate that it takes time to analyze this data and assess the costs and benefits of a switch upgrade versus switch replacement. Petitioners further state that if switch replacement emerges as the better solution, they will then need additional time to determine which switch platform will provide the best long-term solution for customers. The parties also note that if the Petitioners are required to implement LNP, it will result in substantial implementation costs that Petitioners may recover in accordance with FCC rules from the Petitioners' end user customers. Petitioners' estimated LNP charges necessary to recover implementation costs are between $0.39 and $0.71 per month for each subscriber over a five-year period, based on the cost of upgrading Petitioners' current switching equipment. Petitioners indicate that these figures do not include ongoing LNP charges.

In the Stipulation and Agreement, the parties recommend that the Commission suspend the LNP requirements in order to avoid the imposition of a significant adverse economic impact on Petitioners' subscribers and to avoid imposing an undue economic burden on the Petitioners. The parties also agree that suspension of Petitioners' LNP obligations will ensure that subscribers are not forced to bear the costs for something from which they are unlikely to benefit. In addition, the parties agree that granting the requested suspension is consistent with the public interest, convenience, and necessity since it will avoid the imposition of additional economic burdens on customers or telecommunications services and will reduce customer confusion prior to the FCC's resolution of the rating and routing issues. The Stipulation and Agreement provides that after this initial suspension period, the parties will be free to offer further recommendations as to whether or not an additional period is appropriate.

In its Supporting Comments Regarding the Unanimous Stipulation and Agreement, Public Counsel argues that, while it supports the Stipulation and Agreement, it would prefer that the Commission simply suspend the entire local number portability requirement for rural local exchange carriers until the FCC further addresses the rating and routing issues that it avoided in its implementing order. Public Counsel contends that if the Commission is not willing to take that step, then the Stipulation and Agreement is the best available alternative.

2) Modification:

Once LNP is achieved, the required interconnection between the wireline and wireless carriers can be made by establishing appropriate facilities, or by making arrangements with third party carriers to transport the ported number and the associated calls to the wireless carrier's point of presence. The question is, who should have to pay to establish those facilities?

As noted above, the FCC did not resolve this "rating and routing" issue in its LNP Order. However, 47 U.S.C. Section 251(f)(2), a provision of the Telecommunications Act of 1996, provides that a state commission shall suspend or modify number portability requirements for rural carriers, if suspension or modification:

> (A) is necessary –
>
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
>
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
>
> (iii) to avoid a requirement that is technically infeasible; and
>
> (B) is consistent with the public interest, convenience, and necessity.

The parties agree that the costs of implementing LNP at this time will impose an undue economic burden on the Petitioners. In addition, any requirement to deliver calls outside of Petitioners' local exchange boundaries would also impose

an undue economic burden upon the Petitioners. If Petitioners are required to provide service outside of their certificated local service areas, then additional legal and regulatory issues will arise relating to modifying existing certificates and tariffs, and obtaining – through negotiation, and, if necessary, arbitration – facilities or arrangements with third-party carriers to port numbers and transport associated calls to remote locations outside of Petitioners' local exchange service areas.

The parties also agree that modification of Petitioners' LNP obligations will ensure that subscribers are not forced to bear the costs for something from which they are unlikely to benefit. The parties further agree that modification will prevent Petitioners from having to incur costs before the FCC has resolved the LNP rating and routing issues.

In addition, the parties agree that granting the requested modification is consistent with the public interest, convenience, and necessity since it will avoid the imposition of additional economic burdens on customers or telecommunications services and will reduce customer confusion prior to the FCC's resolution of the rating and routing issues.

The parties thus agree that the Commission should enter an order granting Petitioners' requested modification of the FCC's LNP requirements until such time as the FCC addresses the call rating and routing issues presented by the FCC's November 10, 2003 Order. The modification is therefore a conditional modification. The Stipulation and Agreement further provides that the Petitioners should not be foreclosed from seeking additional modification if and when the FCC issues any subsequent decisions to address the rating and routing issues associated with porting numbers.

Specifically, the parties agree that the Commission should grant modification such that if wireline-to-wireless LNP is requested after a Petitioner becomes fully LNP capable, then the Petitioner would notify the wireless carrier that it is not the responsibility of the Petitioner to establish facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of its local servicing area. This would also apply to a situation where a wireless carrier that has established facilities or arrangements with third-party carriers to transport calls to a point outside of the Petitioner's local servicing area is requested to port numbers to another wireless carrier who has not established such facilities or arrangements.

The parties also agree that neither the Petitioners, nor their wireline customers, will be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside Petitioners' local service area. The parties further agree that the Commission should authorize Petitioners to establish an intercept message for seven-digit dialed calls to ported numbers where the facilities or the appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed, and, if possible, provide information about how to complete the call. At the July 7th On-the-Record Presentation, the parties agreed that the Commission could go beyond *authorizing* Petitioners to establish an intercept message, and could instead *require* Petitioners to establish the message.

On July 19, 2004, the Petitioners filed their supplemental response regarding the context of their intercept messages. Petitioners indicate that New London can record any custom intercept message up to 60 seconds. Therefore, New London could implement a message similar to that, in Exhibit 26, of Green Hills Telephone Company or Holway Telephone Company.

Petitioners indicate that the equipment at Orchard Farm Telephone Company and Stoutland Telephone Company, however, is limited to a pre-programmed vocabulary and that the pre-programmed vocabulary does not address "porting" of numbers to wireless carriers or "long distance" or "toll" charges. Petitioners state that the existing intercept machines at Orchard Farm and Stoutland are vintage, and have no parts or vendor support available. Petitioners further note that the existing equipment at Orchard Farm and Stoutland does have the ability to provide intercept information to: (1) let customers know that calls cannot be completed as dialed, and (2) explain how to complete the calls. Specifically, the intercept message could state: "The call cannot be completed as dialed. You must dial a 1 + the area code + the number to complete the call."

Decision

After reviewing the Unanimous Stipulation and Agreement, Staff and Public Counsel's suggestions, the supplemental filings, and after hearing the arguments and explanations of the parties at the On-the-Record Presentations, the Commission finds that the Stipulation and Agreement filed on June 18, 2004, should be approved. Granting the suspension and modification is consistent with 47 U.S.C. Section 251(f)(2), in that it is necessary to avoid a significant adverse economic impact on users of telecommunications services generally and to avoid imposing a requirement that is unduly economically burdensome. In addition, granting the suspension and modification is consistent with the public interest, convenience, and necessity since it will avoid imposing additional economic burden on customers or telecommunications services and will reduce customer confusion prior to the FCC resolving rating and routing issues.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement (Attachment A) filed on June 18, 2004, is approved, and the signatory parties are ordered to comply with its terms.

2. That the requirement established by the Federal Communications Commission's November 24, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* to implement local number portability is suspended until November 24, 2004.

3. That the Federal Communications Commission's local number portability requirements for small rural local exchange carriers are modified to provide that if wireline-to-wireless local number portability is requested after the Petitioner has become fully LNP capable, then the Petitioner shall notify the wireless carrier that it is not the responsibility of the Petitioner to establish facilities or arrangements with third party carriers to transport calls on a local basis to a point outside of its local service areas. This also applies to a situation where a wireless carrier that has established facilities or arrange-ments, or both, with third party carriers to transport calls to a point outside of the Petitioner's local service areas is requested to port numbers to another wireless carrier that has not established such facilities or arrangements.

4. That while this modification is in effect, neither Petitioners, nor their wireline customers, will be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside Petitioners' local service area.

5. That Petitioners shall establish an intercept message for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed and, to the extent possible, provide information about how to complete the call and whether long distance charges will apply.

6. That Petitioners shall notify the Commission ten days from the date the Federal Communications Commission issues any further decisions addressing the rating and routing issues associated with porting numbers.

7. That the modifications made in this order will remain in effect only until 30 days after the Federal Communications Commission further addresses the rating and routing issues associated with porting numbers, unless otherwise ordered.

8. That this order shall become effective on July 30, 2004.

Gaw, Ch., Clayton, Davis, and
Appling, CC., concur.
Murray, C., dissents, with separate
dissenting opinion attached.

Ruth, Senior Regulatory Law Judge

Editor's 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.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I am opposed to an indefinite suspension of the FCC's wireline-to-wireless LNP requirements. The Stipulation and Agreement, by its terms, amounts to an indefinite suspension, even though it purports to be a temporary six-month suspension.

The language at paragraph 6 does not indicate that the six-month period will be used, as it should, to become LNP capable. To the contrary, the language provides that "After this initial six-month suspension period, the parties will then be free to offer further recommendations as to whether or not an additional suspension is appropriate under Section 251(f)(2) of the Act." (emphasis supplied)

I would have reluctantly granted a firm six-month suspension to allow additional time to become LNP capable. Unfortunately, that is not the agreement the Commission was presented.

Therefore, I respectfully dissent.

In the Matter of an Incident in #6 Hagers Mill Court, Manchester, Missouri.*

Case No. GS-2004-0264
Decided July 27, 2004

Gas §16. The Commission approved an agreement between Laclede Gas Company and the Staff of the Commission that established practices Laclede would undertake with respect to inspecting and monitoring certain plastic pipe fittings.

ORDER APPROVING STIPULATION AND AGREEMENT

On December 19, 2003, the Staff of the Commission filed a motion to open a case to investigate an incident that occurred on Thursday, December 11, 2003, at approximately 6:22 a.m., at #6 Hagers Mill Court in Manchester, Missouri. The Commission opened this case and on April 27, 2004, the Staff filed a Gas Incident Report detailing the results of its investigation.

On June 2, 2004, Staff and Laclede filed a Stipulation and Agreement. In the agreement, the parties agree that Laclede will undertake the following actions:

> a) Consistent with Staff Recommendation No. 1.A., Laclede agrees to modify its current procedures to inspect for the presence of a tubular stiffener in each plastic service tee manufactured for use with a non-integral tubular stiffener when exposed for routine work by Laclede crews. Any tee inspected and found not to contain a tubular stiffener will be upgraded to meet current regulatory requirements if the tee is to remain in service. The performance of these inspections will be documented on Laclede's Service Order F-610 for a period of one year beginning on June 1, 2004, with an anticipated sample size of approximately 100. The results of this sampling will be reviewed with Staff to determine if any further actions are required.
>
> b) Consistent with Staff Recommendation No. 1.B., Laclede will instruct all field crews to inspect any Continental service tee whenever such service tees are exposed and taken out of service for any reason, including leak repairs, service replacements, and service relocations. Any tee not meeting current regulatory requirements for new installations must be upgraded to meet today's standards if the tee is to remain in service. Laclede will record each such exposure, and report them to the Staff annually.
>
> c) Consistent with Staff Recommendation No. 1.C., Laclede has completed its inspection of the six service tee connections that were similar to the one installed at #6 Hagers

* Also see Case No. GC-2004-0557.

Mill Court and that, according to the Company's electronic database of Leak Repair and Pipe Condition Reports, had previously experienced a pull-out of the service line from a service tee. In each of these cases, the Company's inspection revealed that the service line contained a tubular stiffener. The Company additionally agrees that it will perform a search of its electronic database using expanded search criteria to assure the identification of any other service lines of this type where a pull-out occurred. Laclede will perform an inspection of any service tees that may be identified as a result of this search and report its results to the Staff. Those inspected tees, if any, that do not meet current regulatory requirements for new installations will be upgraded to meet today's standards if the service tee is to remain in service.

d) Consistent with Staff Recommendation No. 1.D., Laclede has revised its leak repair and pipe condition reporting to allow additional documentation and database tracking of specific issues related to fitting pullouts. Laclede has provided these revisions to the Staff and they have been in full use since June 1, 2004. Laclede has also developed procedures to continually review its leak repair and pipe condition database for issues related to fitting pullout and commits to provide Staff with annual updates of statistics related to plastic fitting pullouts.

On July 2, 2004, in response to a Commission order, Staff filed suggestions in support of the agreement. In those suggestions, Staff stated that it believes that Laclede has reasonably addressed the recommendations included in the Staff Incident Report.

The Commission has considered the incident report, the stipulation and agreement, and the Staff suggestions. The Commission finds that the agreement is a reasonable resolution of the issues raised in the incident report, and will approve it.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on June 2, 2004, is approved, and the parties shall carry out the terms and requirements therein.

2. That this order shall become effective on August 6, 2004.

3. That this case may be closed after August 7, 2004.

Murray, Clayton, Davis and Appling, CC., concur
Gaw, Ch., dissents

Mills, Deputy Chief Regulatory Law Judge

Editor's 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 Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*

In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.

Case Nos. TO-2004-0576 and TO-2004-0584
Decided July 27, 2004

Telephone §36. The Commission consolidated two cases dealing with interrelated agreements between SBC Communications, Inc., and Sage Telecom, Inc. It also found that an amendment to an existing interconnection agreement between SBC and Sage was not in the public interest and therefore rejected it. Because the Commission rejected the amendment and took no further action on the related agreement, the Commission dismissed applications to intervene as moot.

ORDER CONSOLIDATING CASES, REJECTING AMENDMENT TO INTERCONNECTION AGREEMENT, AND DENYING INTERVENTION

Syllabus: This order consolidates two cases dealing with interrelated agreements between SBC Communications, Inc., and Sage Telecom, Inc. It also finds that an amendment to an existing interconnection agreement between SBC and Sage is not in the public interest and therefore rejects it. Because the Commission rejects the amendment and takes no further action on the related agreement, the Commission dismisses applications to intervene as moot.

On May 4, 2004, SBC submitted to the Commission an amendment to an interconnection agreement between it and Sage.[1] Case Number TO-2004-0584 was created when the Staff of the Commission filed a motion, on May 14, requesting Commission review of the amendment. In Staff's view, Commission review of the amendment is necessary because of the relationship between the amendment and a so-called "commercial agreement"[2] between the two parties. Although Staff did not, in its initial pleading, recommend what action the Commission should take on the amendment, in a later pleading it recommended that the Commission reject the amendment.

Case Number TO-2004-0576 was created when the Commission, on its own motion, ordered SBC and Sage to show cause why the commercial agreement should not be filed pursuant to Section 252(e) of the federal Telecommunications

[1] The amendment is entitled "Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Sections 251 and 252 of the Telecommunications Act of 1996."
[2] The commercial agreement is also sometimes referred to a "local wholesale complete" agreement.

* This order contains changes from a notice of correction issued on October 7, 2005.

Act of 1996 (47 U.S.C. 252). Both SBC and Sage responded that the commercial agreement need not be filed, and is not subject to Commission approval or rejection, because it is not an "interconnection agreement" as that term is used in the Telecommunications Act. They argue, in an analogy they use frequently in these proceedings, that the commercial agreement is analogous to an agreement in which Sage would purchase used trucks from SBC. Although the truck sale agreement would be an agreement between telecommunications companies, they assert it would not be subject to approval pursuant to the Telecommunications Act because the provision of used trucks is not an obligation required by Section 251 of the Telecommunications Act. Similarly, they argue that all the provisions that are required by the Telecommunications Act are contained in the amendment, and the commercial agreement deals only with non-Section 251 items. This order will discuss this argument below, following its discussion of the amendment.

As a threshold matter, the Commission determines that there are common questions of law and fact such that consolidation of Case Number TO-2004-0576 and TO-2004-0584 is administratively expedient, and this order will consolidate the two cases.

The Commission will first address the question of what to do with the amendment. As noted above, Staff urges the Commission to reject it as discriminatory and not in the public interest. A number of Competitive Local Exchange Carriers (CLECs) that have sought intervention in these cases share Staff's position. The Commission agrees that the amendment must be rejected.

The amendment is clearly related to the commercial agreement. Each references the other. They were apparently negotiated at the same time, and executed within a few days of each other. The amendment, by its terms, will be void in any state in which the commercial agreement becomes inoperative. Perhaps most tellingly, the commercial agreement itself refers to the "indivisible nature" of the commercial agreement and the amendment. From these facts, the Commission concludes that the two are indeed indivisible; that is, neither one is a stand-alone agreement.

Having determined that the amendment is simply part of an agreement, should the Commission approve it? The answer is no. The Commission has a duty, pursuant to the Telecommunications Act, to examine interconnection agreements and to reject those that are discriminatory or not in the public interest. Here, the Commission cannot determine whether the agreement is discriminatory, because the parties have not presented an agreement to the Commission for approval; rather they have presented a select part of an agreement. It is certainly possible for parties to craft a set of agreements in which the public portion has ordinary interconnection provisions that are counterbalanced by interrelated terms in the undisclosed portion. This could have the effect of making the agreement as a whole discriminatory, even though the portion proffered for approval appeared to be unexceptional and non-discriminatory. No party has made such an argument about the set of agreements here, and the Commission has no reason, based on the record before it, to believe that such a scheme is included in the SBC/Sage agreements. But the possibility exists. The Commission concludes that it is -- by definition -- against the public interest to approve of one part of an interconnection

agreement without considering all parts of that agreement together as a whole. Accordingly, this order rejects the amendment filed for approval in Case Number TO-2004-0584.

The Commission next turns to the question of the commercial agreement. At this time, the so-called commercial agreement is not before the Commission for approval, and indeed SBC and Sage insist it need not and should not be approved by the Commission. The Staff has been provided a complete copy, and some of the CLECs involved in these cases have produced a redacted version. Both Staff and the CLECs urge the Commission to require SBC and Sage to file the commercial agreement along with the amendment, and urge the Commission to review the two together.

The Commission will not order SBC and Sage to make a further filing, because to do so would be to inappropriately interfere in the management of the companies. SBC and Sage now know that the Commission will not approve just a part or parts of an indivisible agreement. Armed with that knowledge, it is up to SBC and Sage to determine what their next steps will be.

Neither of these two consolidated cases was created to deal with approval of an entire SBC/Sage agreement. If those parties' next steps include filing a whole agreement for Commission approval, that filing will create a new case number, and these consolidated cases may be closed.

The last question the Commission needs to address is that of intervention. Because the Commission has resolved the issues presented and will be closing these cases, the applications to intervene are moot and will be denied.

IT IS THEREFORE ORDERED:

1. That Case Nos. TO-2004-0576 and TO-2004-0584 are consolidated, with Case No. TO-2004-0576 being the lead case.

2. That the "Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Sections 251 and 252 of the Telecommunications Act of 1996" filed on May 4, 2004, and subsequently assigned Case Number TO-2004-0584, is rejected.

3. That the applications to intervene are denied as moot.

4. That this order shall become effective on August 1, 2004.

Gaw, Ch., Clayton, Davis and Appling, CC., concur
Murray, C., dissents

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Transfer of Assets, Including Much of Southern Union's Gas Supply Department, to EnergyWorx, a Wholly Owned Subsidiary.*

Case No. GO-2003-0354
Decided August 5, 2004

Gas §6. The Commission determined that the Staff of the Commission failed to meet its burden to show that Southern Union violated any statute when it transferred personnel and sold property in Texas, and the Commission therefore closed the case.

ORDER CLOSING CASE

Syllabus: The Commission determines that the Staff of the Commission has failed to meet its burden of going forward, and the Commission closes this case.

On March 21, 2003, concurrently with the filing of a related complaint case (GC-2003-0348), Staff filed a request to investigate a transaction in which Southern Union Company sold certain property located in Texas, and transferred certain employees. The request to investigate resulted in this case, Case Number GO-2003-0354. The Commission dismissed the complaint on July 8, 2003, largely on the grounds that it was premature for Staff to allege that the transaction involved a violation of statute while still in the process of investigating that transaction.

After completing its investigation into the transaction, Staff filed its report on January 9, 2004. In its report, Staff alleges two different actions on the part of Southern Union that it believes required Commission approval under Section 393.190, RSMo 2000. First, Staff alleges that Southern Union sold "rate base property." Second, Staff alleges that Southern Union transferred "its assembled experienced and trained gas supply workforce." Staff argues that, by completing this transaction without prior Commission approval, Southern Union violated Section 393.190.

The "rate base property" that Staff alleges was sold without Commission approval is not actual gas plant located in Missouri and used directly to serve Missouri customers. Rather, it is an allocation of a portion of the costs associated with property in Texas. Staff's January 9 report does not describe this allocation very clearly; it appears from Staff's report that the property at issue (as opposed to the "operations" discussed below) is "approximately $2 million of assets which were allocated to MGE in MGE's last rate case and included as a part of the sale of Southern Union…." Staff does not specifically identify these "assets," but alludes to buildings, computers and furniture located in Austin, Texas.

In its reply to the Staff report, Southern Union explains that only a portion of the $2 million of overhead was actually allocated to MGE; the MGE portion was $718,940 in its last rate case. Staff does not dispute this figure.

* This order contains a correction made by the Commission in an order issued August 16, 2004.

So, with respect to the corporate allocation, the issue facing the Commission is this: Section 393.190 requires a utility to obtain this Commission's approval before consummating a transaction in which it sells property used to serve customers. Here, none of the property sold was in Missouri, or directly used to serve Missouri customers, but a very small part (.002) of the transaction consisted of property the costs of which had been allocated to MGE's Missouri customers.

As the moving party, Staff has the burden of production (also called the burden of going forward).[1] Staff has not met its burden to show that the Commission has jurisdiction over the sale of office equipment in Texas even when the costs of that equipment were allocated for ratemaking purposes to Missouri customers.

Staff's second allegation is that Southern Union transferred "its assembled experienced and trained gas supply workforce." Staff devotes most of its report to this allegation and the related argument that the transfer of personnel invokes the Commission's oversight pursuant to Section 393.190. Staff does not allege that Southern Union did not meet its obligation to procure gas for its customers as a result of the transfer. Southern Union points out, and Staff does not disagree, that all the functions that had been provided by the transferred gas procurement personnel were still performed after the transfer, either by in-house personnel or through other arrangements. Again, Staff has the burden of production, and has failed to meet it.

This is not to say that the transfer of the gas supply department was a good idea, or that the Commission would have approved of it if asked. It may or may not have been wise, and there may or may not be ratemaking consequences. But in this case, Staff has not met its burden of showing that the transfer of personnel invokes the Commission's jurisdiction.

In conclusion, Staff's report does not show any violation of rule or statute, nor does it suggest that further investigation might uncover one. The Commission will therefore close this case.

IT IS THEREFORE ORDERED:

1. That this order shall become effective on August 15, 2004.

2. That this case may be closed on August 15, 2004.

Clayton, Davis and Murray, CC., concur
Davis, C., concurs with concurring opinion to follow
Murray, C., concurs with concurring opinion attached
Gaw, Ch., and Appling, C., dissent with dissenting opinion to follow

Mills, Deputy Chief Regulatory Law Judge

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[1] The initial burden of production or going forward is the duty of a litigant to convince the trier of fact that cumulatively, there is legally sufficient evidence to permit a finding in the litigant's favor. Black's Law Dictionary (6th Edition) says that a moving party meets this burden when it "make[s] out a prima facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him."

Concurring Opinion of Commissioner Jeff Davis

I respectfully concur with the majority's decision in this case. The facts are set out accurately in the opinion of the majority and it is not necessary to repeat them here. The majority reached the right conclusion in that there was no evidence to support further investigation of Southern Union in this matter; however, I strongly disagree with the implication that this commission has the statutory authority to review personnel decisions pursuant to Section 393.190.[1]

I. Personnel are not part of a utility's franchise or property. Thus, the sale, transfer or dismissal of employees does not require the approval of the Missouri Public Service Commission pursuant to Section 393.190.

Section 393.190 sets out the standard of review regarding the Missouri Public Service Commission's authority to approve a utility's transfer of service or property. Section 393.190.1 states in pertinent part:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. (Emphasis added)

Whether or not the transfer of an employee or a group of employees is subject to review by this commission depends on whether the employee or group of employees is part of the corporation's "franchise, works or system." Once this finding is made, it would then be necessary to determine whether those employees were necessary or useful in the performance of the utility's duties to the public. It is not necessary to reach this issue because employees are not part of a utility's franchise, works or system.

There are no Missouri cases interpreting the exact meaning and scope of the phrase "franchise, works or system" as the phrase appears in Section 393.190. (RSMo 2000). Since there appears to be some ambiguity and none of these words are defined by statute, we look to the rules of statutory construction for guidance.

This commission has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 489-490 (Mo. banc 2003). The plain and ordinary meaning of statutory language is generally derived from the dictionary where no definition is provided. See *Curry v. Ozarks Electric Cooperative* 39 S.W.3d 494, 496-497 (Mo. banc 2001).

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[1] All references are to RSMo 2000 unless otherwise noted.

A. Employees are not part of a "franchise" contemplated in Section 393.190.

Webster's Third New International Dictionary defines "franchise" as "a right or privilege conferred by grant from a sovereign or a government and vested in an individual or group; *specifically*: a right to do business conferred by government." See, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 902 (1993). "Franchise" is also defined as "a contract for public works or public services granted by a government to an individual or company." *Id.*

The case law cited by Southern Union in this case confirms this finding. In *State ex rel. Union Electric Co. v. Public Service Com.*, 770 S.W.2d 283, 285 (Mo. App.W.D. 1989), the Western District Court of Appeals declared "utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." Thus, the only possible conclusion that can be reached in this case is that a franchise is a right to operate granted by some governmental entity and employees cannot be bootstrapped into being "part of the franchise."

B. Employees are not part of the "works" as defined in Section 393. 190.

The term "works" is not defined by statute or commission rule. The most relevant definitions found in Webster's Dictionary for "works" are as follows:

> **4b** *plural* **:** structures in engineering (as docks, bridges, or embankments) or mining (as shafts or tunnels).
> **5** *plural but singular or plural in construction* **:** a place where industrial labor is carried on **: PLANT, FACTORY.**
> **6** *plural* **:** the working or moving parts of a mechanism <*works* of a clock>.
> everything possessed, available, or belonging <the whole *works,* rod, reel, tackle box, went overboard.

See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2634 (1993).

Further guidance in defining this term has been given to us by the Missouri Supreme Court. In *State ex rel. McKittrick v. Missouri Public Service Corp.*, 351 Mo. 961, 977 (Mo. banc 1943), the Missouri Supreme Court determined "the word 'works' is used as applying to an electric light plant, a gas plant or both."

Statutes passed by the Missouri General Assembly also support this interpretation. The term "gas plant" is defined in Section 386.020(19) as being "all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas, natural or manufactured, for light, heat or power." Moreover, the Missouri General Assembly includes employees in its definition of "gas corporation." See Section 386.020(18). If the Missouri General Assembly had wanted employees to be part of a gas company's "works," they would have inserted such a reference into this section of statute.

C. Employees are not part of a system as defined in Section 393.190.

"System" is defined by Webster's Dictionary as being "a group of devices or artificial objects or an organization forming a network especially for distributing

something or serving a common purpose <a nationwide dial telephone *system*> <an express highway *system*> <a *system* of public parks> <a hot air heating *system*>." See, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2322 (1993).

Although the Missouri General Assembly has not defined the term "system," they have given us some guidance in this matter by defining the terms "sewer system" and "water system" in Chapter 386 relating to the Missouri Public Service Commission. Sections 386.020(49) and 386.020(59) state respectively:

> "Sewer system" includes all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose.
>
> "Water system" includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use.

It is impossible to read employees into the dictionary definition of "system." Moreover, the pertinent sections of statute defining "sewer system" and "water system" demonstrate that employees are not part of their "system." Accordingly, we have no authority to determine that employees should be part of a gas pipeline system.

D. Employees are not part of a utility's "franchise, works or system."

The employees of Southern Union's gas purchasing division may have been useful in performing the duties of the utility in this case; however, the definitions of the words making up the phrase "franchise, works or system" reveal that employees were not contemplated when this statute was created and subsequently amended. See generally RSMo 1939 § 5651, A.L. 1967 p. 578, A.L. 1984 H.B. 1477 Section(s) 393.190.1, .3 and .4. "Franchise" refers to the company's right to operate and MGE has given up no rights. Likewise, "works or system" refers to the physical infrastructure owned by the company, not employees. Thus, employees are not part of the "franchise, works or system," a condition necessary to invoking the commission's review under Section 393.190.

This interpretation is further supported by the fact that this statute has been in existence for at least sixty years. **No Missouri Public Service Commission or superior court has ever found the transfer of employees like we have in this case to be a transaction invoking the commission's authority under Section 393.190.** If there were such a case, the authors of the majority opinion and the dissenting opinion would have cited it instead of arguing in favor of public policy.

II. Discussion of Ancillary Issues and Conclusion:

The ancillary issues raised by the dissent in this case will not be discussed in this opinion because they are largely irrelevant in that we do not have the statutory authority to review employment decisions.

In addition to ignoring the plain meaning of the statutes and the case law in this area, those arguing that certain employees constitute part of a company's "franchise, works or system" because of their leadership skills and their high level of compensation would do well to remember the history of the Missouri Public Service Commission and other public utility commissions.

At one time, this commission regulated railroads and most of America's first *billionaires* were the so-called "Robber Barons" of the early 1900's, who made their fortunes from railroads. See J. Bradford DeLong, *Robber Barons*, University of California at Berkeley, and NBER; second draft January 1, 1998. See website: www.*econ161.berkeley.edu/Econ_Articles/carnegie/delong_moscow_paper2.html*. Men like E.H. Harriman and James J. Hill were recognized for their ability to manage railroads in the same way people idolize Bill Gates and Jack Welch today. *Id.* Great management and a superior product did not turn the early robber barons and Bill Gates into *billionaires*; what turned these individuals into *billionaires* and icons of American culture was Wall Street's willingness to buy their companies. *Id.* The Missouri General Assembly was not ignorant of these facts in 1939, when the present statute was passed, and it can be inferred that future legislators were also aware of these facts. Therefore, one can only conclude the Missouri General Assembly made a conscious decision not to include employees in Section 393.190 and the dissent's argument is without merit.

The majority and the dissent, no matter how well-intentioned, overstep the bounds of statutory authority by implying that the Missouri Public Service Commission has jurisdiction to review personnel matters of this nature.

The world has changed since Section 393.190 was adopted and amended. The rise of public utilities with arms, both regulated and unregulated, leaves policymakers to resolve cases involving several new questions of first impression. It may be good public policy for the Missouri General Assembly to include a utility's key employees and other intangibles in this statute, but such a decision belongs to the elected representatives of the people and not to the Missouri Public Service Commission.

Dissenting Opinion of Chairman Steve Gaw and Commissioner Lin Appling

We respectfully dissent from the Order Closing Case issued by the majority in this proceeding. As the following analysis demonstrates, the majority's decision merely perpetuates the uncertainty surrounding this Southern Union transaction. Furthermore, we assert that the majority did not take an opportunity to provide guidance to the Missouri utilities regarding the scope of Section 393.190.1. As such, these utilities are left, for the unforeseeable future, to question under what circumstances it should seek Commission approval for the transfer of certain utility

assets. For these reasons as well as that reflected in the following analysis, we must respectfully dissent.

FACTS

In late 2002, Southern Union Company entered into an agreement to have Energy Worx, a wholly-owned Southern Union subsidiary, manage the Central Pipeline on behalf of AIG's Southern Star Central Corp. (Southern Star Agreement). As part of the transaction and largely unbeknownst to Missouri regulators, Southern Union also transferred its executive of gas procurement, Mike Langston, to Energy Worx to commence work on behalf of AIG Southern Star.[1]

Also in 2002, in a separate agreement, Southern Union announced that it had entered into an agreement to sell its entire Texas operations to ONEOK. As designed, ONEOK purchased Southern Union's operations in 100 Texas municipalities consisting of over 520,000 customers. Included in the transaction, Southern Union also transferred its remaining five gas procurement employees to ONEOK.

In a letter dated November 26, 2002, Southern Union informed the Missouri Commission of the Southern Star agreement. In light of the recent FERC efforts to ensure structural and operational separation between an interstate gas pipeline and affiliated local distribution companies, Southern Union assured the Commission that employees of Energy Worx would function independently of MGE. Consistent with this pledge, MGE noted that MGE's gas supply function would now be placed within the responsibility of MGE officers in Kansas City.

Noticeably, the letter was completely silent as to the fact that the new MGE gas supply department would now be entirely staffed by new personnel and that all previous Southern Union gas procurement personnel had been transferred to either Energy Worx or ONEOK. Despite the fact that gas commodity costs represent a substantial portion of overall retail rates, MGE failed to inform the Commission or ratepayers that responsibility for this portion of its business would rest in new hands and that all former gas procurement personnel had been reassigned to other entities.

LAW

It is well recognized that a fundamental goal of regulation, in addition to rates, service, and safety, is the efficiency of management. As has been noted, "it does the buyer no good to compel the producer to accept half the former net earning if he gets in exchange a management half as efficient, for the poor management will add more to the costs of operations than the regulating commission can take away in reduced earnings."[2]

Recognizing the possibility that poor management decisions could negatively affect the operation of the utility and the cost of service to ratepayers, the General Assembly provided the Public Service Commission with oversight of several managerial decisions including decisions related to debt and equity issuances,

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[1] Mr. Langston and 5 other individuals provided gas procurement services on behalf of both the Missouri and Texas operations of Southern Union.

[2] J.M.Clark, Social Control of Business, 2d ed. (New York: McGraw-Hill, 1939) at page 337 (emphasis added).

corporate reorganizations and transfers of utility assets "necessary or useful" in providing service to the public.

Specifically, as regards the Commission oversight of corporate transfers of property, Section 393.190.1 provides that "No gas 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".

Recognizing that there is no dispute that the entire gas procurement department has been transferred, the outcome of the pending MGE investigation appears to revolve around the following inquiries. First, are the personnel in the MGE gas supply department and the intellectual knowledge possessed by those personnel a part of MGE's franchise, works or system? Second, if the gas supply department is part of the MGE franchise, works or system, is the department necessary or useful in the performance of MGE's duties to the public?

ISSUES

I. The Gas Supply Personnel are part of the MGE Franchise, Works or System.

In the course of its operation of the MGE local distribution company, Southern Union has hired and trained several employees in the field of gas supply procurement. In the course of establishing customer rates, the Commission would necessarily reflect the training and payroll costs for these employees. Naturally, as the skill of the gas supply department is perfected over time, these personnel become a vital part of the franchise, works or system of the local distribution company.

Despite the critical nature of the gas procurement personnel, Southern Union has essentially treated its regulated Missouri operations as a minor league training ground by transferring these employees to the detriment of the Missouri ratepayers and without the approval of the Missouri Commission. Gas procurement employees that once provided a valuable service on behalf of the regulated local distribution company have been transferred in an effort to realize larger profits for an unregulated subsidiary. As these more experienced employees are replaced, it is naturally expected that gas procurement costs for the regulated operations will increase. Recognizing that these costs will likely be accepted by regulators and reflected in retail rates, Southern Union has effectively increased the overall profitability of the company while simultaneously increasing the costs to regulated Missouri ratepayers.

Clearly the fact that MGE found it necessary to subsequently hire new gas supply personnel provides indisputable evidence that these employees were part of the MGE "franchise, works or system." Companies routinely tout the effectiveness of their company as a product of their employees. In fact, understanding the critical nature of some of their employees, many companies take out policies to insure against the untimely death or disability of their key employees. Ultimately, the premiums associated with these employee insurance policies are presented for inclusion in retail rates.

It is a widely held concept that regulation should act as a surrogate for competition. Recognizing such a concept, it is logical to look to the competitive

environment for guidance on certain issues. In the competitive environment, it is indisputable that corporate entities may view certain employees as assets of the corporation. Certainly, Microsoft views the presence and leadership of Bill Gates as a corporate asset. Similarly, it is without question that General Electric looked upon Jack Welch as an asset of the corporate entity. Undoubtedly, similar importance would be placed on individuals that have developed skills critical to the continued performance of the company.

The fact that certain employees can constitute a part of a company's "franchise, works or system" is also found in the fact that companies routinely provide golden parachute packages to key employees to entice those employees to continue their employment at the company. As with the employee insurance policies, the costs of these retention packages are ultimately reflected in the prices charged to customers.

The importance of certain employees is not diminished in the utility environment. As competition develops in certain portions of the industry, the importance of critical employees is enhanced. It is without question that an individual and department that is responsible for the ultimate price of a firm's largest cost input would be held with similar regard. As such, it is imperative that any attempts by the regulated entity to transfer these employees be reviewed in a critical light.

The fact that the assets in question are not tangible does not negate the fact that they are critical assets of the MGE "franchise, works or system." These intangible, intellectual assets are no less important to the efficient operations of a utility as any more tangible asset.

II. The Gas Supply Personnel are Necessary or Useful in the Performance of MGE's Duties to the Public.

Recognizing that the creation and development of unregulated subsidiaries is a fairly recent development, it is not surprising to find a lack of direction in past PSC or court decisions regarding the proposed transfer of intellectual assets to an unregulated affiliate. Instead, decisions focusing on the transfer of assets under Section 393.190 have focused on the sale of tangible assets. These cases have been fairly clear-cut and have not required any definition to the statutory terms of "necessary" or "useful" as contained in Section 393.190. Nevertheless, despite the lack of guidance in opinions interpreting Section 393.190, some guidance can be found in the definition of "necessary" as used in Section 393.170 regarding the grant of certificates of public convenience and necessity.

In *State ex rel. Intercon Gas Inc. v. Public Service Commission of Missouri*, the Missouri Court of Appeals found that "[t]he term 'necessity' does not mean 'essential' or 'absolutely indispensable', but that an additional service would be an improvement justifying its cost."[3] Using this definition, we have proposed that the determination of whether a utility asset is "necessary" should be evaluated based upon the improvement that the asset provides to the utility's provision of service.

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[3] *State ex rel. Intercon Gas Inc. v. Public Service Commission of Missouri,* 848 S.W.2d (593) (Mo.App. W.D. 1993) at 597, citing *Beaufort Transport Co. v. Clark*, 504 S.W.2d at 219.

The case at hand would have provided this Commission an excellent opportunity to provide definitive guidance to Missouri utilities regarding their ability to transfer assets without Commission approval, on the basis that such assets are not "necessary". Specifically, adoption of the Intercon Gas test would allow a utility to sell or transfer "office equipment or other fungible assets" in the ordinary course of business, without Commission approval, on the basis that such assets do not provide an improvement to the utility's provision of service relative to the assets used to replace the sold asset. Similarly, individual gas distribution lines scheduled for retirement and replacement would not be considered necessary since they could be replaced without any perceptible diminution of service.

Unlike office equipment or other such fungible assets, the intellectual assets of a utility are unique and provide a definite improvement to the utility's provision of service. Only through the mixture of such intellectual utility assets with the rate base plant of the utility can expected utility efficiencies be realized. Given the critical nature of these intellectual assets, the Commission should be diligent in protecting the public interest by requiring that such assets not be transferred without approval.

ANCILLARY ISSUES

I. The Proposed Order Does Not Provide Certainty.

As written, the Proposed Order fails to provide certainty for Southern Union that its transfer of the gas procurement department was appropriate. Rather, the Order merely states that the Staff failed to meet its burden of proof. It does not foreclose the possibility that facts are later uncovered and another complaint filed by Staff or any other party with standing under Section 386.390. Effectively, this transaction would be forever tainted by the possibility that another complaint would be filed that provides the facts necessary for the complainant to meet its burden of proof. As such, Southern Union is left to wonder, absent a voluntary application on their part, whether it can safely proceed with this transaction. Given the punitive nature of Section 393.190 (sales are void absent Commission approval), we are left to question Southern Union's ability to proceed safely with this transaction.

Similarly, the Proposed Order does not provide Staff the guidance necessary to determine whether it should seek investigations of future transfers or the criteria under which it should present such investigations to the Commission. Instead, the Order merely suggests that, in the event that the Staff does present such a matter, it should provide a greater factual basis. Specifically in regards to the matter at hand, Staff must be left to wonder whether it should develop additional facts sufficient to satisfy the majority and then seek to file another complaint.

Finally, the Proposed Order does not provide the guidance necessary for Missouri utilities to independently determine whether it should seek Commission approval for the transfer / sale of certain utility assets. Recognizing the likelihood that additional situations will develop in which a utility attempts to transfer intellectual assets to unregulated operations, Missouri utilities are left to question whether Commission approval is needed. Unfortunately, given the majority's refusal to provide the necessary guidance, these utilities are left to continue in their uncertainty.

The test provided in this Dissent (e.g., whether the asset is "necessary" because it provides an improvement to the utility's service relative to potential replacements), would have provided the clear guidance needed by these utilities.

II. MGE's Claims that Commission Approval will Hinder Employee Freedom of Movement is Unfounded.

In its Response to Staff's Report, MGE suggests that Commission action would have hindered basic human freedoms.

> Southern Union feels compelled to observe that individuals employed by the company, regardless of their responsibilities or job descriptions, even as they may relate to the company's operations in Missouri, are perfectly free to seek and accept other employment within the company or with other employers for whatever reason they may choose. This is the inevitable consequence (and beauty) or a free market economy. Choosing one's own career path is a fundamental right in this country and no creative use of accounting euphemisms (such as calling groups of employees an "experienced workforce") will change the immutable fact that this is a free country. Individuals have a right to better their own situation. People are not property. Southern Union does not own its employees. Indentured servitude is expressly prohibited by the constitution of the United States. It really is remarkable that Southern Union is in the position of finding it necessary to make this point in response to allegations of the Staff.[4]

Any discussion of this topic must focus on the fact that these employees did not voluntarily leave their positions at Southern Union. Rather, Southern Union, focused solely upon corporate financial interests, informed these employees that their positions had been transferred to another entity. It was Southern Union that informed these employees that their services were no longer needed and that their options were to move to another entity or face unemployment. It is the Southern Union decision to transfer these employees to another entity that demanded Commission review.

Commission exercise of jurisdiction under Section 393.190 does not impede an individual's right to better their situation or pursue additional employment opportunities. Nowhere does Chapter 386 or 393 provide the Commission with authority to review decisions of an individual. As such, employees of Southern Union would be free now and in the future to pursue more attractive employment opportunities.

Clearly, the indentured servitude argument is a red herring. Exercise of Commission jurisdiction would not hinder the freedom of individual employees. Rather, exercise of the Commission oversight capability would have merely ensured that utilities do not voluntarily transfer intellectual assets to the detriment of Missouri ratepayers.

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[4] Southern Union Company's Response to Staff's Report Concerning Its Investigation of the Sale by Southern Union Company of its Texas Division, Southern Union Gas, to ONEOK at page 4. (emphasis in original).

III. Southern Union's Claims that the Gas Supply Department is Located in Texas is Irrelevant.

In its Response, Southern Union implies that the Commission is devoid of jurisdiction merely by way of the fact that the ONEOK agreement involved the sale of a "natural gas distribution company located solely in the State of Texas".[5] Again, this argument is baseless.

Section 386.450 clearly anticipates the situation in which a Missouri public utility may have operations in another state. As reflected in that statute, the mere fact that books, records or operations are located in another state does not preclude the Commission from exercising its full jurisdiction regarding Missouri operations.

In the case at hand, Southern Union allocated costs of its gas procurement department to both the Missouri and Texas operations. The gas procurement costs allocated to Missouri were reflected in rates, paid by customers and collected by Southern Union. As a result, the Missouri Commission clearly had regulatory oversight regarding this department. When Southern Union attempted to transfer all of the employees in the gas supply department, it invoked the jurisdiction of the Commission regardless of the fact that these employees were located in Texas.

IV. Relationship to Other Pending Cases

As noted in a previous footnote, it is an essential objective of utility ratemaking that the return "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."[6] Clearly, this language imposes a duty on the Commission to analyze the decisions of a public utility's management in order to determine if they have acted in an "efficient and economical" manner. In light of this duty, the Commission has criticized MGE in the past for unsatisfactory customer service performance and penalized MGE by ordering a return on equity at the low end of the acceptable range.[7]

Interestingly, in its pending rate proceeding, MGE now requests that it be granted an additional 25 basis point on rate of return on account of management efficiency. As MGE explains in its Statement of Position in that pending proceeding, "[b]ecause the Commission has used findings of less than satisfactory management performance as justification for awarding a lower than expected compensation in the past, fairness requires that when high management efficiency is shown, higher than expected compensation should be awarded."

While it is important to note that we have not predetermined the issue of return on equity / rate of return in the pending rate proceeding, we do note that a decision to transfer an entire gas procurement department may not necessarily be reflective of an "efficient and economical" management.

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[5] *Id.* At 2 (emphasis in original).

[6] *State ex rel. U.S. Water / Lexington v. Missouri Public Service Commission*, 795 S.W.2d 593, 597 (Mo.App.W.D. 1990).

[7] *Missouri Gas Energy*, 5 Mo.P.S.C. 3d 437, 468 (1997); *Missouri Gas Energy*, 7 Mo.P.S.C. 3d, 394, 404 (1998).

CONCLUSION

It is an undeniable fact that an employee can be a corporate asset. This fact is not diminished in a regulated environment. To date, the Public Service Commission has not had the opportunity to define "necessary" as used in the context of Section 393.190.1. As such, utilities have suffered from the lack of such guidance and have been forced to make a case-by-case determination of whether to seek Commission approval for the transfer of certain assets.

This matter should have provided the opportunity for the Commission to give clear guidance to such utilities. In the Commission's deliberations, we proposed a test, based upon case law that evaluates the improvement that an asset provides to the utility's provision of service. Based upon this definition, utilities would have had the freedom to transfer fungible assets such as office supplies and non-unique inventory on the basis that these assets do not provide an improvement to the utility's provision of service. On the other hand, unique assets, such as intellectual assets and unique plant, could not have been transferred without Commission review.

As applies to the matter at hand, it is my opinion that the transfer of the Southern Union gas procurement department involved the sale of an asset that provides an improvement to the Southern Union provision of gas service. As such, this asset was "necessary", as used in the context of Section 393.190, and would have required Commission approval prior to transfer. The application of this test in no way disposes of the question whether such a sale should be permitted. It is conceivable that, given the opportunity to present the benefits of the transaction, the company would have been able to show that this sale was reasonable and in the public interest. Unfortunately, such a showing will not be immediately forthcoming.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

I vote with the majority today on the long-overdue order to close this case. The case was opened by Staff over sixteen months ago. The report was filed almost seven months ago. I write separately to express my discontent with the tardiness of the Commission's action.

Furthermore, it is clear that this Commission's jurisdiction was neither invoked by the sale of office equipment in Texas, nor by the transfer of personnel. The fact that Section 393.190 does not apply to the facts of this transaction should have been apparent from the start.

Therefore, I concur that the case should be closed.

In the Matter of the Application of Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular, for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996.*

Case No. TO-2003-0531
Decided August 5, 2004

Telecommunications §1. Under guidance from the Federal Communications Commission regarding public interest considerations when granting universal service support, the Commission determined that RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular should not be granted status as an eligible telecommunications carrier for universal service support funds because Mid-Missouri Cellular did not provide competent and substantial evidence to show that the public would benefit through increased competition, lower rates, quality of service or plans to upgrade its network.

APPEARANCES

Paul S. DeFord, Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for Missouri RSA No. 7 Limited Partnership, d/b/a Mid Missouri Cellular.

W.R. England, III and *Sondra B. Morgan*, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Alma Communications Company, d/b/a Alma Telephone Company, and Citizens Telephone Company of Higginsville, Missouri.

Charles Brent Stewart, Stewart & Keevil, 4603 John Garry Drive, Suite 11, Columbia, Missouri 65203, for Spectra Communications Group, LLC, d/b/a CenturyTel, and CenturyTel of Missouri, LLC.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102-2230, for the Office of the Public Counsel and the public.

Marc D. Poston, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge

REPORT AND ORDER

Syllabus: This order finds that Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular should not be granted status as an eligible telecommunications carrier for federal universal service fund purposes.

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* The Commission, in an order issued on November 30, 2004, denied applications for rehearing and granted reconsideration - amended report and order. This case was appealed to Cole County Circuit Court (05ACCC00017).

Procedural History

On June 2, 2003, MMC filed an application for designation as an eligible telecommunications carrier for federal universal service fund purposes under Section 254 of the Telecommunications Act of 1996. MMC is the first wireless service provider to apply for ETC designation with the Commission. MMC sought ETC designation throughout its FCC-licensed service area[1] with respect to all local exchange carrier wire centers where MMC's FCC-licensed service area encompasses at least one complete wire center of that LEC.[2]

MMC seeks ETC designation in areas served by the rural telephone companies Mid-Missouri Telephone Company, Alma Communications Company d/b/a Alma Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Spectra Communications Group, LLC d/b/a CenturyTel,[3] and Sprint Missouri, Inc.[4] MMC also seeks designation in non-rural telephone company areas served by CenturyTel of Missouri, LLC,[5] and SBC Missouri, Inc., with respect to their wire centers that lie wholly or partially within MMC's FCC-licensed service area.[6]

With respect to the areas served by rural telephone companies, the proposed MMC ETC service area includes the entire study area for Alma and Citizens, and a portion of the study areas of Spectra, Mid-Missouri Telephone Company and Sprint. MMC initially requested ETC status throughout Spectra's entire Concordia exchange and for portions of Spectra's Lawson, Braymer, and Kingston exchanges. In its Initial Brief, however, MMC amended its request with respect to Spectra's existing service area to include only Spectra's Concordia exchange.[7] The Commission finds MMC's Application to be amended accordingly.

Sprint and Sprint Spectrum L.P., d/b/a Sprint PCS, intervened in this proceeding in support of MMC's request for ETC designation. Alma, Citizens, CenturyTel and Spectra intervened in opposition to MMC's request for ETC designation. The Office of Public Counsel withheld judgment on the MMC application until after all evidence was presented. In its Initial Brief, Public Counsel supported the designation as an ETC.

An evidentiary hearing was held on January 28-29, 2004. Neither Sprint nor Sprint PCS participated in the hearing. The parties, with the exception of Sprint and Sprint PCS, later filed Initial Briefs. In addition, all the parties, except Sprint, Sprint PCS, and Public Counsel, filed Reply Briefs and Proposed Findings of Fact and Conclusions of Law. Spectra and CenturyTel filed a motion to file their Proposed

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[1] Also known as a Cellular Geographic Service Area.

[2] Tr. p. 134.

[3] Hereinafter referred to as "Spectra."

[4] Ex. 4, pp. 5-9.

[5] Hereinafter referred to as "CenturyTel."

[6] Application for Designation as an Eligible Telecommunications Carrier Pursuant to § 254 of the Telecommunications Act of 1996, Case No. TO-2003-0531, June 2, 2003 (hereinafter referred to as "Application"), at pp. 8-10 and Appendices D and E.

[7] Initial Brief of Mid-Missouri Cellular, filed March 15, 2004, p. 23.

Findings of Fact and Conclusions of Law one day out of time. There was no objection to that motion and it will be granted.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Mid-Missouri Cellular

MMC is licensed by the Federal Communications Commission to provide commercial mobile radio service to seven rural counties wholly within the state of Missouri, under Federal Communications Commission Call Signs KNKN595 and KNKR207.[8] MMC is not certificated to provide telecommunications services in Missouri by this Commission.

In its verified application, MMC lists the services that it provides that qualify for universal service fund support.[9] The Commission finds that MMC is providing all the services required to qualify for universal service fund support.

MMC also states in its verified application that it advertises the availability of its services and the charges for such through media of general distribution within its service territory.[10] The Commission finds that MMC advertises its services through the media of general distribution.

MMC has been providing competitive wireless service since at least 1991. MMC's current service plans, or similar service plans, have been offered within a competitive environment for many years. Six other wireless carriers currently compete with MMC, in addition to the incumbent LECs. MMC provides service to the lower cost portions of its licensed coverage area similar to the nationwide wireless carriers, such as near the interstate highways and larger population centers. MMC also provides service to the more rural areas including population centers like Miami, Gilliam and Pilot Grove, Missouri. MMC will receive approximately $1.75 million in universal service fund support annually if MMC's request as originally filed is granted.[11]

Service Offerings of MMC

MMC has provided the Commission with details of two Lifeline-only plans, known as Lifeline and Link-Up, that it will offer throughout its designated ETC service area. In addition, the Lifeline discount will be available on any of MMC's current service plans.[12] MMC suggests that without ETC status, MMC will not be

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[8] Application, p. 1 and Appendix D.

[9] Application, para. 4.

[10] Application, para. 5.

[11] Ex. 8, p. 17; Tr. p. 49.

[12] Tr. p. 81.

able to offer Lifeline discounts. If granted, MMC will advertise the availability of the supported services and the availability of Lifeline and Linkup services to qualifying customers.

The Lifeline-only plan is intended to provide a low-cost service option comparable in price to that offered by the ILEC.[13] Lifeline offers unlimited calling and mobility in the area served by the subscriber's home cell site at a fixed monthly price of $6.25.[14] The subscriber's outbound local calling area would correspond to its traditional local exchange calling area for that subscriber's address. With limited mobility of the wireless service, calls could be originated by the MMC Lifeline subscriber to any numbers within that exchange from any location within the subscriber's home cell site serving area, not just from within the subscriber's home. Similarly, the Lifeline customer would receive inbound calls, wherever they originate from, so long as the customer remains within the geographic area served by its home cell site. The area served by a home cell site typically extends to a 10-to-18 mile radius of the home cell site.[15]

The second MMC Lifeline-only plan, Link-Up, would allow for local calling and mobility throughout the entire service area for which MMC is designated as an ETC, for a flat $10.00 per month charge.[16] Since this would be the MMC subscriber's local calling area, even toll-restricted subscribers would have a seven-county mobility and local calling area with the Link-Up plan.

Neither Lifeline nor Link-Up would allow roaming into other cellular networks to place and receive routine calls; however, both plans would allow access to 911 even in a roaming situation.[17]

MMC's current rate plans now range from $19.95 to $64.95 per month. MMC has not indicated that it will reduce rates if it does become eligible to receive USF, other than to offer the two additional plans and a Lifeline discount as described above.[18] Mr. Dawson testified on behalf of MMC that MMC's Lifeline plan would give qualifying consumers a $1.75 monthly discount.[19] Mr. Dawson also testified, however, that to initiate service a new Lifeline customer would have to pay a $30 activation fee except for the most restricted Lifeline plan and would need to purchase a $45 to $199 wireless handset.[20] So, to benefit from a $1.75 discount, a low-income customer would need to pay at least $45, and perhaps $75 or more just to initiate service.[21]

While the MMC rates appear to be costlier than those charged by Citizens, Alma, and Spectra, the subject level of services are not identical. Each of the current MMC

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[13] Tr. pp. 59 and 157.

[14] Tr. p. 59.

[15] Tr. pp. 59 and 157.

[16] Tr. p. 157.

[17] Ex. 5, p. 7.

[18] Ex. 10, p. 15.

[19] Tr. pp. 59 and 90.

[20] Tr. pp. 85-87.

[21] *Id.*

plans includes voice mail, call waiting, call forwarding, three-way calling, and caller ID. Adding the tariff rates for those features to the rates charged by the Intervenors results in monthly rates of $29.85 for Citizens, $21.95 for Alma and $39.06 for Spectra. In addition, the local calling area for those LEC subscribers is limited to the subscriber's local exchange. All calls beyond that limited local calling area result in additional per minute toll charges.

By comparison, the MMC local calling area includes all of the exchanges of not only the Intervenors but also of the other LECs in a seven-county area. Within those calling areas, however, there may be dead spots[22] and the possibility of dropped calls.[23] The Intervenors' subscribers receive unlimited local calling compared to a number of "bundled" minutes with which an MMC subscriber can place local or toll calls without incurring charges.

MMC also suggests that it may be able to provide service to some areas at a lower cost than a landline provider. MMC presented evidence that it has already helped Mid-Missouri Telephone Company serve one customer where the landline would have been cost-prohibitive.[24] The witnesses testified that MMC is willing to accept carrier-of-last-resort status and there was no evidence that suggested MMC was currently unable to serve the areas where ETC designation is requested. In addition, the MMC witnesses testified that the company would go to whatever lengths were necessary to make certain it could serve, at least within the customer's home, any customer within its wireless service area. MMC is also ready, willing and able to offer equal access to toll carriers should a customer want to choose such a plan.[25]

Commitments to Quality of Service

MMC is a member of the Cellular Telecommunications and Internet Association and has committed to complying with the CTIA's current Consumer Code for Wireless Service.[26] Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy.[27]

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[22] Tr. p. 70.

[23] Tr. p. 127.

[24] Tr. pp. 97-99.

[25] Ex. 5, pp. 8-9.

[26] Tr. pp. 128-9.

[27] Ex. 12.

In addition to the Consumer Code, Mr. Kurtis testified on behalf of MMC that if a potential customer requests service where the existing service area does not immediately allow MMC to provide service, MMC will take the same steps to provide service as those committed to by Virginia Cellular before the FCC.[28] Those steps are as follows: (1) modify or replace the requesting customer's equipment to provide service; (2) install a roof-mounted antenna or other equipment to provide service; (3) adjust the nearest cell site to provide service; (4) identify and make any other adjustments that can reasonably be made to the network or customer facilities to provide service; and (5) determine the feasibility of installing an additional cell site, cell extender, or repeater to provide service where all other options fail. If, after following these steps, MMC still cannot provide the requested service, it will notify the requesting party and include that information in an annual report filed with the Commission detailing how many requests for service were unfulfilled for the past year.[29]

Mr. Kurtis also testified that MMC would be willing to meet the other conditions agreed to by Virginia Cellular.[30]

Proposed Upgrade

The MMC network was originally deployed utilizing then state-of-the-art time division multiple access (TDMA) technology. However, that technology is no longer being supported and MMC needs to overlay its entire network with a code division multiple access (CDMA) technology. The specifics regarding the costs associated with that overbuild were provided in highly confidential testimony at the hearing.[31]

The CDMA overbuild, will allow for enhanced voice and data services throughout MMC's market and is also necessary for MMC to meet the FCC accuracy requirements with respect to E-911 Phase II locational services.[32] MMC has admitted that it is required by federal law to implement E-911 system improvements regardless of whether this Commission grants MMC's requested ETC status.

