

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

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**Volume 9 MPSC 3d**

**February 1, 2000 Through January 31, 2001**

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**Kevin Kelly**  
*Reporter of Opinions*

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**JEFFERSON CITY, MISSOURI**  
**(2003)**



## PREFACE

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This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning February 1, 2000 through January 31, 2001. 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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Appointed April 2, 2001

**BRYAN FORBIS**  
Appointed November 20, 2001

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Resigned May 3, 2001

**ROBERT SCHEMENAUER**  
Resigned March 31, 2001

**HAROLD CRUMPTON**  
Resigned June 1, 2000

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Dale Hardy Roberts, Secretary/Chief Regulatory Law Judge

Brian Kinkade, Executive Director  
Appointed February 14, 2000  
Resigned May 18, 2001

Robert J. Quinn, Jr., Executive Director  
Appointed September 12, 2001

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### **GENERAL COUNSEL**

**DAN JOYCE**  
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**STEVEN DOTTHEIM**  
Chief Deputy General Counsel



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DIRECTOR

**UTILITY SERVICES DIVISION**

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DIRECTOR

**ADMINISTRATION DIVISION**

DONNA PRENGER  
DIRECTOR

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TA-2000-477	AmericaNetworks, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	3/17/00
TD-2001-5	Amer-I-Net Services, Corp. (Certificate of service authority, IXC, canceled) .....	10/6/00
TD-2000-538	Anchor Communications Corporation (Certificate of service authority, IXC, canceled) .....	4/7/00
TD-2000-688	Andover Group, Inc. (Certificate of service authority, shared tenant services, canceled) .....	5/31/00
SA-99-608	AquaSource Development Company (Certificate of public convenience and necessity to operate a sewer system in a portion of Morgan County, granted) .....	3/9/00
TA-2001-255	Arbros Communications Licensing Company Central, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	12/5/00
TA-2001-337	Arthur, Kenneth (Certificate of service authority, pay phones, granted) .....	1/4/01
TA-2000-505	Arrival Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	3/29/00
TO-2000-464	ASC Telecom, Inc. (Name change to ASC Telecom, Inc. d/b/a AlternaTel, recognized) .....	2/17/00
TD-2000-554	Assisted Operator Services, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TD-2001-13	Athena International, L.L.C. (Certificate of service authority, IXC, canceled) .....	9/22/00
TA-2000-723	Atlas Mobilefone, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	6/6/00

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TO-2001-210	Atlas Mobilfone, Inc. (Interconnection agreement with Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, Nevada Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Bell Telephone Company, The Southern New England Telephone Company, Southwestern Bell Telephone Company and Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin, approved) .....	11/13/00
TD-2001-242	ATN Communications Incorporated (Certificate of service authority, IXC, canceled) .....	10/26/00
TA-2001-31	Avertel Communications, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	1/9/01
TD-2000-399	Axces Acquisition, Inc. (Certificate of service authority, IXC, canceled) .....	2/28/00
— B —		
TD-2001-69	Baker, Brent H. (Certificate of service authority, pay phones, canceled) .....	8/29/00
TA-2001-138	Barry Technology Services, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/5/00
TA-2000-400	BCGI Communications Corp. (Certificate of service authority, IXC, granted) .....	2/9/00
WA-2000-321	Bear Creek Water and Sewer, LLC (Certificate of public convenience and necessity to provide water and sewer service in Taney County near Branson, granted) .....	7/20/00
TO-2001-1	Bell Atlantic Communications, Inc. (Name change to Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, acknowledged) .....	7/27/00
TA-2000-858	Bell Atlantic Network Data, Inc. (Certificate of service authority, IXC, granted) .....	8/2/00
TO-2001-127	Bell Atlantic Network Data, Inc. (Name change to Verizon Advanced Data, Inc., approved) .....	9/14/00
TO-2000-860	Bell Atlantic Network Data, Inc. (Interconnection agreement with GTE Midwest Incorporated and GTE Arkansas Incorporated, granted) .....	9/15/00
TD-2001-48	Beller, R.Jay d/b/a Midwest Payphones (Certificate of service authority, pay phones, canceled) .....	9/20/00
TA-2001-128	Berghoff, James (Certificate of service authority, pay phones, granted) .....	9/27/00
TD-2000-551	BFI Communication, Inc. (Certificate of service authority, IXC, canceled) .....	4/7/00
TA-2001-106	Blansit, Jeffrey T. (Certificate of service authority, pay phones, granted) .....	9/14/00
TM-2001-286	BLT Technologies, Inc., Touch 1 Long Distance, Inc., MCI WorldCom Communications, Inc. (Merger of applicants into a single entity, approved) .....	11/21/00

## UNREPORTED UTILITY CASES

TA-2001-266	Boyd, Reverend A.A. (Certificate of service authority, pay phones, granted) .....	11/29/00
TD-2001-6	Brittan Communications International Corporation (Certificate of service authority, IXC, canceled) .....	9/7/00
TA-2000-373	BroadBand Office Communications, Inc. (Certificate of service authority, basic local exchange, exchange access and interexchange telecommunications services, granted) .....	4/4/00
TO-2001-123	BroadBand Office Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	11/21/00
TO-2001-300	Broadspan Communications, Inc. d/b/a Primary Network Communications (Name change to Mpower Communications Central Corp., recognized) .....	11/22/00
TA-2000-304	BroadStream Corporation (Certificate of service authority, facilities-based and resold basic local telecommunications services, granted) .....	2/10/00
TO-2000-636	Business Telecom, Inc. d/b/a BTI (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	5/19/00
— C —		
TD-2000-494	Calls For Less, Inc. (Certificate of service authority, IXC, canceled) .....	3/14/00
TD-2000-547	Call For Less Long Distance, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TD-2000-553	Call Plus of Delaware, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TA-2001-200	Call Processing, Inc. (Certificate of service authority, IXC, granted) .....	10/23/00
TA-2000-536	Capsule Communications, Inc. (Certificate of service authority, IXC, granted) .....	3/24/00
TA-2000-347	CAT Communications International, Inc. (Certificate of service authority, resold interexchange and basic local telecommunications services, granted) .....	8/8/00
TA-2000-567	Cavanaugh, Matthew d/b/a OneTel Communications (Certificate of service authority, pay phone, granted) .....	4/3/00
TA-2001-259	Cbeyond Communications, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	12/1/00
TD-2001-302	C.C.O. Telecom, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	11/17/00
TA-2000-815	CenturyTel Northwest Arkansas, LLC (Designation as a telecommunications carrier, eligible for Federal Universal Service Support, granted) .....	7/27/00
TD-2001-226	Cincinnati Bell Long Distance, Inc. (Certificate of service authority, IXC, canceled) .....	10/12/00
WO-2000-472	City of Columbia (Territorial agreement with Public Water Supply District No. 4 of Boone County which encompasses part of Boone County, approved) .....	4/25/00

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TA-2001-323	Coin Phone Management Company (Certificate of service authority, pay phones, granted) .....	12/19/00
TA-2000-814	Coin-Tel, Inc. (Certificate of service authority, pay phones, granted) .....	7/20/00
TA-2000-861	Commercial Communications Services, L.L.C. (Certificate of service authority, pay phones, granted) .....	8/14/00
TO-2000-451	Comm South Companies, Inc. d/b/a Missouri Comm South Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved).....	3/10/00
TA-2000-509	Comm South Companies, Inc. f/k/a Onyx Distributing Company, Inc. d/b/a Missouri Comm South, Inc. (Certificate of service authority, amending certificate to provide basic local and local exchange telecommunications services, granted) .....	12/22/00
TD-2000-714	Communication Systems Development, Inc. (Certificate of service authority, IXC, canceled) .....	6/15/00
TM-2000-653	Communications TeleSystems International d/b/a WORLDxCHANGE Communications (CTI), (Merge with and into WorldxChange Communications, Inc., a wholly owned subsidiary of World Access, Inc., approved) .....	10/17/00
TA-2000-180	Compass Telecommunications, Inc. (Certificate of service authority, basic local exchange telecommunications services, local exchange telecommunications services, exchange access service and IXC, granted) .....	3/17/00
TD-2000-683	Complete Communications Company, Inc. (Certificate of service authority, IXC, canceled) .....	5/10/00
TA-2000-632	Complete Telecom Solutions, Inc. (Certificate of service authority, pay phones, granted) .....	5/2/00
TA-2000-32	Computer Business Sciences, Inc. (Certificate of service authority, facilities-based basic local telecommunications services and IXC, granted) .....	4/11/00
TO-2001-171	Computer Business Sciences, Inc. (Name change to IG2, Inc., recognized) .....	11/17/00
TA-2001-238	Congee Communications Corporation d/b/a CommRad.com (Certificate of service authority, IXC, granted) .....	11/29/00
TA-2000-585	ConnectSouth Communications of Missouri, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)...	8/15/00
TO-2001-95	ConnectSouth Communications of Missouri, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	9/11/00
TA-2000-585	ConnectSouth Communications of Missouri, Inc. (Certificate of service authority, basic local, local exchange and interexchange telecommunications services, granted) .....	10/5/00
TA-2000-391	CoreComm Missouri, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	2/2/00
TA-2001-49	Cox, Debbie A. (Certificate of service authority, pay phones, granted) .....	9/13/00

## UNREPORTED UTILITY CASES

TA-2000-661	Cox Missouri Telecom LLC (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	8/8/00
TA-2000-456	Custom Network Solutions, Inc. (Certificate of service authority, IXC, granted) .....	2/28/00
TA-2001-325	Cybertel, Communications Corp. (Certificate of service authority, IXC, granted) .....	12/29/00
TA-2000-830	Cypress Communications Operating Company, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) ..	12/19/00

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TA-2001-105	DeGraffenreid, John B. (Certificate of service authority, pay phones, granted) .....	9/14/00
TO-2000-470	Destia Communications Services, Inc. (Name change to Viatel Services, Inc., recognized) .....	2/28/00
TA-2000-752	Digital Access Corporation of Missouri, Inc. (Certificate of service authority, basic local, nonswitched local exchange and interexchange telecommunications services, granted) .....	10/5/00
TD-2000-549	Digital Dial Communications, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TD-2001-199	Digital Network Services, Inc. (Certificate of service authority, IXC, canceled) .....	1/4/01
TD-2000-548	Digital One Plus, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TO-2001-52	Dobson Wireless, Inc. (Name change to Logix Communications Corporation, recognized) .....	8/14/00
TD-2000-560	Dodge, Clinton D. (Certificate of service authority, pay phone, canceled) .....	3/20/00
TO-2001-74	dPi-TeleConnect, L.L.C. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	10/2/00
TO-2000-619	DSLnet Communications, LLC (Adoption of master interconnection and resale agreement between Sprint Missouri, Inc. and Dakota Services Limited, granted) .....	5/31/00

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TA-2000-313	Eagle Communications Missouri, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	3/10/00
TA-2001-244	Ellsworth's Senior Advantage, Inc. (Certificate of service authority, pay phones, granted) .....	11/7/00
WR-2000-594	Emerald Pointe Utility Company (Water rate increase, granted) .....	5/4/00
SR-2000-595	Emerald Pointe Utility Company (Sewer rate increase, granted) .....	5/4/00
TA-2001-301	Encompass Communications, L.L.C. (Certificate of service authority, IXC, granted) .....	12/8/00
TA-2000-421	Enhanced Communications Group, L.L.C. (Certificate of service authority, IXC, granted) .....	3/1/00

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TA-2000-530	Enhanced Global Convergence Services, Inc. (Certificate of service authority, IXC, granted) .....	6/2/00
TA-2001-374	Enkido, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	1/26/01
TA-2000-484	Essential.com, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	4/20/00
TA-2000-625	essential.com, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	5/15/00
TO-2001-364	Essex Communications, Inc. d/b/a eLEC Communications (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	1/22/01
TA-2000-522	Eubanks, Joe (Certificate of service authority, pay phone, granted) .....	3/21/00
TA-2001-98	Evans, Mitchell and Ruth (Certificate of service authority, pay phones, granted) .....	9/14/00
TA-2000-452	Everest Connections Corporation (Certificate of service authority, resold and facilities-based basic local telecommunications services, granted) .....	4/27/00
TO-2000-654	Everest Connections Corporation (Interconnection agreement with Southwestern Bell Telephone Company, granted) .....	5/18/00
TA-2000-623	Everest Connections Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	6/6/00
TA-2001-68	Evolution Networks Midwest, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	9/25/00
TA-2001-97	eVulkan, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/17/00
TD-2000-689	Executech Services, Inc. (Certificate of service authority, shared tenant services, canceled) .....	10/10/00
TD-2000-724	Executone Information Systems, Inc. (Certificate of service authority, IXC, canceled) .....	5/18/00
TA-2000-414	ezTel Network Services, LLC (Certificate of service authority, IXC, granted) .....	2/22/00

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TD-2000-833	FaciliCom International, LLC (Certificate of service authority, IXC, canceled) .....	9/28/00
TA-2000-515	FairPoint Communications Corp. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	4/18/00
TO-2000-839	FairPoint Communications Corp. (Name change to FairPoint Communications Solutions Corp., recognized) ..	7/21/00
TD-2001-17	Fiberline Network Communications, L.P. (Certificate of service authority, IXC, canceled) .....	9/22/00

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UNREPORTED UTILITY CASES

TO-2000-192	Fidelity Cablevision, Inc. (Certificate of service authority, basic local exchange telecommunications service, granted) .....	2/17/00
TO-2000-758	Fidelity Communications Services II, Inc. (Seeks adoption of GTE/AT&T Communications of the Southwest, Inc. interconnection agreement for agreement with GTE Midwest Incorporated and GTE Arkansas Incorporated, recognized) .....	8/10/00
TA-2000-712	Fidelity Communications Services III, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	10/5/00
GR-2000-285	Fidelity Natural Gas, Inc. (Establishing ACA balance and closing case) .....	8/22/00
TA-2000-685	Fidelity Networks, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	6/1/00
TA-2000-765	First Fiber Corporation d/b/a IAMO Long Distance (Certificate of service authority, IXC and local exchange telecommunications services; transfer of a portion of the assets of Fiber Four Corporation to First Fiber Corporation d/b/a IAMO Long Distance, granted) .....	6/29/00
TD-2000-616	Frakes, Larry and Janet d/b/a Central Midwest Payphones (Certificate of service authority, pay phones, canceled) .....	4/10/00
TO-2001-124	Frontier Communications, Inc. (Name change to Global Crossing North American Networks, Inc., recognized) .....	10/6/00
TD-2001-254	Frontier Communications of the West, Inc. (Certificate of service authority, IXC, canceled) .....	11/7/00
— G —		
TD-2000-550	Gates Communications, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TD-2001-196	Gemini Communications Management, Inc. (Certificate of service authority, IXC, canceled) .....	11/2/00
TA-2001-174	Global TeleLink Services, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	12/14/00
TA-2000-835	Gorman, Shekki (Certificate of service authority, pay phones, granted) .....	7/20/00
TA-2001-169	Go Solo Technologies, Inc. (Certificate of service authority, IXC, granted) .....	10/25/00
TD-2001-24	Gray, Dennis A. (Certificate of service authority, pay phones, canceled) .....	11/8/00
TM-2000-471	GTE Arkansas Incorporated (Sale of part of GTE's franchise, facilities and system located in Missouri to CenturyTel of Northwest Arkansas LLC, granted) .....	6/22/00
TO-2001-30	GTE Communications Corporation, (Name change to Verizon Select Services Inc., recognized) .....	7/21/00
TO-2000-533	GTE Midwest Incorporated (Adoption of GTE/AT&T interconnection agreement by DSLnet Communications, LLC, approved) .....	4/5/00

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TO-2000-497	GTE Midwest Incorporated (Adoption of GTE/AT&T interconnection agreement by McLeodUSA, approved) .....	4/5/00
TM-2000-403	GTE Midwest Incorporated (Sale of certain assets from GTE to Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, granted) .....	5/25/00
TO-2001-29	GTE Midwest Incorporated (Name change to GTE Midwest Incorporated d/b/a Verizon Midwest, recognized) .....	7/21/00
TM-2001-129	GTE Midwest Incorporated d/b/a Verizon Midwest (Transfer of assets to Verizon Advanced Data, Inc., approved) .....	10/23/00
TO-2001-135	GTE Midwest Incorporated d/b/a Verizon Midwest (Order recognizing adoption of GTE/AT&T interconnection agreement by Everest Connections Corporation) .....	11/2/00
TO-2001-247	GTE Midwest, Inc. d/b/a Verizon Midwest (Interconnection agreement with ServiSense.com, Inc., approved) .....	11/28/00
TO-2000-333	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Choctaw Communications, Inc. d/b/a Smoke Signal Communications, approved) .....	2/1/00
TO-2000-334	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Delta Phones, Inc., approved) .....	2/1/00
TO-2000-381	GTE Midwest Incorporated and GTE Arkansas Incorporated and BlueStar Communications, Inc. (Interconnection agreement, approved) .....	2/10/00
TO-2000-376	GTE Midwest Incorporated and GTE Arkansas and EZ Talk Communications, LLC (Interconnection agreement, approved) .....	2/29/00
TO-2000-423	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Comm South Companies, Inc., approved) .....	3/10/00
TO-2000-488	GTE Midwest Incorporated and GTE Arkansas Incorporated (Adoption of the GTE/AT&T Communications of the Southwest, Inc. interconnection agreement by Teleport Communications Group, Inc./TCG St. Louis and TCG Kansas City, Inc., approved) .....	3/14/00
TO-2000-526	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Universal Telecom, Inc., approved) .....	4/4/00
TO-2000-534	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Ciera Network Systems, Inc., approved) .....	4/5/00
TO-2000-463	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Omniplex Communications Group, LLC., approved) .....	4/11/00
TO-2000-575	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Basicphone, Inc., approved) .....	4/18/00
TO-2000-510	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with TeleCorp Communications, Inc., granted) .....	4/27/00

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TO-2000-638	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with U.S. Dial Tone, L.P., granted) .....	5/18/00
TO-2000-682	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with 1-800-RECONEX, Inc., granted) .....	6/22/00
TO-2000-684	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with New Edge Networks, Inc., d/b/a New Edge Networks, granted) .....	7/14/00
TO-2000-681	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Suretel, Inc., granted) .....	7/21/00
TO-2000-722	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Snappy Phone of Texas, Inc. d/b/a Snappy Telephone, granted) .....	7/28/00
TO-2000-775	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Southern Telcom Network, Inc., granted) .....	7/31/00
TO-2001-25	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Cat Communications International, Inc. d/b/a CCI, approved)..	9/15/00
TO-2001-26	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with USA Digital, Inc., approved) .....	9/15/00
TO-2001-34	GTE Midwest Incorporated and GTE Arkansas Incorporated, IONEX Communications, Inc. (Adoption of interconnection agreement, approved) .....	9/19/00
TO-2001-27	GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement with Pathnet, Inc., approved) .....	9/27/00
TO-2001-94	GTE Midwest Incorporated and GTE Arkansas Incorporated, Teligent Services, Inc. (Adoption of interconnection agreement, approved) .....	9/28/00
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TO-2000-466	Harcourt Telco, L.L.C. (Name change to Harcourt Telco, L.L.C. d/b/a Maverix.net, recognized) .....	3/2/00
TD-2000-680	Harms, David (Certificate of service authority, pay phones, canceled) .....	4/28/00
EO-2000-346	Hearrell, Jack (Change of electric supplier from White River Valley Electric Cooperative, Inc. to The Empire District Electric Company, granted) .....	2/1/00
TD-2000-475	Hebron Communications Corporation (Certificate of service authority, IXC, canceled) .....	2/9/00
TO-2001-76	HJN Telecom, Inc. (Resale agreement with Southwestern Bell Telephone Company, approved) .....	9/19/00
TA-2000-786	Holway Long Distance Company d/b/a Holway Long Distance (Certificate of service authority, interexchange and local exchange telecommunications services;	

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	transfer of a portion of the assets of Fiber Four Corporation to Holway Long Distance Company, granted) .....	7/6/00
TA-2000-631	Hopson, Albert (Certificate of service authority, pay phones, granted) .....	5/2/00
WA-99-137	Hotel Associates, Inc. (Certificate of public convenience and necessity to build and operate a water system in and around Kimberling City in Stone County, granted) ....	2/1/00
TD-2000-558	Hutchinson, Steve (Certificate of service authority, pay phones, canceled) .....	4/20/00

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TM-2000-493	IDT America, Corp. (Acquisition of certain business and residential customers of MCI WorldCom Communications, Inc., granted) .....	6/1/00
TA-2000-420	Illinois Payphone Systems, Inc. (Certificate of service authority, pay phone, granted) .....	2/15/00
TM-2000-531	Innovative Telecom, Corp. (Transfer of assets to Enhanced Global Convergence Services, Inc., approved) .....	10/25/00
TD-2000-507	International Gateway Communications, Inc. (Certificate of service authority, resold IXC, canceled) .....	3/31/00
TD-2001-339	Interoute-Retail, Inc. (Certificate of service authority, resold IXC, canceled) .....	1/3/01
TO-2000-518	lonex Communications, Inc. (Name change from Feist Long Distance Service, Inc. to lonex Communications, Inc., recognized) .....	3/7/00
TA-2000-600	lonex Communications, Inc. (Certificate of service authority, resold and facilities-based basic local telecommunications services, granted) .....	6/7/00
TO-2001-172	lonex Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	11/9/00
TO-2000-572	IP Communications Corporation (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	5/26/00
TA-2001-15	IPVoice Communications, Inc. (Certificate of service authority, IXC, granted) .....	9/6/00
TA-2001-100	IPVoice Communications, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	11/13/00
TD-2000-552	Itelecom (Certificate of service authority, IXC, canceled) .....	9/18/00

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TA-2001-42	James, David A. (Certificate of service authority, pay phones, granted) .....	8/15/00
TO-2001-33	JATO Operating Corp. (Seeks adoption of GTE/AT&T Communications of the Southwest, Inc. interconnection agreement for agreement with GTE Midwest Incorporated and GTE Arkansas Incorporated, recognized) .....	8/31/00

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TA-2000-698 & TM-2000-699	J D Services, Inc. d/b/a American Freedom Network (Certificate of service authority, IXC and nonswitched local exchange certificates; merger of J D Services, Inc., a Utah corporation with J D Services, Inc., a Nevada corporation, granted) .....	7/11/00
WO-2001-111	Jefferson City Water Works Company, Inc. (Recognition of new fictitious name Missouri-American Water Company, acknowledged) .....	9/15/00
TA-2000-848	JirehCom, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	8/10/00

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EF-2001-282	Kansas City Power & Light (Order approving financing, granted) .....	12/5/00
EO-2001-240	Kansas City Power & Light (Territorial agreement with the City of Marshall, approved) .....	1/23/01
TD-2000-832	KCI Long Distance, Inc. (Certificate of service authority, IXC, canceled) .....	9/28/00
TA-2000-789	KLM Long Distance Company (Certificate of service authority, IXC and local exchange telecommunications services; transfer of a portion of the assets of Fiber Four Corporation to KLM Long Distance Company, granted) .....	6/29/00
TA-2000-785	KMC Telecom V, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	8/16/00
TA-2001-130	K-Powernet, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/11/00

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GF-2000-843	Laclede Gas Company (Financing order) .....	8/10/00
TA-2000-805	Langworthy, Webb (Certificate of service authority, pay phones, granted) .....	7/18/00
TO-2000-798	LDD, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, granted) .....	7/13/00
TA-2000-762	LD Exchange.com, Inc. (Certificate of service authority, IXC, granted) .....	6/22/00
TD-2000-626	Local Fone Service, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, canceled) .....	5/2/00
TA-2001-295	Long Distance Billing Services, Inc. (Certificate of service authority, IXC, granted) .....	12/11/00
TD-2001-202	Long Distance International, Inc. (Certificate of service authority, IXC, canceled) .....	10/2/00
TD-2000-565	Long Distance Network, Inc. (Certificate of service authority, IXC, canceled) .....	4/7/00
TO-2000-669	Long Distance of Michigan, Inc. d/b/a LDMI Long Distance (Name change to Long Distance of Michigan, Inc. d/b/a LDMI Telecommunications, acknowledged) .....	10/6/00

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TA-2001-55	Looking Glass Networks, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	9/21/00
TA-2000-852	Loyd, Gary (Certificate of service authority, pay phones, granted) .....	8/14/00

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TA-2001-358	MAH Communications/Utelecom, LLC (Certificate of service authority, pay phones, granted) .....	1/3/01
TA-2000-591	Mark Twain Communications Company (Designation as telecommunications carrier eligible for Federal Universal Service Support, granted) .....	6/15/00
TA-2000-361	Matrix Telecom, Inc. (Certificate of service authority, IXC, granted) .....	2/22/00
TA-2000-98	Maverix.com, Inc. d/b/a Maverix.net (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	3/8/00
TO-2000-569	Maverix.com, Inc. d/b/a Maverix.net (Name change to Maverix.net, Inc., recognized) .....	3/31/00
TO-2001-79	Maverix.net, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	10/31/00
TA-2000-571	Maxcess, Inc. (Certificate of service authority, IXC, granted) .....	4/24/00
TA-2000-570	Maxcess, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted)...	7/13/00
TO-2001-318	Maxcess, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	12/27/00
TA-2001-296	Maxtel USA, Inc. (Certificate of service authority, IXC, granted) .....	12/11/00
TD-2001-59	McFadden, Linda (Certificate of service authority, pay phones, canceled) .....	8/10/00
TA-2001-262	McMillen, John (Certificate of service authority, pay phones, granted) .....	11/29/00
TD-2001-183	Megsinet-CLEC, Inc. (Certificate of service authority, IXC and basic local telecommunications services, canceled)..	10/10/00
TD-2001-197	Meridian Telecom Corporation (Certificate of service authority, IXC, canceled) .....	11/2/00
TA-2000-335	Metromedia Fiber Network Services, Inc. (Certificate of service authority, basic local exchange and IXC telecommunications services, granted) .....	2/25/00
TA-2000-453	MGC Communications, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	3/22/00
TO-2000-790	MGC Communications, Inc. d/b/a Mpower Communications Corp. (Interconnection agreement with Southwestern Bell Telephone Company, granted) .....	7/11/00
TA-2000-812	MGC Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	7/20/00
TO-2001-122	MGC Communications Inc. (Name change to Mpower Communications Corp, recognized) .....	9/18/00

## UNREPORTED UTILITY CASES

TD-2000-855	MiComm Services, Inc. (Certificate of service authority, basic local telecommunications service, canceled).....	7/13/00
TD-2001-9	Mid-Com Communications, Inc. (Certificate of service authority, IXC, canceled).....	11/1/00
WF-2001-78	Middlefork Water Company (Order approving financing, granted) .....	12/12/00
WA-2000-405	Missouri-American Water Company (Certificate of public convenience and necessity to provide water system in an unincorporated area of Jasper County, granted) .....	5/9/00
GE-2000-543	Missouri Association of Natural Gas Operators (Waiver of Commission gas safety rule 4 CSR 240-40.030, granted)..	6/15/00
GA-2000-412	Missouri Gas Energy (Certificate of public convenience and necessity to provide gas service in a portion of Newton County, granted) .....	2/29/00
TA-2001-348	Missouri Network Alliance, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	1/11/01
TO-2000-467	Missouri State Discount Telephone (Resale agreement with Southwestern Bell Telephone Company, approved) .....	3/10/00
TO-2000-469	Missouri State Discount Telephone (Interconnection agreement with ALLTEL Communications Service Corporation, approved) .....	4/24/00
TO-2000-406	Missouri Telecom, Inc. (Interconnection agreement with Southwestern Bell, approved) .....	2/10/00
TO-2000-487	Missouri Telecom, Inc. (Adoption of GTE/AT&T Communications of the Southwest, Inc. interconnection agreement by Missouri Telecom, Inc., granted) .....	3/15/00
TM-2000-377	Mocas, Robert E., Easton Telecom Services, Inc. and Teligent, Inc. and its affiliates (Transfer control of Easton from Mocas to Teligent via a merger transaction, approved) .....	2/1/00
TA-2001-125	MoKan Communications, Inc. (Certificate of service authority, IXC, granted) .....	10/3/00
TD-2000-566	MTC Telemanagement Corporation (Certificate of service authority, IXC, canceled) .....	4/7/00
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TA-2000-634	Natel, L.L.C. (Certificate of service authority, IXC, granted) .....	5/5/00
TD-2000-563	National Telecom, Inc. (Certificate of service authority, IXC, canceled) .....	4/7/00
TD-2000-535	Network Services Long Distance (Certificate of service authority, IXC, canceled) .....	4/7/00
TO-2000-744	New Edge Network, Inc. (Interconnection and resale agreement with SBC Communications, Inc., approved) ....	6/27/00
TO-2000-803	New Edge Network, Inc. d/b/a New Edge Networks (Interconnection agreement with Sprint Missouri, Inc., granted) .....	8/11/00
TA-2000-491	NewPath Holdings, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	6/20/00

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TA-2000-389	NewSouth Communications Corp. (Certificate of service authority, IXC, granted) .....	2/1/00
TO-2001-340	NEXTLINK Long Distance Services, Inc. (Name change to XO Long Distance Services, Inc., recognized) .....	12/21/00
TO-2001-341	NEXTLINK Missouri, Inc. (Name change to XO Missouri, Inc., recognized) .....	12/21/00
TD-2000-842	Norris, Coleman F. (Certificate of service authority, pay phones, canceled) .....	10/6/00
TD-2001-22	North American Communications Corporation (Certificate of service authority, IXC, canceled) .....	9/28/00
TM-2001-136	North American Telephone Network, L.L.C. (Transfer of certain assets to International Exchange Communications, Inc. d/b/a IE COM, granted) .....	11/29/00
SA-2000-417	North Oak Sewer District, Inc. (Certificate of public convenience and necessity to construct, own and operate sewer system in Warren County, granted) .....	7/13/00
WF-2000-519	North Suburban Public Utility Company (Acquisition of 72 shares of the outstanding capital common stock of Ozark Shores Water Company, granted) .....	5/25/00
TM-2000-501	NOW Communications, Inc. (Transfer of assets from Tel-Link, L.L.C. to NOW Communications, Inc., granted)...	11/13/00
TA-2001-38	NTEGRITY TELECONTENT SERVICES, INC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	8/16/00
TO-2001-40	NYNEX Long Distance Company d/b/a Bell Atlantic Business Services (Name change to NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions, recognized) .....	7/31/00

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TA-2000-496	01 Communications of Missouri, LLC (Certificate of service authority, basic local, local exchange and IXC telecommunications services, granted) .....	6/21/00
TA-2001-51	Ol' MacDonalds Farm (Certificate of service authority, pay phones, granted) .....	8/15/00
TO-2000-450	Omniplex Communications Group, LLC (Interconnection agreement with Southwestern Bell, approved).....	4/5/00
TD-2000-564	One-2-One Communications, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TM-2000-418	OneStar Long Distance, Inc. (Transfer of assets from NeTel, Inc. d/b/a Tel 3 to OneStar, granted) .....	3/10/00
TM-2000-419	OneStar Long Distance, Inc. (Transfer of assets from USTel, Inc. and Arcada, Inc. to OneStar, granted) .....	3/14/00
TA-2000-362	One Tel, Inc. (Certificate of service authority, IXC, granted) .....	2/16/00
TD-2001-243	One Tel, Inc. (Certificate of service authority, IXC, canceled) .....	10/31/00
TA-2000-691	OnSite Access Local, LLC (Certificate of service authority, basic local and local exchange services, granted) .....	1/3/01

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TD-2001-203	Owl Telecomm (Certificate of service authority, pay phones, canceled) .....	11/2/00
TA-2001-133	Ozark Technologies, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/12/00
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TA-2001-194	Pac-West Telecom, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/30/00
TD-2001-198	Pantel Communications, Inc. (Certificate of service authority, IXC, canceled) .....	10/5/00
TA-2000-457	Paramount International Telecommunications, Inc. d/b/a R Network (Certificate of service authority, pay phone, granted) .....	2/23/00
TA-2000-455	Paramount International Telecommunications, Inc. d/b/a R Network (Certificate of service authority, IXC, granted)..	3/6/00
TA-2001-173	Partner Communications & Services, Inc. (Certificate of service authority, IXC, granted) .....	11/17/00
TA-2000-664	Pathnet, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	6/19/00
TA-2000-665	Pathnet, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted)...	8/8/00
TO-2000-807	Payroll Advance, Inc. (Interconnection agreement with Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, Nevada Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Bell Telephone Company, The Southern New England Telephone Company, Wisconsin Bell d/b/a Ameritech Wisconsin collectively known as Southwestern Bell Telephone Company or SWBT, approved).....	8/8/00
TO-2000-559	PF.Net, LLC (Name change to PF.Net Network Service Corp., recognized) .....	3/31/00
TA-2000-597	Phoenix Telecom, L.L.C. (Certificate of service authority, pay phones, granted).....	4/19/00
TM-2000-528	Phoenix Telecom, L.L.C., (Purchase of assets and transfer of control of Teletrust, Inc. to Phoenix Telecom, L.L.C., granted) .....	6/12/00
TA-2000-701	Phone Bank, Inc. d/b/a Phone Banc, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	8/16/00
TM-2001-81	PNG Telecommunications, Inc. (Acquisition of assets of BroadWing Communications Services, Inc., granted).....	9/14/00
TD-2001-14	Prism Communications, L.L.C. (Certificate of service authority, IXC, canceled) .....	9/22/00
TO-2000-562	Prism Missouri Operations, LLC (Interconnection agreement with Southwestern Bell Telephone Company, approved)..	4/18/00
TA-2000-545	PromiseVision Technology, Inc. (Certificate of service authority, IXC, granted) .....	4/21/00

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TD-2001-12	Providian Group, L.L.C. (Certificate of service authority, IXC, canceled) .....	10/24/00
TA-2000-847	PT-1 Counsel, Inc. (Certificate of service authority, IXC, granted) .....	7/31/00
TA-2000-788	Public Communications Services, Inc. (Certificate of service authority, pay phones, granted) .....	6/28/00
TA-2000-787	Public Communications Services, Inc. (Certificate of service authority, IXC, granted) .....	7/12/00
WO-2000-849	Public Water Supply District No. 2 of St. Charles County (Water territorial agreement with City of Wentzville, granted) .....	10/17/00

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TA-2001-176	RCN Telecom Services, Inc. (Certificate of service authority, IXC, granted) .....	12/5/00
TM-2001-178	RCN Telecom Services, Inc. (Merger with RCN Long Distance Company with RCN Telecom Services, Inc. the surviving entity, approved) .....	12/12/00
WR-2000-416	RDE Water Company (Water rate increase granted) .....	5/11/00
TO-2000-426	Reitz Rentals, Inc. d/b/a SouthWest TeleConnect (Resale agreement with Southwestern Bell Telephone Company, approved) .....	3/17/00
TA-2000-396	Reitz Rentals, Inc., d/b/a SouthWest TeleConnect (Certificate of service authority, basic local telecommunications services, granted) .....	4/27/00
TD-2001-58	Rider, Bradley E. d/b/a R&B Enterprises (Certificate of service authority, pay phones, canceled) .....	8/10/00
TA-2000-663	Rock Port Telephone Company (Certificate of service authority to provide IXC and non-switched local exchange telecommunications services, transfer of a portion of assets of Fiber Four Corporation to Rock Port Telephone Company, granted) .....	6/20/00
TA-2000-462	Rounds, Jaimie (Certificate of service authority, pay phone, granted) .....	2/17/00

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TD-2000-613	Scherers Communications Group, Inc. (Certificate of service authority, IXC, canceled) .....	4/11/00
TD-2000-568	Scott, Stephen R. (Certificate of service authority, pay phones, canceled) .....	6/6/00
TA-2000-324	2nd Century Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	3/31/00
TA-2000-323	2nd Century Communications, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	6/8/00
TO-2001-32	2nd Century Communications, Inc. (Seeks adoption of GTE/AT&T Communications of the Southwest, Inc. interconnection agreement for agreement with GTE Midwest Incorporated and GTE Arkansas Incorporated, recognized) .....	8/31/00

## UNREPORTED UTILITY CASES

TO-2001-109	2nd Century Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)..	10/11/00
TA-2000-781	Selman, Curt R. (Certificate of service authority, pay phones, granted) .....	7/25/00
TA-2001-45	ServiSense.com, Inc. (Certificate of service authority, IXC, granted) .....	8/25/00
TO-2001-63	ServiSense.com, Inc. (Interconnection agreement with SBC Communications, Inc., approved) .....	10/11/00
TA-2001-46	ServiSense.com, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted).....	12/4/00
TD-2000-413	SeTel, L.L.C. (Certificate of service authority, IXC, canceled) .....	2/1/00
TD-2001-72	Set'em Up Saloon (Certificate of service authority, pay phones, canceled) .....	8/29/00
WR-2001-82	Shell Knob Estates Utilities, Inc. (Water rate case decision under informal rate case procedure) .....	9/28/00
SR-2001-83	Shell Knob Estates Utilities, Inc. (Sewer rate case decision under informal rate case procedure) .....	9/28/00
TA-2000-656	Siesta Telecom, Inc. (Certificate of service authority, IXC, granted) .....	5/17/00
TA-2001-56	Sigma Networks Telecommunications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/3/00
TD-2000-628	Slatinsky, Paul V. (Certificate of service authority, pay phones, canceled) .....	6/20/00
TA-2000-593	Smith, Christopher A. (Certificate of service authority, pay phones, granted) .....	4/19/00
TA-2000-372	Snappy Phone of Texas, Inc., d/b/a Snappy Phone (Certificate of service authority, basic local exchange and IXC services, granted) .....	4/28/00
TO-2000-768	Snappy Phone of Texas, Inc. d/b/a Snappy Phone (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	6/21/00
TA-2000-783	Snappy Phone of Texas, Inc., d/b/a Snappy Phone (Amended certificate of service authority, basic local exchange telecommunications services, granted) .....	10/26/00
TA-2000-398	Socket Communications Group, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	2/7/00
TD-2000-601	Socket Internet Services Corporation (Certificate of service authority, IXC, canceled) .....	4/12/00
GR-2000-288	Southern Missouri Gas Company (1998-1999 Actual Cost Adjustment case) .....	12/12/00
GM-2000-503	Southern Union Company (Authority to acquire the stock of and merge with Fall River Gas Company, granted) .....	6/27/00
GM-2000-500	Southern Union Company (Authority to acquire the stock of and merge with Providence Energy Corporation, granted) .....	6/27/00
GM-2000-502	Southern Union Company (Authority to acquire the stock of and merge with Valley Resources, Inc., granted) .....	6/27/00

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TM-2001-368	Southwestern Bell Telephone Company (Transfer of certain support assets from Southwestern Bell to SBC Services, Inc., approved) .....	1/23/01
TM-2000-366	Southwestern Bell Telephone Company and SBC Advanced Solutions, Inc. (Transfer of certain assets from SWBT to SBC-ASI, granted) .....	3/2/00
TO-2000-407	Southwestern Bell Wireless, Inc. and TDS Telecom, Inc. (Interconnection agreement, approved) .....	2/25/00
TO-2000-482	Southwestern Bell Wireless, Inc. (Interconnection agreement with ALLTEL Communications Services Corporation, approved) .....	4/4/00
TO-2000-523	Spectra Communications Group, LLC (Interconnection agreement with Mark Twain Communications Company, approved) .....	5/12/00
TA-2000-817	Spectra Communications Group, LLC (Designation as a telecommunications carrier eligible for federal universal service support, granted) .....	7/27/00
TO-2001-85	Spectra Communications Group, LLC (Interconnection agreement with Nextel West Corp., approved) .....	9/27/00
TO-2001-87	Spectra Communications Group, LLC (Interconnection agreement with EZ Talk Communications, LLC, approved)..	9/27/00
TO-2001-84	Spectra Communications Group, LLC (Interconnection agreement with Universal Telecom, Inc., approved) .....	9/27/00
TO-2001-89	Spectra Communications Group, LLC (Resale agreement with Local Line America, approved) .....	10/5/00
TO-2001-86	Spectra Communications Group, LLC (Interconnection agreement with Tel-Link, Inc., approved) .....	10/11/00
TO-2001-90	Spectra Communications Group, LLC (Resale agreement with NOW Communications, Inc., approved) .....	10/25/00
TO-2001-187	Spectra Communications Group LLC (Interconnection agreement with Green Hills Communications Services, approved) .....	10/30/00
TO-2001-88	Spectra Communications Group, LLC (Resale agreement with Payroll Advance, Inc., granted) .....	10/31/00
TO-2001-181	Spectra Communications Group, LLC (Interconnection agreement with Sprint Spectrum, L.P., approved) .....	11/17/00
TO-2001-306	Spectra Communications, Group, LLC (Interconnection agreement with Basicphone, Inc., granted) .....	1/11/01
TO-2001-310	Spectra Communications Group, LLC (Resale agreement with 1-800-Reconex, Inc., approved) .....	1/17/01
TO-2001-356	Spectra Communications Group, LLC (Interconnection, resale and unbundling agreement with Southern Telecom Network, Inc.d/b/a STN Long Distance, approved) .....	1/26/01
TO-2000-508	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Logix Communications Corporation, approved) .....	4/18/00
TO-2000-621	Sprint Missouri, Inc. d/b/a Sprint (Interconnection and resale agreement with Reitz Rentals, Inc. d/b/a Southwest TeleConnect, granted) .....	5/31/00
TO-2000-620	Sprint Missouri, Inc. (Interconnection and resale agreement with Comm South Companies, Inc., granted) .....	6/9/00

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TO-2001-188	Sprint Missouri, Inc. (Interconnection agreement with Universal Telecom, Inc., approved) .....	11/1/00
TO-2001-190	Sprint Missouri, Inc. (Interconnection agreement with Payroll Advance, Inc., approved) .....	11/2/00
TO-2001-185	Sprint Missouri, Inc. (Interconnection agreement with Tel-Link, Inc., approved) .....	11/3/00
TO-2001-192	Sprint Missouri, Inc. (Interconnection agreement with Pathnet, Inc., approved) .....	11/7/00
TO-2001-191	Sprint Missouri, Inc. (Commercial mobile radio services interconnection agreement with AT&T Wireless Services, Inc., approved) .....	12/1/00
TO-2001-189	Sprint Missouri, Inc. (Interconnection and resale agreement with New Edge Network, Inc., approved).....	12/4/00
TO-2001-186	Sprint Missouri, Inc. (Commercial mobile radio services interconnection agreement with Sprint PCS, approved)...	12/7/00
TO-2001-253	Sprint Missouri, Inc. (Adoption of the terms of the interconnection agreement between Sprint and Dakota Services Limited with Green Hills Telecommunications Services, granted).....	12/14/00
TO-2001-305	Sprint Missouri, Inc. d/b/a Sprint (Commercial mobile radio services interconnection agreement with Nextel West Corp., approved) .....	1/3/01
TO-2001-320	Sprint Missouri, Inc. d/b/a Sprint (Adoption of the terms of the interconnection agreement between Sprint and Dakota Services Limited with Broadband Office Communications, Inc., granted) .....	1/11/01
TO-2001-324	Sprint Missouri, Inc. (Adoption of the terms of the interconnection agreement between Sprint and Dakota Services Limited with Adelphia Business Solutions Operations, Inc., recognized) .....	1/16/01
TO-2001-321	Sprint Missouri, Inc. d/b/a Sprint Missouri (Adoption of the terms of the interconnection agreement between Sprint and New Edge Network, Inc. with USA Digital, Inc. d/b/a USA Digital of Nevada, Inc., approved) .....	1/18/01
TO-2001-103	Sprint Spectrum L.P. d/b/a Sprint PCS (Commercial mobile radio services interconnection agreement with ALLTEL Communications Service Corporation, approved) .....	11/2/00
TA-2001-333	STI Merger Co. (Certificate of service authority, IXC, granted) .....	1/18/01
GA-2000-422	St. Joseph Light & Power (Certificate of public convenience and necessity to provide natural gas service to parts of Andrew, Atchison, Holt and Nodaway Counties, granted) .....	4/4/00
GR-99-394	St. Joseph Light & Power (1998-1999 Actual Cost Adjustment case, order approving agreement) .....	12/7/00
WO-2001-112	St. Louis County Water Company (Recognition of new fictitious name Missouri-American Water Company, acknowledged) .....	9/15/00
GO-2000-635	Strategic Energy, L.L.C. (Certificate of service authority, seller of energy services, granted) .....	5/2/00

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TA-2000-811	TDS Long Distance Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted).....	7/25/00
TO-2000-740	TDS Telecommunications Corporation (Approval of a Commercial Mobile Radio Services interconnection agreement with Nextel Communications, Inc., granted)...	7/31/00
TO-2001-77	TDS Telecommunications Corporation (Interconnection agreement with U.S. Cellular Corporation, approved).....	9/13/00
TO-2001-75	TDS Telecommunications Corporation (Interconnection agreement with Universal Telecom, Inc., approved) .....	10/17/00
TO-2000-542	Telco Holdings, Inc. d/b/a Dial & Save (Name change to Teleglobe Business Solutions, Inc., recognized).....	3/14/00
TA-2000-720	TeleCents Communications, Inc. (Certificate of service authority, IXC, granted).....	6/2/00
TO-2001-312	TeleCorp Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	1/18/01
TA-2001-101	Telera Communications, Inc. (Certificate of service authority, IXC, granted) .....	9/25/00
TA-2001-102	Telera Communications, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	11/13/00
TO-2001-44	Teletouch Communications, Inc. (Interconnection agreement with Southwestern Bell, approved) .....	8/30/00
TA-2001-211	Telicor, Inc. (Certificate of service authority, IXC, granted) .....	11/9/00
TA-2001-212	Telicor Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	12/11/00
TM-2000-584	Teligent, Inc. (Reorganization and transfer of assets to Teligent Services, Inc., granted) .....	10/25/00
TD-2001-378	Teligent, Inc. (Certificate of service authority, basic local exchange services and local exchange telecommunications services, IXC and nonswitched local exchange telecommunications services, canceled) .....	1/23/01
TA-2000-578	Teligent Services, Inc. (Certificate of service authority, basic local and exchange access telecommunications services, granted) .....	11/9/00
TD-2000-605	Tel-Span Communications, Inc. (Certificate of service authority, IXC, canceled) .....	4/11/00
TA-2001-201	T-NETIX Internet Services, Inc. (Certificate of service authority, IXC, granted) .....	10/31/00
TA-2001-231	Toledo Area Telecommunications Services, Inc., d/b/a Buckeye TeleSystem (Certificate of service authority, IXC, granted) .....	1/19/01
TO-2001-319	TotalTel, Inc. (Name change to Covista, Inc., recognized)..	12/11/00
TD-2000-540	Total World Telecom (Certificate of service authority, IXC, canceled) .....	4/7/00
TA-2001-110	Touch America, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	10/3/00

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TD-2000-604	Touchtone Network, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
TA-2000-359	Trans National Telecommunications, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	4/20/00
TO-2000-756	Trans National Telecommunications, Inc. (Seeks adoption of GTE and Comm South Companies, Inc. interconnection agreement for agreement with GTE Midwest Incorporated and GTE Arkansas Incorporated, recognized) .....	8/10/00
TM-2000-853	TTI National, Inc. (Approval to transfer subscribers of Minimum Rate Pricing, Inc., Parcel Consultants, Inc., National Tele-Communications, Inc., and Discount Call Rating, Inc., granted) .....	7/18/00

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TA-2000-544	UKI Communications, Inc. (Certificate of service authority, IXC, granted) .....	4/5/00
TO-2000-857	UniDial Communications, Inc. (Name change to Lightyear Communications Inc., granted) .....	7/24/00
EO-2000-221	Union Electric Company d/b/a AmerenUE (Variance for MasterCard International, granted) .....	3/23/00
EO-2000-630	Union Electric Company d/b/a AmerenUE (Territorial agreement with Lewis County Rural Electric Cooperative in portions of Lewis, Clark, Shelby, Knox, Adair, Schuyler, Scotland and Marion, approved) .....	7/21/00
EO-2000-774	Union Electric Company d/b/a AmerenUE (Territorial agreement with Intercounty Electric Cooperative Association which designates the boundaries of each supplier in Gasconade, Maries and Phelps Counties) .....	8/31/00
GR-99-396	Union Electric Company d/b/a AmerenUE (1998-99 Actual Cost Adjustment, order requiring adjustment of ACA balance) .....	9/12/00
EE-2000-561	Union Electric Company d/b/a AmerenUE (Variance from rules to allow for an electronic image of a bill through the use of the Internet instead of mailing or hand delivering a bill, approved) .....	10/31/00
GR-99-280	United Cities Gas Company (1998-1999 Actual Cost Adjustment case, order establishing ACA balance and closing case) .....	12/19/00
TA-2000-499	United Communications HUB, Inc. (Certificate of service authority, IXC, granted) .....	4/24/00
TA-2000-483	Universal Access, Inc. (Certificate of service authority, IXC, granted) .....	3/20/00
TA-2000-481	Universal Access, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	4/20/00
TM-2001-338	Universal Access, Inc. (Reorganization to become a wholly owned subsidiary of UAXS Global Holdings, Inc., approved) .....	1/30/01
TA-2000-598	Universal Telecom, Inc. (Certificate of service authority, prepaid basic local telecommunications services, granted) .....	10/11/00

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TO-2001-360	Universal Telecom, Inc. (Interconnection agreement with ALLTEL Communications Service Corporation, approved)..	1/22/01
TA-2001-316	USA Digital Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	12/27/00
TD-2001-16	U.S. Digital Network Limited Partnership (Certificate of service authority, IXC, canceled) .....	9/18/00
TA-2000-731	U.S. TelePacific Corp. d/b/a TelePacific Communications (Certificate of service authority, IXC, granted) .....	6/9/00
TA-2000-732	U.S. TelePacific Corp. d/b/a TelePacific Communications (Certificate of service authority, basic local and exchange access telecommunications services, granted) .....	10/5/00
WO-2000-836	U.S. Water/Lexington, Missouri, Inc. (Name change to U.S. Water Company, acknowledged) .....	7/27/00
EM-2000-358	UtiliCorp United Inc. (Request authority to act through subsidiary, UtiliCorp Brazil Energy Holdings, through bid process, to acquire capital stock of Companhia Energetia DePernambuco, order canceling approval of application and closing case) .....	4/4/00
EM-2000-506	UtiliCorp United, Inc. (Acquisition of TransAlta Corporation, granted) .....	5/18/00
GM-2000-637	UtiliCorp United, Inc. (Acquisition of AlintaGas Limited, granted) .....	5/25/00
TA-2001-60	Utility.com, Inc. (Certificate of service authority, IXC, granted) .....	9/12/00

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TA-2001-64	Valor Telecommunications CLEC of Missouri, L.L.C. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	10/30/00
TD-2001-8	Vassil, Lerita D. Wanda (Certificate of service authority, pay phones, canceled).....	7/20/00
TA-2000-409	Vectris Telecom, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	2/17/00
TA-2000-408	Vectris Telecom, Inc. (Certificate of service authority, competitive basic local telecommunications services on a facilities-based and resold basis, granted).....	4/7/00
TO-2000-555	Vectris Telecom, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, granted) .....	5/5/00
TO-2001-234	Verizon Wireless Messaging Services, LLC (Interconnection agreement with Southwestern Bell Telephone Company, approved) .....	12/22/00

— W —

TA-2001-170	Walrath, Dennis (Certificate of service authority, pay phones, granted) .....	10/26/00
TD-2000-602	WATS International Corporation (Certificate of service authority, IXC, canceled) .....	4/11/00

UNREPORTED UTILITY CASES

TM-2000-770	Widra, Alan and trusts for the benefit of certain of his family members (the Shareholders), American Long Lines, Inc. (ALL), and Teligent, Inc. and its affiliates, including Teligent Services, Inc. (Transfer of control of ALL from the Shareholders to Teligent, granted) .....	6/28/00
TA-2000-468	Williams Local Network, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	3/9/00
TO-2000-793	WorkNet Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)..	6/29/00
TM-2001-314	WorldCom, Inc. (Acquire control of Intermedia Communications Inc. and indirectly its subsidiary Access Network Services, Inc., approved) .....	1/16/01
TD-2001-256	World Link Communications, Inc. (Certificate of service authority, IXC, canceled) .....	11/7/00
TA-2000-850	WORLDxCHANGE Communications, Inc. (Certificate of service authority, IXC, granted) .....	10/16/00
TO-2001-99	Worldwide Fiber Networks, Inc. (Name change to 360networks (USA) Inc., recognized) .....	9/7/00
TA-2001-131	WWC License, LLC d/b/a Cellular One Long Distance (Certificate of service authority, IXC, granted).....	12/1/00
— X —		
TD-2000-603	XIEX Telecommunications, Inc. (Certificate of service authority, IXC, canceled) .....	8/15/00
— Z —		
TA-2001-229	Zone Telecom, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	11/21/00
TM-2001-230	Zone Telecom, Inc. (Transfer of selected assets of The Furst Group, Inc. to Zone Telecom, approved) .....	11/30/00

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

**In the Matter of the Application of Osage Water Company for  
Permission, Approval, and a Certificate of Convenience and  
Necessity Authorizing It to Construct, Install, Own, Operate,  
Control, Manage and Maintain a Water and Sewer System for  
the Public Located in an Unincorporated Portion of Camden  
County, Missouri, Known as Eagle Woods.\***

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*Case No. WA-99-437  
Decided February 10, 2000*

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**Water §2.** The Commission approved the Application filed by Osage Water Company for a certificate of public convenience and necessity authorizing Osage to construct, own, operate, control, manage, and maintain a water and sewer system for the public located in an unincorporated area of Camden County, Missouri.

**APPEARANCES:**

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

*Gary W. Duffy*, Brydon, Swearngen and England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri, 65101, for City of Osage Beach.

*Shannon Cook*, Assistant Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

*Keith R. Krueger*, Deputy 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

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\*The Commission, in an order issued on March 14, 2000, denied an application for rehearing. On April 12, 2000, this case was appealed to Cole County Circuit Court (00CV323577). On September 28, 2000, Cole County Circuit Court reversed the Commission's initial Report & Order. See page 502 for another order in this case.

**REPORT AND ORDER****I. Procedural History**

On April 5, 1999, Osage Water Company (Osage) filed an application pursuant to Section 393.170, RSMo 1994<sup>1</sup>, requesting that the Missouri Public Service Commission (Commission) grant it a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a water and sewer system for the public located in an unincorporated portion of Camden County known as Eagle Woods.

On April 12, 1999, the Commission issued an order and notice of application, directing interested parties to file applications to intervene no later than April 29, 1999. On April 28, 1999, the City of Osage Beach (City) filed a timely application to intervene and also filed motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment. On May 3, 1999, Osage filed its response to the application to intervene by the City, stating that it opposed the intervention of the City and also filed a response to the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment. On May 5, 1999, the City filed its replies to Osage's responses to the City's motions. On May 10, 1999, the Staff of the Commission (Staff) filed its response to the application to intervene filed by the City and also filed its response to the motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA 99 268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment.

On May 10, 1999, Osage filed its response to a motion to compel filed by the City. However, the official case filings do not reflect such a motion by the City being filed.

The City's application to intervene was granted by order of the Commission entered on May 11, 1999, which order also set a prehearing conference for June 11, 1999, which was held as scheduled. The order also denied the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment, and instead set a deadline for the parties to file a procedural schedule no later than June 21, 1999. On May 14, 1999, the City filed its application for a rehearing on the order denying consolidation. On May 17, 1999, Staff filed its motion to reconsider the order

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<sup>1</sup>All references herein to sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 1994.

denying the motion to reconsider (*sic*) and a "motion to compel<sup>2</sup>." On May 26, 1999, Osage filed its response to the motion for rehearing by City and to the motion to reconsider by Staff. On June 21, 1999, Office of the Public Counsel (Public Counsel) filed its clarification of its position, stating that it had decided to oppose Osage's application.

On June 22, 1999, the Commission entered its order denying the City's application for rehearing filed on May 14, 1999, and also denying the Staff's response to the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment, filed on May 10, 1999, and Staff's motion to reconsider order denying motion to reconsider (*sic*) and motion to compel, filed on May 17, 1999.

On June 23, 1999, Osage filed a motion to establish a procedural schedule. Osage stated that all parties agreed on the procedural schedule set forth. On June 24, 1999, the Commission entered its order adopting procedural schedule which, *inter alia*, set an evidentiary hearing for December 2 and 3, 1999. The Commission filed a notice of correction of the order adopting procedural schedule on June 30, 1999, which corrected a date for rebuttal testimony to be filed. On August 12, 1999, the Commission entered its order scheduling a local public hearing for September 16, 1999, which was held as scheduled.

On November 1, 1999, Staff filed its proposed list of issues, order of witnesses, and order of cross examination, which Staff stated that all parties agreed upon. On the same date, both Staff and City each filed its statement of position on the issues. Osage filed its statement of position on November 5, 1999. Included in that statement was also an objection by Osage to that part of Staff's proposed list of issues, order of witnesses, and order of cross examination which indicated that Public Counsel possibly intended to call unidentified "public witnesses." On November 19, 1999, the Commission entered its order partially granting Osage's objection to public witnesses. The Commission ordered that the objection to the proposed order of witnesses filed by Osage was granted insofar as to prohibit the introduction of the testimony of any witness which did not comply with applicable rules of the Commission or statutes of the State of Missouri.

On November 9, 1999, the Commission issued a notice changing the dates for the evidentiary hearing to December 1 and 2, 1999. On November 16, 1999, Staff, City and Public Counsel filed a joint motion to strike portions of the prepared testimony of William P. Mitchell (Mitchell), Osage's engineering witness. On November 24, 1999, Public Counsel filed its statement of position and its motion for leave to file its statement of position out of time.

On November 29, 1999, the Commission filed its notice of official notice, stating that it had taken official notice of Osage's 1998 annual report.

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<sup>2</sup>Although the caption of the motion filed by Staff indicated that it was, *inter alia*, a "motion to compel," there was nothing in the body of the motion which consisted of a motion to compel.

An evidentiary hearing was held on December 1 and 2, 1999. All the parties were represented. On December 17, 1999, the Commission entered its order adopting a briefing schedule. Also on December 17, 1999, the Commission filed its notice regarding motions and notice of ex parte contact. The notice stated, *inter alia*, that at the evidentiary hearing, the joint motion to strike portions of the prepared surrebuttal testimony of Mitchell was denied on the record. The motion filed by Public Counsel for leave to file its statement of position out of time was granted on the record. Also at that hearing, the Commission notified the parties of an ex parte contact made with the Commission on November 30, 1999, by way of a letter sent from and signed by Linda Hulett.

At the hearing, the Commission also took official notice of the following: Department of Natural Resources rule 10 CSR 20.610, a copy of the recorded restrictions on Eagle Woods subdivision, small water company rate cases (2000-345 and 2000-346), and Section 644.141, RSMo. At the hearing, Exhibit Number 9 was reserved for accounting documents, Exhibit Number 11 was reserved for copies of restrictions on Eagle Woods, and Exhibit Number 12 was reserved for a copy of a Department of Natural Resources sewer construction permit. All of the late filed exhibits were filed by Osage on December 15, 1999, and are received and made a part of the record of this matter.

## **II. Issues**

The following list of issues was taken from Staff's proposed list of issues and the *Tartan Energy Company Case*.

In Re Tartan Energy, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994) (*Tartan Energy Company Case*), articulated the legal standard to be met by an applicant for a certificate of convenience and necessity: (1) there must be a need for the service; (2) the applicant must be qualified to provide the service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. See also Re Intercon Gas, Inc., 30 Mo. P.S.C.(N.S.) 554, 561 (June 28, 1991); State ex rel. Intercon Gas v. Public Service Commission, *loc. cit.* This standard has also been historically applied to water and sewer certificate cases. See Re M.P.B. Inc., 28 Mo. P.S.C. (N.S.) 55, 73 (November 15, 1985).

Although one or more of the parties attempted to inject the issue of whether or not an alternative provider could possibly be more economical or efficient than Osage, nowhere is there any statutory authority for the Commission to consider such an issue. In addition, there is no requirement established in the *Tartan Energy Company Case* that an applicant for a certificate of convenience and necessity to construct and maintain a water and sewer system must first exhaust all other possible methods of meeting the public need prior to requesting authorization to provide utility service. If the law were otherwise, this would tend to relegate the Commission to being a forum of "last choice" for providing a solution to the public's need for utility service.

Again, in case number SA-99-28, In the Matter of the Application of Osage Water Company for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain

a Sewer System for the Public Located in Unincorporated Portions of Camden County, Missouri, Golden Glade Subdivision, the Commission stated that:

... [T]here is no other company, private or public, which is ready, willing and able to furnish sewer service to the proposed service area. For instance, the City [of Osage Beach] tried to inject an irrelevant issue into the proceedings by alleging that it was going to serve Golden Glade.

The Commission can reach no other conclusion than that the consideration of possible alternative suppliers is also irrelevant here.

The authority for the issuance by the Commission of a certificate of convenience and necessity to provide water and sewer service is contained in Section 393.170, RSMo. Subsection 1 of that statute states in part, that no “. . . water corporation or sewer corporation shall begin construction of . . . a water system or sewer system without first having obtained the permission and approval of the commission.” Subsection 3 of that statute states in part, “The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction . . . is necessary or convenient for the public service.”

The courts have held that “necessity,” as used in the term “convenience and necessity,” does not mean essential or absolutely indispensable, but rather that an additional service would be an improvement justifying the cost and that the inconvenience to the public occasioned by the lack of a utility is so sufficiently great as to amount to a necessity. See State ex rel. Public Water Supply District No. 8 v. Public Service Commission, 600 S.W.2d 147, 154 (Mo. App. 1980); State ex rel. Intercon Gas v. Public Service Commission, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993)(*Intercon*); and State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 219 (Mo. App. 1973).

As discussed below, the Commission has determined that Osage has met its burden of proof under the legal standards articulated by the Commission and the courts for the grant of a certificate of public convenience and necessity. For the reasons stated herein, the Commission will grant Osage's application for a certificate of public convenience and necessity.

### **III. Discussion**

#### **A. Osage Water Company Proposal**

Osage is a Missouri corporation duly organized and existing under the laws of the State of Missouri with its principal office and place of business located at Highway 54 West, Osage Beach, Missouri 65065. It is a public utility proposing to render water and sewer service to the public under the jurisdiction of the Commission in the proposed service area. In its application, Osage stated that it is currently certificated to provide water and sewer utility services to the public in various portions of Camden County, Missouri.

The proposed service area is legally described as all of Eagle Woods Subdivision and all of Eagle Woods Subdivision II, which consists of part of Section

7, Township 39 North, Range 16 West, County of Camden, State of Missouri. Osage stated that the service area consists of two new subdivisions located on Turkey Bend, which is an unincorporated portion of Camden County located on State Route KK, near Tan Tar A resort. Mitchell testified that the project is designed to contain 53 lots and, at present, around 12 lots have been improved and sold. Mitchell testified that the first phase consists of 25 lots, all of which are basically complete. The second phase consists of an additional 28 lots currently under construction by the developer, Mitchell stated.

Woods consists of two multi family wells permitted to serve eight houses each. All this would be done with an initial investment of \$500 per customer for the sewer service and \$250 per customer for the water service, according to Osage.

**B. Is there a need for service?**

In their statements of position, Osage, City, and the Public Counsel all agreed that there was a public need for water service and sanitary sewer service in the proposed service area. Staff, in its statement of position, did not address this issue. Instead, Staff stated that Osage “. . . has not demonstrated that there is a need for service that will not be adequately met by other providers, such as the City of Osage Beach or the homeowners association for the Eagle Woods Subdivision.” As shown earlier, Osage is not required to demonstrate that there is a need for service that will not be adequately met by other providers.

All parties except Staff agreed on this issue. The Commission finds that there is a public need for water and sewer service in the proposed service area.

**C. Is Osage qualified to provide the service?**

In their statements of position, Osage stated that it was qualified to provide water and sewer service to the public in the Eagle Woods Subdivision, while Staff, City and Public Counsel all agreed that Osage was not qualified to provide water and sewer service to the public in the Eagle Woods Subdivision.

In the *Tartan Energy Company Case*, the Commission, in reference to deciding the question of whether a company was qualified to provide a utility service, stated that “[t]he safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers,” citing *Intercon*. There are no competing suppliers in the proposed service area, thus the Commission is required only to analyze the qualifications of Osage.

Osage presented evidence as to its experience in the water and sewer utility industry along with its technical experience and knowledge regarding engineering and safety. Osage also showed that it had the ability to properly construct and operate a water and sewer system for the proposed service area. This evidence was substantial and unrefuted.

Mitchell testified extensively concerning Osage's qualifications. He stated that he had been operating water and sewer utilities since 1981. Mitchell stated that he had been with Osage since 1987 when it was originally formed by his parents and him to provide regulated water utility service in the Lake of the Ozarks area. Mitchell stated that he was a member of the Board of Directors of Osage and participated in all meetings that affected the policies and management of Osage, and that he was involved in the day to day operations of Osage.

Mitchell testified that Osage's president is an attorney whose practice includes real estate, taxation, and public utilities. Mitchell said that Osage employs a construction foreman and various individuals from time to time as construction laborers for the purpose of performing construction of new water and sewer main extensions, service connections, and repairs to water and sewer lines and systems. Osage owns a mini excavator and a bobcat for use in new construction and repairs. Mitchell testified that he was the vice president of operations for Osage and that he was the principal of Jackson Engineering and Water Laboratory Company. Mitchell stated that he holds a Class A license, the highest type of license available, from the Missouri Department of Natural Resources (MDNR) for both water and wastewater. Osage therefore possesses the necessary technical expertise with which to operate not only the physical facilities needed for the proposed service area, but also the necessary general overhead and support staff required to conduct its water and sewer utility operations.

Mitchell said that Osage has an operation contract with both Jackson Engineering and Water Laboratory Company under the terms of which those companies provide regular operation, maintenance, and testing of all of Osage's water supplies and sewage treatment facilities. The two companies also provide basic office operations for Osage, including secretarial support, telephone, meter reading, and billing.

Mitchell testified that Osage has both a water and sewer tariff on file with the Commission.

Mitchell stated that Osage currently operates six other water and sewer systems under the Commission's regulation: Osage Beach North (water), Osage Beach South (water), Chelsea Rose (water and sewer), Cimmarron Bay (water and sewer), Cedar Glen (water and sewer), Parkview Bay (water), and Golden Glade (sewer). Mitchell testified that Osage owns three sewage treatment facilities of the same recirculating sand filter design as that proposed for the Eagle Woods service area, and one of those is of the extended aeration type. Mitchell stated that he had experience operating both kinds of systems as well as numerous other sewage treatment systems. Mitchell testified regarding the history, workings and development of recirculating sand filters, including the fact that MDNR has been promoting the use of that technology. As far as water systems are concerned, Mitchell stated that Osage has also constructed, owns, and operates several water systems, including large capacity public drinking water supplies. These systems, Mitchell maintained, serve both small subdivisions comparable to Eagle Woods, as well as large commercial districts, such as downtown Osage Beach.

Mitchell's testimony more than adequately displayed his knowledge of water and sewer systems, plus his knowledge of the operation of the equipment needed to run a water and sewer system. This experience is valuable to the operation of any water and sewer system. Osage and its principals have substantial knowledge regarding engineering, safety, and the technical ability and equipment to provide the service needed for the proposed water and sewer system.

Osage has the burden of proof to demonstrate that it is qualified to provide the service and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that it is qualified to provide the service.

**D. Does Osage have the financial ability to provide the service?**

In their statements of position, Osage stated that it had the financial ability to provide the water and sewer service, while Staff, Public Counsel, and City all agreed that Osage did not have the financial ability to provide the service.

Osage is required to show that it has the financial ability to provide the proposed service. Both Osage's application and its testimony reflect that the project developer has and is willing to make contributions in aid of construction of either cash or water systems and sewer collection systems; Osage need only provide the labor and equipment to assemble the necessary components for the sewage treatment plant, which is substantially complete. Osage does not require any additional capital beyond that offered by the project developer in order to have the financial ability to provide water and sewer utility service to Eagle Woods. The proposed capital structure for the project leaves the risk of the success of the development with the project developer, rather than requiring a level of investment by Osage that would not be supported by an established customer base.

Concerning the water system, Mitchell also stated that the Eagle Woods developer has agreed to contribute an existing well and distribution system to Osage, and to construct or pay the cost of construction of any distribution system expansions. Mitchell also pointed out that Osage has constructed public water systems similar to that proposed for Eagle Woods. For example, Osage constructed the water well at Shoney's Restaurant in its Osage Beach North service area in 1993, the water well at the Super 8 motel in 1995, the water well at Parkview Bay in 1997, and Osage is currently completing construction of a new water well at Chelsea Rose.

Osage has the burden of proof to demonstrate that it has the financial ability for completing this proposal and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that it has the financial ability for completing this proposal.

**E. Is Osage's proposal economically feasible?**

In their statements of position, Osage stated that its proposal was economically feasible, while Staff, Public Counsel, and City all agreed that Osage's proposal was not economically feasible.

Osage prepared and attached a feasibility study to its Application, which calculated the anticipated financial impact on Osage of the extension of water and sewer service to Eagle Woods. Osage stated that it anticipated using its current sewer tariff rate of \$23.90 per customer per month for the service rate in the proposed service area. Also, Osage stated that it anticipated using its current metered water tariff rate of \$7.75 per customer per month, plus \$2.07 for each 1,000 gallons used in excess of 1,000 gallons per month for all new residences in Eagle Woods. Osage stated that the financial analysis in its feasibility study indicated that the proposed service is economically feasible at Osage's current tariff rates.

The proposal in this case places the principal burden on the subdivision developer, as he is contributing the bulk of the necessary capital in the form of cash and completed systems. Osage's shareholders also bear some risk as a result of Osage's injection of capital in the form of labor and equipment used to construct the sewage treatment facility. The feasibility study indicates a positive net marginal revenue should be derived from both the water and sewer systems, with a positive net cash flow generated after the payment of a return on invested capital. If Osage has underestimated the economic feasibility of the project, the loss will be borne by Osage and the project developer (i.e., the investors) and not by Osage's ratepayers.

Osage has the burden of proof to demonstrate the economic feasibility of this proposal and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that the proposal is economically feasible.

#### **F. Does Osage's proposal promote the public interest?**

In their statements of position, Osage stated that its proposal was in the public interest, while Staff, Public Counsel, and City all agreed that Osage's proposal was not in the public interest.

This case is not about whether Osage or the City is the more qualified applicant in this case; the issue is whether Osage has satisfied the requirements for a certificate as explained in the *Tartan Energy Company Case*. That case stands for the proposition that a positive finding for the first four standards will, in most cases, support a finding that granting an application for a certificate promotes the public interest.

Because there is a need for the service, because Osage is qualified to fill that need, and because its plan to fill that need appears feasible, the Commission concludes that granting Osage a certificate is in the public interest.

#### **IV. 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.

1. The Commission finds that there is a need for water and sewer service in the proposed service area.
2. The Commission finds that Osage is qualified to provide the service.
3. The Commission finds that Osage has the financial ability to serve the proposed service area.
4. The Commission finds that Osage's proposal is economically feasible.
5. The Commission finds that Osage's proposal promotes the public interest.
6. The Commission finds that granting Osage a certificate is necessary and convenient for the public service.

**V. Conclusions of Law**

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

1. Osage is a public utility and a water and sewer corporation subject to the Commission's jurisdiction under Section 386.250, RSMo, and Section 393.170, RSMo.

2. The Commission has authority pursuant to Section 393.170, RSMo, to grant certificates of convenience and necessity.

*IT IS THEREFORE ORDERED:*

1. That late-filed Exhibits 9, 11, and 12 are hereby received into the record.

2. That the certificate of convenience and necessity referenced in ordered paragraph 7 shall become effective simultaneous with the effective date of the tariff sheets required to be filed and approved pursuant to ordered paragraph 3.

3. That Osage Water Company shall file with the Commission tariff sheets modifying its water and sewer service areas to reflect the additional service area granted herein.

4. That nothing in this order shall be considered a finding by the Commission of the reasonableness of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.

5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.

6. That any motions which have not been previously ruled upon, if any, are hereby denied.

7. That the Application filed by Osage Water Company for a certificate of public convenience and necessity authorizing Osage to construct, own, operate, control, manage, and maintain a water and sewer system for the public located in an unincorporated area of Camden County, Missouri, as more fully described in its Application, is hereby granted.

8. This Report and Order shall become effective on February 23, 2000.

9. That this case may be closed on February 24, 2000.

Lumpe, Ch., Crumpton, and Drainer, CC., concur;  
Murray and Schemenauer, CC., dissent; certify compliance with  
the provisions of Section 536.080, RSMo 1994.

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**In the Matter of the Application of Kansas City Power & Light  
Company for a Variance from the Commission's Rule Re-  
quiring Separate Metering for Bickford House.**

*Case No. EO-2000-251  
Decided February 15, 2000*

**Electric §§14, 31, 41.** The Commission granted a variance of Commission Rule 4 CSR 240-20.050, requiring a separate meter be installed for each residence or commercial unit in a multi-occupancy building, because Bickford House is a building, consisting of 65 assisted living apartments for elderly residents, and the owner is assuming responsibility for payment of the bills for each apartment and the common facilities, thereby lowering the initial construction costs.

**ORDER GRANTING VARIANCE**

On September 27, 1999, Kansas City Power & Light Company (KCPL) filed a request for variance from Commission rule 4 CSR 240-20.050 which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981. KCPL stated in its request that the Bickford House, located at 9110 East 63rd Street, Raytown, Missouri, is a building, which will consist of 65 assisted living apartments for elderly residents.

KCPL stated that the owner of the project has requested that one master meter be installed for this project as the owner will be responsible for the payments of the bills for each apartment and the common facilities. KCPL stated that separate metering will increase initial construction costs and obstruct the intentions of the new owner. The new building will be billed on KCPL's 1MGAE rate. KCPL stated in its request that separate metering for each apartment would result in additional expenditures of approximately \$49.40 per apartment, or \$3,211. Further, KCPL stated that its customer, the owner of Bickford House, estimates savings of approximately \$525 per apartment or \$34,125 if the variance is approved. KCPL stated that it supports the owner's request for the master metering of the project because of the overall cost benefits.

On November 19, 1999, the Variance Committee of the Missouri Public Service Commission (Committee) filed its recommendation that the Commission approve KCPL's Application for Variance. The memorandum of the Individual Electric Metering Variance Committee<sup>1</sup> (Committee) was attached to the Committee's pleading and marked as Appendix A. The Committee's recommendation noted

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<sup>1</sup> The Individual Electric Metering Variance Committee members are James Watkins, Utility Division; Jim Ketter, Utility Division; Nathan Williams, Office of the General Counsel; and John Coffman, Office of the Public Counsel.

that Commission rule 4 CSR 240-20.050(2) requires the installation of a separate electric meter for each residential or commercial unit in a multiple occupancy building where construction has begun after June 1, 1981. Further, the Committee noted that this Commission rule is aimed at compliance with certain sections of the Public Utility Regulatory Policies Act of 1978. 16 U.S.C. § 2625. Paragraph (d) of 16 U.S.C. § 2625 provides:

Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if:

- (1) there is more than one unit in such building,
- (2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and
- (3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

The Committee stated that it has reviewed the application, examined the construction plans, and discussed the operation of the Bickford House with both KCPL and the Project Manager. The Committee also stated that it has considered the potential benefits to consumers of individual metering and finds that these potential benefits are likely to be of little value to consumers that choose to live in a carefree retirement community. Further, the Committee stated that since the Bickford House will be paying the electric bill(s), the individual consumers will not directly receive the financial benefits of individual conservation and efficiency efforts. The Committee noted that receiving, processing, and paying 66 separate bills for electric service would be unnecessarily burdensome and costly for the Bickford House.

The Committee also noted that the Application for Variance incorrectly indicated that the electric service to Bickford House would be billed on KCPL's 1MGAE (Medium General Service – All Electric) rate. The Committee stated that natural gas will be used for central space and water heating. The Committee recommended the Commission issue an order approving the variance requested by KCPL from the Commission's rule requiring separate metering for electric service to the Bickford House for good cause shown.

The Commission has reviewed the application and the Variance Committee's recommendation and finds that for good cause shown, the Application for Variance from the requirement for separate metering for the Bickford House located at 9110 East 63rd Street, Raytown, Missouri, should be granted. Commission rule 4 CSR 240-2.060(11).

*IT IS THEREFORE ORDERED:*

1. That the Application for Variance filed by Kansas City Power & Light Company on September 27, 1999 is granted.
2. That this order shall become effective on February 25, 2000.

3. That this case may be closed after February 28, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Register, Regulatory Law Judge

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**In the Matter of the Application of Missouri-American Water Company, for Authority (a) to Execute and Deliver a Fifteenth Supplemental Indenture of Mortgage, Dated as of May 1, 1968, for the Purpose of Creating an Additional Series of its General Mortgage Bonds, to Secure Bonds Issued by the State Environmental Improvement and Energy Resources Authority, (b) to Issue and Sell at Private Sale \$29,000,000 Principal Amount of such Bonds, (c) to Enter Into, Execute and Deliver a Loan Agreement and Other Documents in Connection therewith and (d) to Issue and Sell at Private Sale \$19,500,000 Aggregate Amount of Its Common Stock.**

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*Case No. WF-2000-383  
Decided February 17, 2000*

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**Security Issues §10.** Commission authorized public water utility corporation to sell additional shares to its parent corporation.

**Security Issues §57.** Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.

**Security Issues §28.** Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.

**Security Issues §38.** Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.

**Security Issues §69.** Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.

### **ORDER APPROVING FINANCING**

On December 23, 1999, Missouri-American Water Company (Applicant or Company), filed an application with the Commission requesting authority under Sections 393.190 and 393.200, RSMo 1994, and 4 CSR 240-2.060, to:

- a) enter into, execute and deliver a Loan Agreement;
- b) execute and deliver a Fifteenth Supplemental Indenture to the St. Joseph Trustees under the Company's Indenture of Mortgage and Deed of Trust dated May 1, 1968, as amended and supplemented, for the purpose of creating a new series of General Mortgage Bonds to be issued by the Company;
- c) create, issue and deliver new bonds to secure obligations with respect to bonds to be issued by the Environment Improvement and Energy Resources Authority, on specific terms;
- d) create and make effective the lien of the Indenture of Mortgage on the property of the Company in the State of Missouri to secure the Company's General Mortgage Bonds including up to \$29,000,000 aggregate principal amount of said new bonds;
- e) issue and sell to American Water Works Company, Inc., 2,552,356 shares of the Company's common stock;
- f) amortize any premium or discount and expenses incident to the issuance of the new bonds over the life thereof;
- g) enter into, execute, deliver and perform the necessary arrangements and other documents necessary to effectuate the said transactions; and
- h) take such other actions as may be reasonably necessary to complete the subject transactions.

On January 28, 2000, the Commission's Staff filed it's memorandum in this case, recommending that the Commission issue an order approving the application. The Staff stated that the Company's application meets the legal standard set by Section 393.200, RSMo 1994. On February 3, 2000, Staff supplemented its memorandum with attachments that had been inadvertently omitted and revised a paragraph reference.

**Missouri-American Water Company's Application**

The Applicant is a Missouri corporation with its principal office in St. Louis, Missouri. The Company is a public utility authorized to provide water service in communities in the counties of Andrew, Audrain, Chariton, Jasper, Johnson, Newton, Platte, and St. Charles. The Company proposes to issue and sell stock and bonds to pay or refinance short-term debt of \$19,700,000, undertake a significant construction project, and to pay for general property acquisition, construction, and improvement of its plant and distribution facilities throughout its system in Missouri (the Project).

Presently, the Company has an Indenture of Mortgage dated May 1, 1968, as amended and supplemented, securing \$63,650,000 of outstanding General Mortgage Bonds. Pursuant to the application the Company proposes to execute and deliver a Fifteenth Supplemental Indenture for the purpose of issuing and securing an additional series of its General Mortgage Bonds in the amount of \$29,000,000. The Company will deliver its bonds to the State Environmental Improvement and Energy Resources Authority (Authority) to secure an equivalent amount of bonds issued by the Authority. The Authority will sell its bonds (EIERA bonds) and provide the proceeds to the Company.

The Applicant also proposes to participate in the Missouri Drinking Water Revolving Fund (DWRF) of the Department of Natural Resources in an amount up to approximately \$9,300,000. This program would offer lower costs than the EIERA bonds and any financing through the DWRF would lower the Company's participation in the EIERA program. The bond proceeds will be used for paying the costs of the Project and for refinancing of short-term debt described above.

The Applicant also proposes to issue and sell 2,552,356 shares of common stock to American Water Works Company, Inc., to obtain \$19,500,000. The proceeds from the sale of the common stock will also be used to pay short-term debt, financing costs and for acquisition and construction of the Project.

The Project provides for the construction of a new ground water supply well field, new treatment facilities and associated water lines in Buchanan County, Missouri. Additionally, bond and stock proceeds will be used for general acquisition of property, construction and improvement of plant and distribution facilities throughout the Company's system.

The bonds proposed to be issued will mature not later than 30 years after their date of issue and with an interest cost that will not be more than 200 basis points over the Bond Buyer Revenue Bond Index at the time of sale. The bonds will be sold in a negotiated sale to an underwriter. The application and attachments present additional details for the financing and copies of associated authorizations, agreements and implementing documentation in substantially final form. Final terms and conditions will be filed when the proposed transactions are closed.

The Applicant states that the total principal amount of the new bonds will be subject to the fee pursuant to Section 386.300, RSMo 1994. The Applicant further states that proceeds to be provided from the proposed transactions are reasonably required for the purposes described in the application and will be used therefore and are not reasonably chargeable to operating expense or to income as required by Section 393.200, RSMo 1994.

**Staff Analysis and Conditions**

Based on the pro forma financial statements filed by Company, Staff determined that the capital structure of the Company would be affected by the proposed transactions. The present capital structure of the Company consists of 35.15 percent common equity, 2.03 percent preferred stock, 48.28 percent long-term debt, and 14.53 percent short-term debt. The issuance of stock, the retirement of short-term debt and the issue of new long-term debt will result in a capital structure of 40.86 percent common equity, 1.68 percent preferred stock, and 57.47 percent long-term debt. Short-term debt will be eliminated. Staff stated that as a result, coverage ratios for the Company would be slightly lower, but the Company would remain in the lower quartile for an "A" rating according to Standard and Poor's Corporation. Annual interest costs will increase \$1,287,602. The anticipated interest rate would be 5.8 to 6.0 percent. Staff found the interest rate and proposed capital structure to be reasonable.

The Commission's Staff recommended approval of the application with two conditions:

1. That the interest cost of the General Mortgage Bonds not exceed 200 basis points above the most current Bond Buyer Revenue Bond Index at the time of issuance.
2. That the Company file the final terms and conditions with the Commission.

**Findings and Conclusions**

The application and the Staff recommendation show that the proposed financial transactions for the issuance and sale of securities and the terms proposed are reasonable. The Company's capital structure will be affected but not in a manner that is adverse to the public interest. The Commission finds that the proposed financing is not detrimental to the public interest and should be approved upon the terms presented in the Company's application and the conditions stated in the Staff's recommendation.

*IT IS THEREFORE ORDERED:*

1. That Missouri-American Water Company is authorized to issue and sell up to \$29,000,000 aggregate principal amount General Mortgage Bonds as described in the application.
2. That Missouri-American Water Company is authorized to issue and sell 2,552,356 shares of common stock as described in the application.
3. That the interest costs of the General Mortgage Bonds shall not exceed 200 basis points above the most current Bond Buyer Revenue Bond Index at the time of issuance.
4. That Missouri-American Water Company shall submit to the Director of Commission's Financial Analysis Department the final terms and conditions of each of the transactions described and authorized in this order.
5. That Missouri-American Water Company shall pay all fees required under Section 386.300, RSMo 1994.

6. That Missouri-American Water Company shall file its notice in this case advising the Commission that each of the transactions described and authorized in this order have been closed consistent with its application and in compliance with the terms of this order.
7. That if the transactions authorized in this case are not closed within six months of the date of this order, Missouri-American Water Company shall file a status report in this case.
8. That this order shall become effective on February 29, 2000.

Keith Thornburg Regulatory Law Judge, by delegation of authority  
Pursuant to 4 CSR 240-2.120(1) (November 30, 1995) and Section  
386.240, RSMo 1994.

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**In the Matter of the Application of Union Electric Company d/b/  
a AmerenUE for an Order Authorizing the Issue and Sale of  
up to \$750,000,000 Aggregate Principal Amount of Additional  
Long-term Debt.**

**In the Matter of the Application of Union Electric Company for an  
Order Authorizing the Issue and Sale of up to \$310,000,000  
Principal Amount of First Mortgage Bonds for the Purpose  
of Discharging Outstanding Long-Term Indebtedness.**

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*Case Nos. EF-2000-385 & EF-94-25  
Decided February 17, 2000*

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**Security Issues §18.** Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms.

**Security Issues §28.** Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms.

**Security Issues §38.** Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms. Tax-exempt securities would be issued through state authority.

**Security Issues §53.** Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms.

**Security Issues §64.** Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain

more favorable terms. Pricing and interest rates to be determined at sale with savings to be documented by a net present value analysis.

#### **ORDER APPROVING FINANCING**

On December 23, 1999, Union Electric Company, d/b/a AmerenUE (UE, Applicant or Company), filed an application with the Commission requesting authority under Sections 393.180 and 393.200, RSMo 1994, and 4 CSR 240-2.060, to issue and sell up to \$750,000,000 aggregate principal amount of long-term debt for the purpose of obtaining economic savings by refunding prior debt issues. In a separate motion, UE requested the Commission's approval on an expedited basis by February 28, 2000, in order to have the flexibility to respond to favorable market conditions when and as they arise to redeem and refinance existing debt.

On January 11, 2000, UE filed a motion to consolidate a prior financing case, Case No. EF-94-25, with this case. In the latter case, the Commission authorized UE to issue and sell up to \$310,000,000 principal amount of First Mortgage Bonds. UE has \$210,000,000 remaining unissued First Mortgage Bonds under that authority and UE requested that, in the event the Commission approves the current financing, the remaining authorization under EF-94-25 be canceled. The authorization under EF-94-25 would then be effective only with respect to the \$100,000,000 principal amount of First Mortgage Bonds previously issued and sold.

On January 21, 2000, the Commission's Staff filed its memorandum, recommending that the Commission issue an order approving UE's application. The Staff stated that the Company's application meets the requirements of Sections 393.180 and 393.200, RSMo 1994, and 4 CSR 240-2.060(8). The Staff also suggested certain conditions be stated in the Commission's order. On February 2, 2000, Staff filed a revised memorandum to revise the fourth of four conditions proposed.

On February 4, 2000, the Commission issued a notice to expedite responses, if any, to the Staff's revised memorandum. On February 7, 2000, UE filed a response stating that UE concurs with the revised memorandum, including the revised statement of condition number 4.

#### **UE's Application**

UE proposes to issue and sell, from time to time, and in several transactions, up to \$750,000,000 aggregate principle amount of new securities. The securities will generally be taxable First Mortgage Bonds, unsecured debentures or notes. Or, they will be tax exempt bonds or notes issued through the State Environmental Improvement and Energy Resources Authority. UE proposes to use the proceeds from the new securities to discharge or refund its outstanding debt. Existing maturity dates of debt may be extended. Refunding issues will be to obtain interest savings which the Applicant will document with a net present value savings analysis submitted to the Commission's Financial Analysis Department.

The application provides a detailed explanation of the form, terms, and conditions of the securities, conditions of sale, and anticipated amounts of the various securities for which UE seeks the Commission's approval. Interest rates will be according to market conditions, but not greater than 9 percent.

The application indicates that no fee will be paid pursuant to Section 386.300, RSMo 1994, because the proposed securities will be used to refund existing debt and will not represent additional debt. The debt authorized on Case No. EF-94-25 was, likewise, also for the purpose of refunding existing debt. UE indicates that it will promptly report the final terms and conditions of each issue or series of securities issued under the application after the issuance and sale of each series. Corporate authorization for the proposed securities was filed with the application.

#### **Staff Analysis and Conditions**

Based on the pro forma financial statements filed by UE, the capital structure of the Company consists of 57.52 percent common equity, 3.5 percent preferred stock, and 38.98 percent long-term debt. With the pro forma adjustments, the Company's capital structure is estimated to be 57.54 percent common equity, 2.56 percent preferred stock and 39.90 percent long-term debt. Staff stated that these capitalization ratios are consistent with "A" or better rating according to Standard and Poor's Utilities Rating Service.

The Commission's Staff recommended approval of the application with four conditions (Revised Memorandum) as follows:

1. That nothing in the Commission's order shall be considered a finding by the Commission of the value of the proposed transactions for ratemaking purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding.
2. That the Company be required to report the final terms and conditions of each series of new securities as they are issued.
3. That the Company be required, upon issuing the various New Securities, to provide the Commission a net present value savings calculation indicating the amount of interest saved as a result of each refinancing.
4. That in its order, the Commission: a) establish March 1, 2003 as the deadline for completion by the Company of the New Securities issuance activity, for which Commission authorization is being sought in this docket; and b) direct that, in the event AmerenUE desires an extension of the March 1, 2003 deadline for completion of its New Securities issuance activity, the Company file an application for such extension on or before December 1, 2002.

#### **Findings and Conclusions**

The application and the Staff recommendation show that UE is in sound financial condition. UE's capital structure will not be significantly affected by the issuance of the proposed securities. The issuance of the securities and the terms proposed are reasonable and should generally result in savings for the Company and resulting benefits to shareholders and ratepayers.

The Commission finds that the proposed financing is not detrimental to the public interest and is reasonably required and should be approved upon the terms presented in the Company's application and the conditions stated in the Staff's recommendation. Furthermore, the remaining \$210,000,000 authority under Case No. EF-94-25 shall be canceled and that case shall be closed.

Both UE and Staff shall maintain necessary records to ensure that the authorization of this order is not exceeded. The information to be provided to the Commission shall be provided to Staff and to the Director of the Utilities Services Division. This case may be closed. In the event that any modification, investigation, or other action related to the subject securities and financing is required, this case may be reopened or a new case may be filed as appropriate.

*IT IS THEREFORE ORDERED:*

1. That Union Electric Company, d/b/a AmerenUE, is authorized to issue and sell up to \$750,000,000 aggregate principal amount of taxable and tax exempt securities as described in the application.
2. That Union Electric Company, d/b/a AmerenUE, is authorized to execute and deliver such instruments and to undertake such other acts as are necessary to consummate the issuance and sale of the new securities as presented in the application and described in this order.
3. That Union Electric Company, d/b/a AmerenUE, shall submit to the Director of the Commission's Financial Analysis Department the final terms and conditions of each series of securities as they are issued.
4. That Union Electric Company, d/b/a AmerenUE, shall submit to the Director of the Commission's Financial Analysis Department a net present value savings calculation indicating the amount of interest saved as a result of refinancing outstanding debt upon the issuance of each series of new securities.
5. That nothing in this order shall be considered as a finding of the value or the proposed transactions for ratemaking or for other matters before the Commission.
6. That the Commission reserves the right to consider the ratemaking or other treatment to be afforded the transactions herein approved, and the resulting cost of capital, in any later proceeding.
7. That the remaining and unissued authority of \$210,000,000 approved by the Commission in Case No. EF-94-25 is canceled and that Case No. EF-94-25 shall be closed.
8. That the new securities issuance activity approved in this order shall be completed by March 1, 2003, and in the event an extension is required, Union Electric Company, d/b/a AmerenUE, shall apply for an extension on or before December 1, 2002.
9. That Union Electric Company, d/b/a AmerenUE, and Staff shall maintain the necessary records to ensure that the authorization of this order is not exceeded.
10. That in the event that any modification, investigation, or other action related to the subject securities and financing is required, this case may be reopened or a new case opened as appropriate.
11. That this order shall become effective on February 29, 2000.

12. That this case may be closed effective March 1, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thornburg, Regulatory Law Judge

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**In the Matter of the Monitoring of the Experimental Alternative  
Regulation Plan of Union Electric Company.\***

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*Case No. EO-96-14  
Decided February 29, 2000*

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**Electric §§1, 20, 21. Rates §§37, 65, 79, 104.** Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.

**ORDER DIRECTING CREDIT SHARING**

On February 17, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a Motion for Commission Orders in Case No. EO-96-14, Case No. EO-96-15 and Case No. EM-96-149. In Case No. EO-96-14, Staff requested that the Commission order Union Electric Company d/b/a AmerenUE (AmerenUE) to effectuate the crediting of customers' bills for the third year sharing credit of the First Experimental Alternative Regulation plan (EARP) starting April 1, 2000. Staff noted that on January 14, 2000, AmerenUE filed its response reporting the sharing credit amount for the third credit sharing period to be \$28.334 million. In compliance with the Stipulation and Agreement approved in Case No. ER-95-411, AmerenUE also added to the \$28.334 million an additional \$.041 million, which constituted the difference between the 1997 sharing credit amount actually credited to AmerenUE's customers and the 1997 sharing credit amount that should have been credited to AmerenUE's customers. Staff confirmed that AmerenUE showed the total sharing credit amount for the third year of the first EARP to equal \$28.375 million. Staff

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\*The Commission, in an order issued on March 21, 2000, denied an application for rehearing in this case. See page 319, Volume 5, MPSC 3d, page 306, Volume 7, MPSC 3d and page 465, Volume 8, MPSC 3d for other orders in this case. On April 18, 2000, this case was appealed to Cole County Circuit Court (00CV323608).

pointed out that AmerenUE had indicated that it would be able to issue the customer credit no earlier than the billing cycle beginning April 1, 2000. Staff requested that the Commission issue an order in Case No. EO-96-14 directing AmerenUE to effectuate crediting customers' bills starting April 1, 2000 for the third year sharing credit of the first EARP with the amount to be shared among customers equaling \$28.375 million.

The Commission issued a Notice Shortening Time Within Which A Response May Be Filed on February 18, 2000, requiring all responsive pleadings to be filed no later than February 22, 2000, at 4 p.m. On February 22, AmerenUE filed its response to the Staff Motion for Commission Orders. In relation to Case No. EO-96-14, and Staff's request for an order directing AmerenUE to effectuate credit sharing of the third year sharing credit beginning on April 1, 2000, AmerenUE stated that it continues to believe that it can effectuate the third year sharing credit, starting April 1, 2000. In addition, AmerenUE restated its position that the "effectuation" of the third year sharing credit should not be ordered pending appeal of the Commission's decision. AmerenUE clearly states that it does not waive its right to appeal the Commission's decision, to seek a stay of these proceedings, or to pursue any other relief deemed appropriate.

On February 22, 2000, Retirement Facilities Coalition (RFC) filed its response in support of Staff's Motion for Commission Orders. In reference to Case No. EO-96-14, RFC requests the Commission issue the order requested by Staff.

On February 28, 2000, Staff filed its reply to AmerenUE's response requesting that, in Case No. EO-96-14, the Commission order the third year sharing credits in the amount of \$28,375,000 be credited to customers commencing April 1, 2000.

The Commission has reviewed the pleadings and finds that it is just and reasonable to order AmerenUE to distribute the \$28,375,000 of the third year sharing credits for the first EARP by crediting customers' bills beginning April 1, 2000.

*IT IS THEREFORE ORDERED:*

1. That Union Electric Company d/b/a AmerenUE is ordered to distribute the third year sharing credit of the first Experimental Alternative Regulation Plan in the amount totaling \$28,375,000 by crediting customers' bills effective beginning April 1, 2000.
2. That Union Electric Company d/b/a AmerenUE shall file a notice with the Commission indicating its compliance with the Commission's order directing the distribution of the sharing credits from the third year of the first Experimental Alternative Regulation Program upon substantial completion.
3. That this order shall become effective on March 10, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Register, Regulatory Law Judge

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**In the Matter of the Investigation into the Class Cost of Service  
and Rate Design for Union Electric Company.\***

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*Case No. EO-96-15  
Decided February 29, 2000*

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**Electric §§1, 20, 21. Evidence, Practice & Procedure §8. Rates §§37, 65, 79, 104, 119.**  
The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.

**Electric §§1, 20, 21. Evidence, Practice & Procedure §8. Rates §§37, 65, 79, 104, 119.**  
The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.

**ORDER DIRECTING RATE REDUCTION**

On February 17, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a Motion for Commission Orders in Case No. EO-96-14, Case No. EO-96-15 and Case No. EM-96-149. In Case No. EM-96-149 and Case No. EO-96-15, Staff requested that the Commission order Union Electric Company d/b/a AmerenUE (AmerenUE) to effectuate the permanent rate reduction in the amount of \$16.321 million prior to April 1, 2000. Staff requested that the Commission direct AmerenUE to file tariff sheets with the Commission having an effective date prior to April 1, 2000, reflecting the permanent rate reduction. In addition, Staff requested that the Commission order AmerenUE to effectuate, in Case No. EM-96-149, starting April 1, 2000, the crediting of customers' bills for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction. Staff also requested that the Commission direct AmerenUE to file in Case No. EM-96-149 a final earnings report for the first year of the second Experimental Alternative Regulation Plan (EARP). On February 17, 2000, AmerenUE filed its final earnings report filing for the first sharing period of the second EARP.

On February 18, 2000, the Commission issued its Notice Shortening Time Within Which A Response May Be Filed requiring the parties to file their response to the Staff's motion by 4 p.m. on February 22, 2000. On February 22, 2000, AmerenUE filed its response to Staff's Motion for Commission Orders in Case No. EO-96-14, with a footnote that the identical pleading would be filed in Case No. EO-

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\*This order contains a change approved by the Commission in a Notice of Correction issued on March 1, 2000. On March 21, 2000, the Commission issued an order denying a rehearing in this case. On April 18, 2000, this case was appealed to Cole County Circuit Court (00CV323608).

96-15 and EO-96-149 as soon as possible. AmerenUE filed its response in Case No. EO-96-15 and Case No. EM-96-149 on February 25, 2000, along with its Request to File Response which explained why these copies were being late filed. The Commission will consider the responsive pleading filed by AmerenUE.

In its response, AmerenUE stated that it had been working closely with Staff since the issuance of the Commission's Report and Order in Case No. EO-96-14 on December 23, 1999 to develop the tariff sheets for the rate reduction agreed to in Case No. EO-96-15 and Case No. EM-96-149. However, AmerenUE believes that it will not be possible to complete the necessary work to prepare and file appropriate tariff sheets to reflect the rate reduction and the additional credit for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction before April 1, 2000. AmerenUE stated that it does anticipate that the permanent rate reduction can be filed a few days prior to April 1, to become effective on April 1, 2000 and that the associated credits for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction can begin one month later, on May 1, 2000.

On February 22, 2000, Retirement Facilities Coalition (RFC) filed its response in support of Staff's Motion for Commission Orders. In reference to Case No. EO-96-15 and Case No. EM-96-149, RFC requests the Commission issue the order requested by Staff.

On February 28, 2000, Staff filed its reply to AmerenUE's response, requesting that, in Case No. EO-96-15, the Commission order AmerenUE to file tariffs effectuating a permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000.

The Commission has reviewed Staff's motion and the responsive pleadings from AmerenUE and RFC. The Commission finds that it is just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 to be effective on April 1, 2000, and to order AmerenUE to file the tariff sheets necessary to effectuate that permanent rate reduction. In addition, the Commission finds that it is just and reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues billed between September 1, 1998 and April 1, 2000, the effective date of the permanent rate reduction, beginning on May 1, 2000.

*IT IS THEREFORE ORDERED:*

1. That Union Electric Company d/b/a AmerenUE is directed to file tariff sheets with the Commission implementing the permanent rate reduction in the amount of \$16,321,000, as agreed in Case No. EO-96-15 and Case No. EM-96-149. These tariff sheets shall have an effective date of April 1, 2000 and shall be filed no later than 3 p.m. on March 27, 2000. Staff shall file its recommendation to approve or reject the tariff sheets no later than 4 p.m. on March 29, 2000.

2. That Union Electric Company d/b/a AmerenUE is directed to issue credits on customers' bills for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction, April 1, 2000, beginning on May 1, 2000.

3. That Union Electric Company d/b/a AmerenUE shall file a notice with the Commission indicating its compliance with the Commission's order directing the rate reduction and distribution of credits for excess rates billed between September 1, 1998 and April 1, 2000, upon substantial completion.

4. That this order shall become effective on March 10, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Register, Regulatory Law Judge

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**In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) the Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) in Connection Therewith, Certain Other Related Transactions.\***

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*Case No. EM-96-149  
Decided February 29, 2000*

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**Electric §§1, 20, 21. Evidence, Practice & Procedure §8. Rates §§37, 65, 79, 104, 119.**  
The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.

**Electric §§1, 20, 21. Evidence, Practice & Procedure §8. Rates §§37, 65, 79, 104, 119.**  
The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.

#### **ORDER DIRECTING RATE REDUCTION**

On February 17, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a Motion for Commission Orders in Case No. EO-96-14, Case No. EO-96-15 and Case No. EM-96-149. In Case No. EM-96-149 and Case No. EO-96-15, Staff requested that the Commission order Union Electric Company d/b/a AmerenUE (AmerenUE) to effectuate the permanent rate reduction in the amount of \$16.321

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\*The Commission, in an order issued on March 21, 2000, denied an application for rehearing in this case. See pages 396 and 399 for other orders in this case. In addition, see page 28, Volume 6, MPSC 3d and page 157, Volume 5 MPSC 3d for other orders in this case. On April 18, 2000, this case was appealed to Cole County Circuit Court (00CV323608).

million prior to April 1, 2000. Staff requested that the Commission direct AmerenUE to file tariff sheets with the Commission having an effective date prior to April 1, 2000, reflecting the permanent rate reduction. In addition, Staff requested that the Commission order AmerenUE to effectuate, in Case No. EM-96-149, starting April 1, 2000, the crediting of customers' bills for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction. Staff also requested that the Commission direct AmerenUE to file in Case No. EM-96-149 a final earnings report for the first year of the second Experimental Alternative Regulation Plan (EARP). On February 17, 2000, AmerenUE filed its final earnings report filing for the first sharing period of the second EARP.

On February 18, 2000, the Commission issued its Notice Shortening Time Within Which A Response May Be Filed requiring the parties to file their response to the Staff's motion by 4 p.m. on February 22, 2000. On February 22, 2000, AmerenUE filed its response to Staff's Motion for Commission Orders in Case No. EO-96-14, with a footnote that the identical pleading would be filed in Case No. EO-96-15 and EO-96-149 as soon as possible. AmerenUE filed its response in Case No. EO-96-15 and Case No. EM-96-149 on February 25, 2000, along with its Request to File Response which explained why these copies were being late filed. The Commission will consider the responsive pleading filed by AmerenUE.

In its response, AmerenUE stated that it had been working closely with Staff since the issuance of the Commission's Report and Order in Case No. EO-96-14 on December 23, 1999 to develop the tariff sheets for the rate reduction agreed to in Case No. EO-96-15 and Case No. EM-96-149. However, AmerenUE believes that it will not be possible to complete the necessary work to prepare and file appropriate tariff sheets to reflect the rate reduction and the additional credit for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction before April 1, 2000. AmerenUE stated that it does anticipate that the permanent rate reduction can be filed a few days prior to April 1, to become effective on April 1, 2000 and that the associated credits for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction can begin one month later, on May 1, 2000.

On February 22, 2000, Retirement Facilities Coalition (RFC) filed its response in support of Staff's Motion for Commission Orders. In reference to Case No. EO-96-15 and Case No. EM-96-149, RFC requests the Commission issue the order requested by Staff.

On February 28, 2000, Staff filed its reply to AmerenUE's response, requesting that, in Case No. EM-96-149, the Commission order (1) AmerenUE to file tariffs effectuating a permanent rate reduction in the amount of \$16,321,000, effective April 1, 2000, and (2) that excess revenues/rate reduction credits covering the period September 1, 1998, to the effective date of the permanent rate reduction be implemented commencing May 1, 2000.

The Commission has reviewed Staff's motion and the responsive pleadings from AmerenUE, RFC and Staff. The Commission finds that it is just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 to be effective on April 1, 2000, and to order AmerenUE to file the tariff sheets necessary to effectuate that permanent rate reduction. In addition, the Commission

finds that it is just and reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues billed between September 1, 1998 and April 1, 2000, the effective date of the permanent rate reduction, beginning on May 1, 2000.

*IT IS THEREFORE ORDERED:*

1. That Union Electric Company d/b/a AmerenUE is directed to file tariff sheets with the Commission implementing the permanent rate reduction in the amount of \$16,321,000, as agreed in Case No. EO-96-15 and Case No. EM-96-149. These tariff sheets shall have an effective date of April 1, 2000 and shall be filed no later than 3 p.m. on March 27, 2000. Staff shall file a recommendation indicating whether the Commission should approve or reject the tariff sheets no later than 4 p.m. on March 29, 2000.

2. That Union Electric Company d/b/a AmerenUE is directed to issue credits on customers' bills for the excess revenues billed between September 1, 1998 and the effective date of the permanent rate reduction, April 1, 2000, beginning on May 1, 2000.

3. That Union Electric Company d/b/a AmerenUE shall file a notice with the Commission indicating its compliance with the Commission's order directing the rate reduction and distribution of credits for excess rates billed between September 1, 1998 and April 1, 2000, upon substantial completion.

4. That this order shall become effective on March 10, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Register, Regulatory Law Judge

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**In the Matter of Associated Natural Gas Company's Tariff Revision to be Reviewed in its 1996-1997 Actual Cost Adjustment.\***

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*Case No. GR-97-191*  
*Decided February 29, 2000*

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**Gas §17.1.** The Commission found ANG's adjustment to recover gas costs upon removal of the gas from storage after December 1, 1995 for the same gas accounted for on a dollar-for-dollar basis as it was injected into storage, would result in a double recovery.

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\*On March 21, 2000, the Commission denied an application for rehearing in this case. On April 18, 2000, this case was appealed to Cole County Circuit Court (00CV323609).

**REPORT AND ORDER****Procedural History**

This case was established to consider the Purchased Gas Adjustment (PGA) and Actual Cost Adjustment (ACA) filing of Associated Natural Gas Company (ANG), a division of Arkansas Western Gas Company, for the 1996-1997 annual period. ANG submitted tariff sheets designed to revise the ACA factors for each of its three Missouri districts on November 7, 1996, December 20, 1996, February 14, 1997, March 17, 1997, April 18, 1997, May 19, 1997, June 18, 1997, July 18, 1997 with substitute sheets filed on July 28, 1997, August 18, 1997, September 16, 1997, and October 31, 1997 with substitute sheets filed on November 7, 1997. Those tariff sheets were approved on an interim basis, subject to refund, respectively on November 22, 1996, December 31, 1996, February 27, 1997, March 28, 1997, April 25, 1997, May 28, 1997, June 27, 1997, July 30, 1997, August 27, 1997, September 24, 1997, and November 13, 1997.

In its November 13, 1997 order, the Commission directed the Procurement Analysis Department Staff of the Missouri Public Service Commission (Staff) to conduct an audit of the ACA period and submit its recommendation by August 1, 1998. Staff conducted the required audit and submitted its recommendation on August 3. Staff's proposed adjustments reflected its earlier recommendation in Case No. GR-96-227 to reduce ANG's SEMO District gas costs by \$254,476 to eliminate an alleged double recovery in ANG's 1995-1996 ACA filing of Liquefied Natural Gas (LNG) and Natural Gas Pipeline of America (NGPL), non-S2 storage withdrawal dollars. In the 1996-1997 ACA filing, Staff proposes an additional reduction of \$382,162 to eliminate the alleged double recovery in ANG's 1996-1997 ACA filing of LNG and NGPL, non-S2 storage withdrawal dollars. The double recovery allegedly occurred as a result of ANG's change in ACA recovery methodology with regard to storage injection and withdrawals. Staff recommended that this ACA case remain open pending an order from the Commission in Case No. GR-96-227.

On August 13, ANG filed a response to Staff's recommendations. ANG stated that it vigorously opposed the Staff's proposed disallowance in Case No. GR-96-227 and that it would take a similar position in this proceeding. To avoid duplicative efforts, ANG also requested that the Commission stay further proceedings in this case until the Commission issued its decision in Case No. GR-96-227. In addition, ANG requested that a standard protective order be issued as litigation may become necessary in this case.

On January 26, 1999, the Commission issued its Report and Order in Case No. GR-96-227, effective February 5, 1999. ANG filed an application for rehearing in Case No. GR-96-227 on February 4, 1999, which the Commission denied on March 2, 1999.

On March 11, 1999, the Commission issued its Order Setting Prehearing Conference and Granting Protective Order in Case No. GR-97-191 setting a prehearing conference for March 25, 1999. The Commission also ordered the parties to file their proposed procedural schedules no later than April 6, 1999.

An Order Adopting Procedural Schedule was issued on April 26, 1999. Direct testimony on behalf of Staff and ANG was filed on June 25, rebuttal testimony was

filed on behalf of both parties on August 18, and surrebuttal testimony was filed on behalf of both parties on October 5.

A hearing was held on November 5. Staff and ANG submitted initial briefs on December 20, 1999, and ANG filed a reply brief on January 27, 2000. Although the Office of the Public Counsel (Public Counsel) entered its appearance at the hearing, Public Counsel did not present evidence. Public Counsel also notified the Commission that it would not be submitting post-hearing briefs.

#### **Findings of Fact**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

#### **Evidence Presented**

Staff alleges that ANG has double recovered \$382,162 for natural gas withdrawn from storage after December 1, 1995, during the period identified as the 1996-1997 ACA period. Staff proposes to decrease ANG's SEMO District gas costs by that amount when calculating ANG's ACA adjustment. Staff's proposed adjustment for the 1996-1997 PGA/ACA is the second of three proposed adjustments for PGA/ACA years 1995-1996 (Case No. GR-96-227), 1996-1997 (Case No. GR-97-191) and 1997-1998 (Case No. GR-98-399). Staff proposed an adjustment in the 1995-1996 PGA/ACA case of \$254,476. Staff's proposed adjustment in this 1996-1997 PGA/ACA case is \$382,162, with the proposed adjustment for all three years of PGA/ACA adjustments totaling \$664,824.

The PGA/ACA is designed to permit a gas utility to pass along to consumers the actual costs it incurs for purchase of natural gas on a dollar for dollar basis. This procedure was also referred to by both parties' witnesses as a "dollar tracker" method of calculating the amount of gas purchased and consumed, or "dollar for dollar" annual ACA/PGA recovery mechanism.

This PGA/ACA dollar tracker method of calculating the cost of gas was adopted in July 8, 1982. This method accounted for the dollar amounts expended exactly, "dollar for dollar", and was therefore considered the most accurate method of calculating the amount expended for purchased gas and for collecting revenues for gas consumed. Staff alleges that ANG chose to continue to use "gas purchased" ("up-front") method of calculating the cost of gas using invoices, even after the "dollar tracker" method of calculating gas purchased was adopted.

Staff argues that, prior to December 1, 1995, ANG had employed an "up-front" ACA recovery method under which it passed to consumers its cost of gas that was injected into storage at the time the gas was injected into storage. Beginning on December 1, 1995, ANG changed to an "as withdrawn/consumed" recovery method. For the period of the 1996-1997 PGA/ACA filing, ANG included the value of natural gas it removed from storage after December 1, 1995 from gas which had

been injected into storage between July 8, 1982 and December 1, 1995 in its actual cost.

Staff agreed with ANG's decision to change its recovery method because ANG already used the "as withdrawn/consumed" method with regard to its other storage accounts and that method is also used by the majority of other local distribution companies in Missouri. However, Staff asserts that ANG should only be allowed to recover under the new "as withdrawn/consumed" method for those gas supplies injected into storage after the changeover date of December 1, 1995. Staff alleges that allowing ANG to recover for the gas supplies injected prior to the changeover date would permit ANG to recover the cost of the previously injected gas both at the time of injection under the former "up-front" recovery method and at the time of withdrawal under the new "as withdrawn/consumed" method.

Staff argues that prior to July 8, 1982, the date when ANG began recovering its procurement gas costs through the ACA true-up mechanism, ANG had already recovered approximately \$663,000 of Missouri allocated storage withdrawal costs in an up-front fashion<sup>1</sup>. Staff argues that this up-front recovery had occurred because, prior to July 8, 1982, the PGA tariffs then in effect would have allowed ANG to recover the cost of gas injected into storage by charging its Missouri customers an estimated PGA rate. Staff alleges that that rate was based on the Company's average cost of gas, which was determined by using the most recent supplier invoices without a reduction for gas injected into storage. In support of this argument, Staff attached a copy of PGA tariff sheet number 44 which served as ANG's PGA clause for the SEMO District for the period of June 2, 1978 to July 8, 1982. Staff asserts that this tariff sheet would have permitted ANG to recover all of the cost of gas injected into storage prior to July 8, 1982.

ANG argues that since October 1970, ANG has recovered the current actual annual cost of purchased gas consumed by jurisdictional customers using a combination of base rates set in general rate cases and the operations the PGA mechanism approved by the Commission for ANG. ANG states that its investment in storage gas, which has not yet been delivered to and consumed by consumers, has been included in jurisdictional rate base, examined in general rate cases, and ANG has presumably earned a fair rate of return on that investment. However, ANG notes that under any of the PGA mechanisms in effect beginning with sheet 44, ANG has recovered the gas costs that these PGA mechanisms are designed to recover, which did not include recovery of gas purchased and injected into storage.

ANG argues that the PGA mechanisms are designed to provide ANG an opportunity to collect the annual purchased gas cost consumed by jurisdictional customers. ANG's witness testified that the pre-July 1982 PGA mechanism (also referred to as tariff sheet 44 or sheet 44) provided ANG an opportunity to collect a "representative level" of the current actual annual purchased gas costs consumed by jurisdictional customers, but did not guarantee recovery of an exact amount. ANG states that the volume of gas consumed for a particular year is computed by the following formula:  $VOLUME\ CONSUMED = GAS\ PURCHASES - STORAGE\ INJECTIONS + STORAGE\ WITHDRAWALS$ . ANG states that from September 1979 through August 1995 the

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<sup>1</sup>A portion of the value of ANG's natural gas storage inventory, specifically a portion of the inventory in ANG storage, would be used outside Missouri and would not be allocated to Missouri ratepayers.

difference in the volume between “purchased” and “consumed” gas was only 17,500 MCF out of the total volume of 64,000,000 MCF, citing the calculations included in Ex. 1, Schedule BRL-3. ANG argues that, over the long term, consumption and purchases are nearly equal. Therefore, ANG concludes, in the long term, the formula for calculating gas consumed by customers can be simplified to CONSUMPTION = PURCHASES.

ANG argues that the cost of gas consumed is all that is collected through the Purchase Gas Adjustment. ANG states that the pre-July 1982 PGA did not collect the exact amount but was designed to approximate the cost of gas consumed. ANG notes that because the post-1982 PGA is a “dollar tracker,” it collected the exact amount of the cost of gas consumed. ANG alleged that, in the short term, the “dollar tracker” post-1982 PGA is more precise but in the long term it produces the same dollar impact as the pre-1982 PGA mechanism. ANG’s witness testified that the “dollar tracker” post-1982 PGA produces a better match of revenues and expenses in the short term, however, in the long term, on an annual basis, the volume and cost of gas purchased still equals the volume and cost of gas consumed.

ANG argues that the volume “purchased” method did not provide up-front recovery of gas purchased and injected into storage as alleged by Staff. ANG’s witness testified that Staff correctly observed that ANG’s tariff sheet 44 (pre-1982 PGA) allowed ANG to charge customers an estimated PGA rate, which was based on a determination of ANG’s average cost of gas by using the most recent supplier invoices. ANG’s supplier invoices show that (1) storage injections were included or added to the pipeline invoices and (2) storage withdrawals were excluded or subtracted from the pipeline invoices. There is also no dispute that invoices ANG received from interstate pipelines from 1978 through 1982 were “bundled” in the sense that they contained all of the pipeline services, including gas injected into storage. ANG’s witness stated that invoices do not provide ANG with recovery of gas costs, rather it is the operation of ANG’s PGA tariff that provides recovery. ANG argues that the Federal Energy Regulatory Commission (FERC) Order 636, which required unbundling of gas products and services, has no direct impact on this proceeding. ANG’s witness stated that Staff incorrectly concluded that sheet 44 allowed ANG to recover its storage withdrawal cost in an up-front fashion. ANG states that just because purchases related to volumes injected into storage show up on an invoice does not mean that storage gas not yet consumed by customers was collected through the pre-1982 PGA. ANG’s witness testified that while there are two different methods that are used for calculating the cost of gas consumed, there is only one method for collecting gas costs, and that is the cost of gas consumed. Because storage gas has not yet been consumed, it is not collected by any PGA.

#### **Discussion**

Staff’s initial position, as set forth in direct testimony of Michael J. Wallis, was that the fact of ANG’s double recovery for gas sold out of storage was essentially self-evident because when ANG changed to a dollar tracker PGA in July 1982, it began accounting specifically for the product purchased and no longer using the purchase invoices to estimate the cost of gas consumed. Staff’s witness testified

that “[p]rior to December 1, 1995, ANG would have recovered the amounts in its storage accounts by (1) including the entire . . . commodity gas cost amount in its ACA filing and (2) excluding from the ACA filing the subsequent withdrawal, from storage of the . . . commodity gas amount which had previously been injected into storage.” Ex. 4, Schedule 2, pp. 2.4-2.5. On December 1, 1995, ANG switched to an accounting system whereby it recovered the amounts in storage by including in its commodity gas amount in its ACA filing the value of the gas withdrawn from storage. Thus, Staff argues that ANG included the value of the gas in its ACA filings both at the time the gas was injected into storage and at the time it was withdrawn from storage, resulting in a double recovery by ANG.

ANG argues that what seemed to be a double recovery in fact was not so. ANG contends that it had injected and withdrawn essentially equal values of gas since 1982 when the ACA mechanism first went into effect. Therefore, ANG would have recovered essentially the same amount under the ACA mechanism whether it used the “as injected” or the “as withdrawn” method of accounting for the value of gas in storage. Therefore, there was no double recovery and ANG should be able to recover the value of gas as withdrawn after December 1, 1995 to the extent that the recovered gas was being taken from the balance that existed in 1982, when the ACA mechanism went into effect.

Staff’s position is persuasive. The Commission finds that from June 2, 1978 to July 8, 1982, tariff sheet 44 served as ANG’s PGA clause for the SEMO District and it controlled ANG’s recovery treatment of storage injection and withdrawal costs during that period. The Commission finds that as of July 8, 1982, the date tariff sheet 44 was canceled, ANG had fully recovered its gas costs incurred up to that date. In order to understand the fact of this recovery, it is important to understand that tariff sheet 44 operated in a pre-FERC Order 636 environment in which all components of gas supply and service were provided by the pipeline and appeared on the pipeline invoices.

Before the FERC issued Order 636, interstate natural gas pipeline companies provided local distribution companies with bundled gas supply, transportation and storage. FERC Order 636 required interstate natural gas pipelines to unbundle their gas supply service from their transportation and storage services. Prior to FERC Order 636, components of gas supply service included fixed and variable storage charges, fixed and variable transportation charges and all gas supply costs, irrespective of whether that gas supply flowed directly to the city gate or was injected into storage. Thus, fixed and variable storage charges would have been included on pipeline supplier invoices in the pre-Order 636 environment in which tariff sheet 44 operated. The Commission finds that when ANG changed its recovery mechanism for purchased gas on July 8, 1982, it had already recovered the gas cost associated with those volumes injected into storage prior to that date.

The Commission finds that, after July 8, 1982, ANG collected its purchase gas costs based upon the amount of gas purchased including gas injected into storage until December 1, 1995. The Commission finds that the cost of gas collected from July 8, 1982 to December 1, 1995 was accounted for on a dollar-for-dollar basis using the dollar tracker PGA/ACA, upon injection into storage. The Commission finds that ANG’s adjustment to recover gas costs upon removal of the gas from

storage after December 1, 1995 for the same gas injected into storage prior to December 1, 1995 would indeed result in double recovery.

**Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law:

Associated Natural Gas Company, a division of Arkansas Western Gas Company, is a gas corporation as defined under Section 386.020(18), RSMo (Supp. 1997)

Associated Natural Gas Company, a division of Arkansas Western Gas Company, is an investor-owned public utility engaged in the provision of natural gas service in the state of Missouri and is, therefore, subject to the jurisdiction of the Missouri Public Service Commission under Chapters 386 and 393, RSMo.

Associated Natural Gas Company, a division of Arkansas Western Gas Company, has the burden of proving that the increased rate or proposed increased rate is just and reasonable. Section 393.150.2, RSMo (1994).

The Staff of the Missouri Public Service Commission has the burden of proving its assertion that Associated Natural Gas Company's SEMO District gas costs should be reduced by an additional \$382,162 to eliminate an alleged double recovery, in ANG's 1996-1997 ACA filing, of LNG and NGPL, non-S2 storage withdrawal dollars which allegedly occurred as a result of ANG's change in ACA recovery methodology with regard to storage injection and withdrawals. Dycus v. Cross, 869 S.W.2d 745, 749 (Mo. banc 1994).

*IT IS THEREFORE ORDERED:*

1. That Staff's proposal to reduce Associated Natural Gas Company's SEMO District gas costs by \$382,182 to eliminate an alleged double recovery is affirmed.
2. That any pending motions or objections not specifically ruled on in this order are hereby denied or overruled.
3. That this Report and Order shall become effective on March 10, 2000.

Lumpe, Ch., Crumpton, Schemenauer, and Drainer, CC., concur  
and certify compliance with the provisions of Section 536.080, RSMo 1994.  
Murray, C., dissents

Register, Regulatory Law Judge

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**In the Matter of the Small Company Rate Increase Request of  
Quail Run Water & Land Company, for a Water Rate In-  
crease.**

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*Case No. WR-2000-337  
Decided February 29, 2000*

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**Water §11.** Where members of the public at a local public hearing questioned the adequacy of Company's facilities for fire protection and the Commission's Staff suggested that the Commission lacks jurisdiction over the Company for fire protection purposes, the Commission declined to make such a conclusion and granted the requested rate increase.

**ORDER APPROVING TARIFF**

On January 3, 2000, Quail Run Water and Land Company (Company) filed proposed tariff sheets and an Agreement seeking a water rate increase through the Commission's Small Company Rate Increase Procedure, Rule 4 CSR 240-2.200. The Agreement, executed by Company and the Staff of the Missouri Public Service Commission (Staff), calls for an increase of approximately 63.27 percent. The proposed tariffs bear an effective date of March 1, 2000.

On November 22, 1999, the Office of the Public Counsel (Public Counsel) requested a local public hearing. Public Counsel stated, in support of its request, that the average customer will experience a rate increase of approximately 49.4 percent. The Commission granted Public Counsel's request on January 14, 2000, and the local public hearing was held on February 14, 2000. At that hearing, several of Company's customers raised concerns regarding the adequacy of Company's system for fire protection purposes. Because the Commission considered this to be an important public safety issue, the Commission on February 17, 2000, directed the parties to file pleadings addressing this issue no later than February 24, 2000.

On February 18, 2000, Staff filed a Motion to Suspend Tariff. The Motion stated that the questions posed in the Commission's Order of February 17, 2000, require extensive investigation that Staff will not be able to complete by February 24, 2000. Therefore, Staff moved that the tariff be suspended for further consideration and analysis. However, on February 24, 2000, Staff filed its memorandum and recommendation, responding to the questions raised by the Commission and recommending that the tariff be approved as submitted.

The Commission's questions, and a summarization of Staff's responses, are set out below:

**Does the Commission's jurisdiction in this matter, and over small water companies in general, include fire protection as an aspect of public safety, convenience and necessity, such that the Commission may establish and enforce an appropriate standard with respect to the fire protection capabilities of a water system in terms of number and location of hydrants, diameter of mains, storage capacity, and the like?**

Staff suggests that the Commission lacks jurisdiction in the present case to consider the adequacy of Company's system for fire protection purposes. The system was approved in its present form by both the Commission and the Missouri Department of Natural Resources (DNR). Staff further suggests that the prospective application of fire protection standards to small water companies is an issue deserving further review.

**If the Commission's jurisdiction does include fire protection, what is the appropriate standard to be applied in this matter, and to small water companies in general?**

Staff suggests that the Commission lacks such jurisdiction in this case.

**If the Commission's jurisdiction does not include fire protection, what agency or governmental entity does have jurisdiction over the fire protection capabilities of small water systems in general, and over Quail Run Water and Land Company in particular?**

Staff advises the Commission that such local governmental entities as municipalities and fire protection districts have such authority but may not, as is the case here, exercise it.<sup>1</sup> Staff further advises that DNR does not require that water systems include fire protection capabilities, but does apply minimum standards to proposals that purport to include such a capability.

**Are the hydrants, storage facilities, and other fire protection features of the small water system operated by Quail Run Water and Land Company included in rate base?**

Staff advises that Company's system does not include any fire protection features or capability. Its hydrants are "flush" hydrants, not fire protection hydrants. Its storage capacity is not intended to support fire protection. Company's storage facilities are included in rate base; its flush hydrants and mains are contributed property and are not included in rate base.

**Are the hydrants, storage facilities, and other fire protection features of the small water system operated by Quail Run Water and Land Company operable? Are they sufficient for the residential development they serve?**

As noted above, Staff advises that Company's system does not include any fire protection features or capability. Company's system is adequate only as a public drinking water system.

On February 24, 2000, Staff also filed its memorandum recommending approval of the proposed tariff sheets. Staff states that, following an audit of Company's books and records and review by members of the Commission's accounting, depreciation, financial analysis, and water and sewer departments, it concluded that an increase in Company's annual operating revenue of \$11,243 was justified. Consequently, Staff recommends that the requested increase be granted. Staff and Company also agreed to change Company's tariffs by implementing charges for late payments, returned checks, reconnections, and collections, as well as a provision permitting Company to levy charges against customer deposits as permitted by Rule 4 CSR 240-13.030.

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<sup>1</sup>Quail Run was designed and built when its county lacked any such code; while the county now has a code, Quail Run is not required to meet it.

On February 23, 2000, Public Counsel filed its position statement, indicating that it does not oppose Company's rate increase request.

The Commission has considered the revised tariff sheets, the agreement of the parties, the transcript of the local public hearing, Public Counsel's position statement, and Staff's response to the Commission's Order, its memorandum and its recommendation. With respect to Staff's suggestion that the Commission lacks jurisdiction in the present case to review the adequacy of Company's system for fire protection purposes, the Commission appreciates Staff's position, but will not make such a finding here. The policy and other considerations necessarily bound up in the development and application of fire protection standards to small water companies in general are, as Staff indicated, better considered within another context. The Commission concludes that no public benefit will result from delaying Company's proposed rate increase while the small company fire protection issue is reviewed. The Commission concludes that the Company's proposed revised tariff sheets are just and reasonable and should be approved to take effect on March 1, 2000.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheets filed by Quail Run Water and Land Company on January 6, 2000, are approved, effective March 1, 2000. The tariff sheets approved are:

**P.S.C. MO. No. 1**

**1st Revised Sheet No. 4, Cancelling Original Sheet No. 4**

**1st Revised Sheet No. 5, Cancelling Original Sheet No. 5**

**Original Sheet No. 5A**

2. That this order shall become effective on March 1, 2000.
3. That this case may be closed on March 2, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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**In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for the Issuance of an Accounting Authority Order Relating to Year 2000 Compliance Projects.**

*Case No. GO-99-258*  
*Decided March 2, 2000*

**Gas §29, Accounting §9.** The Commission found that the costs incurred by Missouri Gas Energy, a Division of Southern Union Company (MGE), to prepare for Y2K compliance were extraordinary and met the criteria for deferral. The Commission granted MGE's application and allowed MGE to defer these costs.

**APPEARANCES:**

*Robert J. Hack*, Attorney, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy.

*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*, Assistant General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Lewis R. Mills, Jr.

**REPORT AND ORDER**

**Procedural History**

On December 8, 1998, Missouri Gas Energy, a division of Southern Union Company (MGE), filed an application for an accounting authority order relating to its Year 2000 (Y2K) compliance projects. On March 3, 1999, the Staff of the Commission (Staff) filed its memorandum in which it recommended that the Commission require MGE to submit to certain conditions. On April 19, MGE filed its response in which it objected to these conditions. On May 5, the Office of the Public Counsel (Public Counsel) filed a motion to dismiss, or in the alternative, to establish a procedural schedule. On May 11, 1999, the Commission set this matter for a prehearing conference. On May 17, 1999, MGE requested rehearing and reconsideration of the order establishing a prehearing conference. On June 6, 1999, the Commission denied Public Counsel's motion to dismiss and MGE's request for rehearing and reconsideration. The parties filed testimony, and a hearing was held on October 20, 1999.

**Findings of Fact**

The parties have identified six issues. The Commission will address them in the order they are listed in the List of Issues filed on October 13, 1999. The

Commission will also address the Nonunanimous Stipulation and Agreement filed on October 5, 1999, by MGE and Staff.

The Commission has reviewed and considered all of the evidence and arguments presented by the various parties. Some evidence and positions of parties on the issue may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or a position of a party indicates that, while the evidence or position was considered, it was not found relevant or necessary to the resolution of the particular issue. In particular, since the position of the Staff was, through the Nonunanimous Stipulation and Agreement, resolved in support of MGE, its testimony will not be specifically discussed.

#### **Issues Presented for Hearing**

##### **1. Are MGE's Y2K expenditures material?**

This issue arose early in the case when Public Counsel moved to dismiss MGE's application partially based on Public Counsel's allegation that MGE's Y2K expenditures were not material. In discussing Public Counsel's motion, the Commission stated: "materiality is an issue that may be considered when determining whether to allow deferral of expenses. However, a finding of materiality is not necessary to allow deferral. . . ." Inasmuch as the Commission finds that both the event causing the expenditures and the expenditures themselves are extraordinary, the Commission need not find that the expenditures are material to allow deferral.

##### **2. Are MGE's Y2K expenditures to upgrade or replace computer equipment recurring?**

Public Counsel argues that MGE's Y2K expenditures are similar to routine computer hardware and software upgrades, and similar to "activities that MGE has taken to correct other problems it has had with its computer systems and operating processes." Public Counsel states that because MGE regularly replaces hardware and software, its efforts to ensure Y2K compliance are not extraordinary. Public Counsel asserts that these Y2K efforts are in essence the same activities that MGE takes nearly every day to operate and maintain its computer systems. Public Counsel also argues that MGE's Y2K efforts are similar to other project teams that MGE constitutes from time to time.

MGE points out that its Y2K Project will not recur with any reasonable frequency. MGE testified that its Y2K compliance efforts included:

- identifying all critical business systems in which a failure could lead to service interruptions, to a degradation of the quality of customer service, or to problems in business management;
- assessing the criticality of these systems;
- collecting vendor-provided Y2K compliance documentation for all applicable systems;
- testing critical systems and interfaces in a simulated Y2K environment;
- modifying existing systems and validating modifications to meet Y2K readiness requirements;
- investigating critical supplier Y2K compliance; and
- developing contingency and recovery plans.

The Commission finds that MGE's expenditures to ensure its systems are Y2K compliant are not recurring. Although businesses regularly upgrade computer systems to ensure that they do not become obsolete, the comprehensive scope of MGE's Y2K project, and the fact that it was a response to a non-recurring event, supports MGE's arguments that these costs are non-recurring.

**3. Are MGE's Y2K expenditures extraordinary?**

Public Counsel's arguments that MGE's Y2K costs are not extraordinary are similar to those it advances on the question of whether these costs are recurring. That is, Public Counsel argues that MGE's Y2K efforts are not extraordinary because they are similar to ongoing computer upgrades, similar to other project teams, and planned for and budgeted.

MGE points out that assessing the Y2K compliance of all software and hardware that might contain microchips, in a relatively short period of time, is an extraordinary undertaking. Furthermore, assessing the Y2K readiness of all MGE's vendors and suppliers, and developing contingency plans are not activities similar to those undertaken in MGE's normal course of business.

The Commission finds that MGE's Y2K expenditures are extraordinary. As noted above, MGE's Y2K project required examination of a large number of separate areas to ensure Y2K compliance and prepare for contingencies. The comprehensive nature of this examination, coupled with the fact that the event necessitating the examination happens only once every 100 years, makes the expenditures extraordinary. The Commission largely agrees with MGE's position that expenditures caused by the turn of the century are extraordinary.

**4. Is MGE seeking to defer costs that are already built into its current tariffed rates?**

This question is moot because the Commission is herein approving the Nonunanimous Stipulation and Agreement between Staff and MGE which will allow MGE to only defer incremental operating expenses incurred for Y2K compliance projects. By definition, incremental operating expenses cannot be included in current rates.

**5. Does MGE require an AAO for Y2K expenditures to prevent irreparable harm to its financial integrity?**

There is no evidence that MGE will suffer irreparable harm to its financial integrity if an AAO is not granted, and no party argues that such harm will occur. In granting an AAO, the Commission need not, and does not here, find that irreparable harm will occur if the AAO is not granted.

**6. Were MGE's Y2K expenditures unforeseen or unpredictable?**

Public Counsel argues that MGE's Y2K compliance costs were neither unforeseen nor unpredictable. Both MGE and Staff argue that whether they were unforeseen or unpredictable is immaterial to the question of whether an AAO should be granted. The Commission agrees with MGE and Staff. Although a finding that an event was unpredictable might support the conclusion that the event was extraordinary, an event can be extraordinary even though it was predictable and foreseeable. Public Counsel points out that MGE has known that it might face Y2K issues since at least 1993. Nevertheless, the sheer breadth of the examination undertaken in MGE's Y2K project and the fact that it was necessitated by an

unrelated industry's failure to program computer systems to accommodate the passage of time to a new century make the associated costs extraordinary, even though they may have been predictable.

The Commission concludes that the costs associated with MGE's Y2K compliance efforts are extraordinary and meet the Commission's criteria for deferral. The Commission will allow MGE to defer them.

#### **The Nonunanimous Stipulation and Agreement**

Having found that Public Counsel's arguments in opposition to the granting of the AAO are not well taken, and having concluded that the AAO will be granted, the Commission will turn to the provisions of the Nonunanimous Stipulation and Agreement filed on October 5, 1999, by MGE and Staff. The Nonunanimous Stipulation and Agreement resolved all issues between those two parties, and recommended that the Commission grant MGE an AAO subject to certain conditions. The signatories stipulated that:

The Commission should grant MGE an AAO for the incremental operating expenses incurred for Y2K compliance projects between July 1, 1998, and February 28, 2000.

MGE shall begin to expense the deferred costs beginning on January 1, 2000, subject to restatement for expenditures through February 28, 2000, using a ten-year amortization period.

Rate base treatment of the unamortized balance, and materiality of the deferred costs, will be addressed in the general rate case in which the recovery of the deferred costs is addressed.

MGE will not seek recovery of deferred costs unless it initiates a general rate case by February 28, 2002.

The Commission finds that these conditions are reasonable, and will adopt them.

#### **Conclusions of Law**

MGE is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

Pursuant to Section 536.060, RSMo 1994, the Commission may accept the Stipulation and Agreement as a resolution of some of the issues in this case.

*IT IS THEREFORE ORDERED:*

1. That the application for an accounting Authority Order for the incremental operating expenses incurred for Y2K compliance projects filed on December 8, 1998, by Missouri Gas Energy, a Division of Southern Union Company, as modified by the Nonunanimous Stipulation and Agreement filed on October 5, 1999, is granted.

2. That the Nonunanimous Stipulation and Agreement filed on October 5, 1999, by the Staff of the Commission and Missouri Gas Energy, a Division of Southern Union Company, is approved.
3. That the motion to dismiss filed by the Office of the Public Counsel on May 5, 1999 is denied.
4. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the expenditures herein involved.
5. That the Commission reserves the right to consider any ratemaking treatment to be afforded the expenditures herein involved in a later proceeding.
6. That this order shall become effective on March 14, 2000.
7. That this case may be closed on March 15, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**Director of the Department of Manufactured Homes, and Modular Units of the Public Service Commission, Complainant, v. Pitts Mobile Homes, Respondent.**

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*Case No. MC-2000-181  
Decided March 9, 2000*

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**Manufactured Housing §19.** If the Director of the Department of Manufactured Homes and Modular Units of the Public Service Commission chooses not to pursue monetary penalties against a mobile home dealer after the Director has been authorized, but not required, by the Commission to do so, the Director need not request that the Commission withdraw its authorization to pursue penalties.

**ORDER REJECTING REQUEST FOR  
RECONSIDERATION AND REDUCTION OF PENALTY**

The Director of the Department of Manufactured Homes and Modular Units of the Public Service Commission (Director) filed a formal complaint with the Missouri Public Service Commission on August 24, 1999, against Pitts Mobile Homes (Pitts). The Director alleged, in seven counts, that Pitts failed to properly comply with the setup procedures for a manufactured home and failed to correct the setup deficiencies within a reasonable amount of time as specified by the Director, as required by Section 700.100.3(6), RSMo 1994.

On August 31, the Commission issued a Notice of Complaint to William Pitts, d/b/a Pitts Mobile Homes requiring Pitts to answer within 30 days from the date of the notice (September 30). The Commission's official files did not indicate that the August 31st notice was sent by certified mail. Therefore, a second Notice of Complaint was issued on October 7, requiring Pitts to answer within 30 days from the date of the notice (November 7). The Commission's official file indicated that the notice was delivered by certified mail on November 4. Pitts did not file an answer. On November 19, the Director filed a Motion for Default. Pitts did not respond to the Director's motion.

On December 7, the Commission issued an Order of Default that found Pitts to be in default and pursuant to 4 CSR 240-2.070(9) found the allegations of the complaint to be deemed admitted by Pitts. The Commission granted the relief sought by the Director in his complaint. The Certificate of Dealer Registration No. 890001, issued to Pitts Mobile Homes on January 13, 1999, was suspended for 14 days on each of the seven counts set forth in the Director's Complaint. The certificate was therefore suspended for a total of 98 days. In addition, the Office of General Counsel was authorized to seek civil penalties from Pitts pursuant to Section 700.115.2, RSMo 1994.

The Order of Default indicated that it would become effective on December 17, 1999. Pitts did not respond to the Order of Default prior to its effective date. On February 7, 2000, William L. Pitts, d/b/a Pitts Mobile Homes, through his attorney, filed a Request for Reconsideration and Reduction of Penalty.

In his request, Pitts argues that the seven counts listed in the Director's complaint are minor deficiencies that did not render any of the mobile homes uninhabitable. Pitts also indicates that all of the deficiencies, except one that is the subject of separate litigation with the homeowner, have been corrected. Pitts argues that the Commission's suspension of his certificate of dealer registration for 98 days results in a penalty that is far greater than the crime it is intended to correct and will result in an undue hardship.

On February 16, the Director filed a response to Pitts' request. The Director recognized that Pitts has in fact performed the required repair work on the homes that were the basis for the complaint. For that reason, the Director indicates that he will not seek civil monetary penalties against Pitts and asks that his authority to do so be withdrawn. Nevertheless, the Director suggests that the 98 day suspension of Pitts' certificate of dealer registration is appropriate not only because of Pitts' failure to properly set-up the homes that were sold, but also because Pitts' failure to respond to the complaint showed a disregard for the Director's authority as well as for the authority of the Commission.

Section 386.500.1, RSMO (1994) provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." Section 386.500.2 further provides that no party has a right to appeal an order of the Commission in any court unless it has applied for rehearing prior to the effective date of the order. In addition, 4 CSR 240-2.160(1) provides that "applications for rehearing may be filed prior to the effective date of the order." That same regulation provides that "motions for reconsideration of procedural and interlocutory orders shall be filed within ten (10) days of the date the order is issued."

The order that Pitts is asking the Commission to reconsider was issued on December 7 and became effective on December 17, 1999. Pitts filed his request for rehearing on February 7, 2000. Therefore, his request was filed some six weeks late. Pitts' request for reconsideration will be rejected as untimely filed.

In addition, even if the Commission were to consider Pitts' request for reconsideration on its merits, it would be rejected. In his complaint, the Director alleged seven separate occasions in which Pitts failed to properly comply with setup procedures for a manufactured home and failed to correct the setup deficiencies within a reasonable time as specified by the Director. The Director notified Pitts of each of these deficiencies between July, 1998 and June, 1999 and ordered that they be corrected within thirty days. Yet Pitts' request for reconsideration indicates that only three of the deficiencies had been corrected by September of 1999 and that three of the remaining four deficiencies had been completed by February, 2000. Pitts also neglected to promptly respond to the Director's complaint when it was filed before the Commission. The Commission directed Pitts to respond to the Director's Complaint but he chose not to do so. Pitts was given an opportunity to request rehearing of the default order in a timely fashion. He did not do so.

The Director's Response to Pitts' request for rehearing indicates that the Director has chosen not to seek civil monetary penalties against Pitts. The Director asks that its authorization to seek civil penalties be withdrawn. The Order of Default merely authorized the Commission's General Counsel to seek civil penalties against Pitts. It did not require that the Director take any action to seek those penalties. If the Director chooses not to further pursue such penalties, he is not in violation of the Commission's order. The Default Order need not be altered to withdraw the authorization to seek civil penalties.

Pitts has, in the judgment of the Commission, failed to establish sufficient reason to grant his Request for Reconsideration and Reduction of Penalty.

*IT IS THEREFORE ORDERED:*

1. That the Request for Reconsideration and Reduction of Penalty filed by William L. Pitts d/b/a Pitts Mobile Homes is rejected.
2. That this order shall become effective on March 9, 2000.

Lumpe, Ch., Murray, and Drainer, CC., concur ,  
Crumpton and Schemenauer, CC., absent

Woodruff, Regulatory Law Judge

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**In the Matter of Southern Missouri Gas Company L.P.'s Tariff  
Revision Designed to be Reviewed in Its 1997-1998 Actual  
Cost Adjustment for the Missouri Service Area of the Com-  
pany**

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*Case No. GR-99-178  
Decided March 14, 2000*

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**Gas §17.1.** The Commission found Staff's recommendations, with which the Company concurred, reasonable and directed the adjustments to the Company's firm sales and refund factor be made, as recommended, and the ending ACA balances be established effective November 1, 1999.

**ORDER ESTABLISHING ACA BALANCE AND CLOSING CASE**

This case was opened for the purpose of receiving the 1997-1998 Purchased Gas Adjustment (PGA) filings and Actual Cost Adjustment (ACA) filing of Southern Missouri Gas Company (SMGC). On July 30, 1999, the Procurement Analysis Department of the Staff of the Missouri Public Service Commission (Staff) filed a memorandum indicating that Staff had reviewed SMGC's 1997-1998 ACA filing. Staff stated that it audited the billed revenues and actual gas costs for the period of September 1997 to August 1998. Staff stated that effective August 1998 SMGC had approximately 5,840 customers on its system.

Staff addressed the following concerns in its memorandum regarding SMGC's ACA filing:

- Staff proposes to carry-forward an under-recovery balance of \$433,209 (\$360,090 + \$73,119) from the 1996-97 ACA filing, not the \$73,119 under-recovery balance filed by SMGC. This increases the cost of gas by \$360,090.
- Staff proposes to reduce the firm customers gas costs by \$3,992 because SMGC does not have tariff authority to recover agency fees as a gas cost in this ACA filing.
- Staff proposes to increase the cost of gas by \$485 to reflect carrying charges associated with SMGC's Deferred Carrying Cost Balance.
- To reflect the proper as billed revenues and as billed cost of gas, the Staff developed a modified revenue recovery and gas cost recovery (including all previous adjustments) to reflect an adjusted ACA balance of \$785,683. This includes a projected transportation cost of \$871,148.
- Staff proposes that Company include WNG refunds totaling \$133,409 in its next PGA filing, effective November 1999.

Staff made the following recommendations:

1. Adjust the Firm sales ACA balance by \$350,561 from the filed under-recovery balance of \$435,607 to the Staff adjusted under-recovery balance of \$786,168. The total adjustment should be included as a separate line item adjustment applied to the beginning 1998-99 ACA balance.

2. Adjust the refund balance by \$133,409 in the calculation of Company's refund factor. The adjustment should be reflected in the Company's next PGA filing, effective November 1999.

On October 21 and October 26, 1999, the Company filed a response to the Staff memorandum and indicated that SMGC concurs with Staff's recommendation.

The Commission has reviewed the filings, determines that the ending balances shown on Staff's recommendation are reasonable and should be approved. The Commission further determines that this case should be closed.

*IT IS THEREFORE ORDERED:*

1. That Southern Missouri Gas Company adjust the Actual Cost Adjustment account balances in its next Actual Cost Adjustment filing to reflect the following Staff adjustments and to reflect the (over)/under-recovery ending Cost of Gas, Actual Cost Adjustment, Transportation Cost, Revenue Recovery, and Deferred Carrying Cost balances effective November 1, 1999:

<b>Description</b>	<b>Beginning ACA Balance Per Filing</b>	<b>Staff Adjustments</b>	<b>Ending ACA Balance Per Staff</b>
<b>Cost of Gas</b>	\$2,131,975	\$11,133	\$2,143,108
<b>1996/97 ACA Balance</b>	\$73,119	\$360,090	\$433,209
<b>Transportation Cost</b>	\$794,002	\$77,146	\$871,148
<b>Revenue Recovery</b>	\$2,563,489	\$98,293	\$2,661,782
<b>DCCB</b>	\$0	\$485	\$485
<b>Total (Over)/ UnderRecovery</b>	\$435,607	\$350,561	\$786,168

2. That this order shall become effective on March 24, 2000.

3. That this case may be closed on March 27, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Register, Regulatory Law Judge

**In the Matter of Missouri Public Service's Purchased Gas Adjustment Factors to be Reviewed in its 1997-1998 Actual Cost Adjustment.**

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*Case No. GR-98-421*  
*Decided March 14, 2000*

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**Gas §17.1.** The Commission found the ending ACA balances, proposed by Staff in its February 4, 2000 filing, reasonable, and approved the adjustments and ending balances for ACA, Take or Pay, transition costs, deferred carrying cost balance and refund balances effective August 31, 1998.

**ORDER ESTABLISHING ACA BALANCE  
AND CLOSING CASE**

This case was opened for the purpose of receiving the 1997-1998 purchased gas adjustment (PGA) filings and actual cost adjustment (ACA) filing of UtiliCorp United Inc. d/b/a Missouri Public Service (MPS). On September 1, 1999, the Procurement Analysis Department of the Staff of the Missouri Public Service Commission (Staff) filed a memorandum indicating that Staff has reviewed the 1997-1998 ACA filing of MPS. Staff stated that it audited the billed revenues and actual gas costs for the period of September 1, 1997 to August 31, 1998.

Staff stated that MPS separates its gas operations into a Southern System, a Northern System and an Eastern System. As of August 1998, MPS served approximately 30,000 customers on the Southern System, 10,000 customers on the Northern System and 3,500 customers on the Eastern System. Staff also stated that Williams Natural Gas Company (WNG) serves customers on the Southern System. Panhandle Eastern Pipe Line Company (PEPL) serves customers on the Northern System and the Eastern System. In addition to PEPL, gas is delivered to the Eastern System by Missouri Pipeline Company (MPC) and Missouri Gas Company (MGC), affiliates of UtiliCorp United Inc. (UtiliCorp).

Staff further stated that a comparison of billed revenue recovery with actual gas costs will yield either an over-recovery or under-recovery of the ACA, refund, transition costs, deferred carrying cost balance (DCCB) and Take-or-Pay (TOP) balances calculated. Staff indicated that it also performed an examination of MPS' gas purchasing practices to determine the prudence of the Company's purchasing decisions.

Staff addressed the following concerns in its memorandum regarding MPS' case filing:

1. The Staff proposes to reduce the eastern system gas costs by \$6,191 to reflect MGC deliveries to Rolla only for the month of December 1997.

2. To reflect costs based on actual PEPL deliveries during the months of November 1997 and December 1997, the Staff proposes to reduce the cost of gas on the northern system by \$149,566.
3. The Staff proposes to reduce the northern system gas costs by \$14,400 resulting from a change in the volumetric demand charge for MPS.
4. The Company's revision to the DCCB results in a \$33,387 reduction in the cost of gas on the southern system; a \$5,710 reduction in the cost of gas on the northern system; and a \$14,794 increase in the cost of gas on the eastern system.

Staff recommended that the Commission order MPS to adjust the ACA account balances in its 1998-99 ACA filing to reflect Staff adjustments and ending (over)/under recovery balances for the ACA, TOP, Transition Cost, DCCB, and Refund accounts.

On October 15 and October 21, 1999, MPS filed a response to the Staff memorandum and indicated that MPS concurs with Staff's recommendation with one exception. Under PEPL purchases and deliveries, MPS disagreed with the amount \$2.35 for weighted average cost of gas as used in the December 1997 reconciliation of purchased gas volumes with delivered volumes. MPS calculated the adjustment with the amount \$2.33 as weighted average cost of gas resulting in a reduction to the Staff recommended gas cost increase in the amount of \$31. MPS proposed that the MPS proposed that the correcting entry adjustment of \$3,611 be included in the 1998-1999 ACA filing.

On February 4, 2000, Staff filed its recommendation for approval accepting MPS' correction that results in a gas cost decrease of \$31 (\$3,611 gas cost increase instead of \$3,642 gas cost increase) on the Northern System for PEPL purchases and deliveries (firm ACA). Staff recommended that the proposed adjustments and ending (over)/under recovery balances for the ACA TOP transition cost, DCCB and refund accounts be adopted and that this case be closed.