MMC provided no specific written plans to the Commission regarding the use of the universal service funds. MMC has failed to provide written documentation of any specific system build out plans and improvements other than the technology upgrade and has not provided any timetable for implementation of the upgrade.

MMC has admitted that it already provides service throughout its entire licensed service area and that MMC already has an extensive network in place. According to MMC, its existing network is the most extensive wireless network in its licensed service area.

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[28] *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Application for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004) (Virginia Cellular Order).

[29] Tr. pp. 142-143.

[30] *Id.*

[31] Tr. pp. 186-187.

[32] Tr. pp. 173-175.

Proposed Service Areas

MMC has requested that it be designated an ETC in rural study areas where Alma, Citizens, Mid-Missouri Telephone Company, Sprint, and Spectra operate. MMC has requested that it be designated an ETC in the non-rural study areas where CenturyTel and SBC Missouri operate. A study area is used to calculate the costs of providing service to a high-cost area for the dispersal of USF funds. In this application, the study areas are the same as the service areas of the rural companies, and the service areas encompass all the exchanges in which the rural companies operate. In addition, each exchange in this case is equal to one wire center.

Each of the intervenor companies are incumbent local exchange companies that provide basic local and other telecommunications services in their respective service areas, as certificated by the Commission and pursuant to Commission approved tariffs. Each is a carrier of last resort and is an ETC providing service to the public throughout its respective service areas. No evidence was presented to show that any residents in the service areas of the incumbents are being denied access to the public switched network or service in the incumbents' service areas.[33]

MMC requests ETC status throughout the entire rural LEC study areas of Alma and Citizens thus no redefinition of those study areas is requested.[34] In addition to MMC, six other commercial mobile radio service carriers currently provide cellular phone service in the service areas of Alma and Citizens.[35] The other commercial mobile radio service providers charge rates that are similar to those charged by MMC.[36] In the Citizens study area MMC already has a number of lines equal to 22% of what the ILEC has and in the Alma study area that number is equal to 76%.[37]

Alma's local tariffed rate for residential service is $6.50. When combined with the $6.50 federal subscriber line charge, the rate is $13.00 for basic service.[38] Citizens' local tariffed rate for residential service is $8.40. When combined with the $6.50 subscriber line charge, a Citizens customer pays $14.90 for local service.[39]

MMC requests ETC designation in the entire Concordia wire center. This wire center is a noncontiguous portion of a larger study area.[40] The MMC licensed service area also encompasses portions of the Braymer, Kingston, and Lawson wire centers.[41] No evidence was presented indicating that any member of the public currently was being denied basic local telecommunications service in Spectra's service area.

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[33] Tr. p. 281.

[34] Application, para. 6.

[35] Ex. 10, p. 21.

[36] Tr. p. 262.

[37] Ex. 8, p. 20; Tr. p. 377.

[38] Ex. 10, p. 14.

[39] Ex. 10, p. 14.

[40] Tr. p. 134.

[41] Application at Appendix D.

Spectra does not disaggregate, keep, or report ETC-related records or line counts below the exchange level. Spectra has disaggregated its study area down to the wire center level.[42] MMC's request as originally filed would require the incumbent LECs to begin to keep records for partial wire centers and thus would create added administrative burdens and costs to the incumbents where this was to occur. MMC's request for an ETC service area with respect to the area served by Spectra has now been limited to only the Concordia wire center. With this deletion of the partial wire centers from its proposed ETC service area, MMC proposes to serve the entire contiguous portion of the study area within its licensed service area.

By seeking ETC status in only Spectra's Concordia exchange, and not in the remaining portions of Spectra's existing ETC study area, MMC's Application raises the issue of potential cream-skimming. In order to determine whether MMC is engaging in prohibited cream-skimming with respect to Spectra's Concordia exchange, the Commission must look to the factual record before it. The record, however, is silent with respect to existing Spectra universal service fund support levels in the Concordia exchange, the specifics of Spectra's disaggregation plan, and the population density in Spectra's exchanges.

The evidentiary record does, however, indicate that the Concordia exchange is much larger than the other partial Spectra exchanges within MMC's licensed coverage area and that it is located in an already highly competitive area along a major interstate highway, where, according to Mr. Kurtis, other wireless carriers target their marketing and engage in cream-skimming. Accordingly, on this record the Commission is unable to find that no cream-skimming would occur with respect to Spectra's Concordia exchange if MMC's request is granted.

Mid-Missouri Telephone Company is an affiliate of MMC. Mid-Missouri Telephone Company's study area is comprised of three noncontiguous geographic areas. Two of those noncontiguous areas, encompassing nine[43] of the twelve Mid-Missouri Telephone Company wire centers, lie wholly within MMC's licensed service area and were included in the proposed MMC ETC service area.[44] The remainder of the study area is comprised of the Fortuna, Latham and High Point wire centers and is a noncontiguous geographic area that lies wholly beyond MMC's licensed service area.[45]

MMC requests redefinition of Mid-Missouri Telephone Company's service area to include only the nine contiguous wire centers. Mid-Missouri Telephone Company does not object to this redefinition.

MMC has also sought ETC designation coterminous with the following Sprint wire center boundaries: Blackburn, Centerview, Green Ridge, Henrietta, Holden, Houstonia, Lexington, Malta Bend, Odessa, Otterville, Smithton, Sweet Springs,

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[42] Ex. 9, p. 13.

[43] The Gilliam, Bunceton, Speed, Pilot Grove, Marshall Junction, Nelson, Blackwater, Arrow Rock, and Miami wire centers. Application at Appendix D and F.

[44] Application, p. 13, and Appendix D.

[45] Application at Appendix D.

and Warrensburg.[46] MMC has sought ETC designation for those portions of the following Sprint wire center boundaries that lie within MMC's licensed service area: Blairstown, Calhoun, California, Chilhowee, Clarksburg, Cole Camp, Hardin, Ionia, Kingsville, Leeton, Lone Jack, Norborne, Oak Grove, Strasburg, Syracuse, Tipton, Urich, Waiverly, Wellington and Winsor.[47] MMC requests that the Commission redefine the service area along the licensed service area boundaries for MMC's system. Sprint has not objected to the redefinition of its service area.

Public Interest

MMC suggests in its Application that granting ETC status to MMC "will enhance consumer welfare by bringing service choices, innovation, quality differentiation and rate competition to the local market."[48] MMC fails to explain in sufficient detail how these public interest benefits will occur. The only mention of a forward-looking plan is MMC's assertion that it will use universal service fund support to finance construction, maintenance and upgrading of facilities, which would allow MMC to serve remote locations.[49] However, MMC provided no supporting documentation to substantiate that such remote locations exist, or that these locations are substantial enough to make the ETC grant in the public interest.

MMC claims an ETC grant will bring the benefits of advanced technologies to the remote areas of MMC's service area.[50] The only advancement in technology discussed in any detail concerned the industry-wide change in platforms from a TDMA platform to a CDMA platform. Mr. Dawson testified for MMC that it would upgrade platforms with or without USF support.[51] Thus, the new technology deployment appears to be inevitable with or without USF support, and does little to support a finding that the ETC designation is in the public interest.

Mr. Kurtis testified that a wireless ETC's provisioning of additional lines to existing ILEC subscribers will expand the availability of innovative, high-quality and reliable telecommunications services.[52] No evidence was presented, however, indicating how this ETC grant will increase the lines provisioned to existing ILEC subscribers.

MMC's next argument in favor of the ETC grant is that it will bring the benefits of wireless service to the current Lifeline subscribers of the various ILECs.[53] MMC suggests that without ETC status, MMC will not be able to offer Lifeline discounts. Mr. Dawson testified that MMC's Lifeline plan would give qualifying consumers a $1.75 monthly discount.[54] However, Mr. Dawson also testified that to benefit from a $1.75 discount, a low income customer seeking only the Lifeline plan would need

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[46] Application at Appendix E.

[47] Application at Appendix E.

[48] Application, p. 14-16.

[49] Application, p. 16.

[50] Tr., p. 36.

[51] Tr. pp. 86-87.

[52] Ex. 5, p. 6.

[53] Tr. p. 36.

[54] Tr. p. 59.

to pay for a handset costing at least $45, and a low income customer seeking the Link-Up plan would need to pay for a handset and pay an activation fee of up to $30.[55] The Commission finds that for low income customers, the cost of initiating service will erase any benefit that a Lifeline customer would receive through a $1.75 Lifeline discount.

The Commission finds that MMC has not shown that the benefits to the public of granting MMC ETC status will outweigh the potential detriments. The Commission also agrees with the Office of the Public Counsel that if MMC's request were granted it would be important for the Commission to place reasonable limits on MMC so that the Commission can monitor and ensure that essential telecommunications services are provided in a manner consistent with the protections currently afforded to wireline customers. While MMC has verbally made general system improvement and customer service commitments the record is unclear as to the extent of the Commission's legal authority and practical ability to enforce such commitments if MMC's request is granted.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

SBC Missouri, CenturyTel, Sprint, Mid-Missouri Telephone Company, Spectra, Alma, and Citizens are each a "telecommunications company" and a "public utility" as those terms are defined in Section 386.020, RSMo 2000, and are therefore fully subject to the regulatory jurisdiction of the Commission. Each of the companies is an incumbent local exchange carrier and has been designated as an ETC for purposes of receiving federal USF support.

Spectra, Mid-Missouri Telephone Company, Alma, Citizens, and Sprint are each rural telephone companies as defined by the Federal Telecommunications Act of 1996.

CenturyTel and SBC Missouri are non-rural telephone companies. While not a rural telephone company as defined by the Act, at least two of CenturyTel's four statewide ETC study areas are rural.

The commercial mobile radio service provided by MMC is specifically excluded from the statutory definition of "telecommunications service."[56] Thus, MMC is not subject to the general regulatory jurisdiction of the Commission. Under the authority granted to the Commission by the FCC, MMC has requested that the Commission designate it as an eligible telecommunications carrier for purposes of receiving federal universal service support.

The purpose of the Universal Service Fund is to provide financial support to carriers that use the support to advance universal service principles. Before a carrier can receive support from the USF, the carrier must be designated as an ETC by the state commission with jurisdiction over the service area where the carrier seeks to apply its USF support.[57]

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[55] Ex. 1, Attachment 1; Tr. pp. 59 and 85-86.

[56] Section 386.020(53)(c), RSMo.

[57] 47 U.S.C. § 214(e).

The state commission must first confirm that the petitioning carrier offers the services that are supported by federal universal service support mechanisms under Section 254(c) of the Act.[58] Second, the state commission must confirm that the petitioning carrier advertises the availability of such services and charges using media of general distribution.[59] After making those determinations, the Commission must determine if the request is in the public interest.[60]

Requirements of 47 U.S.C. Section 214(e)(1)

Paragraph (1) of Section 214(e) of the Act requires that an eligible telecommunications carrier:

> (A) offer 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 (including services offered by another eligible telecommunications carrier); and
>
> (B) advertise the availability of such services and the charges therefore using media of general distribution.

The Commission has previously found that MMC offers the services that are supported by federal universal service support. The Commission has also found that MMC advertises the availability of those services using media of general distribution. No party contests that MMC meets the requirements for provision of service found in Section 214(e)(1). The Staff and Intervenors only argue that MMC has not proven that the designation would be in the public interest, particularly in the rural service areas. Thus, the Commission concludes that MMC has met the requirements set out in Section 214(e)(1)(A) and (B).

Public Interest Determination

Section 214(e)(2)[61] of the Act, as well as the Federal Communications Commission regulations,[62] govern the designation of ETC status. Section 214(e)(2) of the Act states, in relevant part:

> Upon request and consistent with the public interest, convenience and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecom-

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[58] 47 C.F.R. § 54.101.

[59] 47 U.S.C. § 214(e).

[60] 47 U.S.C. § 214(e)(2).

[61] 47 U.S.C. § 214(e)(2).

[62] 47 C.F.R. § 54.201, et seq.

> munications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Thus, the Commission must determine if the designation of an additional ETC is in the public interest.

This case represents a case of first impression before the Commission with respect to the designation of wireless ETC. This is not, however, a case of first impression with respect to this Commission's grant of ETC status to non-LEC carriers in areas served by rural telephone companies.[63]

At the time the MMC application was originally filed, and during the period of time that written testimony was prepared and filed, the FCC had consistently held that the public interest benefits related to the introduction of competition in rural areas satisfied the public interest mandate of Section 214. As of that point in time, the FCC had never denied or conditioned a wireless ETC application. In the *Green Hills Order*, applying the same statutory provisions at issue in the instant case, the Commission approved a stipulation that found, without testimony or further support that the grant of the requested ETC status in an area served by a rural telephone company was in the public interest.

On the eve of the hearing in this proceeding, the FCC issued an order setting forth additional guidance to be used in conjunction with a public interest finding for competitive ETC designations in areas served by rural telephone companies.[64] In addition, the FCC has issued an order in the *Highland* case[65] that helps define the public interest standard. Thus, the current case may be distinguished from the Commission's previous *Green Hills Order* because the FCC has given this additional guidance and specifically "acknowledge[d] the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas."[66]

"With regard to the rural LEC service areas, the FCC found that the benefit of increased competition, while an important objective of the telecommunications policy, might not alone be sufficient to meet the public interest standard."[67] The FCC states that "[I]n determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant."[68]

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[63] *See, e.g., Application of Green Hills Area Cellular Telephone, Inc. d/b/a Green Hills Telecommunications Services,* Case No. CO-2003-0162, Order Approving Stipulation and Agreement (adopted March 4, 2003) (Green Hills Order).

[64] *Virginia Cellular*.

[65] *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia,* CC Docket No. 96-45, FCC 03-338 (rel. April 12, 2004).

[66] *Id*. at para. 4.

[67] Initial Brief of MMC, p. 8.

[68] *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. April 12, 2004); See also, *Virginia Cellular*, at para. 26.

In *Virginia Cellular*, the FCC stated that to make the public interest determination, the specific facts should be analyzed to determine

> whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, [by weighing] . . . the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.[69]

The FCC recognized that its "Common Carrier Bureau previously found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of Section 214(e)(1) of the Act."[70] However, in *Virginia Cellular* and *Highland*, the FCC said that an additional ETC was not in the public interest in every instance even in non-rural areas. The FCC did not set out a new standard to follow for non-rural areas, but said that because the company had met the more rigorous test for the rural areas, it must also necessarily meet the test for the non-rural areas.

Thus, the Commission will first examine whether MMC has shown that it is in the public interest for it to be designated as an ETC in the rural areas. To determine if the designation is in the public interest, the Commission looks to the factors set out by the FCC.

A. Benefits of Increased Competition

The FCC takes for granted that an increase in competition is in the public interest. This is based on the fact that one of the main goals of the Telecommunications Act of 1996 was to increase competition. Thus, under the FCC's analysis, having MMC designated as an ETC will have some benefit of increasing competitive choice. In the current case, however, the only evidence MMC presented regarding how competition will increase was two new service offerings for Lifeline.

The Commission has found that in the Citizens study area MMC already has a number of lines equal to 22% of what the ILEC has and in the Alma study area that number is equal to 76%.[71] In addition, six other wireless carriers offer services in those same areas. The Commission concludes, based on the record before it, that the benefits to competition of designating MMC an ETC will not be very significant. MMC already has a significant presence in these service territories and the only additional offering MMC has presented to the Commission is its Lifeline programs. The other improvements made by MMC will take place regardless of the designation.

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[69] *Virginia Cellular*, p. 13, para. 28.

[70] *Highland*, p. 10, para. 21.

[71] Ex. 8, p. 20; Tr. p. 377.

B. Impact on the Universal Service Fund

The second factor that the FCC considered is the impact on the Universal Service Fund. In the *Virginia Cellular* case the impact on the fund was 0.105% of the total high-cost support available to all ETCs.[72] The impact on the fund of MMC of $1,751,721 per year[73] is higher at about 0.20%.[74] The FCC acknowledged that there were concerns about the overall impact of designating multiple carriers, including wireless, as ETCs but left those concerns to be determined in its pending rulemaking.[75]

The Intervenors believe a stricter analysis should be done. The Intervenors suggest that the Commission must look to the Universal Service Principles in Section 254(b) to determine the impact on the USF.[76] The Intervenors suggest that because the wireless carrier does not have to show that the amount it receives in Universal Service Funds is equal to its costs, like the ILECs must, that the USF principle regarding competitive neutrality is violated.[77] The Intervenors also believe that the USF will grow too rapidly with the addition of wireless companies.

The Commission is also concerned with the rapid growth of the Universal Service Fund, and eagerly awaits final guidance from the FCC on improvements to the system. The FCC has stated that the state commissions should undergo a stricter public interest analysis before designating a carrier as eligible in the rural areas. Thus, the Commission cannot just ignore the potential harm to the universal service fund of designating a this wireless carrier as an additional ETC in rural areas. Especially, where that carrier already has a significant competitive presence and proposes only an upgrade to its service that will take place regardless of the designation.

C. Unique Advantages and Disadvantages of the Service Offering

The Commission has found that the advantages that MMC will provide include mobility, access to emergency services, and an increased local calling scope. Disadvantages include such things as dead spots and dropped calls.

One distinction between this case and the *Virginia Cellular* and *Highland* cases is that in those cases the companies each presented some specific build-out plans for adding additional towers and being able to service areas where currently no landline service exists and to improve dead spots. MMC presented evidence that it has already helped Mid-Missouri Telephone Company serve one

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[72] 19 FCC Rcd 1563, note 96.

[73] Ex. 8, pg. 17.

[74] *See* Universal Service Administration Company Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003, Appendix HC1 (Universal Service Administrative Company, August 1, 2003) demonstrating that the total amount of high-cost universal service support is $857,903,276 in the Fourth Quarter of 2003.

[75] *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High Cost Universal Service Support and the ETC Process,* CC Docket No. 96-45, 18 FCC Rcd 1941, Public Notice (rel. Feb. 7, 2003).

[76] *Alma and Citizens Initial Brief*, pp. 7-9.

[77] Ex. 8, p. 25.

customer where the landline would have been cost prohibitive.[78] However, no evidence was presented that any other ILEC has not been able or would not be able to meet its carrier of last resort options. Also, MMC has only generally said that it would increase its network capabilities. It has not presented any specific plans for how to upgrade its network, except for the technology upgrade. Without specific plans for upgrades before it, the Commission cannot determine that MMC will offer any advantages over its current service offering.

D. Commitments to Quality of Service

Another disadvantage of wireless service is that the company is not subject to the mandatory quality of service standards with which the landline companies must comply. MMC has committed to complying with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service and to reporting the number of complaints it receives and the number of customers it cannot serve.

The Intervenors argue, however, that the Commission will have no tool to actually insure compliance since the cellular company does not have its rates and services regulated by the Commission. All of the parties agree that the only power the state Commission has once the designation is made is to revoke the ETC designation. Thus, the Commission's ability to guarantee the quality of service is limited.

Another concern is that the Consumer Code is not nearly as rigorous regarding quality of service as the requirements on the landline companies. The Intervenors suggest that if ETC status is granted, that it should be conditioned on the same quality of service standards that the landline companies must provide. MMC argues that by doing so, the Commission would be posing an unreasonable barrier to entry for the cellular company.

At least one court has ruled that Section 214(e)(2) does not prohibit the states from imposing additional eligibility requirement on ETCs.[79] However, the states may be limited in their ability to enforce the additional requirements. The Commission concludes that if ETC status were granted to MMC, it would be necessary to place sufficient requirements regarding quality of service to insure that customers would be protected.

E. Ability to Serve

One of the recommendations by the Joint Board is that state commissions may choose to require a formal build-out plan. Since MMC has not proposed any specific written plan for insuring it is capable of providing service, the Intervenors suggest that MMC has not proven it is capable of providing service.

MMC has committed that it is willing to accept carrier-of-last-resort status and there was no evidence that suggested MMC was currently unable to serve the areas where ETC designation is requested. In addition, the MMC witnesses testified that the company would go to whatever lengths were necessary to make certain it could serve any customer, at least within that customer's home. Thus, the Commission concludes that MMC has the ability to serve the area.

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[78] Tr. pp. 97-99.

[79] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999).

Conclusion

The Commission determines that the grant of ETC status to MMC is not in the public interest because MMC has not provided competent and substantial evidence to show that the public will benefit from designating MMC an eligible telecommunications carrier for universal service fund purposes.

MMC has not agreed to abide by the same quality of service standards as landline companies and will not be required to do so by law. The Commission will have no jurisdiction over rates or service plans of MMC, and MMC has not agreed to provide plans with lower rates if it is allowed to become an ETC except for the Lifeline service required under the law. MMC has told the Commission that the funds will be used for an upgrade of its system, but it has not presented the Commission with any construction or financial plans or any timelines for these upgrades.

Additionally, MMC has not shown that the customers in the rural service areas will see any increased competition or benefits from the grant of ETC status to MMC. MMC has made no showing that it intends to expand its coverage area or fix dead spots. Although cellular service does offer mobility that the landline carriers cannot provide, that service is already available throughout MMC's service area to those customers who have a need for that service. MMC states that it intends to update its TDMA platform to a CDMA with the funds, but it also admits that it will make the upgrade regardless of whether it is granted ETC status.[80]

MMC has not met its burden to show that a grant of ETC status in the rural areas is in the public interest. Furthermore, MMC has not shown that a grant of ETC status in the non-rural areas would be "consistent with the public interest, convenience, and necessity."[81] Therefore, the Commission will deny MMC's request.

IT IS THEREFORE ORDERED:

1. That the application of Missouri RSA No. 7 Limited Partnership d/b/a Mid Missouri Cellular to be granted status as an eligible telecommunications carrier for federal universal service fund purposes is denied.

2. That Spectra Communications Group, LLC d/b/a CenturyTel, and CenturyTel of Missouri, LLC's Motion to Accept Proposed Findings of Fact and Conclusions of Law One Day Out of Time is granted.

3. That all objections not ruled on are overruled and all motions not granted are denied.

4. That this Report and Order shall become effective on August 15, 2004.

Gaw, Ch., Clayton, Davis, and
Appling, CC., concur;
Murray C., dissents, with separate
dissenting opinion attached;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

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[80] Tr. pp. 55 and 64.

[81] 47 U.S.C. § 214(e)(2).

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I would grant ETC status to applicant in the non-rural areas, in accordance with Section 214(e)(2) of the Federal Telecommunications Act. I conclude, with the majority, that Mid-Missouri Cellular has met the requirements set out in Section 214(e)(1)(A) and (B) of the Act. Therefore, I interpret the act to direct this Commission to designate the applicant as an eligible telecommunications carrier for the non-rural service areas.

For that reason, I respectfully dissent.

Michael E. McKinzy, Sr., Complainant, v. Missouri Gas Energy, Respondent.*

Case No. GC-2003-0579
Decided August 5, 2004

Gas §17. The Commission found that, based on the circumstances, Missouri Gas Energy's 5-month delay in commencing service was not reasonable.

Gas §21. The Commission determined that Missouri Gas Energy was authorized, pursuant to Section 3.03 of its tariff, to charge Mr. McKinzy a transfer fee of $5.00, not a connection fee of $20.00.

The Commission determined that, based on the facts of this case, Missouri Gas Energy may not transfer to Mr. McKinzy's account the past-due debt owed by his wife for service that Missouri Gas Energy provided to her at a prior address, when Mr. McKinzy did not receive the use and benefit of that service.

APPEARANCES

Michael E. McKinzy, Sr., 8004 Overton, Raytown, Missouri 64138, *pro se.*

Dean L. Cooper, Brydon, Swearengen & England P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri Gas Energy, a division of Southern Union Company.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Robert S. Berlin, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

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* The Commission, in an order issued on September 28, 2004, denied applications for rehearing in this case. This case was appealed to Cole County Circuit Court (04CV326390).

REPORT AND ORDER

Syllabus: In this order, the Commission finds that Missouri Gas Energy violated its tariff when the company refused, in April 2003, to either commence service or transfer service from Gerald Lee, the landlord, to Michael E. McKinzy, Sr. MGE also incorrectly charged Mr. McKinzy a "connection fee" instead of a "transfer fee." However, the Commission finds that MGE did not violate its tariff by discontinuing service or by failing to reconnect Mr. McKinzy's service. The Commission further finds that MGE did not violate its tariff provisions regarding notice of a discontinuance of service. Lastly, the Commission finds that MGE's tariff does not authorize the company to transfer the debt of Ms. Nance to Mr. McKinzy's account at this time.

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. 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.

Background and General Procedural History:

In August 2000, Mr. Michael McKinzy, Sr., began living at a residence at 8609 East 87th Street, Raytown, Missouri, and had natural gas service in his name from Missouri Gas Energy (MGE).[1] Mr. McKinzy moved out of the East 87th Street residence in January 2002, and ceased to be a customer of MGE.[2]

In February 2003, Michael McKinzy, Sr., married Tamara Nance.[3] In March 2003, Mr. McKinzy signed an agreement to lease a home at 8004 Overton, Raytown, Missouri.[4] He moved in later that month.[5] At the time he moved in, the residence had natural gas service through an account in the name of the landlord, Gerald Lee.[6] In March 2003, Ms. Nance updated her records with the Missouri Department of Revenue, Driver and Vehicle Service Bureau, by changing her name to Tamara L. McKinzy and her address to 8004 Overton, Raytown, MO 64138.[7]

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[1] Exh. 1 (McKinzy's Direct Testimony), page 1, ¶ 5,7 and 9; and Exhs. 8 and 9.

[2] Exh. 1 (McKinzy's Direct Testimony), page 1, ¶ 9 through page 2, ¶ 11; and Exhs. 8 and 9.

[3] Transcript, page 77, line 22 through page 78, line 1; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 14; and Exh. 3 (the marriage license of Mr. McKinzy and Ms. Nance).

[4] Transcript, page 101, lines 8–11; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 15.

[5] Transcript, page 101, lines 12–14; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 16.

[6] Transcript, page 113, lines 4–5; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 17.

[7] Exh. 10 and 11 (Missouri Department of Revenue, Driver and Vehicle Service Bureau documents).

On or about April 9, 2003, Mr. McKinzy sought to have the natural gas service at 8004 Overton Street placed in his name.[8] At some point during the application process, Mr. McKinzy provided the name of his wife, Tamara Nance.[9] MGE denied service to Mr. McKinzy after the company performed a credit check on Ms. Nance and discovered that she had a past-due gas bill with MGE in the amount of $449.96, for service at a previous residence in 1998-1999.[10] The evidence establishes that at the time of this initial denial of service, MGE believed that Ms. Nance was residing at the Overton Street residence.[11] As discussed below, Mr. McKinzy claims that Ms. Nance did not become a member of his household until December 24, 2003.[12]

On June 18, 2003, MGE terminated the gas service at 8004 Overton Street at the request of Mr. Lee, the landlord.[13] Mr. McKinzy subsequently filed, on June 30, 2003, a complaint with the Missouri Public Service Commission regarding the alleged denial of gas service by MGE at his residence at 8004 Overton.

On or about September 11, 2003, MGE commenced gas service at the Overton Street residence.[14] MGE indicated that it commenced service based on its new understanding that Mr. McKinzy's wife, Ms. Nance, was not living at the residence.[15] MGE did not require Mr. McKinzy to pay any portion of Ms. Nance's bill at this time.[16]

MGE initially charged Mr. McKinzy a connection fee of $20.00, but the company later, in "a spirit of cooperation and goodwill," gave Mr. McKinzy a credit of $15.00.[17] Thus, the final service fee charged by MGE was $5.00 ($20.00 charged - $15.00 credit applied = $5.00 charge remaining).

Staff filed a Staff Report of Investigation and Recommendation on September 8, 2003. Attached to the Memorandum is the Staff Report prepared by James M. Russo and Gay Fred.

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[8] Transcript, page 113, lines 6–8, and page 167, lines 22–24; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 17 and 18; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 1–2.

[9] Transcript, page 96, lines 5–22.

[10] Transcript, page 96, lines 19-25; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, line 19 through page 4, line 3, page 4, lines 12 through page 5, line 11.

[11] Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 1-6 and lines 17-19, page 4, line 10 through-15 page 5, line 11 and lines 20-26.

[12] Exh. 2 (McKinzy's Surrebuttal Testimony), page 3, ¶ 8.

[13] Transcript, page 216, line 21 through page 217, line 11; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 7-16 and Sch. KL-3, and page 9, lines 4-8.

[14] Exh. 12 (Lambert's Rebuttal Testimony), page 5, line 20 through page 6, line 4; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 20; Transcript, page 88, lines 22-23 and page 112, lines 16-23

[15] Exh. 12 (Lambert's Rebuttal Testimony), page 5, line 20 through page 6, line 4.

[16] Exh. 12 (Lambert's Rebuttal Testimony), page 6, lines 2-7.

[17] Exh. 13 (MGE's billing statement, dated October 9, 2003, for Mr. McKinzy); Exh. 14 (McKinzy's letter, dated October 20, 2003); Exh. 15 (MGE's letter to Mr. McKinzy, dated October 22, 2003); and Transcript page 187, line 20 through page 189, line 18.

MGE and Mr. McKinzy both filed responses to Staff's recommendation. MGE's response suggested that Mr. McKinzy's complaint had been satisfied and that the case should be closed. Mr. McKinzy's response, however, suggested that his complaint might not have been resolved. The Commission therefore held a prehearing conference on December 1, 2003.

On December 4, 2003, MGE filed a Motion for Summary Determination and suggestions in support of that motion. Staff filed suggestions in support of that motion. Mr. McKinzy filed Suggestions in Opposition to Summary Determination or, in the Alternative for Dismissal of Complaint.

Mr. McKinzy and MGE filed testimony; Staff and the Office of the Public Counsel did not. The Commission held an evidentiary hearing on April 14, 2004. Mr. McKinzy, MGE, Staff, and Public Counsel were present. Staff and MGE subsequently filed posthearing briefs; Mr. McKinzy and Public Counsel did not.

Ms. Nance's Residence:

Much of this case hinges on whether Ms. Nance was living in at the Overton Street residence in April 2003, when Mr. McKinzy first attempted to get natural gas service at 8004 Overton Street. The evidence regarding this question, however, is contradictory.

Printouts from the Missouri Department of Revenue, Driver and Vehicle Service Bureau, show that in March 2003, Ms. Nance updated her records, changing her name from Tamara L. Nance to Tamara L. McKinzy, and changing her address from 6107 E. 8th St., Kansas City, MO 64128, to 8004 Overton, Raytown, MO 64138.[18]

MGE's business records indicate that in April 2003, Mr. McKinzy initially told MGE personnel that his wife was living with him at the Overton Street residence, but that when he was told that he would have to pay all or a portion of her past-due debt, he then stated that she was not living with him at the Overton address.[19] Furthermore, an article in the October 16, 2003 edition of the *Kansas City Call* newspaper states that "[f]or about a month, McKinzy and his new bride, Tamara, along with McKinzy's four children from a previous marriage, were forced to live without gas [service]. . . ."[20]

Mr. McKinzy's direct and surrebuttal testimony, however, indicates that Mr. McKinzy's wife was not a member of his household when he applied for service on April 9, 2003.[21] In his testimony, Mr. McKinzy contends that in June 2003, Ms. Nance lived at 6107 East 9th Street, Kansas City, Missouri,[22] and that she did

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[18] Exhs. 10 and 11 (Missouri Department of Revenue, Driver and Vehicle Service Bureau documents).

[19] Transcript page 192, line 16 through page 193, line 7, and page 195, lines 6-19, and Exh. 12 (Lambert's Rebuttal Testimony), Schedule KL-1.

[20] Exh. 12 (Lambert's Rebuttal Testimony), page 6, line 23 through page 7, line 10, and Schedule KL-4.

[21] Exh. 1 (McKinzy's Direct Testimony), page 3, ¶ 26; and Exh. 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 4.

[22] Exh. 1 (McKinzy's Direct Testimony), page 2, ¶¶ 4-5; and Exh. 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 5.

not become a member of his household until December 24, 2003.[23] At the hearing, Mr. McKinzy testified several times that his wife, Ms. Nance, became a member of his household on December 24, 2003.[24]

Mr. McKinzy provided plausible explanations rebutting the evidence that suggested his wife lived at the Overton Street address prior to December 24, 2003. When asked about the driver's license record listing his wife's address as 8004 Overton, Mr. McKinzy suggested that his wife may have changed her address on her driver's license because she wanted a permanent address for the mailing of important documents or correspondence.[25] Mr. McKinzy's explanation is believable.

As to the copies of computer screens, or business records, provided by MGE, Mr. McKinzy contends that when he requested service in April 2003, he did not tell any MGE employee that his wife would be living with him at the Overton Street residence.[26] In fact, MGE's witness, Ms. Lambert, testified that when a potential customer calls regarding service, MGE typically requests the name of the person calling – the potential customer – and then the spouse's name.[27] Ms. Lambert indicated that if a person calls and indicates that he or she wants gas service, MGE would typically ask "who's living at the residence and are you married[?]".[28] Ms. Lambert further stated that "unless they indicate that the spouse is not in the home, we assume that they are. I think that's logical and reasonable."[29]

The Commission finds that Mr. McKinzy's explanation or rebuttal of MGE's computer screen records is credible. Mr. McKinzy is believable in his assertion that when he attempted to obtain gas service in April 2003, he only provided his wife's name and did not state that she would be living with him at the Overton Street residence. It is also plausible that Mr. McKinzy told MGE's employee that he was married, and then the employee *assumed* that the wife was living at the Overton Street residence with Mr. McKinzy. The Commission determines that Mr. McKinzy's premise – that MGE jumped to the erroneous conclusion that Mr. McKinzy's wife would be residing with him – is credible.

And as for the newspaper article in the *Kansas City Call*, which suggests that Mrs. McKinzy (Ms. Nance) was living at the Overton Street address during the summer of 2003, Mr. McKinzy stated at the hearing that he never told the reporter that his wife was living at the Overton address.[30] Mr. McKinzy suggests that the

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[23] Exh. 2 (McKinzy's Surrebuttal Testimony), page 3, ¶8.

[24] Transcript page 68, lines 8-9 and 13-14, and page 101, lines 15-25.

[25] Transcript page 110, line 7-15.

[26] Transcript page 96, lines 5-18 and page 97, lines 10-1; and Exh. 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 6 through page 3, ¶ 7.

[27] Transcript page 190, lines 5-14.

[28] Transcript page 191, lines 2-5.

[29] Transcript page 191, line 24 through page 192, line 2.

[30] Transcript page 102, line 20 through page 103, line 14.

reporter made an error when she wrote that his wife had lived in the apartment without gas service.[31] The Commission finds that Mr. McKinzy's explanation is credible.

Finally, the Commission finds Mr. McKinzy's own testimony that his wife did not move into the Overton residence until December 24, 2003, to be credible.

For these reasons, the Commission finds that Mr. McKinzy has established by a preponderance of the evidence that Ms. Nance was living at the Overton Street residence as of December 24, 2003, and not before.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction:

MGE is a "gas corporation" and a "public utility" as those terms are defined in Missouri Public Service Commission law.[32] The Missouri Public Service Commission, therefore, has jurisdiction over the services, activities, and rates of MGE.[33]

The Commission is authorized to hear and determine complaints made by "any corporation or person" concerning "any act or thing done or omitted to be done by any corporation, person or public utility.[34]

A tariff that has been approved by the Commission has the same force and effect of a statute.[35]

Burden of Proof:

The Complainant, Mr. McKinzy, bears the burden of proof in a case, such as this one, in which the Complainant alleges that a regulated utility has engaged in unjust or unreasonable actions.[36] Thus, Mr. McKinzy must establish all facts necessary to support the relief he seeks by a preponderance of credible evidence.

Discussion

As noted in the Findings of Fact above, Mr. McKinzy requested gas service in his name at the Overton Street residence in April 2003. At that time, MGE refused to initiate service at the Overton Street residence in Mr. McKinzy's name because Mr. McKinzy's wife, Ms. Nance, owes a past-due debt to MGE, and the company mistakenly believed that Ms. Nance would be living at the premises. In June 2003, MGE shut off the gas service to the Overton Street residence at the request of the

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[31] Transcript page 103, lines 11-19 and page 104, lines 3-8.

[32] Section 386.020(18) and (42), RSMo Supp. 2001. Section 386.010 states that Chapter 386 shall be known as the "Missouri Public Service Commission Law."

[33] Sections 386.020(42) and 386.250(1), RSMo Supp. 2001.

[34] Section 386.390.1, RSMo 2000.

[35] *Allstates Transworld Van Lines, Inc. v. Southwestern Bell Telephone Co.*, 973 S.W.2d 314, 317 (Mo. App. E.D. 1996).

[36] *Ahlstrom v. Empire District Electric Company*, 4 Mo.P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company*, 30 Mo.P.S.C. (N.S.) 517, 523 (1991).

company's customer, Gerald Lee. Mr. McKinzy was without natural gas service to his Overton Street residence until September 2003, at which time MGE began supplying natural gas service to Mr. McKinzy. MGE charged Mr. McKinzy a "connection fee" of $20.00 when it initiated gas service, but the company later reduced the charge to $5.00. Ms. Nance moved into the Overton Street residence on December 24, 2003.

The issues remaining are whether any of MGE's actions violate the company's tariff, and whether the tariff authorizes the company to transfer Ms. Nance's past-due debt to the account of Mr. McKinzy, now that Ms. Nance is living with Mr. McKinzy at the Overton Street residence. Specifically, Mr. McKinzy requests that the Commission issue an order that:

1. Finds that MGE violated its tariff:

   a. by refusing to "commence" or "transfer" natural gas service to Mr. McKinzy in April 2003;

   b. by charging Mr. McKinzy a "connection" fee instead of a "transfer" fee;

   c. by "discontinuing" Mr. McKinzy's natural gas service in June 2003;

   d. by subsequently refusing, until September 2003, to "reconnect" natural gas service to Mr. McKinzy's residence at 8004 Overton;

   e. by failing to use reasonable diligence to furnish continuous gas service to Mr. McKinzy; and

2. Prohibits MGE from ever transferring the debt of Mr. McKinzy's wife, Tamara Nance, to an account in Mr. McKinzy's name.

1. Did MGE violate its tariff?

a. Did MGE violate its tariff by refusing to "transfer" or "commence" service to Mr. McKinzy in April 2003?

MGE contends that it properly relied on Section 3.02 to deny service to Mr. McKinzy in April 2003. Both Staff and Mr. McKinzy argue that MGE should have commenced or transferred service in April 2003.

Section 3.02 of MGE'S tariff provides as follows:

> Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made.

Thus, the question is whether, at the time service was requested, the applicant – Mr. McKinzy - or a member of applicant's household (who has received benefit from the previous gas service), was indebted to MGE for gas service previously supplied. If so, MGE's tariff authorized the company to refuse to commence supplying gas service to Mr. McKinzy in April 2003. On the other hand, if neither Mr. McKinzy (the applicant) nor a member of Mr. McKinzy's household was indebted to MGE for gas service, then MGE should have commenced or transferred service when Mr. McKinzy requested it in April 2003. As discussed above, Ms. Nance was not living at 8004 Overton until December 24, 2003. Therefore, tariff Section 3.02 did not authorize MGE to refuse to commence service in April 2003.

Instead, MGE should have commenced service to Mr. McKinzy pursuant to tariff Section 3.01, which provides that the company will supply gas service in accordance with its rates and tariffs.[37] Although Section 3.01 does not specify the time period in which the company must commence supplying gas service, the Commission determines that it is implicit that service must start within a reasonable time. And based upon the circumstances, the Commission concludes that the five-month delay, from April to September, was not reasonable. Nonetheless, the Commission also determines that MGE's belief regarding Ms. Nance's residency was reasonable and not in bad faith. Furthermore, MGE is now supplying gas service to Mr. McKinzy. For these reasons, the Commission will not direct its Staff to initiate a case for civil penalties against MGE for its failure to promptly commence service to Mr. McKinzy.

b. Did MGE violate its tariff by charging Mr. McKinzy a "connection fee" rather than a "transfer fee" when the company commenced service in September 2003?

The first question is whether Mr. McKinzy's request, on April 9, 2003, was a request to "transfer" service or a request to "commence" service. Unfortunately, MGE's tariff does not specifically define either term. Instead, tariff Section 3.03 describes a "transfer fee" as being applicable to when "natural gas service is not being initiated or reinstated but is continuing from a prior customer."[38] The tariff further provides that a "connection fee" is applicable "when natural gas service is being initiated for the first time or had been previously terminated at the location."[39]

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[37] Section 3.01 provides that the "Company will supply gas service in accordance with its rate schedules and these General Terms and Conditions for Gas Service on file with and approved by the Commission."

[38] Tariff Section 3.03, which reads, in part, as follows:

CONNECTION OF SERVICE: The Company shall charge a transfer fee as set forth in Section 14 herein to service applicants when natural gas service is not being initiated or reinstated but is continuing from a prior customer. The Company shall charge a connection fee as set forth in Section 14 herein to service applicants when natural gas service is being initiated for the first time or had been previously terminated at the location. . . .

[39] *Id.*

Although a "transfer" appears to be a type of commencement or initiation of service, the service fees for the two are quite different.[40]

Mr. McKinzy views his April 9th request for service as a request for MGE to *transfer* his closed account from East 87th Street to his new residence on Overton Street.[41] Consequently, Mr. McKinzy contends that MGE should have charged him a transfer fee of $5.00, instead of a connection fee of $20.00.[42]

Mr. McKinzy's position that MGE should have transferred, on or about April 9, 2003, his closed East 87th Street account to his new address at 8004 Overton Street is flawed. Mr. McKinzy cannot "transfer," under Section 3.03, a closed account at one residence to another residence. Rather, a "transfer" must refer to "when natural gas service is not being initiated or reinstated but is continuing from a prior customer."[43]

MGE's position is also flawed. MGE contends that the initialization of service in September 2003 was a commencement of a new service and thus subject to a $20.00 connection fee. As previously discussed, Ms. Nance was not living at 8004 Overton in April 2004. Therefore, MGE improperly relied upon Section 3.02 of its tariff to refuse to commence service to Mr. McKinzy. It was MGE's refusal to transfer service from Mr. Lee to Mr. McKinzy that lead to service at 8004 Overton being terminated, which ultimately resulted in MGE charging the connection fee when service was commenced in September 2003.

Instead, MGE should have treated Mr. McKinzy's April 9th request for service as a request to transfer service at Overton Street *from the name of the landlord, Mr. Lee, to Mr. McKinzy's name*. And pursuant to Section 3.03, MGE would have then been authorized to charge Mr. McKinzy a transfer fee of $5.00, not a connection fee of $20.00. Although MGE did violate its tariff by charging Mr. McKinzy a connection fee instead of a transfer fee[44], in October 2003 MGE voluntarily reduced the fee from $20.00 to $5.00 – the correct amount.[45] Consequently, Mr. McKinzy has received all of the relief to which he is entitled with regards to the transfer/connection fee.

c. Did MGE violate its tariff by "discontinuing" Mr. McKinzy's service?

Mr. McKinzy argues that MGE violated tariff Section 3.07(D) by "discontinuing" his natural gas service based on his "failure to pay the bill of another customer when [he] did not receive substantial benefit and use of the service."[46] Mr. McKinzy also alleges that MGE violated Sections 3.08 and 3.09 of its tariff by failing to provide him

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[40] Tariff Sections 3.03 and 14.0.

[41] Transcript, page 95, line 18 through page 96, line 3, page 97, lines 3-7, page 100, lines 21-25, page 112, lines 16-21, page 115, lines 15-21, and page 118, lines 5-25.

[42] *Id.*

[43] See Section 3.03 of MGE's tariff.

[44] Sections 3.03 and 14.0 of MGE's tariff.

[45] Exh. 15 (MGE's letter to Mr. McKinzy, dated October 22, 2003); and Transcript page 187, line 20 through page 189, line 18.

[46] Complainant's Issues List; and Exh. 1 (McKinzy's Direct Testimony), page 3, ¶s 22-25. Tariff Section 3.08 describes the requirements regarding the timing of a discontinuance of service, and Section 3.09 lists the requirements for notice of a discontinuance of service.

with ten days' notice and then twenty-four hours notice prior to "discontinuing" his natural gas service.[47] Mr. McKinzy's characterization of this matter as a "discontinuance of service" is in error. Commission rules and MGE's tariff define a "discontinuance of service" as a "cessation of service by Company not requested by customer."[48] A "termination of service," however, differs from a discontinuation of service in that a termination of service is defined as a "cessation of gas service requested by a customer."[49]

MGE did not "discontinue" service to Mr. McKinzy. Rather, the June 2003 cessation of service was a "termination of service" at the request of MGE's customer, Mr. Gerald Lee.[50] Therefore, the discontinuance of service provisions cited by Mr. McKinzy (i.e., the grounds for discontinuance, ten days written notice and 24-hours notice) are not applicable to the situation in this case, and MGE did not violate these tariff provisions.

d. Did MGE violate its tariff, Section 3.12, by failing to "reconnect" Mr. McKinzy's service?

Mr. McKinzy argues that MGE failed to "reconnect" his service in violation of Section 3.12 of the company's tariff.[51] Specifically, Section 3.12 requires the company to restore service promptly when the cause of a "discontinuance of service" has been eliminated.[52] As noted above, Mr. McKinzy did not suffer a "discontinuance of service," and therefore, Section 3.12 is not applicable. As a result, the Commission finds that MGE did not violate Section 3.12 regarding the reconnection of gas service after a discontinuance of service.

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[47] Complainant's Issues List; Tariff Sections 3.08, 3.09, and 1.10. See also 4 CSR 240-13.015 (1)(I).

[48] Tariff Section 1.10 and 4 CSR 240-13.015(1)(I).

[49] Tariff Section 1.37 and 4 CSR 240-13.015(1)(W).

[50] Transcript, page 216, line 21 through page 217, line 11; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 7-16 and Sch. KL-3, and page 9, lines 4-8.

[51] McKinzy's Issues List. Section 3.12 of MGE's tariff provides, in part:

RECONNECTION OF GAS SERVICE: Upon customer's request, Company shall restore service promptly when the cause for discontinuance of service has been eliminated, applicable reconnection charges paid and, if required, satisfactory credit arrangements have been made. At all times a reasonable effort shall be made to restore service upon the day restoration is requested, and in any event, restoration shall be made no later than the next working day following the day requested by customer.

The reconnection charge, precedent to the restoration of gas service to a customer whose gas service has been discontinued for any reason whatsoever, shall be as provided in Section 14, herein.

If gas service is discontinued for non-payment by customer of any delinquent gas service bill, Company shall not, except as provided in Section 3.10 herein, be required to restore service until all delinquent bills and reconnection charges have been paid and customer has complied with Section 2.05 herein. . . .

[52] *Id.*

e. Did MGE violate its tariff by failing to use reasonable diligence to furnish continuous gas service to Mr. McKinzy?

Mr. McKinzy argues that MGE violated tariff Section 3.05, which provides in part:

> CONTINUITY OF SERVICE: Company will use reasonable diligence to furnish continuous gas service to customer, but does not guarantee the supplying of gas service against irregularities or interruptions. . . .

Mr. McKinzy again misapplies a tariff provision. Section 3.05 contains the standard – reasonable diligence – to which MGE will be held in its efforts to furnish continuous gas service to its customers. Section 3.05 does not apply to the current situation, whereby MGE terminated service *at the request of its customer*, Mr. Lee. Thus, Mr. McKinzy's application of tariff Section 3.05 to the current situation is erroneous, and the Commission finds that MGE did not violate tariff Section 3.05.

2. May MGE transfer to Mr. McKinzy's account the past-due debt owed by his wife, Tamara Nance, for service MGE provided to her at a prior address, when Mr. McKinzy did not receive the use and benefit of that service?

MGE contends that the answer to this question is "yes." Mr. McKinzy and the Commission's Staff argue that the answer is "no." The Commission finds that MGE's tariff, specifically Section 3.02, does not allow the company to transfer the past-due debt of Ms. Nance to Mr. McKinzy's account at 8004 Overton Street at this time.

MGE focuses on one sentence in Section 3.02: "Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account." Tariff Section 3.02, however, must be read as a whole.[53] The entire section addresses *commencing* or *transferring* service when an applicant or a member of applicant's household has a prior indebtedness. Once service has been commenced or transferred, the section no longer applies.

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[53] Section 3.02 of MGE's tariff states:

PRIOR INDEBTEDNESS OF CUSTOMER: Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made. This provision cannot be avoided by substituting an application for service at the same or a new location signed by some other member of the former customer's household or by any other person acting for or on the behalf of such customer.

In order to expedite service to a customer moving from one location to another, Company may provide service at the new location before all bills and charges are paid for service at the prior location. ***Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account.*** Such transferred bills are then subject to the provisions of Sections 7.07 and 7.08 herein. [Emphasis added.]

Thus, if Ms. Nance had been a resident of 8004 Overton at the time service was commenced, Section 3.02 would have applied and MGE would have been authorized to transfer Ms. Nance's past-due debt to Mr. McKinzy's account at that time. However, Ms. Nance was not a resident of 8004 Overton at the time service was commenced, and MGE may not pull out a part of Section 3.02 and apply it to a situation that does not involve commencing or transferring service. Therefore, MGE may not transfer Ms. Nance's past-due debt of $449.96 to Mr. McKinzy's account at 8004 Overton Street at this time.[54]

Decision

As discussed above, the Commission determines that Sections 3.05, 3.07, 3.08, 3.09, and 3.12 of MGE's tariff, the "continuity of service," "discontinuance," and "reconnection" provisions, do not apply to the facts of this case and thus, MGE did not violate these tariff provisions. Consequently, the Commission will dismiss the portions of Mr. McKinzy's complaint that pertain to these five tariff sections.

The Commission further determines that although the company (1) violated Section 3.01 of its tariff in April 2003 when it refused to commence service to Mr. McKinzy, and (2) violated tariff Section 3.03 when it charged Mr. McKinzy a "connection fee" instead of a "transfer fee," Mr. McKinzy has received all of the relief to which he is entitled. That is, MGE did commence service to Mr. McKinzy and MGE did reduce the connection fee of $20.00 to $5.00 – the correct amount for a transfer fee. The Commission will therefore dismiss the portions of Mr. McKinzy's complaint that address the connection/transfer fee.

Lastly, the Commission finds that MGE may not transfer, at this time, Ms. Nance's past-due debt of $449.96 to Mr. McKinzy's account at 8004 Overton Street. Mr. McKinzy's complaint is thus sustained only to the extent that MGE may not transfer Ms. Nance's past-due debt to Mr. McKinzy's account at this time. If in the future Mr. McKinzy and Ms. Nance commence or transfer service in MGE's service area, and Ms. Nance still has a past-due debt with MGE, Section 3.02 would apply, as would any other relevant Commission rule. Consequently, the Commission will not issue an order, as requested by Mr. McKinzy, which prohibits MGE from *ever* transferring Ms. Nance's past-due debt to Mr. McKinzy.

IT IS THEREFORE ORDERED:

1. That the Complaint filed on June 30, 2003, by Michael E. McKinzy, Sr., against Missouri Gas Energy is dismissed in part and granted in part, as discussed above.

2. That the Commission finds that Missouri Gas Energy may not transfer Ms. Nance's past-due debt of $449.96 to the current account of Michael E. McKinzy, Sr. at 8004 Overton Street at this time, as discussed above.

3. That this Report and Order shall become effective on August 15, 2004.

Gaw, Ch., concurs, with separate concurring
opinion to follow;
Clayton and Appling, CC., concur;
Murray, C., dissents, with separate dissenting
opinion attached;

[54] Section 3.02 would apply if Mr. McKinzy and Ms. Nance later jointly commence or transfer service in MGE's service area.

Davis, C., dissents, with separate dissenting opinion to follow;
and certify compliance with the provisions of Section 536.080, RSMo 2000.

Dissenting Opinion of Commissioner Jeff Davis

In this case, the majority of members on this Commission found that Missouri Gas Energy violated its tariff when the company refused, in April 2003, to either commence service or transfer service from Gerald Lee, the landlord, to Michael E. McKinzy, Sr. The Commission also found that MGE violated its tariff by charging Mr. McKinzy a "connection" fee instead of a "transfer" fee. Further, the Commission found MGE did not violate the provisions of its tariff which address a "discontinuance" of service, a "reconnection" of service or notice thereof. Lastly, the Commission found that MGE's tariff does authorize the company to transfer the debt of Mrs. McKinzy to Mr. McKinzy's account.

This Commissioner respectfully dissents from the findings of the Commission in the following ways: (1) Mr. McKinzy's testimony is neither credible, nor reliable; (2) MGE did not violate Section 3.02 of its tariff by refusing to "transfer or "commence" service to Mr. McKinzy in April 2003; and (3) MGE may transfer the past-due debt of Mrs. McKinzy, for service provided to her at a prior address, to the account of Mr. McKinzy, even though Mr. McKinzy did not receive the use and benefit of that service.

Findings of Fact

The majority in this case determined that the testimony of Mr. McKinzy was "credible" and, in fairness, Mr. McKinzy did have an answer to every one of MGE's assertions regarding his wife's address; however, any reasonable person viewing these facts should, in light of common sense and experience, determine that his testimony is not credible.

General Procedural History and Background:

In August 2000, Mr. Michael McKinzy, Sr., began living at a residence at 8609 East 87th Street, Raytown, Missouri, and had natural gas service in his name from Missouri Gas Energy (MGE).[1] Mr. McKinzy moved out of the East 87th Street residence in January 2002, and ceased to be a customer of MGE.[2]

In February 2003, Michael McKinzy, Sr., married Tamara Nance.[3] In March 2003, Mr. McKinzy signed an agreement to lease a home at 8004 Overton, Raytown, Missouri.[4] He moved in later that month.[5] At the time he moved in, the residence had natural gas service through an account in the name of the landlord, Gerald Lee.[6]

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[1] Exh. 1 (McKinzy's Direct Testimony), page 1, ¶ 7; and Exhs. 8 and 9.

[2] Exh. 1 (McKinzy's Direct Testimony), page 1, ¶ 9 through page 2, ¶ 11; and Exhs. 8 and 9.

[3] Transcript, page 77, line 22 through page 78, line 1 ; Exh . 1 (McKinzy's Direct Testimony), page 2, ¶ 14; and Exh . 3 (the marriage license of Mr. McKinzy and Ms. Nance).

[4] Transcript, page 101, lines 8-11 ; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 15.

[5] Transcript, page 101, lines 12-14; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 16.

[6] Transcript, page 113, lines 4-5; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 17.

In March 2003, Ms. Nance updated her records with the Missouri Department of Revenue, Driver and Vehicle Service Bureau, by changing her name to Tamara L. McKinzy and her address to 8004 Overton, Raytown, MO 64138.[7]

On or about April 9, 2003, Mr. McKinzy sought to have the natural gas service at 8004 Overton Street placed in his name.[8] At some point during the application process, Mr. McKinzy provided the name of his wife, Tamara Nance.[9] MGE denied service to Mr. McKinzy after the company performed a credit check on Ms. Nance and discovered that she had a past-due gas bill with MGE in the amount of $449.96, for service at a previous residence in 1998-1999.[10] The evidence establishes that at the time of this initial denial of service, MGE believed that Ms. Nance was residing at the Overton Street residence.[11]

On June 18, 2003, MGE terminated the gas service at 8004 Overton Street at the request of Mr. Lee, the landlord.[12] Mr. McKinzy subsequently filed, on June 30, 2003, a complaint with the Missouri Public Service Commission regarding the alleged denial of gas service by MGE at his residence at 8004 Overton.

On or about September 11, 2003, MGE commenced gas service at the Overton Street residence.[13] MGE indicated that it commenced service based on its new understanding that Mr. McKinzy's wife, Ms. Nance, was not living at the residence.[14] MGE did not require Mr. McKinzy to pay any portion of Ms. Nance's bill at this time.[15]

MGE initially charged Mr. McKinzy a connection fee of $20.00, but the company later, in "a spirit of cooperation and goodwill," gave Mr. McKinzy a credit of $15 .00.[16] Thus, the final service fee charged by MGE was $5.00 ($20.00 charged - $15.00 credit applied = $5.00 charge remaining).

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[7] Exh. 11 (Missouri Department of Revenue, Driver and Vehicle Service Bureau document, printed March 25, 2003) .

[8] Transcript, page 113, lines 6-8, and page 167, lines 22-24; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 17; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 1-2.

[9] Transcript, page 96, lines 5-22.

[10] Transcript, page 96, lines 19-25; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, line 19 through page 4, line 3, page 4, lines 12 through page 5, line 11.

[11] Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 1-6 and lines 17-19, page 4, lines 10 through 15, page 5, line 11 and lines 20-26.

[12] Transcript, page 216, line 21 through page 217, line 11 ; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 7-16 and Sch. KL-3, and page 9, lines 4-8.

[13] Exh . 12 (Lambert's Rebuttal Testimony), page 5, line 20 through page 6, line 4; Exh . 1 (McKinzy's Direct Testimony), page 2, ¶ 20; Transcript, page 88, lines 22-23 and page 112, lines 16-23.

[14] Exh. 12 (Lambert's Rebuttal Testimony), page 5, line 20 through page 6, line 4.