The Commission has reviewed the filings of Staff and the Company. The Commission determines that the ending balances shown on Staff's recommendation filed on February 4, 2000 are reasonable and should be approved. The Commission further determines that this case should be closed.

*IT IS THEREFORE ORDERED:*

1. That UtiliCorp United Inc. d/b/a Missouri Public Service adjust the Actual Cost Adjustment account balances in its 1998-1999 Actual Cost Adjustment filing to reflect the following Staff adjustments and to reflect the (over)/under recovery ending Actual Cost Adjustment, Take or Pay, transition costs, deferred carrying cost balance and refund balances as of August 31, 1998:

<b>Description</b>	<b>Beginning ACA Balance Per Filing</b>	<b>Staff Adjustments</b>	<b>Ending ACA Balance Per Staff</b>
<b>Southern System: Firm ACA</b>	\$(1,592,305)		\$(1,592,305)
<b>Interruptible ACA</b>	\$(9,563)		\$(9,563)
<b>Take-or-Pay</b>	\$0		\$0
<b>Transition Cost</b>	\$112,979		\$112,979
<b>DCCB</b>	\$0	\$(33,387)	\$(33,387)
<b>Refund</b>	\$(1,061,816)		\$(1,061,816)
<b>Northern System: Firm ACA</b>	\$(754,664)	\$(163,997)	\$(918,661)
<b>Interruptible ACA</b>	\$104,100		\$104,100
<b>Take-or-Pay</b>	\$0		\$0
<b>Transition Cost</b>	\$0		\$0
<b>DCCB</b>	\$0	\$(5,710)	\$(5,710)
<b>Refund</b>	\$(75,477)		\$(75,477)
<b>Eastern System: Firm ACA</b>	\$373,143	\$(6,191)	\$366,952
<b>DCCB</b>	\$0	\$14,794	\$14,794

2. That this order shall become effective on March 4, 2000.
3. That this case may be closed on March 27, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Register, Regulatory Law Judge

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**In the Matter of Terre Du Lac Utilities Corporation Water Rate Increase Request.****In the Matter of Terre Du Lac Utilities Corporation Sewer Rate Increase Request.**

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*Case Nos. WR-2000-68 & SR-2000-69  
Decided March 14, 2000*

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**Rates §§8, 23, 62, 72, 111, 112. Service §§1, 11, 18, 25, 27, 43, 44. Sewer §§5, 7, 10, 14, 16, 17, 19. Water §§6, 8 12.** Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.

**ORDER APPROVING TARIFFS  
AND FIRST AND SUPPLEMENTAL AGREEMENTS**

On July 26, 1999, Terre Du Lac Utilities Corporation (Company) filed revised tariff sheets pursuant to an agreement between the Company and the Commission's Staff for both water and sewer rate increases pursuant to the Commission's Small Company Rate Increase Procedure under 4 CSR 240-2.200. The Company initiated the small company rate increase procedures for its water and sewer rates on October 26, 1998. On August 10, 1999, the Commission issued its Notice to Supplement File and the Company complied with that notice by filing the requested information on August 14, 1999. The agreements between Staff and the Company are attached to this order as Attachments A (water) and B (sewer).

The revised tariff sheets, Tariff File Nos. 9900333 and 9900334, filed pursuant to the agreement between the Company and Staff had an issue date of August 25, 1999, and an effective date of October 10, 1999.

On August 13, 1999, the Office of the Public Counsel (Public Counsel) filed a Request for Local Public Hearing in these cases. The Commission granted the Public Counsel's request and held a local public hearing for these cases on November 16, 1999. In addition, the Commission issued orders suspending the effective dates of the proposed tariffs for 120 days to February 7, 2000, to allow time for these additional proceedings.

Approximately 75 people attended the hearing. Sixteen customers of the Company provided sworn comments for the record. The sworn comments provided new information and also supplemented information provided to the Commission in correspondence concerning the rates and service provided by the Terre Du Lac Utilities Corporation. Based on the record, significant issues were raised concerning whether the service instrumentalities and facilities provided by the Company were safe and adequate and whether services are provided in a manner that is just and reasonable.

On November 24, 1999, the Commission's Staff filed its Notice of Intent to Conduct Further Investigation and Motion to Further Suspend Tariff Sheets in each of these cases. On the same date, the Public Counsel filed its Request for Variance to Allow Additional Time for Filing of Recommendation in each of these cases.

As a result of the local input and the requests of Staff and the Public Counsel, the Commission issued an order on December 14, 1999, that extended the suspension of the proposed tariffs until April 7, 2000. The order also provided a procedural schedule for purposes of bringing these cases to a resolution.

On January 24, 2000, the Staff filed its Staff Report on Additional Investigation. Based upon the staff report and subsequent negotiations, the Company, the Staff and the Public Counsel reached a supplemental agreement (Attachment C to this order) applicable to both cases which was filed on February 4, 2000. The Company submitted substitute tariff sheets pursuant to the supplemental agreement on February 9, 2000. The Staff filed its recommendation in support of the agreements and supplemental agreement for each case and recommending approval of the substitute tariff sheets on February 9, 2000. The Public Counsel filed its recommendation for each case on February 14, 2000, endorsing the supplemental agreement.

**STAFF RECOMMENDATION:**

Specifically, the Staff stated that the supplemental agreement satisfactorily addresses the issues presented in the January 14, 2000, staff report. Staff stated that the substitute tariff sheets were consistent with the agreed terms and conditions. The Staff recommended that the Commission approve the Company/Staff agreements (Attachments A and B) filed on August 3, 1999; that the Commission approve the Company/Staff/Public Counsel supplemental agreement (Attachment C) filed on February 4, 2000; that the Commission approve the tariff sheets substituted on February 9, 2000. The requirements of the agreements will not be set forth in detail here because the agreements are attached and incorporated by reference to this order.

However, it is noted that the parties have requested that these cases be held open for Staff to monitor the Company's compliance and file a report by September 30, 2000. The Public Counsel will be afforded the option of filing a report also. The parties have agreed that the increased rates reflected in the substitute tariff sheets will be regarded as interim subject to the Commission's final order in this case.

**RECOMMENDATION OF THE PUBLIC COUNSEL:**

In its recommendation, the Public Counsel states that the supplemental agreement presents a just and reasonable resolution of the matters raised in these cases. The Public Counsel stated that the agreements address most of the concerns raised by customers in communications with the Public Counsel and raised during the Commission's local public hearing on November 16, 1999.

The Public Counsel expressly noted that the provision that the rates reflected in the substitute tariffs be interim and conditioned upon the Company's compliance

to all the terms and conditions of the supplemental agreement, was essential to its signature to the agreement. The Public Counsel stated that, if for any reason, the Company does not comply with any of the conditions in the supplemental agreement, the Commission will have the opportunity to address that matter in its final order.

**COMMISSION FINDINGS:**

Under the Commission's small company rate increase procedure at 4 CSR 240-2.190, the Company may file tariff sheets in accordance with an agreement between the Staff and the Company or the Staff, the Company and the Public Counsel. The supplemental agreement (Attachment C) which also incorporates the prior agreements (Attachments A and B) and imposes express conditions on the parties represents an agreement between the Staff, the Company and the Public Counsel. The Company has filed its substitute tariff sheets in accordance with the supplemental agreement.

Based on the representations by Staff, the Company, the Public Counsel and the information provided to the Commission at the local public hearing, as well as the terms of the agreements and supplemental agreement, the agreements and the supplemental agreement will be approved. The substitute tariff sheets are approved on an interim basis pending the Commission's final order in these cases. The agreements, supplemental agreement and the substitute tariff sheets serve the public interest by supporting water and sewer service by the Company on a basis that will be safe and adequate and under terms that are just and reasonable pursuant to Section 393.130, RSMo 1994.

The parties recommended approval of the substitute tariff sheets effective March 1, 2000. The Commission will not approve the retroactive effect of tariff sheets and thus the order of the Commission will provide for the substitute tariff sheets to be effective April 1, 2000.

*IT IS THEREFORE ORDERED:*

1. That the Company/Staff Agreement Regarding Disposition of Small Company Rate Increase Request, filed on August 3, 1999, in Case No. WR-2000-68 (Attachment A) is approved.
2. That the Company/Staff Agreement Regarding Disposition of Small Company Rate Increase Request, filed on August 3, 1999, in Case No. SR-2000-69 (Attachment B) is approved.
3. That the Company/Staff/Public Counsel Supplemental Agreement Regarding Disposition of Small Company Rate Increase Request, filed on February 4, 2000, in Case No. WR-2000-68 and Case No. SR-2000-69 (Attachment C) is approved.
4. That the substitute tariff sheets set out below are approved for service rendered on and after April 1, 2000, for an interim basis pending the Commission's final order in this case.

**P.S.C. MO. No. 1 (Water Service)**

**4<sup>th</sup> Revised Sheet No. 8, Canceling 3<sup>rd</sup> Revised Sheet No. 8**

**Original Sheet No. 8A**

P.S.C. MO. No. 1 (Sewer Service)

**5<sup>th</sup> Revised Sheet No. 9, Canceling 4<sup>th</sup> Revised Sheet No. 9**

**2<sup>nd</sup> Revised Sheet No. 9A, Canceling 1<sup>st</sup> Revised Sheet No. 9A**

5. That the Staff of the Public Service Commission shall file its report on compliance and recommendations in each of these cases no later than September 30, 2000.
6. That the Office of the Public Counsel may file a report on compliance and recommendations in each of these cases no later than September 30, 2000.
7. That the Terre Du Lac Utilities Corporation may file its response to any report filed by the Staff of the Public Service Commission or by the Office of Public Counsel within thirty days of each report.
8. That this order shall become effective on April 1, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thornburg, Regulatory Law Judge

EDITOR'S NOTE: Company/Staff Agreement Regarding Disposition of Small Company Rate Increase Request Attachments A, B and C have not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

**In the matter of the Missouri Public Service Commission vs.  
Missouri Gas Energy, a Division of Southern Union Com-  
pany.**

*Case No. GC-2000-386  
Decided March 14, 2000*

**Gas §16.** The Commission's Staff filed a complaint against Missouri Gas Energy, a division of Southern Union Company, alleging that MGE had violated Commission Rule 4 CSR 240-40.030(8)(l)3 in that the curb box containing the shutoff valve serving certain premises in Kansas City, Missouri, served by MGE was not properly documented and the curb box cover was partially covered with cement, inhibiting prompt access. MGE has agreed that it will inspect all of its curb boxes connected to high-pressure gas lines and correct any deficiencies it finds. Further, MGE will provide additional training to its employees, including documentation of curb box locations. The Commission concludes that the Agreement of the parties will prevent the occurrence of such violations in the future. Staff has not requested that any penalty be imposed on MGE in this case and the Commission concludes that none is warranted.

**ORDER APPROVING SETTLEMENT AGREEMENT  
AND CLOSING CASE**

On December 23, 1999, the Staff of the Missouri Public Service Commission (Staff) filed a Complaint against Missouri Gas Energy (MGE), a division of Southern Union Company, alleging that MGE had violated Commission Rule 4 CSR 240-40.030(8)(1)3 in that the curb box containing the shutoff valve serving certain premises in Kansas City, Missouri, served by MGE was not properly documented and the curb box cover was partially covered with cement, inhibiting prompt access. This complaint arose out of an investigation conducted by Staff into an explosion on July 26, 1999, that demolished the building in question, Case No. GS-2000-133.<sup>1</sup> Staff filed a Gas Incident Report in Case No. GS-2000-133 on the same day that it filed this Complaint.

The Commission issued its Notice of Complaint on December 29, 1999, advising MGE that it had 30 days in which to file a responsive pleading. On January 31, 2000, MGE and Staff filed their Settlement Agreement and Satisfaction of Complaint (Agreement). The Office of the Public Counsel (Public Counsel), although served with all the case documents, has not made an appearance herein.

In the Agreement, the parties note that the violation which is the subject matter of this Complaint was not a cause of the explosion at 101 East 41<sup>st</sup> Street in Kansas City, Missouri, on July 26, 1999. That incident occurred after natural gas escaped into the building at 101 East 41<sup>st</sup> Street following the ejection of the valve core from a 2-inch valve body on the high-pressure gas line serving the premises. Staff made three recommendations in its Incident Report. In the Agreement, MGE accepts all three recommendations, to the full satisfaction of Staff, as evidenced by its execution of the Agreement. The Agreement specifically states that Staff's execution thereof constitutes its recommendation that the Commission approve the Agreement.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has asked permission to intervene or requested a hearing, the Commission may resolve this matter on the basis of the pleadings, including the Agreement.

The Agreement is primarily concerned with Staff's recommendations in the Incident Report filed in Case No. GS-2000-133. These recommendations, in turn, are designed to reduce the likelihood of explosions such as the one that occurred at 101 East 41<sup>st</sup> Street in Kansas City. The Agreement is also directed to the alleged rule violations that are the subject of this case, in that MGE will inspect all of its curb boxes connected to high-pressure gas lines and correct any deficiencies it finds. Further, MGE will provide additional training to its employees, including documentation of curb box locations. The Commission concludes that the

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<sup>1</sup>Ten persons were injured in the explosion; four of them were hospitalized.

Agreement of the parties will prevent the occurrence of such violations in the future. Staff has not requested that any penalty be imposed on MGE in this case and the Commission concludes that none is warranted.

*IT IS THEREFORE ORDERED:*

1. That the parties' Settlement Agreement and Satisfaction of Complaint filed herein is approved. The parties are directed to perform in accordance with its provisions.
2. That this Order shall become effective on March 24, 2000.
3. That this case may be closed on March 27, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

**In the matter of Missouri Gas Energy, a Division of Southern Union Company, Regarding an Incident at 101 East 41st Street, Kansas City, Missouri, on July 26, 1999.**

*Case No. GS-2000-133  
Decided March 14, 2000*

**Gas §35.** Commission approved settlement agreement closing complaint case filed by staff. Company agreed to inspect certain curb boxes, change construction techniques to avoid placing shut-off valves underground and provide additional training to employees emphasizing federal and state gas pipeline safety rules.

**Public Utilities §7.** Commission approved settlement agreement closing complaint case filed by staff. Company agreed to inspect certain curb boxes, change construction techniques to avoid placing shut-off valves underground and provide additional training to employees emphasizing federal and state gas pipeline safety rules.

**ORDER APPROVING SETTLEMENT AGREEMENT AND CLOSING CASE**

On July 26, 1999, at approximately 8:09 p.m., a natural gas explosion and fire occurred at 101 East 41<sup>st</sup> Street, Kansas City, Missouri. As a result of the explosion and subsequent fire, the multi-story apartment building at that address was destroyed and other buildings and property were damaged. Several people were injured. There were no fatalities.

On August 11, 1999, the Commission's Staff filed a Motion to Open Docket to establish a case for the purpose of receiving information, including a gas incident report relating to the incident at 101 East 41<sup>st</sup> Street and for the purpose of ordering an appropriate response to the report to be presented by Staff. On August 18, 1999, the Commission issued its Order Establishing Case.

On December 23, 1999, the Staff filed its Gas Incident Report and a motion requesting that the Commission order MGE to file a response to the report. The report presented information about the incident and Staff recommendations. The Commission issued its Order Directing Response on December 28, 1999.

The Staff also filed a complaint against MGE on December 23, 1999, regarding the matters presented in the Gas Incident Report. This complaint was assigned Case No. GC-2000-386.

On January 31, 2000, the Staff and MGE filed their proposed Settlement Agreement and Satisfaction of Complaint (Agreement) in both this case and Case No. GC-2000-386. Staff and MGE requested that the Commission approve the agreement and close each related case.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has asked permission to intervene or requested a hearing, the Commission may resolve this matter on the basis of the pleadings, including the Agreement.

In the Incident Report, Staff states that the explosion occurred after natural gas escaped into the building at 101 East 41<sup>st</sup> Street following the ejection of the valve core from a 2-inch valve body on the high-pressure gas line serving the premises. Staff made three recommendations in its Incident Report.

The Agreement is primarily concerned with Staff's recommendations in the Incident Report, which are designed to reduce the likelihood of explosions such as the one that occurred at 101 East 41<sup>st</sup> Street in Kansas City. MGE will inspect all curb boxes where high-pressure gas lines enter structures and remedy any deficiencies it finds. MGE will change its construction techniques to avoid underground shut-off valves on high-pressure lines. MGE will provide additional training to its employees and will emphasize the need to adhere to federal and state gas pipeline safety rules. The Staff is satisfied with MGE's actions herein and recommends that the Commission approve the Agreement and close this case.

The Commission, having reviewed all of the pleadings filed herein, as well as the Agreement of the parties, concludes that MGE has taken appropriate steps, at the recommendation of the Staff, to reduce the likelihood of incidents such as the one considered herein and thereby to protect the public it serves. Therefore, the Commission concludes that the Agreement should be approved and this case closed.

*IT IS THEREFORE ORDERED:*

1. That the parties' Settlement Agreement and Satisfaction of Complaint filed herein is approved. The parties are directed to perform in accordance with its provisions.
2. That this Order shall become effective on March 24, 2000.
3. That this case may be closed on March 27, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thornburg, Regulatory Law Judge

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**In the Matter of the Joint Application of Missouri-American Water Company and United Water Missouri, Inc., for Authority for Missouri-American Water Company to Acquire the Common Stock of United Water Missouri, Inc., and, in connection therewith, Certain Other Related Transactions.**

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*Case No. WM-2000-222*

*Decided March 16, 2000*

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**Public Utilities §13.** MAWC seeks authority to acquire 100 percent of the stock of UWM. If the transaction is approved and goes forward, UWM will become a subsidiary of MAWC and will likely merge into MAWC at some point in the future. MAWC cannot lawfully acquire the common stock of UWM without Commission approval. Pursuant to Commission Rule 4 CSR 240-2.060(9)(C), the Applicants must show why the proposed acquisition is not detrimental to the public interest. In considering this application, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and that “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” “The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.” 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 asset safely and efficiently. The Commission understands the law to require a showing of a direct and present public detriment. The acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed, is not a present detriment. “[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur.” There is no such compelling evidence in this record and the Commission will approve the application.

**Public Utilities §13.** Where parties sought to adjudicate the issue of an acquisition premium in an acquisition case, the Commission refused because that issue was properly part of a future rate case and was not before it in the acquisition case.

**Public Utilities §13.** Where Public Counsel sought to apply the so-called “four standards” announced by the Commission in its decision, In the Matter of the Application of UtiliCorp United, Inc., and Colorado Transfer Company (CTC) for Authority for UtiliCorp to Acquire All of the Issued and Outstanding Shares of Stock of CTC and Then to Merge CTC With and into UtiliCorp, and to Acquire Certain Debt Obligations of Centel Corporation, Case No. EM-91-290 (*Order Approving Merger*, issued September 13, 1991), to an acquisition case, the Commission refused because the so-called “four standards” were not applicable because the case in question did not involve a merger and did not involve multi-jurisdictional entities.

## **REPORT AND ORDER**

### **Procedural History**

On September 8, 1999, Missouri-American Water Company (MAWC) and United Water Missouri, Inc. (UWM), filed their Joint Application for authority for MAWC to acquire the common stock of UWM. Simultaneously, the Applicants also filed a Motion for a Protective Order, seeking protection for proprietary and highly

confidential information concerning the proposed transaction. On September 10, 1999, the Commission by order adopted its standard protective order. On September 20, 1999, the Applicants filed their Stock Purchase Agreement, a highly confidential (HC) document under the terms of the protective order.

On September 21, 1999, the Commission granted Applicants' request, contained in their Application, for expedited treatment and directed the Staff of the Missouri Public Service Commission (Staff) to file its memorandum and recommendation concerning the proposed transaction not later than 30 days following the Applicants' filing of their Stock Purchase Agreement. On October 20, 1999, Staff filed a Motion to Compel Answers to Data Requests. Also on October 20, 1999, Staff and the Office of the Public Counsel (Public Counsel) filed a Joint Motion seeking an extension of the deadline for Staff's memorandum and recommendation. On October 22, 1999, taking notice of the increasingly adversarial nature of the case, the Commission by order suspended Staff's obligation to file a memorandum and recommendation.

On October 25, 1999, Staff supplemented and renewed its motion to compel discovery. On October 29, 1999, the Applicants replied to Staff's motion to compel and to the joint motion of Staff and Public Counsel for an extension of time. Simultaneously, Applicants filed a motion for a procedural schedule. On November 5, 1999, the Commission sustained Staff's motion to compel, set a prehearing conference for November 18, 1999, and directed that a proposed procedural schedule be filed on or before November 24, 1999. Staff and Public Counsel jointly responded to Applicants' motion for a procedural schedule on November 5, 1999.

The Commission convened a prehearing conference on November 18, 1999. Thereafter, on November 24, 1999, the parties jointly submitted a proposed procedural schedule. The Commission adopted the proposed procedural schedule by order issued on November 30, 1999.

On December 6, 1999, the Commission issued its Order Directing Notice, setting an intervention deadline of January 5, 2000. No applications to intervene were filed.

On December 29, 1999, a second prehearing conference was held. On December 30, 1999, the parties filed their proposed list of issues as required by the procedural schedule. On January 4, 2000, the parties filed their position statements.

The Commission held an evidentiary hearing on January 10, 2000. All parties were represented at the evidentiary hearing. At the request of the parties, a portion of the hearing was held *in camera* and that portion of the transcript designated HC. On January 20, 2000, the Commission by order adopted a briefing schedule, which was corrected in part by a notice issued on January 25, 2000. All parties filed initial briefs on February 4, 2000, and reply briefs were filed by February 14, 2000.

At the hearing, the Applicants agreed to supply certain additional information in response to specific requests. Some of this information was supplied in a pleading, filed on January 24, 2000. The rest was supplied in three late-filed exhibits, Exhibit Nos. 6, 9 and 11. Of these, Exhibit 9 is designated HC. No party made any objection to the receipt of these exhibits, either at the hearing or afterwards, and they are received and made a part of the record of this matter.

### **Discussion**

The Applicants are both public utilities engaged in providing public water services to the public in the State of Missouri, subject to the jurisdiction of this Commission. MAWC provides such services in several service areas in the state. UWM provides public drinking water services in Jefferson City, Missouri.

MAWC seeks authority to acquire 100 percent of the stock of UWM. If the transaction is approved and goes forward, UWM will become a subsidiary of MAWC and will likely merge into MAWC at some point in the future.

MAWC cannot lawfully acquire the common stock of UWM without Commission approval. Section 393.190.2, RSMo 1994.<sup>1</sup> Pursuant to Commission Rule 4 CSR 240-2.060(9)(C), the Applicants must show why the proposed acquisition is not detrimental to the public interest. In considering this application, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and that “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). “The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). 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 asset safely and efficiently. 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.3d 216, 220.

The Applicants contend that the proposed transaction will promote the public interest rather than detract from it. MAWC is, the Applicants note, an experienced operator of public water systems. The rates and rules of UWM will not change by reason of the proposed transaction and will continue to be in force. The affiliation of UWM with MAWC will, in the Applicants’ view, improve UWM’s ability to attract needed capital. Economies of scale may reduce costs, perhaps leading to lower rates.

Staff recommends that the Commission approve the proposed acquisition, with one proviso: that MAWC not be permitted to seek recovery of the acquisition premium in a future rate proceeding. With respect to the standard governing the Commission’s consideration of this transaction, Staff characterizes the possible future recovery by MAWC of the acquisition premium from ratepayers as a present detriment to the public. Staff opposes the inclusion of any acquisition premium in customer rates.

Public Counsel agrees with Staff that the Commission must condition its approval of the transaction upon the disallowance of the acquisition premium. Public Counsel suggests that judicial economy would be best served by disposing of this issue now rather than in a future rate case. Public Counsel also contends

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<sup>1</sup>Unless otherwise specified, all statutory references are to the Revised Statutes of Missouri (RSMo), revision of 1994.

that the Commission should view the proposed transaction as a merger and that it must, consequently, deny the requested authorization because the parties have not provided sufficient information to support a merger application.

The information Public Counsel refers to is the “four standards” announced by the Commission in its decision, In the Matter of the Application of UtiliCorp United, Inc., and Colorado Transfer Company (CTC) for Authority for UtiliCorp to Acquire All of the Issued and Outstanding Shares of Stock of CTC and Then to Merge CTC With and into UtiliCorp, and to Acquire Certain Debt Obligations of Centel Corporation, Case No. EM-91-290 (*Order Approving Merger*, issued September 13, 1991). These need not detain us for they are not standards at all; rather, they are a laundry list of items that the Commission stated it would require in future cases to ensure that the Missouri jurisdictional effects of a proposed transaction are highlighted and considered. The entities involved in that case were multi-jurisdictional and the Commission was concerned that the documentation provided to it did not permit it to readily ascertain the likely effects of the proposed transaction on Missouri customers. The transaction now before the Commission is not multi-jurisdictional.

The proposed transaction now before the Commission is also not a merger. By the terms of the Commission’s Order in Case No. EM-91-290, the four conditions announced therein apply only to “future merger applications.” The proper time for the Commission to consider a merger of MAWC and UWM is if, and when, such an application is actually filed. The Commission will not view this proposed acquisition as a merger and will not apply the four conditions announced in Case No. EM-91-290.

The matter of the acquisition adjustment is also not properly before the Commission in this case. That is a matter for a rate case, as the Applicants point out. This is not a rate case. Therefore, the Commission will not address the matter of the acquisition premium in this case. See In the Matter of the Application of Missouri-American Water Company for Approval of its Acquisition of the Common Stock of Missouri Cities Water Company, Case No. WM-93-255 (*Report and Order*, issued July 30, 1993) at 8 and 10.

The only purported public detriment that any party has identified is the possibility of a future attempt to recover the acquisition premium from ratepayers. The Commission reads State ex rel. City of St. Louis v. Public Service Commission, *supra*, 335 Mo. at 459, 73 S.W.2d at 400, to require a direct and present public detriment. The acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed, is not a present detriment. “[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur.” In the Matter of the Joint Application of Missouri Gas Company et al., Case No. GM-94-252, *supra*, 3 Mo. P.S.C. 3rd at 221. There is no such compelling evidence in this record.

#### **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.

MAWC is a Missouri corporation, headquartered at St. Joseph, Missouri, and a wholly owned subsidiary of American Water Works Company, Inc. (AWW), a Delaware corporation and the nation's largest investor-owned water utility. MAWC provides residential, commercial, industrial, and municipal water service to approximately 90,000 customers in Missouri, located in seven noncontiguous service areas. MAWC is the 13th largest of AWW's 23 subsidiary operating corporations, which together serve more than seven million persons in 879 communities throughout the United States.

UWM is a Missouri corporation, headquartered at Jefferson City, Missouri, and a wholly owned subsidiary of United Waterworks, Inc. (UWI), a subsidiary of United Water Resources, Inc. UWM provides water service to approximately 10,400 customers in Jefferson City, Missouri.

MAWC and UWI entered into a stock purchase agreement on July 12, 1999, whereby MAWC will purchase from UWI 100 percent of the common stock of UWM for approximately \$9.2 million. The proposed transaction may be cancelled by either party if not consummated by March 31, 2000. MAWC proposes to finance the acquisition with a short-term line of credit, to be eventually replaced with equity by the sale of stock to AWW and with new long-term debt.

MAWC asserts that it will continue to provide safe, reliable and adequate water service to UWM's customers, utilizing UWM's existing tariffs until such time as this Commission authorizes a change thereof. MAWC asserts that it is fully qualified to operate UWM's water system.

The purchase price of approximately \$9.2 million includes an acquisition premium of approximately \$550,000 above UWM's equity balance of \$8.65 million as of the end of 1998, a figure amounting to six percent.

MAWC has shown, and the Commission finds, that it has extensive experience in the water utility industry. The record does not show that MAWC has any history of service difficulties. No party has challenged MAWC's general financial health or its ability to absorb the proposed transaction. The Commission finds that MAWC is able to operate UWM's water system safely and efficiently and that approval of the proposed acquisition will not result in any discontinuation of service to UWM's customers.

#### **Conclusions of Law**

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

MAWC and UWM are each a "water corporation" and a "public utility" within the intendments of Section 386.020, RSMo Supp. 1999. Consequently, the Missouri Public Service Commission has jurisdiction over the services, activities, and rates of MAWC and UWM pursuant to Section 386.250 and Chapter 393.

Section 393.190.2 provides that no water corporation "shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business . . . unless . . . authorized to do so by the commission." By Commission Rule, a water corporation seeking such authoriza-

tion must show "why the proposed acquisition of the stock of the public utility is not detrimental to the public interest." 4 CSR 240-2.060(9)(C). Based on the findings of fact made herein, the Commission concludes that the acquisition of 100 percent of UWM's common stock by MAWC is not detrimental to the public interest and should be approved.

*IT IS THEREFORE ORDERED:*

1. That Late-filed Exhibits 6, 9 (HC), and 11 are received and made part of the record herein.
2. That Missouri-American Water Company is hereby authorized to acquire 100 percent of the common stock of United Water Missouri, Inc., as proposed in the joint application filed on September 8, 1999, and in the stock purchase agreement filed on September 20, 1999. The parties are further authorized to take such lawful actions as may be necessary to consummate the acquisition herein authorized.
3. That Missouri-American Water Company shall supplement its monthly surveillance report with information as to employee numbers and allocated costs as described in Late-filed Exhibit 11, starting with the first full calendar month which is 90 days following the acquisition herein authorized and continuing until either a merger of Missouri-American Water Company and United Water Missouri, Inc., is consummated or the Commission by order permits its discontinuance.
4. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions or 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.
5. That Missouri American Water Company shall file a pleading in this case within ten (10) days of the consummation of the acquisition herein authorized, so advising the Commission.
6. That this Report and Order shall become effective on March 26, 2000.

Lumpe, Ch., concurs, with separate concurring opinion attached;  
Crompton, Drainer, Murray, and Schemenauer, CC., concur;  
and certify compliance with the provisions of Section 536.080,  
RSMo 1994.

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**CONCURRING OPINION OF CHAIR SHEILA LUMPE**

I write because, while I concur in the result reached in this case, I believe that the Staff of the Commission and the Office of the Public Counsel appropriately identified the acquisition premium as a potential detriment to the ratepayers. It seems to me that the "not detrimental" standard requires one either to prove a negative or to predict the future. An officer of Missouri-American Water Company has testified that the company anticipates that it will seek recovery of the acquisition premium in its next rate case. I believe that that statement renders this potential future event certain enough to amount to a possible present detriment.

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**In the Matter of the Application of Atmos Energy Corporation,  
Through Its Divisions Greeley Gas Company and United  
Cities as Company, for Authority to Issue and Implement up  
to a \$500,000,000 Universal Shelf Registration for Debt and  
Equity Financing.**

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*Case No. GF-2000-393  
Decided March 23, 2000*

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**Security Issues §9.** Commission approved debt and equity issue conditioned upon gas utility reporting uses of proceeds and submitting applicable fees if any portion of debt is not used to retire existing debt.

**Security Issues §14.** Commission approved flexible "shelf registration" debt and equity issue permitting gas utility to respond to market conditions to issue most favorable mix of debt and equity securities.

**Security Issues §18.** Commission approved debt and equity issue to be used primarily to refund short term debt on favorable terms.

**Security Issues §26.** Commission approved debt and equity issue for total fixed amount but allowed flexibility to issue most favorable mix of debt and equity based on market conditions to obtain funds to refund short term debt.

**Security Issues §28.** Commission approved debt and equity issue to refund short term debt on favorable terms.

**Security Issues §38.** Commission approved debt and equity issue to refund short term debt on favorable terms.

**Security Issues §53.** Commission approved debt and equity issue to refund short term debt on favorable terms.

**Security Issues §57.** Commission approved debt and equity issue to refund short term debt on favorable terms.

**Security Issues §61.** Commission approved debt and equity issue for total fixed amount but allowed flexibility to issue most favorable mix of debt and equity based on market conditions to obtain funds to refund short term debt.

**Security Issues §63.** Commission approved debt and equity issue to refund short term debt on favorable terms. Cap was set for debt interest rates.

**Security Issues §69.** Commission approved debt and equity issue to refund short term debt on favorable terms.

**Security Issues §78.** Commission approved debt and equity issue to refund short term debt on favorable terms.

**ORDER APPROVING FINANCING**

On December 29, 1999, Atmos Energy Corporation, through its divisions Greeley Gas Company and United Cities Gas Company (Applicant or Company), filed an application with the Commission requesting authority under Section 393.190, RSMo 1994, and 4 CSR 240-20.060(6), to implement a \$500,000,000

universal shelf registration for debt and equity financing. The Company states that a universal shelf registration for will allow it to offer debt securities and shares of its common stock at prices and terms to be determined at the time of sale.

On February 2, 2000, the Commission's Staff filed its memorandum, recommending that the Commission issue an order approving the Company's application. The Staff stated that the Company's application meets the requirements of Sections 393.190.1 and 393.200, RSMo 1994, and 4 CSR 240-2.060(8) and 8(H). The Staff also suggested certain conditions be stated in the Commission's order.

The Company has not filed a response to the Staff memorandum and in its application the Company requested that no hearing be held on its application. In this regard, the Company further stated that it would submit other information to the Commission as required by the Commission or Staff to obtain the Commission's action upon the application.

#### **The Application**

The Company proposes to issue and sell, from time to time, and in several transactions, up to \$500,000,000 aggregate principle amount of new securities. The securities will consist of both debt and common stock. The proceeds from the new securities will be used for one or more of the following purposes: for repayment of all or a portion of the Company's outstanding short-term debt; for the purchase, acquisition and construction of additional properties and facilities, as well as improvements to the Company's existing plant; for the refunding of higher coupon long-term debt as market conditions permit and for general corporate purposes.

The application does not provide a detailed explanation of how the \$500,000,000 authorization will be allocated between debt and equity. The Company stated that it has a goal to increase its debt to capitalization ratio and that its target would be to obtain a range of 50-52% over two years.

The Company provided its certified copy of its Board of Directors authorizing the universal shelf registration with its application and pro forma financial statements demonstrating the effect of the proposed financing under certain assumptions. The Company also provided a five-year capitalization expenditure schedule with its application.

The application indicates that no fee will be paid pursuant to Section 386.300.2, RSMo Supp. 1999 (hereafter Section 386.300.2). The Commission determined that it required additional explanation regarding this assertion and issued an Order Directing Filing on March 6, 2000. The responses are addressed later in this order.

The Company anticipates no impact on the tax revenues of Missouri's political subdivisions in which any structures, facilities, or equipment of the Company are located.

The Company asserted that its application is in the public interest and presented that implementing a universal shelf registration would provide it with the flexibility to respond to favorable financing conditions as they arise to the benefit of the Company and the public.

#### **Staff Analysis and Conditions**

Staff stated that the current capital structure of the Company consists of 44.93 percent long-term debt, 12.91 percent short-term debt, and 42.15 percent common equity. Based on the pro forma financial statements filed by the Company, Staff

stated the capital structure of the Company would consist of 55.17 percent common equity, 44.83 percent long-term debt, and 0 percent short-term debt. The pro forma adjustments are based on issuing \$317,500,000 in common equity and \$182,000,000 in long-term debt. Staff stated that the current and pro forma ratios represent a structure for an investment grade natural gas distribution utility as defined by Standard & Poor's Corporation.

Staff performed a ratio analysis that indicated interest coverage ratios and the capital structure ratio both improve on a pro forma basis. Although Staff noted that the Company had indicated its desired ratios, it had not made a specific commitment to attain a particular ratio or range.

The Commission's Staff recommended approval of the application with three conditions as follows:

1. That this authority be granted for a period of three years.
2. That the interest rate on any debt issue not be greater than 300 basis points above the yield on a United States Treasury security of a comparable maturity.
3. That nothing in the Commission's order shall be considered a finding by the Commission of the value of the proposed transactions for ratemaking purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding.

#### **Application of Fee Schedule under Section 386.300.2**

The Commission issued an order Directing Filing on March 6, 2000, and directed the Company and Staff to address the basis for the Company's assertion that the fee schedule under Section 386.300.2 would not apply to the debt issued pursuant to its application. The Company filed its response on March 13, 1999. The Staff filed its response on March 16, 2000.

The Company states that the fee schedule does not apply to equity or to debt that is issued to retire existing debt, including short-term debt. The Company states that in the event that new debt proceeds of bonds issued under the application are used for purposes other than debt retirement, the Company will pay the applicable fees under Section 386.300.2. The Company stated that it would provide the Commission with a report regarding the actual uses of the debt financing proceeds to ensure that the appropriate fees, if any, are assessed.

The Staff response provided authority consistent with the Company's response. Staff emphasized that the debt retired must be "in existence" at the time of the closing of the financing transaction for the debt to be exempt from the fee schedule and the debt proceeds must actually be used to refund or retire that debt. The Company and Staff responses are consistent.

Staff recommended that the Commission order the Company to file accurate verified reports with the Commission's Internal Accounting Department to document the actual use of the proceeds of any Commission approved financing. The purpose of the reports would be to determine the applicability and measure of any fees under the fee schedule.

**Findings and Conclusions**

The application and the Staff recommendation show that the Company is in sound financial condition. The Company's interest coverage ratios and capital structure are likely to be improved by the issuance of the proposed securities. The Company proposes to obtain issuance of the securities under the most favorable terms that market opportunities provide.

The Commission finds that the proposed financing is not detrimental to the public interest and should be approved upon the terms presented in the Company's application and the conditions stated in the Staff's recommendation.

The Company shall ensure that necessary records are maintained to demonstrate that the authorization of this order is not exceeded. This information shall be provided by Staff to the Commission upon request. The Company shall also file a verified report for each debt issuance closed under the Commission's approval to document the applicability and measure of fees under Section 386.300.2.

This case may be closed. In the event that any modification, investigation, extension of authority, or other action related to the subject securities and financing is required, this case may be reopened or a new case may be opened as appropriate.

*IT IS THEREFORE ORDERED:*

1. That Atmos Energy Corporation, and its divisions Greeley Gas Company and United Cities Gas Company, are authorized to issue and sell, from time to time and in several transactions, up to \$500,000,000 aggregate principle amount of new securities. The securities will consist of both debt and common stock.
2. That Atmos Energy Corporation, and its divisions Greeley Gas Company and United Cities Gas Company, are authorized to execute and deliver such instruments and to undertake such other acts as are necessary to consummate the issuance and sale of the new securities as presented in the application and described in this order.
3. That the interest rate on any debt issue subject to this order not be greater than 300 basis points above the yield on a United States Treasury security of a comparable maturity.
4. That the authority granted under this order shall extend for a period of three years from the effective date of this order subject to any extension granted by the Commission.
5. That the Commission reserves the right to consider the ratemaking or other treatment to be afforded the transactions herein approved, and the resulting cost of capital, in any later proceeding.
6. That Atmos Energy Corporation, and its divisions Greeley Gas Company and United Cities Gas Company, shall comply with all applicable statutes and regulations, including compliance with Section 386.300.2, RSMo Supp. 1999, and submit all fees due under the applicable fee schedule.
7. That the Commission reserves the right to consider the application of the fee schedule under Section 386.300.2, RSMo Supp. 1999, to any debt financing under the Commission's approval in any later proceeding.
8. That Atmos Energy Corporation, and its divisions Greeley Gas Company and United Cities Gas Company, shall maintain the necessary records to ensure that the authorization of this order is not exceeded.

9. That Atmos Energy Corporation, and its divisions Greeley Gas Company and United Cities Gas Company, shall file a verified report for each debt issuance closed under the Commission's approval to document the applicability and measure of fees under Section 386.300.2, RSMo Supp. 1999. The reports shall be filed with the Commission's Internal Accounting Department and shall document the actual use of the proceeds of any Commission approved financing.

10. That in the event that any modification, investigation, extension or other action related to the subject securities and financing is required, this case may be reopened or a new case opened as appropriate.

11. That this order shall become effective on April 4, 2000.

12. That this case may be closed effective April 5, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thornburg, Regulatory Law Judge

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**In the Matter of the Petition of DIECA Communications Inc.,  
d/b/a Covad Communications Company, for Arbitration of  
Interconnection Rates, Terms, Conditions and Related Ar-  
rangements With Southwestern Bell Telephone Company.**

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*Case No. TO-2000-322  
Decided March 23, 2000*

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**Rates §110.** Commission may determine rates for unbundled network elements presented in arbitration of interconnection agreement presented under Section 252(b) of the Telecommunications Act of 1996.

**Telecommunications §7.** Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.

**Telecommunications §36.** Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.

**Telecommunications §37.** Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.

**Telecommunications §38.** Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.

**Telecommunications §45.** Local exchange competition. Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.

## APPEARANCES:

*Laura A. Izon*, Counsel, Covad Communications Company, 2330 Central Expressway, Santa Clara, California 95050, and

*Christopher Goodpastor*, Attorney at Law, Covad Communications Company, 960 Great Hills Trail, Suite 150N, Austin, Texas 78759, and

*Mark P. Johnson*, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for DIECA Communications, Inc., d/b/a Covad Communications Company.

*Paul G. Lane*, General Counsel-Missouri, and *Mimi B. MacDonald*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Suite 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*John B. Coffman*, Deputy Public Counsel, and *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.

*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: Keith Thornburg.

**ARBITRATION ORDER****Procedural History**

On November 9, 1999, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad), filed a petition seeking arbitration of unresolved interconnection issues related to Covad's request for an interconnection agreement with Southwestern Bell Telephone Company (SWBT). SWBT filed its answer to Covad's petition on December 6, 1999. The agreement under consideration will have a term of approximately one year.

Covad's Petition is based on the requirements of Section 252(b) of the Telecommunications Act of 1996, which requires state commissions, such as the Missouri Public Service Commission, to arbitrate interconnection disputes between an incumbent local exchange carrier (ILEC) and a telecommunications carrier as defined in the Telecommunications Act. SWBT is an ILEC as defined in the Telecommunications Act. Covad is a competitive local exchange carrier (CLEC). Covad meets the Act's definition of telecommunications carrier.

Covad uses various technologies to provide Digital Subscriber Line Equipment and Services to its customers. The term "xDSL" is a generic term describing the technologies and services. xDSL technologies are used to provide high speed digital data transmission through telephone lines. Covad seeks an interconnection agreement with SWBT so that it may make use of portions of SWBT's network to offer its services.

The Commission issued its Order Regarding Arbitration on November 29, 1999. Among other things, the order directed the Staff of the Missouri Public Service Commission (Staff) to participate in the proceeding and directed the parties to

prepare a proposed procedural schedule. On December 22, 1999, a prehearing conference was held. On December 27, 1999, the Commission issued its Order Adopting Procedural Schedule. The procedural schedule was later amended in the course of these proceedings in certain respects.

Pursuant to the requirements of the procedural schedule, as amended, a Joint Issues Statement was filed on January 5, 2000, framing the issues presented for arbitration. Prefiled written testimony of the parties was filed in this case between January 7, 2000, and February 10, 2000. A hearing was conducted on February 15 and 16, 2000. The parties filed posthearing briefs and proposed findings of fact and conclusions of law on March 1, 2000.<sup>1</sup>

#### **Findings of Fact**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

#### **Loop Qualification and Pricing**

xDSL technology allows a customer to use existing telephone lines to transmit and receive data at high speed. DSL stands for "Digital Subscriber Line" and the x is a generic reference to this technology. The x is replaced with a specific letter to designate a specific DSL technology.

The telephone line serving a customer is also referred to as a "loop". A loop is a pair of wires that run from the telephone company's central office to the customer's premises. xDSL services are offered over one or two pairs of twisted copper loops.

In some cases certain devices may be present on a loop that interfere (interferers) with the xDSL digital signal. These devices are load coils, digital repeaters, and excessive bridged taps. If the customer's telephone line does contain such interferers, they must be disconnected from the loop in most instances before adequate xDSL service can be provided. Removal of interferers from a loop is referred to as "conditioning". An alternative to conditioning a loop would be to locate an available loop that does not require conditioning. SWBT has agreed to provide xDSL-capable loops to Covad as an unbundled network element.

Before Covad can utilize a particular loop to provide xDSL service to a customer, it must learn whether or not any interferers are present on that loop and the length of the loop. This process is referred to as loop qualification.

SWBT is offering Covad a two-step process for determining what, if any, interferers are present on a loop. The first step is prequalification. This would allow

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<sup>1</sup>The Office of Public Counsel presented a statement at the opening of the hearing in this proceeding and also supported an application for intervention filed by the Missouri Department of Economic Development on February 14, 2000. The Public Counsel did not offer other input. The Missouri Department of Economic Development's application for intervention was denied.

Covad to access an electronic database where all loops have been divided into Distribution Areas. This database does not contain information about the exact makeup of individual loops. Instead it broadly categorizes loops by length and composition. Covad to access an electronic database where all loops have been divided into Distribution Areas. This database does not contain information about the exact makeup of individual loops. Instead it broadly categorizes loops by length and composition.

If Covad wishes to proceed further than prequalification, SWBT proposes that Covad request SWBT to locate and qualify a loop. SWBT's testimony indicated that its loop qualification process is a partially mechanized process. In some cases complete loop makeup data may exist in one or more electronic (or mechanized) databases, and in some cases a SWBT employee must physically pull a paper map from files and examine the representation of the loop to determine whether or not any interferers are on the loop.

SWBT will attempt to locate an available loop that does not require conditioning. SWBT asserted that some of the manual labor involved in its partially mechanized loop qualification process would have to be performed by an engineer.

SWBT proposes to charge Covad \$15.00 per loop for loop qualification. SWBT presented this as an average charge reflecting that in some cases all the required loop makeup data would be mechanized and in other cases manual labor would be required.

SWBT initially indicated that it would provide mechanized loop qualification with direct electronic access for CLECs on a "designed" basis by July 1, 2000, and on an "as built basis" by December 31, 2000. However, in later testimony, SWBT indicated that it was striving to have electronic access to loop qualification information by July 1, 2000, and that this date should be achievable.

SWBT asserted that its mechanized database would never be 100 percent populated with the data that it requires to perform a loop qualification. Therefore, SWBT did not offer any reduction in its proposed charge for loop qualification since that charge is based on an average, which assumes use of both mechanized and manual processes to qualify loops.

Covad and SWBT disagreed on the information necessary to determine loop qualification. Covad indicated that it was requesting only loop makeup information and that this information existed in SWBT's current databases. Covad stated that it was not requesting that SWBT undertake an effort to populate the database. Covad stated that the information it requires exists in SWBT's back office systems and is used for loop assignment purposes. Covad described various SWBT databases from which Covad could access the data it required to qualify a loop. Covad stated that it would analyze the loop makeup information using its own engineers.

Covad stated that it only required information to show actual loop length, presence of excessive bridged taps, and presence of load coils and repeaters. Covad stated it did not need additional information to qualify a loop, such as the location of load coils, bridged taps and repeaters. Covad conceded that information regarding location of these items might be difficult to provide, but Covad was not requesting this information for loop qualification purposes.

SWBT indicated that a drafting clerk could determine loop makeup, but would not be able to analyze the data or study loop binder groups to locate a loop pair that would not require conditioning. SWBT described specific information that would not be available in a mechanized database, such as locations of load coils, repeaters, and bridged taps. SWBT asserted that determining the location of interferors on the loop was part of the qualification process.

SWBT stated that it would not provide direct access to its databases but would provide electronic access to the relevant information in its databases. SWBT also stated it would not undertake to populate its databases with all information it would deem necessary to perform a loop qualification. Covad responded that it is not requesting SWBT to populate its database and that the data it requires already exists in SWBT's database. Staff and Covad state that electronic access should be provided at no additional charge through SWBT's Operational Support System (OSS).

Covad asserted that SWBT's prices, based on manual and partial mechanical processes, do not meet the Total Element Long Run Incremental Cost (TELRIC) standard imposed by federal regulation (47 C.F.R. 51.505(b)(1)). TELRIC principles require that prices of unbundled network elements be based on forward-looking economic cost, which must be measured based on the use of the most efficient telecommunications technology currently available. Under this standard, Covad argued that the most efficient loop qualification process should be performed on a 100 percent mechanized basis and the price should be zero since the cost for a mechanized process is recovered elsewhere.

Covad asserted, in the alternative, that even if SWBT were to receive additional compensation for loop qualification, SWBT should not use an engineer's time to determine loop makeup data and that SWBT's proposed price was therefore too high. Covad offered a substantially reduced alternative price proposal.

Staff proposed adjusting SWBT's proposed loop qualification pricing by removing a joint and common cost factor to reduce the price to \$13.00. Staff further noted arbitration orders in Texas requiring SWBT to provide access to mechanized loop qualification by July 1, 2000, and SWBT's efforts to provide further mechanization of the loop qualification process. Based on these circumstances, Staff offered its price as an interim charge to be discontinued after July 1, 2000.

Staff's basis for removing joint and common costs from nonrecurring charges, such as loop qualification, was that these costs are fully recovered in recurring charges. SWBT asserted that the expenses associated with nonrecurring charges were in fact in its underlying expense base on which the joint and common cost factor was determined. If this factor were not applied to nonrecurring charges, then there would be an underrecovery of joint and common costs unless the factor was increased. Staff was not able to verify that SWBT's accounting system in fact excluded expenses related to provisioning goods or services to which nonrecurring charges applied.

Covad stated that it should not have to subscribe to or pay for information that it does not require. Covad has stated that it only needs loop makeup information and that it can qualify the loop itself. Covad disagrees with SWBT concerning the amount of information that is required to qualify a loop. Covad has stated that it does not require SWBT's clerical or engineering labor to qualify a loop.

The Commission determines that Covad shall have electronic access only to the relevant loop qualification data that exists in SWBT's mechanized database by August 1, 2000. While the record indicates that the mechanized database may be available on July 1, 2000, the Commission has chosen a later cut-over date in order to allow a period for testing and training. As of the cut-over date Covad shall have electronic access only to the relevant data through SWBT's OSS at no additional charge. Covad will pay SWBT's proposed \$15.00 charge for loop qualification until August 1, 2000.

#### **Loop Conditioning**

The issues in this case concerning conditioning are whether SWBT should be permitted to charge for loop conditioning, and, if so, what is the appropriate price. SWBT does not charge for removing load coils or repeaters from loops under 12,000 feet because their presence on such loops is infrequent. For loops over 17,500 feet SWBT and Covad have agreed to terms. Thus, the focus in this arbitration involves loops of between 12,000 and 17,500 feet. Even in this range, conditioning will infrequently be required. SWBT stated that information it gathered showed load coils would be removed 2 percent of the time; bridged taps 6 percent of the time; and repeaters 0.6 percent of the time.

The Federal Communications Commission's (FCC's) interpretation of federal law requires SWBT to perform the conditioning work requested by Covad. However, it also requires that Covad compensate SWBT for the cost of such conditioning. The fact that Covad must compensate SWBT for the cost of conditioning the loops it requests is not disputed. However, the parties disagree sharply concerning how SWBT is to be compensated for its work.

SWBT's position is that it should be compensated based on nonrecurring charges established in prior cases before this Commission for the conditioning services it provides. Covad's initial position is that since SWBT's recurring charges are based on a network that does not require conditioning, that SWBT is already recovering its costs in the form of those recurring charges.

While the Commission may, under FCC decisions, permit the recovery of nonrecurring costs in the form of recurring charges, the Commission has previously established nonrecurring charges for loop conditioning costs. The Commission has not, in prior arbitration proceedings, affirmatively placed the cost of conditioning SWBT's existing network in recurring charges. The Commission has not made a finding that these costs are implicitly recovered in recurring charges.

SWBT testified that its cost studies supporting its recurring charges were based on least cost design and do not reflect the costs to condition existing loops.

In this proceeding the Commission's Staff advised against setting recovery of these costs in recurring charges because SWBT's network and the telecommunications environment are changing rapidly. Staff stated that setting recurring charges could be disadvantageous to CLECs. SWBT is undertaking a major investment in its network called Project Pronto that over a short period of time will deploy technology that would eliminate the need for loop conditioning or qualification for most customers using SWBT's network. Thus, nonrecurring charges for loop conditioning will become more and more infrequent and therefore less burdensome to CLECs than longer term recovery in recurring charges.

Covad argued, in the alternative, that nonrecurring charges be substantially reduced. Covad and Staff both offered evidence to support reducing certain task times; to eliminate tasks and associated costs, such as charging CLECs for the potential restoral of bridged taps; and requiring SWBT to employ more efficient conditioning practices such as conditioning entire 25 or 50 pair loop binder groups, rather than conditioning only one loop at a time. Staff argued for limits on the number of loops to which conditioning charges would be applied and removing a joint and common cost allocation from nonrecurring charges.

SWBT's proposed charges are based on its own interviews with its employees to determine the amount of time required to complete the tasks necessary to disconnect interfering devices from its existing network.

Covad strenuously challenged the admission of SWBT's cost evidence based on the lack of a supervising witness to sponsor this information. The Commission rejected these arguments and accepted SWBT's evidence. The information presented by SWBT was developed based on SWBT's longstanding business practices and using business records and information on which it typically relies. The Commission has accepted this information in other proceedings.

Covad also requested sanctions against SWBT for what Covad believed were incomplete responses to its discovery requests. However, it does not appear that the lack of fully verified information is the result of intent on SWBT's part to deny discovery. SWBT was insistent that it produced all the information it had that was responsive to Covad's discovery requests. Covad did not establish that any evidence was intentionally withheld. The problem appears to lie with the manner in which the subject cost studies were developed and the work-in-process nature of SWBT's planning for network development. The Commission will direct SWBT to provide more current cost studies and other information. The Commission denies Covad's request for sanctions.

Covad also argued for a significant reduction in conditioning costs based on conditioning 25 or 50 pair loop binder groups rather than one loop at a time and spreading the cost over the binder group. Covad and Staff presented evidence on the efficiency of this practice and its benefits in maintaining the network. The problem with Covad's argument is that it is based on speculation about how many loops will be leased for xDSL services. Without some firm knowledge about how many loops will be leased, it is impossible to devise a nonrecurring per-loop charge that will fully compensate SWBT for the up-front costs it must incur to condition a loop for Covad's use. Covad could have, but did not, propose to pay for binder group conditioning with SWBT passing subsequent nonrecurring charges for conditioning that binder group back to Covad.

Staff is concerned that the imposition of significant up-front conditioning charges will discourage the entry of competition in the provision of xDSL services and is concerned with the number of times such charges would apply. Staff proposed limiting the number of loops for which SWBT could charge nonrecurring conditioning costs to four loops out of 100. This proposal suffers the same infirmity as dividing conditioning charges by 50 or by 25: it results in a nonrecurring per loop charge that fails to fully compensate SWBT for the up-front costs it must incur to condition a loop for Covad's use.

The facilitation of service to a large number of customers is a worthy goal. SWBT is working toward this goal through Project Pronto.<sup>2</sup> This upgraded network will be available to Covad and other CLEC's on nondiscriminatory terms.

Covad and Staff offered reduced estimates of the time for certain tasks and resulting cost required to disconnect the interferors which reflect significant reductions to SWBT's estimates. This evidence was presented through the opinions of experts familiar with performing and supervising this work. Staff also recommended that the joint and common cost allocation factor should not be added to nonrecurring loop conditioning charges. Staff and Covad recommended the removal of SWBT's costs to restore bridged taps.

The Commission declines to make adjustments based on this record and will affirm and adopt for purposes of this interconnection agreement the nonrecurring charges it has previously approved. The Commission will order new cost studies to be performed by SWBT to document conditioning costs based upon verified data and facts and actual time and motion studies. The Commission will direct its Staff to participate in these cost studies. The Commission will direct that the cost studies be filed with the Commission within six months.

SWBT will also be directed to provide the Commission with confidential quarterly monitoring reports beginning July 1, 2000, showing the total number of loops requested for xDSL based services and the number of loops requested that required conditioning by binder group and by each affiliate or company requiring these loops or services.

The parties are directed to incorporate the conditioning prices adopted by the Commission in Sprint (Case No. TO-99-461, Arbitration Order, August 3, 1999).

#### **xDSL Loop Charges**

This issue presents the appropriate recurring and nonrecurring charges for ISDN loops. SWBT and the Staff both recommended that the Commission adopt the rates approved in the AT&T arbitration (Case No. TO-97-40, et al., Final Arbitration Order July 31, 1999).

Covad asserted that SWBT's ISDN rates were too high, and urged the Commission to adopt a proxy based on rates for an affiliated company in another state. Covad asserted that certain pricing for electronics was too high and did not reflect current costs that had declined significantly in recent years.

SWBT conceded that the pricing data used in its study dated to 1996, that many inputs had changed, and that the pricing of electronics had gone down. Nevertheless, SWBT asserted that it would be unfair to make changes to the cost study without reexamining all the inputs.

The Commission's Staff distinguished the ISDN loop rates used in other states. Specific adjustments to SWBT's costs were not offered by any party.

The Commission declines to make adjustments based on this record and will affirm and adopt the recurring and nonrecurring charges it has previously approved. The Commission will order new cost studies to be performed by SWBT to document

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<sup>2</sup>SWBT's Project Pronto is a network plan for deployment of additional fiber optic cables and next generation digital loop carrier (NGDLC) terminals, capable of providing xDSL-based services, in SWBT's loop network. These facilities will be first choice for xDSL.

these costs based upon verified data and facts and, in particular, updated electronics costs to reflect current technology and pricing. The Commission will direct its Staff to participate in these cost studies. The cost studies will be directed to be filed with the Commission within six months.

The parties are directed to incorporate the recurring and nonrecurring charges for ISDN loops adopted by the Commission in the AT&T arbitration (Case No. TO-97-40, et al., Final Arbitration Order July 31, 1999).

#### **Cross-Connect Rates**

This issue presents the appropriate recurring and nonrecurring rates for nonshielded and shielded cross-connects. SWBT and Staff agreed that the appropriate recurring and nonrecurring charges for nonshielded cross-connects are those established in the AT&T arbitration (Case No. TO-97-40, et al., Final Arbitration Order July 31, 1999). SWBT and Staff agreed that the appropriate recurring and nonrecurring charges for shielded cross-connects are those established in the Broadspan arbitration (Case No. TO-99-370, Final Arbitration Order June 15, 1999).

Covad asserted that it had not had an adequate opportunity to review SWBT's costing data. Covad suggested that the recurring charge was in the "ballpark" but offered an alternative for nonrecurring charges based on averaging a \$0.16 rate from California with a \$17.29 rate from Texas. SWBT distinguished the rates in California and Texas, noting that costing, component pricing and network design differs.

Covad has failed to support proposed pricing for shielded and nonshielded cross-connects based upon factors relevant to Missouri. The Commission declines to make adjustments based on this record and will affirm and adopt the recurring and nonrecurring charges it has previously approved.

The Commission will order new cost studies to be performed by SWBT to document these costs based upon verified data and facts. The Commission will direct its Staff to participate in these cost studies. The cost studies will be directed to be filed with the Commission within six months.

The parties are directed to incorporate the prices adopted by the Commission for recurring and nonrecurring charges for non-shielded cross-connects in the AT&T arbitration (Case No. TO-97-40, et al., Final Arbitration Order July 31, 1999), and recurring and nonrecurring charges for shielded cross-connects in the Broadspan arbitration (Case No. TO-99-370, Final Arbitration Order June 15, 1999).

#### **Technical Publications**

The issue stated here was whether SWBT should have the ability to make unilateral substantive modifications to its technical publications. Covad argued that SWBT should not be able to make unilateral changes that would affect Covad's rights and obligations under its interconnection agreement. Based on Covad's testimony, it appears that Covad's concern arose out of circumstances in Texas and California where Covad believed that proposed technical publications would limit the technology Covad could offer or deploy.

SWBT asserted that it must have the capability to update its technical publications in order to keep them current with new technology and equipment used in its network and with national standards and applicable regulations. SWBT indicated that it was willing to subject any disagreements to a dispute resolution process, but that it could not subject its ability to make modifications to individual CLECs.

Staff proposed that SWBT be permitted to make changes to its technical publications without prior approval by companies with which it has interconnection agreements. Staff stated that those changes should not be allowed to change existing interconnection agreements without further negotiations or arbitration. The Commission accepts Staff's proposal.

#### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following Conclusions of Law:

1. Section 252(b)(1) of the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996, provides that "during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."

2. Covad is a carrier for purposes of Section 252 of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996.

3. SWBT is an incumbent local exchange carrier for purposes of Section 252 of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996.

4. Covad's arbitration petition was timely filed, more than 134 and less than 161 days after Covad requested access to Unbundled Network Elements from SWBT on June 23, 1999.

5. Section 252(b)(4)(C) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 provides that:

[t]he State Commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

SWBT received Covad's request on June 23, 1999, and therefore the Commission must act to resolve this arbitration no later than March 23, 2000.

6. Section 252(c) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 provides that "[I]n resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall - . . . (2) establish any rates for interconnection

services, or network elements according to subsection (d). . . ."

7. Section 252(d) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 provides that:

Determinations by a State Commission of the just and reasonable rate for . . . network elements for purposes of subsection (c)(3) of such section -

(A) shall be -

(i) based on the cost (determined without reference to a rate-of-return or other rate based proceeding) of providing the . . . network element . . . , and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

8. Section 252(e)(4) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 provides that when an agreement adopted by arbitration is submitted to the Commission for approval, that the agreement will be deemed approved if the Commission does not act to approve or reject the agreement within 30 days.

*IT IS THEREFORE ORDERED:*

1. That Southwestern Bell Telephone Company shall charge DIECA Communications Inc., d/b/a Covad Communications Company, a nonrecurring charge of \$15.00 per loop for loop qualification services until August 1, 2000. After August 1, 2000, this charge shall not apply.

2. That on and after August 1, 2000, Southwestern Bell Telephone Company shall provide DIECA Communications Inc., d/b/a Covad Communications Company, with electronic access to only the relevant loop qualification data that exists in Southwestern Bell Telephone Company's mechanized databases. Covad shall have electronic access to this data through Southwestern Bell Telephone Company's Operational Support System at no additional charge.

3. That Southwestern Bell Telephone Company and DIECA Communications Inc., d/b/a Covad Communications Company, shall incorporate the conditioning prices adopted by the Commission in Sprint (Case No. TO-99-461, Arbitration Order, August 3, 1999).

4. That Southwestern Bell Telephone Company shall perform new cost studies to document conditioning costs based upon verified data and facts and actual time and motion studies. The Commission's Staff shall participate in these cost studies. The cost studies shall be filed with the Commission within six months.

5. That Southwestern Bell Telephone Company shall provide the Commission with confidential quarterly monitoring reports beginning July 1, 2000, showing the total number of loops requested for xDSL based services and the number of loops requested that required conditioning by binder group and by each affiliate or company requiring these loops or services.

6. That Southwestern Bell Telephone Company and DIECA Communications Inc., d/b/a Covad Communications Company, shall incorporate the recurring and nonrecurring charges for ISDN loops adopted by the Commission in the AT&T arbitration (Case No. TO-97-40, et al., Final Arbitration Order July 31, 1999).

7. That Southwestern Bell Telephone Company shall perform new cost studies to document ISDN loop costs based upon verified data and facts, and, in particular updated electronics costs to reflect current technology and pricing. The Commission's Staff shall participate in these cost studies. The cost studies shall be filed with the Commission within six months.

8. That Southwestern Bell Telephone Company and DIECA Communications Inc., d/b/a Covad Communications Company, shall incorporate the prices adopted by the Commission for recurring and nonrecurring charges for nonshielded cross connects in the AT&T arbitration (Case No. TO-97-40, et al., Final Arbitration Order July 31, 1999), and, recurring and nonrecurring charges for shielded cross connects in the Broadspan arbitration (Case No. TO-99-370, Final Arbitration Order June 15, 1999).

9. That Southwestern Bell Telephone Company shall perform new cost studies to document prices for recurring and nonrecurring charges for nonshielded cross connects, and recurring and nonrecurring charges for shielded cross-connects. The Commission's Staff shall participate in these cost studies. The cost studies shall be filed with the Commission within six months.

10. That Southwestern Bell Telephone Company may amend its technical publications and apply those amendments to DIECA Communications Inc., d/b/a Covad Communications Company, without obtaining prior approval. Amendments to technical publications for reasons other than actions of Missouri or federal legislative bodies, courts or regulatory agencies shall not be allowed to change any existing interconnection agreement between the parties without further negotiation or arbitration.

11. That Southwestern Bell Telephone Company and DIECA Communications Inc., d/b/a Covad Communications Company, shall submit their executed interconnection agreement to the Commission's Staff 15 days prior to filing it for the Commission's final review and approval.

12. That the Staff of the Missouri Public Service Commission shall submit its recommendations to the Commission concerning approval or rejection of the arbitrated interconnection agreement 15 days after the agreement is filed for the Commission's final review and approval.

13. That the request for sanctions by DIECA Communications Inc., d/b/a Covad Communications Company is denied.

14. That this order shall become effective on March 23, 2000.

Lumpe, Ch., concurs, with separate concurring opinion attached;  
Crumpton, Drainer, and Murray, CC., concur; Schemenauer, C., dissents.

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**CONCURRING OPINION OF CHAIR SHEILA LUMPE**

I am able to concur in this Arbitration Order because the underlying agreement is for a limited term of one year and because the Commission has directed the production of new cost studies. However, I do support Staff's position that costs for restoration of bridged taps should have been removed from conditioning costs.

The use of bridged tap is at the sole discretion of Southwestern Bell Telephone Company and is a means that it uses to service its new customers while avoiding investment it should be making in its own network.

Southwestern Bell Telephone Company's assertion that Covad Communications Company is responsible for this cost has no merit. The use of bridged taps provide no benefit to Covad Communications Company and hinders high-speed data access that both incumbent and competitive local exchange companies desire to provide to meet growing consumer demand for these services.

I can find no justification for including restoration of bridged taps as a cost of providing an xDSL-capable loop.

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**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 March 23, 2000*

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**Evidence, Practice & Procedure §8.** Where a non-unanimous stipulation and agreement is filed and parties file timely objections to it, the Commission is required to ignore the non-unanimous stipulation and agreement and to proceed with the case on the merits. The Commission understands the case law to mean that it cannot, by any procedural gymnastics, impose a non-unanimous stipulation and agreement on objecting parties and thereby dispose of a contested case. In previous cases, the Commission has stated that it considers a non-unanimous stipulation and agreement "to be merely a change of position by the signatory parties from their original positions to the stipulated position." Likewise, the Commission will proceed in the present matter pursuant to law and its own rules of practice and procedure, granting such relief as, after hearing, it concludes has been shown to be warranted under the law.

**Accounting §42.** The Uniform System of Accounts adopted by the Commission for Water Utilities authorizes the deferral of extraordinary expenses without Commission approval. Thus, seeking an Accounting Authority Order serves only to resolve the question as to whether the expenses in question were indeed extraordinary.

**ORDER CONCERNING NON-UNANIMOUS STIPULATION AND AGREEMENT, DENYING MOTION TO MODIFY PROCEDURAL SCHEDULE, GRANTING RECONSIDERATION AS TO ACCOUNTING AUTHORITY ORDER AND DENYING MOTION TO COMPEL**

**Procedural History:**

On October 15, 1999, Missouri-American Water Company (MAWC) filed proposed tariff sheets seeking a general rate increase for water and sewer service provided to customers in its Missouri service areas. The Commission, on October 28, 1999, suspended the proposed tariff sheets until September 14, 2000.

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\*See pages 254 and 322 for other orders in this case.

The proposed water service tariffs are designed to produce an annual increase of approximately 53.97 percent (\$16,446,277) in the Company's revenues. The proposed sewer service tariffs are designed to produce an annual increase of approximately 5.0 percent (\$2,363) in the Company's revenues.

This Order addresses several different but more or less related disputes which have arisen in the course of this matter. The first concerns a Non-unanimous Stipulation and Agreement filed by MAWC, together with the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel).<sup>1</sup> The second concerns the motion by the stipulating parties to modify the procedural schedule. The third concerns MAWC's efforts to obtain an Accounting Authority Order (AAO). The fourth concerns Public Counsel's motion to compel MAWC to respond to discovery.<sup>2</sup>

#### **The Non-unanimous Stipulation and Agreement**

On February 23, 2000, the Signatory Parties filed their Non-unanimous Stipulation and Agreement (Stipulation), which provided in part for a mechanism of "deferred revenues" during the lag period between the date that MAWC's new St. Joseph plant goes on line and the date MAWC's new rates, which may include the new plant in rate base, take effect.<sup>3</sup> In the event that the Commission approves this Stipulation, MAWC agreed to withdraw its proposed tariffs, the filing of which initiated this case. MAWC further agreed to merge with its subsidiary, St. Louis County Water Company, and to initiate a new rate case no later than May 31, 2000.

Such non-unanimous stipulations and agreements are governed by Commission Rule 4 CSR 240-2.115.<sup>4</sup> That rule provides, first, that nonsignatory parties have only five days after receipt of a non-unanimous stipulation and agreement to request a hearing. *Supra*, at (3). It further provides that, in the absence of a timely request for a hearing, the Commission may treat the non-unanimous stipulation and agreement as a unanimous stipulation and agreement. *Supra*, at (1).

Accordingly, on February 25, 2000, the Commission issued its Notice and Order, setting March 8, 2000, as the deadline for hearing requests pursuant to Rule 115(3). This Notice and Order was distributed by telefacsimile to counsel for all parties of record, as well as by First Class Mail. The Commission took this action out of concern that all non-signatory parties be afforded an adequate opportunity to file a request for a hearing.

On March 1, 2000, a group of fourteen intervenors<sup>5</sup> jointly filed an objection to the Stipulation and a request for hearing on "all issues in the case." The Objecting Intervenors did not specify these issues in their pleading and cited no authority except Rule 115.

<sup>1</sup>Referred to jointly herein as the "Signatory Parties."

<sup>2</sup>On March 15, 2000, the Commission by Order extended the deadlines for the filing of Direct Testimony, thus disposing of that portion of Public Counsel's motion.

<sup>3</sup>The plant is currently expected to be on-line by April 30, 2000.

<sup>4</sup>For the sake of brevity, referred to herein as "Rule 115."

<sup>5</sup>AG Processing, Inc., a Cooperative, Friskies Petcare, a Division of Nestle USA, Wire Rope Corporation of America, Inc., St. Charles County, the cities of St. Peters, Warrensburg, O'Fallon, Weldon Spring, and Joplin, Hawker Energy Products, Inc., Harmon Industries, Inc., Stahl Specialty Company, Swisher Mower and Machine Company, and Central Missouri State University. Jointly referred to herein as "the Objecting Intervenors."

On March 3, 2000, the Commission issued its Order Denying Rehearing and Concerning Accounting Authority Order, which Order concerned the Stipulation only in one respect:

That the Commission will convene an evidentiary hearing on the Motion for Reconsideration filed on February 10, 2000, by Missouri-American Water Company with respect to the Commission's Order concerning the Accounting Authority Order. **That hearing will be held together with the hearing mandated by Rule 4 CSR 240-2.115(2) on the non-unanimous Stipulation and Agreement filed herein.** The Commission will set a date for that hearing and a procedural schedule in a separate Order.

The above-cited language in the Commission's Order of March 3, 2000, provoked the Objecting Intervenors to file their motion for rehearing on March 7, 2000. In that pleading, the Objecting Intervenors assert that the Commission has misunderstood both its Rule 115 and their request for hearing of March 1, 2000.

The Objecting Intervenors point out that they requested a hearing "on all issues in the case" and not a hearing on the Stipulation as the Commission's Order implied. This, they state, is a factual error in the Order that should be corrected. The Objecting Intervenors further assert that the Order of March 3, 2000, is unlawful and contrary to Rule 115(1) to the extent that it indicates that the hearing therein contemplated will be limited in scope to the Stipulation. State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo. App., W.D. 1982), *cert. den.*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). The Stipulation, the Objecting Intervenors assert, is no more than the joint recommendation of the parties that signed it. See State ex rel. Kansas City Power & Light Company v. Public Service Commission, 770 S.W.2d 740, 742 (Mo. App., W.D. 1989); In re Application of Empire District Electric Company, 1999 Mo.P.S.C. Lexis 173, 179 (1999); In re Missouri Public Service, 2 Mo.P.S.C.3d 221, 223 (1993).

On March 13, 2000, the Signatory Parties filed suggestions in opposition to the Objecting Intervenors' motion for rehearing. The Signatory Parties suggest therein that the Order of March 3, 2000, correctly construed Rule 115 when it referred to a hearing on the Stipulation. They rely on no citations to authorities for this position, but urge that it is the plain and unmistakable reading of the rule. They also assert that the rule of Fischer, *supra*, is inapplicable because of differences between the present circumstances and those in that case. These differences amount to no more than the Signatory Parties' assertion that the Objecting Intervenors will get a full hearing on the merits of this matter, and thus due process, no matter which way the Commission might rule.

In Fischer, the Commission was presented with a non-unanimous stipulation and agreement in which all parties joined but the Public Counsel. The Commission held a hearing on the non-unanimous stipulation and agreement, but permitted Public Counsel to present such testimony, and to pursue such cross-examination, as he chose. The Commission then approved the non-unanimous stipulation and

agreement and based its order disposing of the case upon it. The Court of Appeals reversed. First, the Commission's order was held inadequate as a matter of law because the factual findings were conclusory and insufficient to support the Commission's disposition of the case, in violation of Section 386.420, RSMo. That statute requires that all parties have the opportunity to be heard and to present evidence in Commission proceedings and also that all Commission orders contain written findings of fact. Fischer, 645 S.W.2d at 42-43; State ex rel. Rice v. Public Service Commission, 220 S.W.2d 61, 65 (Mo. 1949). The court stated:

Rather than performing its statutory duty to fix a rate design . . . based on findings of fact supported by competent and substantial evidence, the Commission appears to have simply adopted the stipulation [and] agreement. This procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission.

Fischer, *supra*, 645 S.W.2d at 43.

The Public Counsel in Fischer also attacked the Commission's order as made on unconstitutional procedure. The court agreed that the hearing procedure adopted by the Commission denied due process to the Public Counsel because, although he was permitted to present evidence and conduct cross examination, "the Commission had previously decided that the only issue it would consider was whether or not to approve the stipulation and agreement." *Id.* The court went on to explain:

the hearing afforded Public Counsel was not meaningful, in that the Commission was precluded from considering anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal.

Fischer, *supra*, 645 S.W.2d at 43.

Turning to the present case, the Commission's statutory duty is to set a rate for MAWC based on findings of fact supported by competent and substantial evidence. The attempt by the Signatory Parties to distinguish Fischer fails, for even if due process were satisfied in the present case, there remain the requirements of Section 386.420, RSMo. The Court in Fischer stated, with respect to the procedure of determining a case on the basis of a non-unanimous stipulation and agreement, "[t]his procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission." The Commission understands Fischer to mean that it cannot, by any procedural gymnastics, impose a non-unanimous stipulation and agreement on objecting parties and thereby dispose of a contested case.