[15] Exh. 12 (Lambert's Rebuttal Testimony), page 6, lines 2-7.

[16] Exh. 13 (MGE's billing statement, dated October 9, 2003, for Mr. McKinzy); Exh. 14 (McKinzy's letter, dated October 20, 2003); Exh. 15 (MGE's letter to Mr. McKinzy, dated October 22, 2003); and Transcript page 187, line 20 through page 189, line 18.

Counsel for the Commission's Staff filed a Staff Report of Investigation and Recommendation on September 8, 2003. Attached to the Memorandum is the Staff Report prepared by James M. Russo and Gay Fred.

MGE and Mr. McKinzy both filed responses to Staff's recommendation. MGE's response suggests that Mr. McKinzy's complaint has been satisfied and that the case should be closed. Mr. McKinzy's response, however, suggested that his complaint might not have been resolved. The Commission therefore held a prehearing conference on December 1, 2003.

On December 4, 2003, MGE filed a Motion for Summary Determination and suggestions in support of that motion. Mr. Berlin filed suggestions in support of that motion on behalf of the Commission's Staff. Mr. McKinzy filed Suggestions in Opposition to Summary Determination or, in the Alternative for Dismissal of Complaint.

Mr. McKinzy and MGE filed testimony; Staff and the Office of the Public Counsel did not. The Commission held an evidentiary hearing on April 14, 2004. Mr. McKinzy, MGE, Staff, and Public Counsel were present. Staff and MGE subsequently filed posthearing briefs; Mr. McKinzy and Public Counsel did not.

Ms, Nance's Residence:

There is a question of fact as to whether Ms . Nance was living in at the Overton Street residence in April 2003, when Mr. McKinzy first attempted to get natural gas service at 8004 Overton Street.

MGE's business records indicate that in April 2003, Mr. McKinzy initially stated that his wife was living with him at the Overton Street residence, but that when he was told that he would have to pay all or a portion of her past-due debt, he then stated that she was not living with him at the Overton address.[17] A printout from the Missouri Department of Revenue, Driver and Vehicle Service Bureau, shows that in March 2003, Ms. Nance listed her name as Tamara L . McKinzy and her address as 8004 Overton, Raytown, MO 64138.[18] Furthermore, an article in the October 16, 2003 edition of the *Kansas City Call* newspaper states that "[f]or about a month, McKinzy and his new bride, Tamara, along with McKinzy's four children from a previous marriage, were forced to live without gas [service] . . . ."[19]

Mr. McKinzy's direct and surrebuttal testimony, however, indicates that Mr. McKinzy's wife was not a member of his household when he applied for service on April 9, 2003.[20] In his surrebuttal testimony, Mr. McKinzy contends that in June 2003, Ms. Nance lived at 6107 East 9th Street, Kansas City, Missouri,[21] and that she did

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[17] Transcript page 192, line 16 through page 193, line 7, and page 195, lines 6-19.

[18] Exh. 11 (Missouri Department of Revenue, Driver and Vehicle Service Bureau document, printed March 25, 2003).

[19] Exh . 12 (Lambert's Rebuttal Testimony), page 6, line 23 through page 7, line 10, and Schedule KL-4 .

[20] Exh . 1 (McKinzy's Direct Testimony), page 3, ¶ 26; and Exh . 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 4.

[21] Exh . 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 5.

not become a member of his household until December 24, 2003.[22] At the hearing, Mr. McKinzy testified several times that his wife, Ms. Nance, became a member of his household on December 24, 2003.[23]

Although Mr. McKinzy attempted to rebut provided plausible explanations rebutting the evidence that suggests his wife lived at the Overton Street address prior to December 24, 2003, his testimony was not credible. When asked about the driver's license record listing his wife's address as 8004 Overton, Mr. McKinzy indicated that he did not know why his wife changed her name and address on her driver's license, but suggested that the reason may have been that his wife may have changed her address on her driver's license because she wanted a permanent address for the mailing of important documents or correspondence.[24] By itself, Mr. McKinzy's explanation might be believable; however, combined with the other evidence, it is not.

In response to the newspaper article in the *Kansas City Call*, which suggests that Mrs . McKinzy (Ms. Nance) was living at the Overton Street address during the summer of 2003, Mr. McKinzy stated at the hearing that he never told the reporter that his wife was living at the Overton address.[25] Mr. McKinzy further suggests that the statement was an error on the reporter's part.[26] Mr. McKinzy's testimony on this point was not credible.

Finally, as to the copies of computer screens, or business records, provided by MGE, Mr. McKinzy contends that when he requested service in April 2003, he did not tell any MGE employee that his wife would be living with him at the Overton Street residence.[27] Nonetheless, MGE's records show that Mr. McKinzy did in fact indicate that his wife, Ms. Nance, would be residing at the Overton residence.[28] Mr. McKinzy recanted his statement regarding his wife's living arrangements once he was told that part of her past-due bill must be paid before service would be initiated at the Overton address.[29] In fact, MGE's witness, Ms. Lambert, testified that when a potential customer calls regarding service, MGE typically requests the name of the person calling - the potential customer - and then the spouse's name.[30] Ms. Lambert indicated that if a person calls and indicates that he or she wants gas service, MGE would typically ask "who's living at the residence and are you

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[22] Exh . 2 (McKinzy's Surrebuttal Testimony), page 3, ¶ 8.

[23] Transcript page 68, lines 8-9 and 13-14, and page 101, lines 15-25.

[24] Transcript page 110, line 7-15.

[25] Transcript page 102, line 20 through page 103, line 14.

[26] Transcript page 103, lines 11-19 and page 104, lines 3-8.

[27] Transcript page 96, lines 5-18 and page 97, lines 10-1 ; and Exh. 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 6 through page 3, ¶ 7.

[28] Exh. 12 (Lambert Rebuttal Testimony), page 6, line 20 through page 7, line 10, and Sch. KL-1.

[29] Exh. 12 (Lambert Rebuttal Testimony), page 6, line 20 through page 7, line 10, and Sch. KL-1.

[30] Transcript page 190, lines 5-14.

married[?]"[31] Ms. Lambert further stated that "unless they indicate that the spouse is not in the home, we assume that they are. I think that's logical and reasonable."[32]

The Commission finds that Mr. McKinzy's explanation or rebuttal of MGE's computer screen records is not credible. Mr. McKinzy is not believable in his assertion that when he attempted to obtain gas service in April 2003, he only provided his wife's name and did not state that she would be living with him at the Overton Street residence.

For these reasons, this Commissioner finds that MGE has established by a preponderance of the evidence that Ms. Nance was living at the Overton Street residence at least as of April 9, 2004, the date Mr. McKinzy first attempted to obtain natural gas service at the Overton Street residence.

Conclusions of Law

I agree with the majority opinion of this Commission with regard to numerous aspects in this case including their jurisdictional statement, their finding that Mr. McKinzy bears the burden of proof in this case and the following findings:

b. MGE did violate Section 3.03 of its tariff by charging Mr. McKinzy a "connection" fee instead of a "transfer" fee. However, Mr. McKinzy has received all of the relief to which he is entitled.

c. MGE did not violate Section 3.07(D) of its tariff by "discontinuing" Mr. McKinzy's natural gas service in June 2003;

d . MGE did not violate Section 3.12 of its tariff by subsequently refusing, until September 2003, to "reconnect" natural gas service to Mr. McKinzy's residence;

e. MGE did not violate Section 3.05 of its tariff by failing to use reasonable diligence to furnish continuous gas service to Mr. McKinzy; and

Discussion

As noted in the Findings of Fact above, Mr. McKinzy requested gas service in his name at the Overton Street residence in April 2003. At that time, MGE refused to initiate service at the Overton Street residence in Mr. McKinzy's name because Mr. McKinzy's wife, Ms. Nance, owes a past-due debt to MGE, and Ms . Nance was living at the premises. In June 2003, MGE shut off the gas service to the Overton Street residence at the request of the company's customer, Gerald Lee. Mr. McKinzy was without natural gas service to his Overton Street residence until September 2003, at which time MGE began supplying natural gas service to Mr. McKinzy. MGE charged Mr. McKinzy a "connection fee" of $20.00 when it initiated gas service, but the company later reduced the charge to $5.00.

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[31] Transcript page 191, lines 2-5.

[32] Transcript page 191, line 24 through page 192, line 2.

The issues remaining for discussion are: (1) whether MGE violated Section 3.02 of its tariff by refusing to "transfer" or "commence" service to Mr. McKinzy in April 2003; and (2) whether MGE may transfer to Mr. McKinzy's account the past-due debt owed by his wife, Tamara Nance, for service MGE provided to her at a prior address, when Mr. McKinzy did not receive the use and benefit of that service.

I. MGE did not violate Section 3.02 of its tariff by refusing to "transfer" or "commence" service to Mr. McKinzy in April 2003 .

It is a well-established fact that a tariff approved by this Commission has the same force and effect of statute. *Allstates Transworld Vanlines v. Southwestern Bell Tel. Co*., 937 S.W.2d 314, 317 (Mo.App.E.D. 1996). Therefore, we analyze a tariff as we do a statute. If a statute, or in this case, a tariff, is clear and unambiguous, we cannot give it another meaning. *Id.* In determining whether the language of a tariff is clear and unambiguous, the standard is whether the tariffs terms are plain and clear to one of ordinary intelligence. *Id.*

Section 3.02 of MGE'S tariff provides in pertinent part:

> Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made .

There is no question about the meaning of this tariff and, thus, the question is whether, at the time service was requested, the applicant, or a member of applicant's household (who has received benefit from the previous gas service), was indebted to MGE for gas service previously supplied . If so, MGE's tariff authorized the company to refuse to commence supplying gas service .

As discussed above, Ms. Nance was a member of Mr. McKinzy's household when Mr. McKinzy requested gas service on April 9, 2004[33] And, the parties do not dispute that at the time service was requested, Ms . Nance owed MGE a past-due debt of $449 .96.[34] Furthermore, this $449 .96 debt was for service that Ms. Nance did benefit from while she lived at a previous residence . [35] Consequently, MGE was authorized by its tariff, Section 3.02, to refuse to commence or transfer service to Mr. McKinzy until payment had been made on the past-due debt.

II. MGE may transfer to Mr. McKinzy's account the past-due debt owed by his wife, Tamara Nance, for service MGE. provided to her at a prior address, even though Mr. McKinzy did not receive the use and benefit of that service.

MGE contends that the answer to this question is "yes ." McKinzy and the Commission's Staff argue that the answer is "no." This Commissioner finds that MGE's tariff, specifically Section 3.02, does allow the company to transfer the past-

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[33] Exhibit 12 (Lambert's Rebuttal Testimony), page 3, lines 19-23 and Sch. KL-4 .

[34] Exhibit 12 (Lambert's Rebuttal Testimony), page 3, lines 19-23 and Sch. KL-4.

[35] See McKinzy's Complaint, filed June 30, 2003.

due debt of Ms. Nance to Mr. McKinzy's account at 8004 Overton, now that Ms. Nance is living at the Overton Street residence.

Section 3.02 of MGE's tariff provides that the "[c]ompany reserves the right to transfer any unpaid amount from prior service(s) to a current service account."[36] It is undisputed that Ms . Nance is currently a member of Mr. McKinzy's household at 8004 Overton Street.[37] As Ms. Nance is now a member of Mr. McKinzy's household, her past-due debt may be transferred, pursuant to Section 3.02, to the current service account of Mr. McKinzy.

Nonetheless, MGE acknowledged at the hearing and in its brief that the effect of this conclusion is somewhat limited.[38] Because service to Mr. McKinzy at the subject residence has already started, MGE concedes, and the Commission agrees, that the company would not be authorized, under Section 3.12, to discontinue service to Mr. McKinzy for the nonpayment of the transferred amount.[39]

Further, this Commissioner determines that the arguments of Staff and Mr. McKinzy regarding the "benefit and use" of service simply do not apply to the situation at hand. Staff's reliance upon the cases of *Bowman v. The Gas Service Company*[40] and *Winkleman v. Associated Natural Gas Company*[41] is misplaced. Neither case is relevant to the situation here, where a tariff provision specifically authorizes a company to "transfer any unpaid amount from prior service(s) to a current service account."[42]

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[36] Section 3.02 of MGE's tariff states in part:

> PRIOR INDEBTEDNESS OF CUSTOMER: Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made. . . .
>
> In order to expedite service to a customer moving from one location to another, Company may provide service at the new location before all bills and charges are paid for service at the prior location. **Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account**. Such transferred bills are then subject to the provisions of Sections 7.07 and 7.08 herein . [Emphasis added.]

[37] Exh. 2 (McKinzy's Surrebuttal Testimony), page 3, ¶ 8 ; and Transcript, page 101, lines 15-25.

[38] Transcript, page 65, line 1 through page 66, line 2; MGE's brief, page 4; and MGE's Suggestion in Support of Motion for Summary Determination, or in the Alternative, for Dismissal of Complaint, page 4.

[39] MGE's brief, page 4. However, if Mr. McKinzy and Ms. Nance later jointly move into a new residence in MGE's service area, and they then attempt to commence service at that new residence, MGE's actions will be governed by its tariff and the Commission's rules in effect at that time.

[40] 27 P.S.C. (N.S.) 44 (1984).

[41] 27 P.S.C. (N .S.) 40 (1984).

[42] Section 3.02 of MGE's tariff. In fact, Staff seems to be confusing the tariff requirements for a discontinuance of service, Section 3.12, with the tariff requirement for transferring the prior indebtedness of a customer to another account, found in Section 3.02.

Conclusion

As discussed above, Mr. McKinzy's testimony is simply not credible. Mrs. McKinzy was living with Mr. McKinzy at the time he sought gas service from MGE. Accordingly, MGE did not violate Section 3.02 of its tariff by refusing to provide service and Mrs. McKinzy's prior debt to MGE was assignable under Section 3.02(d).

The majority was correct in determining that MGE violated Section 3.03 of its tariff and that MGE did not violate Sections 3.05, 3.07, 3.08, 3.09, and 3.12 of its tariff. In fact, the majority applied the law correctly here in most circumstances . It was the law that forced the majority to make the determination that Mr. McKinzy's testimony was, in fact, credible so that this Commission would not be forced to follow the law and order Mrs . McKinzy's past due debt be transferred to the account of Mr. McKinzy for 8004 Overton. However, it should be noted that the Commission left open the issue of whether Mrs. McKinzy's debt could be transferred to any household she shares with Mr. McKinzy in the future. Tariffs like the one in question are often the product of negotiated agreements where utilities received the benefit of being able to transfer debts when they gave up some other right . Such agreements should be respected and tariffs having the force and effect of law should not be ignored.

The majority's application of an "ends justifies the means" analysis in determining the outcome of this case is not surprising. The present commission has a tendency to apply the law liberally in favor of individual ratepayers and strictly against corporate defendants. Since there does not appear to be a statute or case law requiring the Missouri Public Service Commission to impartially construe the law, this practice is perfectly legal and will continue until the Missouri General Assembly or a court of higher jurisdiction decides to change that policy.

CONCURRING OPINION OF CHAIRMAN STEVE GAW

I concur in the analysis and result in this opinion. However, regardless of the interpretation of this tariff, no tariff should be allowed which purports to transfer the debt for a service of one individual to a second individual who has received no benefit for the service, has not consented to liability for the debt, and had no relationship to the debtor at the time the service was rendered. To so allow would be contrary to our rules of law and equity. Yet company appears to be arguing that Mr. McKinzy should be liable for a debt his wife incurred long before their marriage or relationship. Hypothetically, if Mr. McKinzy's relationship with his wife were to terminate there is no indication that MGE would remove the debt from his bill. Such a result is at a minimum against the public interest and should not be allowed.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I dissent from today's Report and Order because I do not find the Complainant's testimony credible.

Furthermore, I find that MGE properly relied on Section 3.02 of its tariff to deny service to Complainant in April 2003. I also find that MGE properly charged a connection fee of $20.00 in September 2003, and unnecessarily reduced that fee to $5.00.

Perhaps most significantly, I find that Section 3.02 of MGE's tariff does allow the company to transfer the past-due debt of Complainant's wife to the account at 8004 Overton Street.

Unlike the majority, I find that the tariff provision would operate in the same manner even if the individual with a prior indebtedness became a member of the household after service commenced. The majority's interpretation of the tariff provision would encourage household members with prior utility indebtedness to take up residency only after commencement of service, thereby effectively nullifying the lawfully-approved tariff provision.

In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area.

Case No. ER-2004-0570
Decided August 11, 2004

Electric §20. Rates §§101, 114. The Commission denied an electric company's motion to lift the suspension of a portion of a general rate increase tariff to allow an Interim Energy Charge to go into effect before completion of a full hearing on the general rate increase request.

ORDER DENYING MOTION TO LIFT SUSPENSION OF IEC TARIFF

Procedural History and Positions of the Parties:

On April 30, 2004, The Empire District Electric Company submitted to the Missouri Public Service Commission certain proposed tariff sheets, Tariff File No. YE-2004-1324. The purpose of the filing, according to Empire, is to implement a general rate increase for retail electric service provided by the Company. Empire states that the new retail electric service rates are designed to produce an additional $38,282,294 in gross annual electric revenues excluding gross receipts, sales, franchise, and occupational taxes, a 14.82% increase over existing revenues. On May 5, the Commission suspended the proposed sheets for 120 days plus six months beyond the proposed effective date of May 30, 2004, until March 27, 2005.

On May 20, Empire filed its Motion and Suggestions urging the Commission to lift the suspension of a particular sheet, specifically, P.S.C. Mo. No. 5, Section 4, 4th Revised Sheet No. 17, Cancelling 3rd Revised Sheet No. 17, the Interim Energy Charge (IEC) Rider. Empire also requested that the Commission convene "an immediate technical conference" and permit this sheet to become effective "as soon as possible and in any event no later than June 15, 2004." In support of its motion, Empire stated that the IEC is a mechanism designed to quickly pass on to ratepayers changes in Empire's natural gas costs. Empire explained that natural gas is the primary fuel for more than half of Empire's generating capacity. Empire further noted that natural gas costs are historically very volatile. According to Empire, rates designed in the traditional manner, based on test year natural gas costs, are unlikely to accurately reflect the true cost of this fuel to Empire during the period that the tariffs now under consideration are effective. Consequently, either Empire or its ratepayers will inevitably pay more than necessary. Empire asserted that the IEC Rider, modeled on the PGA/ACA mechanism already found to be lawful by the Missouri Court of Appeals, would avoid this unfortunate result by passing gas cost variations rapidly through to ratepayers. Empire did not accompany its motion

with a separately stated request for expedited treatment as required by Commission rule.[1]

The Commission issued its Order Directing Filing on May 20, the day upon which Empire filed its motion. Therein, the Commission directed that the other parties and intervention applicants should file responses to Empire's motion by 4:00 p.m. on May 26.

Staff timely responded to Empire's motion on May 26. Staff stated that Empire's motion is, in effect, a request for interim rate relief pending the final resolution of its current rate case. Staff noted that Missouri courts have acknowledged the Commission's authority to grant interim rate relief.[2] The Commission, with the approval of the courts, has consistently viewed interim rate relief as an emergency measure. The Western District has stated, "the Commission's authority to grant an interim rate increase is . . . to enable it to deal with a company in which immediate rate relief is required to maintain the economic life of the company so that it might continue to serve the public."[3] The Commission has indicated that this authority must be exercised cautiously "since such relief requires the Commission to make a determination without the benefit of a thorough Staff audit."[4] Staff stated that a review of the testimony filed by Empire in support of its current rate case shows that its financial condition is sound. Staff noted that "Empire's Motion does not attempt to show that its current circumstances constitute a financial emergency justifying immediate relief." Likewise, "Empire does not indicate that its ability to render safe and adequate service is impaired or jeopardized." Nonetheless, Staff was "agreeable" to promptly convening a technical conference.

Public Counsel filed his response on June 1. Public Counsel opposed the motion, stating that it would amount to a rate increase of $6.0 million without any opportunity for a hearing. On a per-customer basis, the average residential customer would pay an additional $45.85 over the nine-month period from June 15, 2004, through March 30, 2005.[5] These customers would have no opportunity to comment on the increase before it takes effect. Public Counsel asserted that the Commission cannot grant Empire's motion because to do so would violate the bans on single-issue ratemaking and retroactive ratemaking.[6] Public Counsel joined Staff in noting that Empire's motion does not assert that interim rate relief is necessary to meet any emergency. Furthermore, Public Counsel stated that Empire's IEC Rider is similar to the Fuel Adjustment Clause (FAC) struck down in *Utility Consumers Council*.[7] Unlike Staff, Public Counsel opposed a technical conference.

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[1] Rule 4 CSR 240-2.080(17).

[2] *St. ex rel. Fischer v. Public Service Commission*, 670 S.W.2d 24, 26 (Mo. App., W.D. 1984).

[3] *Id*.

[4] *In the Matter of Gas Service Company*, 25 Mo.P.S.C. (N.S.) 633, 637 (1983).

[5] The IEC Rider would evidently impose a surcharge of $0.0040 per kilowatt hour.

[6] Public Counsel relies on *St. ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 47-49 (Mo. Banc 1979).

[7] *Id.*

Intervenor Praxair, Inc., and Intervenor-Applicant Explorer Pipeline Co. also responded in opposition to Empire's motion on June 1. Like Staff and Public Counsel, these Intervenors[8] pointed out that Empire's motion does not meet the established grounds for interim relief. Reviewing the history of interim rate relief, the Intervenors quoted the *Utility Consumers Council* Court for the proposition that, "[a]n interim rate increase may be requested where an emergency need exists."[9] As noted by other parties, too, the Intervenors pointed out that Empire doesn't even claim that there is an emergency here. The Intervenors further argued that any rate order issued in June 2004 would not be supported by competent and substantial evidence of record as required by law because no adequate hearing would have been held.[10] Even when the Commission permits a tariff to take effect without suspension, the Intervenors stated, Missouri law requires that the Commission consider all relevant factors.[11] Like the Public Counsel, these Intervenors opposed a technical conference.

Empire replied on June 7, stating that certain points are not at issue. Empire stated that no one disputes that natural gas is the primary fuel source for over half of Empire's generation. No one disputes that gas prices are volatile. Empire asserted that gas prices continue to rise, despite Empire's hedging strategies. For these reasons, Empire argued that it has shown the Commission "a significant, unusual event" that merits interim relief outside of the parameters of the traditional emergency test. As Empire put it, "will [the Commission] move in the direction of attempting to create innovative solutions to deal with changing circumstances?" Empire renewed its motion and, additionally, requested an opportunity to make an oral presentation to the Commission.

The Commission discussed Empire's motion and the parties' responses at its public Agenda session on June 17. The Commission determined to grant Empire's request to make an oral presentation and an order setting an on-the-record presentation was issued that day. The on-the-record presentation was convened on July 26 and continued on July 27.[12] Two employees of Empire made presentations over the objections of the Public Counsel and Intervenors Praxair and Explorer Pipeline. The presenters were placed under oath and stood cross-examination.

Discussion:

Empire's motion to lift the suspension of one sheet among 25 filed simultaneously to initiate a general rate case is unusual. It is noteworthy that none of the other parties support Empire's motion. All of them raise significant questions, both of fact and of law, that necessarily would require extensive litigation to resolve. The

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[8] Explorer Pipeline's unopposed Application to Intervene was granted at the Prehearing Conference on June 3, 2004.

[9] *Supra*, at 48.

[10] Note that *Utility Consumers Council, id*. at 57 and quoted by the Intervenors, refers to "an abbreviated hearing."

[11] *Id*., at 49.

[12] These were the earliest available dates.

Commission, having considered the pleadings filed by the parties and the on-the-record presentation, has determined that it is inappropriate to undertake the litigation of the IEC at this time. The proposed sheet is part of Empire's general rate case, the hearing of which is set for December. The Commission will take up the question of the IEC, therefore, at that time as part of the resolution of this general rate case. The issues as to the lawfulness of the proposed IEC and Empire's need for such a mechanism will be determined along with all the other issues presented in this matter.

IT IS THEREFORE ORDERED:

1. That the Motion to Lift Suspension of IEC Tariff and Suggestions in Support Thereof, filed by The Empire District Electric Company on May 20, 2004, is denied.

2. That this order will become effective on August 11, 2004.

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by
delegation of authority under
Section 386.240, RSMo 2000.

In the Matter of the Investigation into the Earnings of Citizens Telephone Company of Higginsville, Missouri.

Case No. IR-2005-0024
Decided August 12, 2004

Rates §110. The Commission found that it should approve an agreement that would reduce the company's gross intrastate revenues by about $183,291 annually. The company would achieve that revenue decrease by reducing fees for 911-related services, local rates, intrastate interLATA terminating carrier common line rates, and intrastate interLATA and intraLATA local transport rates. The agreement also provides for a four-year rate moratorium.

ORDER APPROVING STIPULATION AND AGREEMENT

Procedural History:

On July 16, 2004, the Staff of the Missouri Public Service Commission filed its Motion to Open Case, stating that it had conducted an investigation and audit of the earnings of Citizens Telephone Company of Higginsville, Missouri. Attached to its motion was a Stipulation and Agreement which, Staff stated, resolved all of the issues resulting from its investigation and audit. On July 28, 2004, Staff filed Suggestions in Support of the Stipulation and Agreement. A copy of the Stipulation and Agreement is attached as Attachment 1 to this Order.

Discussion:

Staff states that its audit covered the twelve months ending December 31, 2002, updated for known and measurable changes in 2003. Based on the audit and extensive negotiations, Staff, the Company, and the Office of the Public Counsel, entered into a Stipulation and Agreement that resolves all issues raised by the audit. In particular, the Stipulation and Agreement provides for the reduction of Company's gross intrastate revenues by about $183,291 annually, to be achieved by reducing (1) charges for 911-related services, (2) local rates, (3) intrastate interLATA terminating carrier common line rate, and (4) intrastate interLATA and intraLATA local transport rates. The latter reduction alone will account for roughly 60 percent of the total. The Stipulation and Agreement also provides for a rate moratorium for four years and for a schedule of depreciation rates.

In Staff's Suggestions, Staff counsel William K. Haas advises the Commission to approve the Stipulation and Agreement. The reduction of Citizens' earnings by $183,291 is reasonable, Staff states, and should be approved. Staff has spread this reduction over Citizens' 911-rates, its local rates and its access rates. The reduction to the 911-rates, while small (two percent), will bring those in line with levels advocated by Staff for other small local exchange companies and will result in savings for local governments using those services. About a third of the reduction will be allocated to local rates. Citizens' residential and business customers will enjoy reductions in basic rates as well as rates for certain optional features. Finally, about 64 percent of the reduction is allocated to access charges. Staff states that Citizens has relatively high intrastate access rates, its composite of $0.2179 per minute being the eighth highest of Missouri's 43 incumbent local exchange companies. If the Stipulation and Agreement is approved, Citizens composite will reduce to $0.1971 per minute, twelfth highest among Missouri's 43 incumbents. Finally, the Stipulation and Agreement includes new depreciation rates for Citizens that exclude net salvage.

Staff states that the Stipulation and Agreement is fair to both Citizens and its subscribers. Staff has agreed to an unusually long rate moratorium of four years, based on the thorough audit and investigation of Citizens' financial condition and to limit rate case expenses that would be passed on to Citizens' customers. Staff urges the Commission to approve the Stipulation and Agreement.

The Commission has considered Staff's motion, the Stipulation and Agreement, and Staff's Suggestions. The Commission finds that the Stipulation and Agreement will result in rates that are just and reasonable. In addition, the Commission finds that the other aspects of the Stipulation and Agreement are in the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement of the parties, filed on July 16, 2004, and attached hereto as Attachment 1, is approved. The parties are directed to comply with the Stipulation and Agreement.

2. That Citizens Telephone Company of Higginsville shall file tariffs in compliance with the Stipulation and Agreement in this case not later than August 22, 2004.

3. That this order shall become effective on August 22, 2004.

Clayton, Davis, and Appling, CC., concur.
Gaw, Ch., dissents.
Murray, C., dissents, with separate dissenting opinion to follow.

Thompson, Deputy Chief Regulatory Law Judge

Editor's 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.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I would not approve the Stipulation and Agreement because I do not think it is in the public interest to allocate any portion of the rate reduction from the over-earnings investigation to local rates.

The local rates of Citizens are currently low and the local calling scopes to all three of its wire centers have recently been expanded. There is no need to lower local basic rates, and certainly no justification for reducing to "0" many of the popular calling features. These reductions will simply reduce the likelihood of competition in Citizens' territory.

By allocating 34% of the rate reduction to local rates, the Commission unwisely preserves the proportional revenue stream of Citizens, i.e., local vs. access. This misses the opportunity to place a higher proportion of Citizens' revenue requirement on local rates and reduce the proportion that it gets from access rates. The need for such rebalancing is widely recognized in today's telecommunications environment.

The Commission could have used this opportunity to achieve at least a small level of rate rebalancing without creating a revenue-neutrality issue.

Failure to reduce dependency on access rates contributes to the delay of real competitive choice for Citizens' customers.

For these reasons, I respectfully dissent.

In the Matter of the Petition of KLM Telephone Company for Suspension and Modification of the Federal Communications Commission Requirement to Implement Number Portability.*

Case NO. TO-2004-0401
Decided August 12, 2004

Telecommunications §8. The Commission required that KLM Telephone Company establish an intercept message informing customer that a call can not be completed and how it can be completed, for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established.

Telecommunications §23. The Commission suspended until May 26, 2006, KLM Telephone Company's obligation to implement local number portability.

Telecomunications §26. The Commission modified the Federal Communications Commission local number portability requirement to require KLM Telephone Company, after it has become fully Local-Number-Portability capable, to notify wireless carriers that it is not responsible for establishing facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of KLM's local service area.

APPEARANCES

W.R. England and *Brian McCartney*, Counsel, Brydon, Swearengen & England P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Petitioner KLM Telephone Company.

William D. Steinmeier, and *Mary Ann (Garr) Young*, Counsel, William D. Steinmeier, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110, for Intervenor WWC License L.L.C., a/k/a Western Wireless d/b/a Cellular One.

David A. Meyer, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kennard L. Jones, Judge.

REPORT AND ORDER

SUMMARY

After reviewing KLM Telephone Company's petition for suspension and modification, the Missouri Public Service Commission concludes that implementation of local-number portability is technically feasible, would pose a significant adverse economic impact, but is not an undue economic burden. Finding also that suspension of KLM's obligation to implement local-number portability is consistent with the public interest, convenience and necessity, the Commission will grant KLM's request for suspension. Additionally, the Commission concludes that it is necessary to modify KLM's obligation to transport calls to ported numbers to avoid

* See also Case Nos. TO-2004-0504 and TO-2004-0505.

an undue economic burden and that modification of KLM's obligation is in the public interest. Finally the Commission directs that where a wireless carrier has not made provisions to transport calls to ported numbers, an intercept message should be in place to instruct the caller of the attending circumstances.

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. 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

KLM Telephone Company filed a petition with the Missouri Public Service Commission on February 17, 2004, requesting that the Commission suspend for two years KLM's obligation to implement intermodal number portability. KLM also seeks modification of its duty under federal law to provide facilities to transport calls to ported numbers. KLM is a rural incumbent local exchange carrier, providing service to 1625 customers in Bates and Vernon counties in western Missouri.

The Staff of the Commission filed its memorandum on March 3, 2004, recommending that the Commission grant suspension but deny modification. Staff later recommended that the Commission grant modification and authorize KLM to intercept calls from its customers to ported numbers with a message informing the caller that because the person being called has changed telephone companies, the call will be treated as a long distance call.

On April 29, 2004, the Commission granted a petition to intervene filed by WWC License L.L.C., a/k/a Western Wireless d/b/a Cellular One. Western Wireless opposes KLM's requests for suspension and modification. KLM's service territory is wholly within Western Wireless' service territory. In light of intermodal number portability, the two companies are in direct competition for KLM's customers.

On May 11, 2004, a prehearing conference was held with a number of other LNP cases, whereupon industry representatives fielded questions from the Commission. And, on June 4, 2004, the Commission further suspended, until August 15, 2004, the enforcement of KLM's intermodal porting obligations. The Commission then held an evidentiary hearing on July 21, 2004. KLM, Western Wireless and Staff were present. Although the Office of the Public Counsel entered its appearance, it subsequently filed a Notice of Nonparticipation and was not present at the hearing. The parties filed post hearing briefs on July 23, 2004.

Is it technically feasible for KLM to implement local number portability?

KLM's switch is not local-number-portability capable.[1] However, it would take only 90 days for KLM to implement local-number portability.[2] Although KLM cannot

[1] Direct testimony of KLM's Bruce Copsey p.4 line 21 and surrebuttal testimony of KLM's William Warinner p. 12, lines 1-6.

[2] Direct testimony of Bruce Copsey p. 6 lines 8-9 and Transcript p. 242, lines 11-13 and 17-20.

now provide local-number portability due to technical limitations of its current switch, that limitation can be overcome by the purchase and installation of additional software.[3] Therefore, the Commission finds that it is technically feasible for KLM to implement local-number portability.

If KLM implements local number portability will there be a significant adverse impact on users of telecommunications services generally?

KLM serves 1,625 customers.[4] The cost of upgrading its switch to be local-number-portability capable will be approximately $12,833.[5] And with recurring costs, each customer would have to pay an additional $1.23 per month for five years.[6]

KLM does not, however, base its request for suspension solely on the fact that its customers will be charged an additional $1.23 per month for five years. KLM also asserted that "immediate implementation of local number portability will have an adverse impact on customers because KLM will have to duplicate costs when it becomes necessary to replace its switch due to technical support expiration."[7] Technical support for the switch will expire on December 31, 2007. KLM will have to replace its switch prior to that time.[8] Upon this premise, KLM rests its request for suspension.[9]

Staff also asserted that suspension for two years is necessary to allow KLM more time to use existing switch before replacing it.[10] If, however, switch replacement were not an issue, then Staff's recommendation would have been to deny the suspension, based on its analysis of cost and its recommendation in other cases.[11]

KLM purchased its current switch for $751,954.21 in 1999.[12] Switch replacement will cost from $600,000 to $700,000.[13] With the initial cost to upgrade KLM's system being $12,883, an immediate local-number-portability upgrade would represent 2% of a total switch replacement.[14] The Commission notes that implementation of local-number portability, alone does not cause a significant adverse impact. However, the Commission finds that the economic impact on KLM's customers would be significantly adverse, if they are required to bear both

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[3] Post-hearing brief filed by Staff.

[4] See verified petition filed by KLM Telephone Company, Transcript, p. 389 line 13.

[5] Proprietary information filed by KLM on February 24, 2004 and rebuttal testimony of Ron Williams (Wireless) p. 14, lines 8-9.

[6] Transcript p. 219, lines 15-22. Initially filed as proprietary, these figures were openly discussed in the hearing and in post-hearing briefs.

[7] Post-hearing brief filed by KLM.

[8] Direct testimony of Bruce Copsey (KLM) p. 5, line 4 and Transcript p. 242, line 25.

[9] Surrebuttal testimony William Warinner (KLM) p.17, lines 7-11.

[10] Staff's recommendation, filed March 3, 2004.

[11] Transcript, p.406, lines 10-13.

[12] Direct testimony of Bruce Copsey (KLM), p. 5, line 2.

[13] Transcript, p.289, lines 22-23.

[14] Rebuttal testimony of Ron Williams (Wireless), p. 14, lines 8-9.

the costs associated with implementing local-number portability now and the cost of a total switch replacement later.

Will implementation of local number portability cause an undue economic burden?

That KLM must replace it switch prior to December 31, 2007, due to the expiration of technical support, also drives its assertion that implementation of local-number portability would be unduly burdensome.[15] The argument being that KLM must replace its switch in two years and that it would be unduly economically burdensome to require KLM to implement local-number portability by upgrading its switch only to replace it in. The Commission notes that it would be unduly economically burdensome for KLM to bear the cost of implementing local-number portability now and the cost of replacing its switch in two years. However, an analysis of an undue economic burden does not allow for contemplation of a switch replacement in two years. Therefore, the Commission makes no finding on this issue.

Is suspension consistent with the public interest, convenience, and necessity?

KLM argued that customers will see little, if any, benefit from a local-number portability surcharge and that there is little demand for wireline-to-wireless local-number portability in rural areas.[16] Staff opines that it is in the public interest to allow KLM the opportunity to replace its switch as opposed to creating a situation where KLM subscribers incur local-number portability implementation costs and then, within the next two years, incur duplicative costs for switch replacement. [17] On the other hand, Western Wireless argued that the public interest would not be served by suspending KLM's local-number-portability obligations because the provision of local-number portability is a critical component of a competitive local telephone market.[18] The Commission finds that it is consistent with the public interest, convenience, and necessity to suspend KLM's obligation to implement local number portability.

Is it technically feasible for KLM to transport calls outside of its service area?

KLM does not have the facilities or necessary agreements in place to transport calls to ported numbers outside of its service area. Nor is KLM legally authorized to transport calls outside of its exchange boundaries.[19] Transporting calls to numbers that have been ported to a wireless carrier with no point of presence in the KLM local service area could result in KLM inappropriately operating like an interexchange carrier instead of a local exchange carrier.[20] But if KLM did not route ported numbers through agreement or facilities, a call to a number that was local

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[15] Surrebuttal testimony of William Warinner (KLM), p19, lines 8-9.

[16] Post-hearing brief filed by KLM.

[17] Surrebuttal testimony of Natelle Dietrich, p. 3, lines 16-19.

[18] Rebuttal testimony of Ron Williams (Wireless), p.21, lines 5-9.

[19] Surrebuttal testimony of William Warinner (KLM), p.12, lines 1-6.

[20] Rebuttal testimony of Natelle Dietrich, p.6, lines 4-7.

before being ported would either not be completed or would be required to be dialed as a toll call.[21] Although the Commission recognizes the concerns of the parties on this issue, none of these positions show that it is not possible for KLM to transport calls outside of its exchange area to ported numbers. Just as it is technically feasible for KLM to make its equipment local-number-portability capable, the Commission finds that it is technically feasible for KLM to make arrangements or build facilities to transport calls to ported numbers.

If KLM must transport calls outside of its service area, will there be a significant adverse economic impact on users of telecommunications services generally?

KLM does not know what the costs will be to transport calls outside of its exchange boundaries.[22] Western Wireless pays 3/10 of a cent to transport calls through SBC to KLM.[23] Western offered to reimburse KLM, at this same rate, for costs associated with routing calls to numbers that have been ported to Western.[24] However, it is not certain that 3/10 of a cent will be adequate to cover KLM's costs.[25] Although it is certain that there will be some economic impact on KLM's customers if KLM must transport calls outside of its service area, the evidence does not show that show that such impact will be significant. The Commission therefore finds that there will be no significant impact on KLM's customers if KLM is required to transport calls outside of its service area.

If KLM must transport calls outside of its service area, will there be an undue economic burden?

KLM argued that there would be an undue economic burden to it and its customers if KLM must route calls outside of its local exchange area.[26] Neither KLM nor its customers should be responsible for the costs of transporting calls outside of KLM's exchange area.[27] Western stated that because it bears the cost of transporting calls to KLM, KLM should bear the costs of transporting calls to Western.[28] KLM does not have facilities, arrangements or regulatory authority to transport calls outside of its service area.[29] The FCC has yet to determine which carrier should bear the burden of transporting calls to ported numbers. In light of this uncertainty and the costs of securing facilities, arrangements and regulatory approval to transport calls to ported numbers, the Commission finds that there would be an undue economic burden if KLM must transport calls outside of its service area.

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[21] Rebuttal testimony of Ron Williams (Wireless), p. 24, line 25.

[22] Transcript, p. 289, lines 9-14.

[23] Transcript, p. 375, line 19.

[24] Rebuttal testimony of Ron William (Wireless), p.24, lines 8-12.

[25] Transcript p. 308, lines 10-12.

[26] Transcript p. 308, lines 10-12.

[27] Rebuttal testimony of Natelle Dietrich, p.5, lines 20-23.

[28] Rebuttal testimony of Ron Williams (Wireless), p. 17, lines 2-3.

[29] Surrebuttal testimony of Ron Williams (Wireless), p. 17, line 2-3.

Is modification of KLM's obligation to transport calls outside of its service area consistent with the public interest, convenience, and necessity?

KLM seeks modification so that if intermodal porting is requested prior to the FCC resolving the rating and routing issues, then KLM will notify the wireless carrier that KLM is not responsible for establishing facilities or arrangements with third-party party carriers to transport calls outside of its local service area.[30] KLM argued that it is not in the public interest to incur costs today for an unknown demand, especially when all of the costs are still unknown since the FCC has not addressed the issue of carrier responsibility for the transporting calls to ported numbers.[31] Staff supports modification until such time as the FCC addresses the outstanding rating and routing issues.[32] In its recommendation, Staff suggested that KLM implement an intercept message alerting callers of the circumstances surrounding calls to ported numbers. The Commission finds that modification of KLM's obligation to transport calls outside off its service area is consistent with the public interest, convenience, and necessity.

CONCLUSIONS OF LAW

KLM is a local exchange telecommunication company providing telecommunications services between points within the State of Missouri.[33] KLM is therefore subject to the Commission's jurisdiction.[34]

Section 251(b) of the Telecommunications Act of 1996 (the Act) states that incumbent local exchange providers have a duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC.[35] "Number Portability" is defined by the Act as "the ability of users of telecommunications service to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[36]

On November 10, 2003, the Federal Communications Commission (FCC) issued a *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (the LNP Order) addressing local number portability (LNP) between wireline and wireless telecommunications carriers.[37] Among other things, the Local-Number Portability Order concludes that, by November 24, 2003, local exchange carriers must port numbers to wireless carriers where the requesting wireless carrier's "coverage area" overlaps the geographic location of the rate center in which the customer's wireline number is provisioned. This requirement

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[30] Post-hearing brief of KLM.

[31] Surrebuttal testimony of William Warinner (KLM), p.28, lines 15-18.

[32] Surrebuttal testimony of Natelle Dietrich, p. 5, lines 21-23.

[33] Transcript, p. 221, lines 9-10.

[34] Section 286.250(2), RSMo 2000.

[35] 47 U.S.C §251(b).

[36] 47 U.S.C. §153(30).

[37] Id.

applies even though the wireless carrier's point of presence is in another rate center and has no physical interconnection with the wireline carrier. Although the Local-Number Portability Order recognized the problem of designating different routing and rating points on local-number portability for small rural local exchange carriers, the FCC did not resolve these issues in its decision.

Section 251(f)(2) of the Act does, however, provide that a state commission shall suspend or modify number portability requirements for rural carriers, if suspension or modification:

> (A) is necessary –
>
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
>
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
>
> (iii) to avoid a requirement that is technically infeasible; and
>
> (B) is consistent with the public interest, convenience, and necessity.[38]

***Suspension*:** The Commission reasons that the word "requirement," referred to in "(i)" and "(ii)" above, refers to that of local-number portability implementation. The Commission therefore concludes that it is the implementation of local-number portability that must cause the undue burden or the technical infeasibility. However, the word "requirement" is not included in the factor concerning a significant economic adverse impact. The Commission notes that the word "generally" is found in that subsection. Because the word "requirement" is found in "(ii)" and "(iii)", above, but not in "(i)", different treatment must be afforded.

The Commission questions whether the word "generally" in "(i)", above, modifies "telecommunications users" or whether it refers to the "significant economic adverse impact." If "generally" modifies telecommunications users, this shows an intent to consider users other than KLM's customers and could be construed to include *all* telecommunications users. This is an unreasonable conclusion. The word "generally" must therefore modify significant adverse economic impact. Having concluded that the word "requirement" refers to that of implementation of local number portability, the Commission concludes that the consideration of a significant adverse impact includes more than the costs of local number portability implementation but also the general impact on telecommunications users. This general impact includes the imminent costs of switch replacement.

Evidence was presented that showed the cost of a new switch could be from $600,000 to $700,000. It does not make economic sense for KLM and its customers to upgrade its switch now only to replace the switch in two years. Further,

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[38] 47 U.S.C. §251(f)(2).

it would be convenient to wait for two years and then replace the switch, which will be local-number-portability capable. There is also little, if any, demand for porting in KLM's service area. There is no necessity to require KLM to implement local number portability. If KLM were required to upgrade its switch now, its customers would incur unnecessary duplicative costs. The direct effect on KLM's customers outweighs any other interests, including that of Western Wireless, who may see little benefit from requiring KLM to implement local-number portability now, rather than in two years when it replaces it switch. The Commission therefore concludes that there would be a significant adverse economic impact on telecommunications users were KLM required to upgrade its switch now, then in two years have to replace the same switch, incurring duplicative costs.

***Modification*:** The Commission concludes that modification of KLM's obligation to transport calls to ported numbers is necessary to avoid an undue economic burden. In light of the FCC not yet resolving the issue of which carrier will bear the costs of transporting calls, it is not certain that KLM will have to bear these costs. If KLM were required to bear the costs of implementing local-number portability and the costs of transporting calls to Western , KLM would shoulder all of the costs of intermodal porting while losing customers and getting no benefit. Furthermore, KLM would incur the additional costs of modifying its regulatory certificates and tariffs. And, if necessary, the costs of making arrangements with third-party carriers to transport calls outside of KLM's service area. All of these circumstance combine to create what would be an undue economic burden.

DECISION

***Suspension*:** KLM can implement local-number portability within 90 days with the purchase and installation of additional software. Therefore, the Commission finds that it is technically feasible for KLM to implement LNP. However, there would be a significant adverse impact upon KLM's customers if they are forced to pay for a switch upgrade now and in two years, through costs included in a switch replacement, pay for that same switch upgrade. The Commission finds that it has been shown that implementation of LNP would cause a significant adverse economic impact and that suspension is consistent with the public interest, convenience and necessity.

***Modification*:** The Commission determines that modification is necessary to avoid an undue economic burden for several reasons. First, it is uncertain whether Western Wireless or KLM will ultimately be required to bear the costs of transporting calls to ported numbers. Also, in order to transport calls outside of its service area, KLM will have to bear the costs of new facilities, third-party arrangements and regulatory processes. Lastly, KLM stands to gain no benefit from these costs. These factors combine to create an undue economic burden.

Modification of KLM's obligation to transport calls to ported numbers is consistent with the public interest, convenience and necessity. Modification is certainly consistent with the interest, convenience and necessity of KLM's customers. KLM's customers would otherwise have to bear the cost of transporting calls, while receiving no benefit. It is also uncertain that KLM's customers will have to bear these costs because the FCC is currently considering whether the wireless or wireline carrier should bear the cost of transporting calls.

If Western Wireless does not facilitate the transportation of calls to ported numbers, then calls to ported numbers from KLM's service area will be treated like long distance calls. Therefore, in order to prevent KLM's customers who call ported numbers from incurring unexpected long distance charges, the Commission will direct KLM to inform customers of that possibility through an intercept message. This message is also consistent with the public interest. It may not be convenient to reach a message rather than the person being called, but the surprise of long distance charges outweighs the inconvenience of an intercept message.

IT IS THEREFORE ORDERED:

1. That KLM Telephone Company's request to suspend until May 26, 2006, the requirement established by the Federal Communications Commission's November 24, 2003, *Memorandum Opinion and Order and Further Notice of Proposed* Rulemaking to implement local number portability is granted.

2. That the Federal Communications Commissions local number portability requirements for KLM Telephone Company is modified to provide that if wireline-to-wireless local number portability is requested after KLM has become fully LNP-capable, then KLM shall notify the wireless carrier that it is not the responsibility of KLM to establish facilities or arrangements with third-party carriers to transport call son a local basis to a point outside of KLM's local service area.

3. That KLM Telephone Company shall establish an intercept message for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed and to the extent possible, provide information about how to complete the call and whether long distance charges will apply.

4. That KLM Telephone Company shall notify the Commission ten days from the date the Federal Communications Commission issues any further decision addressing the rating and routing issues associated with porting numbers.

5. That the modifications made in this order will remain in effect only until 30 days after the Federal Communications Commission further addresses the rating and routing issues associated with porting numbers, unless otherwise ordered.

6. That this order shall become effective on August 22, 2004.

7. That this case may be closed on August 23, 2004.

Gaw, Ch., Clayton, Davis, and
Appling, CC., concur;
Murray, C., dissents;
and certify compliance with the
provisions of Section 536.080,
RSMo 2000.

Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc., Respondent.*

Case No. MC-2004-0271
Decided August 17, 2004

Manufactured Housing §1. The Commission's Staff brought a complaint against Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc., alleging that the contractor improperly set up a home in violation of Missouri law. In order to ensure the safety of the homeowners and their property, the Commission directed its Staff to send notice to each of the 126 homeowners potentially affected by the allegations in this case.

ORDER DIRECTING NOTICE TO HOMEOWNERS

Syllabus: This order directs the Staff of the Missouri Public Service Commission to send a notice to each of the homeowners that may be affected by the allegations in this complaint case.

Staff has filed a complaint alleging the improper setup of a manufactured home that was later destroyed when it fell from its piers. Coachman Homes of Eureka, Inc., filed a list of the homeowners whose homes were set up by the same contractor that set up the home that is the subject of the Complaint. In an abundance of caution, the Commission will notify each of these homeowners of the allegations. Therefore, the Commission will direct its Staff to send a notice to each of the 126 homeowners in the list filed on July 28, 2004. The notice should be sent by certified mail and by regular first class mail and should be substantially in the same format as set out below.

NOTICE OF POSSIBLE MANUFACTURED HOME SETUP PROBLEMS

> The Missouri Public Service Commission is sending you this notice because you have been identified as having had a manufactured home set up by a particular contractor for Coachman Homes of Eureka, Inc. Currently, the Commission has before it a Complaint against Coachman Homes alleging that this particular contractor improperly set up a home in violation of Missouri laws. The Complaint further alleges that as a result of the improper setup, the home was destroyed when it moved off its piers. These are currently only allegations and the Commission at this time has found no wrongdoing. However, in order to ensure the safety of the homeowners and security of their property, the Commission is notifying Coachman customers who may be affected.

* See pages 462, 555 and 579 for other orders in this case.

If you have concerns about the setup of your manufactured home purchased from Coachman Homes of Eureka, Inc., or if you have had problems with or damage caused by the setup, please contact the Missouri Public Service Commission. You may contact the Commission at:

Telephone: 1 800-819-3180

Write: Manufactured Housing and Modular Units Program
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

E-mail: leslie.wiebe@psc.mo.gov
or: ron.pleus@psc.mo.gov

The Director shall compile the names and addresses of those persons contacting the Commission pursuant to this notice and shall file reports in this case as directed below.

IT IS THEREFORE ORDERED:

1. That no later than August 24, 2004, the Staff of the Missouri Public Service Commission shall mail notice to potential affected homeowners as set out above.

2. That the Director of Manufactured Housing and Modular Units Program shall file a report in this case no later than the 15th and the 30th of each month informing the Commission of the number of contacts with the notified homeowners.

3. That this order shall become effective on August 27, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Dippell, Senior Regulatory Law Judge

Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc., Respondent.*

Case No. MC-2004-0271
Decided August 19, 2004

Manufactured Housing §1. The Commission issued an order directing Coachman Homes of Eureka, Inc. to file a status report regarding the progress of its settlement negotiations.

NOTICE OF STATUS CONFERENCE, NOTICE OF CORRECTION, AND ORDER DIRECTING FILING

On August 18, 2004, at approximately 3:30 p.m., the Judge assigned to this matter conducted a status conference with the parties. Counsel for Staff, Keith Krueger and Mary Weston, were present in Judge Dippell's office; Counsel for Coachman Homes, Timothy Huff and Aisling Murphy, were present via telephone; and Doug Micheel, representing the Office of the Public Counsel, declined to participate. This notice is to memorialize the events of that conference, to correct a date in the Order Directing Notice to Homeowners issued on August 17, 2004, and to direct a further status report to be filed.

The parties indicated to the Judge that settlement of the issues was in progress and that the remedies provided in the settlement will, in the parties' opinions, resolve the issues of concern to the Commission. The parties also indicated that the only reason a settlement has not been previously filed is that Counsel for Coachman Homes is still in negotiations with Ms. Hatfield regarding her damages. Coachman has at this time made an offer to Ms. Hatfield and is waiting for a response, which is expected within two days. Counsel for Coachman Homes explained the terms of the offer to the Judge.

The Judge also asked the parties if they understood the Commission's Order Directing Notice to Homeowners issued on August 17, 2004, and if there were any questions pertaining to that order. The parties indicated a concern that the timing of the notice may affect the Commission's consideration of their settlement and requested that the order be extended to allow the notice to be issued as late as September 3, 2004. The parties also indicated to the Judge that they expect to be able to file a settlement for presentation to the Commission no later than August 31, 2004.

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* See pages 462, 553 and 579 for other orders in this case. On August 27, 2004, the Commission issued an order granting a motion to amend notice. The changes basically will inform the homeowners that they may request an inspection of their set-up by completing a form and returning it to the Commission by September 27, 2004. In addition, an Anchoring Inspection Form will be included with the notice and, initially, the notice will be sent only by regular first class mail.

The parties also noted an error in the order in that it requires the notice to be issued by August 24, 2004, with the effective date of the order not being until August 27, 2004. The Commission will correct the error in the order. Ordered Paragraph 1 should have stated that the Staff of the Missouri Public Service Commission should issue the notice no later than August 27, 2004. That error is hereby corrected with this notice.

The Commission will not, however, at this time further extend the time for the notice as it finds no reason for further delay in issuing a notice. According to Counsel for Coachman it should have an answer regarding acceptance or rejection of its offer from Ms. Hatfield within the next few days, and this will allow the terms of a second settlement agreement with the Commission Staff to be presented to the Commission by the end of August. The Commission will therefore direct Coachman to file a status report indicating whether its negotiations with Ms. Hatfield have been successful and whether a second settlement agreement with Staff is expected to be forthcoming.

IT IS THEREFORE ORDERED:

1. That Ordered Paragraph 1 of the Order Directing Notice to Homeowners issued on August 17, 2004, is corrected to state that the notice shall be issued no later than August 27, 2004.

2. That Coachman Homes of Eureka, Inc., shall file a status report no later than August 27, 2004, as described above.

3. That this order shall become effective on August 19, 2004.

Nancy Dippell, Senior Regulatory Law
Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

In the Matter of the Joint Application of Northwest Missouri Holdings, Inc., and Oregon Farmers Mutual Telephone Company for an Order authorizing Northwest Missouri Holdings, Inc., to purchase or acquire, Take or Hold, All of the Issued and Outstanding Capital Stock of Oregon Farmers Mutual Telephone Company.

Case No. IM-2004-0461
Decided August 26, 2004

Telecommunications §4. The Commission approved the sale of all outstanding shares of a small incumbent local exchange carrier to an out-of-state holding company, based on the recommendation of its Staff that the transaction was not detrimental to the public interest.

ORDER APPROVING SALE OF STOCK

Procedural History:

On March 9, 2004, Northwest Missouri Holdings, Inc., and Oregon Farmers Mutual Telephone Company filed their Joint Application seeking authority for Northwest Missouri to acquire all of the outstanding shares of Oregon Farmers. Simultaneously, the Joint Applicants moved for a protective order. On March 10, the Commission issued its Order Directing Notice, adopting its standard protective order and directing the Joint Applicants to file proof of notice to all affected customers. The Company did so on April 6.

On April 12, the Joint Applicants filed their Supplemental Application. Staff filed its Memorandum and Recommendation on June 22 and its Revised Memorandum and Recommendation on July 13.

On August 13, following a discussion of this matter by the Commission during its Agenda, the Commission directed its Staff to gather and file certain additional information by August 23. Staff timely filed its Response to Order Directing Filing on that date.

The Parties:

According to the Joint Application, Oregon Farmers is a Missouri chartered corporation in good standing that owns and operates a single telephone exchange providing basic local telecommunications services to some 1,271 subscribers in Holt County, Missouri. Oregon is thus an incumbent local exchange carrier (ILEC) and it and its services are noncompetitive. Its principal place of business is located at 118 East Nodaway, Oregon, Missouri. Oregon has no outstanding annual reports or Commission assessments.

The Joint Application states that Northwest is a Delaware corporation in good standing. Its principal place of business is located at 756 Tyvola Road, Charlotte, North Carolina. Northwest is authorized to do business in the state of Missouri and was formed for the specific purpose of acquiring Oregon Farmers and its cellular

and cable television subsidiaries which are not regulated by this Commission. Northwest owns no other companies. Neither Oregon nor Northwest has any pending actions or unsatisfied judgments, involving customer service or rates, in any state or federal court or agency, nor has had any such within the past three years.

American Broadband Communications, Inc. (ABC), a North Carolina company, owns Northwest. ABC is in the business of acquiring small, generally family-owned, local exchange carriers. ABC retains local management and employees and will do so in this case. Upon the closing of the transaction, Signal Equity Partners will acquire 51 percent of Northwest. Signal Equity Partners is a private equity investment partnership focused on the communications and information technology sectors. Signal Equity Partners is a licensed Small Business Investment Company. The licensure process of the Small Business Administration of the United States Department of Commerce is rigorous and includes a background check of the principals by the Federal Bureau of Investigation. Signal Equity Partners' various individual and corporate members are legitimate investors in both the communications and other industries.