In previous cases, the Commission has stated that it considers a non-unanimous stipulation and agreement "to be merely a change of position by the signatory parties from their original positions to the stipulated position." In the Matter of the Application of Empire District Electric Company, Case No. EA-99-172

(*Report and Order*, issued December 7, 1999); *In the Matter of Missouri Public Service*, 2 Mo.P.S.C.3d 221, 223 (1993). As the Commission explained in *Empire District*, *supra*:

The Commission need not, and will not, “approve” or “disapprove” the Agreement. In that regard, some of the parties have suggested that Empire and the other signatories to the Agreement have an obligation to present evidence to “support” the Agreement. In the context of this case, that suggestion is misleading. Section 393.170.3, RSMo 1994, provides that the Commission may grant a certificate of convenience and necessity if, after due hearing, it determines that “such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service.” If the Commission finds that the requirements of law have been satisfied, it will grant the requested certificates of convenience and necessity. If those requirements have not been met, then no certificates will be granted, no matter what some of the parties may have agreed upon in the non-unanimous stipulation and agreement.

Likewise, the Commission will proceed in the present matter pursuant to law and its own rules of practice and procedure, granting such relief as, after hearing, it concludes has been shown to be warranted under the law.

In the *Missouri Public Service* case cited above, 2 Mo.P.S.C.3d at 223, the Commission also addressed the responsibilities of parties objecting to a non-unanimous stipulation and agreement:

When a nonunanimous stipulation is filed, the nonsignatory party must notify the Commission and the stipulating parties of the specific issues which it is disputing and must adduce evidence or testimony on those specific issues. The stipulating parties must likewise file evidence and testimony supporting settlement of the disputed issues.

The Objecting Intervenors have not, by requesting a hearing on “all issues in the case,” given notice of “the specific issues which it is disputing.” However, it is hard to see how, at this early stage in this case, they could do so. The Commission concludes that the filing of testimony, an issues list, and position statements as called for in the existing procedural schedule will be sufficient to define the issues actually in dispute herein.

For the reasons explained above, the Commission determines that the Objecting Intervenors’ request for a hearing on “all issues in the case,” pursuant to the existing procedural schedule, should be granted. Their Motion for Rehearing directed at the Commission’s Order of March 3, 2000, which served primarily to clarify their hearing request, shall be denied.

### **The Joint Motion to Modify the Procedural Schedule**

This motion, filed by the Signatory Parties the day following the filing of their Stipulation, calls for extensive modifications to the procedural schedule in order to permit a hearing and determination on the Stipulation prior to April 30, 2000. In that motion, they promised to file direct testimony in support of the Stipulation on or before March 1, 2000; and, on March 1, MAWC, Staff and Public Counsel filed the direct testimony of four witnesses in support of the Stipulation.

The Objecting Intervenors make several arguments against the joint motion to modify the procedural schedule, the best of which is the fact that the hearing contemplated by Rule 4 CSR 240-2.115(2), and which these intervenors requested on March 1, 2000, is not a hearing on the Stipulation but a hearing on whatever issues the movant identifies. In the present case, that is a hearing on "all issues in the case." However, under *Fischer, supra*, the disposition of a contested case on the basis of a non-unanimous stipulation and agreement is not permissible.<sup>6</sup> Thus, the modifications to the procedural schedule requested by the Signatory Parties are unnecessary.

The Commission has granted, by Order issued on March 15, 2000, an extension of time for the filing of Direct Testimony by all parties other than MAWC. This was the one aspect of the joint motion on which all parties that were heard from agreed.

### **The Accounting Authority Order**

On November 19, 1999, MAWC filed its motion for an Accounting Authority Order (AAO) with respect to its new plant in St. Joseph, Missouri. In support of its motion, MAWC stated that the plant is expected to go on-line about four-and-one-half months before MAWC's new tariffs take effect. During this interval, MAWC asserted that it will be exposed to large costs with respect to the plant, \$347,000 monthly, and will collect no corresponding revenues. Therefore, MAWC sought authority to continue to capitalize the allowance for funds used during construction (AFUDC) until September 14, 2000, and to amortize the post-in-service AFUDC over twenty years at 7.22 percent per annum. MAWC also sought to defer depreciation on its new plant until September 14, 2000, and to amortize the deferred depreciation over the life of the plant. An AAO was warranted, in MAWC's view, because the new plant is an extraordinary and unique item, equal in value to fully 40 percent of MAWC's rate base.

Other parties, including Staff, Public Counsel and the Industrial Intervenors,<sup>7</sup> an informal association of industrial customers of MAWC from St. Joseph, opposed the AAO. The Industrial Intervenors contended that it would mean higher

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<sup>6</sup>Except, of course, in those cases in which a failure to file timely requests for a hearing permits the Commission to treat the non-unanimous stipulation and agreement as a unanimous stipulation and agreement. Rule 115(1).

<sup>7</sup>AG Processing, Inc. (a Cooperative), Friskies Petcare, a Division of Nestle USA, and Wire Rope Corporation of America, Inc.

rates for customers. Public Counsel and Staff asserted that the new plant was not a unique or extraordinary event such as supports an AAO and that MAWC was simply trying to avoid regulatory lag. MAWC responded that all AAOs are intended to avoid regulatory lag and that granting the AAO would do nothing but preserve the issue of the recovery of these amounts for the rate case and would not in any way guarantee that MAWC will recover all or any part of them.

The Commission issued its Order Concerning Test Year, True-up, Accounting Authority Order, and Local Public Hearings on February 1, 2000. In that Order, the Commission stated:

That the Commission will defer decision on Missouri-American Water Company's Motion for an Accounting Authority Order until it issues its Report and Order in this case. The parties will thoroughly advise the Commission on this issue in testimony and briefing. Any party that wishes to supplement its already-filed testimony to include this issue may do so.

Thereafter, on February 10, 2000, MAWC filed its Motion for Reconsideration of the Order of February 1, 2000, with respect to the Accounting Authority Order. MAWC asserted therein that the AAO must be in place before the new plant goes on line in order to preserve the issue of recovery for the rate case. The Industrial Intervenors responded in opposition to MAWC's motion on February 18, 2000; MAWC replied on February 28, 2000. On March 15, 2000, Public Counsel filed its very belated suggestions in opposition to MAWC's motion for reconsideration and, on March 22, filed its Motion to Suspend Procedural Schedule and Request for Expedited Consideration. On March 23, 2000, MAWC filed its Response to Public Counsel's Suggestions in Opposition to MAWC's Motion for AAO and for Reconsideration of Order Concerning AAO.

On March 3, 2000, as previously noted, the Commission issued its Order Denying Rehearing and Concerning Accounting Authority Order. In that Order, the Commission indicated that it would hold a hearing on MAWC's motion for reconsideration together with a Rule 115 hearing on the Non-unanimous Stipulation and Agreement. However, as explained previously in this Order, the Commission will not hold a hearing on the Non-unanimous Stipulation and Agreement. Neither will the Commission hold a hearing on MAWC's motion for reconsideration.

An AAO is, as MAWC has repeatedly asserted, merely an accounting mechanism that permits deferral of costs from one period to another. In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d 200, 202 (Dec. 20, 1991). The items deferred are booked as an asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period. *Id.* AAOs should be used sparingly because they permit ratemaking consideration of items from outside the test year:

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. State ex. rel. Union Electric Company v. PSC, (UE), 765 S.W.2d 618, 622 (Mo. App. 1988).

In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 205.

The Commission will not hold a hearing on MAWC's Motion for Reconsideration because no hearing is necessary. The Commission, pursuant to its authority to prescribe uniform accounting methods at Section 393.140(4), RSMo, has adopted the Uniform System of Accounts (USOA) and required public water utilities to comply with it. Rule 4 CSR 240-50.030(1). The USOA authorizes utilities to defer extraordinary and non-recurring expenses without prior permission of the Commission. State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 810 (Mo. App., W.D. 1993); In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 203. The Commission has previously taken the position that, as authority from the Commission in the form of an AAO is not necessary for deferral anyway, the Commission need not hold an evidentiary hearing prior to granting an AAO. In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 204.<sup>8</sup>

The only benefit from seeking prior Commission approval for deferring costs is to remove the issue of whether those costs are extraordinary from the case. *Id.*, at 203-204. It is not appropriate to remove that issue where, as here, it is contested. The Commission will authorize MAWC to capitalize its post-in-service AFUDC and defer depreciation on its new plant after its in-service date. Specific Commission approval is not necessary; Rule 4 CSR 240-50.030(1) authorizes MAWC to do so. All issues, including whether or not these costs are indeed extraordinary and non-recurring, remain for the hearing, as the Commission indicated in its Order of February 1, 2000.

Although MAWC does not need Commission approval to defer the costs in question, the motion for reconsideration will be granted.

#### **Public Counsel's Motion to Compel**

On February 28, 2000, Public Counsel filed its Motion to Compel Responses to Data Requests, Request for Extension of Time to File Testimony and Request for Expedited Consideration. That motion is now moot because, on March 15, 2000, the Commission extended the deadline for the filing of direct testimony by all parties other than MAWC. Therefore, Public Counsel's motion will be denied.

*IT IS THEREFORE ORDERED:*

1. That the request for a hearing on "all issues in the case" pursuant to the existing procedural schedule herein, filed by certain intervenors on March 1, 2000, and clarified by their Motion for Rehearing filed on March 7, 2000, is granted.
2. That the Motion for Rehearing of the Commission's Order of March 3, 2000, filed by certain intervenors on March 7, 2000, is denied.

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<sup>8</sup>This theory has not yet been tested on appeal. See Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 809-10 (Mo. App., W.D. 1993).

3. That the Motion to Modify the Procedural Schedule filed on February 23, 2000, by Missouri-American Water Company, the Staff of the Public Service Commission, and the Office of the Public Counsel is denied.

4. That the Motion for Reconsideration filed by Missouri-American Water Company on February 10, 2000, is granted. Missouri-American Water Company may capitalize post-in-service AFUDC and defer depreciation with respect to its new water treatment plant in St. Joseph, Missouri, pending the final determination by this Commission.

5. That the Motion to Compel Responses to Data Requests, Request for Extension of Time to File Testimony and Request for Expedited Consideration filed by the Office of the Public Counsel on February 28, 2000, is denied.

5. That this Order shall become effective on April 4, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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**In the Matter of the Application of the Clarence Cannon Wholesale Water Commission for Cancellation of Its Certificates of Convenience and Necessity and Tariffs and for an Order Recognizing Termination of Public Service Commission Jurisdiction.**

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*Case No. WA-2000-17*  
*Decided March 23, 2000*

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**Water §§8, 26.** In response to action by the legislature, the Commission found that it no longer had jurisdiction over Clarence Cannon Wholesale Water Commission, cancelled its certificates and tariff, and recalculated its assessment to only assess it for the portion of the fiscal year it was under the Commission's jurisdiction.

**ORDER CANCELING CERTIFICATE AND TARIFF AND  
ORDER TERMINATING JURISDICTION**

In 1999, the 90<sup>th</sup> General Assembly passed, and the Governor subsequently signed into law, two separate pieces of legislation (HS HCS SS SCS SB s 160 and 82, and CCS SS SCS HS HB 450) which, *inter alia*, removed all references to "water" and "water corporations" from Section 386.025 and 393.295 RSMo. This legislation became effective on August 28, 1999.

On June 13, 1999, the Clarence Cannon Wholesale Water Commission (CCWWC) filed an application with the Commission requesting that the Commission issue an order which would (1) cancel CCWWC's certificates of convenience and necessity; (2) cancel CCWWC's tariff(s); (3) declare that the Commission's

jurisdiction over CCWWC has been terminated; and (4) waive in part or in full CCWWC's FY2000 annual PSC assessment.

On August 27, 1999, the Staff of the Missouri Public Service Commission (Staff) filed its memorandum in which it recommended approval of the application. Staff noted that CCWWC does not provide service at retail to individual customers. CCWWC provides water supply and treatment services on a wholesale basis to its member cities and water districts. The ultimate customers of CCWWC are members of CCWWC's twenty-member municipalities and water districts. As such, the retail customer continues to be represented through the election process within their respective municipality or through their membership within their respective water district.

Staff's August 27 memorandum concluded with a request that the Commission recalculate and reissue the assessment of CCWWC on a pro-rata basis. Staff asserted this would be a reasonable calculation of assessment *in this instance* (Emphasis added). Staff also recommended the Commission cancel CCWWC's certificates and its tariff and also recognize the termination of the Commission's jurisdiction over CCWWC.

After a review of CCWWC's application and of the Staff's memorandum, the Commission issued an order directing filing. The parties were directed to clarify the actual number of certificates currently held by CCWWC and the name(s) in which those certificates were held. Similarly, the parties were asked to confirm that although CCWWC may have multiple certificates, it held only one tariff.

Lastly, the Commission asked the parties to respond to CCWWC's request regarding its assessment. In its application, CCWWC asked that the Commission waive in its entirety the annual assessment which CCWWC would be required to pay the Commission as of July 1, 1999. In the alternative, CCWWC asked the Commission recalculate on a *pro rata* basis its assessment. The Commission questioned the parties as to its authority for refunding an assessment for a period of time within which the utility in question was required by law to be regulated under the Commission's jurisdiction. The question regarding CCWWC's assessment actually involves two different issues. First, may the Commission refund assessment fees already paid for a period in which this utility was assessed? Second, may the Commission recalculate an assessment on a pro-rata basis?

On January 18, 2000, CCWWC filed its Response To Order Directing Filing. CCWWC denied any specific information regarding the certificates which it may now hold and waived any *ex parte* consideration to the extent necessary so that the Commission and its staff might investigate those facts as needed. However, this waiver was not necessary and no such communication took place.

As to legal authority regarding refund of assessments in whole or in part, counsel for CCWWC noted that there is no statute or case law which governs this issue. However, CCWWC's counsel did assert that the Commission has the ability to make such a refund pursuant to the appropriation process of the Missouri General Assembly. The provisions of C.C.S. H.B. 7, wherein both appropriations to, and payments from, the Public Service Commission fund provides this authority. This section shows the amount of \$10,000.00E ("E" meaning estimated, which allows more or less than this amount as a matter of law) and should provide

sufficient legal authority for the Commission to issue a refund to CCWWC as has been requested. CCWWC further argued that there is no law to preclude the Public Service Commission fund from making a refund for an overpayment by a regulated utility.

On March 15, 2000, the Staff submitted its response to the order directing filing and within that response provided the following information. There is one certificate, which was issued in Case No. WA-90-3, and this certificate has been amended by adding additional service areas in three subsequent cases, specifically: Case No. WA-92-137, Case No. WA-96-171, and Case No. WA-97-141. CCWWC has only one tariff, specifically P.S.C. Mo. No. 1. The Commission's assessment to CCWWC for the fiscal year beginning July 1, 1999, was \$18,237.00.

As noted above, in the Memorandum that Staff filed in this case on August 27, 1999, the Staff stated that it believed that "recalculation and reissuance of the assessment on a pro-rata basis would be reasonable in this instance." However, in its response filed on March 15, 2000, after further reflection and research, Staff stated it was unable to find any legal authority that would authorize a refund of any portion of the monies that CCWWC has paid into the PSC fund. In fact, the Staff now argues that CCWWC is responsible for not only the first quarterly installment of this assessment, which CCWWC has already paid (\$4,559.49), but that it is also responsible for the unpaid balance of its annual assessment (\$18,237.00 less \$4,559.49, or \$13,677.51).

While it is clear that the purpose of Section 386.370, RSMo is to assess the expenses that the Commission incurs in regulating any group of public utilities during any fiscal year, it is not clear what the Commission is to do when the regulation of a given utility is terminated by the legislature. The Staff could find no statute that either authorizes or prohibits a partial refund of an assessment against a regulated public utility.

The Commission finds the legislation in question provides authority for terminating the assessment as of the same date upon which this legislation became law. When faced with an issue of first impression, such as this, the Commission must interpret the legislation within the realm of utility regulation as it exists today. The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight. *Foremost-McKesson, Inc v. Davis*, 488 S.W.2d 193, 197 [1-4] (Mo. Banc 1972). The Commission finds that it was the intent of the legislature to end jurisdiction on a date certain and that the assessment should have ended on that day as well. The Commission further finds that cancellation of CCWWC's certificate(s), tariff and the recalculation of CCWWC's assessment is not detrimental to the public interest.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the application.

*IT IS THEREFORE ORDERED:*

1. That the certificate(s) of service authority for Clarence Cannon Wholesale Water Commission as set out herein are hereby canceled.

2. That the tariff P.S.C. Mo. No. 1 of Clarence Cannon Wholesale Water Commission is hereby canceled.
3. That under the statutes in effect on this date the Commission no longer retains regulatory authority over the Clarence Cannon Wholesale Water Commission.
4. That the annual assessment for the Clarence Cannon Wholesale Water Commission shall be recalculated by the Staff of the Commission on a *pro rata* basis so that the Clarence Cannon Wholesale Water Commission shall not be required to pay an assessment fee for the period on and after August 29, 1999.
5. That this order shall be effective April 3, 2000.
6. That this case shall be closed April 4, 2000.

Lumpe, Ch., Crumpton, and Drainer, CC., Concur.  
Murray and Schemenauer, CC., Dissent.

Dale Hardy Roberts, Chief Law Judge

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**GS Technology Operating Company, Inc., d/b/a GST Steel  
Company, Complainant, Kansas City Power & Light Com-  
pany, Respondent.\***

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*Case No. EC-99-553  
Decided March 23, 2000*

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**Evidence, Practice & Procedure §22.** Where an electric corporation filed pleadings containing errors as to its corporate structure and identity and the Commission relied on those errors, the corporation, but not its counsel, was found to have committed misconduct before the Commission. Because this misconduct did not prejudice other parties, no sanction was imposed.

**Evidence, Practice & Procedure §25.** Where an electric corporation filed pleadings containing errors as to its corporate structure and identity, the Commission was not required to dismiss the complaint because of those errors.

**ORDER REGARDING MOTION TO COMPEL,  
FOR DIRECTED FINDINGS AND  
FOR INTERIM RELIEF**

February 22, 2000, GS Technology Operating Company, Inc., doing business as GST Steel Company (GST), filed its Motion to Compel Production of Documents,

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\*See page 186 for another order in this case. On September 1, 2000, this case was appealed to Cole County Circuit Court (00CV324891).

for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief. Respondent Kansas City Power & Light Company (KCPL) responded on March 3, 2000. GST then replied to KCPL's response on March 13, 2000. Thus, GST's motion is now ripe and ready for determination.

**Request for Interim Relief:**

GST has renewed its request for interim relief, a request denied more than once in this proceeding already. GST presents nothing in this latest attempt to gain interim relief that sways the Commission to alter its previous decision. Citations to cases in which the Commission granted interim rate relief to utility companies are without relevance in this context. Likewise, the Commission is not persuaded by GST's assertion of the inapplicability of Utility Consumers Council of the State of Missouri v. Public Service Commission, 585 S.W.2d 41, 51-58 (Mo. banc 1979). As KCPL accurately observed in its response, Utility Consumers teaches that the Commission cannot do anything it is not authorized to do by statute.

GST suggests that the Commission is authorized to grant the requested interim relief by Section 393.130.1, RSMo 1994. However, even if the Commission is so empowered under that or some other statute, GST has failed to show why the Commission should exercise this power to grant relief to GST prior to its establishment of any fact in this matter. GST has not shown that this is such a case in which the public interest demands that the Commission take immediate and summary measures. Rather, this is a case in which due process requires that the Commission act, if at all, upon the competent and substantial evidence established by normal contested case procedures.

GST's renewed request for interim relief is denied.

**Request for Directed Findings:**

GST also requests that the Commission make certain "directed findings"; that is, that the Commission by order apply the doctrine of *res ipsa loquitur* to this proceeding in advance of the evidentiary hearing.

The doctrine of *res ipsa loquitur* is a rule of evidence that permits a jury to infer from circumstantial evidence that the defendant is negligent without requiring that the plaintiff prove defendant's specific negligence. Trefney v. Nat'l Super Markets, Inc., 803 S.W.2d 119, 121 (Mo. App. 1990). Like any other case, the plaintiff begins in a *res ipsa loquitur* case bearing both the burden of proof and the burden of evidence. McCloskey v. Kopljar, 329 Mo. 527, 46 S.W.2d 557, 563 (1932). The plaintiff must prove the doctrine's three elements: "(1) the incident resulting in injury is of the kind which ordinarily does not occur without someone's negligence; (2) the incident is caused by an instrumentality under the control of the defendant; and (3) the defendant has superior knowledge about the cause of the incident." Trefney, 803 S.W.2d at 121. By plaintiffs proving the three elements, the defendant must meet a broader assault than that posed by specific allegations of negligence

under a specific negligence theory. McCloskey, 46 S.W.2d at 563. The plaintiff, however, still bears the risk of nonpersuasion and must show by the greater weight of the evidence that injury resulted from the defendant's negligence. *Id.*

Weaks v. Rupp, 966 S.W.2d 387, 393-94 (Mo. App., W.D. 1998).

KCPL asserts in its response that the Commission lacks authority to apply the doctrine of *res ipsa loquitur*. However, the Commission need not reach that question. GST's request to apply the doctrine in this case at this time is without merit. GST has never yet established the three elements of the doctrine.<sup>1</sup> The doctrine is applied in circumstances in which it is clear that the defendant is most likely the negligent party, even if it is not clear precisely how the defendant was negligent. GST has not adduced any facts thus far, and certainly has not shown that KCPL was most likely the negligent party with respect to the Hawthorn incident. For example, KCPL refers several times in its pleadings to other possibilities.

Furthermore, GST invokes the application of *res ipsa loquitur* primarily as a sanction for alleged discovery abuse by KCPL. The Commission is not persuaded that there has been any discovery abuse by KCPL. According to KCPL, many thousands of documents have been produced in response to GST's numerous discovery requests. Additional staff has been employed to help process the requests and the answers to them. Counsel for KCPL appeared perfectly reasonable at the recent prehearing conference and were evidently prepared to negotiate in good faith with GST to resolve the discovery dispute.

GST may argue *res ipsa loquitur* in its posthearing brief if it wishes. However, GST's request for directed findings is denied.

#### **Motion to Compel Discovery:**

Finally, GST seeks to compel certain discovery. On March 6, 2000, after KCPL had filed its response and before GST filed its reply, a prehearing conference was convened in this matter. The pending discovery dispute was taken up at that time; the parties also had an opportunity to discuss their differences and some were resolved. GST's reply of March 13, 2000, indicates the following items remain: a Cause and Effect Diagram, KCPL's responses to Data Requests (DRs) 10.6 and 10.7, and certain documents received by KCPL from Crawford Investigative Services.

At the prehearing conference, counsel for KCPL explained that the Cause and Effect Diagram no longer existed and had never consisted of more than some Post it™ Notes stuck on a wall during a brainstorming session. KCPL need not produce the diagram, for it cannot produce what does not exist.

DRs 10.6 and 10.7 were not discussed in GST's motion of February 22, 2000. Consequently, they are not properly before the Commission at this time as KCPL has not had an opportunity to respond to GST's allegations concerning them.

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<sup>1</sup>Thus, in a civil trial, plaintiff would request a *res ipsa loquitur* instruction at the close of evidence, and the judge would grant or deny the request based upon the showing made by plaintiff in the trial.

The only remaining items are forty some employee statements obtained by Crawford Investigative Services (Crawford) from employees of KCPL. KCPL asserts that these statements are privileged from discovery and GST contends that they are not. KCPL asserts the work product privilege and the attorney client privilege, contending that Crawford took the statements while working jointly for KCPL and its insurer in investigating the Hawthorn incident. KCPL characterizes this work as done in anticipation of litigation, for it shares a common interest with its insurer in finding someone to sue over the boiler explosion. GST, on the other hand, asserts that any possible privilege was lost by sharing the statements with third parties, that is, Crawford and the insurer. GST denies that KCPL and its insurer share a community of interest in this matter and characterizes their interests as potentially adverse. Both cite numerous cases in support of their positions.

The Commission concludes that KCPL is correct. Witness statements are within the attorney work product privilege. Mo. R. Civ Pro. 56.01(b)(3); State ex rel. Atchison, Topeka and Santa Fe Railway Company v. O'Malley, 898 S.W.2d 550 (Mo. banc 1995). The statements themselves, being tangible work product, may be obtained on a showing of substantial need and inability to obtain the equivalent. O'Malley, supra, at 554. In the present case, GST has not shown an inability to obtain the equivalent because, as KCPL has noted, GST is free to depose the witnesses in question. Witness statements also implicate the intangible aspect of the work product privilege because they may embody the impressions, plans, and strategic decisions of counsel. Opinion work product is absolutely privileged. O'Malley, supra, 552-53.

Crawford, an investigative agency assisting KCPL in the preparation of this case, is within the ambit of the attorney-client privilege and the work product immunity. The "rule as to the absence of privilege where a third person is present does not apply when the third person is the confidential agent of either the client or the attorney." McCaffrey v. Brennan's Estate, 533 S.W.2d 264, 267 (Mo. App. 1976) (quoting 58 Am. Jur. "Witnesses"). The fact that Crawford is also passing information to KCPL's insurer does not defeat KCPL's assertions of privilege. Having acknowledged coverage and paid KCPL's claim, the insurance company's interest is sufficiently identical to KCPL's to support the claim of privilege. See Brantley v. Sears Roebuck & Co., 959 S.W.2d 927, 928 (Mo. App., E.D. 1998). As KCPL asserts, its insurer and KCPL own different parts of the same cause of action.

Finally, and as a wholly independent ground for the Commission's decision to deny GST's motion to compel, we have had occasion before in this case to refer to the admonition of State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. App., E.D. 1985), concerning the duty of the tribunal to prevent the "[s]ubversion of pre-trial discovery into a 'war of paper.'" That point has been reached here.

GST's motion to compel discovery is denied.

*IT IS THEREFORE ORDERED:*

1. That the Motion to Compel Production of Documents, For Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief filed by GS Technology Operating Company Inc., doing business as GST Steel Company, on February 22, 2000, and corrected on February 24, 2000, is denied.

2. That this order shall become effective on April 4, 2000.

Lumpe, Ch., Crumpton, Drainer,  
Murray, and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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**In the Matter of the Application of Southern Union Company for  
Authority to Acquire Up to and Including Five Percent (5%)  
of the Common Stock of Fall River Gas Company, Valley  
Resources, Inc., and Providence Energy Corporation.**

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*Case No. GF-2000-504  
Decided March 28, 2000*

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**Gas §6.** The Commission approved an application from a gas company to immediately acquire up to five percent of the outstanding common stock of three out-of-state gas companies in anticipation of a pending merger, with certain conditions, requested by the Staff of the Commission and accepted by the Company, designed to protect the Company's Missouri ratepayers.

**ORDER APPROVING APPLICATION WITH CONDITIONS**

On February 17, 2000, Southern Union Company (Southern Union) filed an application with the Commission requesting authority to acquire up to and including five percent of the common stock of Fall River Gas Company (FAL), Valley Resources, Inc. (Valley) and Providence Energy Corporation (ProvEnergy). In companion cases, case numbers GM-2000-500, GM-2000-502 and GM-2000-503, Southern Union has requested authority to complete mergers with FAL, Valley, and ProvEnergy. Southern Union wishes to immediately purchase a portion of the stock of ProvEnergy, Valley, and FAL in anticipation of the mergers for the purpose of mitigating the pricing effect of possible arbitrage trading in the shares of FAL prior to the time of closing of the merger and to take advantage of temporary market discounts in Valley and ProvEnergy stock prices. Along with its application, Southern Union filed a motion requesting that the Commission make a determination on its application as soon as possible, but in no event later than March 30, bearing an effective date of April 11.

On February 23, the Commission issued an Order Establishing Time for Filing of Recommendation. That order directed the Staff of the Commission (Staff) to file its recommendation regarding approval or rejection of the application, no later than

March 20. The Commission's order also provided that the Office of the Public Counsel (Public Counsel) might also file its recommendation no later than March 20.

Staff filed its Memorandum regarding the application of Southern Union on March 20. Public Counsel did not file a recommendation. Staff offers its opinion that the proposed transactions are not detrimental to the public interest and recommends that the Commission approve the application subject to certain conditions set forth in its Memorandum. The conditions proposed by Staff are substantially identical to the conditions to which Southern Union indicated it would agree in its application. However, in order to allow Southern Union and Public Counsel to respond to the conditions proposed by Staff, while still proceeding on this matter in an expeditious manner, the Commission, on March 21, issued a Notice Shortening Time in Which to Respond. That notice notified the parties that any response to Staff's Memorandum was to be filed on or before March 24. On March 22, Southern Union filed a Notice indicating that it did not intend to file a response to Staff's recommendation. On March 24, Public Counsel filed a Notice requesting that the Commission grant Southern Union's application with the conditions set forth in Staff's memorandum. No party has requested a hearing.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the application and the recommendations of Staff.

Based on Southern Union's application and the recommendations of Staff, the Commission finds that the investments proposed by Southern Union in its application are not detrimental to the public interest and should be approved, subject to the conditions described in this order.

*IT IS THEREFORE ORDERED:*

1. That the application filed by Southern Union Company for authority to acquire up to five percent (5%) of the outstanding common stock of each of Fall River Gas Company, Valley Resources, Inc., and Providence Energy Corporation, prior to and in anticipation of the closing of the proposed mergers, is approved subject to the conditions set forth in this order.
2. That Southern Union Company shall be required to file complete financial documentation, concurrent with the action, for each investment, including, but not limited to, methods of finance, overall cost of the transaction, interest rate of borrowed funds, source of equity invested, and correspondence with brokers and investment firms. This documentation will include dated buy and sell orders for the specific investment.
3. That Southern Union Company shall be required to file monthly financial investment reports of the current status of all investments and investment activity. These reports shall include (but are not limited to) information regarding initial investment, current carrying value, any activity such as stock splits and dates of sale.
4. That Southern Union Company shall undertake to capture, retain and make available to the Commission, its Staff and Public Counsel, the raw data needed to capture all direct and indirect costs associated with the investments authorized by this order. Southern Union

Company shall, at a minimum, maintain: a list of all persons involved in the investments; support personnel involved in the investments; the time spent by those personnel on the investments; a list of all support facilities or services used on the investments; and a list of all other expenses incurred by Southern Union Company on the investments. Such other expenses shall include but not be limited to consultants, communications, travel, and debt costs. Southern Union Company shall submit a report within 30 days of the Commission's order detailing the information that it presently has captured and the procedures it will use to capture this information in the future. Such information shall be maintained and made available through the completion of Southern Union Company's next rate case.

5. That Southern Union Company shall represent that the investments authorized by this order will affect neither the funding for the construction budget of its Missouri Gas Energy (MGE) operating division for this fiscal year, nor MGE's operational expenses necessary to provide safe and adequate service. Further, Southern Union Company shall demonstrate that next year's construction budget for MGE will not be affected by this Project. This demonstration shall include MGE's commitment to its safety program for the year ending June 30, 2001. Southern Union Company shall agree that to meet its construction obligations it will, if necessary, liquidate a portion of the investments authorized by this order to meet its obligations.

6. That Missouri ratepayers shall suffer no adverse effects from any initial investment or losses suffered on such investments through either an amortization of said losses directly to the operating income of MGE or via reduction in retained earnings due to such losses. Southern Union Company's capital structure (actual dollar levels and percentage levels) will not be affected by losses on investments in determining the appropriate rate of return in the future. In order to ensure that the investments authorized by this order are not detrimental to the public interest, Southern Union Company shall specify, in a report submitted within 30 days of this order, the steps that it will take to insulate Missouri ratepayers from such possible results.

7. That Southern Union Company and MGE shall not seek an increase to its requested return on equity or overall rate of return, for Missouri operations, due to factors of, or related to, actual leverage, percentage of leverage in the capital structure, risk associated with leverage, changes in cash or cash working capital or any other real or perceived changes in risk profile due to these investments. Also, any adverse effects on Southern Union Company's cost of debt will not be included in the calculation of Missouri-jurisdiction rate of return or cost of service. No adverse effect of the investments authorized by this order will be included in capitalization of AFUDC in Southern Union Company's rate base and/or under presently authorized accounting authority orders. If the investments authorized by this order require interim financing, Southern Union Company shall assign its lowest cost debt to regulated projects, and higher cost debt to unregulated projects.

8. That nothing in this order shall be considered as a finding by the Commission that the merger transaction proposed in Case No. GM-2000-500, GM-2000-502, or GM-2000-503 are consistent with the public interest.

9. That the Commission's approval of this application shall not constitute a finding by the Commission of the value of the investments or the mergers for ratemaking purposes. The Commission reserves the right to consider the ratemaking treatment afforded the investments and the effects on the cost of capital at a later time in any appropriate proceeding.

10. That Southern Union Company is authorized to enter into, execute and perform in accordance with the terms of any and all documents and to take any and all other actions which may be reasonably necessary and incidental to the investments.

11. That this order shall become effective on April 7, 2000.
12. That this case may be closed on April 10, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur  
Woodruff, Regulatory Law Judge

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**In the Matter of the Joint Application of GTE Midwest Incorporated and Spectra Communications Group LLC for Authority to Transfer and Acquire Part of GTE Midwest Incorporated's Franchise, Facilities or System Located in the State of Missouri and for Issuance of Certificates of Service Authority to Spectra Communications Group LLC and for Authority for Spectra Communications Group LLC to Borrow an Amount not to Exceed \$250,000,000 from CenturyTel, Inc., and in Connection Therewith to Execute a Telephone Loan Contract, Promissory Notes, and a Mortgage, Security Agreement and Financing Statement.\***

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*Case No. TM-2000-182  
Decided April 4, 2000*

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**Public Utilities §13.** Where a new entrant proposed to purchase and operate a number of rural exchanges from GTE, the Commission found on the record presented that the applicant was qualified and approved the transaction.

APPEARANCES:

*Byron E. Francis*, Armstrong Teasdale, L.L.P., One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102, for GTE Midwest Incorporated.

*W.R. England, III, and Sondra B. Morgan*, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Spectra Communications Group, L.L.C.

*Leo J. Bub*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Mark W. Comley*, Newman, Comley & Ruth, 601 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102, for Show-Me Competition, Inc.

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\*This case contains a correction ordered by the Commission on May 1, 2000.

*Craig S. Johnson*, Andereck, Evans, Milne, Peace & Baumhoer, 305 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102, for Mark Twain Communication Company.

*Kurt U. Schaefer*, Lathrop & Gage, 326 East Capitol Avenue, Jefferson City, Missouri 65101-3004, for AT&T Communications of the Southwest, 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.

*Cliff E. Snodgrass*, 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: Kevin A. Thompson, Deputy Chief.

## REPORT AND ORDER

### Procedural History

On August 24, 1999, GTE Midwest Incorporated (GTE) and Spectra Communications Group, L.L.C. (Spectra), filed their joint application seeking authority for GTE to sell a portion of its Missouri network to Spectra,<sup>1</sup> seeking certificates of service authority for Spectra so that it can operate the purchased network, and seeking authority for Spectra to borrow no more than \$250,000,000 to finance the proposed acquisition.

With their application, the Applicants filed a request for a protective order. On August 31, 1999, the Commission adopted its standard protective order in this matter and ordered an investigation and report by the Staff of the Public Service Commission (Staff), to be filed within 90 days of the filing of the application. Also on August 31, 1999, the Commission issued its standard Notice of Applications with respect to Spectra's application for certificates of convenience and necessity. This notice was directed to all telecommunications carriers certificated in Missouri. The Order of August 31, 1999, also granted certain waivers requested in the application with respect to certain application requirements. For example, the

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<sup>1</sup>According to the joint application, the 107 exchanges affected are: Amazonia, Annapolis, Arcola, Aurora, Avenue City, Avilla, Belgrade, Belleview, Birch Tree, Bolckow, Boss, Braymer, Bronaugh, Brunswick-Triplett, Bunker, Caledonia, Cameron, Canton, Centerville, Clarence, Clarksdale, Collins, Concordia, Cosby, Dadeville, Dalton, Easton, Edgar Springs, Eldorado Springs, Ellsinore, Elmer, Eminence, Everton, Ewing, Fillmore, Freemont, Golden City, Gorin, Gower, Greenfield, Grove Spring, Hamilton, Hartville, Helena, Houston, Humansville, Hunnewell, Irondale, Ironton, Jericho Springs, Kahoka, Keytesville, Kidder, Kingston, La Belle, La Plata, Laddonia, Lagrange, Lawson, Lesterville, Lewistown, Licking, Lowry City, Macon, Manes, Maysville, Milo, Monroe City, Montauk, Monticello, Mount Vernon, Mountain Grove, Nebo, Norwood, Oates, Osborn, Osceola, Palmyra, Paris, Perry, Plattsburg, Potosi, Raymondville, Revere, Roby, Rockville, Rosendale, Santa Fe, Sarcoxie, Savannah, Schell City, Shelbyville, Sheldon, Stewartsville, Stoutsville, Timbers, Trimble, Turney, Van Buren, Vanzant, Walker, Wayland, Weaubleau, West Quincy, Whitesville, and Winona.

Commission waived its Rule 4 CSR 240-2.060(4)(H), which requires that applicants seeking authority to provide telecommunications services file with their applications a proposed tariff with an effective date not less than 45 days following the date of issue.<sup>2</sup>

On September 2, 1999, the Commission issued its Order Directing Notice, in which October 4, 1999, was established as the deadline for applications to intervene. This second notice was directed to the county commission of every Missouri county containing all or any part of one of the affected exchanges, to the members of the Missouri General Assembly representing the persons residing in those exchanges, and to the newspapers serving those persons. On September 9, 1999, the Office of the Public Counsel (Public Counsel) filed its Motion for an Evidentiary Hearing and, on September 14, 1999, GTE filed nondisclosure agreements as called for by the protective order.

Timely applications to intervene were filed by AT&T Communications of the Southwest, Inc. (AT&T), on September 29, 1999; by Mark Twain Communications Company (Mark Twain) and Southwestern Bell Telephone Company (SWBT) on September 30, 1999; and by Fidelity Communications Services II, Inc. (Fidelity), and Show Me Competition, Inc. (Show Me), on October 4, 1999. On October 13, 1999, Spectra filed its responses in opposition to the intervention applications of SWBT and Fidelity. The Commission granted all of the applications to intervene by Order issued on October 22, 1999. The Commission also set a prehearing conference for November 5, 1999, and directed that the parties file a proposed procedural schedule by November 12, 1999.

On November 9, 1999, Staff filed the proposed procedural schedule on behalf of all the parties and requested relief from the obligation to file a staff recommendation in view of the fact that the case was clearly headed to a contested case hearing. On November 17, 1999, the Commission adopted the proposed procedural schedule and granted the requested relief to Staff.

Between December 1, 1999, and January 14, 2000, the parties prefiled direct, rebuttal and surrebuttal testimony of their witnesses, a joint list of issues, a joint list of witnesses and agreed order of cross examination, and individual position statements as required by the procedural schedule.<sup>3</sup> On January 7, 2000, GTE moved to strike certain portions of the rebuttal testimony of Michael Ensrud, filed on December 22, 1999, by Show Me. Show Me responded in opposition to GTE's motion on January 14, 2000. The Commission denied GTE's motion by Order issued on January 25, 2000. On January 20, 2000, Fidelity filed a motion seeking leave to not appear and participate in the hearing.

On January 26, 2000, on the eve of the hearing, certain parties filed a Joint Recommendation, a copy of which is attached to this Order as Attachment 1. This document constituted the non-unanimous agreement of the signatory parties as to various issues presented by the joint application. The signatory parties were

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<sup>2</sup>This rule is frequently waived. Other waivers concerned the number of copies provided of certain very bulky exhibits and the requirement that 5 years of financial data be provided. As a new entity, Spectra did not have 5 years of data.

<sup>3</sup>AT&T did not submit a position statement.

Spectra, GTE, the Staff, and the Public Counsel. While the Joint Recommendation is not binding on the non-signatory parties, it is binding on the parties that signed it.

The Commission held an evidentiary hearing on January 27, 2000. Other than Fidelity, all parties were represented at the evidentiary hearing. At the opening of the hearing, Mark Twain moved to withdraw its intervention on the grounds that its differences with Spectra had been resolved. The motion was granted by the presiding officer and Mark Twain withdrew its witness and exhibits. At the same time, while it did not withdraw its intervention, SWBT moved to withdraw its witness and exhibits and to be excused from the hearing. The presiding officer also granted that motion.

Following the evidentiary hearing, the Commission by Order issued February 4, 2000, adopted the briefing schedule proposed by the parties. The transcript was filed on February 9, 2000. The parties filed simultaneous briefs on February 17, 2000.<sup>4</sup>

### **Discussion**

#### **The Parties:**

GTE is a Delaware corporation and a public utility engaged in providing interexchange and basic local telecommunications services to the public in numerous local exchanges in the state of Missouri. GTE's principal place of business is located in Wentzville, Missouri.

Spectra is a Delaware limited liability corporation authorized to do business in the state of Missouri. Spectra is composed of a group of investors, including CenturyTel, Spectronics Corporation, Local Exchange Carriers L.L.C., and two individuals. Spectra's principal office is located in Peculiar, Missouri. CenturyTel is a Louisiana corporation which provides telecommunications services to more than two million persons nationwide. Spectronics Corporation is a Georgia corporation specializing in providing telecommunications services in rural markets. Local Exchange Carriers L.L.C. is a Maryland limited liability corporation which invests in telecommunications companies.

Several parties were permitted to intervene in this matter. AT&T is a competitive interstate and intrastate interexchange telecommunications carrier that also provides local exchange and basic local exchange services in parts of Missouri. SWBT is a local exchange telecommunications company and a public utility. Fidelity is a telecommunications company that is seeking authority to provide local exchange telecommunications services in GTE's Missouri exchanges; Fidelity has notified GTE, under the Telecommunications Act of 1996, of its desire to enter into an interconnection agreement with GTE. Show Me is a not-for-profit Missouri corporation whose members include competitive basic local and interexchange telecommunications companies and telecommunications industry associations.

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<sup>4</sup>Fidelity advised the Commission by letter on February 17, 2000, that it would not file a brief. No brief was received from SWBT.

**The Issues:**

GTE and Spectra filed a joint application seeking authority for GTE to sell to Spectra a portion of its Missouri network, comprising some 107 rural exchanges. Spectra also seeks certificates of service authority so that it can operate the purchased network and seeks authority to borrow no more than \$250,000,000 to finance the proposed acquisition. Finally, GTE seeks to be relieved of the obligation to provide basic local telecommunications services in the exchanges sold to Spectra. Pursuant to Commission practice and in compliance with the Order Adopting Procedural Schedule issued on November 17, 1999, the parties jointly submitted a list of issues for determination by the Commission.

**1. Should the transfer of GTE's assets to Spectra be approved? If yes, what, if any, conditions should be adopted as part of a grant of authority to transfer assets?**

None of the parties oppose the sale of GTE's assets to Spectra. Staff and the Public Counsel recommend that the transfer be approved by the Commission, subject to certain conditions set out in detail in the Joint Recommendation. Briefly, these conditions are: that Spectra will never seek to recover any part of the acquisition premium and incidental acquisition expenses in rates; that Spectra will use an offset to rate base, amortized over five years, to protect ratepayers from the effects of deferred income taxes eliminated through this transaction; that Spectra will use GTE's existing rates, charges and regulations; that Spectra will achieve a capital structure including 40 percent equity to total capital within five years; and that Spectra will negotiate interconnection agreements with CLECs to replace GTE's existing interconnection agreements, using the same terms where feasible.

**2. Should Spectra be granted certificates of service authority to provide telecommunications service in the transferred exchanges?**

None of the parties oppose the grant of certificates of service authority to Spectra. Staff and the Public Counsel recommend that the certificates be granted, subject to the conditions set out in the Joint Recommendation.

**3. Should the financing contemplated by Spectra be approved?**

None of the parties oppose the financing authority sought by Spectra. Staff and the Public Counsel recommend that the financing be approved by the Commission, subject to the conditions set out in the Joint Recommendation.

**4. Should Spectra be classified as a price cap company pursuant to Section 392.245, RSMo Supp. 1998?**

SWBT purportedly withdrew this issue. The prehearing positions of the parties on this issue were that SWBT contended that the Commission should grant price cap status to Spectra in this case and Staff, Public Counsel, Spectra, and Show Me asserted that the Commission could not grant price cap status to Spectra until Spectra requests it.

**5. What effect, if any, will the transfer of assets have on the price cap status of GTE?**

GTE asserts that this issue is not properly before the Commission in this case. Public Counsel and Show Me recommend that the Commission open a case to determine whether or not, following approval of the sale of the 107 exchanges concerned in this case, GTE still qualifies for price cap status.

**Issues Relating to Price Cap Regulation:**

Section 392.245.2, RSMo Supp. 1999, provides that a "large incumbent local telecommunications company shall be subject to regulation under this section upon 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." While the joint application is silent as to price cap regulation, the parties sought to insert two issues with respect to this provision by way of the issues list and position statements required under the procedural schedule. The first of these is whether or not Spectra should be subject to price cap regulation if the joint application is granted. The second is whether or not GTE should still be subject to price cap regulation if the joint application is granted.

In the first instance, it is the parties' initial pleadings that frame the issues. Thereafter, the issues may be narrowed or expanded by action of the Commission, on motion of the parties. See GS Technology Operating Company, Inc., d/b/a GST Steel Company v. Kansas City Power & Light Company, Case No. EC-99-553 (*Order Regarding KCPL's Motion for Clarification, Reconsideration and Rehearing of the Commission's Order of July 29, 1999, and Regarding GST Steel Company's Second Motion to Compel Discovery*, issued Aug. 19, 1999) at pp. 4-5. A contested case is initiated by the filing of a writing seeking action by the agency. A.S. NEELY, ADMINISTRATIVE PRACTICE AND PROCEDURE (20 MISSOURI PRACTICE SERIES), § 9.03 (1995); Section 536.063(1), RSMo.<sup>5</sup>

GTE and Spectra defined the issues when they filed their joint application. Although several other parties were permitted to intervene, none of them ever filed a pleading responsive to the joint application. "Answering, intervening and amendatory writings and motions may be filed in any case and shall be filed where required by rule of the agency[.]" NEELY, *op. cit.* The issues list and position statements are not pleadings; indeed, they are not even part of the record.<sup>6</sup> They are submitted by the parties at the Commission's direction and used by the Commission for its internal purposes.

Under the civil rules, issues outside the pleadings are tried by consent where no objection is made to the offer of evidence concerning them. J. DEVINE, MISSOURI CIVIL PLEADING & PRACTICE, § 18-5 (1986); Rule 55.33(b), Mo. R. Civ. Pro. This rule applies with equal force to administrative proceedings. Section 536.063(3); NEELY, *supra*, § 9.03. The question is, did the parties herein try these two issues concerning price cap regulation by consent?

The first of these issues, that concerning Spectra, was purportedly withdrawn by SWBT. No evidence was offered on the issue by the parties and it was not argued

<sup>5</sup>Chapter 536, RSMo, the Missouri Administrative Procedures Act (MAPA), applies to the Commission except where directly in conflict with Chapter 386, the Public Service Commission Act. State ex rel. Utility Consumers Council v. Public Service Commission, 562 S.W.2d 688, 692-93 and 693 n. 11 (Mo. App. 1978), *cert. den.* 439 U.S. 866, 99 S.Ct. 192, 58 L.Ed.2d 177 (1978).

<sup>6</sup>The issues list and position statements replace the former hearing memorandum. The hearing memorandum was part of the record because it was filed as a pleading and generally offered as an exhibit at the hearing, as well.

by all of the parties in the post hearing briefs. The Commission concludes that this issue was not heard by consent of the parties and is thus not before the Commission in this case.

The second price cap issue concerns the effects of the proposed transaction on GTE's price cap status. Show Me points to the Commission's Order granting that status to GTE, which was based on competition in two of the exchanges being sold to Spectra. *In the Matter of the Petition of GTE Midwest Incorporated*, Case No. TO-99-294 (*Order Approving Price Cap Regulation*, issued Jan. 26, 1999). Show Me asserts, and the Order itself suggests, that the sale of these exchanges should occasion a review of GTE's price cap status. *Id.*, at page 2. Show Me is agreeable to conducting this review in another case. Public Counsel agrees with Show Me.

GTE, on the other hand, takes the position that this matter does not properly include the issue of the effect of the proposed transaction on its price cap status. Nonetheless, GTE's witness Gerald Shannon addressed the issue in his testimony, and showed that GTE will face active competition from resellers in some 62 exchanges if the joint application is approved. No party refuted Shannon's testimony.

The Commission concludes that the issue of the effect of the transaction proposed in the joint application on GTE's price cap status was tried in this matter by consent of the parties. The Commission further finds that no party has shown that approval of the transaction will have any effect on GTE's price cap status. Therefore, the Commission will not establish a case to review GTE's price cap status.

#### **The Sale of System Assets by GTE:**

Section 392.300, RSMo 1994,<sup>7</sup> provides that "[n]o telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do." Commission Rule 4 CSR 240-2.060(5)(D) requires the applicant for such authority to state in the application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."

In considering the joint application, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). Referring to a similar statute applicable to water corporations, the Missouri Court of Appeals stated, "The obvious purpose of [the statute] is to ensure the continuation of adequate service to the public served by the utility." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has

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<sup>7</sup>All statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 1994, unless otherwise specified.

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 asset safely and efficiently. 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.3d 216, 220.

The record shows that this sale is part of GTE's nationwide strategic repositioning initiative. GTE is selling approximately 1.6 million switched access lines across the nation, about 8 percent of its domestic telephone network. The 107 Missouri exchanges involved in this case amount to approximately 120,000 switched access lines. GTE is taking this step in order to raise \$2 to \$3 billion dollars, after taxes, with which to pursue other opportunities.

GTE selected Spectra from several hundred prospective purchasers because Spectra possesses the necessary operational, technical, and financial resources to successfully operate the purchased exchanges. Additionally, Spectra is a minority-controlled firm. GTE selected Spectra through a sales process intended to enhance the opportunity and participation of minority-controlled firms.

Kenneth Matzdorff, Chief Operating Officer of Spectra, testified that he has worked in the telecommunications industry for about 23 years in various technical and managerial positions. Matzdorff testified that Spectra's owners have the necessary financial and operational capabilities to purchase and operate the GTE exchanges.

CenturyTel is one of Spectra's owners. CenturyTel is a publicly traded, Fortune 500 company. CenturyTel is the eighth largest incumbent local exchange carrier (ILEC) in the United States and the tenth largest cellular carrier in the United States. CenturyTel, headquartered in Monroe, Louisiana, is focused on the rural telephone market and provides telecommunications services to over one million rural subscribers. The average size of a CenturyTel exchange is 2200 lines.

Spectra will use GTE's existing infrastructure and personnel to operate the purchased exchanges. Some 143 GTE personnel will transfer to Spectra. In addition, CenturyTel will provide computerized billing, customer service, facilities records, and trouble dispatch systems support to Spectra.

The parties agree that Spectra's owners, managers and employees possess sufficient experience in the telecommunications industry to operate the purchased exchanges safely and efficiently. Spectra is a new company and has no history of service difficulties. The financing will be provided by owner CenturyTel, a Fortune 500 company. No party has questioned the general financial health and ability to absorb the proposed transaction of CenturyTel or of Spectra.

The Commission has reviewed and carefully considered the Joint Recommendation and the conditions contained therein. Although it is not a unanimous stipulation and agreement, it is binding on the parties that signed it. Staff and Public Counsel conditioned their support of the joint application upon that agreement. Therefore, the Commission will approve Spectra's acquisition of GTE's exchanges subject to the conditions contained in the Joint Recommendation.

The Commission reads State ex rel. City of St. Louis v. Public Service Commission, *supra*, 335 Mo. at 459, 73 S.W.2d at 400, to require a direct and present public

detriment. No party has identified such a detriment in this case and, with the conditions contained in the Joint Recommendation, the parties evidently agree that there is none. “[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur.” In the Matter of the Joint Application of Missouri Gas Company et al., Case No. GM-94-252, *supra*, 3 Mo. P.S.C. 3rd at 221. There is no such compelling evidence in this record.

**Requirements of Certification:**

Section 392.430 provides that the Commission shall approve an application for a certificate of service authority to provide either interexchange telecommunications service or basic local telecommunications service upon a finding that the grant of service authority is in the public interest. Section 392.450.1, RSMo Supp. 1999, authorizes the Commission to approve an application for a certificate of local exchange service authority to provide basic local telecommunications service only upon a finding that the applicant has complied with the certification process established under Section 392.455, RSMo Supp. 1999. Under the latter section, a new entrant must: (1) possess sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service; (2) demonstrate that the services it proposes to offer satisfy the minimum standards established by the Commission; (3) set forth the geographic area in which it proposes to offer service and demonstrate that such area follows the exchange boundaries of the incumbent local exchange telecommunications company and is no smaller than an exchange; and (4) offer basic local telecommunications service as a separate and distinct service. In addition, the Commission must give due consideration to equitable access for all Missourians to affordable telecommunications services, regardless of where they live or their income.

The Commission has already reviewed the evidence that establishes that Spectra possesses sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service. As noted, Spectra will use GTE’s existing infrastructure and personnel to operate the purchased exchanges and Spectra will also use GTE’s existing tariffs, including rates, services and access rates. The transition will be “seamless” from the customer’s point of view. The areas in which Spectra proposes to provide services are no smaller than GTE’s existing exchanges and follow their boundaries. Spectra will offer basic local telecommunications service as a separate and distinct service. Spectra’s tariffs, like GTE’s, will provide appropriate opportunities for equitable access for all Missourians to affordable telecommunications services, regardless of where they live or their income.

Additionally, Spectra has plans to improve its services over those offered by GTE in these 107 exchanges. Spectra plans to roll out toll free internet access in all exchanges in a year. Spectra also plans to offer heretofore unavailable services such as Caller ID in these rural exchanges. Additionally, Spectra expects to enjoy volume purchasing discounts through its association with CenturyTel. Spectra intends to locate its headquarters in Kansas City, Missouri, and to establish four district offices. Spectra also intends to increase its local presence by opening

“greeter” offices in the communities it serves. Spectra presently plans to open such “greeter” offices in Potosi, Macon, Eldorado Springs, and Cameron. Five additional locations are under consideration. Staff and the Public Counsel recommend that the requested certificates be granted, subject to the conditions contained in the Joint Recommendation.

Based on its careful consideration of all the foregoing, the Commission concludes that granting the requested certificates of service authority to Spectra is in the public interest.

**Financing:**

The Commission is authorized to supervise the power of telecommunications companies to issue stocks, bonds, notes, and other evidence of indebtedness, and to grant liens upon their property within this state. Sections 392.290.1 and 392.310. Likewise, a telecommunications company cannot lawfully mortgage or encumber any part of its facilities or system without authority from the Commission. Section 392.300.1. The Commission approves applications for financing authority upon a showing that the proposed financing is reasonable and not detrimental to the public interest. See e.g. *In the Matter of the Application of Raytown Water Company*, Case No. WF-99-412 (*Order Granting Expedited Treatment and Approving Financing*, Apr. 15, 1999).

Spectra intends to purchase GTE’s network using a mixture of equity and long-term debt. Spectra will also incur short-term debt in order to maintain sufficient operating funds. CenturyTel, an owner of Spectra, will be Spectra’s creditor with respect to both the long-term and short-term debt. The pro forma financial sheets provided by Spectra show that Spectra will have sufficient cash flow to meet all of its obligations under the loan and to increase the equity percentage of its capital structure.

Staff’s witnesses expressed concern because Spectra’s capital structure will initially contain less than 40 percent equity. Staff believes that 40 percent is an appropriate figure for common equity for a telephone company. However, Spectra expects to improve its capital structure over its first five years of operation and has entered into an agreement with Staff and Public Counsel in that regard. Based on its analysis and subject to the conditions contained in the Joint Recommendation, Staff recommends that the Commission authorize Spectra to borrow not more than \$250,000,000 from CenturyTel. Public Counsel, likewise, recommends that the Commission grant the requested authority.

The conditions contained in the Joint Recommendation adequately provide for the improvement of Spectra’s capital structure. Therefore, subject to those conditions, the Commission finds that the proposed financing is reasonable and not detrimental to the public interest. The Commission will grant the requested authority.

**Withdrawal of GTE from the Transferred Exchanges:**

The joint application contains a prayer by GTE to be relieved, if the proposed transaction is approved, from any obligation to provide telecommunications services in the transferred exchanges after the day the sale closes. That prayer will

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be granted. GTE must file proposed amended tariff sheets which delete all references to the transferred exchanges and which make any other appropriate changes consequent to this transaction.

#### **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 finds that GTE is a certificated telecommunications corporation that provides basic local and interexchange telecommunications services in the state of Missouri. Spectra is a Delaware limited liability company, duly authorized to do business in Missouri. Spectra seeks herein to become a Missouri certificated telecommunications company and to acquire a portion of GTE's Missouri network.

The Commission finds, subject to the conditions contained in the Joint Recommendation, that Spectra has the necessary technical, operational and financial resources to operate the exchanges it proposes to acquire from GTE safely and efficiently, without any service interruption.

The Commission finds, subject to the conditions contained in the Joint Recommendation, that Spectra has the necessary technical, operational and financial resources to provide basic local telecommunications service. The services it proposes to offer satisfy the minimum standards established by the Commission. The proposed service area is no smaller than an exchange and follows existing exchange boundaries. Spectra proposes to offer basic local telecommunications service as a separate and distinct service. Spectra will provide appropriate opportunities for all Missourians to have equitable access to affordable telecommunications services.

The Commission finds, subject to the conditions contained in the Joint Recommendation, that Spectra's proposed financing arrangement is reasonable.

#### **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 GTE pursuant to Section 386.250 and Chapter 392, RSMo. The Commission likewise has jurisdiction over Spectra, as the prospective purchaser of a portion of GTE's Missouri network and as an applicant for Missouri certification.

Based on the findings of fact made herein, the Commission concludes that the proposed sale of GTE's assets to Spectra is not detrimental to the public interest and should be approved.

Based on the findings of fact made herein, the Commission concludes that the joint applicants have shown that granting certificates of service authority to Spectra

to provide basic local and interexchange telecommunications services in the exchanges purchased from GTE is in the public interest and should be approved.

Based on the findings of fact made herein, the Commission concludes that the financing proposed by the joint applicants is not detrimental to the public interest and should be approved.

*IT IS THEREFORE ORDERED:*

1. That all pending motions not already ruled herein are denied.
2. That the Joint Recommendation filed herein on January 26, 2000, containing the agreement of Spectra Communications Group LLC, GTE Midwest Incorporated, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, is approved. The various grants of authority and certificates of service authority to Spectra Communications Group LLC contained in this Order are subject to the conditions contained in the Joint Recommendation filed herein on January 26, 2000, a copy of which is attached hereto as Attachment 1. Spectra Communications Group LLC is ordered to comply with those conditions.
3. That, as of the date of the closing of the transaction approved in Ordered Paragraph 4, below, GTE Midwest Incorporated is relieved from any obligation to provide telecommunications services in any of the exchanges sold to Spectra Communications Group LLC.
4. That GTE Midwest Incorporated is authorized to transfer and sell to Spectra Communications Group LLC, subject to the conditions referred to in Ordered Paragraph 2, above, all of its telecommunications facilities, assets and equipment located in the several exchanges described in Exhibit 3 of the Joint Application filed on August 24, 1999, pursuant to the Asset Purchase Agreement set out in Exhibit 2 (proprietary) of the Joint Application filed on August 24, 1999, and to take all other lawful actions necessary to consummate this transaction.
5. That Spectra Communications Group LLC is hereby authorized to consummate the financing transactions contemplated in the Joint Application filed on August 24, 1999, and in Exhibits 2 and 8 thereof, and may do all lawful things necessary to that purpose, including execute and deliver notes, mortgages, security agreements, and financing statements, all as contemplated and described in the Joint Application and subject to the conditions referred to in Ordered Paragraph 2, above. Spectra Communications Group LLC shall use the proceeds of the financing herein approved for the purposes contemplated and described in the Joint Application and for no other purposes.
6. That Spectra Communications Group LLC shall submit all pertinent information regarding the financing transaction herein approved to the Staff of the Commission within 10 days of completion of the transaction, and shall file a pleading in this case notifying the Commission and the parties that the information has been submitted to the Staff of the Commission.
7. 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.
8. That Spectra Communications Group LLC is granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri, subject to all applicable statutes and Commission rules and subject to the conditions referred to in Ordered Paragraph 2, above. The certificate of service authority shall become effective when the company's tariff becomes effective.

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9. That Spectra Communications Group LLC is granted a certificate of service authority to provide basic local exchange telecommunications services in the state of Missouri, subject to all applicable statutes and Commission rules and subject to the conditions referred to in Ordered Paragraph 2, above. The certificate of service authority shall become effective when the company's tariff becomes effective.

10. That the request for waiver of the filing requirements of 4 CSR 240-2.060(4)(H) which requires the filing of a 45-day tariff is granted.

11. That Spectra Communications Group LLC shall file tariff sheets with a minimum 45-day effective date reflecting the rates, rules, regulations, terms and conditions, and the services it will offer, within 30 days after the effective date of this Order, and shall simultaneously file a pleading in this case advising the Commission that the tariffs have been filed.

12. That this Report and Order shall become effective on April 14, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994. Crumpton, C., not participating.

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EDITOR'S NOTE: The Joint Recommendation in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

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**In the Matter of Southwestern Bell Telephone Company's  
Proposed Tariff to Introduce a Discount on the Local Plus®  
Monthly Rate.\***

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*Case No. TT-2000-258  
Decided April 6, 2000*

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**Telecommunications §§14, 36.** The Commission approved a promotional tariff offered by an incumbent local exchange carrier, but reiterated its requirement that the carrier make its Local Plus service available for resale by CLECs and IXCs.

**APPEARANCES:**

*Leo J. Bub*, Attorney at Law, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Kevin K. Zarling*, Attorney at Law, 919 Congress Avenue, Suite 900, Austin, Texas 78701-2444, for AT&T Communications of the Southwest, Inc.

*Linda K. Gardner*, Attorney at Law, 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Communications Company, L.P.

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\*On April 25, 2000, the Commission issued an order denying a motion for reconsideration and motion for clarification.

*Michael Dandino*, Attorney at Law, P.O. Box 7800, Jefferson City, Missouri 65102-7800, for Office of the Public Counsel and the Public.

*William K. Haas*, Attorney at Law, 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

### Procedural History:

On September 20, 1999, Southwestern Bell Telephone Company (SWBT) issued a revision to its tariffs that proposed to offer a discount on the Local Plus monthly rate to business customers who have more than one line. The tariff revision bore an effective date of October 20, 1999. On September 29, AT&T Communications of the Southwest, Inc. (AT&T) filed an Application to Intervene and a Motion to Reject or in the Alternative Suspend the Proposed Tariff.

On October 1, the Commission issued a Notice Establishing Time in Which to Respond, directing that any response to AT&T's application and motion was to be filed on or before October 12. On October 12, the Staff of the Public Service Commission (Staff) filed a Memorandum recommending that the Commission suspend SWBT's tariff pending an investigation of SWBT's practices regarding resale of Local Plus service to Interexchange Carriers (IXCs). Also on October 12, SWBT filed a pleading in opposition to AT&T's application and motion.

On October 14, the Commission issued an Order Granting Motion to Suspend Tariff, Granting Application to Intervene and Setting Prehearing Conference. That order suspended SWBT's tariff for a period of 120 days beyond October 20, to February 17, 2000. That order also provided notice to all Incumbent Local Exchange Companies, all Competitive Local Exchange Companies (CLECs), and all IXCs in the State of Missouri. Any interested persons or entities wishing to intervene were directed to file an application to intervene on or before November 3.

SWBT filed an Application for Partial Rehearing on October 22. Staff filed a response in opposition to partial rehearing on November 1. The Commission issued an Order Denying Application for Partial Rehearing on November 2.

On November 3, Sprint Communications Company L.P. (Sprint) filed an application to intervene. No other party requested permission to intervene. On November 5, the Commission issued an order granting Sprint's application to intervene.

A prehearing conference was held on November 17. On November 24, following the prehearing conference, Staff, on behalf of all the parties, filed a Motion to Establish Procedural Schedule. On November 30, the Commission issued an order that established the procedural schedule requested by the parties. In response to a motion by SWBT, the Commission issued an Order Establishing Protective Order on December 9. SWBT filed direct testimony in support of its tariff on December 29. Staff and AT&T filed rebuttal testimony on January 14, 2000. SWBT, Staff and AT&T filed surrebuttal testimony on January 28.

On January 21, the Staff, on behalf of all of the parties, filed a proposed list of issues. That list of issues identified only one issue, "Should Southwestern Bell Telephone Company's Local Plus promotion be approved?" The list of issues also contained a footnote indicating that the parties were unable to agree on other potential issues requiring resolution. Also on January 21, AT&T filed a separate list of seven issues which it believed should be addressed in the hearing. On January 25, the Commission issued an Order Adopting List of Issues that directed all of the parties to respond to the issues identified by AT&T. Staff, the Office of the Public Counsel (Public Counsel) SWBT, AT&T and Sprint each filed a statement of its positions regarding those issues on or before January 31.

On January 31, SWBT filed a Motion to Strike, asking that the Commission strike portions of the rebuttal testimony of one of AT&T's witnesses. SWBT described the challenged testimony as "irrelevant and improper attempts to expand this docket to relitigate matters already decided by the Missouri Public Service Commission." On the morning of the hearing, February 3, AT&T filed a response to the Motion to Strike. At the hearing SWBT's Motion to Strike was taken up by the Commission, on the record, and denied in its entirety.

The matter proceeded to a hearing on the merits on February 3, 2000. Testimony supporting and opposing SWBT's tariff was admitted into evidence. On February 10, the Commission issued an Order Further Suspending Tariff that suspended SWBT's tariff an additional sixty days, until April 17. The parties submitted initial briefs on March 2 and reply briefs on March 20.

At the hearing, questions arose concerning the resale of Local Plus by CLECs in Missouri. On February 14, SWBT submitted late-filed Exhibit No. 13, consisting of two pages entitled CLECs Reselling Local Plus in Missouri. The exhibit was submitted in both highly confidential and non-proprietary versions. On February 17, the Commission issued a Notice Regarding Late Filed Exhibit, which notified any party wishing to make an objection to the late-filed exhibit that it must do so no later than February 28. The notice also indicated that if no objections were filed, the late-filed exhibit would be admitted into evidence. No party filed any objections to late-filed Exhibit No. 13 and it will therefore be admitted into evidence.

**Findings of Fact:**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather the omitted material was not dispositive of the issues before the Commission.

**Evidence Presented:**

Thomas Hughes and Sherry Myers presented testimony on behalf of SWBT. Mr. Hughes testified that Local Plus, including the promotion that is the subject of this tariff, is available for resale by CLECs and IXCs. Nine CLECs are currently reselling the service but it is not being resold by any IXCs.

CLECs have the option of using an electronic ordering system to place an order for Local Plus. That electronic system is not currently available for use by an IXC because its use is restricted to local service providers of record for the dial tone access line. That restriction excludes IXC providers. SWBT offers an alternative, fax-based ordering system for use by IXC providers who wish to order Local Plus for resale. SWBT requires that any IXC provider who wishes to resell Local Plus complete an IXC Local Plus Resale Account Profile form and enter into a resale agreement for Local Plus. Hughes testified that SWBT is willing to modify the ordering system in consultation with the IXCs if an increased demand for the service is demonstrated.

Hughes also testified that SWBT is willing to negotiate an interconnection agreement that would permit a facility-based CLEC to offer a service like Local Plus on an Unbundled Network Element (UNE) basis. However, SWBT has not determined the price it would charge such a CLEC because it has never received a request for that service.

Sherry A. Myers also presented testimony on behalf of SWBT. Ms. Myers testified that Local Plus is an optional 1-way outbound calling service available to single-party, flat-rate residence and business customers. For a flat monthly rate additive, Local Plus subscribers can place unlimited local calls to all customers within the LATA. The promotional tariff for which SWBT seeks the Commission's approval would allow business customers who purchase Local Plus on two to ten lines to pay the tariffed rate for Local Plus for the first line and receive a discounted monthly rate on the additional lines. SWBT is willing to make the promotion available for resale at the wholesale discount. The promotion is only available for new or additional requests for Local Plus. The promotion is not available for customers who already have Local Plus.

Thomas A. Solt offered testimony on behalf of the Staff. Mr. Solt testified that the Commission should ensure that Local Plus is available for resale as a UNE by facilities based CLECs. Mr. Solt offered the opinion that the fax-based ordering system that SWBT was offering for use by IXCs was reasonable and sufficient. Mr. Solt testified that SWBT's failure to provide a detailed listing of the identifying telephone numbers of the lines on which an IXC is reselling Local Plus would make it difficult or impossible for an IXC reseller to determine if Local Plus was being applied to the proper lines. Finally, Mr. Solt testified that Local Plus and services similar to Local Plus are beneficial to consumers.

Daniel P. Rhinehart offered testimony on behalf of AT&T. Mr. Rhinehart testified that AT&T feared that SWBT would refuse to make its promotion of Local Plus available at the appropriate wholesale discount. Rhinehart also testified that SWBT should not be allowed to assess multiple first line fees on AT&T when AT&T purchases the Local Plus promotion for its separate multi-line customers. In addition to those concerns about the promotion, Rhinehart also testified that SWBT has failed to effectively make Local Plus available for resale to IXCs, such as AT&T.

Rhinehart asserted that SWBT has failed to provide IXCs the opportunity to order Local Plus through a direct mechanized process that would allow an IXC prompt access to the preorder information that is available to SWBT. Rhinehart indicated that the fax-based ordering system offered by SWBT is a poor substitute for the

ordering system actually used by SWBT and puts AT&T at a competitive disadvantage. Rhinehart also objected to SWBT's requirement that AT&T, acting as an IXC, sign a separate service agreement before it would be allowed to resell Local Plus. AT&T asserts that it already has an interconnection agreement with SWBT and that interconnection agreement should be sufficient to govern AT&T's resale of Local Plus as an IXC.

Sprint and Public Counsel participated in the hearing but did not call any witnesses or present any evidence.

#### Discussion

Local Plus is an optional one-way outbound calling plan offered by SWBT that allows subscribers to make unlimited calls within a Local Access and Transport Area (LATA) for a flat-rated monthly additive of either \$30 for residence customers or \$60 for business customers. The Commission first considered SWBT's offering of Local Plus in case number TT-98-351. In a Report and Order issued in that case on September 17, 1998, the Commission found that "imputation of access charges would not be necessary if this type of service is available for resale at a wholesale discount to CLECs and IXCs." The Commission rejected SWBT's initial tariff offering Local Plus. However, SWBT resubmitted a Local Plus tariff incorporating the revisions suggested by the Commission. After considering the revised tariff in case number TT-99-191, the Commission allowed SWBT's Local Plus tariff to go into effect by operation of law on November 29, 1998.

The tariff that is the subject of this case concerns SWBT's promotional offer regarding its Local Plus service. The tariff proposes that each multi-line business customer pay the full \$60 monthly rate for the first line equipped with Local Plus and a discounted monthly rate of \$35 per line for the second through tenth line equipped with Local Plus. If a business customer ordered Local Plus in quantities of 11 or more, the customer would pay \$60 for the first line equipped with Local Plus and a discounted rate of \$25 for the second and additional lines equipped with Local Plus. SWBT's tariff proposed that the offer would be available from October 20, 1999 through December 31, 1999, with the discounted rates remaining in effect until December 31, 2000. The promotional period expired while this tariff was suspended.

Only two of the arguments put forward by the parties who would have the Commission reject SWBT's tariff relate directly to the proposed promotion. The first is that SWBT should be required to offer the promotion for resale at the appropriate wholesale discount when the discounted rate extends beyond ninety days. SWBT repeatedly indicated in its testimony that it would offer the promotion for resale at the discounted rate. Therefore, there is no dispute on this issue that would require resolution by the Commission.

The second issue regarding the promotion was raised by AT&T and concerns whether SWBT should be permitted to assess multiple first line fees on AT&T when AT&T purchases the Local Plus promotion for its separate multi-line customers. Essentially, AT&T argues that it should be treated as an end-user and allowed to purchase multiple lines at the discounted rate created by the promotion. AT&T's position is not supported by the evidence and indeed, AT&T's witness, Daniel P.

Rhinehart, indicated at the hearing that AT&T would "accede to Southwestern Bell's billing limitations on this" (TR 247). AT&T's proposal would permit aggregation of Local Plus service. The Commission has already addressed the aggregation question in its Report and Order in Case Number TT-98-351 and found that SWBT's restriction on aggregation of Local Plus was a reasonable restriction on resale. The Commission will not reverse that finding.

The other issues raised in opposition to SWBT's promotional tariff relate to consideration of the underlying Local Plus service. Those issues concern whether or not SWBT has effectively made Local Plus available for resale by IXCs and CLECs who would like to provide those services as an unbundled network element (UNE). When the Commission initially addressed the Local Plus service in its Report and Order in Case Number TT-98-351, it found that Local Plus service would be permitted without imputation of terminating access charges only if the service were "made available for resale at a wholesale discount to CLECs and IXCs."

With regard to CLECs, the evidence demonstrated that several CLECs are actively reselling Local Plus and that the number of lines being resold is increasing from month to month. Furthermore, the availability of the proposed promotion at the wholesale discount rate may encourage additional reselling of Local Plus by CLECs. Clearly, for most CLECs Local Plus is available for resale.

However, there was some testimony presented indicating that a CLEC wishing to provision Local Plus through UNEs might encounter difficulties. SWBT indicated that it was willing to negotiate amendments to its interconnection agreement that would allow a facilities-based CLEC to offer a Local Plus service using SWBT's UNEs when the CLEC buys a switchport from SWBT. SWBT was unable to describe exactly what arrangements would be made to permit the offering of such services because no CLEC has sought to provision Local Plus in such a manner. Theoretical difficulties that might be encountered by a hypothetical competitor at some time in the future are not a reasonable basis for rejecting SWBT's promotional tariff.

AT&T, Sprint, Staff and Public Counsel are concerned that IXCs do not have adequate access to SWBT's mechanized preorder, ordering and provisioning systems. Concerns were also expressed that the billing statements offered by SWBT to IXCs seeking to resell Local Plus are inadequate. AT&T also objects to SWBT's requirement that it sign a separate service agreement before reselling Local Plus as an IXC.

The Commission will not back away from its previously stated requirement that SWBT make Local Plus available for resale to CLECs and IXCs. Availability for resale requires that SWBT allow IXCs the opportunity to resell Local Plus in a manner that is comparable to the manner in which Local Plus is resold by CLECs and in a manner that is comparable to the manner in which SWBT itself sells that service.

However, this case exists only to consider SWBT's promotional tariff. As a result, only those issues directly relating to the promotional tariff need to be resolved by the Commission. The evidence indicates that this tariff is just and reasonable and is in accord with the law and prior decisions of the Commission. The Commission is willing to approve SWBT's promotional tariff. However, because the effective dates set in the tariff for the promotion have already passed, SWBT will

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be permitted to submit substitute sheets establishing appropriate dates for the promotion.

Because of the limited scope of this case, this is not the best forum for consideration of the technical aspects of the availability of resale of Local Plus by IXC's. Nevertheless, the Commission is concerned about these issues. Therefore, the Commission will open a case on its own motion to direct Staff to investigate the effective availability for resale of Local Plus by IXC's and CLECs.

**Conclusions of Law:**

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

1. Section 392.220, RSMo Supp. 1999, requires every telecommunications company to file tariffs with the Commission showing its rates, rentals and charges for service.
2. Section 392.200, RSMo Supp. 1999, provides that "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.

Based upon the Commission's review of the applicable law, SWBT's tariff, and its findings of fact, the Commission concludes that SWBT's proposed promotion should be approved.

*IT IS THEREFORE ORDERED:*

1. That the tariff sheets issued by Southwestern Bell Telephone Company on September 20, 1999, assigned tariff number 200000254, and previously suspended by the Commission until April 17, 2000, are rejected because the dates established for the promotion have passed.
2. That Southwestern Bell Telephone Company shall be permitted to submit substitute tariff sheets establishing appropriate effective dates for its promotion.
3. That late-filed exhibit number 13 is admitted into evidence.
4. That any evidence the admission of which was not expressly ruled upon is admitted into evidence.
5. That any objection to the admission of any evidence that was not expressly ruled upon is overruled.
6. That any motions not expressly ruled upon are denied.
7. That this Report and Order shall become effective on April 17, 2000.

Lumpe, Ch., Murray, Schemenauer, and Drainer, CC., concur

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**In the Matter of the Application of Union Electric Company for a  
Variance from the Commission's Rule Requiring Separate  
Metering for The National Benevolent Association of the  
Christian Church Hylton Point II Project.**

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*Case No. EE-2000-465*

*Decided April 18, 2000*

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**Certificates §§1, 2, 3. Electric §§2, 13.** AmerenUE was granted its application for a variance from Commission Rule 4 CSR 240-20.050, which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981.

**ORDER GRANTING VARIANCE**

On January 31, 2000, Union Electric Company d/b/a AmerenUE (UE) filed a request for variance from Commission rule 4 CSR 240-20.050 which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981. UE stated in its request that The National Benevolent Association of the Christian Church (NBA or owner) has requested master metering for its Hylton Point II Project (the "project"), located at 933 Belt, St. Louis, Missouri. This project consists of the construction and operation of a new building to provide 60 one bedroom assisted living apartments for elderly residents at subsidized costs.

UE stated that the NBA has requested that one master meter be installed for this project because it will be responsible for the payments of the bills for each apartment and the common facilities. UE stated in its request that separate metering for each apartment would result in additional expenditures of approximately \$280 per apartment, or \$16,800. UE stated that it supports the owner's request for the master metering of the project because of the overall cost benefits.

On April 7, 2000, the Variance Committee of the Missouri Public Service Commission (Committee) filed its recommendation that the Commission approve UE's Application for Variance. The memorandum of the Individual Electric Metering Variance Committee<sup>1</sup> (Committee) was attached to the Committee's pleading and marked as Appendix A. The Committee's recommendation noted that Commission rule 4 CSR 240-20.050(2) requires the installation of a separate electric meter for each residential or commercial unit in a multiple occupancy building where construction has begun after June 1, 1981. Further, the Committee noted that this Commission rule is aimed at compliance with certain sections of the Public Utility Regulatory Policies Act of 1978. 16 U.S.C. § 2625. Paragraph (d) of 16 U.S.C. § 2625 provides:

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<sup>1</sup> The Individual Electric Metering Variance Committee members are James Watkins, Utility Division; Jim Ketter, Utility Division; Nathan Williams, Office of the General Counsel; and John Coffman, Office of the Public Counsel.

Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if

- (1) there is more than one unit in such building,
- (2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and
- (3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

The Committee stated that it reviewed the application and received information regarding the operation of the project from both UE and the NBA. The project will consist of 60 units of 540 square feet with through-the-wall electric heat/air conditioning and a central boiler for hot water. The Department of Housing and Urban Development will subsidize the electric bills for this project and the utility expenses will be included in the rent.

The Committee stated that it considered the potential benefits to consumers of individual metering and finds that these potential benefits are likely to be of little value to consumers living in this proposed facility. The Committee stated that since the NBA will be paying the electric bills, the individual consumers will not directly receive the financial benefits of individual conservation and efficiency efforts. The Committee noted that receiving, processing, and paying 60 separate bills for electric service would be unnecessarily burdensome and costly for the NBA.

The Committee recommended the Commission issue an order approving the variance for electric service to the NBA Hylton Point II Project, for good cause shown, from the Commission's rule requiring separate metering.

The Commission has reviewed the application and the Variance Committee's recommendation and finds that for good cause shown, the Application for Variance from the requirement for separate metering for the NBA Hylton Point II Project located at 933 Belt, St. Louis, Missouri, should be granted. Commission rules 4 CSR 240-2.060(11) and 4 CSR 240-20.050(5).

*IT IS THEREFORE ORDERED:*

1. That the Application for Variance filed by Union Electric Company d/b/a AmerenUE on January 31, 2000, is granted.
2. That this order shall become effective on April 28, 2000.
3. That this case may be closed after May 1, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur.  
Crumpton, C., absent.

Thornburg, Regulatory Law Judge.

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**In the Matter of the Joint Application of Atmos Energy Corporation and Arkansas Western Gas Company, d/b/a Associated Natural Gas Company, for an Order Authorizing the Sale and Transfer of Certain Assets of Associated Natural Gas Company Located in Missouri to Atmos Energy Corporation and Either Authorizing the Transfer of Existing Certificates of Public Convenience and Necessity or Granting a New Certificate of Public Convenience and Necessity to Atmos Energy.\***

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*Case No. GM-2000-312  
Decided April 20, 2000*

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**Gas §6.** The Commission authorized Atmos Energy Corporation to acquire the Missouri assets of Arkansas Western Gas Company, d/b/a Associated Natural Gas Company, subject to the terms and conditions contained within a unanimous stipulation and agreement that was approved by the Commission.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On November 2, 1999, Atmos Energy Corporation (Atmos) and Arkansas Western Gas Company, d/b/a Associated Natural Gas Company (ANG) filed a Joint Application asking that the Commission grant ANG the authority to sell and transfer to Atmos all of the assets of ANG located in Missouri. The Commission responded to the Joint Application by issuing an Order and Notice on November 8, inviting interested parties wishing to intervene to file an appropriate application on or before November 29.

Timely applications to intervene were received from the City of Malden, the City of Campbell, the City of Appleton City, Noranda Aluminum, Inc. (Noranda), and from the International Brotherhood of Electrical Workers, Local Union No. 1439 (IBEW). The Commission granted each of those applications to intervene in an order issued on December 1. The December 1st order also scheduled an early prehearing conference and directed the parties to file a proposed procedural schedule. The early prehearing conference was held on December 15, and on December 17, the parties filed a proposed procedural schedule. On December 20, the Commission adopted the proposed procedural schedule and set this matter for evidentiary hearing on April 4 and 5, 2000.

Atmos and ANG filed direct testimony in support of their Joint Application on January 14. On February 14, the cities of Malden, Campbell and Appleton City filed

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\*The Commission, in an order issued on January 31, 2001, reopened the case. On February 15, 2001, the Commission issued an order directing the filing of additional data, analysis and documentation regarding peak day requirements and resources. The Commission, in an order issued on August 20, 2001, closed the case.

a notice indicating that they were withdrawing their intervention. The Commission granted their request to withdraw by an order issued on February 15. The remaining parties filed rebuttal testimony on March 1.

A prehearing conference was held on March 9, and on March 10, Atmos and ANG filed a Motion for Extension of Time to File Surrebuttal Testimony to allow the parties additional time to pursue settlement negotiations. The Commission granted that motion on March 13 and extended the time for filing surrebuttal testimony from March 15 to March 22. On March 20, Atmos and ANG filed a second Motion for Extension of Time to File Surrebuttal Testimony, again seeking more time to pursue settlement negotiations. The Commission granted the second motion on March 21 and extended the time for filing surrebuttal testimony from March 22 to March 29.

On March 29, Atmos, ANG, Staff, the Office of the Public Counsel (Public Counsel), Noranda and IBEW filed a Unanimous Stipulation and Agreement (Agreement). The Agreement purports to resolve all outstanding issues and asks the Commission to approve the Joint Application effective May 1, 2000, or as soon as possible thereafter. In response to the filing of the Agreement, the Commission issued an order canceling the hearing scheduled for April 4 and 5.

On April 4, the Commission issued an order directing Staff to file a memorandum explaining its rationale for entering into the Agreement. Staff was directed to file its memorandum no later than April 11. All other parties were allowed until April 17 to submit any response to Staff's memorandum. Staff filed the requested memorandum on April 11. ANG filed a letter on April 12 indicating that it did not intend to file any further response to Staff's memorandum. Atmos and Noranda filed similar letters on April 13. No other party filed a response.

In the Agreement, contingent upon the Commission's acceptance of the Agreement, the parties waived 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 Supp. 1999.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Agreement.

Based on the Agreement of the parties, the Commission finds that the transaction proposed in the Joint Application of Atmos and ANG, as qualified by the conditions set forth in the Agreement, is not detrimental to the ratepayers of Missouri.

*IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed on March 29, 2000 by Atmos Energy Corporation, Arkansas Western Gas Company, d/b/a Associated Natural Gas Company, the Staff of the Public Service Commission, the Office of the Public Counsel, the International Brotherhood of Electrical Workers, Local 1439, and Noranda Aluminum, Inc., is hereby approved as a resolution of all issues in this case (See Attachment 1).

6. That Arkansas Western Gas Company, d/b/a Associated Natural Gas Company is authorized to terminate its responsibilities as a public utility in Missouri.

7. That this order shall become effective on May 1, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur.  
Crumpton, C., absent.

Woodruff, Regulatory Law Judge

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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.

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**Office of the Public Counsel, Complainant, v. Kansas City  
Power & Light Company, Respondent.**

**In the Matter of Public Counsel's Investigation into Lawfulness  
of Special Contract Entered into by Kansas City Power &  
Light.**

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*Case Nos. EC-99-485 & EO-99-154  
Decided April 25, 2000*

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**Electric §§13, 20. Evidence, Practice and Procedure §§9, 30.** On April 25, 2000, the Commission ordered that the Unanimous Stipulation and Agreement filed on April 3, 2000, is approved, and that Kansas City Power and Light Company's tariff is modified to establish conditions under which a special services contract may be executed by KCPL.

**ORDER APPROVING UNANIMOUS STIPULATION  
AND AGREEMENT**

In case number EC-99-485, on April 22, 1999, the Office of the Public Counsel (Public Counsel) filed a complaint with the Missouri Public Service Commission (Commission) against Kansas City Power & Light Company (KCPL), pursuant to Section 386.390, RSMo 1994, and Commission Rule 4 CSR 240-2.070, regarding the lawfulness of two special contracts entered into by KCPL. On May 11, 1999, the Commission entered its notice of complaint, giving KCPL until June 10, 1999, in which to file its answer in response to the complaint or to request mediation. Also in its application, Public Counsel requested a protective order for KCPL which was entered July 2, 1999.

On June 8, 1999, an anonymous intervenor filed its application to intervene. Neither Public Counsel nor KCPL responded and on July 6, 1999, the application was denied.

On June 9, 1999, KCPL filed its motion for the referral of the complaint to voluntary mediation. On June 23, 1999, Public Counsel filed no pleading, but did send a letter to the Commission declining mediation.

On June 30, 1999, the Commission entered its order concerning answer, public notice and intervention which ordered, *inter alia*, that any proper person wishing to intervene in this matter should file an application to do so no later than July 20, 1999, and that KCPL should answer Public Counsel's complaint within thirty (30) days after the effective date of the order.

On July 20, 1999, Trigen-Kansas City Energy Corporation (Trigen) filed its application to intervene. On July 30, 1999, KCPL filed its opposition thereto, and on August 2, 1999, Trigen filed its response.

On July 21, 1999, LaFarge Corporation (LaFarge) filed its application to intervene.

On August 9, 1999, KCPL filed its answer to Public Counsel's complaint.

In case number EO-99-154, on October 14, 1998, Public Counsel initiated an investigation case along with a motion to compel and a request for a protective order for KCPL. On October 23, 1998, KCPL filed its response thereto, and on October 30, 1998, Public Counsel filed its reply. On February 17, 1999, the Commission entered its order granting the motion to compel responses to data requests and entered its order granting protective order.

Both of these cases were consolidated by the Commission's order of August 18, 2000. This order also granted the intervention applications of LaFarge and Trigen and ordered the filing of a procedural schedule. It also ordered KCPL to file a pleading concerning information that KCPL had claimed confidentiality for earlier; KCPL did so in a pleading filed August 30, 1999.

The Commission entered a notice of correction on August 26, 1999, noting the correct case names and numbers of these two cases.

On August 20, 1999, Public Counsel filed its motion to compel answers to data requests it had earlier served on KCPL. On August 30, 1999, KCPL filed its response which, *inter alia*, responded to the motion to compel. On September 10, 1999, Public Counsel filed its reply. On September 17, 1999, the motion to compel was denied.

On September 7, 1999, the Staff of the Commission (Staff), Public Counsel, and KCPL filed their joint procedural schedule recommendation. Those parties stated that the two intervenors also agreed with the proposed procedural schedule. On September 15, 1999, the Commission entered an order adopting the procedural schedule. On November 18, 1999, Public Counsel, with the approval of the other parties, filed a motion to extend the procedural schedule, which was approved on November 29, 1999. Public Counsel filed a second motion to extend the procedural schedule on December 17, 1999. KCPL filed its motion in opposition on December 23, 1999, and on December 28, 1999, Staff filed its motion in support of the extension. On the same day, Public Counsel filed its reply to KCPL's

opposition of the extension and KCPL responded on January 4, 2000. The extension was denied on January 6, 2000.

On February 16, 2000, KCPL filed its motion for a stay of the deadlines contained in the procedural schedule. On March 3, 2000, the Commission granted the stay and ordered the parties to file a procedural schedule no later than April 3, 2000.

On April 3, 2000, KCPL filed a stipulation and agreement (Agreement) and a notice of the filing of the Agreement. The Agreement was signed by KCPL, Public Counsel and LaFarge.

On April 10, 2000, Staff and Trigen each filed their separate responses to the Agreement, both stating that neither requested a hearing and neither had any objections to the Agreement. Commission Rule 4 CSR 240-2.115(1) states, in part, that "...[I]f no party requests a hearing, the commission will treat the stipulation and agreement as a unanimous stipulation and agreement." Thus, the Agreement is unanimous.

There is no need for a hearing since no party requested a hearing and the Commission will cancel the remainder of the procedural schedule, including the evidentiary hearing. The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. 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 Agreement. See State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C., 776 S.W.2d 494, 496 (Mo. App. 1989).

Briefly explained, the Agreement pointed out the areas of agreement:

- (A) Tariff modifications: The Agreement explains the modifications for KCPL's tariff for the execution of special contracts. KCPL's special contracts tariff establishes conditions under which a special contract may be executed by KCPL;
- (B) Charitable contribution: KCPL agreed to make a charitable contribution to assist low-income customers;
- (C) Dismissal of complaint: Public Counsel agreed to dismiss with prejudice its complaint;
- (D) Discovery: Public Counsel may use the discovery conducted in this proceeding in a subsequently filed rate case or rate complaint case;
- (E) No acquiescence: None of the signatories to the Agreement shall be deemed to have acquiesced in several areas, including, for example, ratemaking or procedural principles;
- (F) Negotiated settlement: The Agreement represents a negotiated settlement; and
- (G) Interdependent provisions: The Agreement contains interdependent provisions so that if the entire Agreement is not approved, it shall be void.

The parties thus requested an order that approved the entire Agreement as expeditiously as possible.

The Commission concludes that all issues were settled by the Agreement. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in a case, pursuant to Section 536.060, RSMo Supp. 1999. Thus, the Commission will approve the Agreement.

*IT IS THEREFORE ORDERED:*

1. That the Missouri Public Service Commission approves the stipulation and agreement filed on April 3, 2000, signed by Kansas City Power & Light Company, the Office of the Public Counsel, and LaFarge Corporation, and whose terms are set forth in Attachment A.
2. That those portions of the procedural schedule which have not been fulfilled, shall be canceled, including the evidentiary hearing which was scheduled to begin on April 24, 2000.
3. That this order shall become effective on May 5, 2000.
4. That this case may be closed on May 9, 2000.

Lumpe, Ch., Crumpton, Murray, Schemenauer, and Drainer, CC., concur

Hopkins, Senior Regulatory Law Judge

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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.

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**In the Matter of the Application of Strategic Energy, L.L.C. for Certification as a Seller of Energy Services in Missouri.**

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*Case No. GO-2000-635  
Decided May 2, 2000*

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**Evidence, Practice and Procedure §24.** The drafting and filing by a corporate entity of an application to be certified as a Seller of Energy Services, pursuant to 4 CSR 240-45.010, required no legal skill or training and therefore was not the practice of law, so as to require the corporate entity to be represented by a licensed attorney.

**ORDER GRANTING CERTIFICATE AS AN ENERGY SELLER**

On April 11, 2000, Strategic Energy, L.L.C. (Strategic Energy) filed an Application for Certification as a Seller of Energy Services in the state of Missouri. On April 14, the Staff of the Commission (Staff) filed a recommendation and memorandum indicating that Strategic Energy's application complies with the requirements of 4 CSR 240-45.010. Staff recommends that the Commission approve the application as filed.

The Commission notes that Strategic Energy is an artificial entity, a limited liability company formed under the laws of Delaware. As an artificial entity, Strategic Energy cannot represent itself in legal matters. *Clark v. Austin*, 340 Mo 467, 101 S.W.2d 977 (1937). See also *Reed v. Labor and Industrial Relations Commission*, 789 S.W.2d 19 (Mo. banc 1990). Strategic Energy's application is signed by Richard M. Zomnir, its President and Chief Executive Officer. It is not signed by an attorney licensed to practice law in Missouri.

Despite the general prohibition against a corporation representing itself in legal matters, the Missouri Court of Appeals has held that the drafting and filing by a corporation of an application that requires no legal skill or legal training is not the practice of law and need not be signed by an attorney. *Department of Social Services v. Administrative Hearing Commission*, 814 S.W.2d 700 (Mo. App. W.D. 1993). See also *Division of Employment Security v. Westerhold*, 950 S.W.2d 618 (Mo. App. E.D. 1997). The application that Strategic Energy filed is on a form prescribed by the Commission and is little more than a bare request that it be certified as a seller of energy services. The completion of the application does not require any legal skill or training. Therefore, under the previously cited holdings of the Missouri Court of Appeals, the Commission will accept the filing of Strategic Energy's application without requiring that it be signed by an attorney licensed to practice law in Missouri.

The Commission has reviewed the application and Staff's recommendation and concludes that the application should be granted.

*IT IS THEREFORE ORDERED:*

1. That Strategic Energy, L.L.C. is granted a certificate as an energy seller pursuant to 4 CSR 240-45.010.
2. That this order shall become effective on May 12, 2000.
3. That this case may be closed on May 15, 2000.

Lumpe, Ch., Murray, Schemenauer, and Drainer, CC., concur  
Crumpton, C., absent

Woodruff, Regulatory Law Judge

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**In the Matter AT&T's Tariff Filing to Introduce an IntraLATA  
Overlay Plan, PSC Mo. No. 15\***

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*Case No. TT-2000-22*

*Decided May 2, 2000*

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**Telecommunications §34.** The Commission approved tariffs filed by AT&T Communications of the Southwest, Inc. to implement its Overlay Plan. This optional plan allows residential customers in all Southwestern Bell Telephone Company exchanges (both urban and rural) who are pre-subscribed to AT&T for both intraLATA and interLATA toll service to make all intraLATA direct-dialed calls priced at nine cents per minute. The Commission found that approval of the Overlay Plan would provide AT&T customers in SWBT exchanges additional choices that they would not otherwise have had, and would create more competition in the intraLATA market.

**REPORT AND ORDER**

**Procedural History**

On June 25, 1999, AT&T Communications of the Southwest, Inc. filed a revised tariff designed to implement a new optional calling plan known as AT&T IntraLATA Overlay Plan (the Overlay Plan). On July 12, 1999, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company (the Missouri Independent Telephone Group, or MITG) filed a motion to suspend, and ultimately reject, that tariff.

On July 14, 1999, the Small Telephone Company Group<sup>1</sup> (STCG) filed a Motion to Suspend Tariff and Application to Intervene. SCTG raised many of the same points as MITG.

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\*On June 20, 2000, the Commission denied applications for rehearing in this case. On July 17, 2000, this case was appealed to Cole County Circuit Court (OOCV324464).

<sup>1</sup>The Small Telephone Company Group consists of BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, 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, 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. ALLTEL Missouri, Inc., although listed as a member of the STCG in the application to intervene, withdrew its application to intervene on July 21, 1999. The Commission granted intervention to the members of the STCG as listed above, and not to ALLTEL Missouri, Inc.

On August 2, Southwestern Bell Telephone Company filed an application to intervene. On August 9, Sprint Missouri, Inc. and Sprint Communications Company L.P. filed applications to intervene. The Commission granted intervention to each of these entities.

The parties filed testimony pursuant to a procedural schedule established by the Commission, and an evidentiary hearing was held on December 20 and 21, 1999.

On January 6, 2000, STCG filed Late-filed Exhibit 11. No objections were made to that exhibit, and it will be admitted.

#### **Findings of Fact**

The Commission has reviewed and considered all of the evidence and arguments presented by the various parties. Some evidence and positions of parties on the issue may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or a position of a party indicates that, while the evidence or position was considered, it was not found relevant or necessary to the resolution of the particular issue.

The issues in this case are primarily legal ones, and many of the pertinent facts are undisputed.

On June 25, 1999, AT&T filed proposed tariff sheet 71.6 designed to implement its Overlay Plan. The Overlay Plan will be available to residential customers in all SWBT exchanges (both urban and rural) who are pre-subscribed to AT&T for both intraLATA and interLATA toll service. The Overlay Plan is an optional calling plan. Customers enrolled in the plan will have all intraLATA direct dialed calls priced at nine cents per minute. Approval of the Overlay Plan will provide AT&T customers in SWBT exchanges additional choices that they would not otherwise have, and will create more competition in the intraLATA market. The Overlay Plan will not be available in any non-SWBT exchanges. Since the Overlay Plan will be available to all customers in SWBT exchanges, regardless of their geographic location, it is available to all similarly situated customers.

The access costs to originate and terminate traffic in non-SWBT exchanges, on average, are significantly higher than the costs in SWBT exchanges. Some evidence suggested that this differential may be as high as 300 percent<sup>2</sup>. Approval of the Overlay Plan will make AT&T's provision of intraLATA toll in SWBT exchanges more competitive. Allowing AT&T to be more competitive in SWBT exchanges, without incurring losses by offering the same service in other exchanges, will put AT&T in a better position to serve on a statewide basis.

The Commission finds that clear and convincing evidence has been presented that approving the Overlay Plan is in the public interest.

#### **Conclusions of Law**

**1. Is the Overlay Plan consistent with the Telecommunications Act of 1996 and the Federal Communications Commission rules promulgated pursuant thereto?**

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<sup>2</sup> The Commission will not make a specific finding that the differential is 300 percent, but finds that the differential, on average, is substantial and significant.

Public Counsel, STCG, and MITG argue that the Overlay Plan is not consistent with Section 254(g) of the Telecommunications Act of 1996 (the Act). AT&T and Staff argue that it is consistent with federal law. Section 254(g) directs the Federal Communications Commission (FCC) to adopt rules requiring “the rates charged by providers of interexchange services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to subscribers in urban areas.” The FCC adopted rules that use this same language (47 C.F.R. 64.1801).

There are, however, exceptions to the FCC’s prohibition against geographic deaveraging. The FCC noted that it would:

forbear from applying Section 254(g), consistent with the intent of Congress, to the extent necessary to permit carriers to depart from geographic rate averaging to offer . . . optional calling plans . . . provided they are available to all similarly situated customers regardless of their geographic location. (CC Docket No. 96-61, FCC 96-331, Report and Order, at ¶ 26.)

Because the Overlay Plan is an optional calling plan available to all similarly situated customers regardless of their geographic location, it effectively is exempted from the federal prohibition against geographic deaveraging. The Commission concludes that the Overlay Plan is consistent with the Act and the FCC rules promulgated pursuant to the Act.

**2. Is the Overlay Plan consistent with the Missouri statutes?**

Pursuant to Section 392.200.4(1), RSMo Supp. 1999, the Commission must find “clear and convincing evidence” that approval of the Overlay Plan is reasonably necessary to promote the public interest and the purposes and policies of Chapter 392. The Commission has found that approving the Overlay Plan will provide more choices to AT&T customers, and will increase competition in the intraLATA toll market. The Commission has also found that allowing AT&T to offer the Overlay Plan only in SWBT exchanges will put AT&T in a better position to serve statewide. All of these findings support the Commission’s conclusion that approving the Overlay Plan will promote the public interest and purposes of Chapter 392. Taken together, these findings constitute clear and convincing evidence.

Since the Commission has determined that the Overlay Plan is prohibited by neither federal nor state law, and has found that approving it will promote the public interest and the purposes of Chapter 392, the Commission will approve AT&T’s tariff filing implementing the Overlay Plan.

*IT IS THEREFORE ORDERED:*

1. That the following tariff sheet, filed June 25, 1999, by AT&T Communications of the Southwest, Inc., and assigned Tariff File No. 9901018, is approved for service on or after May 23, 2000:

**P.S.C. Mo. No. 15**  
**Section 1, 18th Revised Index Sheet 2**  
**Section 1, Original Sheet 71.6**

2. That late-filed Exhibit 11 is admitted.
3. That this order shall become effective on May 23, 2000.
4. That this case may be closed on May 24, 2000.

Lumpe, Ch., Murray, Schemenauer, and Drainer, CC., concur  
Crumpton, C., absent

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**In the Matter of the Application of Missouri-American Water Company for Permission, Approval, and a Certificate of Convenience and Necessity, Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Water Supply Line Near its Certificated Area in St. Charles County, Missouri.**

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*Case No. WA-2000-461*  
*Decided May 4, 2000*

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**Water §2.** The Commission approved the Application filed by Missouri American Water Company for a certificate of public convenience and necessity authorizing Missouri American to construct, own, operate, control, manage, and maintain a water and sewer system for the public located in part of Saint Charles County, Missouri.

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

On January 24, 2000, Missouri-American Water Company, ("Company" or "MAWC") filed an application with the Missouri Public Service Commission (Commission) pursuant to Section 393.170, RSMo 1994, and 4 CSR 240 2.060, requesting that the Commission grant it a certificate of convenience and necessity to construct, install, own, operate, control, manage, and maintain a water supply line near its certificated area in St. Charles County, Missouri. The proposed project is described in an attachment as the "Greens Bottom Transmission Main Line".

On February 9, 2000, the Commission issued an Order and Notice of Application and directed interested parties to file an application to intervene no later than March 10, 2000. No applications to intervene were filed.

The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no proper party or governmental entity is granted intervention and neither the Commission's Staff nor the Office of the Public Counsel requests a hearing, the Commission may determine that a hearing is not necessary and that the Applicant may submit its evidence in support

of the application by verified statement. State ex rel. Rex Deffenderfer Enterprises, Inc. v. P.S.C., 776 S.W.2d 494, 496 (Mo. App. 1989). No party has requested a hearing in this case.

The Company states that the proposed water supply line is necessary in order for it to increase its delivery rate from contracted water supplies in order to meet growing customer demands. The Company purchases water from the St. Charles County water system and from the City of St. Louis Howard Bend Plant. The Company has a contract limit from these systems of up to 51.6 million gallons per day (MGD). However, the maximum delivery capacity is about 21 MGD. The Company's maximum day usage for this area in 1999 was about 20.5 MGD. The Company states that it is adding 500 to 800 customers per year in the St. Charles area and this growth in demand is projected to continue.

The proposed water supply line will be located exclusively on private easements and will cost about \$2.5 million to construct. MAWC plans to finance the project with short-term debt and later replace that debt with long-term debt.

The Commission's Staff filed its recommendation regarding the application on April 10, 2000. Staff filed a motion correcting its recommendation on April 11, 2000. Staff described the request as one for a "line certificate" for the purpose of constructing a water transmission main from MAWC's Greens Bottom Booster Station to a main located at Pittman Hill Road, a distance of approximately two miles. Staff stated that the proposed water main would effectively provide an increased output from the Greens Bottom Booster Station so that more water may be pumped into the Company's distribution system on a daily basis.

Staff found the proposed service area description submitted by the Company to be inadequate and filed a new description as Attachment A to its recommendation which Staff stated was agreed to by both Staff and MAWC. Staff noted that the actual capital cost of the project would be reviewed for inclusion in the Company's rates after the water main is placed in service, which could occur in either MAWC's pending rate case or in a future rate case.

Staff stated that the Commission has authority to issue a certificate of convenience and necessity under Section 393.170.3, RSMo 1994, when "necessary or convenient for the public service." Staff recommended that the Commission issue its order that:

1. Grants a certificate of convenience and necessity to MAWC for the service area as described in Attachment A to the Staff recommendation.
2. Directs MAWC to submit tariff sheets for water service for the Company's Missouri Cities Divisions tariff including a map and written description of the service area.
3. Makes no finding that would preclude the Commission, in any later proceeding, from considering the ratemaking treatment to be afforded any matters presented in this case or any future expenditure by MAWC.

Staff stated that it would provide a further recommendation in this case regarding the tariff sheets it recommended be submitted under point 2 above.

The Commission finds that granting a certificate of convenience and necessity pursuant to the application and Staff's recommendation is necessary and convenient for the public service.

*IT IS THEREFORE ORDERED:*

1. That Missouri-American Water Company is granted a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain a water supply line in St. Charles County, Missouri for the proposed service area described as follows:

**Line Certificate  
Greens Bottom Booster Station to Pittman Hill Road**

A strip of land located in U.S. Survey 312, U.S. Survey 29, U.S. Survey 657, and U.S. Survey 16, in St. Charles County, Missouri. Said strip of land 1,000 feet wide, and bound on the north by a line described as follows: Commencing at the intersection of the north right-of-way line of the Katy Trail State Park (formerly the north right-of-way of the Missouri Kansas and Texas Railroad) and the centerline of Caulks Hill Road; thence westerly along said right-of-way 10,600 feet to a point west of the westerly right-of-way of Pittman Hill Road, which point is the northwest corner of said strip of land; excluding overlapping area granted as part of a line certificate in Case No. WA-96-353.

2. That Missouri-American Water Company shall submit tariff sheets for water service, including a map and written description of the service area as set out in this order and consistent with the certificate of convenience and necessity approved in this case, and shall file notice of the same in this case.

3. That the Commission's Staff shall file its recommendation in this case regarding the tariff sheets submitted by Missouri-American Water Company.

4. That nothing presented in this order shall preclude the right of the Commission to consider the ratemaking treatment to be afforded any matters herein, or any future expenditure by Missouri-American Water Company in any later proceeding.

5. That this order shall become effective on May 16, 2000.

Lumpe, Ch., Crumpton, Drainer, Murray, and Schemenauer, CC.,  
concur.

Thornburg, Regulatory Law Judge

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**In the Matter of St. Joseph Light & Power Company's Tariff to  
Establish a Voluntary Load Reduction Rider**

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*Case No. ET-2000-670  
Decided May 9, 2000*

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**Rates \$71, Electric \$20.** A prospective intervenor's request to suspend a tariff that created a voluntary load reduction rider was denied where the large industrial customer requesting the suspension failed to allege any specific harm that would result from the tariff and where even a short suspension would prevent the tariff from going into effect during the hot-weather months when it was needed.

**ORDER DENYING REQUEST TO SUSPEND, DENYING APPLICATION  
TO INTERVENE, AND APPROVING TARIFF**

On April 12, 2000, St. Joseph Light and Power Company (SJLP) issued a proposed tariff carrying an effective date of May 12. SJLP's tariff would implement a Voluntary Load Reduction Rider to permit participating customers to voluntarily reduce their electric load in response to SJLP's request for a reduction. In exchange for their load reduction, SJLP would credit the customer's bill. On April 21, AG Processing Inc, a cooperative (AGP), filed an application to intervene and a request that the tariff be suspended.

On April 26, the Commission issued a notice directing that all interested parties wishing to respond to AGP's request to suspend, do so on or before May 2. On May 2, SJLP filed its response to AGP's request. The Staff of the Public Service Commission (Staff) also filed a response on May 2. Along with its response, Staff filed a memorandum recommending that the Commission approve the tariff proposed by SJLP.

AGP asks that the Commission suspend SJLP's tariff because it has various concerns about the particulars of the tariff. AGP does not argue that it will be harmed in any particular way by the tariff but asks that the Commission suspend the tariff for a short period of not more than 30 days to "permit examination and consideration of the tariff and possible discussion with representatives of SJLP of any identified concerns."

SJLP's response indicates that its proposed tariff is similar to plans that have been adopted by most of the electrical utilities in Missouri and have been approved by the Commission. SJLP also points out that the proposed load reduction program is voluntary and that AGP need not be affected by the program unless it chooses to participate. Finally, SJLP states that even a short suspension of the tariff would delay implementation of the program until after the beginning of the extreme heat season, when the program will be needed.

Staff's response states that SJLP's tariff should not be suspended. Staff indicates that AGP's request to suspend does not state how AGP's interest would be adversely affected by the Commission's approval of the proposed tariff. Staff also points out that none of SJLP's customers, including AGP, would be required

to take service under the proposed tariff and that suspension of the tariff will make it unavailable to other eligible customers who might benefit from the program. Finally, Staff argues that if SJLP is not permitted to implement the proposed voluntary load reduction rider, SJLP's cost of supplying power to its customers could increase and the reliability of its electrical system may be affected. Staff recommends that the Commission approve the tariff proposed by SJLP.

The Commission has reviewed the tariff sheets, AGP's request to suspend, SJLP's response to that request and Staff's response and recommendation. The voluntary load reduction rider created by SJLP's tariff is similar to programs that the Commission has previously approved for other electric utilities. The general concerns raised by AGP in its request to suspend do not justify the delay in implementing the program that would result from even a short suspension. AGP's request to suspend SJLP's tariff will be denied. Because the tariff will not be suspended, AGP's application to intervene will also be denied. Finally, based on Staff's recommendation, the tariff filed by SJLP will be approved.

*IT IS THEREFORE ORDERED:*

1. That the request to suspend tariff filed by AG Processing Inc, a cooperative, is denied.
2. That the application to intervene filed by AG Processing Inc, a cooperative, is denied.
3. That the tariff sheets filed by St. Joseph Light & Power Company on April 12, 2000, and assigned tariff number 200000931, are approved to become effective on May 12, 2000. The tariff sheets approved are:

**P.S.C. Mo. No. 6**

**8th Revised Sheet No. 1, Canceling 7th Revised Sheet No. 1**

**Original Sheet No. 22.93**

**Original Sheet No. 22.94**

4. That this order shall become effective on May 12, 2000.
5. That this case may be closed on May 15, 2000.

Lumpe, Ch., Murray, Schemenauer, and Drainer, CC., concur  
Crumpton, C., absent

Woodruff, Regulatory Law Judge

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**In the Matter of the Joint Application of UtiliCorp United Inc. d/  
b/a Missouri Public Service, The Empire District Electric  
Company and St. Joseph Light & Power Company for Waiv-  
ers of Commission Rules 4 CSR 240-20.015, 4 CSR 240-  
40.015, 4 CSR 240-40.016 and 4 CSR 240-80.015**

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*Case No. EE-2000-592  
Decided May 18, 2000*

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**Electric §40.** The Commission found that the purposes of the Affiliate Transactions Rule could better be accomplished by applying the rule to all the utilities not specifically exempted by the Circuit Court than by exempting all utilities. The Commission did not refrain from enforcing a validly promulgated rule because it was subject to appellate review. The Commission denied the requested waiver.

**ORDER DENYING WAIVERS**

On March 22, 2000, UtiliCorp United Inc. d/b/a Missouri Public Service, The Empire District Electric Company and St. Joseph Light & Power Company (Applicants) filed an application for waivers of Commission rules 4 CSR 240-20.015, 4 CSR 240-40.015, 4 CSR 240-40.016 and 4 CSR 240-80.015 (the affiliate transaction rules). Applicants note that the effectiveness of the affiliate transaction rules has been stayed for certain utilities. Applicants allege that requiring them to comply with the affiliate transaction rules while other utilities are effectively exempted will result in an uneven application of the rules. Applicants assert that the application of the affiliate transaction rules to some utilities and not others will result in "uneven playing field." Applicants do not allege that they are competing on this playing field against any of the utilities that have received a stay. Applicants also object to complying with the affiliate transaction rules because of the costs they assert the rules will impose upon them.

On April 3, 2000, the Office of the Public Counsel (Public Counsel) filed suggestions opposing the requested waiver. Public Counsel points out that the fact that certain utilities have had the effectiveness of a validly promulgated rule stayed should not be good cause for exempting other utilities. Public Counsel also disputes Applicants' "level playing field" argument. Finally, Public Counsel counters Applicants' claims of the costs required to comply with the rules.

On April 13, 2000, Applicants filed a response to Public Counsel's April 3, 2000, pleading. Applicants dispute Public Counsel's assertion that the grant of a stay by the Circuit Court frustrates the Commission's intent in promulgating the affiliate transaction rules. The Applicants' also assert that granting the requested waiver would not set back the Commission's intent in promulgating these rules. Applicants argue that a delay in applying the rules to them until the appellate process has been concluded will prevent the potentially needless expenditure of funds. Applicants also take issue with Public Counsel's arguments about the significance of the costs of compliance.

Also on April 13, 2000, the Staff of the Commission filed a pleading entitled "Staff Response in Opposition to Joint Application for Waivers." Staff states the purposes of the rules can be better accomplished by denying the requested waiver than by granting it. Staff contends that the purposes can be accomplished to a certain extent by applying the rules to some utilities, but that they cannot be accomplished at all if the Commission grants the waiver. Staff points out that Applicants could have filed motions for stay in the Circuit Court, but chose not to. Staff disagrees with Applicants' assertions concerning the costs of complying with the rules.

The Cole County Circuit Court made very clear that its order granting stay only applied to those utilities that requested it. Applicants, if they wished to have the effectiveness of the rule stayed as to them, could have joined with the utilities that received a stay. The Commission agrees with Staff that the purposes of the rule can better be accomplished by applying the rule to all the utilities not specifically exempted by the Circuit Court than by exempting all utilities.

The Commission fully considered all of the evidence concerning the cost of compliance before it issued its order of rulemaking. The Commission will not refrain from enforcing a validly promulgated rule because it is subject to appellate review. The Commission will deny the requested waiver.

*IT IS THEREFORE ORDERED:*

1. That the application for waivers filed by UtiliCorp United Inc. d/b/a Missouri Public Service, The Empire District Electric Company and St. Joseph Light & Power Company on December 13, 1999 is denied.
2. That this order shall become effective on May 31, 2000.

Lumpe, Ch., Crumpton, and Drainer, CC., concur  
Murray and Schemenauer, CC., absent

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Adequacy of Laclede Gas Company's  
Service Line Replacement Program and Leak Survey Pro-  
cedures.**

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*Case No. GO-99-155  
Decided May 18, 2000*

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**Gas § 1.** The Commission opened this case to receive information concerning the adequacy of Laclede Gas Company's entire copper service line replacement program and the effectiveness of the company's leak survey and investigations. The Commission approved a Unanimous Stipulation and Agreement in which the parties agreed to a resolution of all issues.

**Gas § 11.** The Commission approved a Unanimous Stipulation and Agreement regarding the adequacy of Laclede Gas Company's entire copper service line replacement program and the effectiveness of the company's leak survey and investigations.

**Gas § 16.** The Commission approved a Unanimous Stipulation and Agreement regarding the adequacy of Laclede Gas Company's entire copper service line replacement program and the effectiveness of the company's leak survey and investigations. Laclede Gas Company is subject to the Commission's jurisdiction regarding safety under Section 386.310, RSMo Supp. 1999.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On October 14, 1998, the Staff of the Missouri Public Service Commission (Staff) filed a motion to open a case for the purpose of receiving information concerning the adequacy of Laclede Gas Company's (Laclede) entire copper service line replacement program and the effectiveness of the company's leak surveys and investigations. This motion indicates that Laclede is a gas corporation as defined in Section 386.020(18), RSMo Supp. 1999, and is a public utility subject to the Commission's jurisdiction pursuant to Section 386.020(42), RSMo Supp. 1999. Laclede is also subject to the Commission's safety jurisdiction under Section 386.310, RSMo Supp. 1999. According to Staff's motion, Laclede provides natural gas service in St. Louis, St. Charles, Franklin, Jefferson, St. Francois, Ste. Genevieve, Iron, Madison, and Butler Counties in Missouri.

Staff's motion indicated that two gas incidents occurred in March 1998 involving Laclede gas service. An explosion and ensuing fire involving natural gas occurred at 401 Pralle Lane in St. Charles, Missouri, on March 17, 1998. Another explosion and ensuing fire involving natural gas occurred at 732 Bergerac Drive in Creve Coeur, Missouri, on March 13, 1998. On April 14, 1998, the Commission opened Cases GS-98-422 and GS-98-423 to receive information related to the 401 Pralle Lane and 732 Bergerac Drive natural gas incidents, respectively. In each of these cases, Staff filed incident investigation reports indicating that a more thorough and complete examination and analysis of Laclede's copper service line replacement program and leak surveys and investigations was required, and recommending that a case be opened for that purpose. Subsequently, the Commission opened Case No. GO-99-155 as a general investigatory case to receive information relevant to the adequacy of Laclede's copper service line program and the effectiveness of Laclede's leak survey procedures.

On February 18, 2000, Laclede, the Staff, and the Office of the Public Counsel (Public Counsel) filed a Unanimous Stipulation and Agreement. This agreement indicates that Laclede and Staff have met on numerous occasions to review the various actions which had been undertaken by Laclede to enhance its program for monitoring and replacing direct-buried copper service lines and to discuss Staff and company proposals for further action in these areas. A prehearing conference was held on November 30, 1999. As a result of the investigation and subsequent discussions, the parties agreed to a resolution of all of the issues in this case. The parties request that the Commission approve the Unanimous Stipulation and Agreement following the filing of the Staff's memorandum.

On March 10, 2000, the Commission issued an Order Suspending Procedural Schedule and Directing Response. The Commission's order notes that although the Stipulation and Agreement states that the Staff shall submit a memorandum and/or testimony explaining its rationale for entering into the stipulation, it does not specify when the Staff shall provide such filing. The Commission directed Staff to file such memorandum and/or testimony no later than April 10, 2000.

The Staff filed its recommendation and memorandum in support of the Unanimous Stipulation and Agreement on April 10, 2000. The memorandum details both the intent of the stipulation and Staff's rationale for entering into the agreement. In summary, Staff notes that the voluntary and stipulated actions Laclede has committed to will work toward providing a better and safer system for Laclede and the public, and Staff recommends the Commission's approval of the Stipulation and Agreement.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. P.S.C., 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

The Commission has reviewed the Unanimous Stipulation and Agreement, Staff's recommendation and memorandum in support of the Unanimous Stipulation and Agreement, and the official case file, and finds the Unanimous Stipulation and Agreement is reasonable and in the public interest. Therefore, the Commission will approve the Unanimous Stipulation and Agreement.

*IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed on February 18, 2000, by Laclede Gas Company, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, is hereby approved as a resolution of all issues in this case (see Attachment A).
2. That the procedural schedule, which was suspended on March 10, 2000, is now canceled.
3. That this order shall become effective on May 31, 2000.

4. That this case may be closed on June 1, 2000.  
Lumpe, Ch., Crumpton, and Drainer, CC., concur Murray and  
Schemenauer, CC., absent

Ruth, Regulatory Law Judge

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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.

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**In the Matter of the Application of The Empire District Electric Company for Permission and Authority to Transfer a Partial, Undivided Interest in Certain Generation Facilities, Land and Related Property Owned by It to Westar Generating, Inc., in Accordance with a Contract Dated July 26, 1999.**

**In the Matter of the Application of Westar Generating, Inc. for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain Electric Production Facilities in Jasper County, Missouri, Pursuant to the terms of a July 26, 1999 Agreement for the Construction, Ownership and Operation of State Line Combined Cycle Generating Facility.**

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*Case Nos. EM-2000-145 & EA-2000-153*  
*Decided June 1, 2000*

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**Electric §§3, 4.** Upon the unopposed recommendation of Staff, the Commission approved certain transactions relating to the construction, ownership, and operation of a combined cycle generating facility.

**ORDER APPROVING APPLICATION TO TRANSFER ASSETS AND  
ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY**

On August 13, 1999, The Empire District Electric Company (Empire) filed an application with the Commission requesting permission and authority to sell and transfer an interest in certain assets to Westar Generating, Inc. (WGI) for the purpose of constructing additional electric generating facilities at the "State Line" facility owned by Empire. That application was assigned case number EM-2000-145. The application indicates that Empire, in conjunction with WGI, plans to

construct a 500 megawatt combined cycle generating station utilizing portions of the existing site and State Line Unit 2. Empire and WGI will have a joint ownership in certain common facilities, the land and in the existing and new facilities pursuant to a Construction, Ownership and Operation Agreement dated July 26, 1999.

On August 17, 1999, WGI filed an application with the Commission for a certificate of public convenience and necessity to allow it to "construct, install, own, operate, control, manage and maintain" the electric generating facilities that Empire seeks to convey to it. WGI's application was assigned case number EA-2000-153.

On August 17, 1999, the Commission issued an Order and Notice in case number EM-2000-145 that directed interested parties wishing to intervene in that case to file an application on or before September 7, 1999. Similarly, on August 20, 1999, the Commission issued an Order and Notice in case number EA-2000-153 directing interested parties to file an application to intervene on or before September 9. No party requested intervention in either case.

In response to a Joint Motion to Consolidate filed by Empire and WGI in both cases, the Commission consolidated the two applications into a single case by an order issued on August 31, 1999.

No party has requested a hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has asked permission to intervene or requested a hearing, the Commission may grant the relief requested based on the application.

On May 11, 2000, Staff filed a recommendation and memorandum. No party filed a response to that recommendation and memorandum. Based on its review and analysis, the Staff concludes that Empire has demonstrated that its application to sell and transfer certain assets to WGI is "not detrimental to the public interest." Staff recommends that the Commission issue an order granting Empire's application. Further, Staff recommends that the Commission reserve all ratemaking treatment associated with this transaction for a future rate proceeding.

With regard to WGI's application for a certificate of convenience and necessity, Staff states that WGI is not requesting authority to provide retail service within the area for which it seeks certification, as that area is the same as that in which Empire currently operates its State Line facility. Indeed WGI does not have any retail customers anywhere in Missouri. This fact raises the question of whether or not WGI should be required to apply for a certificate of convenience and necessity.

Staff's recommendation indicates that Section 393.170.1, RSMo 1994 states, in pertinent part, "No . . . electrical corporation . . . shall begin construction of a[n] . . . electric plant . . . without first having obtained the approval of the commission." Section 386.020(15), RSMo Supp. 1999, in pertinent part, defines an electrical corporation as including: "every corporation . . . owning, operating, controlling or managing any electric plant . . ." In State ex rel. Danciger & Co. v. Public Serv. Comm'n, 205 S.W. 36 (Mo. 1918), the Missouri Supreme Court added a requirement to the statutory definition by finding that an electric corporation is not subject

9 Mo. P.S.C. 3d

to regulation by the Commission unless it is offering electricity for "public use." The question then becomes whether or not WGI will be offering electricity for "public use."

WGI does not have any customers in Missouri at this time. However, in Staff's opinion, WGI's ownership interest, in partnership with Empire, a utility regulated by the Commission, in a facility that will serve retail customers in this state implicates the interests of Missouri ratepayers and justifies the exercise of the Commission's authority. Staff concludes that WGI's project is necessary or convenient for the public service and should be approved and a certificate of convenience and necessity should be granted.

The Commission has reviewed the applications of Empire and WGI, the accompanying documentation, and Staff's recommendation and memorandum. The Commission finds that Empire's application to sell and transfer certain assets to WGI is not detrimental to the public interest and should be approved. The Commission also finds that WGI's application for a certificate of convenience and necessity is necessary and convenient for the public service and should be approved.

*IT IS THEREFORE ORDERED:*

1. That the Application filed by The Empire District Electric Company for authority to sell and transfer certain assets to Westar Generating, Inc. is approved.
2. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions approved by this order.
3. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions approved by this order in a later proceeding.
4. That no later than 90 days after the closing date of the transaction, The Empire District Electric Company shall submit to Staff (Utility Services) a copy of all journal entries made in connection with this sale and transfer.
5. That the application filed by Westar Generating, Inc., for a certificate of convenience and necessity is granted.
6. That Westar Generating, Inc., is granted a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain electric facilities in Jasper County, Missouri in an area set forth on the maps attached to its Application as Appendix 2. A legal description of the area is attached to Westar's Application as Appendix 3.
7. That this order shall become effective on June 13, 2000.

Lumpe, Ch., Murray, Schemenauer, and Drainer, CC., concur

Woodruff, Regulatory Law Judge

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**In the Matter of the Access Rates to be Charged by Competitive  
Local Exchange Telecommunications Companies in the  
State of Missouri.\***

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*Case No. TO-99-596  
Decided June 1, 2000*

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**Telecommunications §40.** Given the locational monopoly enjoyed by LECs in the present state of the industry, the general absence of alternative routes by which IXCs can complete calls, and the experience of jurisdictions where no cap on access rates has been imposed, the Commission concludes that a cap on exchange access rates is reasonable and necessary in order for the service to be classified as a competitive service and for the Commission to suspend or modify the application of its rules or certain statutory provisions.

**Telecommunications §3.** The Commission further concludes that a cap on exchange access rates is reasonably necessary to protect the public interest and is consistent with the purposes and provisions of Chapter 392, RSMo.

**Telecommunications §12.** While a cap on access rates is clearly necessary to protect the public interest, no party has adduced evidence sufficient to support a conclusion that the public interest is served by a cap that restricts a CLEC to access rates lower than those of the ILEC against which it seeks to directly compete in any given exchange. An access rate cap at SWBT's rate level is both anticompetitive and a barrier to market entry because it places a significant competitive disadvantage on CLECs and discourages them from entering multiple ILEC service areas. Indeed, the record shows that the ILECs may use excess access charge revenues to reduce the price of their local service and make it more attractive to subscribers. This is a direct and undeniable competitive advantage to an ILEC that charges access rates higher than those allowed to the CLEC. An unreasonable disadvantage is thereby imposed on the CLEC, in violation of Section 392.200.3, RSMo Supp. 1999.

**Telecommunications §12.** The Commission must reject the suggestion of some of the parties that CLECs be permitted to charge 20 to 50 percent more for access than the directly competing ILEC in order to stimulate the development of competition in the basic local services market. That could constitute an unreasonable disadvantage to the ILEC and, in a regime where ILEC access rates may already be higher than cost, would subject customers to paying more than reasonable charges for telecommunications service, in violation of Sections 392.185(4) and 392.200.3, RSMo.

**Telecommunications §36.** The Commission concludes that the public interest would be best served by capping CLEC exchange access rates at the level of the access rates of the directly competing ILEC.

**Telecommunications §8.** The Commission concludes that the record herein clearly and convincingly shows that it is reasonably necessary to promote the public interest, and to promote the purposes and policies of Chapter 392, RSMo, to define exchange access service as a different telecommunications service, dependent on the geographic area or other market within which it is offered. Those parties to this case who provide competitive exchange access services are hereby authorized to submit tariffs providing for originating and

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\*The Commission, in an order issued on June 22, 2000, denied an application for rehearing in this case.

terminating exchange access rates equal to or less than those of the directly competing ILEC in each exchange in which they are authorized to provide such services.

**Telecommunications §36.** Within the context of a general cap on CLEC access rates at the level of the ILEC's rates in each exchange, the Commission will not prescribe how the rates must be constructed.

**Telecommunications §36.** The cap in any exchange will be the ILEC's access rates at the time the CLEC's access tariff becomes effective. If the ILEC thereafter raises its rates, the CLEC need not follow suit. If the ILEC reduces its rates, the CLEC must also file an appropriate tariff amendment to reduce its rates within 30 days in order to maintain the rate cap.

**Telecommunications §36.** The parties also raised questions concerning the possibility that a CLEC might propose access rates higher than those of the directly competing ILEC. While all of the parties agreed that a CLEC may petition the Commission for authority to set rates in excess of the cap, they did not agree on the standard by which such petitions should be determined. Some of the parties argued that such rates must be cost-justified, while others suggested a more flexible, case-by-case analysis. The Commission concludes that Chapter 392, RSMo, requires that any such petitions be determined on a case-by-case basis. While costs are one important factor to be considered, that chapter mandates the consideration of other factors as well.

**Telecommunications §40.** The record herein shows that exchange access is a "bottleneck" service that confers a locational monopoly upon the company providing it. Under Missouri law, exchange access is a distinct telecommunications service. However, so long as CLEC access rates are capped at a reasonable level, none of the parties to this case object to the classification of CLEC access service as a competitive service. The Commission concludes that Sections 392.185(5) and 392.200.4(2) nonetheless permit exchange access service that is capped at a reasonable level to be classified as a competitive telecommunications service.

#### APPEARANCES:

*Mary Ann (Garr) Young*, Attorney at Law, *William D. Steinmeier, P.C.*, Post Office Box 104595, Jefferson City, Missouri 65110, and

*Bradley R. Kruse*, Associate General Counsel, McLeodUSA Telecommunications Services, Inc., Post Office Box 3177, Cedar Rapids, Iowa 52406-3177, for McLeodUSA Telecommunications Services, Inc.

*Leland B. Curtis*, Attorney at Law, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, St. Louis, Missouri 63105, for MCImetro Transmission Services, L.L.C., and Gabriel Communications of Missouri, Inc.

*Paul S. DeFord*, Attorney at Law, Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Linda K. Gardner*, Senior Attorney, Sprint Corporation, 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Missouri, Inc., and Sprint Communications Company, L.P.

*Charles Brent Stewart*, Attorney at Law, Stewart & Keevil, L.L.C., 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for Intermedia Communications, Inc., WinStar Wireless, Inc., and GTE Communications Corporation.

*Anthony K. Conroy*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3516, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*W.R. England, III*, Attorney at Law, and *Brian T. McCartney*, Attorney at Law, Brydon, Swearingen & England, P.C., Post Office Box 456, Jefferson City, Missouri 65102-0456, for ALLTEL Communications, Inc.; Green Hills Area Cellular Telephone Company, Inc., d/b/a Green Hills Telecommunications Services; and Mark Twain Communications Company.

*Craig S. Johnson*, Attorney at Law, and *Rob Trowbridge*, Attorney at Law, Andereck, Evans, Milne, Peace & Johnson, L.L.C., Post Office Box 1438, Jefferson City, Missouri 65102, for the Missouri Independent Telephone Group.

*Patricia D. Perkins*, Attorney at Law, Hendren & Andrae, Post Office Box 1069, Jefferson City, Missouri 65102, for Digital Teleport, Inc., and e. spire Communications, Inc.

*Marc D. Poston*, Senior Counsel, *William K. Haas*, Deputy Counsel, and *Julie Kardis*, Legal 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

### Procedural History

On June 15, 1999, the Commission issued its Order Establishing Case and Directing Notice in order to investigate certain language appearing in Stipulations and Agreements used with competitive local exchange telecommunications carriers (CLECs). Therein, the Commission directed that interested parties would have 20 days within which to seek to intervene. By notice issued on June 16, the Commission clarified its previous order and set July 6 as the deadline for intervention.

Timely applications to intervene were filed by the Missouri Independent Telephone Group (MITG),<sup>1</sup> Gabriel Communications of Missouri, Inc. (Gabriel), Sprint Missouri, Inc. (Sprint Local), and Sprint Communications Company, L.P. (Sprint Long Distance; collectively Sprint), AT&T Communications of the Southwest, Inc. (AT&T), GTE Midwest Incorporated (GTE Midwest) and GTE Communications Corporation (GTECC; collectively GTE), ALLTEL Communications, Inc. (ALLTEL), Green Hills Area Cellular Telephone Company, Inc., doing business as Green Hills Telecommunications Services (Green Hills), Mark Twain Communications Company (Mark Twain), Southwestern Bell Telephone Company (SWBT), Intermedia Communications, Inc. (Intermedia), WinStar Wireless, Inc. (WinStar), and MCImetro Access Transmission Services, L.L.C. (MCI).

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<sup>1</sup>Consisting of eight local exchange telecommunications companies: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company. Originally the Mid-Missouri Group, the notice of group name change was filed on December 29, 1999.

Untimely applications to intervene were filed by ExOp of Missouri, Inc. (ExOp), Birch Telecom of Missouri, Inc. (Birch), McLeodUSA Telecommunications Services, Inc. (McLeod), Digital Teleport, Inc. (Digital), and e. spire Communications, Inc. (e. spire). There were no objections to any of the applications to intervene and, on July 29, the Commission by Order granted all of the applications to intervene, timely and untimely. By the same Order, the Commission set a prehearing conference and required the filing of a proposed procedural schedule.

The prehearing conference was held on August 13. Thereafter, in compliance with the Commission's Order of July 29, the parties submitted a proposed procedural schedule on August 27. On August 31, the Commission adopted the proposed procedural schedule. In compliance therewith, testimony was prefiled on October 28 and on December 2. On December 10 the parties submitted position statements as well as a list of issues, list of witnesses and an agreed order of cross-examination.

On December 15, Bradley R. Kruse, a member of the Illinois Bar, moved for leave to appear pro hac vice on behalf of McLeod. As the motion complied in all respects with the Commission's procedural rules and no objections were raised, the motion was granted by the presiding officer.

The Commission held an evidentiary hearing on December 15 and 16. All parties were represented at the evidentiary hearing. The hearing transcript was filed on December 30 and on January 4, 2000. On January 5, the Commission issued its briefing schedule. The parties filed their initial briefs on February 7, and their reply briefs on February 22.<sup>2</sup>

**Late-filed Exhibits:**

Certain exhibits were late-filed on December 29, 1999 (Exs. 10, 12A and 12B), January 6, 2000 (Ex. 11), and January 18 (Ex. 11 corrected). No objections were made to the receipt of these late-filed exhibits and the time for doing so has passed. Therefore, Exhibits 10, 11 (as corrected on January 18), 12A and 12B are received and made a part of the record of this matter.

**Motion for Leave to Late-file:**

Staff's initial brief was late and Staff moved for leave to late-file it. No party has objected to Staff's motion and the same is granted.

**Motion to Strike:**

On March 7, ALLTEL, Green Hills and Mark Twain moved to strike portions of SWBT's Reply Brief and Staff's Reply Brief. Staff responded on March 13 and SWBT responded on March 20. The movants did not reply to Staff or SWBT.

With respect to SWBT, the movants assert that SWBT's Reply Brief cites and quotes from portions of the transcripts of two other Commission cases, TA-96-345 and TA-96-322. The transcripts themselves are attached to SWBT's Reply Brief as exhibits. According to the movants, these transcripts were not introduced as

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<sup>2</sup>Staff filed its initial brief out-of-time on February 8, 2000, accompanied by a motion for leave to late-file the same.

exhibits in the hearing of this matter and were not part of SWBT's prefiled testimony. Under Commission Rule 4 CSR 240-2.130(8), therefore, movants contend that these transcripts are outside the record of this matter and must be stricken from SWBT's Reply Brief.

With respect to Staff, the movants assert that Staff's Reply Brief incorrectly characterizes ALLTEL as trying to circumvent the voluntary agreement reached in Case No. TA-99-298. The movants then quote from the Stipulation and Agreement filed in that case, to the effect that that agreement would not prevent its signatories from taking other positions in other cases. For this reason, the movants contend, the offending language must be stricken from Staff's Reply Brief.

SWBT responds that it also cited these cases in its initial brief and that Case No. TA-96-345 was referred to by its witness, Debra Hollingsworth, in her testimony. SWBT also points out that the motion to strike was itself filed out-of-time, 14 days after SWBT filed its Reply Brief. Staff, in its turn, responds that the motion to strike is merely an improper response to Staff's Reply Brief, in violation of Rule 4 CSR 240-2.140.

Commission Rule 4 CSR 240-2.080(12) provides that "parties shall be allowed ten (10) days from the date of filing in which to respond to any motion or other pleading unless otherwise ordered by the commission." There is an initial question as to whether or not this rule even applies to set a deadline by which a motion to strike must be filed in response to a reply brief. "The use of the term "pleadings" to describe all of the various papers filed in an action is incorrect." J. DEVINE, MISSOURI CIVIL PLEADING & PRACTICE, § 12-1 (1986). "[P]leading should be distinguished from court paper, which is a broader term. Motions, briefs, and affidavits are court papers, not pleadings." B.A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 667 (2nd ed., 1995). Commission Rule 4 CSR 240-2.010(12) defines "pleading" as follows:

Pleading means any application, complaint, petition, answer, motion or other similar written document, which is not a tariff or correspondence, and which is filed with the commission in a docketed case. A brief is not a pleading under this definition.

Thus, while neither a motion nor a brief is a pleading under the civil rules, a motion is a pleading for the Commission's purposes and a brief is not. Because a brief is not a pleading, the motion to strike was timely. Rule 4 CSR 240-2.080(12) does not apply to briefs.

Section 536.070(5) provides that:

Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as a part of the record by reference thereto when so offered.

Likewise, Commission Rule 4 CSR 240-2.130(2) provides that "information contained in a document on file as a public record with the commission" need not be produced, but may be "received in evidence by reference, provided that the particular portions of the document are specifically identified and are relevant and material." However, the transcripts in question were never offered and, consequently, are not part of the record of this matter. See A.S. NEELY, ADMINISTRATIVE PRACTICE & PROCEDURE (20 MISSOURI PRACTICE SERIES), § 11.04 (1995). Both Section 536.070(5) and Rule 4 CSR 240-2.130(2) require that matter contained in the agency's files actually be offered during the hearing in order to become part of the record. The motion to strike must be granted as to SWBT's Reply Brief.

However, the situation is different with respect to the motion to strike a portion of Staff's Reply Brief. The paragraph that the movants seek to strike does not quote a document outside the record of this matter; rather, it summarizes Staff's cross-examination of ALLTEL's witness, Beurer.<sup>3</sup> The movants failed to object to this cross-examination during the hearing and have not cited any authority in support of their motion to strike this paragraph from Staff's Reply Brief and the Commission concludes that there is none. The Motion to Strike with respect to Staff's Reply Brief shall be denied.

#### Discussion

##### **The Issues:**

On June 15, 1999, the Commission issued its Order Establishing Case and Directing Notice in order to investigate whether or not certain language, appearing in Stipulations and Agreements used with CLECs, might be anticompetitive or a barrier to market entry:

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)<sup>4</sup> within whose service areas CLEC seeks authority to provide service. [FN 3] In this case the relevant access rates are those of Southwestern Bell.

Pursuant to Commission practice and in compliance with the Order Adopting Procedural Schedule issued on August 31, 1999, the parties jointly submitted a list of eight issues for determination by the Commission:

**1. Is the access charge rate cap contained in the standard stipulation a barrier to market entry or anticompetitive?**

All of the parties except SWBT agree that the language in question is a barrier to market entry and is anticompetitive.

<sup>3</sup>Indeed, it is the movants, rather than Staff, who here quote a document not in the record, for the movants quote a portion of the Stipulation and Agreement from Case No. TA-99-298 in their motion.

<sup>4</sup>An "ILEC" is an incumbent local exchange carrier.

**2. Should competitive local exchange companies (CLECs) be classified as competitive companies?**

All of the parties agree that CLECs may be classified as competitive companies so long as their exchange access rates are capped at a reasonable level.

**3. Should access services offered by a CLEC be classified as a competitive service?**

All of the parties agree that access services offered by CLECs may be classified as competitive services so long as they are capped at a reasonable level.

**4. Should access services offered by CLECs be subject to a cap on the price? If so, what should the cap be?**

Those parties that are CLECs do not believe that there should be a cap on their access rates; however, if a cap is imposed, they assert that it should be set higher than the access rates of the ILEC with which each CLEC is directly competing.

Those parties that are not CLECs, on the other hand, agree that a cap must be imposed on the CLECs' access rates. These parties generally agree that the CLECs' access rates should be capped at the same level as those of the ILEC they directly compete with in each exchange.

**5. Should any access charge rate cap apply uniformly over either the geographic area in which the CLEC is certificated or is offering service pursuant to tariffs, or may it vary (e.g., by geographic area or exchange)?**

Most of the parties agree that, for CLECs competing with multiple ILECs across the state, the CLECs may have different access rates in different areas. SWBT, however, prefers that CLECs have uniform access rates across the state.

**6. If an access charge rate cap is to be tied to the incumbent local exchange company's (ILEC) access rates, should the cap only apply at the time of certification or should it be adjusted automatically on a continuing basis to mirror changes in the ILEC's access rates?**

The parties are evenly divided on this issue.

**7. What justification should a CLEC be required to provide as part of a request to charge an access rate that is in excess of the cap?**

Sprint and SWBT contend that any rate increases in excess of the cap should be cost-justified. Several other parties argue that this is a matter for case-by-case determination by the Commission.

**8. Should any access charge rate cap previously imposed upon a CLEC as a condition to certification be modified?**

While almost all of the parties agree that previously imposed caps should be changed to reflect the Commission's decision in this case, the parties do not agree on whether the Commission can do so within the context 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:**

All of the parties herein, except the Commission's Staff and the Office of the Public Counsel, are telecommunications carriers.

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.]" Section 386.071, RSMo 1994.<sup>5</sup>

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]" Sections 386.700 and 386.710.

ALLTEL is certificated by this Commission to provide basic local and intrastate interexchange telecommunications services in Missouri. ALLTEL is classified by this Commission as a competitive company.

AT&T is a Delaware corporation authorized to conduct business in Missouri. AT&T is certificated by this Commission to provide basic local, local exchange and intrastate interexchange telecommunications services in Missouri. AT&T is also certificated by the Federal Communications Commission (FCC) to provide interstate interexchange telecommunications services. AT&T's intrastate interexchange service has been classified by this Commission as competitive.

Birch Telecom is a Delaware corporation, duly authorized to transact business in Missouri. Birch has been certificated by this Commission to provide basic local exchange, local exchange, and intrastate interexchange telecommunications services in the state of Missouri.

Digital is a Missouri corporation, certificated by this Commission to provide basic local exchange, local exchange, and intrastate interexchange telecommunications services in the state of Missouri. The Commission has classified Digital as a competitive company.

ExOp is a Missouri corporation, certificated by this Commission to provide basic local exchange, local exchange, and intrastate interexchange telecommunications services in the state of Missouri. The Commission has classified ExOp as a competitive company.

e. spire is a Maryland corporation that owns American Communications Services of Kansas City, Inc. (American), and ACSI Local Switched Services, Inc. (ACSI), subsidiaries operating in Missouri. American is certificated by this Commission to provide basic local exchange telecommunications services; ACSI is certificated by this Commission to provide local exchange and intrastate interexchange telecommunications services. The services provided by American and ACSI have been classified by this Commission as competitive services.

Gabriel is a Delaware corporation authorized to do business in Missouri. Gabriel is certificated by this Commission to provide basic local, local exchange and interexchange telecommunications services in Missouri. Gabriel, and its services, have been classified by this Commission as competitive.

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<sup>5</sup>Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 1994.

Green Hills is certificated by this Commission to provide basic local exchange telecommunications services in the state of Missouri. The Commission has classified Green Hills as a competitive company.

GTE Midwest and GTECC are Delaware corporations authorized to operate in Missouri. GTE Midwest is certificated by this Commission to provide basic local, exchange access, and intraLATA toll telecommunications services as a carrier of last resort in Missouri. GTECC is certified by this Commission to provide basic local and interexchange telecommunications services in Missouri and is classified as a competitive company.

Intermedia is a Delaware corporation, duly authorized to conduct business in Missouri. Intermedia is certificated by this Commission to provide facilities-based and resold basic local and local exchange telecommunications services in the state of Missouri. The Commission has classified Intermedia as a competitive company.

Mark Twain is certificated by this Commission to provide basic local exchange telecommunications services in the state of Missouri. The Commission has classified Mark Twain as a competitive company.

MCI is a Delaware limited liability company, duly authorized to conduct business in Missouri. MCI is certificated by this Commission to provide basic local exchange, local exchange, and intrastate interexchange telecommunications services in the state of Missouri. The Commission has classified MCI as a competitive company.

McLeod is an Iowa corporation, duly authorized to transact business in the state of Missouri. This Commission has certificated McLeod to provide local exchange and intrastate interexchange telecommunications services. The Commission has classified McLeod as a competitive company.

The MITG consists of eight companies,<sup>6</sup> each certificated by this Commission to provide basic local telecommunications services in Missouri. Each of these companies is both a rural telephone company and a small incumbent local exchange company. None of the members of MITG have been classified by this Commission as competitive companies.

Sprint Local is a Missouri corporation, certificated by this Commission to provide basic local and interexchange telecommunications services in Missouri. Sprint Long Distance is a Delaware limited partnership authorized to conduct business in Missouri. Sprint Long Distance, like Sprint Local, has been certificated to provide basic local and interexchange telecommunications services in Missouri.

SWBT is a Missouri corporation, certificated by this Commission to provide basic local exchange and intrastate interexchange telecommunications services in the state of Missouri.

WinStar is a Delaware corporation, duly authorized to conduct business in Missouri. WinStar is certificated by this Commission to provide facilities-based and resold basic local exchange and local exchange telecommunications services in the state of Missouri. The Commission has classified WinStar as a competitive company.

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<sup>6</sup>See Footnote 1, supra.

**Access Rates:**

This case is about access rates, which are the rates that a local telephone company charges a long distance telephone company for "access" to its subscribers in completing a long distance call. A local telephone company, or local exchange carrier (LEC), operates one or more exchanges, that is, local networks connecting the telephones of individual subscribers to a central office containing a switch.

A long distance telephone company, or interexchange carrier (IXC), carries calls between local exchanges. Each long distance or "toll" call involves two access charges, an originating access charge for access to the subscriber who dials the call and a terminating access charge for access to the subscriber who receives the call. These access charges are not billed directly to these subscribers, but are paid by the IXC to the LECs that serve the subscribers involved in the call.

The purpose of access charges is to compensate the LECs for the use of the local network in completing a toll call. The LEC, which builds, operates and maintains the local network, has invested significant capital in creating the local network and incurs significant costs in operating and maintaining it.

The testimony was that exchange access rates have historically been set above cost and the excess earnings thereby realized have been used to effectively subsidize the cost of local telephone service. This situation was permitted in the days of traditional rate of return regulation because it was considered in the public interest to promote the goal of universal service, that is, basic local telephone service affordable by all. There was also testimony that earnings from access rates may still be in excess of associated costs and may consequently still serve to subsidize the cost of local telephone service.

There are several components to access charges: a carrier common line charge (CCL), a local or end-office switching charge, a tandem switching charge, a local transport charge, a billing and collection charge, and sometimes additional surcharges. The CCL charge is intended to offset the cost of the local network. Switching charges are levied for the use of local switches. Local transport is a charge for transporting a call across the local network. Billing and collection involves recording a toll call, rating it on the IXC's tariff, and billing it to the end-user. Some of these access charge components can be avoided by an IXC. For example, the IXC can perform the billing and collection function itself or contract for it with a third party. Other components cannot currently be avoided because the local loop owned by the LEC is the only route available to the IXC to complete its subscriber's call.

**A Bottleneck Service:**

The central issue in this case is the fact that, in the present state of the telecommunications industry, there exists only a single route over which a call may be directed to a particular LEC subscriber. This route, the local loop, is owned by and controlled by a LEC. Thus, the LECs control access to the individual LEC subscribers. Consequently, the LECs' exchange access rates are not subject to competitive pressure because IXCs have no choice but to pay them in order to complete their subscribers' calls. An IXC cannot select a lower cost alternative

because there is no lower cost alternative. Additionally, because access charges are not billed directly to individual LEC subscribers, the access charges are further insulated from competitive pressure.

The LECs thus enjoy a locational or situational monopoly with respect to exchange access services. The IXCs are captive customers, with no choice other than the choice not to serve the customers of a LEC whose access rates are considered to be too high. This situation will only be resolved when an IXC has a choice of routes by which to complete a call to a particular subscriber and may freely choose the least costly. Such alternatives exist today only where a very high volume of traffic justifies the expense of creating a separate loop or an other avenue from the switch to the subscriber.

The fear of the IXCs is that, without caps, the LECs will charge unreasonably high access rates. There was testimony that, in jurisdictions where no cap is imposed on exchange access rates, CLECs have tended to set them very high, as much as 20 times the level of the directly competing ILEC.<sup>7</sup> There was also testimony that Missouri CLECs have tended to set their access rates as high as permitted.

**The "Standard Stipulation":**

In Missouri, a cap on exchange access rates has generally been imposed by the agreement of the parties in a CLEC's certification case. Of nearly 100 Missouri CLECs, almost all have agreed to this cap as a condition of certification. Where the CLEC has not agreed to the cap, the Commission has imposed one after a contested case hearing. See In the Matter of the Application of ALLTEL Communications, Inc., Case No. TA-99-298 (Report and Order, issued September 2, 1999), at pp. 7-9. In many cases, the language of the agreement appears to cap the CLEC's access rates at the level of SWBT's access rates.

The large ILECs in Missouri are SWBT, Sprint and GTE. Each of these large ILECs has price-cap status and, consequently, may freely raise its rates, including exchange access rates, without cost-justification so long as the annual increase does not exceed a percentage set by statute. There is significant variation in the access rates of these large ILECs and SWBT's access rates are the lowest in the state. SWBT's rates are about half of GTE's and about a fourth of Sprint's. Most of the parties to this case took the position that the so-called "standard stipulation" did indeed cap access rates at the level of SWBT's and that this cap, where the directly competing ILEC has higher rates, is both anticompetitive and a barrier to market entry.

A CLEC is a telephone company that has elected to compete with an ILEC in providing basic local telephone service within a local exchange. The CLEC may configure itself in several ways: it may buy services from the ILEC at a discount and resell them to subscribers or it may use facilities of its own to provide services to subscribers. In the latter case, the CLEC may either build its own facilities or rent facilities at a discount from the ILEC. Generally, a CLEC will configure itself to use a mixture of these business methods. For example, a facilities-based CLEC might

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<sup>7</sup>The testimony was that this is the case in Wisconsin.

have its own switch, but rent other network components such as local loops from the ILEC. These rented components are referred to as unbundled network elements (UNEs). In the context of the present case, it is important to note that only a facilities-based CLEC may charge for access.