ABC owns 40 percent of American Georgetown, Inc., which owns Georgetown Telephone Company, a local exchange carrier in Georgetown, Mississippi. Signal Equity Partners, II, L.P., owns 60 percent of American Georgetown. Patrick Eudy, ABC's President, owns 60 percent of Dialog Communications, a CLEC operating in Kentucky, Mississippi and North Carolina. Dialog provides basic local telecommunications services on both a resale and UNE platform basis to residential and business customers. As of January 1, 2003, Dialog had 9,084 access lines in Kentucky, 343 in North Carolina and 287 in Mississippi. Dialog also provides resale intraLATA toll and long distance and exchange access on a 1+ basis. The regulatory agencies in North Carolina, Kentucky and Mississippi advised Staff that Georgetown Telephone and Dialog are in good standing with no quality of service issues. ABC's President, Patrick Eudy, and its Chairman, William Tucker, have years of experience in various facets of the communications industry.

The Transaction:

With the authorization of their respective Boards of Directors, Northwest and Oregon entered into a Stock Purchase Agreement on February 13, 2004, whereby Northwest will acquire all of the currently issued and outstanding common stock of Oregon.[1] Upon the closing of the transaction, Signal Equity Partners, a private equity investment partnership focused on the communications and information technology sectors, will acquire 51 percent of Northwest. If the transaction is approved, Oregon will continue to operate in the same manner as it does now. Neither its rates nor its business methods will change. Northwest will retain all of the current employees of Oregon and their experience and abilities will be supplemented and supported by the expertise of Northwest's principals. There will be no effect on the tax revenues of any Missouri political subdivision. The approval of the proposed transaction is not detrimental to the public interest, the Joint

[1] As well as, according to Staff's Revised Memorandum and Recommendation, the issued and outstanding common shares of Oregon's unregulated subsidiaries and affiliates.

Application avers, because Oregon will continue to serve its subscribers and the public as it always has and its management will enjoy additional expertise.

The Supplemental Joint Application explains that Northwest will finance its purchase of Oregon's outstanding common shares by borrowing certain sums, not to exceed $7,388,889, from the Rural Telephone Financing Cooperative (RTFC). These funds will be used to (1) refinance Oregon's existing debt so that a first mortgage lien on Oregon's assets will be available to the RTFC, (2) finance the purchase of Oregon and its unregulated affiliates and subsidiaries and (3) purchase a ten-percent RTFC Subordinated Capital Certificate (SCC). SCCs are equity certificates that RTFC borrowers are required to purchase with a long-term loan. The SCC is amortized on an annual basis at a rate that will maintain a ten percent SCC-to-loan principal ratio. The amortized amounts will be paid in cash to Northwest. The financing agreement imposes stringent covenants upon Northwest with respect to certain ratios, dividends and cash distributions, and other indebtedness. The specific details of these covenants are Highly Confidential.

As security for the loan, Northwest will provide to the RTFC a deed of trust, security agreement and financing statement. Oregon's Board of Directors will by resolution approve the deed of trust, security agreement and financing statement upon Oregon's acquisition by Northwest. Thus, the assets of Oregon will serve as the collateral on Northwest's financing of the purchase price. Oregon's current capital structure includes about 20 percent long-term debt and about 80 percent equity. If the proposed transaction is approved, Oregon's capital structure will consist of 100 percent equity because Northwest will carry the RTFC financing obligation.

Staff's Memorandum and Recommendation:

The Commission's Staff has reviewed the Joint Application, Supplemental Joint Application and other items filed by Northwest and Oregon. Staff filed its Memorandum and Recommendation on June 22 and its Revised Memorandum and Recommendation on July 13. Staff advises the Commission to approve the application.[2]

Staff notes that the governing standard is whether or not the transaction is detrimental to the public interest.[3] Staff explains that it considers this standard to refer to the impact, if any, on Oregon's customers. If that impact is in any way adverse, Staff states, the Commission should either not approve the transaction or impose conditions sufficient to mitigate its detrimental effects.

Staff first analyzed the proposed transaction for "debt overhang," a condition that exists when long-term debt exceeds the value of the assets securing that debt. This transaction presents significant debt overhang. However, Staff's analyst John Kiebel concluded that Northwest's projected consolidated cash flow would be

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[2] Staff's counsel is Cliff Snodgrass. The assigned technical staff includes David Winter, John Kiebel and Rosella Schad.

[3] *St. ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. banc 1934); *St. ex rel. Fee Fee Trunk Sewer Co., Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. 1980); Rule 4 CSR 240-3.535(C).

adequate to meet its obligations under the proposed RTFC financing. Additionally, Staff notes that the RTFC itself performed a thorough investigation and analysis of the circumstances prior to approving the proposed financing. Staff concluded that the debt overhand is not an impediment to the proposed transaction.

Staff also considered the effect of the transaction on Northwest's capital structure, which would be left with a lower percentage of equity than Staff generally considers appropriate. However, Kiebel concluded that two factors in the proposed transaction address that issue and render it acceptable: first, Northwest would make equal, level, periodic principal payments over the life of the loan, enabling it to immediately begin improving its equity position. Second, the rigorous covenants imposed on Northwest by the RTFC as a condition of the financing will protect its equity position from further compromise and provide a strong incentive to quickly improve that position. Consequently, Staff also concluded that the effect of the transaction on Northwest's capital structure is not an impediment to the proposed transaction.

Finally, Staff noted that the transaction would not result in an acquisition adjustment.

For these reasons, Staff recommends that the Commission approve the proposed transaction, reserving ratemaking treatment as is customary and retaining the currently authorized depreciation rates for Oregon.

Discussion:

The Commission has reviewed the Joint Application, Supplemental Joint Application, the other filings by the Joint Applicants, and Staff's Memoranda and Recommendations. The Commission concludes that the proposed transaction does not pose a detriment to the public interest; therefore, the Commission will approve the transaction with the conditions recommended by Staff.

IT IS THEREFORE ORDERED:

1. That the Joint Application, filed on March 9, 2004, and the Supplemental Joint Application, filed on April 12, 2004, by Northwest Missouri Holdings, Inc., and Oregon Farmers Mutual Telephone Company are approved.

2. That Northwest Missouri Holdings, Inc., and Oregon Farmers Mutual Telephone Company are authorized to enter into and perform in accordance with a stock purchase agreement referred to above.

3. That Northwest is hereby authorized to acquire and hold all of the issued and outstanding common shares of Oregon Farmers Mutual Telephone Company.

4. That Oregon Farmers Mutual Telephone Company is hereby authorized to execute and deliver a Deed of Trust, Security Agreement and Financing Statement, as well as to perform such other lawful actions as may be necessary to complete the transaction herein approved.

5. That nothing in this Order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

6. That the depreciation rates contained in the attached Schedule A shall remain in force.

7. That the Commission's Staff shall advise the Commission when the transaction approved above has been closed by filing a pleading in this case.

8. That this order shall become effective on September 5, 2004.

Murray, Clayton, Davis, and
Appling, CC., concur.
Gaw, Ch., dissents.

Thompson, Deputy Chief Regulatory Law Judge

Editor's Note: Schedule A, the depreciation rates, has not been published. If needed, this document is available in the official case files of the Public Service Commission.

Roy Smith, Complainant, v. Missouri Gas Energy, Respondent.

Case No. GC-2004-0281
Decided August 31, 2004

Evidence, Practice and Procedure §6. The Commission found the company's evidence more credible than the complainant's. The company's evidence included other utility companies' records and Department of Revenue records regarding the complainant's address. The complainant's evidence was uncorroborated and inconsistent.

Evidence, Practice and Procedure §19. The Commission found the company's records and other utility companies' records regarding the complainant's address credible.

Evidence, Practice and Procedure §24. The Commission may order a hearing even if a litigant waives its right to hearing.

Evidence, Practice and Procedure §24. The Commission may permit telephone appearance at a hearing, even if that appearance may impair that litigant's ability to review documents and to cross-examine evidence. The Commission explained this waiver of cross-examination in an order, and the litigant did not object.

APPEARANCES

Roy Smith, 5823 East 16th Street, Kansas City, Missouri 64126, pro se.

Dean L. Cooper, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri Gas Energy, a division of Southern Union Company.

Herman A. "Woody" Loepp, Attorney at Law, Missouri Gas Energy, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy, a division of Southern Union Company.

Lera L. Shemwell, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus: This order finds that Missouri Gas Energy, a division of Southern Union Company, did not violate the provisions of its tariff when transferring the unpaid portions of the account of Mr. Jeffery Robert Elders to the account of Mr. Roy Smith.

Procedural History

On January 9, 2004, Roy Smith filed a Complaint alleging that MGE improperly billed him for the gas service of a previous tenant at his address. Mr. Smith requests that the Commission find that he is not responsible for the bill of the previous tenant and direct MGE to remove the charges from his bill.

MGE denied Mr. Smith's version of the facts and claimed in its answer that a Jeffery Robert Elders and Mr. Smith resided at the address together. Thus, MGE argued that it properly transferred the unpaid balance from the account in Mr. Elders' name to the account in Mr. Smith's name.

The Commission directed its Staff to investigate the Complaint and file a report. Staff filed a report, authored by James Russo and Gay Fred, supporting Mr. Smith's version of the facts.[1] Staff's Report indicated that in their opinion, MGE was not authorized to bill Mr. Smith for any gas service before June 1, 2003.[2] MGE subsequently filed a pleading denying the conclusions of Staff, but agreeing to allow this matter to be determined based solely on the information in the pleadings.[3] MGE also waived its right to an evidentiary hearing.[4]

Even though MGE waived its right to a hearing, the Commission determined that there was not competent evidence in the record to support a decision. Thus the Commission set the matter for hearing on July 19, 2004.[5] Subsequently, MGE withdrew its waiver of its right to a hearing.[6]

The Commission also issued *sua sponte* Subpoenas for Jeffery Robert Elders and John Murphy to appear and give testimony at the hearing. The Subpoena for Mr. Elders was unable to be served.

On July 14, 2004, Staff filed a motion requesting that the Commission accept its revised report and recommendation.[7] In its revised report, Staff stated that upon review of documents provided by MGE, Staff reversed its position in the case. The revised report, authored by James Russo, indicated that Staff now believes MGE may bill Mr. Smith for gas service used after January 23, 2003.[8] The Staff's Supplemental Report was received into evidence at the hearing as Exhibit 10; thus, Staff's motion was granted at the hearing.

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[1] *Staff Report Concerning Complaint*, filed March 8, 2004.

[2] Exhibit 9.

[3] *Missouri Bar Energy's Response to Staff Report*, filed March 17, 2004.

[4] *Missouri Gas Energy's Response to Commission Order*, filed April 12, 2004.

[5] *Order Setting Hearing*, issued May 6, 2004.

[6] *MGE's Withdrawal of Waiver*, filed July 13, 2004.

[7] *Motion to Accept Staff's Revised Report and Recommendation*, filed July 14, 2004.

[8] Exhibit 10.

On July 13, 2004, Mr. Murphy contacted the Presiding Officer by telephone and indicated that he was unable to appear in person at the hearing in Jefferson City. The Presiding Officer authorized Mr. Murphy's appearance by telephone and excused him from appearing in person.[9]

Mr. Smith also contacted the Presiding Officer and requested to be allowed to appear by telephone due to his financial and physical conditions. The Commission also authorized Mr. Smith's appearance by telephone.[10] Because the request to appear by telephone was made less than one week before the hearing, there was no time to make arrangements for documents to be offered into evidence to be sent to Mr. Smith by mail. The Commission explained that by choosing to appear by telephone, Mr. Smith might not have the ability to review and cross examine documents and evidence presented by other parties at the hearing or to offer exhibits into evidence at the time of the hearing. Thus, the Commission explained that if Mr. Smith chose to appear by telephone rather than in person, he would waive some of his rights to cross-examination.[11]

A hearing was held on July 19, 2004, with Mr. Murphy and Mr. Smith appearing via teleconference. Closing arguments were made in lieu of briefs. No objection to the hearing procedure was made.

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. 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.

MGE is a gas corporation providing gas service to a residence at 5823 E. 16th Street, Kansas City, Missouri. The residence is owned by Mr. John Murphy[12] as rental property.[13] MGE has an account for gas service at 5823 E. 16th Street, Kansas City, Missouri, in the name of Jeffery Robert Elders that commenced on October 17, 2002, and was terminated on July 1, 2003[14] with a final unpaid balance of $583.43.[15]

According to testimony from Ms. Shirley J. Bolden, on behalf of MGE, Mr. Smith first contacted MGE to initiate service in his name in November of 2003.[16] Ms. Bolden testified that MGE requested a copy of a rental agreement, identification, and documentation of Mr. Smith's former address.[17] Ms. Bolden testified that the

[9] *Order Regarding Appearance by Telephone at Hearing*, issued July 16, 2004.

[10] *Id.*

[11] *Id.*

[12] Tr. p. 11.

[13] Tr. p. 13.

[14] Tr. p. 74; Exhibit 3. The actual gas service itself was discontinued on June 24, 2003, with the final bill being issued July 1, 2003. Tr. p. 94.

[15] Exhibit 1.

[16] Tr. p. 74.

[17] Tr. p. 75.

purpose of requesting these documents was to determine if Mr. Smith and Mr. Elders had been or were currently living at the address together.[18] The Commission finds Ms. Bolden's testimony to be credible.

The Commission finds that MGE initiated gas service at 5823 E. 16th Street and opened an account in the name of Roy D. Smith on November 21, 2003.[19] At that time, based on the determination of MGE that Mr. Elders was still living in the home,[20] the unpaid portion of Mr. Elders' account was transferred to the account of Mr. Smith.[21] Mr. Smith claims that this unpaid account balance has been inappropriately transferred to his account.

Ms. Bolden testified that in making her determination that Mr. Elders still resided at the address, she relied on information from Kansas City Power & Light Company indicating that the account for electric service at the residence was in the name of Jeffery Elders, that the electric account was current in payments, and that Mr. Smith had made no attempt to initiate the electric service in his name. Ms. Bolden also relied on a lack of evidence that Mr. Elders had moved out and that Mr. Smith had produced no evidence of a previous address.[22]

Gas service to 5823 E. 16th Street was discontinued for nonpayment on July 12, 2004.[23] Between the initiation of service on November 21, 2003, and discontinuance of service on July 12, 2004, no payments to the account were received directly from Mr. Smith.[24] MGE did receive an energy assistance payment in the amount of $257 from the LIHEAP program through the state of Missouri.[25]

MGE's account records were entered into evidence and show that Mr. Smith and Mr. Elders used the same telephone number for contact information on their accounts for gas service with Missouri Gas Energy.[26] Mr. Elders' customer application also shows that Mr. John Murphy was listed as his employer and landlord on that application.[27] The phone number used by Mr. Elders and Mr. Smith belonged to Mr. Murphy.[28]

At the hearing, MGE introduced evidence of Mr. Smith's address. Mr. Smith's drivers' license records were admitted and show that he used 5823 E. 16th Street as his address as early as January 23, 2003.[29] The Commission finds the certified records of the Missouri Department of Revenue to be credible.

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[18] *Id.*

[19] Tr. p. 75.

[20] Tr. p. 97-98.

[21] Exhibit 2.

[22] Tr. pp. 97-98.

[23] Tr. p. 76.

[24] Tr. p. 76.

[25] Tr. p. 76; Exhibit 2.

[26] Tr. pp. 81-82; Exhibits 1 and 2.

[27] Tr. p. 81; Exhibit 4.

[28] Tr. pp. 82, 85, and 126.

[29] Ex. 6.

Mr. Smith testified that he did not live at 5823 E. 16th Street prior to June of 2003.[30] Mr. Smith testified that he had lied to the Department of Revenue about his address in order to obtain his drivers' license and insurance coverage on his van. Mr. Smith testified that he was living in his van or staying with family or friends from the summer of 2002 until he moved into 5823 E. 16th Street in June of 2003.[31] Mr. Smith also testified that he did not know Mr. Elders well, but that he sometimes did odd jobs for Mr. Murphy, including mowing the grass at 5823 E. 16th Street.[32] Mr. Smith claims that around January of 2003 he requested permission from Mr. Elders to use the 5823 E. 16th Street address so that he could get his drivers' license.[33]

There were many inconsistencies in Mr. Smith's testimony. First, Mr. Smith claimed to not be very familiar with Mr. Elders, yet he used his address and socialized with Mr. Elders from time to time.[34] He also admits that he stayed at the residence a few times with Mr. Elders.[35] In addition, he admits that even though he barely had money to buy food, and was sleeping in his van, he loaned Mr. Elders at least $50 and paid his electric bill.[36] Finally, Mr. Smith indicated that he was mowing the lawn when he first asked Mr. Elders if he could use the address to receive mail. Mr. Smith also testified that the conversation took place around the time he needed to renew his drivers' license.[37] The Commission finds it highly unlikely that Mr. Smith was mowing the lawn in January in Kansas City, Missouri. The Commission did not find the testimony of Mr. Smith to be credible.

Mr. Murphy stated that to his knowledge Mr. Smith did not reside at the address before June of 2003[38] but he also stated that he "couldn't testify that he wasn't."[39] Mr. Murphy also testified that Mr. Elders had several people living at the address, but Mr. Murphy did not know if they were Mr. Elders' family members or what their names were.[40]

Mr. Murphy's testimony consisted of nothing more than vague and evasive answers to the Commission[41] including not being able to narrow down any kind of time frame, such as two, five, or ten years, for which he owned the residence in question.[42] When pressed, Mr. Murphy stated, "Perhaps a little over two years, but I couldn't be specific."[43] MGE presented evidence that Mr. Murphy had gas service

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[30] Tr. p. 43.

[31] Tr. p. 44.

[32] Tr. p. 46.

[33] Tr. pp. 40, 46-48, 58-59, and 66.

[34] Tr. p. 40.

[35] Tr. p. 48.

[36] Tr. p. 52.

[37] Tr. pp. 59 and 66.

[38] Tr. p. 18.

[39] Tr. p. 21, ln. 24.

[40] Tr. p. 17.

[41] Tr. p. 12-33.

[42] Tr. pp. 12-13.

[43] Tr. p. 12, ln. 24-25. *See also*, Tr. p. 36.

in his name at the 5823 E. 16th Street address as early as December 3, 1997.[44] Mr. Murphy's inability to recall details such as the number of tenants he has rented the home to,[45] the amount of rent owed to him,[46] how long tenants have lived in the property,[47] and his testimony that he thinks he threw away lease agreements less than 14 months after a tenant owing him money had moved out[48] leads the Commission to determine that Mr. Murphy's testimony was not credible.

The Commission finds that since neither Mr. Smith nor Mr. Murphy's testimony was credible, the best evidence of Mr. Smith's address is the Missouri Department of Revenue records. Thus, the Commission finds that at least as early as January 23, 2003, Mr. Smith resided at 5823 E. 16th Street and received the benefit of Mr. Elders' gas service thereafter. The Commission also finds that Mr. Smith continued to reside at 5823 E. 16th Street up to the date of the hearing.

MGE also introduced the Return of Service and Subpoena for Mr. Elders to prove that Mr. Elders had been living at the residence as late as May, 2004.[49] The Return signed by the Deputy states, "Lady said [Mr. Elders] hasn't live there for at least a month."[50] The Deputy further certified that he attempted to execute service from June 9 to July 9, 2004. Mr. Smith confirmed that it was his girlfriend that spoke to the officer attempting to serve the Subpoena for Mr. Elders.[51] No objection was raised to the admission of these hearsay statements. The Commission finds the evidence to be credible. By itself, however, because of its hearsay nature, the Commission gives the evidence little weight. The weight given to these statements goes toward proving that Mr. Elders resided at 5823 E. 16th Street well beyond November 2003, and into 2004.

Electric service at 5823 E. 16th Street is provided by Kansas City Power & Light Company.[52] KCPL had an account for that address in the name of Jeffery Robert Elders which was effective on November 15, 2002, and was terminated on March 16, 2004, for nonpayment of this account.[53] According to KCPL records and the Deposition of Robin Miller,[54] on November 17 and 19, 2003, someone called identifying himself as a friend of Jeffery Elders and attempted to make payment arrangements with KCPL. The caller was informed that Mr. Elders would have to make the arrangements. On November 20, 2003, KCPL notes in its business records that Jeffery Elders paid $80 on the account and was advised that the amount had posted to his account.

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[44] Tr. pp. 36-37 and 79; Ex. 3.

[45] Tr. p. 13.

[46] Tr. pp. 14 and 141.

[47] Tr. p. 15.

[48] Tr. p. 15.

[49] Exhibit 8.

[50] Exhibit 8.

[51] Tr. p. 124.

[52] Exhibit 5, p. 6., ln. 7.

[53] Exhibit 5, p. 12.

[54] Exhibit 5.

Also, according to the Deposition of Robin Miller, on March 17, 2004, a person called KCPL claiming to be Mr. Elders and requested that electric service be reinstated. When asked for identification confirmation, the caller hung up and one minute later, Mr. Smith called to have service placed in his name at 5823 E. 16th Street.[55] Mr. Smith claims that he made the original call instead of Mr. Elders.[56] Mr. Smith accepted transfer of a past due amount from a previous account he had with KCPL and accepted the past due balance of Mr. Elders in order to receive electric service.[57]

Again, these hearsay-within-hearsay statements were not objected to and the Commission finds them credible. The weight given to these statements goes toward proving that Mr. Elders was still living in the home on November 20, 2003.

Mr. Smith has admitted to lying to KCPL,[58] the Department of Revenue, and his auto insurance company.[59] Additionally, Mr. Smith told Mr. Russo during Staff's investigation that he did not know Mr. Elders[60] and only presented his current explanation about living in his van at the hearing. The Commission finds no reason to believe that Mr. Smith was not also lying to MGE and this Commission. Furthermore, it makes sense that where Mr. Elders had an outstanding balance with MGE and Mr. Smith had an outstanding balance with KCPL, the two would attempt to keep the presence of the other secret in order to obtain services without paying the past due accounts.

The evidence that Mr. Elders continued to reside in the home past June 1, 2003, consists of the KCPL call center records indicating that Mr. Elders paid an $80 bill on November 20, 2003, and that someone identifying himself as Mr. Elders called KCPL on March 17, 2004,[61] that the electric service remained in Mr. Elders' name until March 17, 2004,[62] and the statement in the Return of the Subpoena of Jeffery Elders indicating Mr. Elders had lived in the home until sometime in 2004.[63] The only evidence that Mr. Elders did not live with Mr. Smith after June 1, 2003, was the noncredible testimony of Mr. Murphy and Mr. Smith. The Commission finds that, alone, each piece of evidence that Mr. Elders resided in the home in November 2003 would not be sufficient for the Commission to make that determination. In combination, however, the evidence that Mr. Elders lived in the home outweighs the noncredible evidence presented by Mr. Smith. The Commission therefore determines that Mr. Elders lived at 5823 E. 16th Street until at least November 21, 2003.

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[55] Exhibit 5.

[56] Tr. p. 119.

[57] Exhibit 5.

[58] Tr. p. 119.

[59] Tr. p. 58.

[60] Tr. p. 148.

[61] Exhibit 5.

[62] Exhibit 5.

[63] Exhibit 8.

The only evidence that Mr. Smith did not live with Mr. Elders from January 23, 2003, through May 31, 2003, was Mr. Smith's testimony that he was lying about his address. MGE, on the other hand, presented Department of Revenue records indicating that 5823 E. 16th Street was Mr. Smith's residence. The Commission cannot find in favor of Mr. Smith based solely on his noncredible testimony. The Commission determines that Mr. Smith resided at 5823 E. 16th Street from January 23, 2003, through the date of the hearing.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction:

MGE is a "gas corporation" and a "public utility" as those terms are defined in Missouri Public Service Commission law.[64] The Missouri Public Service Commission, therefore, has jurisdiction over the services, activities, and rates of MGE.[65]

The Commission is authorized to hear and determine complaints made by "any corporation or person" concerning "any act or thing done or omitted to be done by any corporation, person or public utility.[66]

A tariff that has been approved by the Commission has the same force and effect of a statute.[67]

MGE has a tariff for the provision of gas service that has been approved and is on file in the Commission's offices.[68] Section 3.02[69] of MGE'S tariff provides as follows:

> PRIOR INDEBTEDNESS OF CUSTOMER: Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made. This provision cannot be avoided by substituting an application for service at the same or a new location signed by some other member of the former customer's household or by any other person acting for or on the behalf of such customer.

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[64] Section 386.020(18) and (42), RSMo Supp. 2001. Section 386.010 states that Chapter 386 shall be known as the "Missouri Public Service Commission Law."

[65] Sections 386.020(42) and 386.250(1), RSMo Supp. 2001.

[66] Section 386.390.1, RSMo 2000.

[67] *Allstates Transworld Van Lines, Inc. v. Southwestern Bell Telephone Co.*, 973 S.W.2d 314, 317 (Mo. App. E.D. 1996).

[68] Missouri Gas Energy, a Division of Southern Union Company, P.S.C. MO. No. 1.

[69] MGE, P.S.C. MO. NO. 1, Sheet Nos. R-19 and R-20.

> In order to expedite service to a customer moving from one location to another, Company may provide service at the new location before all bills and charges are paid for service at the prior location. Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account. Such transferred bills are then subject to the provisions of Sections 7.07 and 7.08 herein.

Burden of Proof:

The Complainant, Mr. Smith, bears the burden of proof in a case, such as this one, in which the Complainant alleges that a regulated utility has engaged in unjust or unreasonable actions.[70] Thus, Mr. Smith must establish all facts necessary to support the relief he seeks by a preponderance of credible evidence. Mr. Smith has failed to meet his burden.

Decision

The question before the Commission is whether, MGE, under the provisions of its tariff, lawfully transferred the past due debt of Mr. Elders to Mr. Smith's account.

Under MGE's tariff Section 3.02, since the Commission has determined that Mr. Elders was still living in the home at the time service was commenced to Mr. Smith's account, it was appropriate for MGE to transfer the past due amount of Mr. Elders' account.

In addition, under MGE's tariff provisions, if Mr. Smith resided in the home with Mr. Elders from January 23, 2003, through June 1, 2003, then MGE may lawfully transfer the unpaid balance for that period to Mr. Smith. It is Mr. Smith's burden to prove that MGE acted unlawfully, and Mr. Smith has failed to meet that burden.

Therefore, the Commission concludes that MGE lawfully transferred $583.43 for gas service to Mr. Smith's account.

IT IS THEREFORE ORDERED:

1. That the Complaint filed on January 9, 2004, by Roy Smith against Missouri Gas Energy is dismissed.

2. That Missouri Gas Energy lawfully transferred $583.43 for gas service to Mr. Smith's account.

3. That this Report and Order shall become effective on September 10, 2004.

Murray, Davis, and Appling, CC., concur;
Gaw, Ch., and Clayton, C., dissent;
certify compliance with Section 536.080,
RSMo 2000.

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[70] *Ahlstrom v. Empire District Electric Company,* 4 Mo. P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company,* 30 Mo.P.S.C. (N.S.) 517, 523 (1991).

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. Amega Sales, Inc., Respondent.*

Case No. MC-2004-0079
Decided September 2, 2004

Manufactured Housing §4. Under Section 740.040, RSMo 2000, the Commission has jurisdiction over dealers of manufactured homes and may, under Section 700.100, consider complaints involving, among other things, violations of Sections 407.020 and 700.045.

Manufactured Housing §17. Upon a complaint and evidentiary hearing, the Commission found that Amega Sales, Inc., sold a new manufactured home without the required Housing and Urban Development labels and misrepresented the condition and value of the home.

APPEARANCES

Keith R. Krueger, Deputy General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102, for Petitioner, the Staff of the Missouri Public Service Commission.

Thomas M. Harrison, Counsel, Amega Sales, Inc., PO Box 1017, Columbia, Missouri 65205 for Respondent, Amega Sales, Inc..

REGULATORY LAW JUDGE: Kennard Jones, Law Judge.

REPORT AND ORDER

Summary

The Commission finds that Amega Sales, Inc., sold a new manufactured home to Don Higginbotham without Housing and Urban Development labels as required by 24 C.F.R., Ch. XX, Section 3282.252(a) as adopted by the State of Missouri under Section 700.045, RSMo Supp. 2002. The Commission also concludes that Amega Sales, Inc., has violated Section 700.100(3), RSMo Supp. 2002, by misrepresenting the condition and value of the home Amega sold to Don Higginbotham, which constitutes a violation of the provision of Section 407.020, RSMo 2000.

Procedural History

On August 5, 2003, the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission filed a complaint with the Missouri Public Service Commission against Amega Sales, Inc. The Director requested that the Commission find that Amega sold a manufactured home to Don Higginbotham in violation of Sections 700.100, RSMo Supp. 2002,[1] 700.045,

* The Commission, in an order issued on September 21, 2004 denied applications for rehearing in this case. This case was appealed to the Cole County Circuit Court (04CV326310).

[1] Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri Supp. 2002.

RSMo Supp. 2002, and 407.020, RSMo 2000, and Section 3282.252(a) and Section 382.205(c) of the Manufactured Home Procedural and Enforcement Regulations. At the request of the parties, the Commission directed, on September 23, 2003, that the matter be referred to mediation. Because the parties had not settled the matter, the Commission subsequently issued an order setting this matter for an evidentiary hearing. Thereafter, the Commission issued a Notice informing the parties that the hearing process would be bifurcated. The first hearing would be held to determine whether or not Amega violated the law. And the second hearing, if necessary, would be held to determine what action the Commission should take. This Report and Order concerns only the question of whether Amega violated the law.

The Commission held an evidentiary hearing on June 2, 2004. All of the parties were represented. On July 12, 2004, the parties filed their initial briefs, and on July 22, filed reply briefs.

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. 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.

Jurisdiction

In paragraph one of its complaint, the Staff of the Commission asserted that Amega Sales, Inc., is a manufactured home dealer in the state of Missouri, with its principal place of business located at 111 Eastside Drive, Ashland, Missouri 65101. Staff further asserted that Amega is a "dealer" as defined in Section 700.010(4), RSMo 2000. In its Answer, Amega denies that it is a manufactured home dealer in the State of Missouri, with its principal place of business located at 111 Eastside Drive, Ashland, Missouri.[2]

During the evidentiary hearing, Staff submitted an Application for Manufactured Home or Modular Unit Certificate of Dealer Registration completed by Amega on January 13, 2002. Amega indicated on the application that it is a Missouri corporation.[3] The Commission issued a Certificate of Dealer Registration to Amega on January 24, 2003, indicating that Amega is registered in the state of Missouri as a dealer of manufactured homes. The certificate was valid until January 15, 2004.[4] The Commission issued another Certificate to Amega on January 16, 2004, which is valid until January 15, 2005.[5] Amega submitted a

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[2] Paragraph one of Amega's answer to the Complaint, filed on March 25, 2004.

[3] Exhibit 4.

[4] Exhibit 5.

[5] Exhibit 6.

Certificate of Corporate Records dated May 28, 2004, which includes Amega's Articles of Incorporation.[6] During the hearing Greg DeLine testified that the company's office is located at 111 Eastside Drive, Ashland, Missouri.[7]

The Commission finds that Amega Sales, Inc., is a Missouri corporation with its principal place of business at 111 Eastside Drive, Ashland, Missouri; further, Amega is a dealer, as defined in Section 700.010(4), RSMo 2000.

Did Amega sell the manufactured home to Don Higginbotham that he now occupies?

Amega and Don Higginbotham executed a purchase contract (Form 500) on May 2, 2002. The home, as indicated on the purchase contract, is a new Skyline, model year 2001.[8] On October 23, 2002, Higginbotham completed a Consumer Complaint Form indicating that the manufacturer of the home is Skyline and the dealer is Amega Sales.[9] Don Higginbotham testified that he went to Amega to purchase the home.[10] He further testified that he purchased the home from Amega.[11] And he testified that to the best of his knowledge all of his dealings were with Amega.[12] Amega, A&G Commercial Trucking, the trucking company for Amega, and Higginbotham entered into a Stipulation of Agreement in March of 2003,[13] that reflects in the second paragraph that Amega and Higginbotham entered into a purchase contract for a new Skyline manufactured home on May 2, 2002.

Amega asserted that A&G Commercial Trucking, Inc., was the owner and seller of the Higginbotham home.[14] Amega submitted a duplicate Certificate of Title, showing A&G Commercial Trucking as the owner of the home.[15] Only upon cross-examination by Amega did Higginbotham agree, after viewing the Certificate of Title and the Stipulation and Agreement, that A&G Commercial Trucking was the seller of the home. In fact, Higginbotham's statement in this regard was: "According to this document, yes."[16]

The Commission finds that Don Higginbotham's testimony, regarding the seller of the home, is not credible where it is inconsistent with his prior statements. In October of 2003, Higginbotham completed a complaint form and submitted it to the Commission. On that form, Higginbotham indicated that the seller of the home was Amega. Furthermore, upon direct testimony Higginbotham stated that it was his understanding that he was purchasing a home from Amega. He then varied

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[6] Exhibit 22.

[7] Tr. p. 348, lines 9-10.

[8] Exhibit 1.

[9] Exhibit 2.

[10] Tr. p. 204, lines 17-21.

[11] Tr. p. 213, lines 19-23.

[12] Tr. p. 218, lines 14-17.

[13] Exhibit 3.

[14] Amega's initial post-hearing brief, at p. 2.

[15] Exhibit 15.

[16] Tr. p. 227, lines 18.

his testimony through cross-examination by Amega and unconditionally agreed with the leading questions asked by Amega. Nonetheless, the contention that A&G Commercial Trucking held title to the home is outweighed by other evidence suggesting that Amega was the seller. Greg DeLine, majority owner of both A&G and Amega, stated that the trucking company is not in the business of selling homes.[17] Also, Tim Haden inspected a manufactured home on Amega's lot on March 8, 2002, with the serial number 0151-0412-MAB.[18] On October 23, 2002, Tim Haden inspected a manufactured home, with the same serial number, on Higginbotham's property.[19] The Commission finds that Don Higginbotham purchased his manufactured home from Amega.

Did Amega misrepresent a material fact when selling or offering to sell a home to Don Higginbotham?

Upon inspecting the home, while on the Amega lot, Staff noted that it did not have HUD labels (seals) and that the home contained numerous defects.[20] Based on this, Staff placed a Red Tag on the home.[21] Thereafter, Staff and Amega agreed that if Amega titled the home and agreed to sell it as a used home, Staff would remove the Red Tag.[22] Amega then titled the home under A&G Commercial Trucking, Inc., and faxed a copy to Staff.[23] Staff then informed Amega that the Red Tag could be removed and that the home must be sold as a used home.[24]

Although he adds that he was unsure, Higginbotham testified that he believed the home he was purchasing was a new home.[25] With regard to whether Higginbotham believed he was misled, the Commission heard the following testimony during cross examination of Higginbotham by Amega:

> Q. You're not saying . . . as you sit here now, are you, you're not saying that you were misled as to the condition of the home you bought? I want to make clear that's not what you're saying. You're not saying you were misled?
>
> A. We were just trying to get in a home. That's all we were doing. We were homeless, we were sleeping on the floor, we were trying to get in a home. He was trying to get us financing, so whatever we could get.
>
> Q. I'm saying —
>
> A. No. I don't remember.

[17] Tr. p. 392, lines 6-8.

[18] Tr. p. 247.

[19] Tr. p. 254, lines 20-22 and Ex. 2.

[20] Exhibit 11.

[21] Tr. p. 249, line 23 through p. 250, line 3.

[22] Tr. p. 253, lines 21-24.

[23] Tr. p. 254, lines 1-2.

[24] Tr. p. 254, line 14.

[25] Tr. p. 281, line 23.

Q. You're not saying —

A. No. I don't remember that.

Q. You're not saying you were misled in any way as to the condition of the home, either the home you bought or any home you looked at —

A. Not to the best of my memory, no.

Q. Correct?

It is apparent from this line of questioning that Higginbotham is not only led by the questions, but is badgered into compliance. Although leading questions are permitted on cross-examination, Amega is apparently putting words in Higginbotham's mouth.

The Form 500 and the Stipulation and Agreement

The parties are in dispute on whether the purchase agreement (Form 500) is the purchase contract for the home Higginbotham bought. Amega and Higginbotham entered into the agreement on May 2, 2002.[26] The agreement indicates that the home is a new Skyline, 68x32, stock manufactured home. When Higginbotham completed the complaint form submitted to the Commission he indicated on the form that his complaint concerned a new home and that he was the first owner and that the date of purchase was May 2, 2002.[27] Higginbotham also stated that according to the Stipulation of Settlement, he signed a contract for a new home and took delivery of a used home instead. And, although it was possible that he signed more than one purchase contract, he does not recall doing so.[28] Though his memory is jogged by the language of the Stipulation of Agreement, Higginbotham also stated that he paid a sales tax that was refunded.[29] This fact is also represented in the Stipulation of Agreement, where Amega agrees to refund a sales tax of $2,578.37 to Higginbotham. The parties agree that a sales tax is applicable only to new, not used, homes.

Much of this matter appears to hinge on whether the purchase contract pertains to the same home referenced in the Stipulation of Agreement. Although DeLine testified that they couldn't be the same because the prices on each are different, he also stated that the differences could have been accounted for by a multitude of possibilities of different options.[30] Although DeLine testified that the purchase price of $66,478.37, as reflected in the Stipulation of Agreement, does not tie into the Form 500[31], questions from the bench illustrated the following:

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[26] Exhibit 1.

[27] Exhibit 2.

[28] Tr. p. 238, lines 5-10.

[29] Tr. p. 238, lines 6-8.

[30] Tr. p. 375, lines 9-20.

[31] Tr. p. 373, lines 14-22.

- The purchase price of the home on the Form 500 is $70,900.
- The purchase price of the home as noted in the first "whereas" clause of the Stipulation of Agreement is $66,478.37 including a sales tax of $2,578.37.
- The discounts afforded Higginbotham on the Form 500, which include a down payment of $1,000 and "cash as agreed", total $7,000.
- $66,478.37 - $2,578.37 = $63,900.
- $63,900 + $7,000 = $70,900.[32]

This means that the sum of the base price of the home as noted in the Stipulation of Agreement plus the down payment and "cash as agreed" as noted in the Form 500 equals the purchase price as noted in the Form 500. From this calculation it is clear that the Stipulation and Agreement between DeLine and Higginbotham directly relates the purchase contract evidenced by the Form 500. DeLine even stated, after coming to the above mathematical conclusion; "Yea. That put that to rest."[33]

DeLine's testimony is further brought into question by the following questions from the bench and answers from DeLine:

> Q. And by "settlement" you're speaking of the Settlement and Stipulation . . . that was in exhibit 3?
>
> A. That's correct. And again, I'm not trying to . . . in my simple mind, I was trying to cover all the basis and make sure everything was covered there. And turns around and somebody says, well, now there's sale tax involved so that implies . . anyway, I intended something totally different.
>
> Q. And covering all bases, to make sure everything was covered, what were you worried about?
>
> A. Liability.
>
> Q. For what?
>
> A. Well, honestly, this kind of situation, civil, some kind of action by Higginbotham that I misrepresented or somebody had or whatever.[34]

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[32] Tr. p. 445, line 14 through p. 446, line 24.

[33] Tr. p. 446, line 24.

[34] Tr. p. 418, line 15 through p. 419, line 5.

The testimony of whether these two documents are related tends to support a conclusion that they both relate to the home Higginbotham ultimately purchased. In light of the testimony and that the numbers above add up as they do, the Commission finds that the home Higginbotham ultimately bought is reflected in the Form 500. The Commission finds that Amega gave Higginbotham the impression that he was purchasing a home of better quality and of more value than the home Higginbotham purchased.

Conclusions of Law

Under Section 740.040, RSMo 2000, the Commission has jurisdiction over dealers of manufactured houses. Having found that Amega is a dealer of manufactured houses in the State of Missouri, the Commission concludes that it has jurisdiction over Amega.

Under Section 700.100.2 the Commission may consider a complaint filed with it charging a registered dealer with a violation of this section. Commission rule 4 CSR 240 2.070 allows the Staff of the Commission to file complaints with the Commission. The Commission therefore concludes that it has jurisdiction to entertain the complaint filed by its Staff.

Under Section 700.010(8) a "new" manufactured home is one that is sold to the first purchaser for purposes other than resale. Higginbotham was the first purchaser of the home for purposes other than resale. Under Section 700.045 it is a violation to sell a new manufactured home that does not bear a seal. The home that the Higginbotham purchased did not bear a seal. Because Amega sold the home without a seal, Amega is in violation of Section 700.045.

Under Section 700.100, engaging in any conduct which constitutes a violation of the provisions of Section 407.020 or 700.045 constitutes grounds for revocation or suspension of a dealer's registration. It is a violation under Section 407.020 to misrepresent any material fact in connection with the sale of any merchandise. The value of the home as contracted for in May of 2002, was $66,478.27. In October, Higginbotham complained to the Commission about defects and the set-up of his home. The Commission questions why Higginbotham would have filed a complaint regarding defects of his home if he knew of such defects when he purchased the home. Higginbotham was unable to recall much of what happened during the time in question because he had been involved in a memory-altering accident.[35]

In the Stipulation of Agreement entered into in March of 2003, Higginbotham and Amega agreed that the value of the home was $38,321.63. DeLine even testified that he knew at that the time that he was negotiating the Stipulation and Agreement that the Commission had been contacted. And that this was his motivation for making "sure all bases were covered."[36] Furthermore, DeLine testified that he was afraid of being liable to Higginbotham because of misrepresentation. The Commission concludes that Amega misrepresented a material fact in connection with the sale of the home to Don Higginbotham and by doing so has violated Section 700.100(4) as it incorporates Section 407.020.

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[35] Tr. p. 204, line 24 through p. 205, line 5.

[36] Tr. p. 373, lines 14-23.

Having found that Amega has violated Sections 700.100(4) and 700.045, the Commission will order that a second hearing be held to determine the Commission's response to Amega's violations.

FURTHER DISCUSSION OF MOTIONS FILED AND DENIED

Amega made several motions during the course of these proceedings. All of the motions have been denied from the bench, with a promise to further discuss the motions in this Report and Order.

Motion to Dismiss Complaint or Alternative Motion to Strike

In its motion, Amega asserted that Sections 700.010(11) and 700.045 is preempted by 42 U.S.C. Section 5403(d), which states:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

Section 700.010(11) is the definition of a "recreation park trailer", which has no relevance to this matter. With regard to Section 700.045, the State of Missouri, through its Revised Statute, has adopted the seal-requirements of the Manufactured Home Procedural and Enforcement Regulations at 24 C.F.R., Ch. XX, Section 3282.252(a). Under 42 U.S.C. Section 5403(a), Congress authorizes the establishment of safety standards, with regard to manufactured housing. This is done at 24 C.F.R., Ch. XX, Section 3282.252(a). The Commission is unable to determine how Amega even raises this issue, let alone argue that there is a conflict. Simply put, the United States Code is to the Code of Federal Regulations just as the Revised Statutes of Missouri are to the Code of State Regulations. The U.S.C. authorizes implementation of the C.F.R.'s, just as the RSMo authorizes implementation of the C.S.R.'s.

Amega also argued that the Commission has no jurisdiction to consider this cause and impose the penalties sought by Staff, because it is beyond the scope of the Commission's powers as granted to it by the Missouri General Assembly. Although not clearly expressed, the Commission assumes that Amega's assertion is based on the powers given the Attorney General to affect, through Section 700.115.1, the registration of manufactured-home dealers. What Amega fails to realize is that this section does not give the Attorney General unilateral power to seek penalties, but rather gives the Attorney General concurrent power, with the Commission, to effect the registration of manufactured home dealers.

Amega also asserted that the Commission's procedures, by sitting as both "prosecutor" and "finder of fact", violates the Missouri Constitution. By this assertion, Amega implies that it is unfair for the Staff of the Commission to bring a complaint before the Commission. Notwithstanding, Amega then states in its

opening statement; "We greatly appreciate the opportunity to have this proceeding be conducted in a fair, open and impartial forum and that those sentiments are sincere." Amega has apparently changed its position with regard the fairness of this proceeding.

Pleading the affirmative defenses of "settlement, release, waiver and accord and satisfaction", Amega further stated that it and the Staff of the Commission have settled this matter. Under Commission rule 4 CSR 240-2.115, stipulations and agreements are filed as pleadings and the Commission *may* resolve all or any part of a contested case on the basis of a stipulation and agreement. Treating it as a pleading, the Commission has rejected the Stipulation and Agreement filed by Amega and Staff.

Amega finally argued that the Director of the Manufactured Housing and Modular Units Program of the Commission does not have authority to file complaints with the Commission. The Director is part of the Staff of the Commission. Under Commission rule 4 CSR 240-2.070(1) the Staff of the Commission may file complaints with the Commission. Amega's argument is without support and lacks merit.

Motion to Exclude Evidence from the Record.

Amega moved the Commission to exclude from the record, evidence of claims filed in Circuit Court against Amega by the Attorney General. Amega stated in the motion that "such documents have not been offered in evidence by any party in this case." Because the evidence has not been offered, there is no need to rule on this motion.

Demand for Jury Trial

Amega offered no support for its demand for a jury trial. During the prehearing discussion of this motion, Amega stated that it requested a jury trial because Staff, in its complaint, requested criminal sanctions.[37] This is not true. Staff requested that the Commission suspend Amega's registration, authorize the Director to seek civil penalties, and issue such other findings and orders as the Commission considers to be just and reasonable. If the Commission authorizes the Director to seek penalties, those penalties will be sought in Circuit Court, not assessed by the Commission. With regard to making findings of criminal liability, the Commission does not determine whether or not Amega has committed a crime. Rather, the Commission determines whether Amega has committed acts that in a different forum would *also* be considered criminal.

Although previously denied by the Commission, the Commission again denies the motions filed by Amega.

IT IS THEREFORE ORDERED:

1. That a hearing shall be held on September 15, 2004, at 9:00 a.m. to determine the appropriate Commission action toward Amega Sales, Inc.

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[37] Tr. p. 76, line 9-13.

2. That the hearing will be held at the Commission's offices in the Governor Office Building, Room 310, 200 Madison Street, Jefferson City, Missouri, a facility which meets the accessibility standards of the Americans with Disability Act (ADA). If any person needs additional accommodations to participate in these hearing, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or Relay Missouri at 711 prior to the hearing.

3. That this Report and Order shall become effective on September 12, 2004.

Gaw, Ch., Murray, Clayton, Davis, and Appling, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc., Respondent.*

Case No. MC-2004-0271
Decided September 9, 2004

Manufactured Housing §1. The Commission issued an order directing Coachman Homes of Eureka, Inc. to file a status report regarding the progress of its settlement negotiations.

ORDER APPROVING STIPULATED AGREEMENT AND CANCELING PROCEDURAL SCHEDULE

Syllabus: This order approves the Stipulated Agreement filed by the parties and directs the parties to comply with its terms.

On August 30, 2004, The Manager of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission and Coachman Homes of Eureka, Inc., filed their second Stipulated Agreement. After rejection of the initial agreement the parties renegotiated and now submit this second agreement for the Commission's approval as a resolution of the issues in this case.

The Agreement requires the payment of certain penalties, further inspection and correction, if needed, of the anchoring of homes at the expense of Coachman, the discontinuance of the use of a subcontractor for Coachman, and a provision for future penalties in exchange for the Manager dismissing the Complaint. The Agreement also indicates that a settlement agreement has been reached with Ms. Dixie Hatfield for restitution of her damages as well as the removal of the damaged home from her property.

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* See pages 462, 553 and 555 for other orders in this case. The Commission, in an order issued on May 19, 2005, dismissed the complaint without prejudice.

By orders issued on September 7 and 8, 2004, the Commission directed the parties to provide it with additional information regarding the terms of the settlement agreement with Ms. Hatfield. The Commission was informed that there is no specific time period set out for the payment of Ms. Hatfield's damages or for the removal of the home from Ms. Hatfield's property. Coachman stated, however, that it has no objection to the Commission setting such a time period as part of its approval of the Stipulated Agreement. Coachman also stated in its filing that it intends to disburse payment to Ms. Hatfield immediately upon the transfer of title of the home to Coachman. Coachman noted that one issue that may cause delay of the transfer is obtaining a proper title in the name of Ms. Hatfield since the home is currently titled in the name of Ms. Hatfield's deceased husband.

The Commission has reviewed the Agreement and finds it to be reasonable. The Commission determines that the Agreement should be approved with the condition that payment be made to Ms. Hatfield and the home removed from her property within 30 days from the transfer of title unless otherwise extended by the Commission. In addition, Paragraph 2 of the Stipulated Agreement states that "Coachman will pay a $2000.00 penalty to the Commission." Under Section 386.600, RSMo, those penalties shall be made payable for deposit in the Public School Fund.

The Commission will also cancel the remaining procedural schedule set for this case. This case shall remain open for reports regarding the inspection of homes as directed in the Commission's previous order. Staff shall file a final report when the inspections are complete.

IT IS THEREFORE ORDERED:

1. That the Stipulated Agreement filed on August 30, 2004, is approved as a resolution of the issues in this case. A copy of the Stipulated Agreement is attached as Attachment A and incorporated as part of this order.

2. That Coachman Homes of Eureka, Inc., and the Manager of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission are ordered to comply with the terms of the Stipulated Agreement with any penalty payment to be deposited in the Public School Fund.

3. That Coachman Homes of Eureka, Inc., is directed to comply with the terms of its agreement with Ms. Dixie Hatfield and shall make its payment to Ms. Hatfield and remove the home from her property no later than 30 days from the transfer of title, unless otherwise ordered.

4. That the remaining procedural schedule, including the prehearing conference set for September 24, 2004, and the hearing set for October 1, 2004, is canceled.

5. That the Staff of the Missouri Public Service Commission shall continue to make reports regarding its contacts with other potential affected homeowners and shall file a final report when inspections are complete.

6. That this order shall become effective on September 19, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Dippell, Senior Regulatory Law Judge

Editor's Note: Attachment A, 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 Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service.*

Case No. GR-2004-0209
Decided September 21, 2004

Rates §41. Gas §20. The company's actual, consolidated capital structure, including the capital structure of its subsidiary, rather than a proposed hypothetical capital structure, was used to calculate the rate of return to be allowed for a gas company, because that actual capital structure resulted from the management decisions of the company.

Rates §41. Gas §20. Inclusion of the long-term debt of a subsidiary in the capital structure of a gas company used to determine the company's rate of return was not appropriate where the debt of the subsidiary was non-recourse to the gas company.

Rates §41. Gas §20. The Commission has an obligation under the law, as well as a matter of practical necessity, to allow a gas company an opportunity to earn a return that will allow it to compete in the capital market.

Rates §41. Gas §20. The Commission allowed a gas company a return on equity of 10.5% in determining the company's allowed rate of return.

Rates §41. Gas §20. A company may not recover flotation costs related to the sale of additional equity where the sale of additional equity was made necessary by an acquisition for which the Company entered into a stipulation abjuring rate recovery of any additional costs associated with the acquisition.

Rates §§23, 41. Gas §20. A rate of return adder proposed by a gas company as a reward for the company's efficient operation was inappropriate in concept and unworkable in practice.

Rates §40. Gas §19. Where the future revenues that a gas company could expect to earn from sales of released pipeline capacity were uncertain, the company could include such revenues as an adjustment to its purchased gas adjustment rather than as an offset to its revenue requirement.

Rates §40. Gas §§19, 17.2 A gas company may share a portion of the revenues it earns from sales of released pipeline capacity so that the company will have an incentive to maximize such sales.

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* The Commission, in an order issued on October 19, 2004, denied applications for rehearing in this case. This case was appealed to the Cole County Circuit Court (04CV326262 - consolidated with 04CV326643). See page 646 for another order in this case.

Expense §19. The Commission refused to allow a gas company to establish a pre-funded source for the payment of possible future environmental cleanup costs where the amount of future cleanup costs was unknown.

Expense §60. Gas §77. The Commission excluded a portion of the salaries of three corporate employees whose job duties included lobbying activities.

Expense §64. Gas §81. The cost of the portion of a gas company's incentive compensation plan that was based on meeting the company's financial goals benefited shareholders, not ratepayers, and could not be recovered through rates.

Expense §58. Gas §75. A gas company's decision to maintain an office in New York City primarily for the convenience of two corporate officers was not a prudent expenditure and could not be recovered from ratepayers.

Expense §59. Gas §76. The salaries a gas company paid to two of its board members, who were not involved in the day-to-day operations of the company, was excessive, and only a portion of the salaries could be recovered from ratepayers.

Rates §§118, 120. The modified relative system utilization methodology – RSUM – proposed by Public Counsel was rejected as inappropriate because, by treating all mains costs as demand related it ignored the fact that unless mains are constructed, at a cost, customers would not have access to the gas distribution system. Furthermore, Public Counsel's proposed method under allocated the cost of mains to the residential and small general service customers that caused the system's peak requirements.

Rates §§118, 120. The zero-intercept method of allocating the cost of gas mains recognizes that when a main is built to reach a customer, a certain portion of the cost of the main will be incurred no matter how much gas the customer uses. The Commission accepted the use of that method to allocate the cost of mains among customer classes.

Rates §120. Class cost of service studies serve as a guide to the ultimate goal of just and reasonable rates, but the Commission does not need to slavishly adhere to any particular study.

Rates §80. High fixed monthly customer charges tend to defeat customer efforts to reduce their bill by conserving natural gas. Therefore, the public interest is best served by setting customer charges as low as reasonably possible.

Rates §80. The Commission rejected a weather mitigation rate design proposed by Missouri Gas Energy as single-issue ratemaking because it would allow rates to change without any further evaluation by the Commission of whether the new rates are just and reasonable.

Rates §102. It is important to set the fees that the company will charge for connection and disconnection fees at a rate that will recover the actual cost of providing that service. If the fee does not cover the actual cost of providing the service, other customers will subsidize the cost causer through higher than necessary base rates.

Gas §22. The Commission increased funding authorized for MGE's weatherization program in the Kansas City area.

Expense §46. Gas §63. Reasonable and prudently incurred costs of presenting a rate case to the Commission are accepted as a cost of doing business, which a company will be allowed to recover in its rates.

Expense §46. Gas §63. The Commission has a responsibility to ensure that the rate case expenses that the company submits to its ratepayers are reasonably and prudently incurred. Otherwise, the company could take a cost-is-no-object approach to its rate case presentation, secure in the knowledge that the ratepayers would be required to pay for any cost that the company might incur.

Expense §46. Gas §63. The Commission rejected a proposal to arbitrarily limit MGE's rate case expenses to an amount found reasonable in an earlier rate case, but did remove certain costs as imprudently incurred.

Gas §34. An accounting authority order would not be granted in a rate case where the parties had not been given a reasonable opportunity to argue the issue because it was raised for the first time at the true-up hearing.

APPEARANCES

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REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

Summary

In this report and order, the Commission finds that Missouri Gas Energy, a division of Southern Union Company, is entitled to a rate increase sufficient to generate a revenue increase of approximately $22.5 million.

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. The Commission in making this decision 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 omitted material was not dispositive of this decision.

Procedural History

On November 4, 2003, Missouri Gas Energy, a division of Southern Union Company (MGE), filed tariff sheets designed to implement a general rate increase for natural gas service in the amount of $44,875,635. The tariff revisions carried an effective date of December 4.

On November 7, the Commission suspended MGE's tariff until October 2, 2004, the maximum amount of time allowed by the controlling statute.[1] In the same order, the Commission directed that notice of MGE's tariff filing be provided to interested parties and the public. The Commission also established November 26 as the deadline for submission of applications to intervene.

Timely applications to intervene were filed by the City of Kansas City, Missouri; the Midwest Gas Users' Association (Midwest Gas);[2] the University of Missouri-Kansas City (UMKC), Central Missouri State University (CMSU), and Jackson County, Missouri. Those applications to intervene were granted on December 4. Subsequently, the Federal Executive Agencies[3] were allowed to intervene on February 10, 2004, and the City of Joplin, Missouri, was allowed to intervene on May 3.

On December 9, the Commission established the test year for this case as the 12-month period ending June 30, 2003, updated for known and measurable changes through December 31, 2003. A further true-up period through April 30, 2004, for the purpose of updating certain cost components, was established by Commission order on June 21, 2004. On December 18, 2003, the Commission established a procedural schedule leading to a hearing beginning on June 21, 2004.

The Commission conducted four local public hearings at which the Commission heard comments from MGE's customers and the public regarding MGE's request for a rate increase. Public hearings were held in Joplin on April 27, Blue Springs and Kansas City on April 28, and St. Joseph on April 29.

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[1] Section 393.150, RSMo 2000.

[2] The Midwest Gas Users' Association is an unincorporated non-profit association consisting of and representing business concerns and corporations that are substantial users of natural gas.

[3] The Federal Executive Agencies include the United States Department of Defense, the United States Department of Energy, and other Federal Executive Agencies, which have offices, facilities or installations in the service territory of MGE and which purchase utility service from MGE.

The parties prefiled direct, rebuttal, and surrebuttal testimony. The evidentiary hearing began on June 21, and continued through July 2. Further true-up direct testimony was prefiled on July 19, and a true-up hearing was conducted on July 23.

The Partial Stipulation and Agreement

On June 29, during the course of the evidentiary hearing, MGE and Staff filed a Nonunanimous Partial Stipulation and Agreement that concerned the issues of Alternative Minimum Tax, Depreciation, Accounting for Net Cost of Removal, Accounting for Pension Expenses, Revenues, Bad Debts, and May 1, 2004 Union Wage Increase issues. This partial stipulation and agreement reflected the agreement of Staff and MGE regarding several issues that would otherwise have been the subject of testimony at the hearing. No party opposed the partial stipulation and agreement. As permitted by its regulations, the Commission treated the unopposed partial stipulation and agreement as a unanimous partial stipulation and agreement. On July 8, the Commission issued an order approving that partial stipulation and agreement as a resolution of the issues addressed in that agreement.