The nature of the competitive local telephone service market herein described is such that the LECs may tend to reduce the price of local service to attract subscribers and raise the price of access to secure necessary revenues. Nationally, access traffic is growing at an annual rate of eight to ten percent. Because access is an important revenue source for LECs, LECs tend to keep access rates as high as they can.

SWBT maintains that there should be one statewide access rate cap for CLECs. A waiver of the cap under Sections 392.220, RSMo Supp. 1999, and 392.230, according to SWBT, should be available only upon a showing that a higher rate is cost-based. Some of the parties, on the other hand, argue that CLECs should be permitted to charge more for access than the directly competing ILEC in order to stimulate the development of competition in the basic local services market. Still others support a cap at the level of the ILEC in the exchange where the CLEC will be competing.

In Missouri, some IXCs have chosen to not serve certain exchanges where access rates are high. For example, while there are nearly 500 IXCs certificated in Missouri, some exchanges are served by as few as nine of these, while metropolitan exchanges are served by hundreds of IXCs. This situation is explained mainly by the fact that the most lucrative markets are the most dense, that is, those with the highest traffic volume, and by the high access rates of certain exchanges.

#### **Conclusions of Law**

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

##### **Jurisdiction:**

Every entity seeking to provide or resell telecommunications services in the state of Missouri must possess a certificate of service authority from the Missouri Public Service Commission. Sections 386.020(51) and 392.410.2, RSMo Supp. 1999; Section 392.440. The Commission may impose any condition or conditions it deems reasonable and necessary upon any company providing telecommunications service, consistent with the public interest and the provisions and purposes of Chapter 392, RSMo. Section 392.470.1. The Commission may alter or modify any certificate it has issued. Section 392.410.5, RSMo Supp. 1999.

Unless otherwise specifically provided by statute, the Commission has broad jurisdiction over the services, activities, and rates of telecommunications companies pursuant to Chapters 386 and 392, RSMo. Section 392.380. In particular, the Commission is authorized to classify telecommunications companies and services as competitive, transitionally competitive or noncompetitive, and to waive the application of certain statutes and rules consistent with such classification. Sections 392.361 and 392.370. The Commission may condition any such waiver upon any conditions reasonably necessary to protect the public interest. Section

392.361.6. Regardless of a company's classification, the Commission retains basic regulatory authority over every telecommunications company certificated in the state of Missouri. Section 392.390.

All of the parties to this case, except the Staff and the Office of the Public Counsel, are telecommunications companies certificated by this Commission to provide telecommunications services in the state of Missouri. Each of these parties, therefore, is subject to the jurisdiction of the Commission.

#### **Should CLEC Access Rates be Capped?**

In certificating telecommunications companies to provide competitive basic local telecommunications services in Missouri, the Commission has approved the agreements of the parties to each such case as to a cap on rates for exchange access services and adopted that agreement as a condition of certification and as a condition of competitive classification and waiver of certain statutory provisions and Commission regulations. Sections 392.361.6 and 392.470.1. This agreement is embodied in the so-called "standard stipulation." With respect to ALLTEL, the Commission imposed a cap even in the absence of an agreement of the parties.<sup>8</sup> *In the Matter of the Application of ALLTEL Communications, Inc.*, Case No. TA-99-298, *supra*. Given the locational monopoly enjoyed by LECs in the present state of the industry, the general absence of alternative routes by which IXCs can complete calls, and the experience of jurisdictions where no cap on access rates has been imposed, the Commission concludes that a cap on exchange access rates is reasonable and necessary in order for the service to be classified as a competitive service and for the Commission to suspend or modify the application of its rules or certain statutory provisions. Section 392.361.6 provides that the Commission "may require a telecommunications company to comply with any conditions reasonably made necessary to protect the public interest by the suspension of the statutory requirement." The Commission further concludes that a cap on exchange access rates is reasonably necessary to protect the public interest and is consistent with the purposes and provisions of Chapter 392, RSMo:

The provisions of this chapter shall be construed to:

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(4) Ensure that customers pay only reasonable charges for telecommunications service;

\* \* \*

(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[.]

Section 392.185, RSMo Supp. 1999.

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<sup>8</sup>The cap imposed in the ALLTEL case is not identical to the so-called "standard stipulation."

**What Should the Cap Be?**

While a cap on access rates is clearly necessary to protect the public interest, no party has adduced evidence sufficient to support a conclusion that the public interest is served by a cap that restricts a CLEC to access rates lower than those of the ILEC against which it seeks to directly compete in any given exchange. An access rate cap at SWBT's rate level is both anticompetitive and a barrier to market entry because it places a significant competitive disadvantage on CLECs and discourages them from entering multiple ILEC service areas. Indeed, the record shows that the ILECs may use excess access charge revenues to reduce the price of their local service and make it more attractive to subscribers. This is a direct and undeniable competitive advantage to an ILEC that charges access rates higher than those allowed to the CLEC. An unreasonable disadvantage is thereby imposed on the CLEC, in violation of Section 392.200.3, RSMo Supp. 1999:

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.

For the same reason, the Commission must reject the suggestion of some of the parties that CLECs be permitted to charge 20 to 50 percent more for access than the directly competing ILEC in order to stimulate the development of competition in the basic local services market. That could constitute an unreasonable disadvantage to the ILEC and, in a regime where ILEC access rates may already be higher than cost, would subject customers to paying more than reasonable charges for telecommunications service, in violation of Sections 392.185(4) and 392.200.3, RSMo Supp. 1999. Consequently, the Commission concludes that the public interest would be best served by capping CLEC exchange access rates at the level of the access rates of the directly competing ILEC.

**Geographic De-averaging:**

Section 392.200.2, RSMo Supp. 1999, prohibits telecommunications companies from charging any person a greater or less compensation for rendering a telecommunications service than it charges any other person for that service. In general, this provision prevents telecommunications companies from charging different rates, in different areas of the state, for the same service. However, Section 392.200.4(3) permits the Commission to geographically de-average rates under certain conditions:

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.

The Commission concludes that the record herein clearly and convincingly shows that it is reasonably necessary to promote the public interest, and to promote the purposes and policies of Chapter 392, RSMo, to define exchange access service as a different telecommunications service, dependent on the geographic area or other market within which it is offered. Those parties to this case who provide competitive exchange access services are hereby authorized to submit tariffs providing for originating and terminating exchange access rates equal to or less than those of the directly competing ILEC in each exchange in which they are authorized to provide such services.

**Access Rate Design:**

Despite the contrary exhortations of some of the parties, the Commission will not require that CLECs construct their access rates in any particular fashion. The Commission is mindful both of the IXCs' fears of "Ramsey pricing"<sup>9</sup> and the CLECs' need for freedom to experiment with innovative rate structures. Therefore, within the context of a general cap on CLEC access rates at the level of the ILEC's rates in each exchange, the Commission will not prescribe how the rates must be constructed. A CLEC seeking to establish an access tariff with a minimum of delay and expense would do well to simply concur in the ILEC's access tariff. On the other hand, a CLEC engaging in "Ramsey pricing" may expect its tariff to be met with active opposition, resulting in delay and expense.

**Changes in Access Rates:**

The parties have raised questions concerning the effect of upward or downward changes in an ILEC's access rates on the access rates of competing CLECs. Staff has suggested that the ILEC's access rates would constitute a "rolling cap," to which the CLECs must conform within a certain period. Necessarily, the cap in any exchange will be the ILEC's access rates at the time the CLEC's access tariff becomes effective. If the ILEC thereafter raises its rates, the CLEC need not follow suit. If the ILEC reduces its rates, the CLEC must also file an appropriate tariff amendment to reduce its rates within 30 days in order to maintain the rate cap. Perhaps the best alternative would be for a CLEC to simply concur in the access tariff of the directly competing ILEC. In that case, the CLEC's rates will rise and fall with the ILEC's, automatically. Such an access tariff could be approved by the Commission very quickly.

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<sup>9</sup>Witnesses used the phrase "Ramsey pricing" to refer to the practice of designing access rates so that the components that customers are least able to bypass are priced the highest.

The parties also raised questions concerning the possibility that a CLEC might propose access rates higher than those of the directly competing ILEC. While all of the parties agreed that a CLEC may petition the Commission for authority to set rates in excess of the cap, they did not agree on the standard by which such petitions should be determined. Some of the parties argued that such rates must be cost-justified, while others suggested a more flexible, case-by-case analysis. The Commission concludes that Chapter 392, RSMo, requires that any such petitions be determined on a case-by-case basis. While costs are one important factor to be considered, that chapter mandates the consideration of other factors as well. See Section 392.185, RSMo Supp. 1999.

**Competitive Exchange Access Services:**

The parties devoted much attention to Section 392.361.3, which provides that "[t]he commission may classify a telecommunications company as a competitive telecommunications company only upon a finding that all telecommunications services offered by such company are competitive telecommunications services." A "competitive telecommunications service," in turn, is one that has been so classified by the Commission pursuant to Section 392.361 or that has become such by operation of law pursuant to Section 392.370. Section 386.020(10), RSMo Supp. 1999. Section 392.361 permits the Commission to classify a telecommunications service as a competitive service upon a determination that it is "subject to sufficient competition to justify a lesser degree of regulation," where "such lesser regulation is consistent with the protection of ratepayers and promotes the public interest[.]" Section 392.361.4.

The record herein shows that exchange access is a "bottleneck" service that confers a locational monopoly upon the company providing it. Under Missouri law, exchange access is a distinct telecommunications service. Section 386.020(17), RSMo Supp. 1999. However, so long as CLEC access rates are capped at a reasonable level, none of the parties to this case object to the classification of CLEC access service as a competitive service.

In construing Chapter 392, including Section 392.361.3, the Commission must be mindful of the contents of Section 392.185, RSMo Supp. 1999, which has been set out in part above. In addition to reasonable prices and the protection of ratepayers, that section provides that the purpose of the chapter is to "[p]ermit flexible regulation of competitive telecommunications companies and competitive telecommunications services[.]" Section 392.185(5), RSMo Supp. 1999. Additionally, Section 392.200.4(2), RSMo Supp. 1999, declares that "[i]t is the intent of this act to bring the benefits of competition to all customers[.]" The Commission concludes that these provisions permit exchange access service that is capped at a reasonable level to be classified as a competitive telecommunications service.

As previously stated, those parties to this case that provide competitive exchange access services may submit proposed access tariff amendments in conformance with this decision. Other CLECs, not parties to this case, need not litigate this matter again. They, too, may submit proposed access tariff amendments in conformance with this decision.

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 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.

*IT IS THEREFORE ORDERED:*

1. That Late-Filed Exhibits 10, 11 (as corrected on January 18, 2000), 12A and 12B are received and made a part of the record of this matter.
2. That the Staff of the Missouri Public Service Commission is granted leave to late file its initial brief.
3. That the Motion to Strike filed on March 7, 2000, by ALLTEL Communications, Inc., Green Hills Telecommunications Services and Mark Twain Communications Company is granted in part and denied in part.
  - A. The motion is granted with respect to Exhibits 1 and 2 attached to the Reply Brief filed herein by Southwestern Bell Telephone Company on February 22, 2000, and all quotations from those exhibits appearing on pages 3 through 7 of the brief, and the same are stricken from the record of this matter.
  - B. The motion is denied with respect to the Reply Brief filed herein by the Staff of the Missouri Public Service Commission on February 22, 2000.
4. That all motions pending herein, not otherwise ruled upon, are denied.
5. That those parties authorized to provide competitive exchange access services in the state of Missouri may submit proposed exchange access tariff amendments in conformance with this decision. Any such proposed tariff must be submitted on a minimum of 30-days notice pursuant to Section 392.220.2, RSMo Supp. 1999.
6. This Report and Order shall become effective on June 13, 2000.
7. This case may be closed on June 14, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**In the Matter of the Application of QWEST COMMUNICATIONS CORPORATION, for a Certificate of Authority to Provide Basic Local Exchange Intrastate Telecommunications Services Within the State of Missouri.**

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*Case No. TA-2000-309  
Decided June 1, 2000*

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**Telecommunications § 3.3.** The Commission granted a certificate of service authority to provide basic local telecommunications services in the state of Missouri, subject to certain conditions including providing a series of reports concerning QWEST COMMUNICATIONS CORPORATION'S resolution of slamming problems to the Commission's Staff.

**ORDER GRANTING CERTIFICATE TO PROVIDE  
BASIC LOCAL TELECOMMUNICATIONS SERVICES**

**Procedural History**

QWEST COMMUNICATIONS CORPORATION (QWEST or Applicant) applied to the Commission on October 29, 1999, for a certificate of service authority to provide competitive basic local telecommunications services in the State of Missouri pursuant to Sections 392.430, 392.440, RSMo 1994, and 392.450 and 392.451, RSMo Supp. 1999. QWEST requested competitive classification and an order waiving certain Commission rules and statutory provisions pursuant to the federal Telecommunications Act of 1996. QWEST seeks to provide its services throughout all exchanges currently served by the incumbent local exchange telecommunications companies of Southwestern Bell Telephone Company (SWBT), Sprint/United Telephone Company (Sprint), and GTE Midwest, Inc. (GTE).

Applicant is a Delaware Corporation registered to transact business in Missouri, with its principal offices located at 555 Seventeenth Street, Denver, Colorado 80202. Applicant seeks classification as a competitive company and waiver of certain statutes and rules as authorized by Sections 392.361 and 392.420, RSMo.<sup>1</sup>

The Commission issued a notice and schedule of applicants on November 2, 1999, directing interested parties wishing to intervene to do so by December 2, 1999. SWBT filed a timely application to intervene on December 1, 1999. The Commission granted intervention in an order issued on December 8, 1999.

Applicant, SWBT and the Staff of the Missouri Public Service Commission (Staff) entered into and filed a Stipulation and Agreement (Agreement), which is included with this order as Attachment 1, on January 7, 2000. In the Agreement, the parties waived their rights to present testimony, cross-examine witnesses, present oral argument or briefs, and to seek rehearing or judicial review. The Staff filed Suggestions in Support of the Stipulation and Agreement on January 12, 2000.

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<sup>1</sup>All statutory references are to the Revised Statutes of Missouri, 1994, unless otherwise indicated.

On February 1, 2000, the Commission issued its Order Directing Additional Staff Review and Directing Filing. Specifically, the Commission requested additional information from the Applicant and from Staff regarding service and marketing complaints involving the Applicant. In response, Staff filed its report on March 9, 2000. QWEST responded on March 21, 2000. Staff filed its Supplemental Suggestions on April 4, 2000. QWEST responded to those suggestions on May 10, 2000.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the application.

#### **Discussion**

Applicant seeks certification to provide basic local exchange telecommunications services on a resold basis in portions of Missouri that are currently served by SWBT, GTE and Sprint. Applicant is not asking for certification in any area that is served by a small incumbent local exchange provider. Applicant proposes to provide service in the exchanges currently served by SWBT, GTE and Sprint as listed in those companies' Missouri local exchange tariffs. Applicant listed these exchanges in Exhibit D to its application.

Applicant is requesting that its basic local services be classified as competitive and that the application of certain statutes and regulatory rules be waived.

#### **A. Requirements of 4 CSR 240-2.060(4)**

Commission Rule 4 CSR 240-2.060(4) requires a foreign corporation applying for certification to provide telecommunications services in Missouri to include in its application a certificate from the Missouri Secretary of State showing that it is authorized to do business in Missouri, a description of the types of service it intends to provide, a description of the exchanges where it will offer service, and a proposed tariff with at least a 45-day effective date.

The Applicant has requested a temporary waiver of the tariff filing requirements. No party to this proceeding has objected. The parties have agreed to certain conditions for this waiver. Applicant has agreed to submit its tariff for Commission approval within 30 days of the effective date of any order approving its interconnection agreement with an underlying carrier with such tariffs having a minimum 45-day effective date. Upon filing such tariffs, the Applicant shall notify the parties to this proceeding and provide copies upon request. Certain additional written disclosures are also to occur upon the filing of an initial tariff. Applicant has agreed to file with the Commission and provide all the parties to this proceeding a written disclosure of all interconnection agreements that affect its Missouri service areas; disclose all portions of its Missouri service area for which it does not have interconnection agreements with an incumbent local exchange carrier; and provide its explanation of why an interconnection agreement for such areas is not necessary.

**B. Basic Local Service Certification**

Section 392.455, RSMo Supp. 1999, sets out the requirements for granting certificates to provide basic local telecommunications service to new entrants. A new entrant must: (1) possess sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service; (2) demonstrate that the services it proposes to offer satisfy the minimum standards established by the Commission; (3) set forth the geographic area in which it proposes to offer service and demonstrate that such area follows exchange boundaries of the incumbent local exchange telecommunications company and is no smaller than an exchange; and (4) offer basic local telecommunications service as a separate and distinct service. In addition, the Commission must give due consideration to equitable access for all Missourians to affordable telecommunications services, regardless of where they live or their income.

Applicant submitted as Exhibit E to its application a copy its Form 10-K and its 1998 annual report. These materials demonstrate that the Applicant has sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service. The parties also agreed, and did not controvert, that Applicant presented evidence of sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service.

Applicant has agreed to provide services that will meet the minimum basic local service standards required by the Commission, including quality of service and billing standards. The parties agreed that Applicant proposes to offer basic local services that satisfy the minimum standards established by the Commission.

Applicant wishes to be certificated to offer services in all the exchanges presently served by SWBT, GTE and Sprint as described in the basic local exchange tariffs of those companies. The parties agreed that Applicant has sufficiently identified the geographic area in which it proposes to offer basic local service and that the area follows the incumbent local exchange carrier's exchange boundaries and is no smaller than an exchange.

Applicant has agreed to offer basic local telecommunications service as a separate and distinct service and to provide equitable access, as determined by the Commission, for all Missourians within the geographic area in which it will offer basic local services in compliance with Section 392.455, RSMo Supp. 1999.

**C. Competitive Classification**

The Commission may classify a telecommunications provider as a competitive company if the Commission determines it is subject to sufficient competition to justify a lesser degree of regulation. Section 392.361.2, RSMo. In making that determination, the Commission may consider such factors as market share, financial resources and name recognition, among others. In the Matter of the Investigation for the Purpose of Determining the Classification of the Services Provided by Interexchange Telecommunications Companies Within the State of Missouri, 30 Mo. P.S.C. (N.S.) 16 (1989); In the Matter of Southwestern Bell Telephone Company's Application for Classification of Certain Services as Transitionally Competitive, 1 Mo. P.S.C. 3d 479, 484 (1992). The Commission has found that whether a service is competitive is a subject for case-by-case examination and

that different criteria may be given greater weight depending upon the service being considered. *Supra*, 1 Mo. P.S.C. 3rd at 487. In addition, all the services a competitive company provides must be classified as competitive. Section 392.361.3, RSMo.

The parties have agreed that Applicant should be classified as a competitive telecommunications company. The parties have also agreed that Applicant's switched exchange access services may be classified as a competitive service, conditioned upon certain limitations on Applicant's ability to charge for its access services. Applicant has agreed that, unless otherwise ordered by the Commission, its originating and terminating access rates will be no greater than the lowest Commission-approved corresponding access rates in effect for the large incumbent LEC(s) within those service areas(s) in which Applicant seeks to operate. The parties have agreed that the grant of service authority and competitive classification to Applicant should be expressly conditioned on the continued applicability of Section 392.200, RSMo Supp. 1999, and on the requirement that any increases in switched access services rates above the maximum switched access service rates set forth in the agreement must be cost-justified pursuant to Sections 392.220, RSMo Supp. 1999, and 392.230, rather than Sections 392.500 and 392.510.

The parties agreed that waiver of the following statutes is appropriate: Sections 392.210.2, 392.270, 392.280, 392.290.1, 392.300.2, 392.310, 392.320, 392.330, RSMo Supp. 1999, and 392.340. The parties also agreed that application of these Commission rules could be waived: 4 CSR 240-10.020, 4 CSR 240-30.040, and 4 CSR 240-35.

#### **D. Customer Service and Marketing**

In response to the Commission's February 1, 2000, order, QWEST and Staff provided information listing pending or formal complaints and final decisions and judgments against QWEST or its affiliates since 1998. These matters primarily involve slamming. QWEST further explained new policies and procedures it had implemented to control slamming.

Staff described the positive steps taken by the company, that included terminating relationships with sales agents who were associated with slamming complaints, background checks of prospective sales agents, forbidding the use of contests and certain other marketing techniques, and charging back commissions and fees if sales agents fail to respond promptly to slamming disputes.

QWEST is also doing more to validate service provider change orders, using customer welcoming postcards to verify proper orders and using technology and data bases to detect and prevent marketing abuses.

Staff stated that QWEST's service provider change procedures were consistent with 4 CSR 240-33.150. In a proposed two-year Slamming Compliance Plan submitted to the Federal Communications Commission (FCC), QWEST indicated that it intended to obtain independent annual audits of its anti-slamming reporting and data tracking mechanisms. In its Supplemental Suggestions filed on April 4, 2000, Staff recommended approval of QWEST's application conditioned upon QWEST providing the anti-slamming audit reports to Staff.

On May 10, 2000, QWEST filed its Response to Staff's Supplemental Suggestions and proposed a specific reporting requirement to the Missouri Public Service Commission in lieu of providing the anti-slamming audit reports that were to be prepared for QWEST's Board of Directors only. QWEST indicated that this alternative was acceptable to the Staff.

The Commission issued its Order Directing Filing that directed Staff to file its response to QWEST's proposal no later than May 23, 2000. The order also provided an opportunity for any other party to file a response to the proposal by QWEST.

The Staff filed its response as directed on May 23, 2000. Staff confirmed that QWEST's proposal was acceptable. None of the parties to this case or the Office of the Public Counsel filed a response and no objections to QWEST's application have been filed.

#### **E Proposed Tariff**

As noted above, the Applicant has requested a temporary waiver of the tariff filing requirements.

#### **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:

- A. The Commission finds that competition in the basic local exchange telecommunications market is in the public interest.
- B. The Commission finds that Applicant has met the requirements of 4 CSR 240-2.060(4) for applicants for certificates of service authority to provide telecommunications services or requested an appropriate waiver.
- C. The Commission finds that Applicant meets the statutory requirements for provision of basic local telecommunications services and has agreed to abide by those requirements in the future. The Commission determines that granting Applicant a certificate of service authority to provide basic local exchange telecommunications services is in the public interest. Applicant's certificate shall become effective when its tariff becomes effective.
- D. The Commission finds that Applicant is a competitive company and should be granted waiver of the statutes and rules set out in the ordered paragraph below.
- D. The Commission finds that Applicant's certification and competitive status should be expressly conditioned upon the continued applicability of Section 392.200, RSMo Supp. 1999, and on the requirement that any increases in switched access services rates above the maximum switched access service rates set forth in the agreement must be cost-justified pursuant to Sections 392.220, RSMo Supp. 1999, and 392.230, rather than Sections 392.500 and 392.510.

- E. The Commission finds that the approval of the application shall be conditioned upon QWEST's submission to Staff of a series of reports concerning QWEST's resolution of slamming problems.
- F. The Commission finds that a temporary waiver of the requirement to file a tariff under 4 CSR 240-2.060(4)(H), as requested and agreed to by the parties, shall be granted; provided, however, that this case shall not be held open pending the filing of tariffs.

#### **Conclusions of Law**

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

The Commission has the authority to grant certificates of service authority to provide telecommunications service within the state of Missouri. Applicant has requested certification under Sections 392.420 - .440, and Sections 392.410 and .450, RSMo Supp. 1999, which permit the Commission to grant a certificate of service authority where it is in the public interest. Sections 392.361 and .420 authorize the Commission to modify or suspend the application of its rules and certain statutory provisions for companies classified as competitive or transitionally competitive.

The federal Telecommunications Act of 1996 and Section 392.455, RSMo Supp. 1999, were designed to institute competition in the basic local exchange telecommunications market in order to benefit all telecommunications consumers. See Section 392.185, RSMo Supp. 1999. 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, pursuant to Section 536.060, RSMo Supp. 1999. Based upon the Commission's review of the applicable law and Stipulation and Agreement of the parties, and upon its findings of fact, the Commission concludes that the Stipulation and Agreement should be approved. However, QWEST shall be required to provide Staff a series of reports concerning QWEST's resolution of slamming problems.

#### ***IT IS THEREFORE ORDERED:***

1. That the Stipulation and Agreement of the parties, filed on January 7, 2000, is approved.
2. That QWEST COMMUNICATIONS CORPORATION is granted a certificate of service authority to provide basic local telecommunications services in the state of Missouri, subject to the conditions of certification set out in this order and to all applicable statutes and Commission rules except as specified in this order. The certificate of service authority shall become effective when the company's tariff becomes effective.
3. That QWEST COMMUNICATIONS CORPORATION shall provide a series of reports concerning QWEST's resolution of slamming problems to the Commission's Staff. Specifically, QWEST will submit reports on six-month intervals for a period of three years as described and illustrated in its Response to Staff's Supplemental Suggestions filed on May 10, 2000.
4. That QWEST COMMUNICATIONS CORPORATION is classified as a competitive telecommunications company. Application of the following statutes and regulatory rules shall be waived:

**Statutes**

392.210.2	-	uniform system of accounts
392.270	-	valuation of property (ratemaking)
392.280	-	depreciation accounts
392.290	-	issuance of securities
392.300.2	-	acquisition of stock
392.310	-	stock and debt issuance
392.320	-	stock dividend payment
392.340	-	reorganization(s)
392.330, RSMo Supp. 1999	-	issuance of securities, debts and notes

**Commission Rules**

4 CSR 240-10.020	-	depreciation fund income
4 CSR 240-30.040	-	uniform system of accounts
4 CSR 240-35	-	reporting of bypass and customer-specific arrangements

5. That QWEST COMMUNICATIONS CORPORATION's certification and competitive status are expressly conditioned upon the continued applicability of Section 392.200, RSMo Supp. 1999, and on the requirement that any increases in switched access service rates above the maximum switched access service rates set forth in the agreement must be cost-justified pursuant to Sections 392.220, RSMo Supp. 1999, and 392.230, rather than Sections 392.500 and 392.510.

6. That the request of QWEST COMMUNICATIONS CORPORATION for a temporary waiver of 4 CSR 240-2.060(4)(H) regarding its tariff filing is granted.

7. That QWEST COMMUNICATIONS CORPORATION shall file tariff sheets with a minimum 45-day effective date within 30 days of the effective date of a Commission order approving an interconnection agreement with an underlying carrier.

8. That QWEST COMMUNICATIONS CORPORATION shall give notice of the filing of the tariffs described above to all parties or participants in this case. In addition, the company shall also file a written disclosure of all interconnection agreements that affect its Missouri service areas, all portions of its Missouri service areas for which it does not have an interconnection agreement, and an explanation of why no interconnection agreement is unnecessary for those areas.

9. That this order shall become effective on June 13, 2000.

10. That this case may be closed on June 14, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur.

Thornburg, 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 Laclede Gas Company's Gas Supply Incentive Plan (GSIP II).**

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*Case No. GO-2000-395  
Decided June 8, 2000*

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**Gas § 1.** The Commission approved a Unanimous Stipulation and Agreement that, among other things, provided that Laclede Gas Company's Gas Supply Incentive Plan (GSIP II) will be extended for an additional one-year term, subject to the terms and conditions set forth in the Agreement. The Agreement addressed the maximum level of savings and/or revenues that the company may retain under the provisions of the GSIP II. In addition, the Agreement addressed the possible new contract for pipeline transportation service between Laclede Gas Company and Mississippi River Transmission Corporation, mandatory fixed rate trigger for gas supply commodity costs, and the company's provision of various information.

**Gas § 17.** The Commission approved a Unanimous Stipulation and Agreement that, among other things, provides that Laclede Gas Company's Gas Supply Incentive Plan (GSIP II) will be extended for an additional one-year term.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

On February 1, 2000, Laclede Gas Company (Laclede) filed its P.S.C. Mo. No. 5 Consolidated, Fourth Revised Sheet No. 28-a, with a proposed effective date of March 3, 2000. The purpose of the revision was to extend the term of the Gas Supply Incentive Plan (GSIP II) from the current expiration date of September 30, 2000, to September 30, 2001, and to modify the circumstances under which the GSIP II could be modified or terminated. On January 11, 2000, the Commission issued an Order Opening Case and Directing Notice, inviting interested parties wishing to intervene to file an appropriate application on or before February 10, 2000.

A timely application to intervene was received from Adam's Mark Hotels, Alcoa Foil Products (Alumax, Inc.), Anheuser-Busch Cos., Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Hussman Refrigeration, Mallinckrodt, Inc., MEMC Electronic Materials, Inc., Monsanto Company, Procter & Gamble Manufacturing Company, Ralston Purina Company, and Solutia, collectively known as the Missouri Industrial Energy Consumers (MIEC). The Commission granted intervention to MIEC in an order issued on February 24, 2000.

The Staff of the Missouri Public Service Commission (Staff) filed a Memorandum and Recommendation on February 15, 2000, recommending that the proposed revised tariff sheets be suspended at least until after the conclusion of the current legislative session, and that a prehearing conference be scheduled. On February 16, 2000, the Commission issued a Notice Shortening Time in Which to Respond, directing that any response to Staff's recommendation must be filed on or before 3:00 p.m. on February 24, 2000. Laclede filed a response to Staff's Memorandum and Recommendation on February 24, 2000.

On February 29, 2000, the Commission issued an Order Suspending Tariff and Setting Prehearing Conference. The Commission suspended the proposed tariff sheet for a period of 120 days beyond March 3, 2000, to July 1, 2000. The Commission also scheduled a prehearing conference for March 10, 2000. The prehearing conference was held on March 10, 2000.

On April 20, 2000, Laclede, Staff, the Office of the Public Counsel (Public Counsel), and MIEC filed a Unanimous Stipulation and Agreement (Agreement). Among other things, the Agreement provides that the GSIP II shall be extended for an additional one-year term, commencing October 1, 2000, subject to the terms and conditions set forth in the Agreement. The Agreement also addresses the maximum level of savings and/or revenues that Laclede may retain under the provisions of the GSIP II for the twelve-month period ending September 30, 2001, the issue of a possible new contract for pipeline transportation service between Laclede and Mississippi River Transmission Corporation, mandatory fixed rate trigger for gas supply commodity costs, and the company's provision of various information previously requested by Staff or to be requested in the future. The parties state that the Agreement disposes of all the identified issues in the case. Contingent upon the Commission's acceptance of the Agreement, the parties waived their rights to cross-examine witnesses, to present oral arguments 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 Supp. 1999.

On May 2, 2000, Staff filed a memorandum in support of the Agreement. On May 9, 2000, Laclede filed a Response to Staff Memorandum. In its response, the company notes that although it does not share the Staff's concerns, it is committed to making a good faith effort to develop an overall incentive plan that all parties can agree to at the conclusion of the proposed one-year extension.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Agreement.

The Commission has reviewed the Stipulation and Agreement, Staff's memorandum in support, Laclede's response, and the official file. The Commission finds that the Unanimous Stipulation and Agreement should be approved.

*IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed on April 20, 2000, by Laclede Gas Company, the Staff of the Missouri Public Service Commission, the Office of the Public Counsel, and the Missouri Industrial Energy Consumers, is approved as a resolution of all issues in this case. (See Attachment 1).
2. That Laclede Gas Company shall file tariff sheets consistent with the approved Unanimous Stipulation and Agreement no later than June 19, 2000.
3. That this order shall become effective on June 20, 2000.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur  
Schemenauer, C., dissents

Ruth, Regulatory Law Judge

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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.

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**Joint Petition of Birch Telecom of Missouri, Inc. for a Generic Proceeding to Establish a Southwestern Bell Telephone Company Collocation Tariff Before the Missouri Public Service Commission.\***

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*Case No. TT-2000-513*  
*Decided June 8, 2000*

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**Telecommunications §36.** The Commission found that applicants cited no authority for their proposition that a collocation tariff was required by law, and had not demonstrated that a collocation tariff was needed.

**ORDER DISMISSING PETITION AND CLOSING CASE**

On February 22, 2000, Birch Telecom of Missouri, Inc., Rhythms Links, Inc., Nextlink Missouri, Inc., McLeodUSA Telecommunications Services, Inc. and IP Communications Corporation of the Southwest (Applicants) filed a pleading requesting that the Commission establish a generic proceeding to establish a Southwestern Bell Telephone Company (SWBT) collocation tariff. Applicants allege that SWBT has current practices of using individual case basis pricing, making unilateral determinations of intervals for the return of price quotes, providing inconsistent provision intervals for collocation, providing different types of collocation, and being ambiguous about the terms upon which collocation is provided. Applicants believe that these practices all constitute significant barriers to competitive entry in Missouri. Applicants contend that SWBT's lack of a collocation tariff prevents the Commission from determining whether SWBT is offering collocation in a nondiscriminatory fashion. Applicants assert that the Federal Communications Commission (FCC) "has invited state commissions to adopt collocations tariffs." Applicants argue that having a collocation tariff would allow

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\*On July 13, 2000, the Commission issued an order consolidating cases, granting reconsideration, granting intervention, directing filing and setting prehearing conference. This case was consolidated with TT-2000-527, with TT-2000-527 being the lead case.

other carriers to adopt the same terms. Applicants contend that SWBT's failure to adopt a collocation tariff is a violation of "the SBC-Ameritech Merger Conditions."<sup>1</sup> Applicants also contend that SWBT must file a collocation tariff in order to obtain authority to offer interLATA service in Missouri. Applicants express concerns that SWBT's affiliate, SBC Advanced Solutions, Inc. (ASI), will be able to negotiate collocation terms more advantageous than Applicants were (or will be) able to obtain. Finally, Applicants argue that a generic proceeding to establish a SWBT collocation tariff is in the public interest.

On March 23, 2000, SWBT filed a motion to dismiss and response to Applicants' filing. SWBT points out that four of the five applicants already have interconnection agreements with SWBT that include collocation provisions. SWBT states that Applicants do not and cannot cite any FCC order that requires SWBT to file a tariff containing collocation provisions. SWBT cites the arbitration order in Case Nos. TO-97-40 and TO-97-67 (the SWBT/AT&T arbitration) in which the Commission held that "terms, conditions and guidelines [for collocation] can be set forth by tariff or incorporated in the Interconnection Agreement." SWBT counters Applicants' argument that having a collocation tariff would allow other carriers to adopt the same terms by pointing out that the collocation terms in its interconnection agreements can be adopted pursuant to Section 252(i) of the Telecommunications Act of 1996 (the Act). SWBT asserts that the interconnection agreements it has with four of the Applicants contain dispute resolution procedures, and those provisions should be followed if those four Applicants have concerns with the collocation provisions in their interconnection agreements. SWBT answers Applicants' concerns about ASI by stating that the ASI/SWBT interconnection agreement: A) is consistent with the Commission's decision in the SWBT/AT&T arbitration; B) contains price quote and construction terms identical to those contained in interconnection agreements with other CLECs, including Applicants; and C) is available in its entirety to any CLEC that chooses to adopt it. SWBT states that it intends to file a "Missouri 271 Agreement" (M2A)<sup>2</sup> that, if approved by the Commission, will constitute a standard offer containing statewide average pricing and collocation terms and conditions.

On April 3, 2000, Birch Telecom of Missouri, Inc. and Rhythms Links, Inc. (Birch and Rhythms) filed a response to SWBT's motion to dismiss and response. Birch and Rhythms mostly re-argue the points that Applicants raised in their petition. Birch and Rhythms express incredulity that SWBT opposes Applicants' petition, since SWBT has collocation tariffs in Texas and Kansas. Birch and Rhythms make vague allegations that ASI must have received favorable treatment, but do not offer any grounds for these allegations. In footnote 4, Birch and Rhythms note that "Birch is pursuing this complaint to provide more certainty to determine how to proceed...." This case is not a complaint; Applicants couched it as a petition to require SWBT

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<sup>1</sup>Applicants do not explain where these conditions are to be found, or what authority this Commission has to enforce them.

<sup>2</sup>In a subsequent pleading filed on June 7, 2000, SWBT stated that it intends to make the M2A filing in the very near future.

to offer a collocation tariff. As a result, the question for the Commission is whether Applicants have demonstrated a need to establish a generic proceeding to establish a SWBT collocation tariff.

On April 13, 2000, SWBT replied to the response of Birch and Rhythms, and a response of IP Communications Corporation of the Southwest. SWBT initially notes certain filing defects in these responses<sup>3</sup>. SWBT asserts that the response of Birch and Rhythms does not remedy what SWBT views as the underlying flaw in Applicants' petition: that there is no anticompetitive problem that needs to be fixed. SWBT states that it is even permitting Rhythms to place collocation orders even though it does not yet have an interconnection agreement with SWBT. SWBT appended to its pleading a copy of its current collocation appendix, which it claims addresses the points Birch and Rhythms raise with respect to an older collocation appendix.

On May 9, 2000, Birch, Rhythms, and IP Communications Corporation of the Southwest filed a motion for interim relief in which they requested that the Commission require SWBT to offer collocation on the same terms and conditions as it uses in Texas and Oklahoma. On May 18, 2000, SWBT filed a pleading opposing the request for interim relief. On May 30, 2000, Staff filed a pleading in which it supported the request for interim relief. On June 7, 2000, SWBT filed a reply to Staff's response supporting Applicants' request for interim relief.

Applicants and SWBT agree that the Act, as well as decisions of the FCC, require SWBT to provide collocation on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Applicants and SWBT also agree that the Commission has jurisdiction over contractual and regulatory issues relating to collocation. The Commission concurs on both of these points. Applicants and SWBT most strongly disagree on whether the Act imposes on SWBT "an obligation to file a collocation tariff." The Commission notes that Applicants cited no specific authority for their position that a tariff is required<sup>4</sup>. The Commission finds that the current practice of negotiating or adopting interconnection (including collocation) terms by agreement, and arbitration if necessary, rather than by tariff is consistent with Congress' intent in drafting the Act, consistent with the FCC's rules and orders implementing the Act, and consistent with the public interest. The Commission will dismiss Applicants' petition<sup>5</sup>. However, the Commission does expect SWBT to

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<sup>3</sup>SWBT alleges that the April 3, 2000, pleading filed by Birch and Rhythms was not properly submitted by an attorney licensed to practice in Missouri. However, the copy filed with the Commission bears a signature of Kara A. Gilmore, and Ms. Gilmore's Missouri bar number, so it appears that SWBT's concerns with the filing are not well founded. SWBT also refers to a response filed by IP Communications Corporation of the Southwest, but the Commission's records do not indicate that such a response was accepted for filing in this case.

<sup>4</sup>Applicants in their petition, and Birch and Rhythms in their April 3, 2000, response, make statements such as "the concept of a collocation tariff is consistent with" FCC orders and the Act, and "the FCC has invited state Commissions to adopt collocation tariffs." They do not cite any authority for the claim that there is a requirement to file a collocation tariff that this Commission must enforce.

<sup>5</sup>Because the Commission is dismissing the petition and declining to require SWBT to implement a collocation tariff, certain later filings such as applications to intervene and a motion for interim relief are moot and will not be addressed.

offer its M2A "in the very near future," and the Commission will address the collocation pricing, and terms and conditions in the M2A.

*IT IS THEREFORE ORDERED:*

1. That the petition to establish a generic proceeding to establish a Southwestern Bell Telephone Company collocation tariff filed on February 22, 2000, by Birch Telecom of Missouri, Inc., Rhythms Links, Inc., Nextlink Missouri, Inc., McLeodUSA Telecommunications Services, Inc. and IP Communications Corporation of the Southwest is dismissed.

2. That this order shall become effective on June 20, 2000.

3. That this case may be closed on June 21, 2000.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur  
Schemenauer, C., dissents

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of Greeley Gas Company's Purchased Gas Adjustment Factors to be Reviewed in Its 1998-1999 Actual Cost Adjustment.**

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*Case No. GR-2000-319*  
*Decided June 15, 2000*

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**Gas §17.1.** The Commission ordered a gas company to adjust its ACA balance in the manner and amounts recommended by Staff, with the concurrence of the company.

**ORDER REQUIRING ADJUSTMENT OF ACA BALANCE**

This case was opened for the purpose of receiving the 1998-99 Actual Cost Adjustment (ACA) filing of Greeley Gas Company (Greeley) for its Southwest Missouri District. On May 1, 2000, the Staff of the Public Service Commission (Staff) filed a recommendation and memorandum indicating that Staff has reviewed the 1998-1999 Actual Cost Adjustment (ACA) filing of Greeley. Staff stated that it audited the billed revenues and actual gas costs for the period of June 1998 to May 1999, included in the Company's computation of the ACA rate.

Staff proposed the following:

1. That Greeley reduce gas costs by \$16,866 to eliminate state line fees that are not allowed in Missouri;
2. That Greeley apply the Staff adjusted Williams Natural Gas (WNG) storage, WNG transportation and gas commodity charges that reduce the cost of gas by \$44,599 (\$18,765 + \$23,146 + \$2,688);

3. That Greeley adopt Staff's revised storage inventory schedule that results in less withdrawals and reduced gas costs of \$1,219;
4. That Greeley adopt the Staff adjusted Gas Supply Realignment (GSR) costs of \$3,636 for the months of June 1998 through May 1999. This reflects a \$2,019 decrease in the cost of gas;
5. That Greeley reduce the refund amount due to its customers by \$2,828. This reflects a factor change from (\$.0293) to (\$.024). This change does not affect the ACA balance;
6. Greeley's billing system change during this ACA period made Staff's analysis of Company's peak day information more difficult. In future ACA periods, Staff recommends that Greeley explain how adjustments are reflected in the billing cycle and also explain the timing effects of the adjustments;
7. Staff conducted a reliability study that analyzes current capacity levels, capacity releases, and peak day forecasting methodology used by the Company. Staff's recommendations are included in the "Reliability Study" section of its ACA recommendation.

Staff recommended that the Commission issue an order requiring Greeley to adjust the ACA balance in its next ACA filing by \$64,703, from \$17,541 over-recovery balance to \$82,244 over-recovery balance to reflect the adjustments set out in the following table:

	Balance per Greeley Filing	Staff Adjustments	ACA Balance Per Staff
Prior ACA Balance	(\$25,249)	\$0	(\$25,249)
Revenue Recovery	(\$168,029)	\$0	(\$168,029)
State Line Fees	\$16,866	(\$16,866)	\$0
GSR Costs	\$5,655	(\$2,019)	\$3,636
Storage Injection/Withdrawals.	\$7,038	(\$1,219)	\$5,819
WNG Storage/Transport & Gas	\$146,178	(\$44,599)	\$101,579
Total (Over)/Under-Recovery	(\$17,541)	(\$64,703)	(\$82,244)

Staff also recommended that the Commission order Greeley to reduce the refund balance owed by Greeley in its next ACA filing by \$2,828.

The Commission ordered Greeley to respond to Staff's recommendation no later than June 5, 2000. Greeley filed its response to Staff's recommendation on June 5. Greeley's response indicates that it has reviewed Staff's recommendations and concurs with them. However, Greeley neither concurs with nor disputes the methodology utilized by Staff in reaching its recommendations.

The Commission has reviewed Staff's recommendations and Greeley's response and concludes that Staff's recommendations should be implemented.

*IT IS THEREFORE ORDERED:*

1. That Greeley Gas Company shall adjust the ACA balance in its next ACA filing by \$64,703, from \$17,541 over-recovery balance to \$82,244 over-recovery balance to reflect the adjustments proposed by the Staff of the Commission.

2. That Greeley Gas Company shall reduce the refund balance owed by Greeley Gas Company in its next ACA filing by \$2,828.
3. That this order shall become effective on June 27, 2000.
4. That this case may be closed on June 28, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Woodruff, Regulatory Law Judge

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**In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area.\***

**In the Matter of Missouri Gas Energy's Proposed Modifications to its Facilities Extension Policy.\***

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*Case Nos. GR-98-140 & GT-99-237  
Decided June 15, 2000*

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**Evidence, Practice and Procedure § 1.** The Commission found that the motion for clarification should be granted.

**Evidence, Practice and Procedure § 1.** The Commission found that the request for rehearing or reconsideration on the issue of the exclusion of the unamortized balance of the SLRP deferrals should be denied and no adjustments should be made to the revenue requirement based upon the specific evidence that was ruled upon in the Report and Order.

**Gas § 1.** The Commission found that the motion for clarification should be granted.

**Gas § 1.** The Commission found that the request for rehearing or reconsideration on the issue of the exclusion of the unamortized balance of the SLRP deferrals should be denied and no adjustments should be made to the revenue requirement based upon the specific evidence that was ruled upon in the Report and Order.

**Evidence, Practice and Procedure § 5.** The Commission granted the motion to strike portions of direct rehearing testimony because it was outside the scope of the issues on rehearing.

**Evidence, Practice and Procedure § 24.** The Commission granted the motion to strike portions of direct and rebuttal rehearing testimony because it was outside the scope of the issues on rehearing. The Commission also declined to preserve the evidence in the record or to allow cross-examination because the testimony was repetitious of an issue upon which the Commission specifically denied rehearing.

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\*See page 394, Volume 7, MPSC 3d, and page 2, Volume 8 MPSC 3d for other orders in this case. In addition, see page 345 for another order in this case.

**ORDER GRANTING MOTION FOR CLARIFICATION  
AND MOTIONS TO STRIKE**

On December 11, 1998, Missouri Gas Energy (MGE), a division of Southern Union Company, filed a motion for clarification of the Commission's Order Granting Reconsideration and Rehearing in Part, Order Denying Reconsideration and Rehearing in Part, and Order Denying Motion to Stay an Alternative Request to Collect Subject to Refund (Rehearing Order). The case was subsequently stayed pending Circuit and Appellate Court review, and on April 27, 2000, MGE notified the Commission that judicial review was final and renewed its motion for clarification.

In its application for rehearing, MGE alleged that the Commission's Report and Order (R&O) had the effect of reversing the Commission's prior decisions which included the unamortized balance of deferrals in the rate base. MGE's application for rehearing stated:

At pages 19 and 20 of the Report and Order, the Commission determined that the unamortized balance of SLRP deferrals should be excluded from MGE's rate base. Because the bulk of these SLRP deferrals (i.e., those recorded for periods prior to November 1, 1996) have already been included in rate base by the Commission in prior general rate proceedings, section 386.550, RSMo (1994) precludes the Commission from reversing its treatment and disallowing these deferrals from rate base in this case.

The Commission's Rehearing Order stated in relevant part:

In its arguments, MGE apparently assumes that the Commission is directing MGE to reverse treatment authorized by prior orders and that the Commission is now retroactively disallowing inclusion of the SLRP deferral balances previously authorized to be included in the rate base.

The Commission did not order the retroactive application of the exclusion of the unamortized balance of the SLRP deferrals to previous cases where those amounts have already been included in rate base and amounts calculated. If the Company can separate the funds affected under prior decisions which permitted the unamortized balance to be included in the rate base from the SLRP deferral amounts deferred under the authority of the most recent accounting authority order authorized in Case No. GO-97-301, the Commission has no objection to its doing so and continuing to include unamortized balance amounts existing and treated during prior cases in the rate base. However, if the Company cannot separate the funds identified as unamortized balance which would have been in

place at the time of the prior order permitting inclusion of the unamortized balance of the SLRP deferrals in rate base, then the entire account currently known as the unamortized balance of SLRP deferrals shall be excluded from the rate base. This order should have a minimal effect on the Company as the prior balance should be greatly reduced. MGE's arguments are not persuasive in regard to this unamortized balance issue and the application for rehearing and motion for reconsideration will be denied.

The Commission interpreted MGE's arguments in its application for rehearing to mean that an issue which was not included as a part of the record in Case Nos. GR-98-140 and GT-98-237 had been affected by the Commission's decision to exclude the **remaining** unamortized balances from the rate base. The comments in the Commission's Rehearing Order cited above were intended to address that possibility. According to the motion for clarification, the unamortized balances which MGE was referring to in its application for rehearing were issues that were specifically addressed by the parties and were included in the evidence ruled upon by the Commission in the R&O.

Replies to MGE's motion for clarification were filed by the Office of the Public Counsel (Public Counsel) and by the Staff of the Commission (Staff). Both the Public Counsel and Staff requested that MGE's motion be denied.

The Commission's decision denying rehearing or reconsideration on the issue of the exclusion of the unamortized balance of SLRP deferrals in rate base is appropriate and no adjustments should be made based upon the **remaining** unamortized balances of **all** SLRP deferrals. The Commission's finding that the R&O with regard to the issue of the exclusion of unamortized balances in the rate base should not be reheard or reconsidered is not altered. To the extent that clarification is necessary, MGE's motion for clarification and expedited consideration is granted.

On December 28, 1998, the Public Counsel filed a motion to strike portions of the rehearing direct testimony of MGE's witness, Charles B. Hernandez. Public Counsel argued that Mr. Hernandez's testimony related to the exclusion of the unamortized balance of SLRP deferrals is beyond the scope of the order granting partial rehearing. MGE filed a response opposing the motion to strike.

On January 12, 1999, the Public Counsel filed a motion to strike portions of the rehearing rebuttal testimony of Staff's witnesses, Charles R. Hyneman and Phillip K. Williams. Public Counsel argued that portions of the rebuttal testimony of Mr. Hyneman also relate to the exclusion of the unamortized balance of SLRP deferrals and are therefore, beyond the scope of the Rehearing Order. Public Counsel further argued that portions of the testimony of Mr. Williams that relate to three errors which Staff asserts need to be corrected are beyond the scope of the Rehearing Order.

The Commission was prohibited from proceeding with the rehearing by order of the Cole County Circuit Court. On May 2, 2000, after judicial review became final and the Commission resumed jurisdiction of this matter, Public Counsel renewed its motions to strike.

The Rehearing Order at ordered paragraph 7 stated in part that:

The affidavit and testimony prefiled shall specifically and clearly explain the individual amounts and updated calculations relating to (a) the Stipulation and Agreement Section Income Statement, Item s. Gross-up of revenue deficiency related to uncollectible expense and gross-down of revenue deficiency related to late payment charge revenues and (b) the correction of the associated deferred taxes related to the inclusion of the unamortized balance of SLRP deferrals.

These were the only two issues for which rehearing was granted. Furthermore, the issue of the exclusion of Unamortized Balance of SLRP Deferrals was specifically denied in the Rehearing Order. The Commission determines that the testimony of Mr. Hernandez<sup>1</sup> and Mr. Hyneman related to the exclusion of the unamortized balance of SLRP deferrals and the testimony of Mr. Williams related to errors as listed below is outside the scope of the Rehearing Order and should not be considered. Therefore, the motions to strike will be granted. The Commission further determines that the testimony of Mr. Hernandez and Mr. Hyneman to be stricken shall not be preserved in the record, nor cross-examination of that evidence be allowed, under Section 536.070(7), RSMo 1994, and 4 CSR 240-2.130(3), as that evidence is wholly repetitious in that the Rehearing Order specifically denied rehearing on this issue.

*IT IS THEREFORE ORDERED:*

1. That Missouri Gas Energy's Motion for Clarification and Request for Expedited Consideration is granted.

2. That Missouri Gas Energy's request for rehearing or reconsideration on the issue of the exclusion of the unamortized balance of the SLRP deferrals continues to be denied and no adjustments should be made to the revenue requirement based upon the specific evidence that was ruled upon by this Commission in its Report and Order.

3. That the Office of the Public Counsel's motion to strike portions of the direct rehearing testimony of Charles B. Hernandez related to the exclusion of the unamortized balance of SLRP deferrals is granted. The portions of the direct rehearing testimony to be stricken are as follows:

Page 1 line 12 "...and CBH-2..."

Page 2 line 2 "...and (c)" through page 2, line 5 "...to Case No. GO-97-301)."

Page 9 lines 9-21

Pages 10 through 12 all

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<sup>1</sup>On May 20, 2000, MGE notified the Commission and the other parties that it intends to substitute the testimony of Ms. June Dively for the testimony of Mr. Charles B. Hernandez due to the fact that Mr. Hernandez is no longer an employee of MGE.

Page 13 lines 16-22

Page 14 lines 4 "...And although..." through line 7

Page 14 line 18 "Column 4 ..." through line 21

Page 15 line 3 "Second..." through line 11 "...of \$15,519,978."

Schedule CBH-2 all

Schedule CBH-3 all

Schedule CBH-5 all

Schedule CBH-6 all

Schedule CBH-7 all

Schedule CBH-8 column 4

4. That the Office of the Public Counsel's motion to strike portions of the rehearing rebuttal testimony of Charles R. Hyneman related to the exclusion of the unamortized balance of SLRP deferrals and portions of the rehearing rebuttal testimony of Phillip K. Williams related to errors in the case is granted. The portions of the rehearing rebuttal testimony to be stricken are as follows:

Charles R. Hyneman Rehearing Rebuttal Testimony pages 10 through 23

Phillip K. Williams Rehearing Rebuttal Testimony page 5, lines 12-23, and page 6, lines 1-14

5. This order shall become effective on June 27, 2000.

Lumpe, Ch., Drainer and Schemenauer, CC., concur.  
Murray and Simmons, CC., not participating.

Dippell, Senior Regulatory Law Judge

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**Director of the Department of Manufactured Homes and Modular Units of the Public Service Commission, Complainant,  
v Rock Road Trailer Parts and Sales, Inc., Respondent.**

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*Case No. MC-2000-397*

*Decided June 20, 2000*

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**Manufactured Housing § 1.** The Director of the Department of Manufactured Homes and Modular Units of the Utility Operations Division, Missouri Public Service Commission, filed a formal complaint with the Commission against Rock Road Trailer Parts and Sales, Inc., alleging that the company failed to comply with setup procedures for a manufactured home and failed to correct code deficiencies within a reasonable amount of time as required by Section 700.100.3(6), RSMo Supp. 1999. The Commission approved a Unanimous Stipulation and Agreement between the parties, in which the company acknowledged that the Director found that the home did not meet the applicable code to which the home was required to be built.

**Manufactured Housing § 16.** The Commission approved a Unanimous Stipulation and Agreement between the parties regarding the complaint that the company failed to comply with setup procedures for a manufactured home and failed to correct code deficiencies within a reasonable amount of time as required by Section 700.100.3(6), RSMo Supp. 1999. The Agreement provides that the company's Dealer Registration will be placed on probation for six months, during which time the complaint will be held in abeyance.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

On December 29, 1999, the Director of the Department of Manufactured Homes and Modular Units of the Utility Operations Division, Missouri Public Service Commission (Director), filed a formal complaint with the Missouri Public Service Commission against Rock Road Trailer Parts and Sales, Inc. (Rock Road Trailer). The Director alleged that Rock Road Trailer failed to properly comply with the setup procedures for a manufactured home and failed to correct code deficiencies within a reasonable amount of time as required by Section 700.100.3(6), RSMo Supp. 1999.

On January 4, 2000, the Commission issued a Notice of Complaint requiring Rock Road Trailer to answer no later than February 3, 2000. No responses were filed with the Secretary of the Commission, and on February 8, 2000, the Director filed a Motion for Default. On February 22, 2000, Rock Road Trailer filed an Answer and a Motion to Supplement Answer or to File Answer Out of Time (Answer). The Director filed a response on March 2, 2000. The Commission issued an order on March 17, 2000, denying the Motion for Default and scheduling a prehearing conference for April 19, 2000.

On May 9, 2000, the Director and Rock Road Trailer filed a Unanimous Stipulation and Agreement (Agreement). The Agreement provides that Rock Road Trailer's Dealer Registration will be placed on probation for six (6) months, beginning on the effective date of the Commission's order approving the Stipulation and Agreement. During the probationary period, this complaint will be held in

abeyance. However, the Agreement provides that if, during the probationary period, Rock Road Trailer violates any of the rules, regulations, or laws pertaining to the sale and/or setup of manufactured homes, the Director shall have the option to prosecute the complaint before the Commission. Rock Road Trailer acknowledges that it received the inspection reports of the Department of Manufactured Homes for the home referred to in the Director's complaint, which was purchased by Susan Piccinno. Rock Road Trailer further acknowledges that the Director found that the home did not meet the applicable code to which the home was required to be built. The Agreement states that Rock Road Trailer has by certified check made Ms. Piccinno whole, and that the consumer is satisfied with this resolution and does not want Rock Road Trailer to attempt to make any further repairs on the home.

The Agreement provides that if the Commission issues an order approving the Stipulation and Agreement, the parties waive their respective rights as follows: a) to call, examine or cross-examine witnesses pursuant to Section 536.070(1), RSMo; b) to present oral argument and written briefs pursuant to Section 536.080.1, RSMo; c) to the reading of the transcript by the Commission pursuant to Section 536.080.2, RSMo; d) to seek rehearing or reconsideration pursuant to Section 386.510, RSMo; and e) to seek judicial review pursuant to Section 386.510, RSMo.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Agreement.

The Commission has reviewed the Unanimous Stipulation and Agreement, and the official case file, and finds that it achieves an equitable resolution of the issues in dispute. The Commission finds that the Stipulation and Agreement should be approved.

*IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed on May 9, 2000, by the Director of the Department of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission and Rock Road Trailer Parts and Sales, Inc., is approved. (See Attachment 1).
2. That this order shall become effective on June 30, 2000.
3. That this case may be closed on July 3, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,  
concur.

Ruth, Regulatory Law Judge

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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.

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**In the Matter of the Application of Kansas City Power & Light  
Company for Authorization to Manage Sulfur Dioxide Emission  
Allowance Inventory.**

*Case No. EO-2000-357*  
*Decided June 22, 2000*

**Electric §1.** Where an electric utility sought authority to manage its sulfur dioxide emission allowance inventory, the Commission had previously granted such authority to the Company, no party opposed the application, and the Commission's Staff advised that it be granted on the same terms as the previous authority, the Commission granted the requested authority.

**ORDER GRANTING AUTHORITY,  
APPROVING STIPULATION AND AGREEMENT  
AND CLOSING CASE**

Kansas City Power & Light Company (KCPL) filed an Application with the Commission on December 3, 1999, for authorization to manage its sulfur dioxide emission allowance inventory. Thereafter, on December 9, 1999, the Commission issued its Order Directing Notice. No applications to intervene were received. On May 1, 2000, as no action had occurred in the case since the Order Directing Notice was issued on December 9, 2000, the Commission issued its Order Directing Filing, directing the parties to file their status reports on or before May 30, 2000. On May 9, 2000, the parties filed their Unanimous Stipulation and Agreement, a copy of which is attached hereto as Attachment 1.

In its Application, KCPL states that the Commission has previously granted authority to KCPL to manage its emission allowance inventory in Case No. EO-95-184. An emission allowance, KCPL explains, is authority under the Clean Air Act Amendments of 1990 to discharge one ton of sulfur dioxide (SO<sub>2</sub>). These allowances are transferable and markets have developed in which such allowances are traded. KCPL's authority to engage in such trading under the Order issued in Case No. EO-95-184 expired on December 31, 1999. Therefore, KCPL seeks renewed trading authority.

KCPL seeks authority to engage in trading techniques such as allowance forwards, allowance purchases and sales, allowance options, allowance swaps, and allowance loans, and to use financial instruments to earn a return on its allowance inventory. KCPL further seeks authority to sell up to half of all of its allowances without seeking further Commission approval. KCPL further states that the market price of allowances is volatile and that it has, therefore, not proposed any price range. KCPL states that it will book any profits or losses realized from allowance trading to utility operating income. Finally, KCPL proposes that ratemaking treatment be deferred.

On May 30, 2000, Staff filed its Memorandum in support of the Unanimous Stipulation and Agreement. Staff recommends that the Commission approve the Unanimous Stipulation and Agreement. Staff states that its review shows that

KCPL has adequately managed its allowance inventory and has never been fined by the United States Environmental Protection Agency (EPA). The Stipulation and Agreement will permit KCPL to continue to manage its allowance inventory on the same terms granted in Case No. EO-95-184. Ratemaking treatment of allowance trading proceeds will be deferred. Staff suggests that ratepayers will ultimately benefit if KCPL is granted the requested authority. Staff further states that the Stipulation and Agreement contains adequate provisions to protect ratepayers from any adverse effects of allowance trading.

The Commission has considered the application and Staff's Memorandum. No party has opposed the application or objected to Staff's Memorandum, and the time for doing so has passed. The Commission finds that granting the requested authority, on the conditions contained in the Unanimous Stipulation and Agreement, is in the public interest. The Commission will therefore approve the Unanimous Stipulation and Agreement.

*IT IS THEREFORE ORDERED:*

1. That the Application filed by Kansas City Power and Light Company on December 3, 1999, is granted, subject to the conditions stated in Ordered Paragraph 2, below.
2. That the Unanimous Stipulation and Agreement filed herein on May 9, 2000, is approved and is incorporated herein by reference. The parties shall comply with its terms.
3. That nothing in this order shall be considered a finding by the Commission of the prudence or the value for ratemaking purposes of the transactions herein authorized. The Commission reserves the right to consider the prudence and ratemaking treatment to be afforded these transactions in a later proceeding.
4. That this order shall become effective on July 5, 2000.
5. That this case may be closed on July 6, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,  
concur.

Thompson, Deputy Chief Regulatory Law Judge

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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.

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**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, 2000.**

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*Case No. OO-2000-846*

*Decided June 27, 2000*

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**Public Utilities §1.** The Commission assessed a total of \$15,792,730 to public utilities in proportion to their respective gross intrastate operating revenues during the preceding calendar year.

**ASSESSMENT ORDER FOR FISCAL YEAR 2001**

Pursuant to the provision of Section 386.370, RSMo Supp. 1999, the Commission has made an estimate of the expenses to be incurred by it during the fiscal year commencing July 1, 2000, reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo, and has also separately estimated the amount of such expenses directly attributable to such regulation of each of the following groups of public utilities: electrical corporations, gas corporations, heating corporations, water corporations, sewer companies and telephone corporations, 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 \$7,989,524. The estimated amount of expenses not attributable to any such group amounts to \$11,025,251. The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$274,807. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2000 is estimated to be \$2,947,238.

The Commission hereby deducts these amounts in estimating its need to be \$19,014,775. This estimated unexpended sum of \$2,947,238 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 1999 as provided in the aforesaid laws.

The Commission has allocated to each group of public utilities the estimated expenses directly attributable to the regulation of such group, and an amount 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.

The Commission does hereby fix the amount so allocated to each such group of public utilities, in addition to said estimated unexpended sum as follows:

Electric.....	\$ 6,244,951
Gas.....	\$ 3,408,660
Heating.....	\$ 61,373
Water .....	\$ 1,058,549
Sewer .....	\$ 182,161
Telephone.....	\$ 4,837,036
Total.....	\$ 15,792,730

The Commission does hereby assess the amount of said \$15,792,730 so allocated to such groups of public utilities and to each public utility in each group in proportion to its respective gross intrastate operating revenues during the preceding calendar year. The Internal Accounting Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Executive Director is hereby directed to render a statement on behalf of the Commission of such assessment to each public utility on or before July 1, 2000. Said assessment will be due and payable on or before July 15, 2000, or at the option of each public utility, same may be paid in equal quarterly installments on or before July 15, 2000, October 15, 2000, January 15, 2001, and April 15, 2001. The Internal Accounting Department will be directed to 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, Internal Accounting Department, P.O. Box 360, Jefferson City, MO 65102.

*IT IS THEREFORE ORDERED:*

1. That the assessment for fiscal year 2001 shall be as set forth herein.
2. That the Internal Accounting Department of the Commission shall calculate the amount of such assessment against each public utility.
3. That the Executive Director shall render a statement on behalf of the Commission of such assessment to each public utility on or before July 1, 2000.
4. That each public utility shall pay its assessment as set forth herein.
5. That the Internal Accounting Department shall deliver checks to the Director of Revenue the day they are received.
6. That this order shall be effective on July 1, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.**

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*Case No. TO-99-227*

*Decided July 6, 2000*

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**Telecommunications § 1.** The Commission directed Southwestern Bell Telephone Company to enter into a contract with Ernst and Young consistent with the terms and conditions of a Request for Proposal developed by the Staff.

**ORDER DIRECTING SOUTHWESTERN BELL  
TELEPHONE COMPANY TO HIRE CONSULTANT**

On January 4, 2000, the Commission ordered the Staff of the Missouri Public Service Commission (Staff) to prepare a request for proposal (RFP) in accordance with the State of Missouri's Office of Administration (OA) procedures in order to find an independent consultant to perform an evaluation and verification of the data submitted by Southwestern Bell Telephone Company (SWBT). On June 9, 2000, the Staff notified the Commission that it had completed the RFP process, received proposals, carefully evaluated the proposals, and determined that Ernst & Young should be selected to perform the evaluation and verification. Staff included with its filing a very detailed analysis of Ernst & Young's proposal.

Staff asked the Commission to direct SWBT to enter into a contract with Ernst & Young consistent with the RFP and the proposal made by Ernst & Young in response to that RFP. Staff also requested that the Commission order SWBT to obtain Staff review and consent of the final contract before it is executed.

The Commission received a response from AT&T Communications of the Southwest, Inc. (AT&T) on June 20, 2000. AT&T requested that Ernst & Young "be required to provide further detail regarding the methodology it plans to use to evaluate the Telcordia finding to determine whether the results adequately address capacity issues impacting Missouri [competitive local exchange company] order activity at current levels and as competitive volumes increase." AT&T also requested that Ernst & Young be required to seek input from the competitive local exchange companies as to whether the capacity tested in Texas is adequate. Finally, AT&T encouraged the Commission to look further into the pre-existing nondisclosure agreements between SWBT and Ernst & Young to determine how they might impact Ernst & Young's performance.

The Commission has previously determined that there is a need for an outside consultant to perform this evaluation. The Commission determines that the Staff has followed OA's procedures regarding the RFP as directed, received proposals, and selected Ernst & Young as the best candidate to complete the evaluation. The

Commission also determines that the Staff in its review of the proposals examined Ernst & Young's potential conflicts of interest and its ability to perform the necessary evaluation with regard to capacity in Missouri. Therefore, the Commission will direct SWBT to enter into a contract consistent with the terms and conditions of Staff's RFP and Ernst & Young's proposal, if Ernst & Young is willing to enter into a contract with SWBT with those same terms and conditions.

*IT IS THEREFORE ORDERED:*

1. That Southwestern Bell Telephone Company shall enter into a contract consistent with the terms and conditions of the request for proposal developed by the Staff of the Missouri Public Service Commission and Ernst & Young's proposal, if Ernst & Young is willing to enter into a contract with Southwestern Bell Telephone Company with those same terms and conditions.
2. That Southwestern Bell Telephone Company shall obtain the review and consent of the Staff of the Missouri Public Service Commission before executing a final contract with Ernst & Young.
3. That the Staff of the Missouri Public Service Commission shall file a written notice in this case indicating that it has reviewed the contract and consented to its execution within 10 days of that consent being given.
4. That this order shall become effective on July 18, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,  
concur.

Dippell, Senior Regulatory Law Judge

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**In the Matter of the Request to Recognize the Name Change of  
United Water Missouri, Inc. to Jefferson City Water Works  
Company, Inc.**

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*Case No. WO-2000-809  
Decided July 7, 2000*

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**Public Utilities §1. Water §§1, 12.** The Commission recognized the proposed name and approved the adoption notice. The Commission also waived the portion of Commission Rule 4 CSR 240-2.060(16)(C), which requires the filing of a revised tariff title sheet, for good cause shown because the original tariff does not have a tariff title sheet.

**ORDER RECOGNIZING CHANGE OF NAME**

United Water Missouri, Inc. (UWM) filed an adoption notice reflecting the change of the company's name from United Water Missouri, Inc. to Jefferson City Water Works Company, Inc. (JCWWC) on June 8, 2000. The proposed effective

date is July 10, 2000. UWM included with its filing a copy of its Certificate of Amendment issued by the Missouri Secretary of State's office on May 16, 2000.

The Staff of the Missouri Public Service Commission (Staff) filed a document entitled Staff Recommendation with an attached memorandum on June 26, 2000 stating that Staff had reviewed the adoption notice and found it to be sufficient. Staff noted that UWM did not file a revised tariff title sheet. Commission rule 4 CSR 240-2.060(16)(C) requires that an adoption notice be filed with a revised tariff title sheet. Staff pointed out that UWM's existing tariff does not include a tariff title sheet. Staff also noted that it is common for many of the water corporations regulated by the Commission not to include tariff title sheets with existing tariffs. Staff recommended that the Commission waive the portion of the Commission rule 4 CSR 240-2.060(16)(C) which requires the filing of a revised tariff title sheet for good cause shown. 4 CSR 240-2.015(1)

The Commission has reviewed the filings and finds that the name change should be recognized and the proposed adoption notice should be approved. The Commission shall waive the portion of the Commission rule 4 CSR 240-2.060(16)(C) which requires the filing of a revised tariff title sheet for good cause shown because UWM's existing tariff does not include a tariff title sheet as permitted under 4 CSR 240-2.015(1).

*IT IS THEREFORE ORDERED:*

1. That the adopted name "Jefferson City Water Works Company, Inc." is acknowledged.
2. That Adoption Notice A filed by Jefferson City Water Works Company, Inc., on June 8, 2000, is hereby acknowledged.
3. That the portion of the Commission rule 4 CSR 240-2.060(16)(C) which requires the filing of a revised tariff title sheet shall be waived for good cause shown.
4. That this order shall become effective on July 10, 2000.
5. That this case may be closed on July 11, 2000.

Shelly A. Register, Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 1994.

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**In the Matter of the Application of The Empire District Electric Company for an Order Authorizing it to Adopt its Shareholders Rights Plan by Making a Dividend Distribution to All Holders of its Common Stock of Certain Rights, Including, Among Other Things, the Right to Purchase Additional Shares of Preference and Common Stock of the Company, to Issue and Sell such Additional Shares of Stock as may be Required by the Exercise of Such Rights.**

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*Case No. EF-2000-764*  
*Decided July 13, 2000*

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**Electric §4.** The Commission authorized an electric utility to adopt a shareholder rights plan designed to discourage unsolicited take-over bids. In doing so the Commission rejected conditions suggested by the Commission's Staff's that would have involved the Commission in attempting to determine the propriety of possible competing bids for acquisition of the utility.

**ORDER GRANTING APPLICATION**

The Empire District Electric Company (Empire) filed an Application on May 17, 2000, for a Commission order authorizing it to adopt a new shareholder rights plan and to implement that plan by making a dividend distribution to all holders of its common stock. Empire's existing shareholder rights plan expires on July 25, 2000. On May 19, Empire filed a Motion for Expedited Consideration, asking that the Commission issue an order approving its application no later than June 30, so as to ensure continuity with the existing shareholder rights plan. The Commission issued an order on May 22, directing the Staff of the Public Service Commission (Staff) to file a response to Empire's Motion for Expedited Consideration on or before May 25. Staff filed its response on May 25, objecting to Empire's request that its Application be considered and approved before June 30. Empire filed a Reply to Staff's Response on June 2. On June 7, Staff filed a response to Empire's reply.

On June 8, the Commission issued an order that denied Empire's motion for expedited treatment but directed Staff to file its recommendations regarding Empire's Application by June 30. Staff filed its Recommendation and Memorandum on June 30. Staff recommended that the Commission approve the application but only if it imposed one of two conditions. Empire filed a response to Staff's Recommendation on July 7. Empire opposed the imposition of either condition recommended by Staff.

Staff recommends that the Commission approve the Application with the modification that Empire cannot exercise the Shareholders Rights Agreement without first coming before the Commission and obtaining the Commission's approval to invoke the Shareholders Rights Agreement. Staff indicates that this condition would allow the Commission the opportunity to evaluate a transaction it might otherwise never be made aware of because the bidder would be deterred by the new Shareholders Rights Agreement.

As an alternative, Staff recommends that the Commission approve the Application for a limited period but provide that it would be terminated sooner if the Commission issues an order terminating or rescinding its authorization. Staff indicates that this condition would allow the Commission the opportunity to eliminate a situation that would deter a bidder with an offer that would provide a greater benefit to the public. The bidder could petition the Commission to rescind or terminate the Commission's authorization of the Shareholders Rights Agreement because the operation of that agreement would be a detriment to the public interest.

Empire's response to Staff's recommendations indicates that it is vehemently opposed to the imposition of either condition recommended by Staff. Empire points out that the imposition of either condition would render the approval meaningless, destroying the rights agreement as an effective tool for providing protection to the shareholders and other constituents. Empire also argues that there is no statutory basis to allow the Commission to impose the recommended conditions. Empire asserts that either condition would impose the Commission deeply into the corporate affairs of Empire by involving the Commission in the decision about whether or not Empire should enter into an agreement of merger with one particular bidder as opposed to another.

The Commission finds Empire's arguments to be persuasive. The Commission does not wish to attempt to impose itself into determinations appropriately made by Empire's board of directors. The Commission's proper role is to examine any proposed merger to determine whether or not it is detrimental to the public. The Commission takes that role seriously and is currently fulfilling that role in its examination of the proposed merger of Empire with and into UtiliCorp United Inc. The Commission does not have, and does not desire, the authority to sift through various possible bids for Empire to try to substitute its judgment for that of Empire's board of directors.

*IT IS THEREFORE ORDERED:*

1. That the Application filed by The Empire District Electric Company for an order authorizing it to adopt a shareholder rights plan, to make a dividend distribution of certain rights to holders of common stock and to issue shares of its preference stock, common stock, other securities, cash or assets upon the exercise or exchange of such rights is granted.
2. That this order shall become effective on July 25, 2000.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur  
Schemenauer, C., not participating

Woodruff, Regulatory Law Judge

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**GS Technology Operating Company, Inc., doing business as  
GST Steel Company, Complainant, v. Kansas City Power &  
Light Company, Respondent.\***

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*Case No. EC-99-553  
Decided July 13, 2000*

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**Evidence, Practice & Procedure §2.** The Commission's power to hear and determine a complaint brought under Section 393.130.1 is defined by Section 386.390.1, RSMo.

**Evidence, Practice & Procedure § 2.** Section 386.390.1 requires that a complaint concerning the reasonableness of utility rates be brought by certain named plaintiffs or be signed by at least 25 customers of the utility. This rule applied where an industrial customer complained that rates under its special contract were not reasonable because they included certain imprudently-incurred costs. However, Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority and the Commission concluded that it might do so in its Report & Order.

**Public Utilities §7.** The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, "neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute." The Commission is without authority to award money to either GST or KCPL, or to alter, construe or enforce their special contract. The Commission is authorized, after a hearing, to set just and reasonable prospective rates. The Commission also has "plenary power to coerce a public utility corporation into a safe and adequate service." The Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, as though some portion of that electricity had been generated by Hawthorn 5 at a lower cost. That would constitute a species of equitable relief and this Commission cannot do equity. Likewise, the Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, using insurance proceeds received with respect to the Hawthorn 5 explosion to reduce the cost of replacement power. With respect to charges already paid for service already rendered, the Commission is authorized to determine that GST has been overcharged; GST may then seek a remedy in the courts.