Overview

MGE is a division of Southern Union Company. As a division, MGE has no separate corporate existence apart from Southern Union. MGE's divisional headquarters is located in Kansas City, Missouri, and it provides natural gas service to customers in Kansas City, Joplin, St. Joseph, and other smaller cities in the western half of Missouri. MGE is a local distribution company, sometimes referred to by the acronym LDC. That means that MGE purchases natural gas from a supplier, pays to transport the gas to Missouri over one or more interstate pipelines, and then distributes the natural gas to its customers in this state.

Southern Union is headquartered in Wilkes-Barre, Pennsylvania, and in addition to MGE, has other divisions that operate as LDCs in Pennsylvania and in New England. In addition to its LDC divisions, Southern Union owns Panhandle Eastern Pipeline Company, which is an interstate pipeline company. Unlike its LDC operating divisions, Panhandle Eastern is a subsidiary of Southern Union, rather than a division. That means that Panhandle Eastern has a separate corporate existence, and issues and holds debt in its own name.

As previously indicated, as an LDC, MGE must purchase natural gas from supply sources, transport the gas over an interstate pipeline, and then distribute that gas to its customers. This Commission does not have any authority to regulate the price that MGE must pay to purchase and transport gas over the interstate pipeline. The purchase price of natural gas is set by the market and transportation rates are regulated by the Federal Energy Regulatory Commission (FERC). As a result, this rate case has nothing to do with those aspects of the cost of natural gas.

The price that MGE must pay to purchase and transport natural gas is passed through, dollar for dollar, to its customers through the PGA/ACA process. Therefore, if MGE is to recover its cost of distributing natural gas to its customers, and earn a profit, it must have another source of income. It is those costs, and that source of income, that are at issue in this rate case.

MGE began the rate case process when it filed its tariff on November 4, 2003. In doing so, MGE asserted that it was entitled to increase its rates enough to generate an additional $44,875,635 in general revenues per year. MGE set out its rationale for increasing its rates in the direct testimony that it filed along with its tariff on November 4. In addition to its filed testimony, MGE 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 MGE's testimony and records to determine whether the requested rate increase was justified.

Obviously, there are a multitude of matters about which the parties could disagree. Fortunately, there was no disagreement about many matters and, as a result, those potential issues were never brought before the Commission. Where the parties disagreed, they prefiled written testimony for the purpose of raising 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 June 4, the parties filed a Joint Statement of Issues that listed the issues that they asked the Commission to resolve.

As previously indicated, a number of the identified issues were resolved by the approved partial stipulation and agreement and will not be further addressed in this report and order. The remaining issues will be addressed in turn. The issue description for each issue is taken from the Joint Statement of Issues filed by the parties. Factual matters will be addressed in the Findings of Fact section. If an issue also contains a legal aspect, that portion of the issue will be addressed in the Conclusions of Law section.

The Issues

The rates that MGE will be allowed to charge its customers are based on a determination of the company's revenue requirement. MGE'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:[4]

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

[4] Dunn Direct, Ex. 1, Page 11, Lines 5-26.

All parties accept the basic formula. Disagreements arise over the amounts that should be included in the formula.

Rate of Return Issues

The first group of issues concerns the rate of return that MGE will be authorized to earn on its rate base; in other words, the return requirement in the revenue requirement formula just mentioned. Rate base includes things like gas mains in the ground, gas meters, and the trucks driven by MGE's repair crews. In order to determine a rate of return, the Commission must determine MGE's cost of obtaining the capital that it needs. The first step toward doing that requires a determination of the appropriate mix of capital sources that MGE will use to obtain its needed capital. That is called a capital structure and that is the first issue.

1. Capital Structure

Issue Description: *What is the appropriate Capital Structure (i.e., the relative proportions of long-term debt, short-term debt, preferred equity and common equity) to use in calculating MGE's cost of capital?*

Determining an appropriate capital structure for MGE is complicated by the fact that MGE is a division of Southern Union and does not issue its own debt or equity. Therefore, MGE does not have its own capital structure.

As a substitute for its non-existent capital structure, MGE proposes to use the consolidated capital structure of Southern Union Company, as of April 30, 2004. However, MGE proposes to modify the actual consolidated capital structure to remove the impact of Southern Union's subsidiary, Panhandle Eastern Pipeline Company. MGE's proposed structure is as follows:[5]

Common Equity.	41.10%
Preferred Equity	11.49%
Long-Term Debt	47.41%

Staff and Public Counsel also recommend that the Commission use the actual consolidated capital structure of Southern Union, as of the true-up date, April 30, 2004. But they would not adjust that structure to remove the equity and debt of Panhandle Eastern Pipeline. The specific recommendations of Staff and Public Counsel differ slightly because Public Counsel includes short-term debt in the calculated structure. Staff and MGE do not include short-term debt in their capital structures because Southern Union had no short-term debt as of April 30. Public Counsel includes a 13-month average of short-term debt because Southern Union has used short-term debt in the past and in Public Counsel's view is likely to continue to do so in the future. These are the capital structures recommended by Staff and Public Counsel:

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[5] Noack True-up, Ex. 49, Schedule F.

	Public Counsel[6]	Staff[7]
Common Stock:	28.37%	29.99%
Preferred Stock	6.06%	6.40%
Long-Term Debt	59.77%	63.61%
Short-Term Debt	5.80%	0.00%

It is important to note that the capital structures recommended by Public Counsel and Staff contain a much smaller proportion of common stock than does the structure recommended by MGE. 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 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 holders of debt. 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. Furthermore, if something really goes wrong and the company has to be liquidated, the holders of debt get paid first. The shareholders get only whatever 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.

Southern Union's unadjusted consolidated capital structure contains a good deal more debt and less equity than the capital structure of the average LDC. MGE's witness John Dunn indicated that his group of 15 comparable LDCs had an average of 46.6% equity in their capital structures.[8] Staff's witness David Murray's group of 8 comparable LDCs had an average capital structure containing 49.68%.[9] And Public Counsel witness Travis Allen reported that his group of 8 comparable companies had an average capital structure containing 49.75% equity.[10] That means that, all other things being equal, a shareholder's investment in Southern Union is more risky than an investment in an average LDC.

MGE contends that the use of the consolidated capital structure adjusted to remove the effects of the Panhandle Eastern Pipeline subsidiary is appropriate because that structure most closely approximates the capital structure of Southern

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[6] Allen True-up, Ex. 233, Page 2, Lines 2-6.

[7] Murray True-up, Ex. 860, Schedule 1.

[8] Dunn Direct, Ex. 1, Schedule JCD-2.

[9] Murray Direct, Ex. 825, Schedule 22.

[10] Ex. 32.

Union's natural gas distribution operations, including its MGE division. It does this by removing the equity and debt of the Panhandle Eastern subsidiary from the consolidated capital structure in a manner that it contends is consistent with the requirements of Generally Accepted Accounting Principles (GAAP).

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. Rather, it is the unadjusted consolidated capital structure under which Southern Union actually operates in the marketplace. Southern Union is able to conduct business, finance its operations, and raise capital with an investment grade rating based on that capital structure. When a business analyst such as Moody's or Standard & Poor's examines Southern Union to assess its credit worthiness, it looks to that unadjusted consolidated capital structure to make its determination.[11]

Furthermore, Southern Union's unadjusted consolidated 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.

Southern Union argues that in a 1993 rate case, involving St. Joseph Light & Power Company, the Commission found that the use of a hypothetical capital structure was appropriate when the utility's actual capital structure fell outside of a "zone of reasonableness."[12] While that was the finding of the Commission in that case, an examination of the entire report and order reveals that St. Joseph Light & Power's actual capital structure was nearly a mirror image of Southern Union's consolidated capital structure. While Southern Union carries a large percentage of debt, St. Joseph Light & Power had an inordinate amount of equity in its capital structure.[13] That meant that St. Joseph Light & Power's capital structure, because it included an excessive amount of high cost equity, was unreasonably expensive for ratepayers. The Commission, therefore, adopted a hypothetical capital structure to protect ratepayers from a management decision, not to protect management from the consequences of its own decisions.

Having determined that the actual consolidated capital structure of Southern Union is the appropriate capital structure to use, the Commission now must decide whether the structure proposed by Staff, or that proposed by Public Counsel is more appropriate. The difference between the two structures results from Public

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[11] Transcript Page 191, Lines 19-22, and Page 203, Lines 23-25.

[12] *In Re: St. Joseph Light & Power*, 2 Mo. P.S.C. 3d 248, 253 (1993)

[13] *In Re: St Joseph Light & Power*, 2 Mo. P.S.C. 3d 248, 250 (1993). SJL&P's actual capital structure contained approximately 58% equity and 40% debt.

Counsel's decision to include short-term debt in the capital structure. The evidence indicates that Southern Union has used substantial amounts of short-term debt in the past. However, most of that debt was used to finance temporary working capital needs and has been repaid or refinanced as long-term debt. As of the true-up date, April 30, 2004, Southern Union had no short-term debt.[14] Since the Commission has determined that it should use the actual capital structure of Southern Union, and that actual capital structure has no short-term debt as of the true-up date, the Commission finds that short-term debt should not be included in the capital structure. Therefore, the capital structure that shall be used for the purpose of calculating rate of return in this case is as follows:

Common Stock:	29.99%
Preferred Stock:	6.40%
Long-Term Debt:	63.61%

Once an appropriate capital structure is established, the cost of the various types of capital – common equity, preferred equity, long-term debt, and short-term debt – are multiplied by the percentage of their prevalence in the chosen capital structure to arrive at the weighted cost of capital. But before that can be done, the cost of each of the types of capital must be determined. That task is encompassed by the next three issues.

2. Embedded Cost of Long-Term Debt

Issue Description: *What is the appropriate cost of long-term debt in calculating MGE's cost of capital?*

The cost of long-term debt is determined simply by reviewing the interest rates specified in the debt issued by Southern Union. The only issue between the parties concerns which debt should be included in the calculations. MGE and Public Counsel agree that the long-term debt to be counted is the debt of Southern Union excluding the long-term debt associated with Southern Union's Panhandle Eastern subsidiary. Based on that assumption, MGE set the cost of long-term debt, as of April 30, 2004, at 7.4342%.[15] Public Counsel used a cost of long-term debt of 7.397%.[16] The slight difference was attributed to rounding differences in the calculations. Staff, however, includes the debt issued by Panhandle Eastern when calculating Southern Union's cost of long-term debt. As a result, Staff recommends use of a cost of long-term debt of 6.151%.[17]

Panhandle Eastern's debt is the debt of a subsidiary company and is not the debt of Southern Union. That debt was raised by Panhandle Eastern for its own purposes and is rated separately by the rating agencies.[18] Furthermore, that debt is non-recourse to Southern Union. That means that the debt restricts the assets that the debt holders can use to satisfy the debt. In other words, if Panhandle

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[14] Dunn Rebuttal, Ex. 2, Page 27, Lines 5-17.

[15] Noack, True-Up Direct, Ex. 49, Schedule F1.

[16] Allen, True-Up Direct, Ex. 233, Schedule TA-3.

[17] Murray True-Up Direct, Ex. 860, Schedule 2.

[18] Dunn Rebuttal, Ex. 2, Page 25, Lines 11-15.

Eastern were to default on its debt, the debt holders would not be able to seize the assets of Southern Union to collect the debt.[19] In addition, a stipulation and agreement entered into by Southern Union, Staff, Public Counsel, and other parties in Case No. GM-2003-0238 – the case in which this Commission approved Southern Union's acquisition of Panhandle Eastern – provides that MGE is to be insulated from the impact of the acquisition of Panhandle Eastern.[20] For all these reasons, the Commission finds that the cost of long-term debt of Panhandle Eastern is properly excluded from the calculation of Southern Union's cost of long-term debt.

Since the differences between the cost of long-term debt as calculated by MGE and Public Counsel is simply based on rounding differences, the Commission will split the difference between the two percentages and use 7.4155% as the cost of long-term debt.

3. Return on Equity

Issue Description: *What is the appropriate return on equity in calculating MGE's cost of capital?*

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 Southern Union 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 that will be 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 MGE's ratepayers. In order to obtain guidance about that rate of return on equity is appropriate, the Commission must turn to the expert advice offered by financial analysts.

Three financial analysts offered recommendations regarding an appropriate return on equity in this case. MGE's witness John Dunn utilized a discounted cash flow (DCF) model to arrive at an initial return on equity estimate of 10.9% to 11.9%. Dunn then argued that the return on equity should be further increased to compensate for risks that are unique to MGE. Specifically, Dunn argued that MGE faces more risk because it is smaller than the average company in his proxy group; because its depreciation rates are substantially lower than those authorized for comparable companies; and because it faces greater regulatory risk because it operates in Missouri. Because of these extra risks, Dunn recommended a return on equity of approximately 12%.[21] Staff's witness David Murray primarily relying on a DCF model, arrived at a recommended a return on equity in the range of 8.52%

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[19] Allen Rebuttal, Ex. 201, Page 23, Lines 9-19.

[20] Dunn Rebuttal, Ex. 2, Page 23, Lines 18-26.

[21] Dunn Direct, Ex. 1, Page 60, Lines 19-20

to 9.52%, with a midpoint of 9.02%.[22] Public Counsel's witness Travis Allen also relying primarily on a DCF model, recommended that MGE be allowed a return on equity of between 9.01% and 9.34%.[23]

Obviously, despite the fact that all three experts are relying on essentially similar DCF models, there is a very wide range in recommended return on equity between MGE's witness and those of Staff and Public Counsel. However, there is one more number that the Commission must consider in establishing an appropriate return on equity. In a survey of regulatory decisions from around the country, as reported by Regulatory Research Associates, the average allowed return in the gas utility industry for 2002 and 2003 was 11%. For the first quarter of 2004, the average return on equity reported was 11.1%.[24] That is the market in which Southern Union will be seeking to raise capital.

Not surprisingly, the low rates of return on equity espoused by the witnesses for Staff and Public Counsel led MGE to aggressively challenge the credibility of Murray and Allen. MGE engaged the services of Dr. Roger Morin to challenge the recommendation of Murray. Dr. Morin is a Professor of Finance for Regulated Industry at the Center for the Study of Regulated Industry at Georgia State University. He has a Ph.D. in Finance and Econometrics at the Wharton School of Finance, University of Pennsylvania. Dr. Morin wrote the textbook, *Regulatory Finance*,[25] upon which the other witnesses rely in their own testimony. Dr. Morin's rebuttal testimony cites 15 specific criticisms of the methods Murray used to arrive at his recommendation and concludes that "Mr. Murray employs inappropriate and stale model inputs throughout his analysis, which causes him to recommend returns that are well below investors' required returns."[26] Dr. Morin did not, however, offer his own recommendation regarding an appropriate return on equity.

MGE did not engage Dr. Morin to challenge the recommendation of Public Counsel's witness Travis Allen. Instead, MGE attacked Allen's credibility based on his lack of experience regarding regulated utilities. Allen has a master of science degree in Business Economic and Finance with a specialization in Finance from Southern Illinois University – Edwardsville. However, his current position with Public Counsel is his first professional position after he earned his master's degree. He did not have any professional experience dealing with regulated utility finance before he began working for Public Counsel, and he filed his direct testimony in this case only two weeks after he started working for Public Counsel.[27] In response to MGE's criticism of Allen, Public Counsel engaged the services of John Tuck, a former Public Counsel employee and currently Senior Investment

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[22] Murray Direct, Ex. 825, Page 33, Lines 3-4.

[23] Allen Direct, Ex. 200, Page 16, Lines 10-11.

[24] Morin Rebuttal, Ex. 5, Page 10, Lines 6-11.

[25] Roger A. Morin, *Regulatory Finance* (1994).

[26] Morin Rebuttal, Ex. 5, Page 5, Lines 1-4.

[27] Transcript, Page 332, Lines 1-10.

Officer for the Public School and Non-Teacher School Employee Retirement Systems of Missouri,[28] to offer surrebuttal testimony to bolster the recommendation offered by Allen.

Whatever other credibility questions may be raised against the positions offered by Staff and Public Counsel, the fact is their recommendations are nearly 200 basis points lower than the national average return on equity. The Commission does not believe that it would be appropriate for its return on equity finding to unthinkingly mirror the national average. Obviously, if all commissions took that approach returns on equity would never change, despite changing economic facts, leading to unjust results. However, the national average is a good indicator of the capital market in which Southern Union will have to compete for the equity needed to finance MGE's operations. The Commission has an obligation under the law and well as a matter of practical necessity, to allow Southern Union an opportunity to earn a return that will allow it to compete in the capital market. No one, including ratepayers, benefits if MGE is starved for capital.

As indicated, the national average for return on equity is approximately 11%. Dunn's return on equity recommendation on behalf of MGE was 12%. The Commission will take that to mean that MGE believes a variation of 100 basis point above the national average would be appropriate. A variation of 100 basis points below the national average should also be appropriate. That means that the lowest reasonable return on equity would be 10%. The Commission will adjust that amount upward by 50 basis points to recognize that Southern Union's equity is more risky than that of the average gas company due to its debt heavy capital structure. The 50 basis point adjustment is based on the current spread between the average A bond rating for the comparable companies used in Murray's DCF analysis and Southern Union's BBB bond rating. That adjustment is described by MGE's witness, Dr. Morin, in his rebuttal testimony as a correction to the 32 basis point adjustment made by Murray.[29] After making that adjustment, the Commission arrives at a return on equity of 10.5%.

A return on equity of 10.5% is supported by the evidence presented in this case. First, Dunn's DCF analysis, if adjusted appropriately, will yield a number in the range of 10.5%. Dunn testified that his initial DCF analysis showed that a return in the range of 10.9% to 11.9% would be appropriate for his comparable companies.[30] He then increased his recommended return on equity to 12% to take into account what he asserted were additional risks associated with MGE beyond the risk associated with his comparable companies. The additional risks cited by Dunn are that MGE is smaller than the comparable companies, it experiences greater regulatory risk because it operates in Missouri, and its earnings are more volatile than those of his comparable group of companies.

None of those additional risks would justify Dunn's increase in his recommended return on equity. None of these risk factors are unique to MGE and they

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[28] Tuck Surrebuttal, Ex. 203, Page 1, Lines 7-8.

[29] Morin Rebuttal, Ex. 5, Page 8-9, Lines 18-23, 1-2.

[30] Dunn Direct, Ex. 1, Page 51, Lines 8-11.

do not justify a deviation from the rate of return that would be established by an examination of the comparable companies. The comparable companies might have other factors that would increase their risk that do not apply to MGE. That is why comparable companies are chosen as a proxy for making that sort of detailed comparison of risk between companies. Furthermore, Dunn's contention that MGE should receive a higher return on equity because it is regulated by the Missouri Commission is undercut by Dr. Morin's testimony that the Missouri Commission is perceived by the investment community as an "average, fair, reasonable, supportive" commission.[31]

If Dunn's upward adjustment is not made, his testimony indicates that a return on equity in the range of 10.9% to 11.9% would be fair and reasonable. 10.9% is at the bottom of that range, but it is still fair and reasonable. Dunn's recommended return on equity should be further adjusted by removing flotation costs, which he includes in his DCF study.

Flotation costs are related to the direct and indirect costs associated with the issuance of new equity. The direct costs are the costs associated with issuing and marketing the stock. The indirect costs represent the downward pressure on the stock price as a result of the increased supply of stock from the new issue. Dunn makes an upward adjustment in his calculations to include such flotation costs.

Flotation costs should not be recovered from ratepayers in this case because the issuance of equity planned, and announced by MGE, for which flotation costs would be incurred, results directly from MGE's need to increase its equity as a result of the acquisition of Panhandle Eastern Pipeline. Thus the inclusion of flotation costs would violate the stipulation and agreement by which the acquisition of Panhandle was approved. That stipulation and agreement provides:

> Southern Union will not recommend an increase or claim Staff should make an adjustment to increase the cost of capital for MGE as a result of the Transaction. Any increases in cost of capital Southern Union seeks for MGE will be supported by documented proof: (1) that the increases are a result of factors not associated with the Transactions; (2) that the increases are not a result of changes in business, market, economic or other conditions for MGE caused by the Transaction; or (3) that the increases are not a result of changes in the risk profile of MGE caused by the Transaction.[32]

MGE's own witness testified that the sale of equity for which MGE is seeking to include flotation costs is required to maintain Southern Union's bond rating.[33] If Southern Union had not taken on approximately $1.2 billion in additional debt in the acquisition of Panhandle Eastern, a stock offering would not likely have been

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[31] Transcript, Page 1707, Lines 2-5.

[32] Tuck Surrebuttal, Ex. 203, Page 45, Lines 9-15.

[33] Dunn Rebuttal, Ex. 2, Page 41, Lines 3-5.

necessary to preserve the company's bond rating.[34] Therefore, the flotation cost would be an increased cost of capital relating to the Transaction that could not be passed on to ratepayers by the terms of the stipulation and agreement. Dr. Morin, MGE's witness, agreed that it would not be appropriate for MGE to recover flotation costs for Southern Union's acquisition related equity.[35]

MGE proposed to increase Murray's return on equity by 30 basis points to add flotation costs.[36] Since flotation costs are not appropriate in this case, Dunn's return on equity could be reduced by 30 basis points to remove flotation costs. Removing 30 basis points from the low end of Dunn's recommendation leaves a return on equity of 10.6%. That is consistent with the 10.5% return on equity found to be appropriate by the Commission.

A return on equity of 10.5% is also supported by part of the analysis of Public Counsel's witness Travis Allen. Allen performed a Capital Asset Pricing Model (CAPM) analysis using 30-year treasury bonds as the risk-free rate – the risk-free rate endorsed by Dr. Morin[37] – that resulted in a return on equity of 10.27%.[38] That is in the vicinity of the 10.5%. Similarly, if the corrections to Murray's DCF analysis proposed by Dr. Morin are made, the result is a return on equity of between 10.4% and 11.4%.[39]

The Commission finds that 10.5% is a fair and reasonable return on equity for MGE that will allow Southern Union an opportunity to compete in the capital market for the funds needed to keep MGE healthy.

4. Cost of Preferred Stock

Issue Description: *What is the appropriate cost of MGE's preferred stock in calculating MGE's cost of capital?*

There was no disagreement about this issue. Staff, Public Counsel, and MGE agree that the appropriate cost of preferred stock as of April 30, 2004, is 7.758%. Therefore, the Commission finds that the cost of preferred stock is 7.758%.

5. Rate of Return Adder

Issue Description: *Should MGE be granted an additional 25 basis points of rate of return on account of its level of management efficiency?*

MGE asks the Commission to add 25 basis points to MGE's authorized rate of return in recognition of its high management efficiency. Thus if the Commission were to determine that the appropriate rate of return was 8%, MGE asks that the Commission authorize a rate of return of 8.25%.

MGE claims that such an adder is appropriate because MGE is currently operating very efficiently and should be rewarded for its efforts. In particular, MGE contends that it is providing good customer service and that its operating and maintenance expenses are low when compared to other Missouri local distribution

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[34] Tuck Surrebuttal, Ex. 203, Page 45, Lines 16-17.

[35] Transcript, Page 1688-1689, Lines 25, 1-8.

[36] Morin Rebuttal, Ex. 5, Page 11, Lines 12-14.

[37] Transcript, Page 1721, Lines 17-25.

[38] Allen Direct, Ex. 200, Schedule TA-9.

[39] Morin Rebuttal, Ex. 5, Page 41, Lines 20-23.

companies. MGE points out that the Commission made such an upward adjustment for management efficiency in at least two rate cases in the early 1980s[40] and that in MGE's last two litigated rate cases, the Commission made a downward adjustment to MGE's allowed return because of customer service problems.[41] MGE asks that the Commission recognize MGE's improved efficiency by bumping up its rate of return in this case.

MGE is correct that for a period in the early 1980s, the Commission had a policy of explicitly adjusting rates of return for the perceived efficiency or inefficiency of the utility. That policy actually began in a 1982 rate case for Missouri Public Service Company.[42] In that case the Commission was quite concerned about the company's failure to deal with a problem of unaccounted-for-water being lost from its water system. As a result, the Commission reduced the rate of return on the company's water rate base by a full percentage point.[43] A year later, in the cases cited by MGE, the Commission explicitly rewarded the affected utilities for management efficiency. Empire District Electric and Kansas City Power & Light Company were rewarded with a .4% increase to their return on equity.[44]

By 1986, however, the Commission had rejected that approach. In a Kansas City Power & Light rate case,[45] the Commission held as follows:

> In the Company's last rate case … the Commission awarded the Company a 40 basis point upward adjustment to its return on common equity for its efforts in improving management efficiency. … The Commission has reevaluated its prior order and determined it is not necessary nor appropriate to upwardly adjust the return on equity which has been found to be reasonable 'to encourage the provision of energy on the most efficient and economical basis possible.' Adequate encouragement is given through the recovery of all prudently incurred costs.[46]

The Commission again addressed the question of adjusting return based on management efficiency in a 1989 case, where the Commission explained that it was rejecting Staff's suggestion to set a company's rate of return at the low end of Staff's recommended range for alleged management inefficiency:

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[40] *In Re: Empire District Electric*, 26 Mo. P.S.C. (N.S.) 58 (1983) and *In Re: Kansas City Power & Light Company*, 26 Mo. P.S.C. (N.S.) 104 (1983).

[41] *In Re: Missouri Gas Energy*, 5 Mo.P.S.C. 3d 437 (1997) and *In Re: Missouri Gas Energy*, 7 Mo.P.S.C. 3d 394 (1998).

[42] *In Re: Missouri Public Service Company*, 25 Mo.P.S.C (N.S.) 136 (1982).

[43] *In Re: Missouri Public Service Company*, 25 Mo.P.S.C. (N.S.) 136, 177-180 (1982).

[44] *In Re: Empire District Electric*, 26 Mo. P.S.C. (N.S.) 58, 70 (1983), *In Re: Kansas City Power & Light Company*, 26 Mo. P.S.C. (N.S.) 104, 150 (1983).

[45] *In Re: Kansas City Power & Light Company,* 28 Mo.P.S.C. (N.S.) 228 (1986).

[46] *In Re: Kansas City Power & Light Company,* 28 Mo.P.S.C. (N.S.) 228 (1986).

> The Commission has determined that it is not appropriate to adjust the rate of return SWB will be authorized to earn for management decisions. Now the Commission has determined that where it has made adjustments to ROE in other cases, these types of adjustments can rarely be supported by sufficient evidence to warrant such a decision. The difficulty of deciding how much value a certain management decision has in terms of ROE makes the determination almost impossible. The evidence in this case provides no real guide to the Commission on how to value the various allegations of inefficient management. The more appropriate method for making adjustments to a public utility's revenue requirement is where specific dollar adjustments can be addressed, not by adjusting the ROE.[47]

Clearly, the Commission has moved away from the idea of adjusting a company's rate of return for perceived management efficiency or inefficiency.

MGE correctly points out that in MGE's last two litigated rate cases the Commission cited MGE's failure to provide quality customer service as the basis for allowing the company a lower rate of return than it might have otherwise received. In the 1997 case, the Commission set the authorized rate of return on equity at 11.3%, which was the low end of Staff's recommendation, because of a great increase in the number of customer complaints after Southern Union bought the MGE system in 1994. In comparison, MGE's expert witness in that case recommended a return on equity in the range of 11.5% to 12.5%. Public Counsel's expert recommended a return on equity of 10.75%.[48] Similarly, in the 1998 case, the Commission set the authorized rate of return on equity at 10.93%, which was the midpoint of the range recommended by Staff. In doing, so the Commission again cited MGE's continuing customer service problems as one reason, among several others, for accepting Staff's recommended return on equity. MGE's expert had recommended a return on equity of 12%, with Public Counsel recommending 10.7%.[49]

In those cases, the Commission appropriately took into consideration the quality of service provided by MGE in determining a just and reasonable rate of return for the company. In both cases the allowed rate of return was within the range supported by the testimony of financial experts. The Commission did not determine a just and reasonable rate of return and then reduce that rate to punish MGE. In sum, the Commission did not, by citing the poor customer service record of MGE, return to the practice of using adjustments to the rate of return to reward or punish utilities for efficient or inefficient management practice.

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[47] *Staff v. Southwestern Bell Telephone Company*, 29 Mo.P.S.C. (N.S.) 607, 654 (1989).

[48] *In Re: Missouri Gas Energy*, 5 Mo.P.S.C. 3d 437, 467-468 (1997).

[49] *In Re: Missouri Gas Energy*, 7 Mo.P.S.C 3d. 394, 401-404 (1998).

As the Commission found in 1986, and as was demonstrated in this case, a rate of return adder is inappropriate in concept and unworkable in practice. Conceptually, the Commission must determine a just and reasonable rate of return for the utility that it regulates. To then tack an additional percentage to the rate as a reward for efficiency means that the company would be receiving a rate of return that is higher than the just and reasonable rate. In essence, the Commission would be making a gift to the company from the ratepayer's pocket. Obviously, that is not acceptable.

As a practical matter, an adder is nearly impossible to support by any objective evidence. As was demonstrated in this case, there is really no way to determine with any degree of certainty that one company is more efficient than another. MGE attempted to do so by comparing its annual operating and maintenance expense to that of other Missouri gas companies.[50] However, as Staff pointed out, operating and maintenance expenses are subject to many variables and are not a good basis for determining management efficiency.[51] Although none of the evidence presented actually demonstrates that MGE is any more or less efficient than other gas companies, there was a lot of evidence filed on that question and its presentation took up a good deal of hearing time. The Commission does not wish to encourage a flood of indeterminate and ultimately pointless testimony on the question of management efficiency in future rate cases.

The Commission finds that a rate of return adder is not appropriate and will not be ordered in this case.

Operating Expense Issues

A second group of issues concerns the expenses that MGE incurred during the test year and will likely incur in the future. MGE asks to recover these expenses from its customers through the rates that will be established in this case.

6. Capacity Release/Off System Sales

Issue Description: *What, if any, is the appropriate level of capacity release/off-system sales revenues to be used in calculating MGE's cost of service? As an alternative to including capacity release/off-system sales revenues in the calculation of MGE's revenue requirement, should the PGA-based revenue sharing mechanism proposed by MGE be adopted?*[52]

As an LDC, MGE must purchase enough pipeline capacity from an interstate pipeline company to meet its customers' anticipated demand for natural gas. Pipeline capacity is essentially the space on the pipeline required to move the amount of gas that MGE will need to supply its customers. MGE recovers the cost of purchasing that pipeline capacity from its customers through the PGA (Purchased Gas Adjustment) mechanism. Pipeline capacity is generally purchased using long-term contracts based on peak capacity needs. Sometimes not all of the pipeline capacity is needed and MGE can sell the unused capacity to a third-party

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[50] Noack Direct, Ex. 8, Page 24, Lines 14-18, and Schedule G-1.

[51] Oligschlaeger Rebuttal, Ex. 829, Pages 3-4, Lines 22-23, 1-5.

[52] Although the issue refers to both capacity release and off-system sales, the dispute between the parties concerns only capacity release revenues.

that might need to transport gas on that pipeline at that time for its own purposes.[53] MGE is able to obtain some revenue each year from these sales.

MGE's current rates are based on the assumption that MGE will earn $1.2 million per year in capacity release revenue.[54] That amount was included as an offset in MGE's revenue requirement for purposes of calculating its rates. In other words, MGE's rates were set based on an assumption that it would earn $1.2 million per year from capacity release sales. If the company earned more than $1.2 million, it was able to keep the extra income. But, if it earned less than $1.2 million, MGE would have a revenue shortfall. As a result, the company has an incentive to maximize its capacity release sales, to the benefit of both the company and its ratepayers. Because it has an incentive to maximize capacity release sales, MGE aggressively markets its available capacity to potential buyers.[55]

Based on a past three-year average of MGE's capacity release earnings, Staff recommends that the Commission include $1,340,400 per year for capacity release revenue in MGE's revenue requirement for this case.[56] Public Counsel also analyzed the last three years of earnings and recommends that the Commission include $1,500,000 per year for capacity release revenue.[57]

MGE argues that the past is not a good guide to predict future capacity release revenue because a new pipeline is about to go into operation, which may drastically reduce the revenue MGE is able to achieve from capacity release sales. Much of MGE's current capacity release revenue is derived from sales on the Kinder Morgan Pony Express Pipeline.[58] The Cheyenne Plains Pipeline is scheduled to begin operations in January 2005, in competition with Kinder Morgan. Since Cheyenne Plains is larger than Kinder Morgan, and since its rates are expected to be lower, MGE is concerned that Cheyenne Plains may reduce or eliminate the market for release of MGE's capacity on Kinder Morgan.[59] If that happens, MGE would not be able to earn the anticipated revenues that have been included in its rates and, as a result, would suffer a revenue shortfall.

To avoid such a revenue shortfall, MGE proposes that capacity release revenue be included in the PGA mechanism. That way MGE would avoid any risk of revenue shortfall. In order to retain an incentive to maximize capacity release revenue, MGE asks that the Commission establish a sharing grid to allow MGE to retain a portion of each dollar earned through the sale of capacity release.

MGE requests that the Commission include the following language in its order to allow MGE to implement a capacity-release-sharing-grid in its PGA:

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[53] Hayes Rebuttal, Ex. 17, Page 7, Lines 8-12.

[54] Busch Direct, Ex. 211, Page 6, Lines 1-10.

[55] Transcript Pages 1474-1475, Lines 8-25, 1-8.

[56] Allee Direct, Ex. 800, Page 5, Lines 5-17.

[57] Busch Direct, Ex. 211, Page 9, Line 14. Public Counsel refers to this number as highly confidential but during the hearing – transcript page 1570, lines 18-20 – MGE indicated that total dollars of sales per month or year are not confidential.

[58] Transcript Page 1543, Lines 10-17.

[59] Hayes Rebuttal, Ex. 17, Page 9, Lines 4-18.

> MGE shall be authorized to implement, through its PGA mechanism, a revenue sharing grid pursuant to which revenues generated by capacity release and off-system sales (net of revenues from off-system sales made for "system protection" purposes) shall be shared between MGE and its customers as follows:
>
> First $300,000 – 15% to MGE and 85% to customers
>
> Second $300,000 – 20% to MGE and 80% to customers
>
> Third $300,000 – 25% to MGE and 75% to customers
>
> Above $900,000 – 30% to MGE and 70% to customers.
>
> Any excess capacity disallowance resulting from an actual cost adjustment ("ACA") proceeding shall be offset by capacity release revenues before application of the above sharing grid and before any shareholder funding may be required.[60]

Staff and Public Counsel argue that the capacity release revenue should remain in base rates. They contend that MGE has failed to present sufficient evidence to justify a conclusion that MGE will be unable to match its past capacity release revenue in coming years. They discount as mere speculation the suggestion that the new Cheyenne Plains pipeline will decrease MGE's revenues.

The Commission agrees with MGE that the capacity release revenue should be considered as part of the PGA rather than as an offset to revenue requirement. Staff's witness Anne Allee conceded at the hearing that the Cheyenne Plains pipeline will be going into service in competition with Kinder Morgan.[61] When the new pipeline goes into service, the demand for release of MGE's capacity on the Kinder Morgan pipeline is likely to decrease, along with the price that MGE can demand for the release of that capacity. It is a basic economic principle that when supply increases, prices in the market are likely to decline. The upcoming changes in the market make MGE's historical level of capacity release revenue an unreliable indicator of the amount of revenue that MGE can reasonably be expected to earn in the future.

Since the past is not a reliable indicator of future revenue, any amount of capacity release revenue that the Commission could ascribe to MGE's revenue requirement would be based on unsupported speculation. The inclusion of any speculative amount in revenue requirement would be unfair to MGE if it was set too high and MGE was unable to earn the designated amount. Similarly, if the amount is set too low and MGE's revenues do not decrease as much as feared, MGE's customers would be unfairly deprived of revenue while MGE collected a windfall.

Placing the capacity release revenue into the PGA is a logical and convenient solution to this problem. Those revenues have been handled through MGE's PGA

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[60] Noack Corrected Rebuttal, Ex. 10, Page 28-29, Lines 16-22, 1-13.

[61] Transcript, Pages 1554-1556.

process in the past; only in the last three years have they been placed in the company's revenue requirement.[62] Capacity release revenues are directly related to pipeline transportation costs, which are a normal component of the PGA process.[63] Furthermore, other LDCs in Missouri already handle their capacity release revenue through their PGA processes.[64]

If the Commission disagrees with their proposals to include capacity release revenue as an offset to MGE's revenue requirement, Staff and Public Counsel are willing to accept the movement of the capacity release revenue into the PGA. However, they oppose the inclusion of any sharing grid in the PGA. Staff and Public Counsel contend that a sharing grid in the PGA would allow MGE to benefit from every dollar of capacity release while shouldering no risk. Since the ratepayers have already paid for the capacity that is being sold, Staff and Public Counsel believe that it would be unfair to allow MGE to benefit from those sales.[65]

Although MGE's ratepayers have undeniably paid for the capacity that is being released, sales of capacity do not just happen. Those sales occur because MGE's employees aggressively market the available pipeline capacity. Under the current system, MGE has a strong incentive to maximize sales of available capacity. If it does not, it faces either a revenue shortfall, or it foregoes income that it can keep. If capacity release income is placed in the PGA mechanism without any sort of sharing mechanism, then MGE is essentially told to do that work for free. As a result, it loses much of its incentive to maximize those sales.

It is easy to say that ratepayers pay the salary of MGE's employees and that ratepayers should expect aggressive marketing of that capacity even if the company cannot benefit from those sales. However, it is unrealistic to believe that MGE will put as much effort into marketing available capacity if it can achieve no benefit from doing so. Yes, the Commission has a stick that it can wield over MGE to encourage it to aggressively market its available capacity: it can adjust MGE's PGA recovery if it finds that the company has not sufficiently marketed its available capacity. However, that would entail the difficult task of proving how much revenue MGE could have obtained if it had tried harder to market available capacity. The Commission does not wish to undertake that daunting task when a simple incentive mechanism is sufficient to ensure that MGE markets available pipeline capacity as aggressively as possible, to the benefit of both ratepayers and the company's shareholders.

> MGE's proposed capacity release tariff language also provides that:
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> Any excess capacity disallowance resulting from an actual cost adjustment ('ACA') proceeding shall be offset by capacity

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[62] Transcript, Page1548, Lines 8-21.

[63] Transcript, Page 1549, Lines 18-24.

[64] Transcript, Page 1559, Lines 9-13.

[65] Allee Surrebuttal, Ex. 802, Page 4, Lines 18-19.

> release revenues before application of the above sharing grid and before any shareholder funding may be required.[66]

Staff contends that this language is a backdoor attempt by MGE to avoid the effect of a PGA adjustment proposed by Staff in another case, in which Staff alleges that MGE has purchased excess capacity beyond what it would need to meet even peak day demands.[67]

The Commission agrees with Staff. The provision that would mandate the offset of a capacity disallowance against capacity release revenue is inappropriate. The capacity disallowance that this provision would affect is unrelated to capacity release revenue. If such a disallowance were required by the Commission, it would be because MGE had failed to properly plan for its peak day gas needs and had purchased more capacity than it would ever reasonably expect to need. In that circumstance, MGE's shareholders should be expected to pay for the cost of that imprudence without passing that cost off to the ratepayers through an offset of revenues obtained from revenue release sales.

The Commission will approve MGE's proposal to implement a revenue sharing grid through the PGA. It will, however, reject that portion of MGE's proposal that would offset any excess capacity disallowance against capacity release revenues.

7. Environmental Response Fund

Issue Description: *Should the environmental response fund proposed by MGE be adopted and what, if any, level of environmental costs should be used in calculating MGE's cost of service?*

MGE will, in the future, incur an unknown, and unknowable, amount of financial liability for the cleanup of environmental hazards left over from the operation of manufactured gas facilities 50 to 100 years ago. Manufactured gas facilities were used before the advent of interstate natural gas pipelines in the 1940s. Before there were interstate pipelines, gas could not be transported over long distances so gas companies manufactured gas by heating coal or oil and collecting the gas that was driven off in the process. A toxic tar was left over from this process and was frequently dumped on-site at the manufactured gas plant.[68]

Manufactured gas plants were located in various cities in MGE's service territory and the leftover toxic tar is now causing environmental problems requiring that it be cleaned up. Federal law, specifically the Comprehensive Environmental Compensation and Liability Act (CERCLA), also known as Superfund, imposes strict, joint and several liability on present or former owners or operators of facilities where hazardous wastes were released into the environment.[69] MGE owns six sites in Missouri for which it may be required to pay cleanup costs under CERCLA. There are fourteen additional sites that MGE does not now own but for which it may face liability.[70]

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[66] Noack Corrected Rebuttal, Ex. 10, Page 29, Lines 9-11.

[67] Allee Surrebuttal, Ex. 802, Page 7, Lines 8-15.

[68] Noack Surrebuttal, Ex. 11, Schedule MRN-3.

[69] Bolin Direct, Ex. 204, Pages 9-10, Lines 19-22, 1-12.

[70] The list of sites for which MGE may be responsible is highly confidential but may be found at Bolin Direct, Ex. 204HC, Schedule KKB-2.

Since it purchased the gas system that is now operated by MGE in 1994, Southern Union has expended approximately $9.3 million in cleanup costs related to manufactured gas plants in Missouri.[71] However, Southern Union has been able to obtain reimbursement for these costs from other sources, including from insurance policies that were purchased many years ago by The Gas Service Company, a previous operator of the natural gas distribution system now operated by MGE.

In addition, when Southern Union purchased the system now operated by MGE, it entered into an Environmental Liability Agreement with the previous owner, Western Resources, Inc. by which the buyer and seller agreed to share liability for environmental cleanup costs for which reimbursement could not be obtained from insurance, or other third parties.[72] That agreement provides that Southern Union would be solely responsible for the first $3 million in unreimbursed costs and that the companies would equally share liability for additional unreimbursed costs up to $15 million until 2009.

Using insurance proceeds and the $3 million it set aside when it purchased MGE's system, Southern Union has thus far avoided paying out any unreimbursed costs for manufactured gas plant cleanup costs in Missouri.[73] As a result, MGE is not seeking to recover any such costs in this case. However, the $3 million set aside when Southern Union purchased the MGE system is nearly exhausted and, as a result, Southern Union expects to face unreimbursed costs in the future.

MGE proposes to create an environmental response fund to deal with these future expenses. The environmental response fund is essentially a tracking mechanism designed to avoid a mismatch between expenses and revenues. MGE proposes to include $750,000 per year in its revenue requirement for collection from ratepayers. That $750,000 would be paid into the environmental response fund and then paid out to cover cleanup expenses as they occur. Staff and Public Counsel would then have an opportunity to audit the fund to determine whether the expenses paid by MGE were prudently incurred.[74]

MGE also proposes that any insurance proceeds or contributions from Western Resources that it may obtain be shared 50/50 between the company and ratepayers. In other words, if MGE were to obtain $100,000 in reimbursement from an insurance company for an environmental cleanup cost, the environmental response fund would be credited with $50,000 and MGE would retain the other $50,000.[75]

Staff and Public Counsel oppose the creation of an Environmental Response Fund. The Commission agrees. The cleanup costs for which MGE seeks to establish the Fund are not yet known and measurable. Indeed, there is no certainty

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[71] Noack Surrebuttal, Ex. 11, Page 9, Lines 9-11.

[72] A copy of the Environmental Agreement may be found at Bolin Rebuttal, Ex. 205, Schedule KKB-16.

[73] The details of the costs and reimbursements may be found in Ex. 855HC.

[74] Noack Surrebuttal, Ex. 11, Pages 6-7, Lines 21-22, 1.

[75] Harrison Rebuttal, Ex. 814, Page 6, Lines 13-20.

that Southern Union or MGE will ever have to pay any costs associated with these cleanup efforts. Thus far the expenses that Southern Union has paid have been covered by insurance or from money set aside for that purpose at the time Southern Union purchased the MGE system.[76] In the future, at least until 2009, costs not covered by insurance will be paid, in part, by Western Resources under the Environmental Liability Agreement between those companies. In sum, MGE's proposal to include $750,000 per year in its cost of service for future environmental cleanup costs is based entirely on speculation regarding costs that the company may never incur.

Furthermore, the creation of a pre-funded source for the payment of these cleanup costs would remove much of Southern Union's incentive to ensure that only prudently incurred and necessary costs are paid. If the money has already been recovered from ratepayers and is being held in the Fund, Southern Union would have little incentive to not pay it out to settle claims brought against it. The Fund would be subject to audit by Staff and Public Counsel and they could seek a prudence adjustment if necessary. But the need for a prudence adjustment is difficult to prove and is not a good substitute for the company's own desire to prudently minimize its costs to improve its bottom line. For these reasons, the Commission finds that MGE's proposal to create an Environmental Response Fund should be rejected.

Public Counsel also argues that, aside from the rejecting the prospective Environmental Response Fund, the Commission should find that MGE will not be allowed to recover environmental cleanup costs related to manufactured gas plants under any circumstances. Public Counsel contends that these cleanup costs relate to facilities that are no longer used and useful to MGE's ratepayers and on that basis should not be paid for by ratepayers. Since MGE is not seeking to recover any such costs in this proceeding and the Commission is rejecting the creation of the Environmental Response Fund on other grounds, the Commission need not further address that question and will not do so.

8. Lobbying/Legislative costs

Issue Description: *What is the proper ratemaking treatment of lobbying/legislative activities in calculating MGE's cost of service?*

Staff and Public Counsel contend that MGE should not be allowed to recover in rates its cost of lobbying the Legislature. MGE does not contest that general proposition and it does not seek to include the cost of hiring outside, contract lobbyists in its cost of service. Neither does it seek to recover the dues it pays to the Missouri Energy Development Association (MEDA), a lobbying organization.[77] The dispute concerns Staff's and Public Counsel's recommendation to also exclude 100% of the salary of Paul Snider, the company's legislative liaison, and 10% of the salaries of company president, Jim Oglesby, and legal counsel, Rob Hack, on the theory that they also engage in lobbying activities on behalf of MGE.

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[76] Transcript, Page 1865, Lines 6-17.

[77] Noack Corrected Rebuttal, Ex. 10, Page 13, Lines 16-18.

The parties agree that this Commission has defined lobbying as any attempt to influence the decisions of regulators or legislators.[78] Staff and Public Counsel also contend that FERC's Uniform System of Accounts requires that all lobbying costs – both internal and external – be recorded "below the line" for ratemaking purposes.[79] That means that lobbying costs would not be included in MGE's revenue requirement for ratemaking purposes and that those costs would be borne by shareholders rather than ratepayers. MGE does not dispute that lobbying costs are to be paid by shareholders. It does, however, dispute Staff's and Public Counsel's conclusions about how much of the contested salaries should be excluded from revenue requirement. MGE did not provide any detailed information about the amount of time Snider spends lobbying but contends that he has job duties that are not related to lobbying and that therefore a 100% exclusion of his salary is not appropriate. It also contends that the proposed exclusion of 10% of the salaries of Oglesby and Hack is not supported by the evidence.

The problem is that there is no way to really know how much of the time of Snider, Oglesby, and Hack is spent lobbying. MGE does not keep detailed time records that separately account for the lobbying activities of its employees.[80] Staff and Public Counsel admit that their estimations of the time the three employees spend on lobbying is just an educated guess based on available time records and calendars. However, specific information that would allow a more precise determination of the amount of time these employees spend lobbying does not exist because MGE has failed to properly account for lobbying activities by its employees.

Since MGE has not properly accounted for the lobbying activities of its employees, the Commission must make adjustments based on the limited information that is available. The evidence presented to the Commission indicates that Snider, Oglesby, and Hack spend some amount of time engaged in lobbying. The Commission's inability to determine the exact amount of time that they spend in lobbying must be laid solely to MGE's failure to properly account for their time. Staff's proposal to exclude 10% of the salaries of Oglesby and Hack is reasonable and is accepted. However, the evidence established that Snider has substantial job duties relating to public affairs and press relations, aside from his lobbying activities.[81] As a result, excluding 100% of his salary would be unfair. The Commission finds that 50% of Snider's salary should be excluded as related to lobbying activities.

9. Incentive Compensation

Issue Description: *What, if any, is the appropriate level of MGE's incentive compensation expense to be used in calculating MGE's cost of service? What, if any, is the appropriate level of Southern Union's allocated incentive compensation expense to be used in calculating MGE's cost of service?*

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[78] *In Re: Kansas City Power & Light Company*, 24 Mo P.S.C. (N.S.) 386, 400 (1981).

[79] Hyneman Surrebuttal, Ex. 817, Page 3, Lines 23-27.

[80] Transcript, Pages 1172-1173, Lines 15-25, 1-6.

[81] Transcript, Pages 1963-1967.

Southern Union's compensation plan for its non-union employees includes an amount of incentive compensation to be paid to those employees if Southern Union and MGE meet certain goals. The incentive compensation is offered in addition to an employee's base salary. Specifically, the incentive plan contains financial goals relating to the earnings of Southern Union as a whole, and MGE as a division. Together, the financial goals make up 90% of the total incentive compensation plan.[82] The plan also offers an incentive relating to customer service. That portion of the plan rewards employees if a specified average speed of answer is achieved at MGE's call center. The customer service incentive makes up 5% of the total incentive compensation plan.[83] Finally, the plan offers an incentive relating to safety that rewards employees if the average time for response to gas leaks is below a specified threshold. The safety incentive also makes up 5% of the total incentive compensation plan.[84]

Staff and Public Counsel argue that the Commission should exclude from MGE's cost of service the incentive compensation that the company pays at the divisional and corporate level for achieving the company's financial goals. As indicated, the financial portion makes up 90% of the total incentive compensation plan. Public Counsel, but not Staff, would also exclude the cost of the customer service goal.

Staff and Public Counsel contend that incentive compensation based on meeting the financial goals of the company benefits shareholders and not ratepayers. On that basis, they would require the shareholders to pay the costs of the incentive compensation plan by excluding those costs from the company's revenue requirement for ratemaking purposes. Public Counsel opposes inclusion in rates of the customer service portion of the incentive compensation plan because it believes that the average speed of answer at which employees receive extra compensation is set slower than the industry average and therefore is not a fair basis for awarding additional compensation to MGE's employees.[85]

MGE replies that its compensation plan is simply a portion of the means that it has chosen to pay its employees. It contends that nothing in the incentive compensation plan would harm ratepayers. On the contrary, MGE contends that its incentive compensation plan encourages the efficient operation of the company to the benefit of both shareholders and ratepayers. MGE argues that it needs its incentive compensation plan to be able to compete with other companies for top employees. Furthermore, it contends that its decision to either pay its employees a straight salary or to offer incentives is simply a matter for its business judgment and should not be of concern to the Commission.

The Commission agrees with Staff and Public Counsel that the financial incentive portions of the incentive compensation plan should not be recovered in rates. Those financial incentives seek to reward the company's employees for

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[82] Transcript, Page 1611, Lines 1-5.

[83] Transcript, Pages 1608-1609, Lines 24-25, 1.

[84] Transcript, Page 1608, Lines 21-23. The entire plan may be found as an HC attachment to Bolin Rebuttal, Ex. 205HC, Schedule KKB-15.

[85] Bolin Direct, Ex. 204HC, Page 15, Lines 8-10.

making their best efforts to improve the company's bottom line. Improvements to the company's bottom line chiefly benefit the company's shareholders, not its ratepayers. Indeed, some actions that might benefit a company's bottom line, such as a large rate increase, or the elimination of customer service personnel, might have an adverse effect on ratepayers.

If the company wants to have an incentive compensation plan that rewards its employees for achieving financial goals that chiefly benefit shareholders, it is welcome to do so. However, the shareholders that benefit from that plan should pay the costs of that plan. The portion of the incentive compensation plan relating to the company's financial goals will be excluded from the company's cost of service revenue requirement.

Public Counsel's argument for excluding the cost of the customer service portion of the incentive compensation plan is not well founded. Public Counsel's position is based on a 1998 call center evaluation study that was commissioned by MGE, and conducted by Theodore Barry and Associates.[86] That study indicates that the industry average speed of answer was 60 seconds.[87] The speed of answer for which the incentive compensation plan would reward employees is slower than 60 seconds and Public Counsel contends that MGE's employees should not be rewarded for achieving a goal that is slower than industry average.

The problem with Public Counsel's argument is that it relies entirely on a finding of industry average contained in a study completed in 1998, using data from 1996 and 1997. There is no evidence in this record that would demonstrate that the industry average in 1998 is still the industry average in 2004. A lot has changed in the natural gas industry in the last six or seven years, and it is certainly reasonable to believe that the industry average speed of answer may also have changed in that time. Admittedly, the 1998 study is the latest study available regarding MGE's call center, but that does not make it any more reliable in 2004. There is simply not enough evidence in the record to conclude that MGE's customer service incentive standard would reward below average speed of answer times in 2004. On that basis, the cost of the portion of the company's incentive compensation relating to customer service will be included in the company's cost of service revenue requirement.

10. Corporate Expenses: New York Office

Issue Description: *What, if any, is the appropriate level of cost associated with Southern Union's New York office to be used in calculating MGE's cost of service?*

Southern Union's corporate offices are located in Wilkes-Barre, Pennsylvania, and MGE's divisional offices are located in Kansas City, Missouri. However, Southern Union also maintains executive offices in New York City for the use of its Chairman, George Lindemann, and Vice-Chairman, John Brennan. The New York office is also used by other company executives when conducting business in New York. The office space is sublet from Activated Communications, Inc., an entity owned by Lindemann and his family, and by Brennan.[88] The cost to Southern Union

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[86] The entire study is attached to Bolin Rebuttal, Ex. 205 as Schedule KKB-4.

[87] Bolin Rebuttal, Ex. 205, Schedule KKB-4, Page 6 of 23.

[88] Hyneman Surrebuttal, Ex. 817, Page 31, Lines 7-13.

of subleasing the New York office in 2003 was $690,000.[89] Staff, supported by Public Counsel, argues that allowing Lindemann and Brennan to maintain an office in New York is not a benefit to MGE's ratepayers and that the costs associated with Southern Union's New York office should therefore be excluded from MGE's cost of service for ratemaking purposes.

MGE replies that the New York office are more than just the offices of Lindemann and Brennan: they are also used by Southern Union to meet with Wall Street investors and with other members of the New York financial community. Having a New York office helps Southern Union in its efforts to attract capital, and thus benefits ratepayers as well as shareholders.[90]

While the evidence indicates that Southern Union's executives frequently use the New York office to meet with the New York financial community, it is apparent that those meetings could be conducted at other locations. Certainly, not all utilities see the need to maintain offices in New York just to have a convenient place to meet Wall Street bankers. It is also troubling that Southern Union sublets the New York office space from a non-regulated company owned by Lindemann, and his family, and Brennan. Certainly, the possibility exists that Southern Union's sublease could be used to unfairly thrust part of the cost of Activated Communications' office onto the backs of MGE's ratepayers.

The evidence indicates that Southern Union maintains an office in New York City primarily for the convenience of its chairman and vice-chairman. Maintaining that office is not a prudent expenditure necessary to provide service to MGE's ratepayers in Missouri. On that basis, the cost of maintaining a New York office will be excluded from MGE's cost of service for ratemaking purposes.

11. Corporate Expenses: Lindemann/Brennan Salaries

Issue Description: *What is the appropriate amount of salaries for Southern Union's Chief Executive Officer/Chairman of the Board and Vice Chairman of the Board to be used in calculating MGE's cost of service?*

This issue is closely related to the previous issue regarding Southern Union's New York City office. As the Commission found for that issue, George Lindemann is the Chairman of the Board for Southern Union and John Brennan is Vice-Chairman. Lindemann also holds the title of Chief Executive Officer for Southern Union. Lindemann and Brennan, along with Tom Karam, who is President and Chief Operating Officer of Southern Union, serve on the Executive Committee of the Southern Union's Board of Directors. The Executive Committee of the Board has the authority to exercise many of the powers of the Board of Directors between meetings of the full board.[91]

Staff, supported by Public Counsel, would limit the recovery in rates of the salaries that Southern Union pays to Lindemann and Brennan. For purpose of inclusion of the corporate joint and common costs ascribed to MGE, Staff would limit each man's salary to $100,000, which is more than three times the salary allowed

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[89] Hyneman Surrebuttal, Ex. 817, Page 31, Lines 14-18.

[90] McLaughlin Rebuttal, Ex. 18, Pages 8-9, Lines 18-22, 1-10.

[91] McLaughlin Rebuttal, Ex. 18, Page 6, Lines 1-15.

to other board members.[92] Staff would also eliminate the costs of Lindemann's and Brennan's administrative support staff in the New York office.

Staff would impose this limit because it believes that Lindemann and Brennan are active board members, but are not actually involved enough in the day-to-day operations of the company to justify a larger salary. Staff supports this position by pointing out that Lindemann and Brennan maintain offices in New York, rather than at the corporate headquarters in Wilkes-Barre, Pennsylvania. Furthermore, Staff argues that Lindemann's and Brennan's calendars reveal that they spend most of their time at their homes in Florida rather than at Southern Union's offices.

MGE replies that Lindemann and Brennan lead Southern Union's executive management team. Lindemann is also chief executive officer of the company. Because of their contributions as managers who help promote fiscal discipline throughout Southern Union, which benefits both customers and shareholders, MGE contends that their salaries should be allowed in cost of service. MGE argues that Lindemann and Brennan are quite capable of leading the company from their homes in Florida.

The evidence supports Staff's adjustment. Lindemann's and Brennan's calendars reveal that they spend very little time at Southern Union's corporate offices. Although they can keep in touch by telephone, e-mail, and many other modern conveniences, their distance from the corporate office indicates that they are not heavily involved in the day-to-day operations of the corporation. Both men are also involved in owning and operating other business interests. Clearly, they do provide service to Southern Union as involved board members, and Staff's adjustment properly recognizes that level of service. However, neither man is so involved in the day-to day operations of Southern Union as to justify an annual salary larger than the $100,000 allowed by Staff. The costs of Lindemann's and Brennan's administrative support staff in the New York office will also be eliminated.

Revenue Allocation Issues

Once the Commission has determined the amount of revenue that MGE will be authorized to earn, it must determine the means by which that revenue will be collected from customers. Furthermore, it must determine the share of that revenue that MGE will collect from each customer class. That is the next set of issues.

12. Class Revenue Responsibility

Issue Description: *What is the appropriate level of revenue responsibility for each customer class to be used in calculating revenue?*

Class Cost of Service Issues:

This issue concerns the proper allocation of revenue responsibility among MGE's four revenue-producing classes: Residential, Small General Services, Large General Services, and Large Volume Services. In other words, what percentage of MGE's total revenue requirement should each class be required to pay?

An allocation of revenue among the various classes begins with a class cost of service study. Such studies seek to assign cost responsibility based on cost

[92] Hyneman Direct, Ex. 816, Page 30, Lines 18-24.

causation principles by classifying all cost elements as customer-related, demand-related, or commodity-related. The guiding principle is that the class that causes the cost should be required to pay rates that will allow the utility to recover that cost. For a local distribution company like MGE, the vast majority of cost of service elements will be either customer or demand related.

There are two full class cost of service studies in the record: those of MGE and Public Counsel. In addition, the Federal Agencies' witness Gary Price evaluated the other studies and corrected a mathematical error in MGE's study. MGE's witness acknowledged his error in his surrebuttal testimony, and during the hearing, and agreed that Price's rebuttal testimony shows the corrected numbers for MGE's study.[93] The intervenor group comprised of Midwest Gas, UMKC, CMSU and Jackson County supports the use of the MGE study, as corrected, as the best available class cost of service study.[94] However, that group contends that MGE's study still overstates the costs attributed to the large volume service customers – largely because the large volume service customers are transportation service only customers – it just does so less than the other studies.[95]

The percentage of revenue derived from each class under the various studies is shown in the following chart:[96]

Description	Residential	Small General Service	Large General Service	Large Volume Service	Total
Current Rate Revenue Percentage	69.80 %	20.56%	1.99 %	7.65 %	100.00 %
MGE COS (corrected)	75.37 %	17.09 %	1.00 %	6.54 %	100.00 %
Public Counsel COS	62.95 %	21.79 %	1.43 %	13.83 %	100.00 %
Federal Agencies	75.09 %	17.87 %	0.80 %	6.24 %	100.00 %

The differences between the cost studies largely derives from a disagreement on how to allocate the cost of mains, which are MGE's largest investment, representing about 39% of its total plant in service.[97] MGE uses a zero-intercept method to classify 34.7% of the investment in mains as being customer-related and 65.3% as demand-related. Public Counsel uses a relative system utilization methodology – know by the acronym RSUM – to classify investment in mains as entirely demand related.

[93] Cummings Surrebuttal, Ex. 26, Pages 30-31, Lines 20-22, 1-2. Transcript, Page 2048, Lines 17-23.

[94] Initial brief at page 13.

[95] Johnston Rebuttal, Ex. 600, Pages 8-10.

[96] This chart is based on that appearing as Table 4, Price Rebuttal, Ex. 500, Page 13.

[97] Cummings Rebuttal, Ex. 25, Page 23, Lines 20-21.

The zero-intercept method used by MGE recognizes that when a main is built to reach a customer, a certain portion of the cost of the main will be incurred no matter how much gas the customer uses. Thus the cost of a zero inch main would be the customer-related portion of the cost of the main. The extra cost derived from installing larger mains, mains that are large enough to meet peak demand, would be the demand-related portion of the cost of the main.[98]

Public Counsel's witness James Busch testified that he allocated the cost of mains using a modified RSUM. Public Counsel's method seeks to identify the portion of capacity that corresponds to each month's demand and then allocate the costs that correspond to that capacity to the customers that use gas in that month.[99] Public Counsel's method allocates mains costs based only on demand and does not allocate any cost of mains to customer-related costs.[100] Public Counsel contends that its method recognizes that mains are in the ground to provide service throughout the year and not just at peak demand.[101] Peak demand on MGE's system is driven by residential customers[102] so minimizing the effect of peak demand tends to reduce the residential class' share of costs.

This is not the first case in which Public Counsel has used the modified RSUM method to allocate costs. In its consideration on remand of a prior MGE rate, the Commission rejected Public Counsel's RSUM method as over-allocating costs to the large volume service class.[103] The Commission will again reject Public Counsel's RSUM method as inappropriate.

Public Counsel's method, by treating all mains costs as demand related, ignores the fact that unless mains are constructed, at a cost, customers would not have access to the gas distribution system.[104] Furthermore, any gas distribution system must be built to accommodate peak demand, and peak demand on MGE's system is driven by residential heating. Public Counsel's cost allocation method fails to recognize that fact and under allocates the cost of those mains to the residential and small general service customers that cause the systems peak requirement.[105] MGE's zero-intercept method recognizes the different nature of these costs and is a preferable method. As a result, the Commission finds that the class cost of service study presented by MGE, as modified by the Federal Agencies' witness provides the best estimate of the actual revenue that might appropriately be derived from each class.

Revenue Requirement to be Assigned to Each Class:

The class cost of service studies are just the starting point in the Commission's determination of the amount of revenue that should be recovered from each class.

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[98] Cummings Direct, Ex. 23, Page 25-26, Lines 8-23, 1-7.

[99] Busch Direct, Ex. 212, Page 5, Line 19-22.

[100] Busch Rebuttal, Ex. 213, Pages 2-4.

[101] Busch Surrebuttal, Ex. 214, Page 3, Line 9-15.

[102] Ex. 610.

[103] *In Re: Missouri Gas Energy,* 10 Mo.P.S.C. 3d 1, 27 (2001).

[104] Cummings Rebuttal, Ex. 25, Page 25, Lines 3-8.

[105] Price Rebuttal, Ex. 500, Page 10, Lines 5-9.

As MGE's witness explained:

> The simple fact is that any cost of service study necessarily entails simplifications and judgments. As a result, no study should be considered anything more than a guide to the regulatory authority as it decides how a revenue increase should be distributed among customer classes.[106]

Class cost of service studies serve as a guide to the ultimate goal of just and reasonable rates, but the Commission does not need to slavishly adhere to any particular study.

Not surprisingly, the parties have varying recommendations about how to divide up the revenue recovery assignments. Public Counsel recommends that the percentage of the revenue requirement to be recovered from the residential and large general service classifications be held constant, while the bulk of the increased revenue is recovered from the Large Volume Class.[107] MGE recommends that the Commission determine rate increases based on MGE's class cost of service, or if it doesn't wish to do that, by simply allocating the revenue increase to customer classes based on current revenue percentages.[108] Midwest Gas, UMKC, CMSU, and Jackson County recommend that the percentage paid by the large volume class should be no larger than the level recommended in the MGE cost of service study, as corrected by the Federal Agencies witness Price.[109] Staff simply suggests that any rate increase be apportioned to the classes equally.[110] Finally, the Federal Agencies recommend that the large general services class receive an increase that is only 75% of the increase allocated to the other classes.

The Federal Agencies' witness, Gary Price, includes the following table in his testimony:[111]

Description	Residential	Small General Services	Large General Services	Large Volume Service	Total
Current Rate Revenue	69.80 %	20.56 %	1.99 %	7.65 %	100.00 %
Federal Agencies COS	75.09 %	17.87 %	0.80 %	6.24 %	100.00 %
Difference as a Percentage	7.57 %	-13.09 %	-59.94 %	-18.32 %	

[106] Cummings Surrebuttal, Ex. 26, Page 33, Lines 4-7. The Federal Agencies' witness, Gary Price, expresses the same opinion at Price Rebuttal, Ex. 500, Pages 4-5, Lines 20-22, 1-2.

[107] Meisenheimer Direct, Ex. 208, Page 4, Table 1.

[108] Cummings Rebuttal, Ex. 25, Page 28, Lines 6-8.

[109] Initial Brief of Midwest Gas, UMKC, CMSU, and Jackson County at page 14.

[110] Beck Direct, Ex. 803, Page 5, Lines 7-17.

[111] Price Rebuttal, Ex. 500, Page 14, Table 5.

Price's table suggests that currently the revenue that MGE collects from the residential class is under-recovering the costs assigned to the residential class by 7.57%. The revenue collected from other classes is over-recovering the costs assigned to those classes. However, all of the classes, except Large General Service, are currently within 20% of their appropriate revenue recovery assignment. Large General Services is the exception because as a class it is currently over-recovering its assigned expenses by almost 60%.

Price suggests that the Large General Service class' substantial over-recovery be ameliorated by assigning the Large General Service class only 75% of the system revenue increase. The remaining customer classes would receive the system average increase and would share proportionally any remaining revenue increase not assigned to the Large General Service class. For example, if MGE were granted a 5% increase in revenue, Large General Services would see an increase of 3.75% while the other classes would see an increase of 5.05%.[112]

The Commission will adopt Price's suggestion. That suggestion has the virtue of minimizing the only glaring inequity in the current class revenue assignments, while protecting the residential class, from the shock of the substantial rate increase that would be required to bring all classes into complete agreement with MGE's corrected class cost of service study.

13. Fixed Monthly Rate Elements

Issue Description: *What is the appropriate level and structure for fixed monthly rate elements including the residential customer charge?*

MGE recovers its distribution revenues from a combination of fixed and volumetric rate elements. Fixed rates are predetermined and do not vary with the amount of natural gas consumed in a month. Volumetric rates are added to the cost of the natural gas that is consumed in a given month. When a customer consumes less gas, either because of warm weather or efforts to conserve, he or she will pay less in volumetric rates. Obviously, when a customer pays less in volumetric rates, MGE receives less revenue, which it needs to cover its costs.

Currently, MGE recovers approximately 55% of its residential distribution revenues from fixed elements and the remaining 45% from volumetric rate elements. MGE would like to shift some of its revenue recovery from volumetric rates to fixed monthly elements to address a problem of earnings shortfalls resulting from decreased customer usage due to warmer than normal weather. As part of its effort to shift its revenue recovery, MGE wants to increase the fixed monthly rate for the residential and small general service customer classes. It would increase the customer charge for residential from $10.05 to $13.55 and for small general services from $13.55 to $18.30.

Public Counsel flatly opposes any increase in the customer charge and would require MGE to recover any rate increase through volumetric rates.[113] Staff would allow MGE to increase the customer charge but only proportionally to current levels.[114]

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[112] Price Rebuttal, Ex. 500, Pages 14-15, Lines 6-16, 1-3.

[113] Busch Rebuttal, Ex. 213, Page 4, Line 11.

[114] Beck Surrebuttal, Ex. 805, Pages 9-20.

High fixed monthly customer charges tend to defeat customer efforts to reduce their bill by conserving natural gas. As a result, the Commission finds that the public interest is best served by setting customer charges as low as reasonably possible. MGE's proposal to increase the residential customer charge from $10.05 to $13.55 would result in an increase of nearly 35% and is not reasonable. However, simply leaving the customer charges unchanged while allowing MGE to otherwise increase its rates would necessarily require that the vast majority of the rate increase be collected through volumetric rates.[115] That result would not be fair to MGE because MGE is already having difficulty in recovering its costs under the current rate structure. An increased reliance on volumetric rate elements will only increase MGE's weather risk and reduce its chance to actually recover its costs, which for the most part do not vary with the weather or the amount of gas sold.[116] The Commission finds that current ratio between fixed and volumetric rate elements, whereby MGE recovers approximately 55% of its residential distribution revenues from fixed elements, is appropriate. In order to be fair to the company and to its ratepayers, the Commission will order that the customer charge for the residential and small general service classes may be increased to an amount sufficient to maintain the current ratio between volumetric rate elements and fixed charges elements.

14. Volumetric Rate Elements

Issue Description: *What is the appropriate level and structure of volumetric rate elements?*

Volumetric rate elements are the flip side of the fixed monthly rate elements discussed in the previous issue. Volumetric rate elements allow MGE to recover its costs by adding a small amount to each volume measure of gas that it sells. Under its current rates, that amount is $0.11423 per Ccf.[117] MGE proposes that the Commission adopt a weather-mitigation rate design for the residential and small general service rate classes to avoid volatility in the company's revenue stream. The rate design that MGE has proposed is based on the rate design that the Commission approved for Laclede Gas as part of a stipulation and agreement in Case Number GR-2002-0356.[118]

MGE's proposed weather mitigation rate design is fairly complicated; but, essentially, MGE's customers would pay more for the first block of gas they use during the winter months so that a greater percentage of delivery costs would be recovered in the first rate block. MGE also proposes to adjust the PGA to offset the bill impacts on small and moderate size users.[119] The result of the proposed rate

[115] A portion of the revenue increase would be collected through increased connection, reconnection, and transfer fees, which the Commission is authorizing elsewhere in this report and order.

[116] Transcript, Page 2231, Lines 12-24.

[117] Busch Rebuttal, Ex. 213, Page 6, Line 6.

[118] Laclede's rate design was approved as part of a stipulation and agreement but the parties bitterly disagreed about the implementation of the rate design, necessitating an emergency hearing and rejection and revision of the implementing tariffs. See Beck Rebuttal, Ex. 804, Pages 15-18.

[119] Cummings Direct, Ex. 23, Pages 28-29.

design would allow MGE to recover a greater percentage of its costs even when warm weather results in the sale and consumption of fewer units of natural gas.

Staff opposes MGE's weather mitigation rate design proposal, but Public Counsel voices the most vehement opposition. Public Counsel correctly points out that the proposed rate design would reduce MGE's risk associated with warmer than normal weather by effectively creating a second, fixed, customer charge.[120] As a result, customers would not receive as much of a benefit from warmer than normal weather. Furthermore, customers would have less ability to lower their bills by conserving energy. As the Commission found in its discussion of fixed rate elements, such a result is contrary to good public policy.

Public Counsel also raises several legal arguments against MGE's proposed weather mitigation rate design. Those arguments are addressed in the Conclusions of Law section of this report and order. Based on its conclusions of law and the facts that it has found, the Commission concludes that MGE's proposed weather mitigation rate design must be rejected.

15. Miscellaneous Service Charges

Issue Description: *Should the Commission change the current tariffed charges for customer connects, standard customer reconnects, and transfer fees?*

MGE currently charges customers additional fees for providing certain services. In this case, MGE proposes to increase its connection fee from $20 to $45, its reconnection fee from $35 to $45, and its transfer fee from $5.00 to $6.50. Staff supports the requested fee increases but Public Counsel opposes them.

Public Counsel argues that the increases are unreasonably large and would be a burden on low-income customers. The connection fee in particular would increase by 125% and the reconnection fee would increase by 28.6%.[121] Public Counsel is concerned that such large increases could be a barrier to the initiation or restoration of service.[122] Public Counsel also attacked the validity of the cost study that MGE performed to evaluate the cost of performing the connections for which it is seeking increased fees. Public Counsel contends that the study should have looked at the incremental cost of providing the connection and reconnection services, and instead included joint and common costs that should not properly be ascribed to those activities.[123]

It is important to set the fees that MGE will charge for these services at a rate that will recover the actual cost of providing that service. These are services that are requested by a particular customer and general principles of cost causation suggest that the person responsible for a cost should be required to bear that cost. If the fee does not cover the actual cost of providing the service, other customers will be subsidizing the cost causer through higher than necessary base rates.[124]

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[120] Busch Rebuttal, Ex. 213, Page 8, Lines 7-12.

[121] Meisenheimer Rebuttal, Ex. 209, Page 18, Lines 8-11.

[122] Meisenheimer Rebuttal, Ex. 209. Pages 18-19, Lines 20-23, 1-7.

[123] Meisenheimer Rebuttal, Ex. 209, Pages 20-22.

[124] Imhoff Direct, Ex. 818, Page 7, Lines 1-3. See also Cummings Rebuttal, Ex. 25, Page 20, Lines16-19.

In other words, MGE incurs these costs. If they are not recovered through the increased fees, they will be recovered through base rates.

Public Counsel also suggests that the cost studies used by MGE to support its determination of the actual cost of providing these services overstate the actual costs because they do not measure the incremental cost of providing the service by excluding any allocation of joint or common costs associated with shared facilities or expenses needed to provide the company's other services.[125] There is no support for Public Counsel's suggestion that such fees should be calculated on an incremental cost basis. MGE is not attempting to price an optional service that it is offering for sale. Rather it is attempting to allocate the cost of providing a service to its customers. It is only fair that the customer using the service pay the costs associated with that service because those costs cannot be avoided. If the customer using the service does not pay those costs, they will be paid by other ratepayers.[126]

Finally, Public Counsel challenges the inclusion of specific costs in MGE's study. In particular, Public Counsel disagrees with MGE's inclusion of field personnel nonproductive time in the cost study.[127] That would include such things as vacation, sick leave, holiday pay, training, and standby time.[128] MGE contends that those costs are a part of the cost of providing the service and are properly included in the cost study. Staff's witness Tom Imhoff agrees with Public Counsel's position on this question but concludes that MGE's inclusion of nonproductive time in the cost study did not materially affect the rate calculation.[129] In other words, the inclusion of nonproductive time in the calculations did not have a large enough effect to make any difference in the rate that MGE proposes to charge.

The Commission finds that the proposed fees for connection, reconnection, and transfer are consistent with MGE's actual cost of providing those services. Public Counsel's suggestions to the contrary are not supported by the evidence. While the connection fee is more than doubling, a substantial increase is needed because the connection fee was deliberately set at half its actual cost in the last rate case to avoid shocking consumers.[130] The Commission is mindful of the need to avoid shocking ratepayers and certainly does not wish to create a barrier that would prevent them from obtaining gas service. However, ratepayers will not incur these fees frequently so the increased fees should not be a shock to their budgets.[131]

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[125] Meisenheimer Rebuttal, Ex. 209, Pages 20-21, Lines 11-23, 1-6.

[126] Cummings Rebuttal, Ex. 26, Page 28, Lines 12-15.

[127] Meisenheimer Rebuttal, Ex. 209, Page 22, Lines 6-10.

[128] Cummings Rebuttal, Ex. 26, Page 29, Lines 2-3.

[129] Imhoff Direct, Ex. 818, Pages 7-8, Lines 21-22, 1-2

[130] Cummings Surrebuttal, Ex. 26, Page 27, Lines 12-20.

[131] Transcript Page 2022, Lines 9-25.

Low-Income Issues

16. Weatherization

Issue Description: *What is the appropriate level of funding for the low-income weatherization program and how should such funding be allocated among the geographic regions of MGE's service territory?*

MGE's ratepayers have provided funding for a low-income weatherization program since 1994. The weatherization program provides financial assistance to MGE's low-income customers to make improvements to their homes to improve energy efficiency. The average cost to weatherize a home in Missouri is $2,600 and weatherizing a home can provide annual natural gas savings of as much as 23% and annual electric savings of about 12%.[132] Aside from reducing the energy bill of the customer whose home is weatherized, the program also benefits all of MGE's customers by reducing MGE's expenses required to collect debts, by reducing the amount of late payments, and by reducing the amount of uncollectable bills.[133]

Since the program began in 1994 over 800 homes have been weatherized. The current program requires little administrative support from MGE as, at least in Kansas City, the program is administered by the City of Kansas City.[134] The weatherization program is quite popular and currently has a waiting list of more than 500 applicants in Kansas City.[135] The cost of the weatherization program is currently built into rates and recovered from MGE's customers through those rates.[136]

MGE acknowledges that the weatherization program has been effective and does not require significant administrative involvement by MGE's employees. As a result, MGE proposes to increase low-income weatherization funding by $160,000 to be allocated according to the existing proportions.[137] Of the $340,000 in current funding, $250,000 is administered by the City of Kansas City and $90,000 is administered throughout the balance of MGE's service territory. If existing proportions were maintained, MGE's proposal would result in a $118,000 funding increase for the weatherization program in Kansas City.

The City of Kansas City contends that the weatherization program has been very successful and cost effective, and asks for a funding increase of $250,000 for the Kansas City service area. If current proportions are maintained, a total weatherization increase of approximately $340,000 would be required to give the City of Kansas City an additional $250,000 in weatherization funding.

During the course of the hearing, Staff, Public Counsel, and the City of Joplin filed a non-unanimous stipulation and agreement dealing with the three low-income issues. With regard to weatherization, that stipulation and agreement provides that weatherization funding should be increased by 15% across the board, totaling $51,000 per year. The stipulation and agreement would also direct an

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[132] Ross Direct, Ex. 836, Page 15, Lines 16-23.

[133] Ross Direct, Ex. 836, Page 16, Lines 17-21.

[134] Jackson Direct, Ex. 300, Page 2.

[135] Jackson Direct, Ex. 300, Page 3.

[136] Transcript, Page 2408.

[137] Noack Corrected Rebuttal, Ex. 10, Page 31, Lines 6-17.

additional $50,000 per year to the City of Kansas City and $50,000 to MGE's non-Kansas City, and non-Joplin service areas. Weatherization for the Joplin service area would be set at $130,000 and would be included in the existing experimental low-income rate (ELIR) program, which is the subject of the next issue. Joplin currently receives $31,000 in weatherization funding.[138] The non-unanimous stipulation also provides that the weatherization funding, as well as funding for all other low-income programs, would be recovered through volumetric rates rather than through a specific surcharge or adder on the customer's bill.[139] The total annual funding requirement of the programs proposed in the non-unanimous stipulation and agreement would be $896,000.[140]

MGE opposes the non-unanimous stipulation and agreement. As a result, Commission rule 4 CSR 240-2.115(2)(D) provides that the stipulation can only be treated as a statement of the positions of the signatory parties to which no party is bound. As a result, the Commission cannot "approve" or "disapprove" the stipulation and agreement. Instead, the Commission must address each issue on its own merits.

The Commission finds that the existing low-income weatherization program has been successful and should be continued with additional funding. The Commission is not, however, willing to increase funding beyond the amount requested by the company. The Commission will order that annual funding for the low-income weatherization program be increased by $160,000 to a total of $500,000. The additional funding is to be allocated consistent with the current funding plan.

17. Experimental Low Income Rate

Issue Description: *What, if any, modifications should be made to the existing Experimental Low Income Rate Program?*

The existing experimental low-income rate ("ELIR") was established in the Joplin service area as a result of the stipulation and agreement that resolved MGE's last rate case. The goal of the program is to make it possible for low-income ratepayers to pay their bills and thereby reduce MGE's bad debt expenses. Under the program, low-income ratepayers participating in the program receive a $40 monthly bill discount if their household income is 50% or less of the federal poverty level, provided that they make timely payment of their gas bill. Participating ratepayers whose household income is 51%-100% of the federal poverty level receive a $20 monthly bill discount. The program has been funded by an $0.08 adder to all MGE residential customer bills.[141] That adder, which expired in August 2003, collected enough funds to allow the program to continue at current levels until July 2006 without collecting any more funds from ratepayers.[142]

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[138] Ross Rebuttal, Ex. 837, Page 16, Table.

[139] Transcript, Page 2409, Lines 2-5.

[140] Non-Unanimous Stipulation and Agreement, Attachment A.

[141] Meisenheimer Direct, Ex. 207, Page 6, Lines 11-16.

[142] Noack Corrected Rebuttal, Ex. 10, Page 32, Lines 3-5.

MGE is willing to continue the current ELIR through July 2006, or until funding runs out, but opposes proposals to expand the program. MGE contends that the changes and expansion proposed by Staff, Public Counsel, and Joplin are too costly, would impose additional administrative requirements on MGE, and will likely complicate evaluation of ELIR results.[143]

The non-unanimous stipulation and agreement provides that the ELIR will continue with some modifications: participation in the weatherization program will be required for ELIR participants; the bill discount levels will be revised; and the Joplin Community Action Agency will be asked to replace MGE as administrator of the ELIR. The stipulation and agreement would not renew the $0.08 adder and would instead recover the cost of the program through volumetric rates.

The ELIR is an interesting attempt to make natural gas bills more affordable for low-income customers while ultimately saving money for MGE and its other ratepayers by reducing expenses that result from bad debts. However, it is only an experimental program and it has had problems. For example, nearly half of the participants that initially entered the program dropped out by January 2004.[144] The Commission is not willing to pour more ratepayers funds into this program, particularly without the agreement of MGE. The Commission will allow the program to continue in its current form through July 2006, or until funding runs outs, which ever occurs first.

18. Experimental Energy Efficiency Programs including PAYS

Issue Description: Should the Pay As You Save (PAYS) program proposed by the Office of Public Counsel be adopted?

The Pay As You Save (PAYS) program is an experimental program designed to help residential ratepayers finance weatherization projects for their homes. It would essentially loan money to the ratepayers to pay for new windows, insulation, a new furnace, etc. The ratepayer would pay back the loan by way of his or her monthly utility bill. The idea is that the savings from increased energy efficiency would lower the customer's monthly bills enough so that the loan could be repaid from the savings. The program would not necessarily be limited to low-income ratepayers and the seed money to make the loans could be provided by MGE or by some other lender.[145]

The non-unanimous stipulation and agreement provides for a feasibility study to determine whether a PAYS program could be implemented in the Kansas City area. Funding for the feasibility study and a potential PAYS system would be set at $100,000 per year for two years, collected through volumetric rates. MGE opposes the proposal to explore the development of a PAYS program as part of this rate case.

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[143] Noack Corrected Rebuttal, Ex. 10, Page 32, Lines 5-7.

[144] Ross Rebuttal, Ex. 837, Page 12, Lines 20-22.

[145] Meisenheimer Direct, Ex. 207, Page11, Lines 2-13 and Warren Rebuttal, Ex. 839, Page 3, Lines 7-20.

The Commission is interested in further consideration and development of the PAYS program. However, such consideration needs to take place in a broader setting than is afforded by MGE's rate case. The Commission agrees with MGE that this rate case is not the appropriate setting for the funding of such a study. As a result, the Commission will reject the proposal offered by Staff, Public Counsel, and the City of Joplin.

Requests by Staff to Require Action by MGE

Staff has asked the Commission to order MGE to take several specific actions regarding its operations. These requests are addressed in the following issues.

19. Merger and Acquisition Recordkeeping

Issue Description: *Should the Commission adopt Staff's proposal to order Southern Union to keep time reports related to merger and acquisition activities?*

Staff asks the Commission to order Southern Union to keep records of the time spent by Southern Union corporate personnel on merger and acquisition related activity. Staff is concerned that Southern Union is very involved in merger and acquisition activities, and would like to exclude such activities from Southern Union's revenue requirement in future rate cases but says that it cannot do so unless Southern Union's executives keep better time records to allow Staff to separate out the merger and acquisition activities.[146] Southern Union contends that the Commission has no authority to make such an order in a rate case. Instead, if the Commission wants to make such a requirement, it must do so through a rulemaking that would apply to all gas companies. This legal issue is addressed in the Conclusions of Law section of this report and order.

Based on its conclusions of law, the Commission finds that the order requested by Staff is not a rulemaking and that the Commission has the authority to issue such an order. However, the Commission finds that such an order is neither needed nor appropriate in this case. The Commission does not wish to attempt to manage either Southern Union or MGE by ordering the company to keep specific time records regarding merger and acquisition activities. If Staff, or any other party, wishes to obtain specific information from Southern Union or MGE, it may do so through the discovery techniques that are recognized and commonly used at this Commission. If, in a future rate case, Staff or another party wishes to propose an adjustment regarding merger and acquisition activities and the company has not kept sufficient records, the company will bear the risk of an imprecise adjustment, as it did in this case with the ordered adjustment for lobbying activities.

20. Gas Purchasing/Reliability Plan Reporting

Issue Description: *Should the Commission order MGE to submit by October 1, 2004, a Natural Gas Supply Plan (updated annually)? Should the Commission order MGE to submit by October 1, 2004, a Natural Gas Supply Reliability Analysis (updated every two to three years)?*

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[146] Hyneman Direct, Ex. 816, Pages 34-35, Lines 15-23, 1-2.

Staff is concerned that MGE is not doing enough to plan for the reliability of its natural gas supply and asks the Commission to order MGE to periodically submit such a plan, including a specific supply reliability analysis, which Staff insists be submitted by October 1, 2004, even though the effective date of this report and order will be October 2, 2004.[147] Staff indicates that it is simply seeking the same information from MGE that is already voluntarily provided by other gas companies.[148] But Staff adds that it is particularly concerned about MGE because it recently replaced its entire gas supply department.

MGE replies that it is doing all that it needs to do to assure that its supplies of gas are reliable. It states that it is perfectly willing to answer data requests and to open its records to Staff as required. However, it contends that the Commission has no authority in a rate case to order MGE to submit such reports. It further argues that if the Commission wants to make such a requirement it should do so through a rulemaking that would apply to all gas companies.

Based on its conclusion of law regarding Issue 19, Merger and Acquisition Recordkeeping, the Commission finds that the order requested by Staff is not a rulemaking and that the Commission has the authority to issue such an order. However, the Commission finds that such an order is neither needed nor appropriate in this case. Staff has not presented any evidence that would indicate that MGE is not properly planning for its future gas needs. Staff has many discovery tools at its disposal to allow it to obtain any information from MGE that it believes it needs. If Staff believes that all gas companies should file such report, and Staff's witness indicated that other gas companies have supplied such reports voluntarily, then Staff should avail itself of the rulemaking procedures to promulgate a rule that will apply to all gas companies.

21. Legislative/Lobbying Time Reporting

Issue Description: Should the Commission adopt Staff's proposal to order MGE to keep detailed time reporting on the amount of time employees spend on lobbying and lobbying related activities?

Staff asks the Commission to order MGE to keep records of the time spent by its personnel on lobbying activity. Staff and Public Counsel have argued that lobbying activity should be excluded from MGE's revenue requirement in this and future rate cases but says that it cannot easily do so unless MGE's employees keep better time records to allow Staff to separate out the lobbying activities. Staff contends that MGE is already required to keep such records by Commission rule and wants an order requiring MGE to comply with those requirements.

MGE contends that the Commission has no authority to make such an order in a rate case. It further argues that if the Commission wants to make such a requirement it should do so through a rulemaking that would apply to all gas companies.

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[147] *See.* Staff's Reply Brief at page 55.

[148] Transcript, Page 1649-1650.

Based on its conclusion of law regarding Issue, 19 Merger and Acquisition Recordkeeping, the Commission finds that the order requested by Staff is not a rulemaking and that the Commission has the authority to issue such an order. However, the Commission finds that such an order is neither needed nor appropriate in this case. The Commission does not wish to attempt to manage either Southern Union or MGE by ordering the company to keep specific time records regarding lobbying activities. If Staff, or any other party, wishes to obtain specific information from Southern Union or MGE, it may do so through the discovery techniques that are recognized and commonly used at this Commission. Furthermore, if Staff believes that MGE is currently refusing to comply with Commission regulations, it may bring a complaint against MGE. Finally, if, in a future rate case, Staff, or another party, wishes to propose an adjustment regarding lobbying activities and the company has not kept sufficient records, the company will bear the risk of an imprecise adjustment, as it did in this case.

22. Response Time to Commission-referred Customer Complaints/ Inquiries

Issue Description: *Should the Commission order MGE to respond to Customer Complaints/Inquiries within three business days?*

Staff asks the Commission to order MGE to respond to Commission forwarded customer complaints/inquiries within three business days of receiving the complaint or inquiry. For interruption of service issues, the response time should be within twenty-four hours. Staff's witness indicated that there is not a particular problem at MGE but that it is trying to hold all utilities to this standard.[149] Other companies have already agreed to this standard and Staff specifically mentions Missouri-American Water Company as one company that has agreed to this requirement in a stipulation and agreement.[150]

MGE contends that the Commission has no authority to make such an order in a rate case. It further argues that if the Commission wants to make such a requirement it should do so through a rulemaking that would apply to all gas companies.

Based on its conclusion of law regarding Issue 19, Merger and Acquisition Recordkeeping, the Commission finds that the order requested by Staff is not a rulemaking and that the Commission has the authority to issue such an order. However, the Commission finds that such an order is neither needed nor appropriate in this case. Staff failed to show any reason why this order should be entered in this case. If this standard is appropriate for all utilities, then Staff should avail itself of the appropriate rulemaking procedure rather than attempt to impose the requirement on utilities one at a time.

23. GM-2003-0238 Cost and Allocation Study Issue

Issue Description: *Should the Commission order MGE to complete and file a study concerning the impacts of the Panhandle Eastern Pipeline Company acquisition on Southern Union's administrative and general expenses and cost allocation methodology?*

[149] Transcript, Pages 1294-1299.

[150] Bernsen Direct, Ex. 806, Page 9, Lines 10-16.

In the unanimous stipulation and agreement that resolved the merger case regarding Southern Union's acquisition of Panhandle Eastern, Southern Union agreed to perform a study within six months regarding the effect of the acquisition on corporate cost allocations following the acquisition. Southern Union provided Staff with some information, but Staff complains that Southern Union did not provide sufficient information regarding its merger and acquisition activities. Staff asks the Commission to order Southern Union to complete this study, file it in this case before the operation of law date for this order, and provide its completed study to the parties in the merger case.[151] Southern Union replies that it has fully complied with all the requirements of the stipulation and agreement and that no action by the Commission is required.

This issue simply does not belong in this case. If Staff believes that Southern Union has failed to comply with a requirement of the stipulation and agreement in the merger case – GM-2003-0238 – it may file a motion in that case bringing the alleged failure to the Commission's attention. If any relief is needed, it will be granted in that case.

True-Up Issues

The next two issues arose for the first time at the true-up hearing.

24. Rate Case Expenses

MGE is entitled to recover its reasonable and prudently incurred cost of presenting this rate case to the Commission. Such costs are routinely accepted as a cost of doing business for which the company will be allowed to recover its costs in rates and no party disputes MGE's right to recover its rate case expenses in this case. There is a dispute, however, over how much MGE should be allowed to recover.

MGE has claimed $1,383,333 in expenses relating to the presentation of this rate case. That figure does not include any amount for post-hearing work.[152] MGE submitted statements from its attorneys and expert witnesses to support that amount. MGE suggests that rate case expense be amortized over 3 years, resulting in an annual cost of $461,111, which would be included in MGE's cost of service for inclusion in the rates established for this case. MGE is also willing to accept a 4-year amortization at an annual cost of $345,833 if the rates that result from this case are sufficient to allow them to remain in effect for four years.[153]

Staff argues that that the rate case expenses submitted by MGE are not reasonable. In particular, Staff contends that the fees paid to MGE's New York law firm – Kasowitz, Benson, Torres & Friedman, LLP – are excessive, especially given what Staff asserts is that firm's inexperience in regulatory law. Staff also contends that MGE failed to present enough documentation to justify some of its submitted expenses. Staff's witness Charles Hyneman recommends that the Commission allow $650,000 for rate case expenses because that is the amount the Commis-

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[151] Oligschlaeger Direct, Ex. 828, Pages 9-10, Lines 14-22, 1-18.

[152] Noack True-Up Direct, Ex. 49, Page 5, Lines 4-12.

[153] Noack True-up, Ex. 49, Page 5, Lines 4-12.

sion found to be reasonable and prudent in MGE's last litigated rate case, GR-98-140. As an alternative, he recommends that the Commission allow recovery of $750,000, which Staff claims is the highest amount of rate case expense ever allowed for a utility in a Missouri rate case.[154]

The Commission finds that Staff's proposal to limit MGE's rate case expenses to an amount found to be reasonable in a previous rate case is completely arbitrary and capricious. There was no evidence presented that would allow the Commission to conclude that this case was so comparable to any other case that the Commission would be justified in placing an arbitrary limit on recovery of rate case expense. Furthermore, the rate cases that Staff would use to limit MGE's recovery took place five or six years ago.When asked, Staff's witness could not even say whether attorney fees and consultant fees have increased since 1997.[155] Staff's proposal to limit recovery of rate case expense to the amounts recovered in earlier cases must be rejected.

Public Counsel also disputes MGE's request for rate case expenses, but Public Counsel would come at MGE's rate case expenses from the opposite direction. Public Counsel suggests that certain costs be removed from MGE's expenses as imprudently incurred. Specifically, Public Counsel would reduce the hourly fees charged by Kasowitz, Benson, Torres & Friedman, MGE's New York law firm, from $690 per hour to $200 per hour. That would allow only $171,950 of that firm's charges to be recovered in rates, a reduction from $614,000 requested by MGE. Public Counsel would also disallow $47,522 in fees charged by MGE's Texas counsel, Watson Bishop London and Brophy, because the work that firm did was allegedly duplicative of the work done by Kasowitz, Benson, Torres & Friedman and MGE's Missouri counsel, Brydon, Swearengen & England. Public Counsel would also exclude $36,303 paid to the law firm of MGE's witness John Quain. Quain, a former commissioner from Pennsylvania, offered public policy testimony that Public Counsel found to be insubstantial. Public Counsel would also reduce recovery of the fee that MGE paid to its witness, Dr. Morin, from $30,000 to $9,800. All of Public Counsel's adjustments would result in a total rate case expense of $787,766.[156]

Public Counsel contends that this amount is still too high. It would average its adjusted total of $787,766 with the amounts allowed MGE for rate case expense in its last two litigated rate cases to arrive at an average of $634,839, which it would amortize over three years for an annual cost of $211,613. As the Commission indicated when rejecting Staff's proposal, the arbitrary reliance on past rate cases to establish a limit on MGE's rate case expense recovery in this case is improper. Therefore, Public Counsel's proposal to further adjust its recommended rate case expense will be rejected.

However, the Commission will further examine Public Counsel's proposals to reduce specific rate case expenses for which MGE is seeking recovery. The first expense challenged by Public Counsel is the $614,000 in bills submitted by

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[154] Hyneman True-up, Ex. 861, Page 10, Lines 11-19.

[155] Transcript, Page 2616, Lines 4-6.

[156] Bolin True-up Direct, Ex. 234, Page 13, Lines 9-16.

Kasowitz, Benson, Torres & Friedman. That firm billed MGE at a rate of $690 per hour and Public Counsel suggests that the hourly rate be reduced to $200, which is the hourly rate charged by MGE's local counsel. At $200 per hour, multiplied by 859.75 hours, the total bill from Kasowitz, Benson, Torres & Friedman would be $171,950.[157] That amount does not include travel and meal expenses because at the time Ms. Bolin submitted her testimony those expenses were not properly documented. Additional invoices were submitted at the hearing and at least Staff's witness was satisfied that nearly all of the submitted expenses were now supported by invoices.[158] The expenses submitted by Kasowitz, Benson, Torres & Friedman, including travel and meal expenses, total $16,250.75.[159]

The Commission is hesitant to disallow expenses incurred by MGE in prosecuting its rate case. The company is entitled to present its case as it sees fit and the Commission will not lightly intrude into the company's decisions about how best to present its case. However, the Commission has a responsibility to ensure that the expenses that the company submits to its ratepayers are reasonably and prudently incurred. Otherwise, the company could take a cost-is-no-object approach to its rate case presentation, secure in the knowledge that the ratepayers would be required to pay for any cost that the company might incur.

In this case, MGE, or perhaps Southern Union, chose to hire the Kasowitz, Benson, Torres & Friedman law firm out of New York. MGE explained that it chose that firm because it had previously represented Southern Union in other complex litigation and the company was very pleased with the results obtained in that case.[160] The other litigation for which the Kasowitz firm had represented Southern Union was, however, a merger and acquisition case and this case was the firm's first litigated regulatory rate case.[161]

Eric Herschmann and Michael Fay of the Kasowitz firm did a good job of representing their client at the hearing. But the firm charged up to $690 per hour for its work. That rate is far higher than the typical rates charged by lawyers appearing before this Commission. The company is certainly entitled to hire lawyers with whom it is comfortable, but it would not be fair to require ratepayers to pay such high rates. The Commission will reduce the rate to $200 per hour, which is the rate charged by MGE's local counsel. The $16,250.75 in expenses incurred by the Kasowitz firm will be allowed. The total allowed for representation by Kasowitz, Benson, Torres & Friedman is $188,200.75.

Public Counsel urges the Commission to disallow $47,522 in fees charged by the Austin Texas firm of Watson Bishop London and Brophy. Public Counsel contends that the work done by that firm did was duplicative of the work done by Kasowitz, Benson, Torres & Friedman and MGE's Missouri counsel, Brydon, Swearengen & England.[162] MGE explained that Christine Dodds, an attorney with

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[157] Bolin True-Up Direct, Ex. 234, Page 8-9, Lines 11-22, 1-4.

[158] Transcript, Page 2638, Lines 8-21.

[159] Exhibit 51.

[160] Transcript, Pages 2482-2483, Lines 24-25, 1-3.

[161] Transcript, Page 2499, Lines 7-17.

[162] Bolin True-Up Direct, Ex. 234, Page 9, Lines 7-14.

Watson Bishop, served as second chair for Eric Herschmann at the hearing. She assisted Herschmann in preparation of witnesses, issues, and cross-examination questions.[163] The Commission does not wish to disparage the work done by the Watson Bishop firm, but $47,522 is more than ratepayers should pay for the services performed by the firm. The fees charged by Watson Bishop will be disallowed in their entirety.

Public Counsel would also exclude $36,303 paid by MGE to Klett Rooney Lieber & Schorling, the law firm of MGE's witness John Quain. In fact, at the true-up hearing, an updated statement from Klett Rooney was admitted into evidence showing that the bill submitted by Klett Rooney totaled $20,115, not $36,303 as previously estimated.[164] Quain, a former commissioner from Pennsylvania, offered public policy testimony that Public Counsel found to be insubstantial. The Commission found Quain's testimony to be helpful and his fees will be allowed as a rate case expense.

Public Counsel would also reduce recovery of the fee that MGE paid to its witness Roger A. Morin from $30,000 to $9,800 because it believes that the fee paid to Dr. Morin is excessive if calculated as a per hour fee. Public Counsel estimated that Morin worked 35 hours and if his full fee were allowed that would amount to an hourly fee of $857. Public Counsel would allow only $280 per hour for Dr. Morin's time for a total of $9,800. The Commission does not agree with Public Counsel. Dr. Morin is a highly respected expert in his field. His $30,000 fee is not excessive and will be allowed as a rate case expense.

MGE's rate expense claim will be adjusted in the following manner. $1,383,333 - $425,799.25 (the amount of reduction in Kasowitz bill) - $47,522 (the Watson Bishop fee) - $16,188 (the difference between the estimated and final bills from Klett Rooney) = $893,823.75. Amortizing that amount over three years, results in an annual amount of $297,941.25, which the Commission finds to be appropriate for inclusion in MGE's annual cost of service.

25. Kansas Property Taxes

At its last legislative session, Kansas imposed a new property tax on gas held in inventory in Kansas. MGE began to incur liability for this tax for the tax year beginning January 1, 2004. It will actually have to begin paying the tax in December 2004, with the balance of the year's tax payment due in June 2005. MGE's tax liability is based on the level of natural gas held in storage in Kansas as of December 31, 2003. MGE indicated that it questions the legality of Kansas' new tax and indicates that it will pay the taxes under protest while it challenges the tax in the courts.[165] Nevertheless, MGE contends that this is a known cost that it will incur during the period covered by the rate that will be established in this case. It asks that it be allowed to recover $1,262,059 annually in rates for these new taxes.[166]

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[163] Transcript, Pages 2509-2510, Lines 24-25, 1-7.

[164] Transcript, Page 2490, Lines 14-21.

[165] Transcript, Page 2523, Lines 17-25.

[166] Noack True-Up Direct, Ex. 49, Pages 5-6, Lines 24-26, 1-12.

Because MGE did not learn about the creation of this new tax until after the hearing was completed, it did not raise this issue until it filed true-up direct testimony on July 19. The question was the subject of rebuttal testimony and cross-examination at the true-up hearing held on July 23.

Staff opposes allowing MGE to recover those taxes in this case but suggests that the Commission instead issue an accounting authority order (AAO) that would allow MGE to defer those increased costs until its next rate case.[167] MGE would accept the issuance of an AAO.[168] Public Counsel, Midwest Gas, UMKC, CMSU, and Jackson County oppose allowing MGE to recover those tax costs in this case and they also oppose the issuance of an AAO.

The Commission agrees that MGE cannot recover the new Kansas taxes in this case. These taxes were not paid during the test year established for this case and the taxes will not be paid at all, until December 2004. MGE also indicated that it would be paying the taxes under protest. That means that if its legal challenge is upheld MGE would receive a refund from the state of Kansas. However, MGE's witness testified that if MGE received a tax refund, it probably would not pass that refund back to ratepayers unless it was ordered to do so by this Commission.[169] As a result, MGE's potential tax liability is not currently known or measurable and on that basis it cannot be included in MGE's cost of service for this case.

Furthermore, property taxes were not included as a true-up issue.[170] The parties had no notice that this issue even existed until MGE filed its true-up direct testimony four days before the hearing. As a result, this entirely new issue cannot be considered in this case.

This is a harsh result for MGE, as it will likely be paying taxes that are not included in its cost of service for calculation of rates in this case. An accounting authority order allowing MGE to defer those tax payments for possible recovery in its next rate case would be a means of avoiding that result. However, this case is not the appropriate forum for deciding whether to grant MGE such an AAO. The other parties have not been given a reasonable opportunity to present testimony and arguments to the Commission regarding this issue. If MGE wishes to request an AAO, it may file a separate application, to which the Commission will give due consideration.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

MGE is a public utility, and a gas corporation, as those terms are defined in Section 386.020(42) and (18), RSMo 2000. As such, MGE is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Section 393.140(11), RSMo 2000, gives the Commission the authority to regulate the rates that MGE may charge its customers for natural gas. When MGE filed a tariff designed to increase its rates, the Commission exercised its authority

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[167] Transcript, Pages 2607-2608, Lines 19-25, 1-25.

[168] Transcript, Page 2480, Lines 13-23.

[169] Transcript, Pages 2524-2525, Lines 1-25, 1-13.

[170] Transcript, Page 2558, Lines 17-24.

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.

In determining the rates that MGE may charge its customers, the Commission is required to determine that the proposed rate is just and reasonable.[171] MGE has the burden of proving that its proposed increase is just and reasonable.[172]

Issues

The parties raised legal arguments regarding some, but not all of the identified issues. The legal arguments relating to those issues are discussed in this section.

1-5. Rate of Return Issues

In determining whether the rates proposed by MGE are just and reasonable, the Commission must balance the interests of the investor and the consumer.[173] The Commission's failure to establish just and reasonable rates would, in fact, violate the United States Constitution. 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.[174]

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

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[171] Section 393.150.2, RSMo 2000.

[172] Section 393.150.2, RSMo 2000.

[173] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1943).

[174] *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

> 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 market and business conditions generally.[175]

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.[176]

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.[177]

14. Volumetric Rate Elements

Public Counsel points out that the weather mitigation rate design proposed by MGE would effectively result in the creation of rates that vary with the weather, contrary to Missouri law that requires rates to be fixed. Public Counsel also contends that allowing rates to vary with the weather would be forbidden as single issue ratemaking because it would allow the single issue of weather to determine whether MGE could charge a higher rate for gas without consideration of other factors that might indicate that the company was earning other income that could offset the need for a higher rate. Public Counsel cites *State ex rel Utility Consumers Counsel of Missouri Inc. v. Public Service Commission*, [178] a Missouri Supreme

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[175] *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 692-93 (1923).

[176] *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944) (citations omitted).

[177] *Federal Power Commission v. Natural Gas Pipeline Co*. 315 U.S. 575, 586 (1942).

[178] 585 S.W.2d 41 (Mo. banc 1979).

Court decision rejecting a fuel-adjustment clause for electric utilities, as support for its position. After reviewing that decision, the Commission concludes that Public Counsel has correctly interpreted the *Utility Consumers* decision.

The fuel adjustment clause at issue in the *Utility Consumers* case established a complicated formula that allowed an electric utility's rates to automatically adjust up or down depending upon the cost of fuel used to generate electricity. In rejecting that clause, the Missouri Supreme Court held as follows:

> By permitting an electric utility to utilize a fuel adjustment clause [FAC], the commission permits one factor to be considered to the exclusion of all others in determining whether or not a rate is to be increased. That is, although the FAC may not *itself* be a rate, by approval of an FAC in a utility's rate schedule, the commission in advance approves any increase (or decrease) in rates which will automatically result through application of the FAC if the price of fuel to the utility increases or decreases.

Although the *Utility Consumers* decision does not address a weather normalization clause by name, its reasoning would equally apply to the clause that is at issue in this case.

Under the weather normalization clause proposed by MGE, the rates paid by the company's customers would vary depending upon the amount of gas used, which depends in large measure upon the weather. Those rates would change without any further evaluation by the Commission of whether the new rates are just and reasonable. That is defined as single-issue ratemaking and is forbidden by the *Utility Consumers* decision.

In addition to condemning the fuel adjustment clause as single-issue ratemaking, the *Utility Consumers* decision also held that the fuel adjustment clause would:

> negate the effect of §393.140(11), by which all rates are printed and open for public inspection. The purpose of thus providing the customer with a method of ascertaining what rates are in effect and enabling him to take the appropriate steps to challenge those rates would be destroyed with a fuel adjustment clause. Upon reference to the filed rate schedule of the utility, the consumer would be confronted with a formula and a rate filed as a result thereof.

Again, the proposed weather normalization clause suffers from the same defect as the fuel adjustment clause and would violate the requirements of Section 393.140(11), RSMo (2000).

As an alternative to the weather normalization clause that it originally proposed, MGE suggests that the Commission implement what it terms a "traditional weather normalization clause" on an experimental basis.[179] MGE argues that if Commis-

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[179] Cummings Rebuttal, Ex. 25, Pages 34-38.

sion adopts its "traditional weather normalization clause" on an experimental basis, it can avoid the restrictions of the *Utility Consumers* decision.

Whatever support there may be for the dubious proposition that the Commission has the authority to establish experimental rates that would otherwise violate state law,[180] there is nothing about MGE's proposal to institute a "traditional weather normalization clause" that is in any way experimental. The Commission will not call a weather normalization clause experimental just to try to find a way around a very clear ruling by the Supreme Court of this state.

19. Merger and Acquisition Recordkeeping

Staff asks the Commission to order MGE to keep time records concerning the amount of time corporate employees spend on merger and acquisition activities. MGE contends that the order that Staff is requesting has nothing to do with setting rates and is not properly before the Commission in a rate case. MGE further contends that Staff's proposal to require MGE to keep specific records is properly the subject for a rulemaking. MGE suggests that any order that the Commission might enter in this case would be "null, void, and unenforceable" as an improperly promulgated rule.

A cursory examination of Missouri's statute concerning administrative rulemaking reveals that MGE is incorrect. Section 536.010, RSMo 2000, defines "rule" as:

> each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:
>
> (d) A determination, decision, or order in a contested case.

This is a contested case. Thus, by definition, an order that the Commission issues in this case cannot be a rule and need not be promulgated in compliance with the rulemaking requirements of Chapter 536, RSMo.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1. Capital Structure

Issue Description: *What is the appropriate Capital Structure (i.e., the relative proportions of long-term debt, short-term debt, preferred equity and common equity) to use in calculating MGE's cost of capital?*

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[180] The six cases cited by MGE at page 77 of its reply brief discuss the Commission's authority to establish interim rates. They do not support the proposition urged by MGE.

Common Stock:	29.99%
Preferred Stock	6.40%
Long-Term Debt	63.61%

2. Embedded Cost of Long-Term Debt

Issue Description: *What is the appropriate cost of long-term debt in calculating MGE's cost of capital?*

The embedded cost of long-term debt is 7.4155%.

3. Return on Equity

Issue Description: *What is the appropriate return on equity in calculating MGE's cost of capital?*

The appropriate return on equity is 10.5%.

4. Cost of Preferred Stock

Issue Description: *What is the appropriate cost of MGE's preferred stock in calculating MGE's cost of capital?*

The appropriate cost of preferred stock is 7.758%

5. Rate of Return Adder

Issue Description: *Should MGE be granted an additional 25 basis points of rate of return on account of its level of management efficiency?*

No.

6. Capacity Release/Off System Sales

Issue Description: *What, if any, is the appropriate level of capacity release/off-system sales revenues to be used in calculating MGE's cost of service? As an alternative to including capacity release/off-system sales revenues in the calculation of MGE's revenue requirement, should the PGA-based revenue sharing mechanism proposed by MGE be adopted?*

> MGE shall be authorized to implement, through its PGA mechanism, a revenue sharing grid pursuant to which revenues generated by capacity release and off-system sales (net of revenues from off-system sales made for "system protection" purposes) shall be shared between MGE and its customers as follows:
>
> First $300,000 – 15% to MGE and 85% to customers
> Second $300,000 – 20% to MGE and 80% to customers
> Third $300,000 – 25% to MGE and 75% to customers
> Above $900,000 – 30% to MGE and 70% to customers.

7. Environmental Response Fund

Issue Description: *Should the environmental response fund proposed by MGE be adopted and what, if any, level of environmental costs should be used in calculating MGE's cost of service?*

The Commission rejects the Environmental Response Fund proposed by MGE.

8. Lobbying/Legislative costs

Issue Description: *What is the proper ratemaking treatment of lobbying/legislative activities in calculating MGE's cost of service?*

50% of the salary of Paul Snider and 90% of the salaries of Jim Oglesby and Rob Hack may be recovered in rates as part of MGE's cost of service.

9. Incentive Compensation

Issue Description: *What, if any, is the appropriate level of MGE's incentive compensation expense to be used in calculating MGE's cost of service? What, if any, is the appropriate level of Southern Union's allocated incentive compensation expense to be used in calculating MGE's cost of service?*

The financial incentive portion of Southern Union's incentive compensation plan is excluded from MGE's cost of service and may not be recovered in rates.

10. Corporate Expenses: New York Office

Issue Description: *What, if any, is the appropriate level of cost associated with Southern Union's New York office to be used in calculating MGE's cost of service?*

The costs associated with Southern Union's New York office are excluded from MGE's cost of service and may not be recovered in rates.

11. Corporate Expenses: Lindemann/Brennan Salaries

Issue Description: *What is the appropriate amount of salaries for Southern Union's Chief Executive Officer/Chairman of the Board and Vice Chairman of the Board to be used in calculating MGE's cost of service?*

The annual salary allowed for Lindemann and Brennan shall be $100,000. The cost of their administrative support staff at the New York office shall not be included in MGE's cost of service.

12. Class Revenue Responsibility

Issue Description: *What is the appropriate level of revenue responsibility for each customer class to be used in calculating revenue?*

The Large General Service class is assigned 75% of the system revenue increase. The remaining customer classes will be assigned the system average increase and will share proportionally any remaining revenue increase not assigned to the Large General Service class.

13. Fixed Monthly Rate Elements

Issue Description: *What is the appropriate level and structure for fixed monthly rate elements including the residential customer charge?*

MGE's fixed monthly rate elements may be increased enough to maintain the current ratio between volumetric rate elements and fixed rate elements.

14. Volumetric Rate Elements

Issue Description: *What is the appropriate level and structure of volumetric rate elements?*

MGE's proposed weather mitigation rate is rejected.

15. Miscellaneous Service Charges

Issue Description: *Should the Commission change the current tariffed charges for customer connects, standard customer reconnects, and transfer fees?*

The customer connect charge shall be increased from $20 to $45, the customer reconnect charge shall be increased from $35 to $45, and the transfer fee shall be increased from $5.00 to $6.50.

16. Weatherization

Issue Description: *What is the appropriate level of funding for the low-income weatherization program and how should such funding be allocated among the geographic regions of MGE's service territory?*

Funding for MGE's low-income weatherization program shall be increased by $160,000. The additional funding is to be allocated consistent with the current funding plan.

17. Experimental Low Income Rate

Issue Description: *What, if any, modifications should be made to the existing Experimental Low Income Rate Program?*

The Experimental Low Income Rate Program shall continue in its current form until July 2006, or until current funding runs out.

18. Experimental Energy Efficiency Programs including PAYS

Issue Description: *Should the Pay As You Save (PAYS) program proposed by the Office of Public Counsel be adopted?*

The proposal to fund a feasibility study of the PAYS program through this rate case is rejected.

19. Merger and Acquisition Recordkeeping

Issue Description: *Should the Commission adopt Staff's proposal to order Southern Union to keep time reports related to merger and acquisition activities?*

No.

20. Gas Purchasing/Reliability Plan Reporting

Issue Description: *Should the Commission order MGE to submit by October 1, 2004, a Natural Gas Supply Plan (updated annually)? Should the Commission order MGE to submit by October 1, 2004, a Natural Gas Supply Reliability Analysis (updated every two to three years)?*

No.

21. Legislative/Lobbying Time Reporting

Issue Description: *Should the Commission adopt Staff's proposal to order MGE to keep detailed time reporting on the amount of time employees spend on lobbying and lobbying related activities?*

No.