**Evidence, Practice & Procedure § 4.** The burden of proof at hearing rests with the complainant in cases where the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions.

**Evidence, Practice & Procedure § 7.** Section 386.410.1, RSMo, provides that "in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence." Nonetheless, Section 386.510 requires that a Commission decision be both reasonable and lawful. A decision "is lawful if the Commission had statutory authority to issue it"; a decision "is reasonable if it is supported by competent and substantial evidence on the whole record." "Substantial evidence is evidence that if true has probative force upon the issues[.] Competent evidence is that which is relevant and admissible evidence

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\*See page 89 for another order in this case. The Commission, in an order issued on August 8, 2000, denied an application for rehearing in this case. On September 1, 2000, this case was appealed to Cole County Circuit Court (OOCV324891).

which is capable of establishing the fact in issue." Thus, because the Courts have held that a Commission decision must be supported by evidence of record that is both competent and substantial, the technical rules of evidence are indeed very much applicable to Commission proceedings.

**Evidence, Practice & Procedure §§6, 15.** Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. More frequently, an expert offers an opinion "as to the inferences and conclusions that should be drawn from other evidence." This sort of testimony is proper where it will "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Section 490.065. Mr. Ward's testimony was of the latter sort. Experts are generally permitted in Missouri to offer opinion testimony as to causation, including the causes of such incidents as building collapses, fires and blast damage. Thus, GST offered, and the Commission received, Mr. Ward's expert opinion as to the cause of the boiler explosion at Hawthorn 5. An expert may rely on hearsay evidence to support an opinion, so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. However, it is also true that an expert's reliance upon inadmissible evidence does not thereby somehow transform that evidence into competent and substantive evidence. Hearsay evidence is not competent and substantial evidence such as can support a finding, conclusion or decision by this Commission. An expert's opinion testimony is not the proper vehicle by which to introduce into the record as independent, substantive evidence the evidence upon which the expert relied in reaching that opinion. Most of the information relied on by Mr. Ward was admitted only for the limited purpose of showing the basis of his expert opinion. Because Mr. Ward's opinion testimony was unsupported by substantive evidence, the Commission accorded it little weight.

**Evidence, Practice & Procedure § 6.** Where an industrial electric service customer alleged that the explosion that destroyed a generating plant was caused by the utility's failure to take a sump pump out-of-service while the associated wastewater line was under repair, permitting wastewater to back up in the control room bathroom, drip down into the Burner Management Unit and allow natural gas to enter the boiler and ignite, the customer failed to sustain its burden of proof because it could not exclude the possible intervening negligence of other actors, such as the contractor repairing the wastewater line, the contractor who installed a check valve in that wastewater line, and the manufacturer of the check valve.

#### APPEARANCES:

*Paul S. DeFord and Kurt U. Schaefer*, Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108, for Complainant GS Technology Operating Company, Inc., doing business as GST Steel Company.

*James W. Brew and Shaun Mohler*, Brickfield, Burchette & Ritts, P.C., 1025 Thomas Jefferson Street N.W., Suite 2800, Washington, D.C. 20007, for Complainant GS Technology Operating Company, Inc., doing business as GST Steel Company.

*Karl Zobrist*, Blackwell Sanders Peper & Martin, L.L.P., Post Office Box 419777, Kansas City, Missouri 64141-6777, for Respondent Kansas City Power & Light Company.

*James M. Fischer and Larry W. Dority*, Fischer & Dority, P.C., 101 West McCarty Street, Jefferson City, Missouri 65101, for Respondent Kansas City Power & Light Company.

*Gerald A. Reynolds*, Kansas City Power & Light Company, 1201 Walnut Street, Kansas City, Missouri 64106, for Respondent Kansas City Power & Light Company.

*John B. Coffman*, Deputy 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.

*Steven Dottheim*, Chief Deputy General Counsel, and *Lera Shemwell*, Assistant General Counsel, Missouri Public Service Commission, Truman State Office Building, 301 West High Street, Room 530, Jefferson City, Missouri 65101, for the staff of the Missouri Public Service Commission.

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

## REPORT AND ORDER

### Procedural History

On May 11, 1999, GS Technology Operating Company, Inc., doing business as GST Steel Company (GST), filed its Petition for an Investigation as to the Adequacy of Service provided by the Kansas City Power & Light Company (KCPL) and Request for Immediate Relief. GST filed its petition in both Highly Confidential (HC) and Nonproprietary (NP) versions, together with a motion for a protective order. GST sought a protective order to protect the details of its special contract with KCPL from disclosure. On May 12, GST filed a Supplement to its petition, as well as the supporting affidavit of Ronald F. Lewonski. On May 18, KCPL filed its response, in HC and NP versions, to GST's request for immediate relief; GST replied on May 21, 1999.

The Commission construed GST's petition as a complaint and issued its Notice of Complaint on May 26, 1999. The Commission also adopted a protective order on that date. On June 1, the Staff of the Missouri Public Service Commission (Staff) responded to GST's petition and request for immediate relief. However, on the same day, the Commission issued its order denying GST's request for immediate relief, shortening the time allowed KCPL to answer the complaint, setting a prehearing conference, and requiring the filing of a procedural schedule.

On June 9, 1999, KCPL filed its Answer in HC and NP versions. An amended Answer was filed on September 9, 1999, also in HC and NP versions. A prehearing conference was held on June 11. On June 18, the parties filed a joint proposed procedural schedule. Also on that date, GST filed its request for interim relief and expedited hearings in HC and NP versions. The Commission adopted the joint proposed procedural schedule by order issued on June 22. On June 28, KCPL responded in opposition to GST's request for interim relief. Staff responded on the same day, but supported GST's request. KCPL responded to Staff's response on July 7 and the Commission denied GST's request for interim relief by Order issued on July 9, 1999. GST applied for reconsideration and clarification on July 21. KCPL responded on August 3, in HC and NP versions. The Commission denied GST's motion on August 19, 1999.

Meanwhile, the first of several discovery disputes arose on July 2, 1999, when GST filed its motion to compel KCPL to respond to its first set of interrogatories and requests for production. KCPL responded on July 14. On July 23, GST filed its motion to compel responses to its second and third sets of discovery in HC and NP versions. On July 26, the Commission by Order shortened the time allowed to KCPL to respond to GST's second motion to compel. On July 28, GST filed, in HC and NP versions, its reply to KCPL's response to its first motion to compel. On July 29, the Commission issued its Order Regarding GST's First Motion to Compel and Amending the Procedural Schedule.

KCPL notified the Commission by letter on August 3 that it had re-evaluated its objections to GST's second and third sets of discovery in the light of the Commission's order of July 29; it filed its HC and NP versions of its response to GST's second motion to compel on the same day. On August 9, KCPL moved for clarification, reconsideration and rehearing of the Commission's order of July 29. On August 11, KCPL filed its modified response to GST's second motion to compel; GST replied on August 17. On August 19, the Commission issued its Order regarding GST's second motion to compel and regarding KCPL's motion for clarification of August 9.

On August 31, 1999, KCPL filed its first motion to compel discovery with supporting suggestions, in HC and NP versions. On September 13, GST and KCPL moved jointly to modify the procedural schedule. On September 21 the Commission modified the procedural schedule as requested by the parties and, as GST had never responded, granted KCPL's first motion to compel. On September 22, the Commission issued a Notice of Correction.

On October 4, 1999, James Brew moved for leave to appear for GST *pro hac vice*. On the same day, GST moved for reconsideration with respect to the Commission's granting of KCPL's first motion to compel, and belatedly filed its response to that motion. GST also filed supporting suggestions on that day. As grounds for reconsideration, GST stated that it had never been served with a copy of KCPL's first motion to compel. Therefore, the Commission on October 6, 1999, issued its Order Directing Filing, requiring the parties to specify the date and manner, if any, in which that motion had been served upon them. Public Counsel filed its response on October 8; Staff filed its response on October 14. Neither of these parties had ever been served with KCPL's motion, although both had received a copy from the Commission in the normal course of affairs. Also on October 14, counsel for GST and KCPL filed a joint response, in which KCPL consented to the vacation of the Commission's order granting its first motion to compel and to GST's late response. Accordingly, on October 19, the Commission vacated the portion of its order of September 21 that concerned KCPL's first motion to compel. At the same time, the Commission granted Mr. Brew's motion to appear *pro hac vice* and gave notice of its acceptance of KCPL's Amended Answer, to which no party had objected.

Meanwhile, on October 13, 1999, KCPL filed its second motion to compel discovery and, on October 19, GST and KCPL again moved jointly for modification of the procedural schedule. On the latter day, KCPL moved to limit the scope of discovery and the issues. On October 19, the Commission again modified the

procedural schedule as requested by the parties. The Commission issued a Notice of Correction on October 20.

On October 21, 1999, KCPL replied to GST's belated response to its first motion to compel. On October 28, both GST and the Staff responded to KCPL's motion to limit the scope of discovery and the issues. On November 2, the Commission issued its new order regarding KCPL's first motion to compel; on November 5, the Commission issued its order regarding KCPL's second motion to compel. Therein, the Commission granted KCPL's second motion to compel, again because GST had never responded to it. On November 8, KCPL replied to GST and the Staff as to KCPL's motion to limit the scope of discovery and the issues. On November 16, the Commission issued its order disposing of KCPL's motion to limit the scope of discovery and the issues.

On November 18, GST responded in opposition to KCPL's request for alternative relief, contained in its November 8 reply. Therein, KCPL had requested that the Commission hold this case in abeyance pending the Commission's final resolution of its investigation of the Hawthorn incident in Case No. ES-99-581. On December 1, the Commission denied KCPL's request for alternative relief. On the same day, GST filed its motion seeking clarification and reconsideration of the Commission's Order of November 5, granting KCPL's second motion to compel. GST filed a corrected version of this motion on December 2. KCPL responded in opposition to GST's motion on December 13 and GST replied on December 22.

On January 6, 2000, the Commission issued its Order to Show Cause. This Order denied GST's motion for clarification and reconsideration as to the Commission's Order of November 5, 1999, which had granted KCPL's second motion to compel. The Show Cause Order also vacated a portion of the Commission's Order of November 2, 1999, regarding KCPL's first motion to compel, and directed GST to respond to certain data requests (DRs) to which the Commission had originally sustained GST's objection. The Commission took this action because, through the pleadings filed on December 13 and December 22, the Commission learned for the first time that GST Steel Company (GST Steel) was not a distinct legal entity from GS Technology Operating Company, Inc. As this was the basis on which GST's objection to certain DRs had been sustained, that determination necessarily had to be reversed. The Show Cause Order also set a show cause hearing on January 18, 2000, for GST to show why sanctions ought not be imposed upon it or upon its attorneys. Finally, the Show Cause Order suspended the procedural schedule pending the Commission's decision on the Show Cause Order, except for a prehearing conference set for January 18.

On January 7, 2000, the Commission issued a procedural order with respect to the show cause hearing. On January 13, GST filed its response to the Show Cause Order, as well as a motion for leave to file out-of-time. KCPL and Staff also responded to the Show Cause Order on that day. On January 18, the Commission held the show cause hearing, as well as the prehearing conference previously scheduled for that day. KCPL filed a letter brief on January 20; GST filed copies of certain authorities on the same day. KCPL filed a further letter brief on January 27, to which GST responded on February 2.

On February 17, 2000, the Commission issued its Order Concerning the Show Cause Hearing. In that Order, the Commission determined that, while GST had engaged in discovery misconduct, GST's attorneys had not. The Commission imposed no sanction because KCPL represented that any prejudice was cured. The Commission also established a new procedural schedule and directed the parties to file memoranda of law regarding the Commission's subject matter jurisdiction with respect to the issues raised by GST's petition and the remedies therein sought. These memoranda were filed on March 17. In the Order of February 17, the Commission also reformed the style of the case to reflect the relationship of GST Steel Company and GS Technology Operating Company, Inc., and directed GST to amend its petition to correctly state that relationship. GST complied on February 29.

On February 22, 2000, GST filed its third motion to compel and also requested directed findings and interim relief; GST filed a correction of this motion on February 24. KCPL responded on March 3 and GST replied on March 13. On March 2, the presiding officer notified the parties that all pending discovery matters would be taken up at the prehearing conference scheduled for March 10. At that conference, the presiding officer heard the arguments of the parties regarding GST's third motion to compel. The parties were able to resolve several discovery issues at that time. On March 23, the Commission granted GST's third motion to compel and denied its requests for directed findings and for interim relief.

On April 5, 2000, the Commission by order directed KCPL to file a privilege log referred to in a letter copied to the presiding officer by KCPL on April 4. The Commission filed that letter in the case. KCPL filed the privilege log on April 17. On April 11, KCPL moved to strike portions of the direct testimony of GST's witness, Jerry N. Ward. This motion was taken up at the hearing as insufficient time remained to deal with it prior to the hearing.

Pursuant to the procedural schedule and the Commission's rules, the parties filed prepared testimony. GST filed direct testimony on November 17, 1999, as well as evidence on billing by KCPL on November 18 and November 22. KCPL and Staff filed rebuttal testimony on February 28, 2000. The parties filed a list of issues and agreed order of witnesses and cross-examination on March 10. GST filed surrebuttal testimony on April 6 and Staff filed cross-surrebuttal on the same date. The parties filed their position statements on April 12 and certain affidavits and schedules were filed on April 14.

The Commission held an evidentiary hearing on April 17 and 18, 2000. All parties were represented at the evidentiary hearing and were accorded a full and fair opportunity to adduce evidence in support of their positions and to cross-examine adverse witnesses. The hearing transcript was filed on April 25, 2000, and the Commission established a briefing schedule by order on April 27. On May 11, Staff was excused, at its request, from filing proposed findings of fact and conclusions of law.

Staff and KCPL filed initial briefs on May 12, 2000; KCPL also filed proposed findings of fact and conclusions of law on that date, in HC and NP versions. Also on that date, GST moved for leave to file its initial brief and its proposed findings of fact and conclusions of law out-of-time. The Public Counsel advised the Commission by letter that it would not brief the case.

On May 15, 2000, GST filed its initial brief and its proposed findings of fact and conclusions of law. On May 24, the parties filed their reply briefs. GST also on that date filed its corrected proposed findings of fact and conclusions of law, HC and NP versions.

**GST's Motion for Leave to File Out-of-Time:**

GST moved for leave on May 12, 2000, to file its initial brief and proposed findings of fact and conclusions of law out-of-time. Thereafter, it filed these items on May 15, with a correction on May 24. No party has objected to GST's motion and the time for doing so has long since passed. Therefore, the Commission will grant GST's motion.

**Discussion**

Pursuant to the procedural schedule established by the Commission, 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. The issues formulated by the parties are as follows:

1. Have the charges imposed under the GST/KCPL Special Contract been "just and reasonable" over the period of the contract?
2. Has KCPL properly accounted for the insurance proceeds that it has received as a result of the Hawthorn incident?
3. Does the Commission have the authority to order KCPL to pay GST insurance proceeds received by KCPL as a result of the explosion of the Hawthorn 5 plant? If so, is it reasonable and appropriate to do so?
4. Does the Commission have the authority to order KCPL to recalculate GST's bills under the contract? If so, should those bills be recalculated (i.e., by using KCPL's incremental costs as if Hawthorn continued to operate)? Is it reasonable and appropriate to do so?
5. Has KCPL operated and maintained its generation units in a reasonable and prudent manner?
6. Has KCPL operated and maintained its distribution and transmission facilities in a reasonable and prudent manner?
7. Should the Commission order a formal investigation into the operation and maintenance of KCPL's generation, transmission and distribution facilities?
8. Should the Commission delay any decision in this case pending the outcome of the Staff's independent and final report of the boiler explosion at Hawthorn 5?

**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 Special Contract:**

GS Technology Operating Company, Inc., doing business as GST Steel Company, is a corporation engaged in the manufacture of steel in Kansas City, Missouri. Specifically, GST manufactures grinding balls and rods for the mining industry and carbon wire rods. GST uses electric arc furnaces in its manufacturing process which consume extremely large amounts of electricity. GST purchases this electricity from KCPL and GST is KCPL's largest "single point retail customer," that is, its largest customer taking service at one location. GST has no other source of electricity available to it in Kansas City.

The steel industry is extremely competitive. GST has sought to acquire electric service at an advantageous price through a special contract with KCPL, the "Amended and Restated Power Supply Agreement," executed on August 12, 1994. This special contract was approved by the Commission. In the Matter of a Special Contract filed by Kansas City Power & Light Company, Case No. EO-95-67 (Order Approving Agreement and Tariff, issued October 26, 1994). The special contract, which is confidential, provides a formula by which to calculate the price which GST pays to KCPL for electric service. At all times herein pertinent, KCPL accurately computed its charges for electric service to GST pursuant to the special contract.

The special contract provides flexibility to GST by permitting it to schedule production when KCPL's incremental costs are low. The special contract price includes a fixed component and a variable component. The variable component fluctuates as KCPL's incremental production costs fluctuate. Factors affecting the variable component of the special contract price are KCPL's fuel costs, operations and maintenance expenses, and purchased power expenses.

Under the special contract, GST has paid significantly less for electric service than it would have paid under KCPL's applicable general service tariffs. Under the special contract, GST is not subject to the rate increases, nor does it benefit from the rate decreases, that are applicable to KCPL's regular Missouri retail customers. The special contract permits GST to opt for service under any of KCPL's general service tariffs at any time. GST has never exercised this option.

**KCPL's System:**

KCPL owned and operated, in whole or in part, seven fossil fuel generating units, one nuclear generating unit, and several gas/oil peaking units. Among the generating assets operated by KCPL was Hawthorn Generating Station Unit No. 5 (Hawthorn 5), a 479 megawatt (MW) coal-fired, baseload generating unit that entered service in 1956.<sup>1</sup> Hawthorn 5 was one of KCPL's more economical baseload units and generated about 2 million MW hours (MWh) annually. KCPL's other baseload generating stations were Montrose 1, 2 and 3 (total rating of 563 MW), Iatan (726 MW), LaCygne 1 and 2 (total rating of 1,619 MW), and Wolf Creek (1,236 MW). While Wolf Creek is a nuclear power plant, the others are all coal-fired, and use either fuel oil or natural gas in addition to coal. Generating resources are generally dispatched in ascending variable cost order; that is, the lower-cost

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<sup>1</sup>A "baseload" unit is one that is always operated at maximum capacity.

generating units are used before the higher-cost generating units. Hawthorn 5 fell between LaCygne and Montrose in KCPL's resource stack.

In August 1998, a ruptured steam line at Hawthorn 5 caused an unplanned outage at that unit that lasted until November 11, 1998, for a total of 83 days. This outage was caused by a contractor's error, in that the pipe in question was a welded pipe rather than a seamless pipe as specified in the plans. GST experienced increases in the variable portion of its rate under the special contract due to this unplanned outage at Hawthorn 5.

KCPL experienced other outages in its system, both planned and unplanned, in September 1998. GST asserts that not a single KCPL generating unit operated for all 30 days of September 1998. However, total system availability that month was 78 percent. In January 1998, total system availability was 97 percent. Forced outages of short duration are not unusual for baseload, coal-fired generation units.

**The Hawthorn Incident:**

At about 12:30 a.m. on February 17, 1999, an explosion destroyed Hawthorn 5's 11-story boiler, causing the immediate shutdown of that unit. KCPL has not returned Hawthorn 5 to service since the explosion. The Commission has initiated an investigation into the explosion at Hawthorn 5. In the Matter of Kansas City Power & Light Company, Case No. ES-99-581 (*Order Establishing Case*, issued June 4, 1999). That investigation is still in progress. The cause of the Hawthorn explosion is not presently known; neither is the degree of responsibility properly to be attributed to KCPL for the explosion.<sup>2</sup>

As a result of the Hawthorn 5 explosion, KCPL estimated that it would experience a net increase in costs for calendar year 1999 between \$6.5 million and \$11.5 million. To replace the power that had been generated by Hawthorn 5, KCPL planned to bring on-line in the spring of 1999 Hawthorn 6, a 142 MW gas-fired combustion turbine generating unit. KCPL also planned to purchase 350,000 MWh on the energy market. KCPL has received \$5 million from an insurance policy covering replacement energy expense in the event of an incident such as the Hawthorn 5 explosion, which it credited to Account 401555, Purchased Power Expense.

KCPL informed GST that the Hawthorn outage would probably result in an increase in KCPL's incremental costs and that these increased costs would be reflected in GST's rate under the special contract. In the nine months following the Hawthorn 5 explosion, GST paid over \$3.0 million more for electric service to KCPL than it would have paid had Hawthorn 5 remained on-line. Since the Hawthorn 5 explosion, KCPL has relied upon more expensive system resources and higher-priced off-system purchases of replacement power to replace the electricity that would have been generated by Hawthorn 5. The variable portion of GST's rate under the special contract has risen accordingly.

**Other Service Disruptions:**

GST also experienced repeated service disruptions in 1998 due to recurring KCPL equipment failures at its Blue Valley Substation. KCPL employs seven large

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<sup>2</sup>See discussion under Conclusions of Law, *infra*.

161 kV transformers and nine 13 kV distribution circuits to provide service to GST. Failures of KCPL's Transformer No. 12 cut power to GST's steel mill on January 20, 1998, and repeatedly from July to October of that year. The failure of this transformer was due to manufacturing defects and not to poor maintenance by KCPL. KCPL has replaced that transformer. In November 1998, GST experienced production delays of 545 minutes due to the failure of KCPL's Transformer No. 1A. KCPL's maintenance of this transformer was well within the manufacturer's recommendations.

On November 13, 1998, KCPL's underground Feeder Cable No. 5316-1 failed, causing GST to scrap 15 tons of steel and shut down for 170 minutes. On November 17, 1998, while Feeder No. 5316 was under repair, Feeder No. 5314 was grounded, causing GST to scrap 19 tons of steel. GST's rod mill was shut down for 180 minutes on this occasion and its south plant was shut down for 300 minutes. Cable faults caused eight outages at GST in 1998; however, two of these were cables owned by GST. Many of these equipment failures resulted from upgrades at GST and nearby industrial facilities. Praxair, Inc., a manufacturer of industrial gases and a neighbor of GST, expanded its facilities in 1998, leading to a much larger demand for power. GST itself in the past decade installed computerized production control equipment which is sensitive to voltage fluctuations. KCPL has invested over \$1 million to improve the electric service it provides to GST. Most of the reliability problems raised by GST have already been resolved.

**Alleged Management Imprudence:**

GST contends that it has experienced increasingly unreliable service from KCPL since July 1998, due to imprudent management decisions by KCPL. GST identifies this imprudence as decreased expenditure on, and attention to, the operation and maintenance of its coal-fired generation units by KCPL's management. In 1994, the percentage of time that Hawthorn 5 was off-line was 7.1 percent; in 1998, it was 33.52 percent. However, although Hawthorn 5 was off-line for an increased period in 1998, its capacity factor for that year was higher than in all previous years except 1997. KCPL's overall maintenance expenditures have decreased from over \$81 million in 1992 to just under \$71 million in 1998. KCPL's operations expenditures associated with its coal-fired plants decreased from approximately \$138.3 million in 1993 to approximately \$126.4 million in 1998. KCPL's maintenance expenses associated with its coal-fired plants decreased from about \$39.5 million in 1993 to \$32.6 million in 1998. KCPL reduced its forecasted five-year capital expenditures from \$191.6 million in 1994 to \$81.2 million in 1999.

Analyses of performance data showed that KCPL's system performed within acceptable industry standards throughout the pertinent period. The equivalent availability factor (EAF) for KCPL's units has been close to the peer group average and, thus, at an acceptable level. However, this data did show a declining trend for KCPL's units EAF and increasing forced outage rates at some of its units. The equivalent availability of KCPL's units has been about 80 percent and, between 1994 and 1998, its baseload units have demonstrated relatively high capacity factors:

<u>Unit:</u>	<u>Average Capacity Factor:</u>
Montrose	60.53%
Hawthorn	63.74%
La Cygne	69.69%
Iatan	82.10%
Wolf Creek	97.03%

#### **Purchased Power and Other Expenses:**

From 1995 to 1998, KCPL's dependence on purchased power increased as its peak demand rose from 2,714 MW to 3,175 MW, an increase of 17 percent. KCPL's purchased power expense increased from 1994 through 1998 from about \$33.9 million to \$63.6 million. These increases in KCPL's purchased power expense directly affected the variable component of GST's rate under the special contract.

During the same period, KCPL incurred large expenses in connection with mergers. In 1996, KCPL incurred \$13 million in expenses related to an unconsumated merger with UtiliCorp, a \$5 million termination fee arising from the UtiliCorp merger, and another \$13 million to defend against an unsolicited exchange offer by Western Resources. In 1997, KCPL had merger related expenses of about \$7 million and paid \$53 million to UtiliCorp as a termination fee. In 1998, KCPL incurred about \$15 million in expenses related to an attempt to merge with Western Resources. However, GST produced no evidence showing that any of these merger-related expenses were ever passed on to GST.

#### **Conclusions of Law**

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

#### **Jurisdiction:**

KCPL is an "electrical corporation" and a "public utility" within the intendments of Section 386.020, (15) and (42), RSMo Supp. 1999.<sup>3</sup> Consequently, the Missouri Public Service Commission has jurisdiction over KCPL's services, activities and rates pursuant to Section 386.250 and Chapter 393, RSMo. However, it does not necessarily follow that the Commission has jurisdiction to hear and determine GST's complaint, or, if the Commission can hear the complaint, that it may grant the relief sought herein by GST.<sup>4</sup>

<sup>3</sup>All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 1994.

<sup>4</sup>GST's initial pleading was styled a "petition," not a "complaint"; however, the two words are synonyms pursuant to Section 386.390.1, RSMo 1994: "Complaint may be made by . . . any corporation . . . by petition or complaint in writing[.]"

**Jurisdiction to Hear GST's Complaint:**

Citing Section 393.130.1, GST complains that KCPL's cost-based rate for electric service is not just and reasonable because of the inclusion therein of certain imprudently incurred expenses. Likewise, citing the same section, GST complains that the electric service provided by KCPL is inadequate and unreliable, again because of imprudent management. The alleged imprudence is a cost-saving reduction in operational expenses, resulting in inadequate maintenance of KCPL's generation, transmission and distribution assets and systems. The most spectacular example of KCPL's managerial incompetence, GST charges, is the destruction of its Hawthorn 5 generation unit by an explosion. GST seeks several remedies, including a finding that it has been overcharged and recalculation of its bills for services already rendered.

Section 393.130.1, under which GST brings its complaint, provides:

Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered 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 gas, electricity, water, sewer or 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.

However, the Commission's power to hear and determine a complaint brought under Section 393.130.1 is defined by Section 386.390.1, which states in pertinent part:

that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or 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.

The gravamen of GST's complaint under Section 393.130.1 is that KCPL's charges have not been just and reasonable. Consequently, GST's complaint is subject to the perfection requirement stated in Section 386.390.1. However, GST's complaint is not perfected as that section requires.

At the Commission's direction, the parties addressed this jurisdictional defect in memoranda due on March 17, 2000. In those memoranda, GST and the Staff of the Commission took the position that perfection was not required under a line of cases beginning with State ex rel. Laundry, Inc. v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37 (1931). KCPL, predictably, took the position that perfection under Section 386.390.1 was required and reminded the Commission of various occasions when it had dismissed complaints for lack of perfection.

The Commission agrees with KCPL that GST's complaint must be perfected under Section 386.390.1. Laundry, Inc., *supra*, and its progeny have to do with misclassification, that is, which of several approved rates should a consumer be charged and not, as here, with whether a rate is just and reasonable. However, Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority. The Commission concludes that it may do so in this order. Therefore, the Commission shall determine the merits of GST's complaint "upon its own motion" as authorized by Section 386.390.1.

**Jurisdiction to Provide a Remedy:**

As noted previously, however, authority to hear and determine GST's complaint does not necessarily equal authority to grant the relief therein requested. 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." 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). 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. 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). "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." State Tax Commission, *supra*.

The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, "neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute." *Id.*, quoting State ex rel. Kansas City v. Public Service Commission, 301 Mo. 179, 257 S.W. 462 (banc 1923). The Commission is without authority to award money to either GST or KCPL, American Petroleum Exchange v. Public Service Commission, 172 S.W.2d 952, 955 (Mo. 1943), or to alter, construe or enforce their special contract. May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, (Mo. 1937); Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954, 959 (Mo. 1936). The Commission is authorized, after a hearing, to set just and reasonable prospective rates. State ex rel. Utility Consumers Council of Missouri, Inc. v. Public

Service Commission, 585 S.W.2d 41, 48-49 (Mo. banc 1979). The Commission also has "plenary power to coerce a public utility corporation into a safe and adequate service." State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, \_\_\_, 168 S.W. 1156, 1163 (banc 1914).

The Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, as though some portion of that electricity had been generated by Hawthorn 5 at a lower cost. That would constitute a species of equitable relief and this Commission cannot do equity. See Soars v. Soars-Lovelace, Inc., 142 S.W.2d 866, 871 (Mo. 1940). Likewise, the Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, using insurance proceeds received with respect to the Hawthorn 5 explosion to reduce the cost of replacement power. American Petroleum Exchange, supra. With respect to charges already paid for service already rendered, the Commission is authorized to determine that GST has been overcharged; GST may then seek a remedy in the courts. State ex rel. Kansas City Power & Light Company v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (1943); State ex rel. Inter-City Beverage Co., Inc. v. Missouri Public Service Commission, 972 S.W.2d 397, 972 (Mo. App., W.D. 1998).

#### **Sufficiency of the Evidence:**

The burden of proof at hearing rests with the complainant in cases where, such as here, the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions. 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). Thus, GST must establish all facts necessary to support the relief it seeks by a preponderance of the credible evidence.

The centerpiece of GST's case is the explosion of KCPL's Hawthorn 5 generating unit. GST presented the testimony of an expert witness, Jerry N. Ward, to show that the explosion was the result of imprudence on the part of KCPL's employees. KCPL objected to Mr. Ward's testimony to the extent that it relied on inadmissible evidence, such as the statements of persons who were not themselves called as witnesses. Mr. Ward was permitted to testify, but the information he relied upon was received only to show the basis of his opinion, and not as substantive evidence.

"The reception of evidence in hearings of this character should be governed by the rules of evidence as applied in civil cases, excepting insofar as such rules may be modified and relaxed by permissible legislative enactments." Garrard v. Dep't of Health and Welfare, 375 S.W.2d 582, 586 (Mo. App. 1964). Section 386.410.1, RSMo Supp. 1999, provides that "in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence."

Nonetheless, Section 386.510 requires that a Commission decision be both reasonable and lawful. A decision "is lawful if the Commission had statutory authority to issue it." State ex rel. Utility Consumers Council v. Public Service Commission, 562 S.W.2d 688, 692 (Mo. App., E.D. 1978). A decision "is reasonable if it is supported by competent and substantial evidence on the whole record." Utility Consumers, supra; State ex rel. Ozark Electric Cooperative v. Public Service

Commission, 527 S.W.2d 390, 392 (Mo. App. 1975). "Substantial evidence is evidence that if true has probative force upon the issues[.] Competent evidence is that which is relevant and admissible evidence which is capable of establishing the fact in issue." Hay v. Schwartz, 982 S.W.2d 295, 303 (Mo. App., W.D. 1998) (citations and internal quotation marks omitted). Thus, because the Courts have held that a Commission decision must be supported by evidence of record that is both competent and substantial, the technical rules of evidence are indeed very much applicable to Commission proceedings.

Mr. Ward offered expert testimony. Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. W.A. SCHROEDER, 23 MISSOURI PRACTICE SERIES-EVIDENCE, Sec. 702.1.a (1992). More frequently, an expert offers an opinion "as to the inferences and conclusions that should be drawn from other evidence." *Id.* This sort of testimony is proper where it will "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Section 490.065. Mr. Ward's testimony was of the latter sort.

Experts are generally permitted in Missouri to offer opinion testimony as to causation, including the causes of such incidents as building collapses, fires and blast damage. SCHROEDER, *supra*, Sec. 702.1.b.3.A. Thus, GST offered, and the Commission received, Mr. Ward's expert opinion as to the cause of the boiler explosion at Hawthorn 5.

Section 490.065.3 provides that:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Thus, an expert may rely on hearsay evidence to support an opinion, so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. State v. Woodworth, 941 S.W.2d 679, 698 (Mo. App., W.D. 1997). However, it is also true that an expert's reliance upon inadmissible evidence does not thereby somehow transform that evidence into competent and substantive evidence. Peterson v. National Carriers, Inc., 972 S.W.2d 349, 354 (Mo. App, W.D. 1998); St. ex rel. Missouri Highway & Transportation Commission v. Delmar Gardens of Chesterfield, 872 S.W.2d 178, 182 (Mo. App., E.D. 1994); and see St. ex rel. Missouri Highway & Transportation Commission v. Sturmfels Farm L.P., 795 S.W.2d 581, 589-90 (Mo. App., E.D. 1994). Hearsay evidence is not competent and substantial evidence such as can support a finding, conclusion or decision by this Commission. St. ex rel. DeWeese v. Morris, 359 Mo. 194, 200-201, 221 S.W.2d 206, 209 (1949).

An expert's opinion testimony is not the proper vehicle by which to introduce into the record as independent, substantive evidence the evidence upon which the expert relied in reaching that opinion. See Covington v. Division of Family Services, 603 S.W.2d 103 (Mo. App., W.D. 1980); Garrard v. Dep't of Public Health and Welfare, 375 S.W.2d 582 (Mo. App. 1964). Most of the information relied on by Mr. Ward was

admitted only for the limited purpose of showing the basis of his expert opinion. Thus, for example, in the same way, the out-of-court statements of a criminal defendant were admitted to show the basis of a psychiatrist's expert opinion that the man was malingering and not for the truth of the statements' assertions. State v. Barnes, 740 S.W.2d 340, 343 (Mo. App., E.D. 1987). Because Mr. Ward's opinion testimony is unsupported by substantive evidence, the Commission will accord it little weight. SCHROEDER, *supra*, Sec. 703.1.

**The Hawthorn 5 Explosion:**

At the hearing, GST offered, and the Commission received, the expert opinion of Jerry N. Ward that the Hawthorn 5 explosion was the result of imprudence by KCPL employees. Imprudence, in this regard, is simple negligence, that is, a failure to meet the appropriate minimum standard of care: "Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances[.]" BLACK'S LAW DICTIONARY 1032 (6th ed. (deluxe), 1990).

Mr. Ward hypothesized that a failure by KCPL employees to follow proper safety procedures by placing a "hold" on a sewage sump pump while the sewage system was under repair permitted wastewater to back up in the restroom adjacent to the Hawthorn 5 control room, then to flood the control room floor, drip down three stories to the computerized Burner Management System (BMS) and disable the BMS, thereby allowing natural gas to enter the shut-down boiler, which consequently exploded. However, as discussed at length above, GST did not place any of these facts into the record, thereby precluding the Commission from finding that the chain of events hypothesized by Mr. Ward had actually occurred. Additionally, Mr. Ward was not able to exclude other possible causes of the wastewater backup, which causes were not due to any negligence attributable to KCPL. For example, confronted with a drawing showing the presence of a check valve<sup>5</sup> between the Hawthorn 5 restroom and the sump pump that he considered to be the likely cause of the wastewater backup, Mr. Ward stated,

The fact that there was a check valve installed is not particularly significant since either it was not working or the piping system that's installed there is installed differently from the description of the drawing. I have no way of knowing.

While not significant to Mr. Ward in terms of his theory of the cause of the explosion, the check valve is necessarily legally significant in assigning blame for the explosion.<sup>6</sup> For example, if the contractor who built Hawthorn 5 failed to actually install the check valve, the results of that failure would likely be attributable to the negligence of the contractor and not to KCPL. If the check valve was installed, but failed to operate properly, the results of that failure would likely be attributable to the negligence of the manufacturer of the check valve and not to KCPL.

<sup>5</sup>A check valve is a device in a piping system that prevents liquid contents from flowing in an undesired direction. The purpose of the check valve in question was to prevent wastewater from flowing up into the Hawthorn 5 restroom.

<sup>6</sup>Assuming that the wastewater backup led to the boiler explosion.

Likewise, Mr. Ward's opinion that KCPL employees caused the backup, and thus the explosion, by failing to place a "hold" on the wastewater sump pump is not persuasive. Mr. Ward admitted that outside maintenance contractors were present at Hawthorn 5 on February 16, 1999, engaged in attempting to clear the clogged sewer line. Mr. Ward was unable to conclusively exclude their activities as a link in the chain of causation leading to the wastewater back-up. Cross-examination of Mr. Ward with respect to KCPL's safety procedures suggested that a "hold" on the sump pump was not required where it was not itself under repair and a check valve separated it from the portion of line that was actually under repair.

For the purposes of this case, the Commission concludes that GST has failed to show that imprudence on the part of KCPL employees caused the explosion at Hawthorn 5 on February 17, 1999. This is not a conclusion that KCPL is not responsible for the Hawthorn 5 explosion. The Commission is unable on this record to determine that issue. The Commission considers the Hawthorn 5 explosion to be an open question, pending the conclusion of Staff's ongoing investigation in Case No. ES-99-581.

**Adequacy and Reliability of Electric Service:**

The Commission concludes that the performance of KCPL's system throughout the pertinent period, with the exception of the Hawthorn 5 explosion, was within acceptable limits. The Commission reiterates that, on this record, it makes no findings as to the Hawthorn explosion. The Commission finds the testimony of Staff expert Dr. Eve Lissik to be both credible and persuasive.

Dr. Lissik analyzed data from KCPL's annual FERC Form 1<sup>7</sup>. Dr. Lissik concluded that, over the period 1993 to 1998, KCPL's coal-fired production expenses decreased although its overall production expenses increased. Over the same period, Dr. Lissik concluded that coal-fired operation and maintenance expenses declined from two-thirds of KCPL's total production expenses to less than half of the total. Dr. Lissik stated that these patterns may indicate significant changes in management focus at KCPL.

Dr. Lissik performed an independent analysis of three factors for each of KCPL's baseload generating units, including net peak demand, capacity factor and percent of time off-line. Dr. Lissik stated that a decrease in the first two of these factors, and an increase in the third, would indicate declining unit availability. Dr. Lissik stated that "Staff found none of these indications." Although Hawthorn 5 was off-line for an increased period in 1998, its capacity factor for that year was higher than in all previous years except 1997. Dr. Lissik offered her opinion that the case presented by GST was "inconclusive."

Dr. Lissik also reviewed the report produced by KCPL's expert, Monica Eldridge. Dr. Lissik found Ms. Eldridge's report to be useful and reliable, despite the criticism of GST's expert, Don Norwood. Dr. Lissik testified that, based on her review of Ms. Eldridge's report and of other evidence produced by the parties, "KCPL's generating units are operating within acceptable limits." However, Dr. Lissik also stated that the increasing forced outage rates at some of KCPL's units, together with a slight

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<sup>7</sup>"FERC" is the Federal Energy Regulatory Commission.

but steady decrease in equivalent availability, was a "cause for some concern." Likewise, in the opinion of Dr. Lissik, KCPL's reductions in operating expenses and capital investment, together with the Hawthorn 5 explosion, "merit further analysis." The Commission also agrees with Dr. Lissik that, while GST has failed to prove its case, it has nonetheless identified a declining trend in KCPL's performance that is a matter for concern.

The Commission will direct the Staff to address these concerns in the course of its investigation of the Hawthorn 5 explosion in Case No. ES-99-581.

**Just and Reasonable Charges:**

The Commission concludes that, throughout the pertinent period, KCPL's charges to GST for electric service have been just and reasonable. The charges were properly and correctly calculated under the special contract, which was freely negotiated by the parties and approved by the Commission. That contract was designed by the parties to afford GST the lowest possible rates for electric service. By virtue of its variable component, which rose and fell as KCPL's incremental costs of production rose and fell, the special contract necessarily carried with it a certain degree of risk. As Staff expert Dr. Michael S. Proctor testified, the parties apportioned these risks when they negotiated their special contract. While GST has not enjoyed rates as low as it evidently hoped for, it has enjoyed rates lower than any of KCPL's tariffed rates. Thus, the Commission concludes that GST has not shown that it has been overcharged by KCPL for electric service.

*IT IS THEREFORE ORDERED:*

1. That the Motion for Leave to File its Brief Out-of-Time, filed by GS Technology Operating Company, doing business as GST Steel Company, on May 12, 2000, is granted.
2. That any pending motions not otherwise granted are denied.
3. That the Commission shall, on its own motion, pursuant to Section 386.390.1, RSMo 1994, hear and determine the petition filed by GS Technology Operating Company, doing business as GST Steel Company, on May 11, 1999, as to whether or not the charges to it by Kansas City Power & Light Company for electric service have been just and reasonable.
4. That it is the decision of this Commission that the charges of Kansas City Power & Light Company to GS Technology Operating Company, doing business as GST Steel Company, on account of electrical service provided have at all pertinent times been just and reasonable and that GS Technology Operating Company, doing business as GST Steel Company, has not been overcharged therefor.
5. That it is the decision of this Commission that, at all times herein pertinent, Kansas City Power & Light Company has operated and maintained its generating, distributing and transmitting system at an adequate level, except as stated in Ordered Paragraph 6, below.
6. That the Commission makes no findings, and reaches no conclusions, as to the explosion that occurred at Hawthorn Station Unit No. 5 on February 17, 1999, except that the Commission finds that GS Technology Operating Company, doing business as GST Steel Company, has failed to show that the explosion resulted from imprudence on the part of Kansas City Power & Light Company.
7. That the Staff of the Missouri Public Service Commission, in its investigation of the explosion that occurred at Hawthorn Station Unit No. 5 on February 17, 1999, in Case No. ES-99-581, shall investigate and report to the Commission as to whether or not the safety

procedures prescribed by the management of Kansas City Power & Light Company were adequate and appropriate, whether or not Kansas City Power & Light Company employees followed those safety procedures, and whether Kansas City Power & Light Company has provided adequate and appropriate training to its employees. Likewise, the Staff of the Commission shall investigate and report to the Commission in Case No. ES-99-581 as to whether or not the performance of Kansas City Power & Light Company's system has declined over the past decade and, if so, why.

8. That this Report and Order shall become effective on July 25, 2000.
9. That this case may be closed on July 26, 2000.

Lumpe, Ch., Drainer, Murray, and Simmons, concur;  
Schemenauer, C., dissents, with separate dissenting opinion attached;  
all certify compliance with the provisions of Section 536.080, RSMo 1994.

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**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of my fellow Commissioners regarding their decision in ORDERED paragraphs 4, 5, and 6. In my opinion there was sufficient evidence presented to show that Kansas City Power & Light Company bears some degree of responsibility for the Hawthorn explosion. Management's decisions to reduce staff and employee training along with their failure to update and follow their own operating and maintenance procedures contributed to the events that led up to the explosion. The seriousness of this incident is only slightly mitigated by the fact that no loss of life occurred. I believe that a decision in this case should have been delayed until after the Staff's investigation of the Hawthorn Plant explosion was completed.

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**In the Matter of the Application of Access Point, Inc., for Approval of a Transaction Whereby Access Point, Inc., Will Acquire Selected Customers of Efficcy Group, Inc.**

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*Case No. TM-2000-615  
Decided July 18, 2000*

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**Telecommunications § 4.** The Commission approved an application whereby Access Point, Inc., acquired Efficcy Group, Inc.'s interexchange telecommunication service customer accounts, in exchange for Access Point, Inc. stock. After the acquisition, Efficcy Group, Inc. will terminate its business in Missouri, and will file an application to cancel its certificate and tariff. Access Point, Inc., will provide services to the customers of Efficcy Group, Inc., under the same rates, terms and conditions as Efficcy Group, Inc. provided services, with no interruption of service. To facilitate the transfer, the Commission approved the waiver of Commission Rule 4 CSR 240-33.150, the "anti-slamming" rule.

**Telecommunications § 43.** To facilitate the transfer of the interexchange telecommunication service customer accounts of Efficy Group, Inc., to Access Point, Inc., the Commission approved the waiver of Commission Rule 4 CSR 240-33.150, the "anti-slamming" rule.

**ORDER APPROVING ACQUISITION,  
WAIVING RULE, REQUIRING FILING OF TARIFF,  
AND CLOSING CASE**

On March 31, 2000, Access Point, Inc. (Access), and Efficy Group, Inc. (Efficy; jointly, the Applicants), filed a joint application for approval of Access' acquisition of all of Efficy's Missouri interexchange telecommunications service customer accounts in exchange for Access stock.<sup>1</sup> On June 15, 2000, no further activity having occurred in the case, the Commission issued its Order Directing Filing, requiring the Staff of the Missouri Public Service Commission (Staff) to file a status report no later than June 22, 2000. Staff filed its status report on June 21, 2000, and its Memorandum and Recommendation on June 26, 2000. In the meantime, the Applicants filed their Motion to Correct and Supplement Application on June 20, 2000.

The joint application, as corrected and supplemented on June 20, 2000, states that Access and Efficy are both foreign corporations duly authorized to conduct business in the state of Missouri. Access is certificated to provide intraLATA and interLATA, facilities-based and resold interexchange telecommunications services in the state of Missouri. Access is also authorized to provide resold interexchange services in 44 states and is authorized by the Federal Communications Commission to provide international switched and private line telecommunications services. Efficy is certificated to provide interexchange telecommunications service in the state of Missouri. Both companies have been classified as competitive companies in Missouri.

Access proposes to acquire all of Efficy's Missouri interexchange telecommunications customer accounts in exchange for Access stock. Efficy will then quit business in Missouri and, upon approval of the transaction that is the subject of this proceeding, Efficy will then file an application to cancel its certificate and tariff. Access will provide services to the customers acquired from Efficy under the same rates, terms and conditions as Efficy provided service, with no interruption of service. The transaction is intended to be transparent from the vantage point of Efficy's approximately 45 Missouri customers.

Access proposes to provide notice of the transaction to Efficy's customers by letter, both before the transfer is initiated and again after it is completed. The notice will advise Efficy's customers that service will continue at the same, or better, rates, terms and conditions; that the customers may elect to switch to a different interexchange carrier; that Access will reimburse customers for any primary

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<sup>1</sup>The application was not captioned as a joint application; however, its actual nature was clarified by the Motion to Correct and Supplement filed on June 20, 2000.

interexchange carrier (PIC) change charges imposed by local exchange carriers; and that customers may contact Access via a toll-free number with any questions. Access states that it will amend its tariff to add Efficy's services, rates, terms and conditions for the transferred customers. Finally, to facilitate the transfer, the Applicants seek waiver of Commission Rule 4 CSR 240-33.150, the "anti-slamm-ing" rule.

Staff's Memorandum and Recommendation, filed on June 26, 2000, advises that the Commission should grant the joint application. Staff states that the Commission may approve a transfer of assets, pursuant to Section 392.300, RSMo 1994, and Commission Rule 4 CSR 240-2.060, (3) and (7), so long as it is "not detrimental to the public interest." State ex. rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). Staff states that it has reviewed the proposed transaction and has found no public detriment therein.

In considering such cases, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). "The obvious purpose of [Section 392.200] is to ensure the continuation of adequate service to the public served by the utility." Fee Fee Trunk Sewer, supra. "[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur." In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-252, supra, 3 Mo.P.S.C.3d 216, 221.

The Commission reads City of St. Louis, supra, 335 Mo. at 459, 73 S.W.2d at 400, to require a direct and present public detriment. 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 asset or assets safely and efficiently. See Missouri Gas Energy, supra, 3 Mo.P.S.C.3d at 220. The present record reveals no such direct and present public detriment; therefore, the Commission will approve the transaction. No party has requested a hearing; therefore, the Commission may resolve the case on the pleadings. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

*IT IS THEREFORE ORDERED:*

1. That the Applicants' Motion to Correct and Supplement Application is granted.
2. That the transaction described in the Joint Application filed on March 31, 2000, as corrected and supplemented on June 20, 2000, is approved. The parties may take all otherwise lawful actions necessary to consummate the transaction herein approved.
3. That Commission Rule 4 CSR 240-33.150, the "anti-slamm-ing" rule, is waived with respect to the transaction approved by this Order.
4. That the parties shall give notice to all affected Missouri subscribers as described in the Joint Application.

5. That Access Point, Inc., shall file proposed tariff sheets with a 30-day effective date in order to make all necessary and appropriate changes to its tariffs to add the services, rates, terms, and conditions of Efficacy Group, Inc., as described in the Joint Application. The parties shall not transfer any customers prior to the effective date of Access Point, Inc.'s proposed tariff sheets referred to in this paragraph.

6. That Efficacy Group, Inc., shall file an application seeking cancellation of its certificate and tariff within 15 days of the consummation of the transaction approved in this Order.

7. That this order shall become effective on July 28, 2000.

8. That this case may be closed on July 29, 2000.

Drainer, Murray, Schemenauer, and Simmons, CC., concur.  
Lumpe, Ch., absent.

Thompson, Deputy Chief Regulatory Law Judge

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**Southwestern Bell Telephone Company's Complaint Against  
Mid-Missouri Telephone Company Concerning Its Plan to  
Disconnect the LEC-to-LEC Common Trunk Groups and  
Request for an Order Prohibiting Mid-Missouri from Dis-  
rupting Customer Traffic.**

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*Case No. TC-2001-20  
Decided July 18, 2000*

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**Telecommunications §§10, 36, 37, 38.** Southwestern Bell Telephone Company ordered to make translation and routing changes in its facilities and programs necessary to lawfully discontinue the transport, transit, or termination of all intrastate telecommunications traffic to Mid-Missouri Telephone Company, except for certain interexchange and wireless traffic.

**ORDER GRANTING REQUEST FOR PRELIMINARY RELIEF**

On July 11, 2000, Southwestern Bell Telephone Company (SWBT) filed its complaint against Mid-Missouri Telephone Company (Mid-Mo) alleging that Mid-Mo plans to disconnect its LEC-to-LEC common trunk groups on July 16. SWBT alleges that disconnecting these trunks will violate prior Commission orders and interconnecting carriers' rights under existing tariffs and under state and federal law. SWBT requests the Commission issue an order prohibiting Mid-Mo from disturbing the LEC-to-LEC common trunk groups.

In support of its allegation of the anticipated disconnection, SWBT provides the following factual background:

9. On May 15, 2000, Mid-Missouri sent Southwestern Bell a letter threatening to disconnect the LEC-to-LEC common trunk groups between Southwestern Bell and Mid-Missouri unless Southwestern Bell either (1) agreed not to permit other carriers to use its network to send calls to Mid-Missouri's exchanges; or (2) agreed to be financially responsible, at terminating switched access rates, for all traffic that terminates in Missouri exchanges over the common trunk groups, including calls placed by other carriers' customers. (A copy of Mid-Missouri Telephone Company President David L. Jones's May 15, 2000 letter to Southwestern Bell is appended as Attachment I).

The Commission has concluded that Section 386.310<sup>1</sup> is the statute under which SWBT invokes the Commission's authority. Section 1 of this statute states, in essence, that the Commission may provide for expeditious issuance of 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, provided that the Commission shall include in such an order an opportunity for hearing as soon as practicable after the issuance of such order. Commission orders issued pursuant to the authority in Section 386.310 are essentially a form of injunctive relief which has specifically been authorized by the legislature to be exercised by the Public Service Commission.

Although SWBT pleaded that it had notice of this planned disruption as early as May 15, 2000, it waited until July 11 to come to the Commission requesting relief. This timing did not allow any party to file a written response to SWBT's request. In order to consider this matter, the Commission determined it appropriate to schedule a hearing at which SWBT could offer support for its request. Similarly, at this hearing, Mid-Missouri Telephone Company, Staff of the Missouri Public Service Commission (Staff), the Office of the Public Counsel (Public Counsel) and all other interested parties were invited to appear and show cause why the requested relief should or should not be granted.

On July 14th the Commission convened the aforementioned hearing and heard from SWBT, Mid-Mo, Staff, Public Counsel, the State of Missouri by and through the Office of the Attorney General (A.G.) and GTE of the Midwest Incorporated (GTE). At the conclusion of that hearing all parties to this case, as well as those parties in attendance who did not request intervention, agreed to terms and conditions which would provide for an interim resolution to the issues outlined in SWBT's complaint.

Mid-Mo assured the Commission, on the record, that it would not disconnect the LEC-to-LEC trunk and that no order from the Commission is necessary to

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<sup>1</sup>All statutory references herein refer to Revised Statutes of Missouri 1994 unless otherwise cited.

prohibit the disconnection, so long as SWBT takes immediate steps to block the traffic for which no payments are being received. SWBT agreed to take immediate steps to block the improper traffic so long as the Commission ordered it to do so.

On July 17th the parties met with the Chief Regulatory Law Judge to propose and draft ordered paragraphs for this order. Based upon the unanimous agreement of the parties, the Commission will order the termination of the traffic in question and encourage the Staff to assist the parties with permanently resolving the question regarding the transport of unauthorized traffic. As to the underlying complaint, the Commission will follow its procedure in issuing a copy of the complaint to the respondent by certified mail and will encourage both the complainant and the respondent to consider mediation of this matter.

*IT IS THEREFORE ORDERED:*

1. That Southwestern Bell Telephone Company is hereby ordered to make any and all translation and routing changes in its facilities and programs necessary to lawfully discontinue the transport, transit, or termination of all intrastate telecommunications traffic to Mid-Missouri Telephone Company, except for the following traffic:

a. interexchange traffic originated by Southwestern Bell Telephone Company in the 524 LATA and terminating to Mid-Missouri Telephone Company in the 524 LATA; and

b. interexchange traffic presented to Southwestern Bell Telephone Company by GTE Midwest, Inc, or its heirs or assigns, in the 524 LATA and terminating to Mid-Missouri Telephone Company in the 524 LATA; and

c. interexchange traffic presented to Southwestern Bell Telephone Company by Sprint Missouri, Inc. and Sprint Communications Company, L.P. in the 524 LATA and terminating to Mid-Missouri Telephone Company in the 524 LATA; and

d. interexchange traffic presented to Southwestern Bell Telephone Company by Alltel Missouri, Inc. and Alltel Communications, Inc. in the 524 LATA and terminating to Mid-Missouri Telephone Company in the 524 LATA; and

e. commercial mobil radio service or wireless traffic originating within the Kansas City Major Trading Area and terminating to Mid-Missouri Telephone Company; and

f. interexchange traffic utilizing Feature Group A connections.

2. That Southwestern Bell Telephone Company is hereby ordered to complete the changes referenced in ordered paragraph 1 above not later than August 18, 2000.

3. That in the event Mid-Missouri Telephone Company terminates trunk access, the Commission will direct its General Counsel to file a petition for mandamus or injunction pursuant to Section 386.360 RSMo, and the Commission will convene a hearing to determine whether to direct its General Counsel to file a petition for penalties pursuant to Section 386.600 RSMo.

4. That telecommunications traffic blocked pursuant to this order shall be subject to a recorded announcement which states that the provider selected for the call is not authorized to complete calls to this area.

5. That Southwestern Bell Telephone Company shall continue to block such transiting traffic until notified to the contrary by a Commission order in this case or a court order. If Southwestern Bell Telephone Company is subsequently ordered not to block traffic for one or more carriers, it shall take the appropriate steps to cease such blocking within ten days.

6. That Southwestern Bell Telephone Company shall determine and track the costs of implementing this order, so that the Commission may determine the company or companies responsible for payment of these costs when this case is determined on the merits.

7. That this order shall remain in effect until the Commission resolves this complaint case or otherwise so orders in Case No. TO-99-593.

8. That this order shall become effective on July 18, 2000.

Drainer, Murray, Schemenauer, and Simmons, CC., Concur.  
Lumpe, Ch., Absent.

Roberts, Chief Regulatory Law Judge

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**In the Matter of the Application of Southwestern Bell Telephone Company for Authority to Transfer Certain Support Assets to SBC Management Services, Inc.**

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*Case No. TM-2000-738*  
*Decided July 20, 2000*

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**Telecommunications §4.** The Commission approved the transfer of assets by Southwestern Bell Telephone Company and SWBT is authorized to take all actions necessary to transfer the assets to SBC Management Services, Inc.

**ORDER APPROVING TRANSFER OF ASSETS**

On May 4, 2000, Southwestern Bell Telephone Company (SWBT) filed with the Missouri Public Service Commission (Commission) an application for approval to transfer certain assets to SBC Management Services, Inc. (SBC-MSI), citing Commission Rule 4 CSR 240-2.060 and Section 392.300, RSMo 1994.<sup>1</sup>

SWBT stated that it seeks expedited review and Commission approval of its application. SWBT stated that it plans to transfer certain support assets, consisting of the assets located in Missouri utilized by SWBT attorneys and other legal department support personnel to provide legal services to SWBT, from SWBT to SBC-MSI. SWBT stated that SBC-MSI is a Delaware corporation and a wholly owned subsidiary of SBC Communications Inc. (SBC). SWBT stated that SBC-MSI provides professional administrative services to SBC and its subsidiaries.

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<sup>1</sup>All references herein to Sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 1994.

SWBT stated that it is a Missouri corporation duly authorized to conduct business in Missouri with its principal place of business in Missouri located at One Bell Center, St. Louis, Missouri 63101. SWBT noted that its contact information was on its application.

SWBT also attached its certificate of good standing from the Missouri Secretary of State. SWBT stated that it is a local exchange telecommunications company and a public utility and is authorized to and provides telecommunications service within the state of Missouri. SWBT noted that no annual report or assessment fees are overdue.

SWBT also stated that, pursuant to the requirement of Commission Rule 2.060(1)(K), applicant is reviewing its records to determine if it has any pending actions or final unsatisfied judgments or judgments against it from any state or federal agency or court which involve customer service or rates, which action, judgment or decision has occurred within three years of the date of its application. (Note: This rule is discussed below.) SWBT stated that it will furnish this information prior to the Commission granting the authority sought herein.

SWBT noted that the assets it seeks to transfer include desks, chairs, file cabinets, library materials and shelving, and other furniture. SWBT stated that it will conduct an inventory of the specific assets it proposes to transfer to SBC-MSI and will provide a list of such assets to the Staff of the Commission (Staff) prior to the Commission making a final determination on its application. SWBT stated that no franchises, permits, operating rights or certificates of convenience or necessity are involved in the proposed transfer of support assets from SWBT to SBC-MSI.

SWBT also attached to its application a certified copy of the consent of the board of directors of SWBT, authorizing the transfer of assets which are the subject of this application from SWBT to SBC-MSI. SWBT noted that SBC-MSI is not subject to the jurisdiction of the Commission under Chapter 392 RSMo, and will not be subject to Commission jurisdiction after the transfer of assets described is completed. SWBT stated, given the relatively small amount of assets involved, the transfer of legal support assets located in Missouri from SWBT to SBC-MSI will not have a material negative impact on the tax revenues of any political subdivision of Missouri.

After the transfer, SWBT stated, the provision of legal services by SBC-MSI to SWBT will be in compliance with the rules of the Federal Communications Commission (FCC) governing affiliate transactions. In addition, SWBT stated that it will continue to receive from SBC-MSI such legal services as are necessary for it to meet its obligations in Missouri to furnish services that are safe and adequate and otherwise in compliance with applicable regulations.

SWBT stated that its proposed transfer of assets to SBC-MSI will not be detrimental to the public interest. SWBT stated that it seeks to transfer the assets to facilitate the consolidation and centralization of similar legal support functions provided to numerous subsidiaries of SBC. The consolidation and centralization which the proposed transfer of assets will accomplish, SWBT stated, will permit SWBT and other subsidiaries of SBC to operate more efficiently by sharing the cost of legal support functions and eliminating unnecessary duplication of such functions in numerous affiliates. This consolidation, stated SWBT, of the legal support function will also allow SBC to realize additional operating efficiencies from its mergers with SNET, Pacific Telesis Group, and Ameritech.

SWBT stated that it will record the greater of the net book value or the fair market value of the assets transferred to SBC-MSI. An independent third party, SWBT stated, will then determine the fair market value of the assets, which will in turn be compared to the net book value of the assets to be transferred. SWBT stated that it will provide this information to the Commission's Staff after the analysis has been completed. SWBT estimates the net book value of the assets located in Missouri which will be transferred to SBC-MSI will not exceed \$250,000.

SWBT anticipates that, over time, efficiencies gained from consolidating and centralizing the provision of legal support services may lead to slightly lower costs of service than would otherwise be incurred. SWBT stated that the FCC's affiliate transaction rules will apply to the contract between SBC-MSI and SWBT and will ensure that SWBT does not book a rate for the receipt of legal services beyond that authorized by the FCC (i.e., the rate will be capped at the fully distributed cost incurred by SBC-MSI). But, SWBT stated that even in the event that such efficiencies do not lead to lower costs, the transfer of assets contemplated by this application will have no impact on the rates, terms, conditions, or quality level of telecommunications services presently provided by SWBT to its retail customers in Missouri.

SWBT stated that it is subject to price cap regulation in Missouri pursuant to Section 392.245, RSMo 1998 Supp. and, as a result, its retail prices may not be increased to recover any potential additional costs which might result from the transfer of assets from SWBT to SBC-MSI. Similarly, SWBT stated that it does not anticipate that the transfer of assets will result in any increase in the costs upon which its wholesale rates are based, but in any event, the Commission retains full authority under Section 252 of the federal Telecommunications Act of 1996 to establish prices for any unbundled network elements if the parties are unable to negotiate an agreement. Accordingly, SWBT stated, the Commission can ensure that this transfer of assets will not result in increased wholesale rates.

Also on May 4, 2000, SWBT filed a motion to expedite the review and approval of its application. This motion did not comply with Commission Rule 4 CSR 240-2.080(3), requiring each pleading to include a reference to the provision under which relief is requested. The motion also did not comply with Commission Rule 4 CSR 240-2.080(17) which lists three requirements: (1) The words "Motion for Expedited Treatment" in the title of the pleading; (2) A statement explaining the harm avoided or the benefit accruing to the party's customers or the general public if the Commission acts by the date requested; and (3) A statement that the pleading was filed as soon as it could have been or an explanation why it was not. The Commission ordered SWBT on May 11, 2000, to comply with the Commission's rules regarding motions for expedited treatment.

On May 19, 2000, SWBT filed a pleading entitled "Supplemental Motion for Expedited Treatment" which cured the defects noted by the Commission. SWBT stated that it was requesting expedited treatment under Commission Rule 4 CSR 240-2.080(17). SWBT stated that substantial benefits would accrue to SWBT if the Commission expedited the review of SWBT's application and if the Commission authorized the transfer of assets to SBC-MSI. SWBT requested that the approval of its application be done by June 30, 2000. SWBT also stated that the application was filed as soon as it could have been, given the workload of the personnel

involved and the time necessary to secure required supporting documentation which was attached to its application.

On June 8, 2000, the Commission found that SWBT's request for the expedited approval of its application to transfer assets had stated good cause for such treatment. On the same date, the Commission also ordered the Staff to respond to the order, stating whether it would be able to handle this case in an expedited manner and, if so, giving suggested dates for the filing of a Staff report or recommendation. On June 13, 2000, the Staff filed its response, stating that it would file its recommendation by June 23, 2000. On June 23, 2000, the Staff filed its motion for extension of time to file its recommendation, stating that it would file it on June 30, 2000. Before the Commission could rule on that motion, the Staff filed its recommendation on June 29, 2000.

The Staff recommended that the Commission issue an order approving the transfer of assets from SWBT to SBC-MSI. Staff stated that the approval should be subject to the receipt by the Commission of an inventory of the specific assets SWBT proposes to transfer to the SBC-MSI, and, pursuant to Commission Rule 4 CSR 240-2.060(2), a statement indicating whether SWBT has any pending actions or final unsatisfied judgments or decisions against it.

On July 11, 2000, SWBT filed a supplement to its application. Included as Attachment 1 was a spreadsheet which contained an inventory of the specific legal department support assets SWBT will transfer to SBC-MSI, along with the fair market value of each of these assets, as determined by an independent third party. SWBT noted that the fair market value of all of the legal department support assets which SWBT seeks authority to transfer is \$29,260.

Also attached to the supplement as Attachment 2 was a list of formal complaints from end user customers which SWBT stated were pending on the date SWBT filed its application.

Commission Rule 4 CSR 240-2.060(1)(K) states that

[a]ll applications shall comply with the requirements of these rules and shall include the following information:...A statement indicating whether the applicant has any pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or rates, which action, judgment or decision has occurred within three (3) years of the date of the application....

Thus, no list of pending action or final unsatisfied judgments is contemplated by this rule; only a statement from the applicant regarding such actions is necessary, pursuant to the rule.

The transfer will be approved.

*IT IS THEREFORE ORDERED:*

1. That the application for approval of transfer of assets filed on May 4, 2000, by Southwestern Bell Telephone Company is approved and that Southwestern Bell Telephone Company is authorized to take any and all actions necessary to effect the transfer of assets to SBC Management Services, Inc., as authorized by this order.

2. That Southwestern Bell Telephone Company shall report to the Commission within ten business days of the completion of the approved transfer of assets that such has been accomplished.

3. That this order shall become effective on August 1, 2000.

Drainer, Murray, Schemenauer, and Simmons, CC., concur  
Lumpe, Ch., absent

Hopkins, Senior Regulatory Law Judge

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**Margaret E. Barker, Complainant, v. St. Louis County Water Co.,  
Respondent.**

**Lorraine Keeven, Complainant, v. St. Louis County Water Co.,  
Respondent.**

**John Freiberger, Complainant, v. St. Louis County Water Co.,  
Respondent.**

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*Case Nos. WC-2000-478, WC-2000-479 & WC-2000-480  
Decided July 20, 2000*

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**Evidence, Practice & Procedure §8.** The Commission approved an agreement stipulating that: (1) the Complainants, together with others residing in five single family residences, are neighbors located in the service area of St. Louis County Water Respondent; (2) the Complainants and the other residents are not presently receiving water service from the Respondent; (3) the Complainants each allege that, including themselves, five of the eight neighbors are willing to bear the cost of an extension of the Respondent's mains that would permit water connections to the main by each of the eight neighbors; (4) three of the neighbors closer to the existing main than the farthest neighbor desiring to obtain service from the Respondent are unwilling to contribute to the initial cost of extending the main; (5) the cost to each of the five neighbors willing to pay for a main extension would be about \$8,000 and that, under the Respondent's tariff, the cost for any of these three neighbors to connect at any time after the main is extended would be approximately \$2,000; (6) the Complainants assert that this is inequitable since, considering refunds that could be available to the Complainants under the Respondent's tariff, the cost to those who originally paid for the main extension could never be reduced to approach the cost to those who connect after the main is extended; (7) the Complainants request the Commission to grant a variance from the Respondent's tariff; and (8) after a new connection is made, those already on the main extension are to be reimbursed by those connecting, in an amount so that after the reimbursement, all those connected to the main extension would have paid the same total dollar amount.

**ORDER APPROVING STIPULATION AND AGREEMENT**

Margaret E. Barker, Lorraine Keeven, and John Freiberger (Complainants) each filed a complaint on February 7, 2000, with the Missouri Public Service Commission (Commission) against St. Louis County Water Co. (Respondent). The complaints involve the contribution formula in Respondent's tariff used in determining charges to users of a water main extension (main extension rule).

On February 8, 2000, the Commission issued its notice of complaint, giving Respondent 30 days in which to either request mediation or file its answer.

On March 8, 2000, the Respondent filed its answers to each complaint, admitting the averments of each but asserting that it would be unlawful for the Respondent to waive the tariff provisions in question and questioning the authority of the Commission to grant variances from the Respondent's tariff. The Respondent also asserted that the Commission could only require change to the rule if the Complainants were "to show by clear and satisfactory evidence that the [Commission approved Main Extension Rule] is unreasonable or unlawful as the case may be," quoting Section 386.430, RSMo. Supp. 1999. The Respondent stated the Complainants could not make this showing.

On March 23, 2000, the Commission consolidated the cases and ordered the Staff of the Commission (Staff) to file a memorandum answering the question: Do the Complainants have the right to any relief from the exercise of the main extension rule in Respondent's tariff in a complaint case before the Commission?

On April 28, 2000, as supplemented by its May 1, 2000 filing, the Staff filed its memorandum, taking the position that the main extension rule of the Respondent's tariff applied to the Complainants, that the Commission has the authority to grant the Complainants the relief they seek and that the Commission should grant to the Complainants relief to obtain a more equitable result through approval of a tariff modification, approving a contract between the Respondent and Complainants or granting to the Complainants a variance from the Respondent's tariff.

On June 15, 2000, the Commission ordered the parties to file a procedural schedule by July 17, 2000.

On July 11, 2000, the parties filed a unanimous stipulation and agreement (agreement) and the Staff filed suggestions in support thereof.

In the agreement, the parties agree, *inter alia*, that the three Complainants raise essentially the same issue. The agreement pointed out that the Complainants, together with others residing in five single-family residences, are neighbors located in the service area of St. Louis County Water Respondent. The agreement stated that the Complainants and the other residents are not presently receiving water service from the Respondent. According to the agreement, the Complainants each allege that, including themselves, five of the eight neighbors are willing to bear the cost of an extension of the Respondent's mains that would permit water connections to the main by each of the eight neighbors. But, according to the agreement, apparently three of the neighbors closer to the existing main than the farthest neighbor desiring to obtain service from the Respondent are unwilling to contribute to the initial cost of extending the main.

According to the agreement, the Complainants allege that the cost to each of the five neighbors willing to pay for a main extension would be about \$8,000 and that, under the Respondent's tariff (specifically, Rule 22.0 found at Tariff Sheets R22.0 to R22.0(f)), the cost for any of these three neighbors to connect at any time after the main is extended would be approximately \$2,000. The agreement stated that the Complainants assert that this is inequitable since, considering refunds that could be available to the Complainants under the Respondent's tariff, the cost to those who originally paid for the main extension could never be reduced to approach the cost to those who connect after the main is extended. Using the Complainants' figures in this case, the agreement alleges that the cost to the original users would be \$8,000 each. If all the neighbors who do not connect when the extension is constructed connect later, then they will contribute a total of \$6,000, according to the agreement. The agreement stated that this would result in refunds of approximately \$1,200 to each of the original neighbors. The ultimate result, the agreement points out, would be that five neighbors would pay approximately \$6,800 each to obtain water service from the Respondent and three neighbors would pay approximately \$2,000 each to obtain water service from the Respondent.

The agreement notes that in their complaints, each of the Complainants request the Commission to grant a variance from the Respondent's tariff to change the result of Rule 22.0 as it applies to the Complainants. The agreement stated that in the complaints, complainant Freiberger best describes the proposed plan. Under the plan, the agreement stated, after a new connection is made, those already on the main extension are to be reimbursed by those connecting, in an amount so that after the reimbursement, all those connected to the main extension would have paid the same total dollar amount. Complainant Freiberger, according to the agreement, specifically requests this reimbursement scheme be in place for fifteen years, although Rule 22.0 of the Respondent's tariff applies for only ten years.

In the agreement, Complainants, the Respondent, Staff and the Office of the Public Counsel all agree that the issue the Complainants raise in their complaints that Respondent's existing tariff does not allow Complainants to recover their investment in a water main extension equitably from those who connect later can be addressed by the addition of special provisions to the Respondent's tariff that will apply to the Complainants and all those similarly situated.

In the agreement, the parties agree that the tariff language set forth in attachment A to the agreement is acceptable and adequately addresses the foregoing issue.

The agreement stated that within ten days of Commission approval of the agreement, the Respondent will file tariff sheets containing the tariff language set forth in attachment A to the agreement.

The agreement stated that after the Commission order approving the foregoing tariff becomes effective and the Commission expressly orders that the Complainants have the right to avail themselves of the foregoing tariff language, so long as no party has appealed the Commission's decision, the parties agree that all issues related to these cases will be resolved and that the cases may be closed.

The agreement stated that it resulted from extensive negotiations among the signatories and the terms thereof are interdependent. The agreement stated that

in the event the Commission does not adopt the agreement in total, then the agreement shall be void and no signatory shall be bound by any of the agreements or provisions hereof. The stipulations herein are specific to the resolution of this proceeding and are made without prejudice to the rights of the signatories to take other positions, according to the agreement.

The Commission concludes that all issues were settled by the agreement. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in a case, pursuant to Section 536.060, RSMo Supp. 1999.

*IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed on July 11, 2000 is approved.
2. That St. Louis County Water Company shall file tariff sheets substantially containing the tariff language set forth in Attachment A to the Unanimous Stipulation and Agreement no later than 3:00 p.m. on August 21, 2000, with an effective date of September 18, 2000.
3. That if the Complainants meet the qualifications set forth in said tariff sheets, then, after the effective date of the aforesaid tariff sheets, the Complainants may elect to use the alternative main extension cost sharing method found in said tariff sheets.
4. That this order shall become effective August 1, 2000.

Drainer, Murray, Schemenauer, and Simmons, CC., concur Lumpe, Ch.,  
absent

Hopkins, Senior Regulatory Law Judge

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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.

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**In the Matter of the Petition of DIECA Communications Inc.,  
d/b/a Covad Communications Company for Approval of an  
Interconnection Agreement Under the Telecommunications  
Act Of 1996.**

**In the Matter of the Petition of DIECA Communications Inc.,  
d/b/a Covad Communications Company for Arbitration of  
Interconnection Rates, Terms, Conditions and Related Ar-  
rangements with Southwestern Bell Telephone Company.\***

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*Case Nos. TO-2001-4 & TO-2000-322  
Decided July 21, 2000*

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**Telecommunications §7.** Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996. Under Section 252(e) of the Act, an agreement of portions of an agreement that have been arbitrated by the Commission may only be rejected if the Commission finds the agreement does not meet the requirements of Section 251 of the Act.

**ORDER APPROVING INTERCONNECTION AGREEMENT**

On July 5, 2000, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed an application and an affidavit with the Commission for approval of an interconnection agreement (Agreement) with Southwestern Bell Telephone Company (SWBT). The application was assigned Case No. TO-2001-4. The Agreement was filed pursuant to Section 252(e)(1) of the Telecommunications Act of 1996 (the Act). See 47 U.S.C. § 251, *et seq.* On July 10, 2000, Covad supplemented its filing to submit pages that were inadvertently omitted from the initial filing.

Portions of the Agreement were arbitrated before the Commission in Case No. TO-2000-322. Pursuant to the Commission's arbitration order, issued and effective March 23, 2000, Covad and SWBT were directed to submit their interconnection agreement to the Commission's Staff and subsequently to file the Agreement with the Commission. The Commission's Staff was directed to file its recommendation within 15 days of the filing of the Agreement. This expedited review was directed in order that the Commission would have time to consider the

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\*The Commission, in an order issued on August 11, 2000, granted an extension for the filing of cost studies. In addition, the Commission issued orders on October 30, 2000 and January 5, 2001 which directed filings.

agreement within the 30 day period allowed under Section 252(e)(4) of the federal Telecommunications Act of 1996 (the Act) for agreements or portions of agreements that have been arbitrated.