22. Response Time to Commission-referred Customer Complaints / Inquiries

Issue Description: *Should the Commission order MGE to respond to Customer Complaints/Inquiries within three business days?*

No.

23. GM-2003-0238 Cost and Allocation Study Issue

Issue Description: *Should the Commission order MGE to complete and file a study concerning the impacts of the Panhandle Eastern Pipeline Company acquisition on Southern Union's administrative and general expenses and cost allocation methodology?*

No.

24. Rate Case Expenses

MGE will be allowed $893,823.75 for rate case expense. That expense is to be amortized over three years.

25. Kansas Property Taxes

MGE will not be permitted to recover the new Kansas property tax for gas in storage in this case. The Commission will not issue an Accounting Authority Order in this case but MGE may file an application for such an order in a new case if it wishes to do so.

IT IS THEREFORE ORDERED:

1. That the tariff sheets filed by Missouri Gas Energy, a division of Southern Union Company, on November 4, 2003, and assigned tariff number YG-2004-0624, are rejected.

2. That Missouri Gas Energy, a division of Southern Union Company, is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order.

3. That any pending motions that the Commission has not specifically ruled upon are denied.

4. That this report and order shall become effective on October 2, 2004.

Murray and Appling, CC., concur;
Davis, C., concurs, with concurring opinion to follow;
Gaw, Ch., dissents, with dissenting opinion to follow;
Clayton, C., dissents; certify compliance with the provisions of Section 536.080, RSMo 2000.

CONCURRING OPINION OF COMMISSIONER JEFF DAVIS

I respectfully concur in the opinion issued by the majority of the Commission allowing Missouri Gas Energy (MGE) an opportunity to recover its prudent costs and earn a fair return on its investments. My vote was necessary to obtain a majority decision; however, I am writing a separate opinion to emphasize several key points regarding witness credibility, return on equity and class cost of service.

Witness Credibility:

MGE presented the testimony of James Dunn and Dr. Roger Morin. Although there were occasional flaws in Dunn's testimony, Dunn acknowledged his mistakes and appeared credible. Dr. Roger Morin, a Professor of Finance for Regulated Industry at the Center for the Study of Regulated Industry at Georgia State University who received his PhD in Finance and Econometrics from the Wharton School of Finance at the University of Pennsylvania, appeared to be the most credible expert witness of all those proffered by any party both on paper and in person. Dr. Morin authored the textbook *Regulatory Finance* (1994), which is relied on by many experts in the field, including those in this case.

The Staff of the Missouri Public Service presented the testimony of David Murray. MGE vigorously contested David Murray's testimony. Murray's testimony left no doubt in this commissioner's mind that he came into possession of an old deposition from a previous case and plugged in MGE's information. Murray took positions designed to minimize the return allowed to MGE and stuck with those positions no matter what arguments and evidence were presented by the other parties. Such a rigid position is not helpful to this Commission and, in the opinion of this commissioner, is not consistent with this Commission's duty to balance the interests of both utilities and consumers. See *State ex rel. Union Electric Co. v. Public Service Com.*, 765 S.W.2d 618 (Mo. App. W.D. 1988)

The Office of the Public Counsel presented the testimony of Travis Allen. When Allen first gave deposition testimony in this case, he had been employed by the Office of the Public Counsel for approximately two weeks. Allen handled himself well on the stand and his testimony on behalf of the Public Counsel should improve with experience. He has the education needed to become an expert in regulatory finance but two weeks of experience in the regulatory field does not make him an expert such as can reasonably be relied on by the Commission. Moreover, it appeared in regard to certain issues, like return on equity, that he adopted a position on behalf of the Office of the Public Council, which was designed to achieve a lower number if the Commission decided to split the difference between the numbers recommended by MGE and the Office of the Public Counsel.

This commission found that the testimony of MGE's witnesses was the most credible and that finding is reflected in the majority opinion.

Return on Equity (ROE):

MGE's expert, John Dunn recommended a return on equity between 11% and 12%. Dunn further opined that his 12% recommendation was in order because of the regulatory risk associated with Missouri and its low depreciation rates comparable to those allowed in other states. Public Counsel's witness, Travis

Allen and Staff's witness, David Murray, on the other hand, recommended a return on equity of approximately 9%. It should be noted that Murray's recommendation ranged as low as 8.52%.

Such a vast range in recommended return on equity is not the norm either for this Commission, or for other Commissions around the country. This commission heard undisputed testimony that the average award for ROE in contested utility rate cases is approximately 11.0%. Moreover, in MGE's last litigated rate cases in the late 1990s the return on equity recommendations of MGE, Public Counsel and Staff varied by only about 100 basis points. In that case, MGE was awarded the opportunity to earn a return on equity of approximately 11.3%, the low end of staff's recommendation as a result of poor customer service.

The great variation in recommended return on equity seen in this case requires the Commission to base its determination in large measure on the credibility of the experts. Witness credibility has already been discussed and the opinions of this author are obvious. David Murray's recommended return on equity recommendation was remarkably equivalent to Staff's recommendation for return on equity in the Empire District Electric Company's 2001 rate case despite differences, including capital structure. *See In Re: Empire District Electric,* 10 Mo. P.S.C. 3d 463 (2001). Murray's position on behalf of the Staff in this case, Staff's recommendation in 2001 Empire District Electric Case and Staff's recommendation in another 2001 rate case leave this Commissioner wondering if Staff will continue recommending 8.5% to 9.5% return on equity in future cases involving gas distribution companies or utilities in general no matter how the variables in future cases differ from the present case.

In conclusion, this commissioner found the testimony of MGE's expert witnesses to be the most credible and supports the finding of 10.5% return on equity, which is .5% below MGE's lowest recommendation for return on equity and approximately .6% below the average of return on equity awards throughout the United States. A strong argument could be made that this award is too generous to MGE ratepayers at the expense of the utility and, in the future, this commissioner could certainly support a recommended return on equity of 11.0% or more under the same or similar circumstances.

Class Cost of Service:

This Commission has once again rejected Public Counsel's modified RSUM method to allocate costs among the customer classes in its class cost of service study because it inappropriately assigns costs away from the residential class and pushes them onto the large volume service class. This methodology is an example of Public Counsel seeking a means to justify a result and it is my hope that the Office of Public Counsel will advocate a more reasonable method of allocating costs in future rate cases.

Conclusion:

The majority of this Commission reached a fair decision on the issues. Obviously, there are individual issues that each member of the majority might opine on a little differently if it were not necessary to achieve the majority necessary to

issue a decision in this case. However, the fact that every commissioner is unhappy about some part of the report and order is an indication that we did meet in the middle, reaching a fair decision for MGE and its ratepayers.

Like the dissent in this case, I am very concerned that MGE customers won't be able to afford their heating bill this winter. The wholesale and retail price of natural gas has risen exponentially over the last few years due to increased demand. This trend is expected to continue in the near future. Arbitrarily reducing MGE's return on equity from 11.3% in its last rate case to 10.0% or less in this case would be of some assistance to ratepayers, but would unfairly penalize MGE, discourage future investment in Missouri and could increase their cost of capital so that the ratepayers receive very little benefit.

If we, as regulators, really want to help consumers cope with rising energy costs, we need to do a much better job of educating all consumers as to how they can save money on their utility bills. Reducing demand and the growth of baseload consumption for natural gas will lower energy prices and produce low rates for years to come.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I respectfully dissent from the Report and Order issued by the majority in this proceeding. In general, I am concerned with the majority's decision regarding the following issues: (1) Short-Term Debt; (2) Long-Term Debt Cost; (3) Return on Equity; (4) Capacity Release / Off-System Sales; (5) Incentive Compensation; (6) Legislative / Lobbying; (7) Gas Purchasing / Reliability Plan Reporting; Legislative / Lobbying Time Reporting / Response Time to Commission Referred Customer Complaints; (8) Class Revenue Responsibility; and (9) Experimental Energy Efficiency Programs including PAYS. Furthermore, I harbor concerns about the impact of this decision on the ability of residential ratepayers to pay their gas bills this winter. This is especially true since it is widely recognized that gas costs, which are in addition to the rates approved by the majority, are expected to be at or near record levels this winter.

I. Short-Term Debt

Although I agree with the majority's decision to utilize the actual consolidated capital structure of Southern Union, I disagree with decision to exclude short-term debt from the Southern Union capital structure.

It is undisputed that Southern Union routinely carries a short-term debt balance. During the test year, Southern Union maintained a short-term debt balance that comprised approximately 7.5% of the Southern Union capital structure.[1] By looking solely at a specific snapshot in time (April 30, 2004), the majority has neglected to reflect the reality of the Company's capital structure.

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[1] Allen Direct at Schedule TA-4.

As the Company has repeatedly informed the Commission, "[f]or MGE to have any realistic chance of actually achieving its Commission-authorized earnings level, *the ratemaking process must reasonably reflect MGE's operating reality*."[2] As shown by OPC, the majority's decision to eliminate short-term debt from the consolidated capital structure does not "reflect MGE's operating reality." By eliminating the cheapest source of capital available to the Company, MGE's revenue requirement is arbitrarily inflated.

II. Long-Term Debt Cost

I am concerned about the exclusion of the Panhandle debt in the determination of long-term debt cost. Specifically, the majority has adopted a consolidated capital structure of Southern Union. This capital structure includes the capital components of the entire company including its wholly owned subsidiary Panhandle Eastern Pipeline. Nevertheless, while the majority included the debt of Panhandle Eastern when determining the appropriate capital mix, it excluded this debt in its determination of the long-term debt cost. Arguably, a more appropriate view of the cost of capital should reflect all sources of capital that influence its cost.

III. Return on Equity

In its Report and Order, the majority adopts a Return on Equity of 10.5%. I believe that the majority's decision ignores the clear weight of the evidence in this matter as well as the economic conditions that currently exist.

The majority discredits the recommendations of Staff (8.52% - 9.52%) and Office of Public Counsel (9.01% - 9.34%) based primarily on a survey of regulatory decisions from around the country. Despite its claims that the Commission does not believe it is appropriate to unthinkingly mirror the national average, the Commission bases its dismissal of Staff and Public Counsel's recommendations upon this national average. Specifically, the majority claims that the national average for 2002 and 2003 was 11% and that the average for the first quarter of 2004 was 11.1%.

As Staff witness Murray indicated, MGE's claims regarding the national average is not relevant. First, any reference to the 2002 and 2003 is clearly outdated. As the record indicates, since the beginning of 2002, the Federal Reserve has reduced the discount rate by 40%.[3] Over the same period, the prime interest rate has been reduced from 4.75% to 4.00%.[4] It is unquestionable that the current costs of capital are much less than those experienced in 2002 and 2003. As such, any references to such survey results should be summarily dismissed.

There are similar problems with MGE's claims that the average for the first quarter of 2004 was 11.1%. As Staff Witness Murray indicates, the survey referenced by MGE does not necessarily reflect return on equity decisions issued by state public utility commissions during that period. Rather, it is merely a recitation of the currently authorized return on equity for the survey companies at that point in

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[2] MGE Initial Brief at 5 (emphasis added).

[3] Murray Direct at Schedule 2-2.

[4] Murray Direct at Schedule 3-1.

time. As such, it may reflect return on equity decisions that are many years old. For instance, Murray noted that one decision included in the survey was over 10 years old.[5] As he notes, these return on equity decisions are "hardly relevant to today's low cost of capital environment."[6] I have no problems with the Commission considering decisions of other utility commissions. That said, however, the Commission should be fully informed as to the timing and circumstances of those decisions.

Of particular interest, I note that, because of Southern Union's practice of not paying dividends, all parties agreed that South Jersey Gas Company was an appropriate proxy for Southern Union. Interestingly, the New Jersey Board of Public Utilities issued a decision on July 8, 2004 for South Jersey Gas Company. As reflected in that decision, the appropriate return on equity for this Southern Union proxy was 10.0%. Clearly, this decision better reflects the current economic conditions faced by Southern Union and highlights the reasonableness of Staff's return on equity calculation.

IV. Capacity Release / Off-System Sales

In its Report and Order, the majority decided to eliminate capacity release revenues from consideration of rates in this proceeding. Instead, prompted by MGE's claims that future capacity release revenues are uncertain, the majority has shifted those revenues to the PGA / ACA process. In order to give the Company an incentive to maximize its efforts to realize these revenues, the majority has also adopted MGE's proposed sharing grid. Under this sharing grid, MGE is permitted to share, to various extents, in all future capacity release revenues.

As an initial matter, it should be stated that I would have preferred that capacity release revenues be treated in the context of the base rates established in this proceeding. The very nature of Missouri regulation provides utilities, such as MGE, an incentive to maximize revenues and minimize expenses. Recognizing that the Commission is not permitted to engage in retroactive ratemaking, utilities are permitted to keep, until the next time that rates are changed, any increase in revenues or decrease in expenses. In this way, because rates established in 2001 were based upon a projected level of capacity release revenues of $1,200,000, MGE has been permitted to profit to the extent that it could exceed that amount. Furthermore, if it was not able to meet this level of revenues, MGE shareholders would suffer the shortfall. As is clearly evident, the current Missouri regulatory process works and provides adequate incentives for utilities to maximize its realized revenues.

That said, if it is determined that the capacity release revenues should be included in the PGA process, I believe that it is inappropriate to implement a sharing grid that allows MGE to share in the first block of revenues. It is reasonable that some level of revenues is attainable by a gas utility without exercising any expertise. I do not believe that a utility should be provided an incentive for exercising such an elementary degree of skill. This is "low hanging fruit" that can be reaped by virtually

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[5] Murray Surrebuttal at page 4.

[6] Murray Surrebuttal at page 4.

anyone. The true expertise, and need for incentive, is needed as the utility reaches higher in the tree for more revenues. At these levels, incentive becomes truly important and I believe that the utility should truly be rewarded.

Instead of a careful consideration of the incentives implicit in a sharing grid, the majority merely accepted MGE's proposed sharing grid. The MGE proposal merely serves to shift risk from the Company to the ratepayer. Under the current system, MGE faced a revenue shortfall if it did not reach the amount of capacity revenues built into rates. Under the new sharing proposal, MGE is permitted to engage in the amount of capacity release sales that it desires. At any point in time, MGE can unilaterally decide that it no longer wants to devote resources to these transactions. In such a situation, Missouri ratepayers will no longer benefit, but MGE is not penalized. For this reason, the current system is superior for providing MGE with incentives while not saddling ratepayers with the risk that MGE will no longer engage in such activities.

V. Incentive Compensation

In its Report and Order, the majority excludes all incentive compensation awards associated with financial performance. While I would concur with this decision, the majority allows MGE to recover costs associated with incentive compensation awards related to customer service. It is my opinion that the majority has rewarded MGE for inferior customer service by allowing it to establish and recover incentive compensation awards based upon goals that are less than industry average.

As pointed out by the Office of Public Counsel, a study conducted by Theodore Barry and Associates indicates that the industry average speed of answer was 60 seconds. Since the Company's incentive compensation program establishes a call answer target that is longer than 60 seconds, I would not allow MGE to recover these incentive compensation awards.

The majority erroneously places the burden upon Public Counsel to demonstrate that the 1998 Theodore Barry analysis is still reflective of industry average. Instead, MGE should have been required to meet the burden of proving that these costs were just and reasonable. The burden should be on MGE to show that its customer service has reached a level that deserves ratepayer support of the incentive compensation program. Although the study is six years old, it is recognized to be the most recent study. Clearly, since MGE was unable to produce any evidence demonstrating that its customer service incentive compensation awards were beneficial to the public, it should not be allowed to reward employees for inferior customer service. The Commission should only be rewarding utilities based on a showing of extraordinary customer service. The majority decision rewards mediocrity.

VI. Legislative / Lobbying

In the last litigated MGE proceeding, the Commission considered the issue of disallowance of legislative / lobbying expenses. Based upon the recommendation of Staff, the Commission disallowed costs of the Public Affairs and Community Relations Department as lobbying expenses. As the Commission noted in that case:

> MGE should keep time records that would at least show the time expense spent by staff members on regulated or recoverable activities. This would give the Commission competent documentary evidence indicating the respective amount of time spent on the various activities assigned to the Public Affairs and Community Relations Department. Lacking such competent evidence, the Commission must disallow any expense that is not support by competent and substantial evidence.[7]

Despite the Commission's stern warning in the last proceeding, MGE again failed to maintain documentary evidence indicating the "respective amount of time spent on the various activities assigned to the Public Affairs and Community Relations Department." Overlooking its past warning and against the advice of Staff, the majority allows the inclusion of 50% of the salary of MGE's Legislative Liaison. Interestingly, the majority admits "MGE did not provide any detailed information about the amount of time Snider spends lobbying". The majority further notes that "[t]he problem is that there is no way to really know how much of the time of Snider, Oglesby, and Hack is spent lobbying."

I believe that MGE has been on notice for over six years that it should maintain documentary evidence to show the legitimacy of the costs in question. Given MGE's blatant disregard of the Commission's warning, I believe that it is highly inappropriate to then reward MGE by including any portion of the costs in question.

VII. Gas Purchasing / Reliability Plan Reporting; Legislative / Lobbying Time Reporting / Response Time to Commission Referred Customer Complaints

In its testimony, Staff requests that the Commission order MGE to submit certain plans or to adopt certain guidelines. Each of these proposals, if adopted, would have assisted the Commission in fulfilling its statutory obligation in ensuring that MGE offers safe and adequate service at just and reasonable rates.

First, Staff asks that MGE be required to submit a Gas Purchasing / Reliability Plan. Recognizing that MGE has recently replaced its entire gas supply department, the Commission needs assurances that the new department at MGE is fulfilling this duty. Staff notes that similar gas purchasing / reliability plans are voluntarily provided by other Missouri gas companies. Reflecting a continuation of its non-cooperative attitude, MGE states that it should not be required to file such a plan and instead proposes that Staff obtain such information through the Commission's formal discovery rules.

As expressed in my dissent in Case No. GC-2004-0507, I am also concerned about MGE's decision to replace its entire gas procurement department. In light of such changes, I believe that it is imperative that this Commission takes a proactive approach to guarantee that ratepayers do not suffer as a result of this management decision. This Commission has a responsibility to ensure that MGE provides safe and adequate service.

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[7] *Missouri Gas Energy*, 7 MoPSC 3d 394 at 412 (emphasis added).

Second, reflecting its ongoing difficulty in assessing the extent that MGE employees are engaged in legislative and lobbying efforts, Staff requests that MGE be required to keep documentation sufficient to allow Staff to eliminate these costs from regulated rates. Despite the frustration expressed by the majority when deciding the issue of legislative / lobbying costs ("the problem is that there is no way to really know how much of the time of Snider, Oglesby and Hack is spent lobbying"; "the Commission must make adjustments based on the limited information that is available"; "the Commission's inability to determine the exact amount of time that they spend in lobbying must be laid solely to MGE's failure to properly account for their time."), the Commission fails to take steps to address this problem. Instead, the Commission further perpetuates the problem that has existed since MGE came into existence. I believe that a definite problem exists and that Staff's proposal should be adopted to ensure that the problem does not continue.

Finally, the Staff makes another proposal in an attempt to address another lingering problem with MGE. Specifically, Staff asks that the Commission order MGE to respond to Commission forwarded customer complaints / inquiries within 3 business days. In the event that such a matter involves an interruption of service, the response should be forwarded within 24 hours. Again, Staff notes that other companies have been more cooperative and have voluntarily adopted Staff's proposal. This Commission should ensure that customer complaints are handled in an expeditious manner.

VIII. Class Revenue Responsibility

After determining the appropriate revenue requirement for MGE, it is necessary to determine how any increase should be allocated among the various customer classes. In my opinion, the current rate revenue percentage is still reasonable and should have been used for the allocation of any increase. Shifting burdens to residential ratepayers on top of the rate increase in this case as well as the increase in the cost of natural gas will impose a severe hardship on many residential customers especially those living on limited income.

IX. Experimental Energy Efficiency Programs including PAYS

In the Report and Order, the majority expresses an interest in the PAYS program, but declines to implement such a program in the context of this proceeding. I believe that the Commission should further its efforts to advance programs similar to PAYS to help achieve more energy efficiency. Inevitably, while the Commission would seek to address this matter in a subsequent proceeding, MGE will claim that the Commission cannot implement such a program without funding. Such funding can only come in the context of a rate proceeding.

During my questioning of MGE witnesses, I was distressed at the Company's seeming lack of interest on this issue. I have a great interest in programs such as PAYS and believe that the implementation of such programs is reflective of an efficient management. Furthermore, I would consider appropriate incentives for companies with effective programs. I would hope that the Company would revisit its position on this program and present the Commission with definite proposals as soon as possible.

CONCURRING OPINION OF COMMISSIONER APPLING

Although I voted with the majority in this matter, it is important that all parties realize that I do not join in the concurring opinion of Commissioner Davis. Specifically, while I believed that MGE deserved a return on equity greater than that recommended by Staff and Public Counsel, I did not base my decision on any perceived lack of credibility by Staff's witness or lack of experience by Public Counsel's witness. Rather, I found the work done by all witnesses to be thorough and credible. It is the very nature of this business that Commissioners are called upon to choose between the expert opinions of multiple witnesses. Clearly, based upon the fact that the return on equity that I voted on was not within the range of any particular expert, I found particular arguments made by each witness to be persuasive. This concurring opinion is merely meant to clarify that I found all of the return on equity witnesses to be credible and that the comments of any particular Commissioner are not intended to be reflective of the Commission as a whole.

In the Matter of the Application of Atmos Energy Corporation for an Order Authorizing it to Acquire the Business of TXU Gas Company.

Case No. GM-2004-0607
Decided September 21, 2004

Gas § 6. The Commission determined that, with the imposition of conditions agreed to by Atmos Energy Corporation, the acquisition of a Texas utility company by Atmos was not detrimental to the public interest, and approved the acquisition.

ORDER APPROVING STIPULATION AND AGREEMENT

On June 18, 2004, Atmos Energy Corporation filed an application for an order authorizing it to acquire the business of TXU Gas Company. On September 14, 2004, Atmos, the Staff of the Commission, and the Office of the Public Counsel filed a unanimous stipulation and agreement. The parties state that as a result of various discussions and discovery, they have reached an agreement, and recommend the Commission approve the acquisition. The parties state that they have structured their agreement so that the acquisition, subject to the agreed conditions, is not detrimental to the public interest.

The numerous conditions to which Atmos agrees appear to insulate Missouri ratepayers from any adverse effects that could result from the acquisition. For example, Atmos agrees that the acquisition premium will be treated below the line in Missouri (that is, the cost will be borne entirely by shareholders rather than ratepayers). Costs related to any employee severance payments made as a result of the acquisition will be similarly treated. Atmos also agrees to keep its books and records available to Staff and Public Counsel, and to record the costs and effects of the acquisition in such a way that it is possible to track them. Atmos agrees to issue and sell at least $300 million of new common equity to complete the transaction.

On September 16, 2004, Staff filed suggestions in support of the agreement. Staff supports approval of the agreement, and stated that it believes the conditions imposed in the agreement, while not foolproof, will adequately protect the interests of Missouri ratepayers and regulators. Staff explained each of the conditions.

On September 17, 2004, Staff filed a supplement to its suggestions in support of the agreement. The supplement consists of an analysis of the proposed transaction on Atmos' financial outlook. Staff does not draw any conclusion about how the transaction will affect Atmos' credit rating.

The Commission has considered the application, the unanimous stipulation and agreement, the pleadings and the Staff Memorandum. The Commission finds that, subject to the conditions imposed, the acquisition will not be detrimental to the public interest, and will approve it.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on September 14, 2004, is approved, and the parties shall carry out the terms and requirements therein.

2. That Atmos Energy Corporation is authorized to complete the transaction described in its application filed June 18, 2004 (including all exhibits and attachments), subject to the conditions in the Stipulation and Agreement.

3. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transaction herein involved.

4. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

5. That this order shall become effective on September 30, 2004.

6. That this case may be closed after October 1, 2004.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Editor's 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 Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service.*

Case No. GR-2004-0209
Decided September 28, 2004

Evidence, Practice and Procedure §1. The Commission granted a post-report and order request for clarification to decide an issue that was not resolved by an agreement between the parties and was not addressed in the report and order.

ORDER GRANTING STAFF'S REQUEST FOR CLARIFICATION

On September 22, 2004, the Staff of the Commission filed a pleading entitled Request for Clarification in which Staff points out that the report and order issued by the Commission on September 21 establishes a methodology for determining the amount of the customer charge to be imposed on the Residential and Small General Service classes, but does not establish the amount of the customer charge for the Large General Service and Large Volume Service classes. Staff asks that the Commission clarify its order so that the parties can properly prepare, file and review the tariffs required to implement the Commission's report and order.

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* The Commission, in an order issued on October 19, 2004, denied applications for rehearing in this case. This case was appealed to the Cole County Circuit Court (04CV326262 - consolidated with 04CV326643). See page 581 for another order in this case.

In its direct testimony, MGE proposed that the fixed customer charge for the Large General Service class be increased from $83.25 to $112.40,[1] and that the fixed customer charge for the Large Volume Service class be increased from $409.30 to $614.00.[2] Subsequently, in its rebuttal testimony, MGE represented that, as a result of discussions at the prehearing conference, MGE had agreed that the multi-meter discount applicable to the large volume service class should be retained such that the increased fixed monthly rate element applicable to large volume service customers would apply only to two meters at a single address or location and the charge for meters in excess of two at a single location would be held at the current level of $204.65. With that modification, MGE's witness represented that UMKC, CMSU, and Jackson County supported the large volume service customer charge that he proposed.[3] MGE repeated that representation in its initial brief,[4] and that representation was not directly contradicted in any other party's brief. Furthermore, the parties did not identify the customer charge for the Large General Service and Large Volume Service classes as a separate issue, although it could be seen as part of the Fixed Monthly Rate Elements issue – Issue 13 – in the report and order. The Commission believed that the parties did not dispute the large volume service and large general service customer fixed monthly rate elements and did not address them in its report and order.

On September 23, the Commission ordered that any party wishing to respond to Staff's request for clarification do so no later than September 27. Midwest Gas Users' Association, UMKC, CMSU, and Jackson County filed a response on September 27. In their response, those parties indicated that their agreement with MGE was only that a multiple meter discount would limit the customer charge for customers with more than two meters to the existing rate of $204.65 for each meter more than two. Those parties indicated that they did not agree to the amount of the customer charge for other meters proposed by MGE.

The Commission's review of the testimony and briefs indicates that there is a misunderstanding between the parties about the exact nature of their agreement. There was not a lot of testimony about this matter, but in cross-examining MGE's witness Mr. Cummings, counsel for Midwest Gas, UMKC, CMSU, and Jackson County, Jeremiah Finnegan, had the following exchange with Mr. Cummings:

> Q. Good Morning, Dr. Cummings. I've just got a few questions for you. One is with respect to the proposal to keep the multi-meter charge discount at a certain rate, *depending upon what happens to the full rate for the customer charge?*
>
> A. Yes.[5] (emphasis added)

And then later:

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[1] Cummings Direct, Ex. 23, Page 37, Lines 11-13.

[2] Cummings Direct, Ex. 23, Page 38, Line 11.

[3] Cummings Rebuttal, Ex. 25, Pages 38-40,

[4] Missouri Gas Energy, Initial Brief, Page 79, footnote 19.

[5] Transcript, Page 2064, Lines 19-23.

> Q. And the proposal here that the Company is now making is that to keep that percentage at such a level so that *whatever the customer charge rate goes to,* that the $204.65 would be the result; is that correct?
>
> A. Yeah, so our - - there are two ways of doing it. Either recalculate the percentage; or where the customer charge is shown several pages over, you could state an actual level. Either way. To get that result.[6] (emphasis added)

Both questions are consistent with Midwest Gas, UMKC, CMSU, and Jackson County's position that they did not agree to a specific level for the customer charge. Rather, their agreement related only to multi-meter customers having more than two meters.

A close reading of the briefs filed by those parties supports the same interpretation. Those briefs speak of how the multi-meter discount will be calculated *if* the customer charge is increased. They do not agree that the customer charge will be increased by a specific amount.

Since the parties did not agree upon the customer charge for the first two meters, the Commission now must decide the proper amount for those charges. MGE's direct testimony indicated that its proposal to increase the customer charges for large general services and large volume services was of the same relative magnitude as the increases it proposed for the residential and small general service classes. In its report and order, the Commission found that the customer charge for residential and small general service classes should be increased to a level sufficient to maintain the current ratio between volumetric rate elements and fixed charges elements, but not to the amount proposed by MGE. The Commission's rational for that decision applies equally to the large general services and large volume services rate classes.

The Commission will therefore find that the customer charge for the large general services and large volume services classes shall be increased to a level sufficient to maintain the ratio between volumetric rate elements and fixed charges elements as it currently exists for those rate classes. Provided, however, that the multi-meter discount applicable to the large volume service class shall be retained such that the increased fixed monthly rate element applicable to large volume service customers will apply only to two meters at a single address or location and the charge for meters in excess of two at a single location will be held at the current level of $204.65.

In a related matter, MGE initially proposed to change its definition of seasons from a winter of five months and a summer of seven months to six months for each season.[7] MGE also agreed to drop that proposal as a result of the prehearing conference.[8] The Commission will accept that agreement and finds that for purposes of the seasonal rates of Large General Service and Large Volume

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[6] Transcript, Pages 2065-2066, Lines 20-25, 1-4.

[7] Cummings Direct, Ex. 23, Page 37, Lines 7-10 and Page 38, Lines 5-7.

[8] Cummings Rebuttal, Ex. 25, Page 29, Lines 6-8.

Service customers, the winter season shall continue to be the five months of November through March and the summer season shall continue to be the seven months of April through October.

Midwest Gas, UMKC, CMSU, and Jackson County also raise objections to two aspects of the rates calculated in the revised tariff MGE filed on September 24. First they object to MGE's proposal to increase the sales or transportation charges on an equal cents per rate block basis. Second, they object to the adjusted test year revenue used by MGE in calculating the rates contained in the revised tariff. These issues have not previously been presented to the Commission in this case and MGE has not had an opportunity to respond. Furthermore, there is no evidence in the record by which the Commission can make a decision on those objections. The Commission will not make a ruling on those objections at this time.

IT IS THEREFORE ORDERED:

1. That Staff's Request for Clarification is granted.

2. That the Commission offers the foregoing order as clarification of its report and order issued on September 21, 2004.

3. That this order shall become effective on October 2, 2004.

Murray, Clayton, Davis and Appling, CC., concur
Gaw, Ch., not participating

Woodruff, Senior Regulatory Law Judge

In the Matter of the Joint Application of Missouri-American Water Company and Cedar Hill Utility Company, Inc., for Authority for Missouri-American Water Company to Acquire Certain Assets of Cedar Hill Utility Company, Inc., and in Connection Therewith, Certain Other Related Transactions.

Case No. SM-2004-0275
Decided September 28, 2004

Sewer §2. The Commission approved a unanimous stipulation and agreement that provided for the granting of a certificate of convenience and necessity to Missouri-American Water Company to operate the sewer system it purchased from Cedar Hill Utility Company.

Sewer §16. Expense §73. The Commission approved a unanimous stipulation and agreement wherein Missouri-American Water Company agreed not to seek rate recovery of any acquisition premium associated with its purchase of Cedar Hill Utility Company.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT AND GRANTING MISSOURI-AMERICAN WATER COMPANY A CERTIFICATE OF CONVENIENCE AND NECESSITY

On January 5, 2004, Cedar Hill Utility Company and Missouri-American Water Company filed a Joint Application asking the Commission to approve Missouri-American 's purchase of Cedar Hill's sanitary sewer system assets. On January 6, the Commission issued an order directing that notice of the joint application be provided to the public. That order also designated January 26 as the deadline for the filing of applications to intervene. No applications to intervene have been received.

On May 5, the Staff of the Commission filed a recommendation regarding the joint application. Staff recommended that the joint application be granted, but also recommended that the Commission impose several conditions on its approval. One of those conditions was that Missouri-American not be allowed to recover in rates the acquisition premium that would result from its purchase of Cedar Hill's assets. On May 17, Missouri-American filed a pleading indicating that it was not willing to accept the conditions recommended by Staff. Cedar Hill concurred in Missouri-American's position on June 2. On July 20, the Commission established a procedural schedule leading to an evidentiary hearing.

On September 9, the parties filed a unanimous stipulation and agreement that resolves all outstanding issues between the parties. Staff filed suggestions in support of the stipulation and agreement on September 20.

The chief area of dispute between Staff and the Joint Applicants had been Staff's insistence that Missouri-American must not be allowed to recover in rates the acquisition premium that will result from its purchase of Cedar Hill's assets. The stipulation and agreement resolves that dispute by Missouri-American's agreement not to seek recovery of any acquisition premium associated with the purchase

of Cedar Hill's assets as part of this case or any future proceeding. The stipulation and agreement also provides that the Commission should grant Missouri-American a certificate of convenience and necessity to operate the sewer system that it will be acquiring from Cedar Hill.

Based on its review of the unanimous stipulation and agreement and Staff's suggestions in support, the Commission finds that the stipulation and agreement filed on September 9 should be approved. Missouri-American Water Company will be granted a certificate of convenience and necessity to operate the sewer system that it acquires from Cedar Hill.

The Commission reminds Missouri-American 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 240-3.335 requires sewer 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 $2000 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 2000.

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 the Commission. If the company fails to comply it is subject to penalties for noncompliance ranging from $100 to $2000 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 all of these obligations.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on September 9, 2004, is approved, and the signatory parties are ordered to comply with its terms.

2. That Missouri-American Water Company is authorized to acquire the sanitary sewer system assets of Cedar Hill Utility identified in the Joint Application.

3. That Missouri-American Water Company is granted a Certificate of Convenience and Necessity to construct, install, own, operate, control, manage, and maintain a system for the provision of sewer service, to serve the area currently served by Cedar Hill Utility Company, Inc., more particularly described in Commission Case No. 17,862.

4. That this certificate is granted upon the conditions set out in the body of this order.

5. That Missouri-American Water Company is ordered to comply with all Missouri statutes and Commission rules.

6. That Missouri-American Water Company is authorized to adopt the tariffs of Cedar Hill Utility Company.

7. That the certificate of convenience and necessity issued by this order will become effective when Missouri-American Water Company's implementing tariff becomes effective.

8. That Missouri-American Water Company is authorized to enter into, execute and perform in accordance with the terms described in The Contract for Sale of Sanitary Sewer System Assets and its First Amendment and to take any and all other actions that may be reasonably necessary and incidental to the performance of the acquisition.

9. That Cedar Hill Utility Company shall file a notice in this case informing the Commission when the transactions authorized in this order have been completed so that the Commission can issue an order canceling Cedar Hill's certificate of convenience and necessity.

10. That this order shall become effective on October 8, 2004.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's 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.

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

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ACCOUNTING

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§1. Generally

The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate. --Union Electric Company 12 MPSC 3d 174.

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS

§21. Grant or refusal of certificate generally

The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate. --Union Electric Company 12 MPSC 3d 174.

§21.1 Public interest

The Commission determined that with certain conditions attached, the benefits of adding a 345-kV transmission line in the Callaway-Franks location outweighed the detriments and therefore, granting the certificate was in the public interest. --Union Electric Company 12 MPSC 3d 174.

§21.4 Economic feasibility of proposed service

The fact that a wholesale supply contract to sell water to a neighboring utility was only for a six-month renewable term, did not raise concern about the long-term economic viability of the applicant utility where the neighboring utility had no other available source of water. --Environmental Utilities 12 MPSC 3d 115.

A wholesale supply contract to sell water to a neighboring utility was sufficient to satisfy the Commission's concerns about the economic viability of the applicant utility and justified the issuance of a certificate of convenience and necessity that had otherwise been approved in an earlier report and order. --Environmental Utilities 12 MPSC 3d 115.

§22. Restrictions and conditions

The Commission found that it was reasonable and necessary to limit the construction to a certain route where easements had already been granted, add certain maintenance and construction requirements and restrictions, to require that absent a voluntary agreement to the contrary no currently occupied residential structure be moved, that owners of certain structures within 75 feet of the centerline be compensated, and that the company file a copy of its survey once the line is constructed. --Union Electric Company 12 MPSC 3d 174.

The Commission determined that certain conditions requested by the intervenors were not reasonable and necessary. --Union Electric Company 12 MPSC 3d 174.

The Commission granted - subject to conditions regarding regulatory, economic and safety concerns - a certificate of convenience and necessity to construct and operate a sewer system to Envirowater Company. --Envirowater 12 MPSC 3d 356.

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

§ 42. Electric and power

The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate. --Union Electric Company 12 MPSC 3d 174.

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VI. DEPRECIATION OF PARTICULAR UTILITIES

§31. Electric and power
§32. Gas
§33. Heating
§34. Telecommunications
§35. Water

DEPRECIATION

III. BASIS FOR CALCULATION

§12. Methods of calculation

The Commission issued an order approving a Stipulation and Agreement wherein the parties agreed that Aquila would adopt the Staff of the Commission's method of depreciation, which is "cost of removal less salvage." --Aquila, Inc. 12 MPSC 3d 418.

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DISCRIMINATION

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ELECTRIC

I. IN GENERAL

§ 1. Generally

The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate. --Union Electric Company 12 MPSC 3d 174.

The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc. The Commission denied Staff's request, finding that Staff's suggestions as to how the Commission *might* have jurisdiction over the proposed transaction to be extremely tenuous. The Commission determined that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction. --Aquila, Inc. 12 MPSC 3d 380.

§3. Certificate of convenience and necessity

The Commission granted the application of Union Electric Company, d/b/a AmerenUE, for approval to construct, operate, own, and maintain a 345-kilovolt transmission line outside its certificated service area and attached certain reasonable and necessary conditions to that certificate. --Union Electric Company 12 MPSC 3d 174.

§4. Transfer, lease and sale

The Commission authorized a Missouri utility to transfer an electric transmission line to an Iowa utility, where such transfer was required by the transmission line agreement under which the line was constructed in 1968. --Aquila 12 MPSC 3d 102.

The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc. --Aquila, Inc. 12 MPSC 3d 380.

The Commission determined that the acquiring utility would not be allowed to recover any acquisition premium from its ratepayers, and therefore, the existence of an acquisition premium could not alter the Commission's evaluation of whether the merger would be detrimental to the public. --UtiliCorp 12 MPSC 3d 388.

§4.1. Change of suppliers

Osage Valley Electric Cooperative served the applicant's land. Then, a city annexed that land. That annexation meant Aquila must now serve it. Mr. Smith wanted the Commission to approve a change of suppliers both for his existing structure, as well as for structures he planned to build.

The Commission allowed a change of suppliers only for the existing structure. In contrast, the Commission required the parties to file a territorial agreement before Osage Valley can serve the undeveloped land. --Smith 12 MPSC 3d 322.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers generally

The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of

Aquila, Inc. The Commission determined that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction. --Aquila, Inc. 12 MPSC 3d 380.

The Commission approved a Stipulation and Agreement and approved, with conditions, AmerenUE's participation in the Midwest Independent System Operator (MISO) through a contractual arrangement with GridAmerica, LLC. --Union Electric Company 12 MPSC 3d 385.

§9. Jurisdiction and powers of the State Commission

The Commission's Staff requested that the Commission issue an order directing its Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC, an unregulated subsidiary of Aquila, Inc. The Commission determined that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction. --Aquila, Inc. 12 MPSC 3d 380.

III. OPERATIONS

§20. Rates

The Commission denied an electric company's motion to lift the suspension of a portion of a general rate increase tariff to allow an Interim Energy Charge to go into effect before completion of a full hearing on the general rate increase request. --The Empire District Electric Company 12 MPSC 3d 538.

§30. Construction

The Commission granted an electric utility's uncontested request for authority to construct an electric distribution line outside its certificated service area. --Union Electric Company 12 MPSC 3d 221.

A utility need not seek Commission approval to construct an additional transmission line within its own certificated service territory. --Union Electric Company 12 MPSC 3d 221.

§42. Planning and management

The Commission approved a Stipulation and Agreement and approved, with conditions, AmerenUE's participation in the Midwest Independent System Operator (MISO) through a contractual arrangement with GridAmerica, LLC. --Union Electric Company 12 MPSC 3d 385.

§45. Decommissioning costs

The Commission approved a Stipulation and Agreement concerning AmerenUE's decommissioning costs. The Commission ordered that AmerenUE's accruals and trust fund payments stay at the current level. --Union Electric Company 12 MPSC 3d 68.

The Commission approved a Stipulation and Agreement concerning KCP&L's decommissioning costs. The Commission ordered that KCP&L's accruals and trust fund payments stay at the current level. --Kansas City Power & Light 12 MPSC 3d 69.

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III. PRACTICE AND PROCEDURE

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§29. Discovery
§30. Settlement procedures
§31. Mediator
§32. Confidential evidence

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§1. Generally

A case is moot when a tribunal's decision would not have any practical effect upon any live controversy. Issues under old, superseded tariffs are moot and therefore not subject to consideration. --Missouri-American Water 12 MPSC 3d 442.

The Commission granted a post-report and order request for clarification to decide an issue that was not resolved by an agreement between the parties and was not addressed in the report and order. --Missouri Gas Energy 12 MPSC 3d 646.

§2. Jurisdiction and powers

The Commission has the jurisdiction to hear complaints against water and sewer companies. The Commission cannot award damages to a complainant. But the Commission can order a water or sewer company to not disconnect a customer for failure to pay disputed charges. --OPC v. Warren County Water & Sewer 12 MPSC 3d 433.

§4. Presumption and burden of proof

Aquila asked the Commission to approve its application to encumber its Missouri regulated assets. The Commission should approve Aquila's application if doing so would not be detrimental to the public interest. The parties opposing Aquila wanted the Commission to find the affirmative of that issue; that is, that the application is detrimental to the public interest. The parties that want the affirmative of the issue have the burden of proof. --Aquila, Inc. 12 MPSC 3d 375.

§6. Weight, effect and sufficiency

An approved tariff has the same force and effect as a statute. Therefore, a tariff is to be analyzed in the same manner as a statute. --Laclede Gas Company 12 MPSC 3d 123.

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that there was not sufficient evidence to finally determine if an acquisition premium exists. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission found the company's evidence more credible than the complainant's. The company's evidence included other utility companies' records and Department of Revenue records regarding the complainant's address. The complainant's evidence was uncorroborated and inconsistent. --Smith v. Missouri Gas Energy 12 MPSC 3d 561.

§8. Stipulation

Where a Complainant sought damages resulting from the disconnection of electric service, the Commission approved a Stipulation and Agreement requiring that Kansas City Power & Light apply a $270 credit to Complainant's account and that KCP&L file tariff sheets, for Commission approval, listing the dollar amounts of the Company's reconnection fees. --Moses v. KCPL 12 MPSC 3d 348.

II. PARTICULAR KINDS OF EVIDENCE

§19. Records and books of utilities

The Commission found the company's records and other utility companies' records regarding the complainant's address credible. --Smith v. Missouri Gas Energy 12 MPSC 3d 561.

III. PRACTICE AND PROCEDURE

§23. Notice and hearing

The Commission will default a party that has not timely answered a complaint. But the Commission may set aside the order if the defaulted party asks the Commission to do so within seven days. --OPC v. Warren County Water & Sewer Company 12 MPSC 3d 339.

§24. Procedures, evidence and proof

The Commission permitted the part owner of a small water and sewer company to appear both as a witness and as attorney for the company where the need to expedite the hearing did not allow enough time to permit the company to obtain alternative legal counsel and where it would be manifestly unjust to deny the company legal representation. --PSC Staff v. Osage Water Company 12 MPSC 3d 25.

The Commission's decision on a theory not espoused by any party was not a denial of due process where the decision was based solely on an interpretation of a tariff and a written stipulation and agreement. --Laclede Gas Company 12 MPSC 3d 123.

A directed verdict is not a summary disposition within the meaning of 4 CSR 240-2.117, and the procedural requirements of that rule do not prevent the Commission from considering a motion for directed verdict at any time. --Osage Water Company 12 MPSC 3d 343.

A directed verdict is simply a determination by the tribunal that the party having the burden of proof has failed to present sufficient evidence to carry its burden. --Osage Water Company 12 MPSC 3d 343.

A motion for directed verdict is appropriate at any time after a party having the burden of proof has submitted its prefiled direct testimony. --Osage Water Company 12 MPSC 3d 343.

A water and sewer company's failure to establish its costs in its direct testimony justified a directed verdict against the company and the dismissal of the company's request for a rate increase. --Osage Water Company 12 MPSC 3d 343.

When a party does not answer a complaint, the Commission deems the complaint to be true.--OPC v. Warren County Water & Sewer 12 MPSC 3d 433.

The Commission may order a hearing even if a litigant waives its right to hearing. --Smith v. Missouri Gas Energy 12 MPSC 3d 561.

The Commission may permit telephone appearance at a hearing, even if that appearance may impair that litigant's ability to review documents and to cross-examine evidence. The Commission explained this waiver of cross-examination in an order, and the litigant did not object. --Smith v. Missouri Gas Energy 12 MPSC 3d 561.

§25. Pleadings and exhibits

Having determined that Complainants failed to state a claim upon which relief could be granted, the Commission granted Respondents motions to dismiss. --ANJ Communications, et al. v. Southwestern Bell 12 MPSC 3d 70.

The Commission refused to strike portions of Staff's proposed findings of fact and conclusions of law because of opposing party's allegation that they contained arguments not previously presented at the hearing. The Commission will decide in its report and order which arguments are supported by the law and facts. --Laclede Gas Company 12 MPSC 3d 123.

§27. Finality and conclusiveness

The Commission denied a motion to suspend a tariff that had been submitted in compliance with a previous report and order. --Southwestern Bell 12 MPSC 3d 62.

The Commission denied a motion to suspend a tariff that had been submitted in compliance with a previous report and order. --Southwestern Bell 12 MPSC 3d 63.

§30. Settlement procedures

Where no party files a timely objection thereto, the Commission may treat a Stipulation and Agreement as unanimous even though all of the parties to the matter have not entered into the Agreement. --Fidelity Telephone 12 MPSC 3d 425.

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
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§77. Adjustments to test year levels
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EXPENSE

IV. ASCERTAINMENT OF EXPENSES

§19. Future expenses

The Commission refused to allow a gas company to establish a pre-funded source for the payment of possible future environmental cleanup costs where the amount of future cleanup costs was unknown. --Missouri Gas Energy 12 MPSC 3d 581.

VI. PARTICULAR KIND OF EXPENSE

§27. Additions and betterments

AmerenUE agreed to invest $15-$25 million to replace its cast iron main lines and its unprotected steel service lines. AmerenUE agreed to invest that money between July 1, 2003 and December 31, 2006. Also, AmerenUE agreed not to attempt to recover those costs through an Infrastructure System Replacement Surcharge before January 1, 2006. --Union Electric 12 MPSC 3d 340.

§46. Expenses of rate proceedings

The Commission rejected a proposal to arbitrarily limit MGE's rate case expenses to an amount found reasonable in an earlier rate case, but did remove certain costs as imprudently incurred. --Missouri Gas Energy 12 MPSC 3d 581.

Reasonable and prudently incurred costs of presenting a rate case to the Commission are accepted as a cost of doing business, which a company will be allowed to recover in its rates. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission has a responsibility to ensure that the rate case expenses that the company submits to its ratepayers are reasonably and prudently incurred. Otherwise, the company could take a cost-is-no-object approach to its rate case presentation, secure in the knowledge that the ratepayers would be required to pay for any cost that the company might incur. --Missouri Gas Energy 12 MPSC 3d 581.

§58. Office expense

A gas company's decision to maintain an office in New York City primarily for the convenience of two corporate officers was not a prudent expenditure and could not be recovered from ratepayers. --Missouri Gas Energy 12 MPSC 3d 581.

§59. Officers' expenses

The salaries a gas company paid to two of its board members, who were not involved in the day-to-day operations of the company, was excessive, and only a portion of the salaries could be recovered from ratepayers. --Missouri Gas Energy 12 MPSC 3d 581.

§60. Political and lobbying expenditures

The Commission excluded a portion of the salaries of three corporate employees whose job duties included lobbying activities. --Missouri Gas Energy 12 MPSC 3d 581.

§64. Salaries and wages

The cost of the portion of a gas company's incentive compensation plan that was based on meeting the company's financial goals benefited shareholders, not ratepayers, and could not be recovered through rates. --Missouri Gas Energy 12 MPSC 3d 581.

§73. Expenses incurred in acquisition of property

The Commission approved a unanimous stipulation and agreement wherein Missouri-American Water Company agreed not to seek rate recovery of any acquisition premium associated with its purchase of Cedar Hill Utility Company. --Cedar Hill Utility Company 12 MPSC 3d 650.

GAS

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§56. Donations
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§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
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§66. Franchise and license expense
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§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
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§79. Rentals
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§81. Salaries and wages
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§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

This case was opened for the purpose of receiving information and a gas incident report regarding an explosion that occurred in one of Missouri Gas Energy's utility vaults in Kansas City, Missouri. The Commission approved the Settlement Agreement and Satisfaction of Complaint between the Staff of the Commission and Missouri Gas Energy. As part of the agreement, the company agreed to change its vault entry procedure to require testing for combustible gas before an employee opens the vault. The company also agreed to fix the vault that was involved in the explosion and to inspect, at least semiannually, all ten of its vaults that have tight-sealed doors and no external vents. The agreement also provides that the company will review its procedures regarding what work its employees must do and what work the company may hire out to contractors. The company also agreed to review the issue of what training it should give employees and contractors, as well as when a company employee should be present to assist a contractor. --PSC Staff v. Missouri Gas Energy 12 MPSC 3d 65.

Laclede Gas Company filed a proposed tariff designed to raise rates by $6 million in order to implement an arrearage forgiveness program, called the "Catch-Up/Keep-Up Plan," for eligible low income customers. The Commission found that while the concept of an arrearage

forgiveness program is worthy of consideration, Laclede's proposal would unlawfully pass non-gas costs through the Purchased Gas Adjustment/Actual Cost Adjustment (PGA/ACA) mechanism. The Commission also determined that the program was longer in duration and larger in size than was reasonable based upon the evidence presented. Although Laclede would profit and some low-income customers would receive short-term help, most customers would receive a rate increase and be denied a corresponding rate offset related to reductions in uncollectible expenses and other costs until the current rate case moratorium ends. For these reasons, the Commission concluded that the proposed tariff should be rejected due to its flawed design and improper funding mechanism. --Laclede Gas Company 12 MPSC 3d 88.

The Commission opened an investigatory case to examine possible programs for improving long term energy affordability for those in need of assistance, and to examine the Commission's Cold Weather Rule. The Commission also established a task force to accomplish the objectives of the investigation. --Investigation - Cold Weather Rule 12 MPSC 3d 393.

The Commission approved Laclede Gas Company's request that the Commission establish certain replacement requirements for the final phase of the company's unprotected steel main replacement program. --Laclede Gas Company 12 MPSC 3d 395.

The Commission adopted Staff's recommendation that the Commission continue the current requirements of the previously-approved Stipulation and Agreement, which addressed the adequacy of Laclede Gas Company's copper service line replacement program. --Laclede Gas Company 12 MPSC 3d 400.

The Commission approved the unanimous Stipulation and Agreement of the parties, finding that it was just and reasonable and should be approved. The Stipulation and Agreement provides for a revenue increase on an annual basis of $2,600,000, exclusive of applicable fees and taxes, for the Northern System and the Southern System of the company's MPS service areas. The Stipulation and Agreement also provides for a revenue increase, on an annual basis, exclusive of applicable taxes and fees, of $836,542 for the L&P service areas. --Aquila, Inc. 12 MPSC 3d 429.

§3. Certificate of convenience and necessity

The Commission granted permission to Missouri Pipeline Company, LLC, to adopt Missouri Pipeline Company's certificate of convenience and necessity. Because Missouri Pipeline was simply reorganizing, and was not dissolving to form a new corporation, Missouri Pipeline Company, LLC, did not have to apply for a new certificate. --Missouri Pipeline Company 12 MPSC 3d 1.

The Commission granted permission to Missouri Gas Company, LLC, to adopt Missouri Gas Company's certificate of convenience and necessity. Because Missouri Gas was simply reorganizing, and was not dissolving to form a new corporation, Missouri Gas Company, LLC, did not have to apply for a new certificate. --Missouri Gas Company 12 MPSC 3d 4.

§4. Abandonment or discontinuance

The Commission opened an investigatory case to examine possible programs for improving long term energy affordability for those in need of assistance, and to examine the Commission's Cold Weather Rule. The Commission also established a task force to accomplish the objectives of the investigation. --Investigation - Cold Weather Rule 12 MPSC 3d 393.

§6. Transfer, lease and sale

The Commission approved a stipulation and agreement and authorized Southern Union Company to acquire Panhandle Eastern Pipeline Company, subject to numerous conditions designed to protect Missouri ratepayers. --Southern Union 12 MPSC 3d 104.

The Commission determined that the sale and transfer of Aquila's Eastern System from Aquila to AmerenUE was not detrimental to the public interest, and approved the sale. --Aquila, Inc. 12 MPSC 3d 423.

The Commission determined that the Staff of the Commission failed to meet its burden to show that Southern Union violated any statute when it transferred personnel and sold property in Texas, and the Commission therefore closed the case. --Southern Union 12 MPSC 3d 488.

The Commission determined that, with the imposition of conditions agreed to by Atmos Energy Corporation, the acquisition of a Texas utility company by Atmos was not detrimental to the public interest, and approved the acquisition. --Atmos Energy Corporation 12 MPSC 3d 645.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Commission had the jurisdiction to determine whether Missouri Pipeline Company could reorganize into Missouri Pipeline Company, LLC. Missouri Pipeline Company is a gas corporation and public utility operating in Missouri. Section 393.250 RSMo states that the reorganization of such a corporation is subject to the Commission's supervision and control. The Commission found the proposed reorganization reasonable and not detrimental to the public interest, and therefore approved it. --Missouri Pipeline Company 12 MPSC 3d 1.

The Commission had the jurisdiction to determine whether Missouri Gas Company could reorganize into Missouri Gas Company, LLC. Missouri Gas Company is a gas corporation and public utility operating in Missouri. Section 393.250 RSMo states that the reorganization of such a corporation is subject to the Commission's supervision and control. The Commission found the proposed reorganization reasonable and not detrimental to the public interest, and therefore approved it. --Missouri Gas Company 12 MPSC 3d 4.

The Commission has the power to waive an inspection rule. Commission Rule 4 CSR 240-2.060(14)(B) authorizes the Commission to waive its rules if an applicant gives a complete justification setting out the good cause for granting the waiver. --Missouri Association of Natural Gas Operators 12 MPSC 3d 99.

The Commission found that it has the legal authority, pursuant to Section 536.060, RSMo 2000, to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in the case. --Aquila, Inc. 12 MPSC 3d 429.

§8. Jurisdiction and powers of the Federal Commissions

The Commission has the power to waive an inspection rule. Because the Commission's rule is similar to a federal rule, 49 USC § 60118(d) requires the Commission to give the U.S. Department of Transportation 60 days' notice of the waiver. The Secretary of Transportation may object to the Commission's waiver during the 60 days' notice. --Missouri Association of Natural Gas Operators 12 MPSC 3d 99.

III. CONSTRUCTION AND EQUIPMENT

§11. Leakage, shrinkage and waste

Commission Rule 4 CSR 240-40.030(13)(M)2.B.(II) requires natural gas operators to inspect their exposed pipelines for leaks every 39 months, but no later than once every third calendar year. --Missouri Association of Natural Gas Operators 12 MPSC 3d 99.

The Commission established certain replacement requirements for the final phase of Laclede Gas Company’s unprotected steel main replacement program. The approved requirements reduce Laclede’s annual replacement requirements for unprotected steel mains that meet the criteria in paragraphs (15)(E)3 through (15)(E)6 of Commission Rule 4 CSR 240-40.030 from an average of 20,000 feet per year to an average annual rate of 10,000 feet, until all remaining mains identified by this section have been replaced. --Laclede Gas Company 12 MPSC 3d 395.

§13. Additions and betterments

The Commission approved an agreement between Laclede Gas Company and the Staff of the Commission that established an infrastructure replacement surcharge for Laclede. --Laclede Gas Company 12 MPSC 3d 450.

§16. Safety

The Commission waived its rule that requires natural gas operators to inspect their pipelines for corrosion every three years. Natural gas operators must also inspect their pipelines for leaks every 39 months, but no later than once every third calendar year. The Commission found that allowing the applicants to inspect for corrosion at the same time they inspect for leaks would not affect public safety. --Missouri Association of Natural Gas Operators 12 MPSC 3d 99.

The Commission approved an agreement between Laclede Gas Company and the Staff of the Commission that established practices Laclede would undertake with respect to inspecting and monitoring certain plastic pipe fittings. --Laclede Gas Company 12 MPSC 3d 483.

IV. OPERATION

§17. Operation generally

The Commission found that a gas company violated its own tariffs when it provided gas supplies and transportation to two large customers in a manner that was not permitted by those tariffs. --Southern Missouri Gas 12 MPSC 3d 147.

The Commission rejected Staff's proposal to decrease a gas company's actual cost adjustment balance by $99,199 - even though the company had provided a service to two large customers that was not authorized by the company's tariffs - because Staff failed to show that ratepayers were actually harmed by the company's actions. --Southern Missouri Gas 12 MPSC 3d 147.

The Commission found that, based on the circumstances, Missouri Gas Energy's 5-month delay in commencing service was not reasonable. --McKinzy v. MGE 12 MPSC 3d 517.

§17.1. Purchased Gas Adjustment (PGA)

The Commission determined that Laclede Gas Company's proposed tariff to implement an arrearage forgiveness program unlawfully passed non-gas costs through the Purchased Gas Adjustment/Actual Cost Adjustment (PGA/ACA) mechanism. --Laclede Gas Company 12 MPSC 3d 88.

The Commission accepted the parties' final report in which the parties agreed to implement certain changes in the PGA process by filing amendments to the companies' individual tariffs. --PGA-Local Distribution Companies 12 MPSC 3d 140.

The Commission rejected Staff's proposal to decrease a gas company's actual cost adjustment balance by $99,199 - even though the company had provided a service to two large customers that was not authorized by the company's tariffs - because Staff failed to show that ratepayers were actually harmed by the company's actions. --Southern Missouri Gas 12 MPSC 3d 147.

The Commission required a gas company to adjust its ACA balance and implement changes to its reliability analysis as recommended by the Commission's Staff, and accepted by the company. --Southern Missouri Gas 12 MPSC 3d 168.

The Commission required a natural gas utility to adjust its ACA balances to comply with the uncontested recommendations of the Commission's Staff. --Aquila Networks-L&P 12 MPSC 3d 217.

§17.2. Purchased Gas-incentive mechanism

Gas company's withdrawal from one half of a price stabilization program also effectively canceled the remaining portions of the program where to allow the program to proceed would allow the company to share in illusory profits it made from trading call options while the price that consumers had to pay for natural gas soared. --Laclede Gas Company 12 MPSC 3d 123.

A gas company may share a portion of the revenues it earns from sales of released pipeline capacity so that the company will have an incentive to maximize such sales. --Missouri Gas Energy 12 MPSC 3d 581.

§18. Rates

The Commission rejected Laclede Gas Company's proposed tariff designed to raise rates by $6 million in order to implement an arrearage forgiveness program for eligible low income customers. The Commission found that although Laclede would profit and some low-income customers would receive short-term help, most customers would suffer a rate increase and be denied a corresponding rate offset related to reductions in uncollectible expense and other costs until the company's current rate case moratorium ends. The Commission also determined that the plan's funding mechanism was improper and that the program was longer in duration and larger in size than was reasonable based upon the evidence presented. --Laclede Gas Company 12 MPSC 3d 88.

The Commission found that Laclede's proposed tariff making changes to its experimental school gas aggregation program was lawful and reasonable, and that the concerns of the Staff of the Commission and the Office of the Public Counsel were misplaced. The Commission accordingly approved the tariffs. --Laclede Gas Company 12 MPSC 3d 165.

The Commission approved an extension of an experimental low-income rate designed to assist low-income customers in paying their natural gas bills. --Missouri Gas Energy 12 MPSC 3d 364.

The Commission approved an agreement between Laclede Gas Company and the Staff of the Commission that established an infrastructure replacement surcharge for Laclede. --Laclede Gas Company 12 MPSC 3d 450.

§19. Revenue

A gas company may share a portion of the revenues it earns from sales of released pipeline capacity so that the company will have an incentive to maximize such sales. --Missouri Gas Energy 12 MPSC 3d 581.

Where the future revenues that a gas company could expect to earn from sales of released pipeline capacity were uncertain, the company could include such revenues as an adjustment to its purchased gas adjustment rather than as an offset to its revenue requirement. --Missouri Gas Energy 12 MPSC 3d 581.

§20. Return

The company's actual, consolidated capital structure, including the capital structure of its subsidiary, rather than a proposed hypothetical capital structure, was used to calculate the rate of return to be allowed for a gas company, because that actual capital structure resulted from the management decisions of the company. --Missouri Gas Energy 12 MPSC 3d 581.

Inclusion of the long-term debt of a subsidiary in the capital structure of a gas company used to determine the company's rate of return was not appropriate where the debt of the subsidiary was non-recourse to the gas company. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission has an obligation under the law, as well as a matter of practical necessity, to allow a gas company an opportunity to earn a return that will allow it to compete in the capital market. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission allowed a gas company a return on equity of 10.5% in determining the company's allowed rate of return. --Missouri Gas Energy 12 MPSC 3d 581.

A company may not recover flotation costs related to the sale of additional equity where the sale of additional equity was made necessary by an acquisition for which the Company entered into a stipulation abjuring rate recovery of any additional costs associated with the acquisition. --Missouri Gas Energy 12 MPSC 3d 581.

A rate of return adder proposed by a gas company as a reward for the company's efficient operation was inappropriate in concept and unworkable in practice. --Missouri Gas Energy 12 MPSC 3d 581.

§21. Service

The Commission required a gas company to adjust its ACA balance and implement changes to its reliability analysis as recommended by the Commission's Staff, and accepted by the company. --Southern Missouri Gas 12 MPSC 3d 168.

The Commission approved a unanimous stipulation and agreement that resolved a complaint brought by Staff against a gas company alleging that the company had violated its tariffs by providing natural gas to certain large customers through an unauthorized service denoted as Transportation Service-Internal. --PSC Staff v. Southern Missouri Gas Company 12 MPSC 3d 232.

The Commission determined that Missouri Gas Energy was authorized, pursuant to Section 3.03 of its tariff, to charge Mr. McKinzy a transfer fee of $5.00, not a connection fee of $20.00.

The Commission determined that, based on the facts of this case, Missouri Gas Energy may not transfer to Mr. McKinzy's account the past-due debt owed by his wife for service that Missouri Gas Energy provided to her at a prior address, when Mr. McKinzy did not receive the use and benefit of that service. --McKinzy v. MGE 12 MPSC 3d 517.

§22. Weatherization

The Commission increased funding authorized for MGE's weatherization program in the Kansas City area. --Missouri Gas Energy 12 MPSC 3d 581.

§34. Accounting Authority orders

An accounting authority order would not be granted in a rate case where the parties had not been given a reasonable opportunity to argue the issue because it was raised for the first time at the true-up hearing. --Missouri Gas Energy 12 MPSC 3d 581.

§35. Safety

As part of a Settlement Agreement and Satisfaction of Complaint between Missouri Gas Energy and the Staff of the Commission, the company agreed to fix the vault where an explosion recently occurred, change its vault entry procedures to require testing for combustible gas before an employee opens the vault, and to inspect all ten of its vaults that have tight-sealed doors and no external vents. In addition, the company agreed to additional changes regarding the work it hires out to contractors. --PSC Staff v. Missouri Gas Energy 12 MPSC 3d 65.

The Commission approved a Stipulation and Agreement between the Staff of the Commission and Missouri Gas Energy, whereby an explosion at a residence was found to have been the result of a service person not following procedure and the incident was used an example in training other service persons. --PSC Staff v. MGE 12 MPSC 3d 361.

The Commission approved Laclede Gas Company's request that the Commission establish certain replacement requirements for the final phase of the company's unprotected steel main replacement program. The approved requirements reduce Laclede's annual replacement requirements for unprotected steel mains that meet the criteria in paragraphs (15)(E)3 through (15)(E)6 of Commission Rule 4 CSR 240-40.030 from an average of 20,000 feet per year to an average annual rate of 10,000 feet, until all remaining mains identified by this section have been replaced. --Laclede Gas Company 12 MPSC 3d 395.

The Commission adopted Staff's recommendation that the Commission continue the current requirements of the previously-approved Stipulation and Agreement, which addressed the adequacy of Laclede Gas Company's copper service line replacement program. --Laclede Gas Company 12 MPSC 3d 400.

V. JOINT OPERATIONS

§40. Transportation

The Commission approved a unanimous stipulation and agreement concerning tariff changes proposed by a natural gas utility to permit daily allocations of natural gas among its large volume transport customers to match daily allocations from the supplying pipeline company. --Missouri Gas Energy 12 MPSC 3d 220.

§41. Pipelines

The Commission approved a unanimous stipulation and agreement concerning tariff changes proposed by a natural gas utility to permit daily allocations of natural gas among its large volume transport customers to match daily allocations from the supplying pipeline company. --Missouri Gas Energy 12 MPSC 3d 220.

VI. PARTICULAR KIND OF EXPENSES

§63. Expenses of rate proceedings

Reasonable and prudently incurred costs of presenting a rate case to the Commission are accepted as a cost of doing business, which a company will be allowed to recover in its rates. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission has a responsibility to ensure that the rate case expenses that the company submits to its ratepayers are reasonably and prudently incurred. Otherwise, the company could take a cost-is-no-object approach to its rate case presentation, secure in the knowledge that the ratepayers would be required to pay for any cost that the company might incur. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission rejected a proposal to arbitrarily limit MGE's rate case expenses to an amount found reasonable in an earlier rate case, but did remove certain costs as imprudently incurred. --Missouri Gas Energy 12 MPSC 3d 581.

§75. Office expense

A gas company's decision to maintain an office in New York City primarily for the convenience of two corporate officers was not a prudent expenditure and could not be recovered from ratepayers. --Missouri Gas Energy 12 MPSC 3d 581.

§76. Officers' expenses

The salaries a gas company paid to two of its board members, who were not involved in the day-to-day operations of the company, was excessive, and only a portion of the salaries could be recovered from ratepayers. --Missouri Gas Energy 12 MPSC 3d 581.

§77. Political and lobbying expenditures

The Commission excluded a portion of the salaries of three corporate employees whose job duties included lobbying activities. --Missouri Gas Energy 12 MPSC 3d 581.

§81. Salaries and wages

The cost of the portion of a gas company's incentive compensation plan that was based on meeting the company's financial goals benefited shareholders, not ratepayers, and could not be recovered through rates. --Missouri Gas Energy 12 MPSC 3d 581.

MANUFACTURED HOUSING

I. IN GENERAL

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§2. Obligation of the manufacturers and dealers
§3. Jurisdiction and powers of Federal authorities
§4. Jurisdiction and powers of the State Commission
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II. WHEN A PERMIT IS REQUIRED

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III. GRANT OR REFUSAL OF A PERMIT

§8. Grant or refusal generally
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§11. Public safety

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

§12. Operations under the permit generally
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§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

I. IN GENERAL

§1. Generally

Finding it to be inappropriate if it were true that A&G sold manufactured homes without the proper registration, the Commission rejected a Stipulation and Agreement that required A&G to register as a dealer of manufactured homes because it encouraged A&G to function as a dealer of manufactured homes. --PSC Staff v. A&G Commercial Trucking, Inc. 12 MPSC 3d 441.

The Commission approved a Stipulation and Agreement that required Coachman Homes of Eureka, Inc., to pay certain penalties, to inspect and correct the anchoring of homes at the company's expense, to discontinue the use of a subcontractor and to pay restitution and remove a

damaged home from a customers' property. --PSC Staff v. Coachman Homes 12 MPSC 3d 462.

The Commission's Staff brought a complaint against Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc., alleging that the contractor improperly set up a home in violation of Missouri law. In order to ensure the safety of the homeowners and their property, the Commission directed its Staff to send notice to each of the 126 homeowners potentially affected by the allegations in this case. --PSC Staff v. Coachman Homes of Eureka, Inc. 12 MPSC 3d 553.

The Commission issued an order directing Coachman Homes of Eureka, Inc. to file a status report regarding the progress of its settlement negotiations. --PSC Staff v. Coachman Homes of Eureka, Inc. 12 MPSC 3d 555 and 579.

§4. Jurisdiction and powers of the State Commission

Under Section 740.040, RSMo 2000, the Commission has jurisdiction over dealers of manufactured homes and may, under Section 700.100, consider complaints involving, among other things, violations of Sections 407.020 and 700.045. --PSC Staff v. Amega Sales, Inc. 12 MPSC 3d 570.

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

§17. Acts or omissions justifying revocation or forfeiture

Upon a complaint and evidentiary hearing, the Commission found that Amega Sales, Inc., sold a new manufactured home without the required Housing and Urban Development labels and misrepresented the condition and value of the home. --PSC Staff v. Amega Sales, Inc. 12 MPSC 3d 570.

§19. Penalties

The Commission approved a Stipulation and Agreement that required Coachman Homes of Eureka, Inc., to pay a penalty of $2000.00. --PSC Staff v. Coachman Homes 12 MPSC 3d 462.

PUBLIC UTILITIES

I. IN GENERAL

§1. Generally
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§3. Functions and powers
§4. Termination of status

§5. Obligation of the utility

II. JURISDICTION AND POWERS

§6. Jurisdiction and powers generally
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§8. Jurisdiction and powers of the Federal Commissions
§9. Jurisdiction and powers of local authorities

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§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

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§24. Municipal plants
§25. Municipal districts
§26. Mutual companies; cooperatives
§27. Corporations
§28. Foreign corporations or companies
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PUBLIC UTILITIES

I. IN GENERAL

§1. Generally

The Commission assessed a total of $15,867,383 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2004. -- Assessment FY 2004 12 MPSC 3d 144.

The Commission assessed a total of $15,525,475 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2005. --Assessment FY 2005 12 MPSC 3d 458.

§5. Obligation of the utility

The Commission assessed a total of $15,867,383 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2004. --Assessment FY 2004 12 MPSC 3d 144.

The Commission assessed a total of $15,525,475 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2005. --Assessment FY 2005 12 MPSC 3d 458.

RATES

I. JURISDICTION AND POWERS

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§123. Rate design, class cost of service for telecommunications utilities
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RATES

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

§13. Character of the service

The Commission will not allow a company to increase its rates while it is unable or unwilling to provide safe and adequate service to its customers. --Osage Water Company 12 MPSC 3d 343.

It is the obligation of the owner of a public utility to provide the plant and make the necessary investments in that plant in order to give public utility service, and it is not the obligation of the subscribers to pay rates which will permit the owner of the utility to build a plant upon which it can then base a request for further increases. --Osage Water Company 12 MPSC 3d 343.

§18. Consolidation or sale

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered. --Warren County Water & Sewer Company 12 MPSC 3d 275.

§23. Efficiency of operation and management

The Commission will not allow a company to increase its rates while it is unable or unwilling to provide safe and adequate service to its customers. --Osage Water Company 12 MPSC 3d 343.

It is the obligation of the owner of a public utility to provide the plant and make the necessary investments in that plant in order to give public utility service, and it is not the obligation of the subscribers to pay rates which will permit the owner of the utility to build a plant upon which it can then base a request for further increases. --Osage Water Company 12 MPSC 3d 343.

A rate of return adder proposed by a gas company as a reward for the company's efficient operation was inappropriate in concept and unworkable in practice. --Missouri Gas Energy 12 MPSC 3d 581.

§37. Refund and/or reduction

Money collected by a utility under an approved rate becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions. --Missouri-American Water 12 MPSC 3d 442.

§40. Revenues

Where the future revenues that a gas company could expect to earn from sales of released pipeline capacity were uncertain, the company could include such revenues as an adjustment to its purchased gas adjustment rather than as an offset to its revenue requirement. --Missouri Gas Energy 12 MPSC 3d 581.

A gas company may share a portion of the revenues it earns from sales of released pipeline capacity so that the company will have an incentive to maximize such sales. --Missouri Gas Energy 12 MPSC 3d 581.

§41. Return

A rate of return adder proposed by a gas company as a reward for the company's efficient operation was inappropriate in concept and unworkable in practice. --Missouri Gas Energy 12 MPSC 3d 581.

The company's actual, consolidated capital structure, including the capital structure of its subsidiary, rather than a proposed hypothetical capital structure, was used to calculate the rate of return to be allowed for a gas company, because that actual capital structure resulted from the management decisions of the company. --Missouri Gas Energy 12 MPSC 3d 581.

Inclusion of the long-term debt of a subsidiary in the capital structure of a gas company used to determine the company's rate of return was not appropriate where the debt of the subsidiary was non-recourse to the gas company. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission has an obligation under the law, as well as a matter of practical necessity, to allow a gas company an opportunity to earn a return that will allow it to compete in the capital market. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission allowed a gas company a return on equity of 10.5% in determining the company's allowed rate of return. --Missouri Gas Energy 12 MPSC 3d 581.

A company may not recover flotation costs related to the sale of additional equity where the sale of additional equity was made necessary by an acquisition for which the Company entered into a stipulation abjuring rate recovery of any additional costs associated with the acquisition. --Missouri Gas Energy 12 MPSC 3d 581.

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

§74. Retroactive rates

The Commission's ratemaking authority is prospective in nature and the Commission has no power to retroactively phase-in rates. --Missouri-American Water 12 MPSC 3d 442.

§79. Test or trial rates

The Commission approved an extension of an experimental low-income rate designed to assist low-income customers in paying their natural gas bills. --Missouri Gas Energy 12 MPSC 3d 364.

V. KINDS AND FORMS OF RATES AND CHARGES

§80. Kinds and forms of rates and charges in general

High fixed monthly customer charges tend to defeat customer efforts to reduce their bill by conserving natural gas. Therefore, the public interest is best served by setting customer charges as low as reasonably possible. --Missouri Gas Energy 12 MPSC 3d 581.

The Commission rejected a weather mitigation rate design proposed by Missouri Gas Energy as single-issue ratemaking because it would allow rates to change without any further evaluation by the Commission of whether the new rates are just and reasonable. --Missouri Gas Energy 12 MPSC 3d 581.

§81. Surcharges

The Commission increased the surcharge for the Relay Missouri Program from $.09 to $.10 per month per access line. The Commission also directed that the retention amount should remain at the current level of $30.00 or one percent, whichever is greater. In addition, the Commission clarified that where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the Deaf Relay and Equipment Distribution Program Fund. --Relay Missouri 12 MPSC 3d 108.

The Commission approved a water company's request to establish an Infrastructure System Replacement Surcharge (ISRS). --Missouri-American 12 MPSC 3d 326.

An eligible water company is authorized by statute to establish a special surcharge – an ISRS – to recover the cost of replacing eligible infrastructure system equipment and plant until a final rate is established in the company's next rate case. --Missouri-American 12 MPSC 3d 326.

The proper measure of accumulated depreciation used in calculating an Infrastructure System Replacement Surcharge is the actual accumulated depreciation recorded on the books of the company for each item of eligible plant. --Missouri-American 12 MPSC 3d 326.

The net cost of removal of old, non-ISRS plant may not be included in the company's calculation of the Infrastructure System Replacement Surcharge. --Missouri-American 12 MPSC 3d 326.

Costs that may be recovered through an Infrastructure System Replacement Surcharge include property taxes on eligible plant that will be due within twelve months of the ISRS filing. Property taxes that are payable more than twelve months after the ISRS filing may not be recovered. --Missouri-American 12 MPSC 3d 326.

AmerenUE, the Staff of the Commission, the Office of the Public Counsel, and the Department of Natural Resources entered into a Stipulation and Agreement. Part of that agreement forbids AmerenUE from filing for an Infrastructure System Replacement Surcharge (ISRS) before January 1, 2006. Also, the agreement forbids AmerenUE from filing for a Purchased Gas Adjustment (PGA) before April 1, 2004. --Union Electric 12 MPSC 3d 340.

§101. Fuel clauses

The Commission denied an electric company's motion to lift the suspension of a portion of a general rate increase tariff to allow an Interim Energy Charge to go into effect before completion of a full hearing on the general rate increase request. --The Empire District Electric Company 12 MPSC 3d 538.

§102. Installation, connection and disconnection charges

It is important to set the fees that the company will charge for connection and disconnection fees at a rate that will recover the actual cost of providing that service. If the fee does not cover the actual cost of providing the service, other customers will subsidize the cost causer through higher than necessary base rates. --Missouri Gas Energy 12 MPSC 3d 581.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

§104. Electric and power

The Commission issued an order approving a Stipulation and Agreement wherein the parties agreed that the tariff sheets initially filed by Aquila should be rejected and that the Company should be authorized to file revised tariff sheets designed to produce an increase in overall gross annual electric revenue of $14.5 million, for its MPS service area, and $3.25 million for its L&P service area. --Aquila, Inc. 12 MPSC 3d 418.

§108. Gas

The Commission rejected the company's proposed tariff designed to implement an arrearage forgiveness program for eligible low income customers. The Commission found that although the company would profit and some low-income customers would receive short-term help, most customers would suffer a rate increase and be denied a corresponding rate offset related to reductions on uncollectible expense and other costs until the company's current rate case moratorium ends. --Laclede Gas Company 12 MPSC 3d 88.

§110. Telecommunications

The Commission approved the company's proposed tariff revising the company's General Exchange tariff, finding that the tariff modifies rates in accordance with the price cap statute, Section 392.245, RSMo 2000. The proposed tariff adjusts the company's basic rates by the change in the CPI-TS as required by Section 392.245.4; updates its maximum allowable prices for non-basic services and adjusts certain rates as

allowed by Section 392.245.11; and adjusts certain switched access rates and rebalances local rates as in accordance with the provisions of Section 392.245.9. --Sprint Missouri 12 MPSC 3d 21.

The Commission rejected the argument of the Office of the Public Counsel that the company's rate rebalancing was not supported by appropriate cost studies. --Sprint Missouri 12 MPSC 3d 21.

The Commission found that SBC Missouri could not use the price-cap statute to increase its' charges for line status verification and for busy line interrupt. The Commission found that because SBC Missouri's rates are tied to the Consumer Price Index for Telephone Services, and the CPI-TS and SBC Missouri's rates have actually declined in the last few years. --Southwestern Bell 12 MPSC 3d 234.

The Commission found that ALLTEL could not elect price-cap status because the alternative local exchange companies were not providing basic local service as contemplated by the statute. Basic local service means that the alternative local exchange company offers **all** essential services required in the Commission's rules. --ALLTEL Missouri, Inc. 12 MPSC 3d 467.

The Commission found that it should approve an agreement that would reduce the company's gross intrastate revenues by about $183,291 annually. The company would achieve that revenue decrease by reducing fees for 911-related services, local rates, intrastate interLATA terminating carrier common line rates, and intrastate interLATA and intraLATA local transport rates. The agreement also provides for a four-year rate moratorium. --Citizens Telephone Company 12 MPSC 3d 541.

§111. Water

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission approved a water company's request to establish an Infrastructure System Replacement Surcharge (ISRS). --Missouri-American Water 12 MPSC 3d 326.

An eligible water company is authorized by statute to establish a special surcharge – an ISRS – to recover the cost of replacing eligible infrastructure system equipment and plant until a final rate is established in the company's next rate case. --Missouri-American Water 12 MPSC 3d 326.

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§112. Sewers

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered. --Warren County Water & Sewer Company 12 MPSC 3d 275.

VII. EMERGENCY AND TEMPORARY RATES

§114. Emergency and temporary rates generally

The Commission denied an electric company's motion to lift the suspension of a portion of a general rate increase tariff to allow an Interim Energy Charge to go into effect before completion of a full hearing on the general rate increase request. --The Empire District Electric Company 12 MPSC 3d 538.

VIII. RATE DESIGN, CLASS COST OF SERVICE

§118. Method of allocating costs

The modified relative system utilization methodology – RSUM – proposed by Public Counsel was rejected as inappropriate because, by treating all mains costs as demand related it ignored the fact that unless mains are constructed, at a cost, customers would not have access to the gas distribution system. Furthermore, Public Counsel's proposed method under allocated the cost of mains to the residential and small general service customers that caused the system's peak requirements. --Missouri Gas Energy 12 MPSC 3d 581.

The zero-intercept method of allocating the cost of gas mains recognizes that when a main is built to reach a customer, a certain portion of the cost of the main will be incurred no matter how much gas the cus-

tomer uses. The Commission accepted the use of that method to allocate the cost of mains among customer classes. --Missouri Gas Energy 12 MPSC 3d 581.

§120. Rate design, class cost of service for gas utilities

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Class cost of service studies serve as a guide to the ultimate goal of just and reasonable rates, but the Commission does not need to slavishly adhere to any particular study. --Missouri Gas Energy 12 MPSC 3d 581.

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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
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§14. Jurisdiction and powers of the State Commission
§15. Jurisdiction and powers of local authorities

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

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§20. Securities covering properties outside the State

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§23. Charters
§24. Competition
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§26. Definite plans and purposes
§27. Financial conditions and prospects
§28. Use of proceeds
§29. Dividends and dividend restrictions
§30. Improper practices and irregularities
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§32. Necessity of issuance
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§47. Intangible property
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§67. Preferred stock
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§69. Financing methods and practices generally
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§71. Financing expense
§72. Payment for securities
§73. Prospectuses and advertising
§74. Subscriptions and allotments
§75. Stipulation as to rate base

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§77. Electric and power
§78. Gas
§79. Sewer
§80. Water
§81. Miscellaneous

SECURITY ISSUES

VIII. FINANCING METHODS AND PRACTICES

§ 69. Financing methods and practices generally

Aquila wished to encumber its Missouri regulated assets to secure a loan it had already received. Aquila had asked utility commission in other states for similar permission. Those other states had allowed Aquila to encumber a sufficient value of assets to satisfy the lender. If Aquila also pledged Missouri assets, then the Missouri assets could become the only collateral supporting the loan. In turn, those Missouri regulated assets would support Aquila's unregulated, and therefore riskier, operations. For those reasons, the Commission found the application detrimental to the public interest. --Aquila, Inc. 12 MPSC 3d 375.

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
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IV. OPERATIONS

§25. Operations generally
§26. Extensions
§27. Trial or experimental operation
§28. Consent of local authorities
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§30. Rate of return
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§32. Use and ownership of property
§33. Hours of service
§34. Restriction on service
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§36. Maintenance
§37. Equipment
§38. Standard service
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V. SERVICE BY PARTICULAR UTILITIES

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§42. Heating
§43. Water
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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

III. DUTY TO SERVE

§ 17. Duty to serve in general

Because M.L.M. Telecommunications, Inc., d/b/a Ameritel, Your Phone Company erroneously began operating without an approved tariff and without indicating the use of a fictitious name, the Commission, pursuant to the terms of an agreement between Ameritel and the Commission's Staff, ordered the Company to remit a payment in the amount of $3,000.00 to the Public School Fund of the State of Missouri, under Section 166.011, RSMo 2000. --PSC Staff v. M.L.M. Telecommunications, Inc. 12 MPSC 3d 138.

IV. OPERATIONS

§27. Trial or experimental operation

AmerenUE agreed to give $100,000 annually for an experimental weatherization/low-income program for Stoddard and Scott Counties. --Union Electric 12 MPSC 3d 340.

§32. Use and ownership of property

Aquila asked the Commission for authority to encumber its Missouri regulated assets. Aquila wished to do so because of its security agreement with its lender. That security agreement allowed the lender to bypass Commission approval and immediately foreclose upon the property if Aquila defaulted. The Commission found such a possibility to be detrimental to the public interest. --Aquila, Inc. 12 MPSC 3d 375.

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
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§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

§1. Generally

Missouri-American Water Company filed proposed tariff sheets designed to implement a general rate increase for water and sewer service. Staff later filed an excessive earnings complaint against Missouri-American Water Company, which was consolidated into this case. The parties subsequently filed three stipulations and agreements, which, among other things, do not provide for an increased revenue requirement in any district. In fact, the revenue requirement stipulation and agreement has a neutral impact in every district except Joplin, where there is a decrease of $350,000, exclusive of taxes. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the rate design stipulation and agreement. --Missouri-American Water 12 MPSC 3d 409.

§2. Certificate of convenience and necessity

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and

granted a certificate of convenience and necessity for Warren County Water & Sewer's service area to Missouri-American. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission approved a unanimous stipulation and agreement that provided for the granting of a certificate of convenience and necessity to Missouri-American Water Company to operate the sewer system it purchased from Cedar Hill Utility Company. --Cedar Hill Utility Company 12 MPSC 3d 650.

§4. Transfer, lease and sale

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company with certain conditions including that a portion of the proceeds of the sale be placed in escrow for payment of overdue assessment, fees, and any other penalties or fines owed by the Seller. --Warren County Water & Sewer Company 12 MPSC 3d 275.

III. OPERATIONS

§14. Rates and revenues

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and also approved a moratorium on rates. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission will not allow a company to increase its rates while it is unable or unwilling to provide safe and adequate service to its customers. --Osage Water Company 12 MPSC 3d 343.

It is the obligation of the owner of a public utility to provide the plant and make the necessary investments in that plant in order to give public utility service, and it is not the obligation of the subscribers to pay rates which will permit the owner of the utility to build a plant upon which it can then base a request for further increases.--Osage Water Company 12 MPSC 3d 343.

Missouri-American Water Company filed proposed tariff sheets designed to implement a general rate increase for water and sewer service. Staff later filed an excessive earnings complaint against Missouri-American Water Company, which was consolidated into this case. The parties subsequently filed three stipulations and agreements, which, among other things, do not provide for an increased revenue requirement in any district. In fact, the revenue requirement stipulation and agreement has a neutral impact in every district except Joplin, where there is a decrease of $350,000, exclusive of taxes. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the rate design stipulation and agreement.

The revenue requirement stipulation and agreement provides that the current Infrastructure Replacement Surcharge (ISRS) would be set to zero on April 16, 2004. It also provides that the company will not file a tariff seeking a new ISRS prior to December 16, 2005, and provides that in any ISRS filing after that date, the company will use a specified weighted cost of capital (common equity 3.91%, preferred equity 0.39%, debt 3.4%, total: 7.70%). --Missouri-American Water 12 MPSC 3d 409.

§16. Costs and expenses

The Commission approved a unanimous stipulation and agreement wherein Missouri-American Water Company agreed not to seek rate recovery of any acquisition premium associated with its purchase of Cedar Hill Utility Company. --Cedar Hill Utility Company 12 MPSC 3d 650.

§18. Depreciation

The revenue requirement stipulation and agreement provides that the company will implement certain new depreciation rates and provides that the company will develop new district-specific historical databases for use in future rate cases. It also provides that as of January 1, 2004, the company will begin expensing cost of removal and salvage and will discontinue the reserve deficiency amortizations currently in effect. --Missouri-American Water 12 MPSC 3d 409.

STEAM

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IV. RELATIONS BETWEEN CONNECTING COMPANIES

§46. Relations between connecting companies generally
§47. Physical connection
§48. Contracts
§49. Records and statements

STEAM

III. OPERATIONS

§20. Rates

The Commission issued an order approving a Stipulation and Agreement wherein the parties agreed that the tariff sheets initially filed by Aquila should be rejected and that the Company should be authorized to file revised tariff sheets designed to produce an increase in overall gross annual revenue of $1.3 million. --Aquila, Inc. 12 MPSC 3d 418.

TELECOMMUNICATIONS

I. IN GENERAL

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§5. Jurisdiction and powers of local authorities
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§7. Jurisdiction and powers of the State Commission

III. OPERATIONS

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TELECOMMUNICATIONS

I. IN GENERAL

§1. Generally

The Commission increased the surcharge for the Relay Missouri Program from $.09 to $.10 per month per access line. The Commission also directed that the retention amount should remain at the current level of $30.00 or one percent, whichever is greater. In addition, the Commission clarified that where the amount of the surcharge collected is less than $30.00, the company may retain the amount it collects, but may not attempt to recover the difference from the Deaf Relay and Equipment Distribution Program Fund.

The Commission found that staff's recommendation to increase the surcharge for the Relay Missouri Program from $.09 to $.10 per month per access line was just and reasonable and should be adopted. The Commission noted that predicting the depletion rate of the fund was quite difficult. However, the evidence suggested that without an increase in the surcharge, the Relay Missouri Fund balance would continue to decline significantly, potentially reducing the fund balance to an unreasonably low level before the next review period. --Relay Missouri 12 MPSC 3d 108.

The Commission suspended the proposed tariff of Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri. The proposed tariff was intended to increase by eight percent the rates for Line Status Verification and Busy Line Interrupt.

The Commission suspended the proposed tariff of Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri, in order to review whether the tariff is consistent with §392.245, RSMo 2000. At issue was whether an eight percent increase in the rates for nonbasic telecommunications services is just and reasonable. --Southwestern Bell 12 MPSC 3d 158.

The Commission found that BPS Telephone Company's notice of election to become a price cap carrier under Section 392.245.2 was invalid.--BPS Telephone 12 MPSC 3d 263.

The Commission found that where the interconnection agreement between the small incumbent local exchange carrier and the competitive local exchange carrier contained a "do not compete" clause, the competitive company was not providing basic local telecommunications service as contemplated by the price cap statute. --BPS Telephone 12 MPSC 3d 263.

Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Green Hills Telephone Company, KLM Telephone Company, and Lathrop Telephone Company filed a petition for suspension of the Federal Communications Commission's (FCC) November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, insofar as that order requires the petitioners to implement local number portability by November 24, 2003. The petitioners also requested expedited treatment, asking that the Commission issue its order by November 21, 2003.

In order to allow additional time to review the request, the Commission issued an order granting a temporary suspension, until January 24, 2004, of the intermodal porting obligations of the FCC's November 10, 2003 order. --Cass County Telephone Company, et al. 12 MPSC 3d 272.

The Commission decided to deny the request to hold a generic investigation into whether a reseller or prepaid provider could provide sufficient competition to justify price cap election by a small incumbent telecommunication carrier, because the Commission found such an investigation would be duplicative given the more specific cases pending before it. --Investigation-Status Prepaid Local Service Providers 12 MPSC 3d 404.

The Commission established a working group and directed it to investigate, consider, and report on the Metropolitan Calling Area (MCA) plan and calling scope matters. The Commission directed the working group to consider whether the MCA plan and calling scopes in general, particularly rural calling scopes, should be amended, and if so, how.

The Commission indicated that it would issue a separate order appointing the members of the working group or task force. --Investigation-MCA 12 MPSC 3d 406.

The Commission appointed 11 members to the Metropolitan Calling Area (MCA)/Calling Scope Task Force. The Task Force members include legislators, industry representatives, Commission Staff, and a representative from the Office of the Public Counsel. Other interested persons or entities were encouraged to participate in the various meetings, although they will not be members of the Task Force itself.

The order also clarified that the scope of the Task Force should be broader than simply evaluating the current MCA plans and Staff's MCA 2 proposal. Instead, the Task Force should also evaluate the need to make changes to Missouri's calling scopes in general. --MCA/Calling Scopes 12 MPSC 3d 437.

The Commission approved a unanimous stipulation and agreement that established the 2-1-1 dialing code for direct access to community information and referral services and designated the Heart of America United Way as the provider of that service for sixteen counties in the Kansas City area. --Heart of America United Way 12 MPSC 3d 451.

The Commission acknowledged certain nominations to the Task Force. The Commission also granted the Missouri Telecommunications Industry Association's (MTIA) request to nominate five members to the Task Force instead of four members. In order to maintain balance in the membership, the Commission authorized the Office of the Public Counsel to nominate two members instead of one member. --MCA Calling Scopes 12 MPSC 3d 460.

Under guidance from the Federal Communications Commission regarding public interest considerations when granting universal service support, the Commission determined that RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular should not be granted status as an eligible telecommunications carrier for universal service support funds because Mid-Missouri Cellular did not provide competent and substantial evidence to show that the public would benefit through increased competition, lower rates, quality of service or plans to upgrade its network. --Mid-Missouri Cellular 12 MPSC 3d 501.

§ 2. Obligation of the utility

The Commission determined that SBC Missouri's proposed tariff revisions contained language, which created a limitation on the requirement to permit commingling which made the tariff unreasonable and unjust. --Southwestern Bell 12 MPSC 3d 351.

The Commission determined that the tariff was subject to unnecessary ambiguity and confusion, making it unreasonable and unjust because it did not specify which other tariffs were incorporated.--Southwestern Bell 12 MPSC 3d 351.

The Commission determined that the tariff should be rejected because the footnote did not comply with Section 392.220, RSMo, by providing 30-days notice to the Commission of a change. --Southwestern Bell 12 MPSC 3d 351.

§ 3. Certificate of convenience and necessity

To receive a certificate of service authority to provide basic local service, an applicant must show that it will provide **all** the services that the Commission has deemed essential to qualify for state universal service fund support. --ALLTEL Missouri, Inc. 12 MPSC 3d 467.

§4. Transfer, lease and sale

The Commission approved the sale of all outstanding shares of a small incumbent local exchange carrier to an out-of-state holding company, based on the recommendation of its Staff that the transaction was not detrimental to the public interest. --Oregon Farmers Mutual Telephone 12 MPSC 3d 557.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Commission has authority to reject price changes for non-basic services that do not exceed the maximum allowable prices under Section 392.245.11. That statute requires that the Commission approve a price-cap change if the change is consistent with the provisions of Section 392.200. It follows that the Commission may reject such a change if that change is inconsistent with the provisions of Section 392.200. --Southwestern Bell 12 MPSC 3d 234.

The Commission determined that it had jurisdiction under its general supervisory powers to hold a generic investigation into whether a prepaid provider or reseller was providing competition sufficient for price cap election; however, the Commission declined to open such an investigation. --Investigation-Status Prepaid Local Service Providers 12 MPSC 3d 404.

III. OPERATIONS

§8. Operations generally

The Commission required that KLM Telephone Company establish an intercept message informing customer that a call can not be completed and how it can be completed, for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. --KLM Telephone Company 12 MPSC 3d 544.

§14. Rates

The Commission approved the company's proposed tariff revising the company's General Exchange tariff, finding that the tariff modifies rates in accordance with the price cap statute, Section 392.245, RSMo 2000. The proposed tariff adjusts the company's basic rates by the change in the CPI-TS as required by Section 392.245.4; updates its maximum allowable prices for non-basic services and adjusts certain rates as allowed by Section 392.245.11; and adjusts certain switched access rates and rebalances local rates as in accordance with the provisions of Section 392.245.9. --Sprint Missouri 12 MPSC 3d 21.

The Commission rejected the argument of the Office of the Public Counsel that the company's rate rebalancing was not supported by appropriate cost studies. --Sprint Missouri 12 MPSC 3d 21.

Based upon an audit, the Staff of the Commission concluded that Steelville Telephone Exchange, Inc., had excess earnings. Thereupon, the Commission approved a Stipulation and Agreement between Staff, Steelville and the Office of the Public Counsel whereby Steelville agreed to: (1) a rate reduction of $330,411; (2) improve its system in accordance with the Communications Assistance for Law Enforcement Act; (3) a three-year amortization of rate-case expenses of $22,677 per year; and (4) other miscellaneous corrections and changes. --Steelville Telephone 12 MPSC 3d 215.

Based on the Federal Communication Commission's triennial review order, and the comments received in response to the Commission's request for comments, the Commission accepted the FCC's finding that no impairment exists in the Enterprise Market even without unbundled local circuit switching. --Investigation - Telco 12 MPSC 3d 219.

The Commission determined that, whether the price cap statute creates a rebuttable or an unrebuttable presumption that a properly calculated price cap increase is just and reasonable, the increase proposed by Sprint should be approved. --Sprint Missouri 12 MPSC 3d 224.

The price-cap statute allows an eligible company to change its rates without going through a traditional rate case. A company is regulated by the price-cap statute if an alternative local exchange company provides basic local services in the incumbent local exchange carrier's service area. The company remains price-cap regulated until the Commission declares the company competitive, or until the company asks for a return to traditional rate-of-return regulation. --Southwestern Bell 12 MPSC 3d 234.

The Commission established the exchange as the appropriate geographic market over which to conduct the impairment analysis. It also established that the DS0 cutoff is ten DS0 lines (that is, it is more economical to serve a customer with a DS1 line than with ten or more DS0 lines). --Investigation - Geographic Markets 12 MPSC 3d 367.

Although Fidelity Telephone Company initially sought a rate increase that would increase its annual revenue by $2,359,972, the Commission approved a unanimous Stipulation and Agreement between the Staff of the Commission and Fidelity whereby an increase in Fidelity's rates would result in a $1,625,000 increase in the company's annual revenue. --Fidelity Telephone 12 MPSC 3d 425.

The Commission approved a unanimous stipulation and agreement that resolved Staff's earnings investigation by reducing the company's annual gross intrastate revenues through rate reductions. --Cass County Telephone 12 MPSC 3d 432.

§23. Rules and regulations

The Commission suspended until May 26, 2006, KLM Telephone Company's obligation to implement local number portability. --KLM Telephone Company 12 MPSC 3d 544.

§26. Service generally

The Commission modified the Federal Communications Commission local number portability requirement to require KLM Telephone Company, after it has become fully Local-Number-Portability capable, to notify wireless carriers that it is not responsible for establishing facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of KLM's local service area. --KLM Telephone Company 12 MPSC 3d 544.

§30. Calling scope

The order clarified that the scope of the Task Force should be broader than simply evaluating the current MCA plans and Staff's MCA 2 proposal. Instead, the Task Force should also evaluate the need to make changes to Missouri's calling scopes in general.--MCA/Calling Scopes 12 MPSC 3d 437.

The Commission made certain modifications to the makeup of the Task Force charged with investigating the Metropolitan Calling Area plan and calling scopes in general. --MCA Calling Scopes 12 MPSC 3d 460.

§34. Pricing policies

The Commission suspended the proposed tariff of Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri, in order to review whether the tariff is consistent with §392.245, RSMo 2000. The issue was whether an eight percent increase in the rates for nonbasic telecommunications services is just and reasonable at this time.

The Commission noted that rate increases of eight percent under the current economic conditions would appear to violate §392.185(4) because affected customers might pay unreasonable charges for telecommunications services.

The Commission stated that the Price Cap Statute, §392.245, RSMo 2000, does not exempt price-cap-regulated carriers from §392.230.3. --Southwestern Bell 12 MPSC 3d 158.

IV. RELATIONS BETWEEN CONNECTING COMPANIES

§36. Relations between connecting companies generally

The Commission approved an Interconnection and Resale Agreement between Sprint Missouri, Inc., and Comm South Company, Inc., d/b/a Missouri Comm South, Inc. --Sprint Missouri 12 MPSC 3d 171.

Based on the Federal Communication Commission's triennial review order, and the comments received in response to the Commission's request for comments, the Commission accepted the FCC's finding that no impairment exists in the Enterprise Market even without unbundled local circuit switching.-- Investigation-Telco 12 MPSC 3d 219.

The Commission found that where the interconnection agreement between the small incumbent local exchange carrier and the competitive local exchange carrier contained a "do not compete" clause, the competitive company was not providing basic local telecommunications service as contemplated by the price cap statute. --BPS Telephone 12 MPSC 3d 263.

Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Green Hills Telephone Company, KLM Telephone Company, and Lathrop Telephone Company filed a petition for suspension of the Federal Communications Commission's (FCC) November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, insofar as that order requires the petitioners to implement local number portability by November 24, 2003. The petitioners also requested expedited treatment, asking that the Commission issue its order by November 21, 2003.

In order to allow additional time to review the request, the Commission issued an order granting a temporary suspension, until January 24, 2004, of the intermodal porting obligations of the FCC's November 10, 2003 order. --Cass County Telephone Company 12 MPSC 3d 272.

The Commission established the exchange as the appropriate geographic market over which to conduct the impairment analysis. It also established that the DS0 cutoff is ten DS0 lines (that is, it is more economical to serve a customer with a DS1 line than with ten or more DS0 lines). --Investigation - Geographic Markets 12 MPSC 3d 367.

The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that if wireline-to-wireless local number portability is requested the small rural exchange carrier is to notify the wireless carrier that local number portability is available but that it is not the responsibility of the small rural exchange carrier to establish facilities or arrangements, or

both, with third-party carriers to transport calls on a local basis to a point outside its local service area. --Mid-Missouri Telephone 12 MPSC 3d 454.

The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that the small rural exchange carrier will not be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside its local service area. --Mid-Missouri Telephone 12 MPSC 3d 454.

The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that the small rural exchange carrier will establish an intercept message for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed and, if possible, provide information about how to complete the call. --Mid-Missouri Telephone 12 MPSC 3d 45.

The Commission consolidated two cases dealing with interrelated agreements between SBC Communications, Inc., and Sage Telecom, Inc. It also found that an amendment to an existing interconnection agreement between SBC and Sage was not in the public interest and therefore rejected it. Because the Commission rejected the amendment and took no further action on the related agreement, the Commission dismissed applications to intervene as moot. --SBC Communications and Sage Telecom, Inc. 12 MPSC 3d 485.

The Commission approved a unanimous stipulation and agreement and thereby suspended, until November 24, 2004, the companies' obligation to implement local number portability (LNP). The stipulation and agreement also modified the local number portability requirements for small rural local exchange carriers such that if wireline-to-wireless local number portability is requested after the petitioners have become fully LNP-capable, then the petitioners shall notify the wireless carrier that they are not responsible for establishing facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of the petitioners' local service areas.

The Commission also required the petitioners to establish intercept messages for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. --New London Telephone Co., et al. 12 MPSC 3d 476.

§39. Division of revenue, expenses, etc.

Exchange access is a service provided by a local exchange telecommunications company that enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service. --Investigation-Access Rates 12 MPSC 3d 201.

Exchange access service is a locational monopoly for which competitive pressure cannot exert sufficient market discipline to maintain access rates at a reasonable level. --Investigation-Access Rates 12 MPSC 3d 201.

The Commission made permanent a cap on exchange access rates that required competitive local exchange carriers to charge access rates no higher than the rates charged by the incumbent local exchange carrier operating in the same exchange, unless the CLEC can prove to the Commission that a higher rate is cost-justified. --Investigation-Access Rates 12 MPSC 3d 201.

V. ALTERNATIVE REGULATION AND COMPETITION

§40. Classification of company or service as noncompetitive, transitionally, or competitive

The Commission found that where the interconnection agreement between the small incumbent local exchange carrier and the competitive local exchange carrier contained a "do not compete" clause, the competitive company was not providing basic local telecommunications service as contemplated by the price cap statute. --BPS Telephone 12 MPSC 3d 263.

§41. Incentive regulation plans

Under Section 392.245.2, RSMo 2000, as currently supplemented, a large incumbent local telecommunications company is subject to price cap regulation when the Commission finds that an alternative local telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area. The record shows that Spectra meets the statutory requirements and thus will be subject to price cap regulation without the necessity of a contested hearing. --Spectra Communications 12 MPSC 3d 58.

§44. Network modernization

The Commission issued an order establishing a working group to study Voice over Internet Protocol; more particularly, the ways VoIP technology is used in the marketplace and how widespread deployment of VoIP

might affect telecommunications services in Missouri. --Investigation - Voice Over Internet Protocol 12 MPSC 3d 359.

§45. Local exchange competition

The Commission held that it would not reject tariffs that offer winback promotions absent a showing that the particular tariff is harmful to competition in the local exchange market. --Southwestern Bell 12 MPSC 3d 7.

The Commission indicated that it would approve two tariffs offered by an incumbent local service provider after finding that these particular tariffs would not harm competition in the local exchange market. --Southwestern Bell 12 MPSC 3d 7.

The Commission determined that, whether the price cap statute creates a rebuttable or an unrebuttable presumption that a properly calculated price cap increase is just and reasonable, the increase proposed by Sprint should be approved. --Sprint Missouri 12 MPSC 3d 224.

The Commission found that effective, facilities-based competition exists in three local exchanges and therefore removed price-cap-regulation restrictions from a large incumbent local exchange carrier for those three exchanges. --Sprint Missouri 12 MPSC 3d 288.

The Commission found that effective competition exists for several non-local, statewide services and therefore removed price-cap-regulation restrictions from a large incumbent local exchange carrier for those services in all the exchanges it serves. --Sprint Missouri 12 MPSC 3d 288.

The controlling statute provides that each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified and has provided basic local telecommunications services for at least five years, unless the Commission determines that effective competition does not exist in the exchange for such service. --Sprint Missouri 12 MPSC 3d 288.

The controlling statute requires that the Commission investigate the state of competition in each exchange where an alternative local exchange telecommunications company has been certified to provide local exchange service and determine no later than five years following the first certification of a competitor whether effective competition exists in that exchange for those services. --Sprint Missouri 12 MPSC 3d 288.

The controlling statute requires that the commission determine whether competition exists based on the following considerations:

(a) The extent to which services are available from alternative providers in the relevant market;

(b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

(c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, RSMo, are being advanced;

(d) Existing economic or regulatory barriers to entry; and

(e) Any other factor deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo. --Sprint Missouri 12 MPSC 3d 288.

Rates do not always fall in a competitive market and the fact that rates have not fallen does not preclude a finding that a market is competitive. --Sprint Missouri 12 MPSC 3d 288.

The existence of a single effective competitor is enough to justify a finding that a market is competitive. --Sprint Missouri 12 MPSC 3d 288.

As the party asserting that effective competition exists in its exchanges, the incumbent local exchange carrier has the burden of proving that assertion. --Sprint Missouri 12 MPSC 3d 288.

The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that if wireline-to-wireless local number portability is requested the small rural exchange carrier is to notify the wireless carrier that local number portability is available but that it is not the responsibility of the small rural exchange carrier to establish facilities or arrangements, or both, with third-party carriers to transport calls on a local basis to a point outside its local service area. --Mid-Missouri Telephone 12 MPSC 3d 454.

The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that the small rural exchange carrier will not be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside its local service area. --Mid-Missouri Telephone 12 MPSC 3d 454.

The Commission approved a unanimous stipulation and agreement and thereby modified the Federal Communications Commission's local number portability requirement for a small rural exchange carrier to provide that the small rural exchange carrier will establish an intercept message for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. The intercept message will inform subscribers that the call cannot be completed as dialed and, if possible, provide information about how to complete the call. --Mid-Missouri Telephone 12 MPSC 3d 454.

Effective competition is not required for a company to become price-cap regulated. Instead, an alternative local exchange company must provide **all** essential basic local services before the price-cap statute is triggered. --ALLTEL Missouri, Inc. 12 MPSC 3d 467.

The Commission approved a unanimous stipulation and agreement and thereby suspended, until November 24, 2004, the companies' obligation to implement local number portability (LNP). The stipulation and agreement also modified the local number portability requirements for small rural local exchange carriers such that if wireline-to-wireless local number portability is requested after the petitioners have become fully LNP-capable, then the petitioners shall notify the wireless carrier that they are not responsible for establishing facilities or arrangements with third-party carriers to transport calls on a local basis to a point outside of the petitioners' local service areas.

The Commission also required the petitioners to establish intercept messages for seven-digit dialed calls to ported numbers where the required facilities or appropriate third-party arrangements have not been established. --New London Telephone Co., et al. 12 MPSC 3d 476.

VALUATION

I. IN GENERAL

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§4. Obligation of the utility

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§7. Jurisdiction and powers of the Federal Commissions
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§75. Gas
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VALUATION

IV. ASCERTAINMENT OF VALUE

§15. Purchase or sale price

As a general rule, only the original cost of utility plant to the first owner devoting the property to public service, adjusted for depreciation, should be included in the utility's rate base. That principle is known as the net original cost rule. --Utilicorp 12 MPSC 3d 388.

The Missouri Commission has consistently applied the net original cost standard when placing a value on assets for purposes of establishing a utility's rates. --Utilicorp 12 MPSC 3d 388.

WATER

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WATER

I. IN GENERAL

§1. Generally

The Commission determined that Missouri-American Water Company's request for an accounting authority order permitting deferral of expenditures made to upgrade security following the events of September 11, 2001, was reasonable under the circumstances and should be granted. --Missouri-American Water Company 12 MPSC 3d 38.

Missouri-American Water Company filed proposed tariff sheets designed to implement a general rate increase for water and sewer service. Staff later filed an excessive earnings complaint against Missouri-American Water Company, which was consolidated into this case. The parties subsequently filed three stipulations and agreements, which, among other things, do not provide for an increased revenue requirement in any district. In fact, the revenue requirement stipulation and agreement has a neutral impact in every district except Joplin, where there is a decrease of $350,000, exclusive of taxes. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to cost shifts contained in the rate design stipulation and agreement. --Missouri-American Water 12 MPSC 3d 409.

§2. Certificate of convenience and necessity

A wholesale supply contract to sell water to a neighboring utility was sufficient to satisfy the Commission's concerns about the economic viability of the applicant utility and justified the issuance of a certificate of convenience and necessity that had otherwise been approved in an earlier report and order. --Environmental Utilities 12 MPSC 3d 115.

The fact that a wholesale supply contract to sell water to a neighboring utility was only for a six-month renewable term, did not raise concern about the long-term economic viability of the applicant utility where the neighboring utility had no other available source of water. --Environmental Utilities 12 MPSC 3d 115.

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and granted a certificate of convenience and necessity for Warren County Water & Sewer's service area to Missouri-American. --Warren County Water & Sewer Company 12 MPSC 3d 275.

§4. Transfer, lease and sale

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company with certain conditions including that a portion of the proceeds of the sale be placed in escrow for payment of overdue assessment, fees, and any other penalties or fines owed by the Seller. --Warren County Water & Sewer Company 12 MPSC 3d 275.

In a previous order, issued November 20, 2003, the Commission approved the application for the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company. On July 13, 2004, Missouri-American notified the Commission that one of the assets approved for transfer, a .3 acre parcel of land, was not available for sale. The parties subsequently modified the terms of the purchase price, removing that parcel from the assets to be purchased and reducing the purchase price by $30,000. The Commission subsequently approved the modified transaction in this order, noting that the removal of the parcel of land was not material to the approval of the sale of assets. --Warren County Water & Sewer Company 12 MPSC 3d 465.

II. JURISDICTION AND POWERS

§10. Receivership

Section 393.145.1, RSMo 2000 provides that "if the commission shall determine that any sewer or water corporation having one thousand or fewer customers is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners …the commission may 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." --PSC Staff v. Osage Water Company 12 MPSC 3d 25.

The Commission directed its Staff to seek appointment of a receiver after it found that a small water and sewer company had been effectively abandoned by its owners, where a lack of available capital, poor management practices, and conflict between the owners, made it unlikely that the company could continue to provide service to its customers. --PSC Staff v. Osage Water Company 12 MPSC 3d 25.

The Commission directed its Staff to seek appointment of a receiver after it found that a small water and sewer company was unable or unwilling to provide safe and adequate service because of its desperate financial situation. --PSC Staff v. Osage Water Company 12 MPSC 3d 25.

III. OPERATIONS

§16. Rates and revenues

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company and also approved a moratorium on rates. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission approved the sale of the assets of Warren County Water & Sewer Company to Missouri-American Water Company, but found that whether or not an acquisition premium exists or would be allowed to be recovered in rates was an issue for a rate case where all factors can be considered. --Warren County Water & Sewer Company 12 MPSC 3d 275.

The Commission approved a water company's request to establish an Infrastructure System Replacement Surcharge (ISRS). --Missouri-American 12 MPSC 3d 326.

An eligible water company is authorized by statute to establish a special surcharge – an ISRS – to recover the cost of replacing eligible infrastructure system equipment and plant until a final rate is established in the company's next rate case. --Missouri-American 12 MPSC 3d 326.

The proper measure of accumulated depreciation used in calculating an Infrastructure System Replacement Surcharge is the actual accumulated depreciation recorded on the books of the company for each item of eligible plant. --Missouri-American 12 MPSC 3d 326.

The net cost of removal of old, non-ISRS plant may not be included in the company's calculation of the Infrastructure System Replacement Surcharge. --Missouri-American 12 MPSC 3d 326.

Costs that may be recovered through an Infrastructure System Replacement Surcharge include property taxes on eligible plant that will be due within twelve months of the ISRS filing. Property taxes that are payable more than twelve months after the ISRS filing may not be recovered. --Missouri-American 12 MPSC 3d 326.

The Commission will not allow a company to increase its rates while it is unable or unwilling to provide safe and adequate service to its customers. --Osage Water Company 12 MPSC 3d 343.

It is the obligation of the owner of a public utility to provide the plant and make the necessary investments in that plant in order to give public utility service, and it is not the obligation of the subscribers to pay rates which will permit the owner of the utility to build a plant upon which it can then base a request for further increases.--Osage Water Company 12 MPSC 3d 343.

The revenue requirement agreed to in the stipulation and agreement has a neutral impact on every district except Joplin, where there is a decrease. In addition to Joplin, some customer classes in other districts will experience increases or decreases due to shifts contained in the rate design stipulation and agreement.

The revenue requirement stipulation and agreement provides that the current Infrastructure Replacement Surcharge (ISRS) will be set to zero on April 16, 2004. It also provides that the company will not file a tariff seeking a new ISRS prior to December 16, 2005, and provides that in any ISRS filing after that date, the company will use a specified weighted cost of capital (common equity 3.91%, preferred equity 0.39%, debt 3.4%, total: 7.70%). --Missouri-American Water 12 MPSC 3d 409.

§20. Depreciation

The revenue requirement stipulation and agreement provides that the company will implement certain new depreciation rates and provides that the company will develop new district-specific historical databases for use in future rate cases. It also provides that as of January 1, 2004, the company will begin expensing cost of removal and salvage and will discontinue the reserve deficiency amortizations currently in effect. --Missouri-American Water 12 MPSC 3d 409.

§29. Security issues

Missouri-American Water Company filed an application for an accounting authority order relating to security costs. The company alleged that the costs were incurred as a direct result of the unexpected and extraordinary events of September 11, 2001. The company sought an accounting authority order so that it might recover some part of these costs in a later rate case. The Commission concluded that an accounting authority order was reasonable under the circumstances and should be granted. --Missouri-American Water Company 12 MPSC 3d 38.

§32. Accounting Authority orders

The Commission determined that Missouri-American Water Company's request for an accounting authority order permitting deferral of expenditures made to upgrade security following the events of September 11, 2001, was reasonable in the circumstances and should be granted. The Commission authorized the company to defer and book to Account 186 expenditures relating to security improvements and enhancements beginning September 11, 2001, and continuing through September 11, 2003. --Missouri-American Water Company 12 MPSC 3d 38.