Covad states that there are no unresolved issues and that the agreement complies with Section 252(e) of the Act in that it is not discriminatory to nonparty carriers and is consistent with the public interest. Section 252(e) of the Act established standards for the Commission's review and consideration of negotiated and arbitrated interconnection agreements.

Although SWBT is a party to the Agreement, it did not join in the application submitting the Agreement. On July 11, 2000, the Commission issued an order making SWBT a party in Case No. TO-2001-4 and directing any party wishing to request a hearing to do so no later than July 19, 2000.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989).

The Staff of the Commission (Staff) filed a memorandum and recommendation on July 19, 2000, recommending that the Agreement be approved. No requests for hearing were filed. Since no one has requested a hearing, the Commission may grant the relief requested based on the application.

#### **Discussion**

The Commission, under the provisions of Section 252(e) of the Act, has authority to approve an interconnection or resale agreement negotiated or arbitrated between an incumbent local exchange company and a new provider of basic local exchange service. The Commission may reject an interconnection or resale agreement only if the Commission finds that the agreement is discriminatory or is inconsistent with the public interest, convenience and necessity or if the arbitrated agreement does not meet the requirements of Section 251 of the Act.

The Staff memorandum recommends that the Agreement be approved, and notes that the Agreement meets the limited requirements of the Act in that it does not appear to be discriminatory toward nonparties, and does not appear to be against the public interest. Staff recommends that the Commission direct the parties to submit a final copy of the Agreement with certain corrections noted by Staff, corrected page numbers, submission of missing pages and with all the pages, including the appendices, numbered seriatim in the lower right-hand corner. Any future modifications or amendments to the Agreement should be submitted 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 and that it does

not unduly discriminate against a nonparty carrier, and implementation of the Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that the parties should submit a corrected final copy of the agreement with numbered pages and finds further that approval of the Agreement should be conditioned upon the parties submitting other future 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. 47 U.S.C. § 252. In order for the Commission's role of review and approval to be effective, the Commission must also review and approve modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection. 47 U.S.C. § 252(h). 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 CSR 240 30.010.

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, 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, the modified pages will be substituted in the agreement, which should contain the number of the page being replaced in the lower right hand corner. Staff will date stamp the pages when they are inserted into the agreement. The Telecommunications Staff will maintain the official record of the original agreement and all the modifications made in the Commission's tariff room.

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 modification will be approved once Staff has verified that the provision is an approved provision, and prepared a recommendation advising approval. 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, 47 U.S.C. 252(e)(1), is required to review

negotiated or arbitrated 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 under Section 252(e)(2)(A). An agreement or portions of an agreement that have been arbitrated may only be rejected if the Commission finds that the agreement does not meet the requirements of Section 251 of the Act.

Based upon its review of the Agreement between Covad and SWBT and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and that the Commission has not found that the Agreement violates Section 251 of the Act. Therefore the Agreement should be approved.

*IT IS THEREFORE ORDERED:*

1. That the interconnection agreement between DIECA Communications, Inc. d/b/a Covad Communications Company and Southwestern Bell Telephone Company, filed on July 5, 2000, is approved.
2. That DIECA Communications, Inc. d/b/a Covad Communications Company and Southwestern Bell Telephone Company shall, within 30 days, file a corrected and final copy of their interconnection agreement making the corrections noted by Staff and with the pages, including the appendices, numbered seriatim in the lower right hand corner.
3. That any changes or modifications to this Agreement after filing of the final Agreement shall be submitted to the Commission for approval pursuant to the procedure outlined in this order.
4. That this order shall become effective on August 1, 2000.
5. That Case No. TO 2001 4 may be closed on August 2, 2000.

Keith Thornburg, Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 1994.

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**Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission, Complainant, v. Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre, Respondent.\***

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*Case No. MC-2000-818  
Decided July 27, 2000*

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**Evidence, Practice and Procedure §§24, 25, 27.** The Commission finds the averments in the complaint are deemed admitted after Respondent's failure to respond to a complaint.

**ORDER FINDING DEFAULT**

On June 14, 2000, the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Missouri Public Service Commission (Complainant) filed a complaint with the Missouri Public Service Commission (Commission) against Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre (Respondent). Notice of complaint was mailed to the Respondent by certified mail on June 19, 2000. In that notice of complaint, the Respondent was given 30 days from the date of the notice of complaint (i.e., until July 19, 2000) to respond to the complaint by filing an answer, a notice that the complaint has been satisfied, or a written request that the complaint be referred to a neutral third-party mediator for voluntary mediation of the complaint.

As of July 27, 2000, which is more than 30 days after the date of the notice of complaint, the Respondent had made no response to the complaint.

Commission Rule 4 CSR 240-2.070(9) states:

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.

The Respondent did not comply with Commission Rule 4 CSR 240 2.070(9) in that it failed to file a timely answer and is thus in default.

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\*See pages 324 and 352 for other orders in this case. Notice closing this case was issued on October 30, 2000. On December 22, 2000, the Commission issued an order which granted a motion to reopen the case, establish a prehearing conference and direct the filing of a procedural schedule. Notice of satisfaction of complaint was filed on April 18, 2001. Notice of dismissal and closing of case was issued on April 23, 2001.

*IT IS THEREFORE ORDERED:*

1. That the averments in the complaint filed on June 14, 2000, by the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Missouri Public Service Commission against Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre are deemed admitted.
2. That Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre is found in default.
3. That this order shall become effective on August 8, 2000.

Drainer, Schemenauer, and Simmons, CC., concur.  
Lumpe, Ch., and Murray, C., absent.

Hopkins, Senior Regulatory Law Judge

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**In the Matter of Missouri Gas Energy's Fixed Commodity Price  
PGA and Transportation Discount Incentive Mechanism.**

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*Case No. GO-2000-705  
Decided August 1, 2000*

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**Gas §17.2.** The Commission found that the unanimous stipulation and agreement of the parties was reasonable and should be approved.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On April 28, 2000, Missouri Gas Energy (MGE), a division of Southern Union Company, and the Staff of the Missouri Public Service Commission (Staff) filed a Stipulation and Agreement and requested Commission approval of that agreement. On May 15, 2000, MGE Staff, and the Office of the Public Counsel (Public Counsel) submitted an Amended Stipulation and Agreement.

The amended agreement states that its purpose is to:

- 1) provide system sales customers with a reliable supply of natural gas at stable and lower prices than would be achieved by continuation of current practices[Footnote omitted]; 2) provide MGE with a reasonable opportunity to generate earnings through skillful and prudent management of its gas supply, transportation and storage portfolio; and 3) streamline the regulatory process associated with gas supply, transportation and storage costs.

On May 11, 2000, the Commission issued notice of the agreement and allowed interested entities the opportunity to intervene. On May 19, 2000, MGE filed specimen tariff sheets.

Staff filed a recommendation on June 30, 2000. In its recommendation, Staff explained the specific provisions of the agreement. Staff recommended that the Commission approve the Amended Stipulation and Agreement and order MGE to file tariff sheets in compliance with the agreement.

The Commission sent notice to the parties on July 18, 2000, that it would request Staff to appear at its regularly scheduled meeting on July 20, 2000. Staff and counsel for the other parties were present to answer technical questions of the Commission.

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, pursuant to Section 536.060, RSMo Supp. 1999. In the Amended Stipulation and Agreement, the parties waived their rights to present testimony, cross-examine witnesses, present oral argument or briefs, and to seek rehearing or judicial review. Since no proper party filed an application to intervene and there are no outstanding requests for hearing, the Commission determines that an oral hearing is not necessary.

The Commission has considered the unanimous Amended Stipulation and Agreement and Staff's Recommendation. The Commission finds that the terms of the Amended Stipulation and Agreement are reasonable and should be approved.

*IT IS THEREFORE ORDERED:*

1. That the Amended Stipulation and Agreement filed on May 15, 2000, is approved.
2. That Missouri Gas Energy, a division of Southern Union Company, shall, within 30 days of the effective date of this order, file with the Commission tariff sheets to reflect the terms of the Amended Stipulation and Agreement.
3. That this order shall become effective on August 11, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur.

Dippell, Senior Regulatory Law Judge

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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.

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**In the Matter of Laclede Gas Company's Tariff Revision to be Reviewed in its 1997-1998 Actual Cost Adjustment.**

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*Case No. GR-98-297*  
*Decided August 1, 2000*

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**Gas §17.1.** Laclede Gas Company's tariffs allowed it to share in demonstrated gas supply savings. The Commission's Staff proposed to disallow some of the savings Laclede claimed based upon Staff's interpretation of the underlying gas supply contract and the tariff language. The Commission found that Laclede's interpretation of the contract and the tariffs was correct and declined to make Staff's proposed disallowances.

REGULATORY LAW JUDGE: Lewis R. Mills, Jr.

**REPORT AND ORDER**

**Procedural History**

This case was opened for the purpose of receiving the 1997-98 Purchased Gas Adjustment filings and Actual Cost Adjustment filing of Laclede Gas Company (Laclede). On October 1, 1999, the Procurement Analysis Department of the Staff of the Commission (Staff) filed a memorandum indicating that Staff has reviewed the Actual Cost Adjustment (ACA) filing of Laclede. Staff recommended that the Commission issue an order requiring Laclede to reduce its ACA balance by \$1,322,100 based on Staff's interpretation of a contract between Laclede and CoEnergy Trading Company (CoEnergy).

On October 13, 1999, the Commission directed Laclede to file a response to Staff's recommendation. On November 1, 1999, Laclede filed its response, together with a motion to reject Staff's proposed adjustments and close the case, or in the alternative, for oral argument.

By order issued December 9, 1999, the Commission denied Laclede's requests to dismiss and for oral argument, scheduled a prehearing conference, and ordered the parties to file a proposed procedural schedule.

The parties filed testimony pursuant to a procedural schedule established by the Commission, and an evidentiary hearing was held on April 13, 2000.

On May 10, 2000, Staff, pursuant to an agreement among the parties, filed late-filed Exhibit 11HC. No objections were made to that exhibit, and it will be admitted.

**Findings of Fact**

The Commission has reviewed and considered all of the evidence and arguments presented by the various parties. Some evidence and positions of parties on the issue may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or a position of a party indicates that, while the evidence or position was considered, it was not found relevant or necessary to the resolution of the particular issue.

Almost of all of the evidence presented in this case has been designated as Highly Confidential by Laclede, and that designation has not been disputed. The Commission will not release any information in this Report and Order that might undermine Laclede's ability to negotiate with suppliers. However, since even the description of some of the issues is considered confidential, the discussion of the issues and the evidence herein will necessarily be somewhat oblique and general.

Staff raises a number of concerns about Laclede's contract with CoEnergy, and the savings Laclede claims from it. In general, Staff is concerned that Laclede has drafted, and interpreted, the contract in order to allow it to retain the largest amount of savings possible pursuant to its Gas Supply Incentive Program (GSIP) tariff. Staff alleges that Laclede has drafted the contract in such a way that it appears that payment is made for one thing when in actuality Laclede is paying for something different. Staff also alleges that Laclede has misinterpreted provisions of the contract as offering superior service rather than inferior service, and that Laclede is attempting to mislead the Commission into finding that the provisions provide superior service. The Commission finds for Laclede on all issues. While the Commission recognizes the concerns Staff has on these issues, Staff simply did not present evidence in this case sufficient to persuade the Commission of their validity.

Issue 1: Are the requirements placed on CoEnergy by the contract consistent with Laclede's interpretation or with Staff's?<sup>1</sup>

Staff alleges that the contract imposes lesser requirements on CoEnergy, and gives correspondingly less valuable benefits to Laclede, than Laclede claimed when it calculated sharing pursuant to its GSIP. According to Staff, since the contract is not as good a deal for Laclede as Laclede claims, the benefit Laclede claims does not exist, and Laclede's "share" of it should be zero. Staff points to two items within the contract to support its position.

Staff first points to the delivery points mentioned in the contract. Staff's position is that, because of the way the language concerning delivery points is couched, the service CoEnergy provides is less valuable than Laclede claims. Laclede counters that, although the exact phrase that Staff views as a term of art concerning delivery points is not used in the contract, the language used means the same thing as the phrase Staff discusses.

The Commission finds that Staff is correct that the particular phrase it is concerned with does not appear in the contract. However, read as a whole, the contract imposes the requirement on CoEnergy, and confers the benefit on Laclede, that Laclede claims. Staff's allegations about the language concerning delivery points do not persuade the Commission that Laclede's interpretation of the contract is incorrect.

Staff next points to the *force majeure* clause<sup>2</sup> in the contract to support its contention that the benefits to Laclede under the contract are less than claimed by Laclede. Staff believes that the contract allows CoEnergy to claim *force majeure*

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<sup>1</sup> This description of the issue differs from the description used by the parties because the parties' description is Highly Confidential.

<sup>2</sup> Because the Highly Confidential designation covers all the material associated with this issue, it is not possible to describe in any detail at all the parties' arguments or the evidence supporting them.

as an excuse for non-performance under a larger number of circumstances than found in similar supply contracts.

Laclede argues that taking the *force majeure* provisions together with CoEnergy's obligation to perform under the contract leaves no room for the interpretation advanced by Staff. The Commission finds that Staff's interpretation of the *force majeure* provisions of the contract are incorrect and that the contract is no more lenient to the supplier than the comparable contracts cited by Staff.

The Commission concludes that Staff has not presented evidence sufficient to prove that Laclede's interpretation of the CoEnergy contract is improper.

Issue 2: Does the GSIP tariff allow Laclede to retain commodity savings from bundled contracts?

Staff's position on this issue is somewhat unclear. In its statement of position filed on April 6, 2000, Staff stated that retention of commodity savings from a bundled contract is prohibited under the tariff language. However, during the testimony of Staff witness Sommerer at the hearing, Staff took the position that the tariff did not prohibit such retention, but that the Commission has discretion to disallow retention. The Commission will take the later position, testified to under oath, as Staff's position on this issue.

Laclede takes the position that the GSIP tariff language not only does not prohibit retention, but requires it. Laclede cites the development of the GSIP, including Staff's own GSIP proposal, Staff's prior review of Laclede's calculated savings pursuant to the GSIP, and, most importantly, the specific tariff language.

Staff does not specifically refute any of Laclede's evidence, but merely states that the actual language in the tariff sheet does not explicitly refer to gas supply and transportation contracts. Staff considers the lack of express language on this point to create an ambiguity.<sup>3</sup> The Commission does not find the tariff ambiguous. The tariff provides any discounted transportation that is part of a bundled sales arrangement is to be included in the GSIP separately from gas supply. The tariff also provides that costs incurred to purchase gas from any producer or marketer for system supply purposes shall be accounted for in the GSIP. It is undisputed that the gas supply in the CoEnergy contract was procured from a producer or marketer and was used for system supply, and the Commission so finds. Thus, there is no reasonable way to read the tariff to exclude these savings, and the Commission will find for Laclede on this issue.<sup>4</sup>

Issue 3: Are the savings attributable to commodity savings or to transportation savings?

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<sup>3</sup>The Commission notes that Staff typically has an active role in drafting or reviewing tariff language in programs such as Laclede's GSIP. It would certainly minimize disputes if Staff's concerns with ambiguities such as the one Staff alleges exists here were eliminated before Staff recommends approval of a tariff, or at least identified in Staff's filed memoranda.

<sup>4</sup>Because the Commission finds the tariff clear on its face, there is no need to address the development and history discussed by Laclede. It will suffice to note that the development and history (including Staff's participation in the development of the GSIP, and Staff's previous recommendations that concluded that Laclede's inclusion of savings from the CoEnergy contract was appropriate) would add further support to Laclede's position, were any needed.

Staff asserts that Laclede has claimed savings from its procurement of gas that should be attributable to transportation. Staff bases its claim on its belief that the contract appears to be just too good to be true, and concludes that Laclede has deliberately mislabeled savings of one type as savings of another type. Staff asserts that the structure of the GSIP creates a strong incentive for Laclede to “gin up” savings. The Commission agrees with Staff that the GSIP mechanism does create an incentive for Laclede to characterize savings as supply-related rather than transportation-related, but finds that Staff has not presented evidence that Laclede acted improperly because of this incentive. The Commission will find for Laclede on this issue.

#### **Conclusions of Law**

Laclede is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

Tariffs approved by this Commission have the same force and effect as a statute directly prescribed from the legislature. Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co., 937 S.W.2d 314 (Mo. App. E.D. 1996). The Commission has approved tariffs for Laclede that include provisions for ACA filings.

#### *IT IS THEREFORE ORDERED:*

1. That the adjustments to Laclede Gas Company's filed Actual Gas Cost Adjustment balance proposed by the Staff of the Commission in its Memorandum filed on October 1, 1999 are rejected.
2. That late-filed Exhibit 11HC is admitted.
3. That this order shall become effective on August 11, 2000.
4. That this case may be closed on August 14, 2000.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur;  
Schemenauer, C., dissents with opinion; certify compliance  
with the provisions of Section 536.080, RSMo 1994.

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#### **DISSENTING OPINION OF** **COMMISSIONER ROBERT SCHEMENAUER**

I respectfully dissent from the majority. I find the evidence presented by the Staff concerning the definition of delivery points and the *force majeure* clause to be credible and convincing. Based on that evidence, I would have ruled in favor of the Staff.

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**In the Matter of the Application of Le-Ru Telephone Company for Authority to Borrow an Amount Not to Exceed \$9,164,700 from the Rural Utilities Service, the Rural Telephone Bank and the Federal Financing Bank and in Connection therewith to Execute an Amending Telephone Loan Contract Amendment, Promissory Notes, and a Restated Mortgage, Security Agreement and Financing Statement.\***

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*Case No. TF-2000-428  
Decided August 15, 2000*

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**Security Issues §21.** The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.

**Security Issues §76.** The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.

**Security Issues §69.** The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs through the issuance of long term mortgage notes.

### **ORDER APPROVING FINANCING**

On January 18, 2000, Le-Ru Telephone Company (Le-Ru or Company) filed an application with the Commission requesting authority under Section 392.310, RSMo 1994, and 4 CSR 240-2.060 to borrow certain sums, not to exceed \$9,164,700, from the Rural Utilities Service, the Rural Telephone Bank, and the Federal Financing Bank in order to fund capital improvements and to finance its operating needs.

On May 16, 2000, the Commission's Staff filed its recommendation and memorandum in this case, recommending that the Commission issue an order approving Le-Ru's application but with a reduction in the amount Le-Ru would be authorized to borrow to \$7,800,606 and with certain conditions. The Staff stated that the Company's application meets the requirements of Section 392.310, RSMo 1994, and recommended approval subject to modification of the amount and the conditions specified.

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\*See pages 331 and 336 for other orders in this case.

This order contains a correction approved by the Commission in an order issued on August 16, 2000.

On July 7, 2000, the Commission held a hearing on the Company's application. On July 24, 2000, the Company submitted suggested ordered paragraphs for the Commission's consideration.

#### **Le-Ru's Application**

Le-Ru is a Missouri corporation based in Stella, Missouri, and provides telecommunication services to approximately 1,400 customers in two exchanges in Newton and McDonald Counties. Le-Ru proposes to use the proceeds of the loan it is requesting to improve and upgrade its existing facilities, and to extend its capacity and facilities to meet forecasted growth of five percent per year. Specifically, Le-Ru proposes to use the loan proceeds for: 1) replacement of air core cable; 2) replacement of air core service entrances; 3) integration of fiber feeder cable in the local loop; 4) utilization of electronic serving area (ESA) terminals; 5) providing for maximum length non-loaded subscriber loops of 15,000 feet; 6) further improvements in the fiber toll network; 7) generic updates of digital switches; 8) engineering and constructing new outside plant that will allow virtually all customers access to digital services; and 9) breaking outside plant into multiple Customer Serving Areas in order to manage growth and eliminate the need to continually reinforce feeder plant.

Le-Ru proposes to enter a loan agreement with the Rural Utility Service (RUS) and execute three mortgage notes in varying amounts payable to the United States of America (acting through the Administrator of the RUS); to the Rural Telephone Bank (RTB); and to the Federal Financing Bank (FFB). As security, Le-Ru will deliver a restated mortgage, security agreement, and financing statement on substantially all of its assets. Le-Ru attached copies of the proposed forms for its notes and agreements as Appendices 1-6. Le-Ru also attached Appendix 7, an original Resolution of the Board of Directors of Le-Ru Telephone Company authorizing the loan and the execution of the necessary documents.

Le-Ru stated that none of the loan proceeds would be used to refund existing indebtedness and, thus, the amounts borrowed would be subject to the fee schedule set forth in Section 386.300, RSMo 1994. Finally, Le-Ru provided a pro forma balance sheet and a pro forma income statement to show the effect of the proposed financing for the Company and a capitalization expenditure schedule, as required by Section 392.310, RSMo 1994 (Appendices 8 and 9 to the application).

#### **Staff Analysis and Conditions**

The Staff reviewed the information provided by Le-Ru with its application and requested additional financial information that it analyzed. The Staff engaged in discussions and negotiations with the Company concerning the financing. Pursuant to the application and the information provided by Staff, the moneys borrowed would be payable over a term of up to 21 years and the estimated interest rate would be 6.39 percent. Final terms and conditions would be determined as the funds are borrowed.

Based on the pro forma financial statements filed with the application, Staff indicated that the capital structure of the Company would be 25.56 percent equity and 74.44 percent long-term debt. Staff stated that these ratios would be compat-

ible with a company of very poor credit quality. In addition the Staff stated a concern that Le-Ru's cash flow ratios would be diminished as a result of the proposed financing.

Staff reviewed and discussed its concerns with Le-Ru and as a result, Staff states Le-Ru agreed as follows:

1. To reduce the loan amount requested to \$7,800,606.
2. To limit dividends to the amount required for payment of taxes until such time as the equity ratio of the Company reaches 40 percent.
3. To use cash and cash equivalent working capital to pay down long-term debt no later than December 31, 2007, to reach an equity ratio of 40 percent.
4. To file semiannual surveillance reports beginning January 1, 2003, and ending December 31, 2007, or when the Company's equity ratio reaches 40 percent.

The Staff summarized Le-Ru's recent past system and facility upgrades and provided details concerning customer and service area growth, inadequacies in current facilities, immediate demands for service and delays meeting those demands, and deficiencies in current facilities and systems due to age and obsolescence. Staff's review and comments confirmed Le-Ru's need for its financing and for the proposed improvements. Staff recommended that the Commission approve the application subject to conditions 1-4 above.

#### **Hearing**

At the hearing for this case, the parties presented witnesses that verified the matters presented in the application and the basis for the conditions suggested by Staff and accepted by the Company and the Office of Public Counsel. The parties further agreed to a modification of the first suggested condition. Based on the modification, the parties would suggest that the Commission approve the loan in the original amount submitted to the Commission, but condition any draw of funds beyond \$7,800,606 upon the Company making further application to the Commission. This would avoid jeopardizing the loan application process already undertaken by the Company and permit the Company the option to come before the Commission at a later date to request authority to expand the scope of the financing to include all the work originally planned.

The witnesses for the Company and the Staff also presented information to the Commission to demonstrate the benefits to the ratepayers and public in terms of additional services and service reliability that would accrue as a result of making the improvements proposed to be financed with the loan transaction presented in this case.

#### **Findings and Conclusions**

The application and the Staff recommendation show that the proposed improvements are needed and that the financing is not detrimental to the public interest. However, Staff's recommendation and Le-Ru's agreement to conditions also demonstrate that there is a need to monitor and assure the soundness of Le-Ru's financial condition.

The Commission finds that the proposed financing is not detrimental to the public interest and should be approved upon the terms presented by the Company, subject to conditions agreed to between Le-Ru and Staff and presented in the Staff's recommendation and at the hearing. Le-Ru and Staff shall maintain their records to ensure that the authorization of this order is not exceeded, that terms and conditions are adhered to, and that required fees are paid.

*IT IS THEREFORE ORDERED:*

1. That Le-Ru Telephone Company is authorized to execute and deliver such instruments and to undertake such other acts as are necessary to consummate the financing transaction as presented in the application and described in this order including the execution of documents to borrow an aggregate amount not to exceed \$9,164,700 from the Rural Utilities Service, the Rural Telephone Bank and the Federal Financing Bank subject to the requirements of this order, including a limit on the portion of this debt that the Le-Ru Telephone Company may draw upon without further application to the Commission.
2. That Le-Ru Telephone Company is authorized to draw down and obtain debt proceeds as provided in this order in amount up to \$7,800,606 aggregate principal amount through mortgage notes payable under terms and conditions as described in the application and in this order.
3. That Le-Ru Telephone Company may make a later application to the Commission to utilize the remainder of the financing authority approved in this order.
4. That Le-Ru Telephone Company shall submit to the Commission's Financial Analysis Department the final terms and conditions of each financing security as the transaction or transactions are closed.
5. That Le-Ru Telephone Company shall limit dividends to the net amount required for payment of the Company related tax liability of its shareholders until such time as the equity ratio reaches 40 percent.
6. That Le-Ru Telephone Company shall use cash and cash equivalent working capital to pay down long-term debt no later than December 31, 2007, as may be required to reach an equity ratio of 40 percent.
7. That Le-Ru Telephone Company shall file semiannual surveillance reports beginning January 1, 2003, and ending December 31, 2007, or ending when the Company's equity ratio reaches 40 percent.
8. That Le-Ru Telephone Company shall submit all fees due as required under Section 386.300, RSMo 1994.
9. That nothing in this order shall be considered as a finding by the Commission of the reasonableness of the particular issuance, or of the value for ratemaking purposes of the transactions undertaken under the authority of this order.
10. That the Commission reserves the right to consider the ratemaking treatment to be afforded the transactions herein involved, and the resulting cost of capital, in any later proceeding.
11. That this order shall be effective until such time as the financing authorized is exhausted or is canceled by the Commission.
12. That Le-Ru Telephone Company and Staff shall maintain their business records to ensure that the authorization and conditions of this order are not exceeded or violated.

13. That in the event any modification, investigation, or other action related to the subject financing is required, a new case file may be opened or this case reopened.
14. That this order shall become effective on August 25, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur; Murray, C., dissents.

Thornburg, Regulatory Law Judge

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**In the Matter of the Request of AT&T Communications of the  
Southwest, Inc., to Terminate Carrier of Last Resort Obliga-  
tion.\***

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*Case No. TO-99-615  
Decided August 15, 2000*

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**Evidence, Practice & Procedure §6, Telecommunications § 2.** AT&T was the only entity licensed by the Commission to provide basic interexchange or "long distance" telecommunications service in Missouri on January 1, 1984. Under Section 392.460, RSMo, AT&T was not permitted to "abandon such service . . . unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment shall not deprive any customers of . . . basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest." The Commission excused AT&T from its "carrier of last resort" obligation upon a showing that over 500 long distance carriers were now certified in Missouri, with 13 of them operating in every exchange.

**APPEARANCES**

*Paul S. DeFord*, Attorney at Law, Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*James M. Fischer* and *Larry W. Dority*, Attorneys at Law, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for GTE Midwest Incorporated, and GTE Communications Corporation.

*Leo J. Bub*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Craig S. Johnson*, *Rob Trowbridge* and *Joe Page*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, 305 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102, for the Missouri Independent Telephone Group.

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\*The Commission, in an order issued on September 12, 2000, denied a request for rehearing in this case. Notice closing this case was issued on September 21, 2000.

*W.R. England, III*, Attorney at Law, and *Brian T. McCartney*, Attorney at Law, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for the Small Telephone Company Group.

*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.

*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: Kevin A. Thompson, Deputy Chief.

## REPORT AND ORDER

### Procedural History

On June 29, 1999, AT&T Communications of the Southwest, Inc. (AT&T), filed its application requesting that the Commission terminate its obligation under Section 392.460, RSMo 1994, the so-called "Carrier of Last Resort (COLR)" obligation, which requires AT&T to provide basic interexchange telecommunications services to any party requesting such services in any exchange in the state of Missouri.

On July 12, 1999, the Commission issued its Order and Notice, establishing August 11, 1999, as the deadline for applications to intervene herein. On July 13, 1999, the Staff of the Missouri Public Service Commission (Staff) filed its request for an evidentiary hearing. The Commission issued its Order and Notice on July 12, 1999, setting August 11, 1999, as the deadline for applications to intervene or to participate without intervention and for requests for a hearing.<sup>1</sup>

On July 9, 1999, the Mid-Missouri Group of Local Exchange Companies (MMG), consisting of Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Mo-Kan Dial, Inc., Modern Telecommunications Company, Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company, filed an application to intervene and request for hearing. Also on that day, the Office of the Public Counsel (OPC) filed a request for hearing.

On July 13, the Staff of the Missouri Public Service Commission filed its request for hearing. On July 14, 1999, the Small Telephone Company Group (STCG), consisting of ALLTEL Missouri, Inc., BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corpo-

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<sup>1</sup>The Commission also issued a Notice of Correction on July 21, 1999, to clarify that applications to intervene were due by August 11, 1999.

ration, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, New Florence Telephone Company, 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, filed an application to intervene and request for hearing.

On July 21, 1999, ALLTEL Missouri, Inc., moved to withdraw its application to intervene. On July 23, 1999, Southwestern Bell Telephone Company (SWBT) filed an application to intervene. On August 10, 1999, GTE Midwest Incorporated (GTE Midwest) and GTE Communications Corporation (GTECC; jointly GTE) filed a joint application to participate without intervention.

On November 23, the Commission granted intervention to the MMG, STCG, excepting ALLTEL, which had withdrawn its application to intervene, and SWBT; and granted participation without intervention to GTE. The Commission also set a prehearing conference for December 6, 1999, a deadline for a proposed procedural schedule, and resolved a discovery dispute which had arisen in September.

On December 6, 1999, the prehearing conference was held as planned. Also that day, Staff filed a proposed procedural schedule as well as a motion urging that it be adopted. On December 8, 1999, the Commission adopted the procedural schedule proposed by the parties. On December 10, 1999, SWBT moved for a protective order; the Commission adopted its standard protective order on December 15. On December 29, 1999, MMG notified the Commission and all parties that it would henceforth be known as the Missouri Independent Telephone Group (MITG).

Pursuant to the procedural schedule, AT&T filed Direct Testimony on January 10, 2000. Rebuttal Testimony was filed on February 10, 2000, and Surrebuttal Testimony on March 3, 2000. The parties filed a List of Issues, List of Witnesses and Order of Cross Examination on March 6, 2000. The parties, except SWBT, filed Position Statements on March 13, 2000. On March 14, the STCG moved to be excused from the hearing. On March 16, GTE advised that it was taking no position, adducing no evidence and waiving opening statement.

The Commission held an evidentiary hearing on March 20, 2000. All parties were represented at the evidentiary hearing, except the STCG, which was excused by the presiding officer. On March 21, 2000, the Commission issued its Order Adopting Briefing Schedule, allowing 30 days from the filing of the transcript for initial briefs and 15 days thereafter for reply briefs. On April 7, the Commission advised the parties by notice that, as the transcript was filed on April 4, 2000, the initial briefs would be due on or before May 4, 2000, and reply briefs on or before May 19, 2000. Initial briefs were timely filed by AT&T, SWBT, MITG, Staff, and Public Counsel; reply briefs were timely filed by AT&T, SWBT, GTE, and MITG. Public Counsel concurred in the briefs filed by MITG.

### Discussion

AT&T seeks herein an order of the Commission terminating its COLR obligation under Section 392.460, RSMo 1994. Section 392.460 provides:

No telecommunications company authorized by the commission to provide or offer basic local or basic interexchange telecommunications service within the state of Missouri on January 1, 1984, shall abandon such service until and unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment will not deprive any customers of basic local or basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest.

“Basic interexchange telecommunications service,” in turn, is defined at Section 386.020(3), RSMo Supp. 1999:

“Basic interexchange telecommunications service”, includes, at a minimum, two-way switched voice service between points in different local calling scopes as determined by the commission and shall include other services as determined by the commission by rule upon periodic review and update.

Pursuant to the Commission’s Order Adopting Procedural Schedule, the parties jointly developed a list of contested issues to be resolved by the Commission and filed position statements in which each party set out its position with respect to each of these issues:

**1. Will termination of AT&T’s carrier of last resort obligation (COLR) deprive any customers of basic interexchange telecommunications service or access thereto?**

All of the parties agreed that termination of AT&T’s COLR obligation will not, in and of itself, deprive any customer of access to basic interexchange telecommunications service. MITG, however, suggested that AT&T be allowed to exit exchanges without relief from the COLR obligation. Public Counsel argued that the Commission cannot resolve this issue because AT&T has not identified any particular exchange which it wishes to exit. SWBT and STCG took no position on this issue.

**2. Is termination of AT&T’s carrier of last resort obligation otherwise contrary to the public interest?**

AT&T and Staff asserted that termination of the COLR obligation was not otherwise contrary to the public interest. Public Counsel and MITG argued that termination of the COLR obligation is contrary to the public interest because that obligation ensures that basic interexchange telecommunications service will always be available in every exchange of the state. SWBT and STCG took no position on this issue.

**3. Should the Commission impose conditions upon AT&T’s exit from an exchange?**

All of the parties except AT&T and SWBT took the position that the Commission should impose conditions on AT&T's exit from an exchange. SWBT took no position; AT&T argued that any conditions would be both unnecessary and anticompetitive.

**4. If the Commission grants AT&T relief from its obligation as carrier of last resort for interLATA service in this case, is AT&T required to seek Commission approval to abandon interLATA service in any specific exchange pursuant to Section 392.460, RSMo, with notice and hearing, prior to actually exiting that exchange?**

AT&T and Staff argued that no additional procedures are necessary for AT&T to exit an exchange. Public Counsel and MITG, in opposition, asserted that notice and an opportunity for hearing are necessary prior to AT&T actually exiting an exchange. SWBT and STCG took no position on this issue.

**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:**

All of the parties herein, except the Commission's Staff and the Office of the Public Counsel, are telecommunications carriers, certificated by this Commission to provide telecommunications services in the state of Missouri.

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.]" Section 386.071, RSMo 1994.<sup>2</sup>

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]" Sections 386.700 and 386.710.

**The Carrier of Last Resort (COLR) Obligation:**

AT&T was the only entity licensed by the Commission to provide basic interexchange telecommunications service in the state of Missouri on January 1, 1984. Thus, pursuant to Section 392.460 AT&T is not permitted to "abandon such service . . . unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment shall not deprive any customers of . . . basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest."

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<sup>2</sup>Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 1994.

Interexchange telecommunications service is commonly known as "long distance" service. The record shows that more than 500 carriers are presently certificated to provide interexchange telecommunications service in Missouri. An informal survey by AT&T showed that thirteen of them offer originating service throughout the state: MCI Worldnet, Inc., Coast International Telecom, Frontier Communications Services, Inc., American Telecom, Incomnet Comm Corp., Excel Telecommunications, Dial & Save, Long Distance Wholesale Club, Qwest, Cable and Wireless, Westel, Inc., GTE Long Distance, and Sprint Long Distance. Likewise, evidence adduced in another Commission proceeding and presented again by AT&T here shows that between eight and 39 IXCs serve each of the various small incumbent local exchange companies in Missouri. Staff presented testimony showing that every exchange in Missouri has at least eleven 1+ dialed interLATA carriers and four 1+ dialed intraLATA carriers. Staff's evidence also showed that a COLR carrier is unnecessary as long as there is at least one other provider in each exchange.

#### **Conclusions of Law**

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

The Missouri Public Service Commission has jurisdiction over the termination of the COLR obligation imposed by Section 386.460, RSMo 1994, by the clear terms of that statute.

#### **The Legal Standard:**

Pursuant to Section 392.460, AT&T is not permitted to "abandon such service . . . unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment shall not deprive any customers of . . . basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest."

#### **Access to, and Deprivation of, Basic IXC Service:**

The Public Counsel opposes the relief sought herein by AT&T and contends that the Commission cannot, on the present record, make the required finding that no customer will thereby be deprived of basic IXC service, or of access thereto. This, in Public Counsel's view, follows inescapably from the fact that AT&T has never yet specified any particular exchange that it intends to exit. However, the Commission concludes that the Public Counsel is mistaken.

AT&T has shown that multiple IXCs are available in each and every exchange in Missouri. This is tantamount to a showing that every Missourian has multiple IXCs immediately available with which to do business. AT&T has, therefore, made the *prima facie* showing required by the statute and the opposing parties must adduce sufficient evidence to rebut that showing. Rebuttal requires that Public Counsel identify a customer who will lose either basic IXC service, or access thereto, if the relief sought by AT&T is granted. Merely to complain that AT&T has not specified any particular exchange is insufficient, because AT&T's proof goes to *every* exchange: If the customers in *every* exchange have ample access to, and service from, IXCs, how can the customers of any particular exchange be unserved? Public Counsel failed to answer this question.

MITG also opposes the relief sought herein by AT&T. MITG reads Section 392.460 as not imposing a COLR obligation at all. After all, points out MITG, the phrase "carrier of last resort" never occurs in Section 392.460. Rather, MITG reads the subject section as relating to AT&T's desire to cease business in the state of Missouri altogether. MITG suggests that, if AT&T's application is granted, AT&T will have no option but to abandon its Missouri operations.

The Commission does not read Section 392.460 in the same way that MITG reads it. The Commission concludes that the cited section does impose a COLR obligation on AT&T with respect to basic IXC service. The Commission further concludes that the phrase "abandon such service" refers to exiting any single exchange. Thus, if the relief sought herein by AT&T is granted, AT&T will be authorized to exit any Missouri exchange, subject only to whatever conditions the Commission may impose elsewhere in this order.

**Otherwise Contrary to the Public Interest:**

AT&T contends that the COLR obligation itself is "otherwise contrary to the public interest" because, as it imposes unique obligations upon AT&T, it is necessarily anticompetitive. Furthermore, AT&T argues that the effect of the COLR obligation, requiring it to be ready and able to provide basic interexchange service in every Missouri exchange upon request, is unfairly burdensome.

Public Counsel argues that it is necessarily contrary to the public interest to relieve AT&T of its COLR obligation because that will deprive Missourians of a "safety net" that assures the continuation of basic interexchange service in every Missouri exchange despite market conditions.

The Commission has already determined, in Case No. TO-99-254, that a COLR obligation with respect to interexchange telecommunications services is anticompetitive and discriminatory. The Commission agrees with the Staff that, as multiple IXCs are operating in every Missouri exchange, the COLR obligation imposed on AT&T is no longer necessary. For these reasons, the Commission concludes that relieving AT&T of its COLR obligation promotes the public interest.

**Conditions Imposed Upon AT&T's Actual Exit of an Exchange:**

AT&T itself agrees, as did most of the parties herein, that it must give "reasonable notice" to its customers before exiting any exchange. The Commission concludes that no other or further procedure is necessary in the event that AT&T chooses to actually exit an exchange. The Commission specifically rejects the position of Public Counsel and MITG, that notice and a hearing is required whenever AT&T elects to exit a particular exchange.

The Commission will require only that AT&T provide 30-day notice to its customers in any exchange it proposes to exit. Likewise, AT&T must amend its tariffs to reflect the change in its service area. The tariff amendment will notify the Commission and the Public Counsel.

***IT IS THEREFORE ORDERED:***

1. That AT&T Communications of the Southwest, Inc., has shown that its exit from any Missouri exchange would not deprive any customers of basic interexchange telecommunications service, or access thereto, and that its exit is not otherwise contrary to the public interest. Therefore, AT&T Communications of the Southwest, Inc., is henceforth relieved of

its obligations under Section 392.460, RSMo 1994, except as otherwise specified in Ordered Paragraph 2, below.

2. That AT&T Communications of the Southwest shall give a minimum of 30 days notice to its customers in any exchange it proposes to exit and shall submit appropriate proposed amended tariffs to the Missouri Public Service Commission.

3. That this Report and Order shall become effective on August 25, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions of  
Section 536.080, RSMo 1994.

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**In the Matter of Northeast Missouri Rural Telephone Company's  
General Rate Case in Compliance with the Commission's  
1999 Orders in TO-99-530 and TO-99-254.\***

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*Case No. TR-2001-66  
Decided August 24, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-530 and TO-99-254, the Commission required Northeast Missouri Rural Telephone Company to file a general rate case. The Commission determined that Northeast's filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS AND DENYING WAIVERS**

On August 3, 2000, Northeast Missouri Rural Telephone Company (Northeast) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-530 and TO-99-254. Northeast did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. Northeast acknowledges that the Reports and Orders in Case Nos. TO-99-530 and TO-99-254 require it to file a general rate case, but states that "Northeast does not believe that this is precisely what the Commission had in mind." Northeast states that it is "not desirous" of filing such a case.

On August 15, 2000, AT&T Communications of the Southwest, Inc. (AT&T) filed a pleading opposing Northeast's request. AT&T states that Northeast's request amounts to another request for rehearing of the requirement that it file a general

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\*The Commission issued an order on September 12, 2000 which denied an application for rehearing/clarification.

rate case. AT&T also states that granting the relief requested by Northeast would constitute single-issue ratemaking.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-530 and TO-99-254 because that phrase has a specific, commonly understood meaning. Northeast's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-530 and TO-99-254. Northeast's tariff filing will be rejected and its request for waivers will be denied.

Northeast also requests, if its request for waivers is denied, that the Commission "establish some mechanism extending the date by which this proceeding can be completed and any relief or remedy implemented." Northeast claims that such an extension would not harm its customers. AT&T, in its August 15, 2000, response, effectively rebuts this claim. AT&T correctly points out that the purpose of requiring Northeast to file a general rate case within a specific time was to ensure that Northeast's customers do not get overcharged as a result of the rate increase (implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-530 and TO-99-254. Whether Northeast's rates, including the increased Carrier Common Line rate, should be continued at the current level can only be determined by an examination of all relevant factors in a general rate case. Northeast's alternative request that the date for filing a general rate case be extended will be denied.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 5, 2000, by Northeast Missouri Rural Telephone Company, and assigned Tariff No. 200100113, and subsequently docketed as Case No. TR-2001-66, is rejected.
2. That the request for waivers filed on August 5, 2000, by Northeast Missouri Rural Telephone Company is denied.
3. That the alternative request for an extension filed on August 5, 2000, by Northeast Missouri Rural Telephone Company is denied.
4. That this order shall become effective on September 3, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of Missouri Public Service, a Division of UtiliCorp  
United Inc.'s Tariff Designed to Establish an Experimental  
Small Volume Aggregation Program in Missouri.**

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*Case No. GT-2001-61  
Decided August 29, 2000*

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**Gas §33.** The Commission denied Public Counsel's motion to suspend and approved a tariff that established an experimental small volume customer aggregation program.

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

On July 20, 2000, Missouri Public Service, a Division of UtiliCorp United Inc., (MPS) issued a proposed tariff carrying an effective date of September 1. MPS' tariff would establish an experimental small volume customer aggregation program. MPS filed substitute tariff sheets on August 8, 11 and 28. On August 1, the Office of the Public Counsel (Public Counsel) filed a Motion to Suspend and Request for Establishment of Procedural Schedule and Hearing. On August 3, the Commission issued a notice directing that all interested parties wishing to respond to Public Counsel's request to suspend, do so on or before August 11. On August 11, MPS filed its response to Public Counsel's Motion. The Staff of the Public Service Commission (Staff) also filed a response to Public Counsel's Motion on August 11. As part of its response, Staff recommended that the Commission approve the tariff proposed by MPS. Also on August 11, the Missouri Purchasing Resource Center – Energy Consortium (MOPRC-EC) filed an application in which it sought to intervene in support of MPS' tariff. On August 21, Mountain Energy Corporation (Mountain Energy) filed an application to intervene. On August 22, Public Counsel filed a reply to MPS's response to Public Counsel's motion to suspend. Because the Commission wanted to hear the responses of MPS and Staff to the latest allegations made by Public Counsel and Mountain Energy, the Commission issued an Order Directing Response on August 24. That order directed MPS and Staff to file additional responses no later than August 28. MPS and Staff filed their responses on August 28.

Public Counsel asks the Commission to suspend MPS' tariff because it has various concerns about the tariff. In particular, Public Counsel argues as follows:

- A. The proposal does not have adequate provisions to protect from harm residential customers who are not eligible for the program and other small customers who do not choose to take advantage of the aggregation option;
- B. The program does not create a level playing field among potential new gas suppliers, including the distribution company's gas marketing affiliate;

- C. The proposed tariff, and other documents that will be used to implement the program lack sufficient clarity and internal consistency to ensure that the program would operate in the manner intended;
- D. The program does not have sufficient protections for small unsophisticated consumers that are choosing a competitive gas supplier for the first time;
- E. Key documents that are referenced in the proposed tariff and contain important terms and conditions for implementing the program should be included as part of the tariff that implements the proposed program;
- F. The proposed tariff contains numerous new charges to aggregators and end users that need to be analyzed to determine MPS' cost basis for the proposed charges and to ensure that the company is not attempting to put rates in place for new or modified services without the consideration of all relevant factors; and
- G. The proposed tariff lacks crucial elements of reporting requirements and an evaluation plan that would be necessary to determine whether and how the program should be continued at the end of the experimental period.

MPS responded in detail to Public Counsel's criticisms of the tariff. MPS emphasized that this is a voluntary, two-year, experimental program that will involve only a small portion of MPS' customers and a small percentage of the natural gas supplied by MPS. Staff's response indicates that MPS, an interested potential end-user, Staff, and Public Counsel have met on several occasions over the past year to discuss MPS' proposed experimental program. Staff states that the tariff that resulted from those discussions is fair to both MPS and to the small end-users who wish to participate in this experiment.

MOPRC-EC's application to intervene indicates that it is an energy purchasing group for members of the Missouri School Boards Association and the Cooperating School Districts of St. Louis. The member school districts support the experimental program as a way to allow them to choose a supplier under a utility transportation tariff. MOPRC-EC asks the Commission to make it a party and to approve MPS' tariff.

Mountain Energy's application to intervene indicates that it is an energy service provider engaged in the business of natural gas marketing in the state of Missouri. Mountain Energy acts as transportation agent on behalf of its customers, which are end-users of natural gas served by various local distribution companies under the jurisdiction of the Commission. Mountain Energy indicates that it generally supports further unbundling of services within the natural gas industry but opposes certain aspects of MPS' tariffs. Mountain Energy requests that the tariffs be suspended until its concerns and those of Public Counsel can be addressed.

The Commission has reviewed the tariff sheets, Public Counsel's motion to suspend, MPS' response to that request, Staff's response and recommendation, MOPRC-EC's response and request for intervention, Mountain Energy's Petition

to Intervene, Public Counsel's Reply and the additional responses of MPS and Staff. MPS has effectively responded to each of the concerns raised by Public Counsel. The experimental small volume customer aggregation program may benefit consumers of natural gas and its results will be evaluated to determine whether or not benefits were attained by these consumers. It is an experiment worth conducting. The Commission will not suspend the proposed tariff.

The Commission emphasizes that this tariff creates an experimental program. That program will expire on August 31, 2002. If MPS wishes to extend the program beyond that expiration date, while avoiding a lapse in the program, it is encouraged to file the appropriate tariff changes at least six months before the expiration date so that the Staff will have sufficient time to properly evaluate the program and make its recommendation to the Commission. The Commission does not wish to be asked to temporarily extend the program while considering a tariff filed shortly before the expiration date.

Because MPS' tariff will not be suspended, there will be no proceedings for which intervention would be appropriate. Therefore, the applications to intervene filed by MOPRC-EC and Mountain Energy will be denied. Finally, the tariff filed by MPS will be approved.

*IT IS THEREFORE ORDERED:*

1. That Public Counsel's Motion to Suspend and Request for Establishment of Procedural Schedule and Hearing is denied.
2. That the Application of the Missouri Purchasing Resource Center – Energy Consortium to Intervene in Support of Tariffs is denied.
3. That the Petition of Mountain Energy Corporation to Intervene is denied.
4. That the tariff sheets filed by UtiliCorp United Inc., d/b/a Missouri Public Service on July 20, 2000, and assigned tariff number 200100065, are approved, as amended, to become effective on September 1, 2000. The tariff sheets approved are:

**P.S.C. Mo. No. 5**

**Original Sheet Nos. 32.1 through 32.20, Inclusive  
6th Revised Sheet No. 36, Canceling 5th Revised Sheet No. 36  
20th Revised Sheet No. 43, Canceling 19th Revised Sheet No. 43  
23rd Revised Sheet No. 44, Canceling 22nd Revised Sheet No. 44  
13th Revised Sheet No. 44.1, Canceling 12th Revised Sheet No. 44.1**

5. That this order shall become effective on September 1, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Woodruff, Regulatory Law Judge

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**In the Matter of the Access Tariff Filing of KLM Telephone Company.\***

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*Case No. TT-2001-120*  
*Decided August 31, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-511 and TO-99-254, the Commission required KLM Telephone Company to file a general rate case. The Commission determined that KLM's filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS  
AND DENYING MOTION FOR PROTECTIVE ORDER**

On August 23, 2000, KLM Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-511 and TO-99-254. The Company did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. The Company, in the testimony filed in support of its tariff, acknowledged that its filing is not a general rate case. The purpose of requiring the Company to file a general rate case within a specific time was to ensure that the Company's customers do not get overcharged as a result of the rate increase (implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-511 and TO-99-254. Whether the Company's rates should be continued at the current level can only be determined by an examination of all relevant factors in a general rate case.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-511 and TO-99-254 because that phrase has a specific, commonly understood meaning. The Company's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-511 and TO-99-254. The Company's tariff filing will be rejected.

The Company also requested that the Commission issue its standard protective order. The Company stated that some of the information it intended to file in support of its tariff filing is proprietary and some may be highly confidential. Because the Commission is rejecting the tariff filing, the filing of supporting information is unnecessary, and the request for a protective order will be denied.

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\*On September 21, 2000, the Commission issued an order granting reconsideration, suspending tariff, directing notice, directing filing, scheduling prehearing conference and establishing protective order.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 23, 2000, by KLM Telephone Company, and assigned Tariff No. 200100209, and subsequently docketed as Case No. TT-2001-120, is rejected.
2. That the motion for protective order filed on August 23, 2000, by KLM Telephone Company is denied.
3. That this order shall become effective on September 12, 2000.
4. That this case may be closed on September 13, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Access Tariff Filing of Green Hills Telephone Corporation.\***

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*Case No. TT-2001-115  
Decided August 31, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-507 and TO-99-254, the Commission required Green Hills Telephone Corporation to file a general rate case. The Commission determined that Green Hills' filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS  
AND DENYING MOTION FOR PROTECTIVE ORDER**

On August 23, 2000, Green Hills Telephone Corporation (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-507 and TO-99-254. The Company did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. The Company, in the testimony filed in support of its tariff, acknowledged that its filing is not a general rate case. The purpose of requiring the Company to file a general rate case within a specific time was to ensure that the Company's customers do not get overcharged as a result

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\*On September 21, 2000, the Commission issued an order granting reconsideration, suspending tariff, directing notice, directing filing, scheduling prehearing conference and establishing protective order.

of the rate increase (implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-507 and TO-99-254. Whether the Company's rates should be continued at the current level can only be determined by an examination of all relevant factors in a general rate case.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-507 and TO-99-254 because that phrase has a specific, commonly understood meaning. The Company's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-507 and TO-99-254. The Company's tariff filing will be rejected.

The Company also requested that the Commission issue its standard protective order. The Company stated that some of the information it intended to file in support of its tariff filing is proprietary and some may be highly confidential. Because the Commission is rejecting the tariff filing, the filing of supporting information is unnecessary, and the request for a protective order will be denied.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 23, 2000, by Green Hills Telephone Corporation, and assigned Tariff No. 200100202, and subsequently docketed as Case No. TT-2001-115, is rejected.
2. That the motion for protective order filed on August 23, 2000, by Green Hills Telephone Corporation is denied.
3. That this order shall become effective on September 12, 2000.
4. That this case may be closed on September 13, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Access Tariff Filing of IAMO Telephone Company.\***

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*Case No. TT-2001-116  
Decided August 31, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-509 and TO-99-254, the Commission required IAMO Telephone Company to file a general rate case. The Commission determined that IAMO's filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS  
AND DENYING MOTION FOR PROTECTIVE ORDER**

On August 23, 2000, IAMO Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-509 and TO-99-254. The Company did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. The Company, in the testimony filed in support of its tariff, acknowledged that its filing is not a general rate case. The purpose of requiring the Company to file a general rate case within a specific time was to ensure that the Company's customers do not get overcharged as a result of the rate increase (implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-509 and TO-99-254. Whether the Company's rates should be continued at the current level can only be determined by an examination of all relevant factors in a general rate case.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-509 and TO-99-254 because that phrase has a specific, commonly understood meaning. The Company's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-509 and TO-99-254. The Company's tariff filing will be rejected.

The Company also requested that the Commission issue its standard protective order. The Company stated that some of the information it intended to file in support of its tariff filing is proprietary and some may be highly confidential. Because the Commission is rejecting the tariff filing, the filing of supporting information is unnecessary, and the request for a protective order will be denied.

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\*On September 21, 2000, the Commission issued an order granting reconsideration, suspending tariff, directing notice, directing filing, scheduling prehearing conference and establishing protective order.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 23, 2000, by IAMO Telephone Company, and assigned Tariff No. 200100204, and subsequently docketed as Case No. TT-2001-116, is rejected.
2. That the motion for protective order filed on August 23, 2000, by IAMO Telephone Company is denied.
3. That this order shall become effective on September 12, 2000.
4. That this case may be closed on September 13, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Access Tariff Filing of Ozark Telephone Company.\***

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*Case No. TT-2001-117*  
*Decided August 31, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-519 and TO-99-254, the Commission required Ozark Telephone Company to file a general rate case. The Commission determined that Ozark's filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS  
AND DENYING MOTION FOR PROTECTIVE ORDER**

On August 23, 2000, Ozark Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-509 and TO-99-254. The Company did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. The Company, in the testimony filed in support of its tariff, acknowledged that its filing is not a general rate case. The purpose of requiring the Company to file a general rate case within a specific time was to ensure that the Company's customers do not get overcharged as a result of the rate increase (implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-509 and TO-99-254. Whether the Company's rates should be continued at the

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\*On September 21, 2000, the Commission issued an order granting reconsideration, suspending tariff, directing notice, directing filing, scheduling prehearing conference and establishing protective order.

current level can only be determined by an examination of all relevant factors in a general rate case.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-509 and TO-99-254 because that phrase has a specific, commonly understood meaning. The Company's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-509 and TO-99-254. The Company's tariff filing will be rejected.

The Company also requested that the Commission issue its standard protective order. The Company stated that some of the information it intended to file in support of its tariff filing is proprietary and some may be highly confidential. Because the Commission is rejecting the tariff filing, the filing of supporting information is unnecessary, and the request for a protective order will be denied.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 23, 2000, by Ozark Telephone Company, and assigned Tariff No. 200100203, and subsequently docketed as Case No. TT-2001-117, is rejected.
2. That the motion for protective order filed on August 23, 2000, by Ozark Telephone Company is denied.
3. That this order shall become effective on September 12, 2000.
4. That this case may be closed on September 13, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Access Tariff Filing of Peace Valley Telephone Company.\***

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*Case No. TT-2001-118  
Decided August 31, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-531 and TO-99-254, the Commission required Peace Valley Telephone Company to file a general rate case. The Commission determined that Peace Valley 's filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS  
AND DENYING MOTION FOR PROTECTIVE ORDER**

On August 23, 2000, Peace Valley Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-531 and TO-99-254. The Company did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. The Company, in the testimony filed in support of its tariff, acknowledged that its filing is not a general rate case. The purpose of requiring the Company to file a general rate case within a specific time was to ensure that the Company's customers do not get overcharged as a result of the rate increase (implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-531 and TO-99-254. Whether the Company's rates should be continued at the current level can only be determined by an examination of all relevant factors in a general rate case.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-531 and TO-99-254 because that phrase has a specific, commonly understood meaning. The Company's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-531 and TO-99-254. The Company's tariff filing will be rejected.

The Company also requested that the Commission issue its standard protective order. The Company stated that some of the information it intended to file in support of its tariff filing is proprietary and some may be highly confidential.

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\*On September 21, 2000, the Commission issued an order granting reconsideration, suspending tariff, directing notice, directing filing, scheduling prehearing conference and establishing protective order.

Because the Commission is rejecting the tariff filing, the filing of supporting information is unnecessary, and the request for a protective order will be denied.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 23, 2000, by Peace Valley Telephone Company, and assigned Tariff No. 200100203, and subsequently docketed as Case No. TT-2001-118, is rejected.
2. That the motion for protective order filed on August 23, 2000, by Peace Valley Telephone Company is denied.
3. That this order shall become effective on September 12, 2000.
4. That this case may be closed on September 13, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of the Access Tariff Filing of Holway Telephone Company.\***

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*Case No. TT-2001-119  
Decided August 31, 2000*

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**Telecommunications §14.** In Case Nos. TO-99-508 and TO-99-254, the Commission required Holway Telephone Company to file a general rate case. The Commission determined that Holway's filing in this case was not a general rate case and rejected it.

**ORDER REJECTING TARIFFS  
AND DENYING MOTION FOR PROTECTIVE ORDER**

On August 23, 2000, Holway Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-508 and TO-99-254. The Company did not file a general rate case as required by those Reports and Orders and requested waiver of the filing requirements of a rate case. The Company, in the testimony filed in support of its tariff, acknowledged that its filing is not a general rate case. The purpose of requiring the Company to file a general rate case within a specific time was to ensure that the Company's customers do not get overcharged as a result of the rate increase

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\*On September 21, 2000, the Commission issued an order granting reconsideration, suspending tariff, directing notice, directing filing, scheduling prehearing conference and establishing protective order.

(implemented by the revenue neutrality surcharge) allowed in Case Nos. TO-99-508 and TO-99-254. Whether the Company's rates should be continued at the current level can only be determined by an examination of all relevant factors in a general rate case.

It is difficult to imagine how the Commission could have made the requirement to file a general rate case more clear. The Commission deliberately used the phrase "general rate case" in both Case Nos. TO-99-508 and TO-99-254 because that phrase has a specific, commonly understood meaning. The Company's filing is not a general rate case and does not comply with the Reports and Orders issued in Case Nos. TO-99-508 and TO-99-254. The Company's tariff filing will be rejected.

The Company also requested that the Commission issue its standard protective order. The Company stated that some of the information it intended to file in support of its tariff filing is proprietary and some may be highly confidential. Because the Commission is rejecting the tariff filing, the filing of supporting information is unnecessary, and the request for a protective order will be denied.

*IT IS THEREFORE ORDERED:*

1. That the proposed tariff sheet submitted on August 23, 2000, by Holway Telephone Company, and assigned Tariff No. 200100206, and subsequently docketed as Case No. TT-2001-119, is rejected.
2. That the motion for protective order filed on August 23, 2000, by Holway Telephone Company is denied.
3. That this order shall become effective on September 12, 2000.
4. That this case may be closed on September 13, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company.\***

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*Case No. WR-2000-281  
Decided August 31, 2000*

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**Rates §23.** Several parties questioned the prudence of MAWC's decision to build a new water treatment plant in St. Joseph and contended that only the cost of renovating the old plant should be included in rate base, a disallowance of approximately half the cost of the new plant and related facilities. The Commission has adopted a standard of reasonable care requiring due diligence as the standard for evaluating the prudence of a utility's conduct. The Commission has described this standard as follows: "The Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." The Commission notes, as well, that the burden of a public utility engaged in building a new plant is "to build the best plant at the lowest cost." The Commission concludes that the challengers have not made a showing of inefficiency or improvidence sufficient to require MAWC to prove the prudence of its decision.

**Rates § 23.** The record shows that MAWC was aware in late 1995, when the decision to build the new St. Joseph plant and related facilities was made, that extensive renovations and improvements were needed in St. Joseph. The nature of the existing plant site made some of these renovations and improvements difficult, or perhaps impossible. The regulatory and environmental outlook was such that the use of a riverine source, and the return of residuals to that source, would necessarily result in ever-increasing costs to the company. There were aesthetic problems with the river water that could not be readily resolved. Finally, the flood of 1993 demonstrated that the reliability of St. Joseph's public water supply could not be assured in the case of a treatment plant located in the flood plain. MAWC assessed four options, one being to renovate and improve the existing plant, and another, that ultimately selected, being the construction of a new plant above the flood plain, the development of a ground water source of supply, and a pipeline linking the two. The other options were a new surface water treatment plant above the flood plain and interconnection with the Kansas City system. The preliminary numbers developed by MAWC suggested that the ground water source/new plant option was about as expensive as any of the other options, and perhaps less expensive than some of them. This option would include all the benefits associated with a ground water supply source: consistent raw water characteristics; diminished public health

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\*See pages 78 and 322 for other orders in this case.

concern with organisms and other toxins; easier control of aesthetic factors, among others. Likewise, this option would remove the threat posed by another flood. On the basis of the record made in this case, the Commission finds and concludes that the management of MAWC did use due diligence to address all relevant factors and information known or available to it when it assessed the situation and reached the decision to build a new treatment plant and develop a new ground water source of supply in St. Joseph. Consequently, the Commission must conclude that the decision to build the new plant and related facilities was not imprudent. Therefore, the total project cost of \$70,097,840 shall be recognized in rate base.

**Rates § 68.** Where a new treatment plant, water source and linking pipeline were built with excess capacity, an amount was deducted from the value of the utility assets recognized in rate base to reflect the fact that not all of the new facility was presently used and useful.

**Rates §68.** With respect to the capitalization of the carrying-costs of construction funding, the Commission recognized only the actual carrying-cost of Company's short-term debt in rate base.

**Accounting §18.** Where Company deferred post-in-service carrying costs and depreciation expense under an Accounting Authority Order, none of the deferred amount was recovered in rate base because none of it reflected an unusual or extraordinary expense.

**Rates § 68.** Where Company replaced its existing water treatment plant with a new plant and the value of the old plant had not yet been fully depreciated as of the in-service date of the new plant, the Commission did not permit Company to recover the residual value of the old plant because, as of the day it was taken out of service, it was no longer presently used and useful.

**Rates § 121.** Much public attention was devoted to the debate between the proponents of Single Tariff Pricing (STP) and District Specific Pricing (DSP). The former is a rate design theory under which all customers of a system with multiple service areas, whether interconnected or not, pay the same rate, regardless of differences in the actual cost of providing the service to the various customers. DSP, on the other hand, sets different rates for each of the service areas, based upon the discrete cost of service in each district. MAWC, along with its parent and affiliates, favors STP; other parties, not wanting to help underwrite the cost of the new water treatment plant in the St. Joseph district, favor DSP. In the past, this Commission has permitted MAWC to move toward STP in its rate design, although that goal was never fully attained. The Commission considers public perception to be a valid factor for consideration in determining just and reasonable rates. The testimony adduced at the Local Public Hearings held in this matter was strongly in favor of DSP. Therefore, the Commission will move away from STP and toward DSP. MAWC, therefore, must set its rates separately for each service area in order to recover the appropriate revenue requirement for each service area.

**Rates §121.** Where the Commission determined that rates would be based on a district-specific scheme rather than on single tariff pricing, the Commission also required class cost-of-service shifts to move each class toward its actual cost of service in order to avoid significant interclass subsidies.

#### APPEARANCES

*W.R. England, III, Dean L. Cooper, and Richard T. Ciottone*, of Counsel, Attorneys at Law, Brydon, Swearingen & 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.

*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

### Procedural History

On October 15, 1999, Missouri-American Water Company (MAWC or Company) submitted to the Commission its proposed tariff sheets intended to implement a general rate increase for water and sewer service provided to customers

in the Missouri service areas of the Company.<sup>1</sup> The proposed tariffs bore a requested effective date of November 15, 1999. The proposed water service tariffs were designed to produce an annual increase of approximately 53.97 percent (\$16,446,277) in the Company's revenues. The proposed sewer service tariffs were designed to produce an annual increase of approximately 5.0 percent (\$2,363) in the Company's revenues.

On October 28, 1999, the Commission issued its Suspension Order and Notice and Order Consolidating Cases by which the Commission consolidated Case No. SR-2000-282 into Case No. WR-2000-281 for all purposes and suspended the proposed tariffs for a period of 120 days, plus an additional six months beyond the requested effective date, in order to allow sufficient time to study the effect of the proposed tariffs and to determine if they are just, reasonable and in the public interest. By this order, the Commission also directed MAWC to file its prefiled direct testimony by November 29, 1999, including its proposed test year and any request for a true-up audit and hearing. The Commission also directed that MAWC provide individual notice by mail to all of its customers, and directed that notice be sent as well to county commissions, state legislators, and the media serving MAWC's Missouri service areas, and set an intervention period of 20 days. The Commission by this order also set an early prehearing conference for December 14, 1999, and directed that the parties file a joint proposed procedural schedule by December 21, 1999. Finally, the Commission set an evidentiary hearing for May 9, 2000, through May 15, 2000.

On November 2, 1999, the Company moved for a protective order. Thereafter, on November 4, 1999, the Commission adopted by order its standard protective order herein to protect proprietary and highly confidential information.

On November 9, 1999, the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel) filed their Joint Motion to Modify the Suspension Order, stating that the Suspension Order did not allow a sufficient interval between the date on which Company must file its direct testimony, November 29, 1999, and the first day of the evidentiary hearing, May 9, 2000. The movants averred that, according to the "generic" rate case timeline employed by Staff, the hearing should start on June 5, 2000. Thereafter, on November 18, 1999, the Commission reset the evidentiary hearing to June 5 through June 9, 2000. The Commission also required that MAWC file its direct testimony, test year recommendation and true-up request by November 24, 1999.

Meanwhile, on November 16, 1999, the Missouri municipalities of Joplin, Warrensburg, O'Fallon, and Weldon Spring filed their application to intervene, followed by the municipality of Mexico, Missouri, the following day (collectively, the Municipal Intervenors). Also on November 17, 2000, Public Water Supply Districts (PWSD) Nos. 1 and 2 of Andrew County, Missouri, PWSD No. 1 of DeKalb County, Missouri, and PWSD No. 1 of Buchanan County, Missouri (collectively the St. Joseph Area PWSD Intervenors) filed their applications to intervene. On the same day, AG Processing, Inc., a cooperative (AGP), Friskies Petcare, a division of

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<sup>1</sup> St. Joseph, Joplin, St. Charles, Warrensburg, Mexico, Parkville, and Brunswick; not including Jefferson City or St. Louis County.

Nestle USA (Friskies), and Wire Rope Corporation of America, Inc. (Wire Rope), filed their application to intervene (collectively, the St. Joseph Industrial Intervenors or SJ Industrials). The Commission granted these uncontested interventions by order issued on December 1, 1999.

The cities of Warrensburg, O'Fallon and Weldon Spring filed a motion, on November 16, 1999, to extend the intervention period herein to December 7, 1999. AGP, Friskies and Wire Rope joined in this motion on November 17, 1999. As no party made any objection to this motion, the Commission extended the intervention deadline, by its order of December 1, 1999, to December 7, 1999.

On November 23, 1999, the City of St. Peters, Missouri (St. Peters), filed its application to intervene out-of-time, as did St. Charles County, Missouri (St. Charles), on November 29.<sup>2</sup> Also on November 29, 1999, the City of St. Joseph, Missouri (St. Joseph), filed an application to participate without intervention; on December 6, 1999, St. Joseph filed an application to intervene. On December 7, 1999, a group of six entities located in Warrensburg, Missouri, filed a joint application to intervene: Hawker Energy Products, Inc., Harmon Industries, Inc., Stahl Specialty Company, Swisher Mower and Machine Company, Inc., and Central Missouri State University (collectively, the Johnson County Intervenors). Finally, also on December 7, 1999, an association of three entities in St. Louis County filed a joint application to intervene under the name Missouri Industrial Energy Consumers (MIEC): The Boeing Company, Ford Motor Company and Hussmann Refrigeration.<sup>3</sup> The Commission granted these unopposed applications on December 23, 1999.

There were also applications to intervene which MAWC contested. Public Water Supply District No. 2 of St. Charles County, Missouri (St. Charles PWSD), timely filed its Application to Intervene on November 16, 1999. On November 29, 1999, MAWC filed its opposition to St. Charles PWSD's application to intervene; St. Charles PWSD responded on November 30, 1999. The Commission granted St. Charles PWSD's application to intervene on December 6, 1999.

On November 17, 1999, the St. Joseph Building and Construction Trades Council (Council) filed its application to intervene. The Council was composed of various St. Joseph area trade unions, including Iron Workers Local Union No. 10, Operating Engineers Local 101, International Brotherhood of Electrical Workers Local Union No. 545, Laborers Local Union No. 579, Sheet Metal Workers Local No. 2, Carpenters District Council of Kansas City and Vicinity, Plumbers and Steamfitters Local No. 45, Roofers Local Union No. 20, Plasterers and Cement Masons Local Union No. 518, Teamsters Local No. 460, Asbestos Workers Local Union No. 27, Painters District Council No. 3, Boilermakers Local Union No. 83, Carpenters Local No. 110, and Elevator Constructors Local No. 12. MAWC responded in opposition on November 29, 1999; the Commission granted the Council's application by order on December 23, 1999.

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<sup>2</sup> In fact, these applications were timely.

<sup>3</sup> MAWC responded to MIEC's application on December 14, 1999, but did not oppose it.

One final application to intervene was received on June 8, 2000, on the fourth day of the evidentiary hearing from the City of Riverside, Missouri. This application was taken up at the opening of the hearing on June 9. The application was unopposed and, consequently, was granted by the presiding officer on condition that the City of Riverside take the case as it found it.

On November 16, 1999, the Public Counsel moved the Commission to hold Local Public Hearings (LPHs) in seven locations in MAWC's Missouri service areas in order to receive public testimony regarding the proposed general rate increase. MAWC responded on December 8, 1999. On January 7, 2000, the City of St. Joseph moved for an LPH in that municipality.

On November 19, 1999, MAWC filed Direct Testimony supporting its proposed tariffs, as well as its recommendation as to the test year and a motion for a true-up audit and hearing and a motion for an accounting authority order (AAO). On November 29, 1999, MAWC filed Direct Testimony concerning the issue of rate design. Public Counsel responded in opposition to MAWC's request for an AAO on November 29. On the same date, the SJ Industrials responded in opposition to MAWC's test year recommendation, its AAO motion, and its true-up motion. Staff and the Public Counsel responded in opposition to MAWC concerning the test year and true-up on December 7. MAWC replied to the SJ Industrials on December 9 concerning the AAO, test year and true-up, and to Public Counsel on December 9 concerning the AAO and again, on December 20, concerning the test year and true-up. The SJ Industrials responded to MAWC regarding the test year on December 9. Staff filed out-of-time in opposition to MAWC's motion for an AAO on December 14; MAWC responded on December 22.

On February 1, 2000, the Commission issued its Order Concerning Test Year, True-up, Accounting Authority Order, and Local Public Hearings. Noting the general agreement of the parties, the Commission determined that the proper test year was the 12-month period ending September 30, 1999, updated for known and measurable changes through December 31, 1999, for plant, revenues, property and income taxes, operations expenses, including labor wage increases, rate case expenditures, and conversion from quarterly to monthly meter reading in the St. Joseph district. The Commission further directed MAWC to update its accounting information consistent with the test year. As to the true-up, the Commission adopted MAWC's position and set a true-up audit for certain specified items<sup>4</sup> as of April 30, 2000, with a true-up hearing to be held in late June. As to the AAO, MAWC sought authority from the Commission to amortize Allowance for Funds Used During Construction (AFUDC) between the in-service date of the new St. Joseph water treatment plant for about four and one-half months between its in-service date and the suspension date of September 14, 2000; MAWC also proposed to defer depreciation expense over the same period. This motion was vigorously contested

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<sup>4</sup> Residential and commercial customers and revenues, Commission's annual assessment for 2001, chemicals, waste disposal, fuel, and power expenses related to new facilities, capital structure, rate base, rate case expenses, employee levels, wage rates and benefits, depreciation expense, amortization of premature retirement, post-in-service allowance for funds used during construction, and deferred depreciation expense, income and property taxes, utility operating income, and purchased water expense.

by the SJ Industrials, Staff and the Public Counsel. The Commission decided to take the issue with the case. Finally, as to the Public Counsel's pending requests for LPHs, the Commission determined that it would schedule LPHs in Joplin, St. Joseph, Warrensburg, and Mexico, with the specific dates and locations to be specified in a later order.

Meanwhile, a discovery dispute had developed. On December 27, 1999, the SJ Industrials filed their First Motion to Compel, to which MAWC timely responded on January 6, 2000, with an appendix filed on January 7. The SJ Industrials filed their reply and supplemental reply on January 11 and MAWC responded to those replies on January 13. On January 10, 2000, the SJ Industrials filed their Second Motion to Compel. MAWC responded on January 20, 2000. The issues presented in the Second Motion to Compel were closely related to those raised by the SJ Industrials' First Motion to Compel and the Commission determined both motions in its Order Concerning Motions to Compel, issued on February 2, 2000. In the meantime, Staff filed a motion to compel on January 21, 2000, to which MAWC responded on January 31.

On December 14, 1999, a prehearing conference was held. Thereafter, on December 23, 1999, Staff filed its proposed procedural schedule and motion for additional hearing dates. On December 27, the Commission by order adopted the proposed procedural schedule and granted Staff's motion for additional hearing dates.

On February 10, 2000, the SJ Industrials filed their Application for Rehearing as to the Test Year, the True-up and the AAO, as well as their Application for Rehearing as to the Motions to Compel. Also on February 10, MAWC filed its Motion for Reconsideration as to the AAO. On February 18, 2000, the SJ Industrials responded in opposition to MAWC's motion; MAWC replied on February 28, 2000. Public Counsel responded in opposition to MAWC's motion on March 15; MAWC replied on March 23. On March 3, 2000, the Commission issued its Order Denying Rehearing and Concerning Accounting Authority Order. This order denied the two applications for rehearing filed by the SJ Industrials and stated that the Commission would hold a hearing on MAWC's motion for reconsideration.

In the meantime, on February 23, 2000, MAWC, together with Staff and the Public Counsel, filed a Non-unanimous Stipulation and Agreement (NUSA). This document was an attempt by MAWC to achieve by agreement what it had thus far failed to secure through an AAO, namely, capitalization of post-in-service AFUDC and deferral of depreciation expense on the new St. Joseph water treatment plant.<sup>5</sup> On February 23, the City of St. Joseph filed a letter stating that it was not opposed to the NUSA, as did the St. Joseph Area PWSD Intervenors.

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<sup>5</sup> The precise mechanism contained in the NUSA, as well as its other details, are unimportant in view of its eventual fate. The NUSA provided in part for a mechanism of "deferred revenues" during the lag period between the in-service date of MAWC's new St. Joseph plant and the effective date of MAWC's new rates, which may include the new plant in rate base, presumably September 14, 2000. MAWC also agreed to withdraw its proposed tariffs, the filing of which initiated this case; to merge with its subsidiary, St. Louis County Water Company; and to initiate a new rate case no later than May 31, 2000.

On February 24, the stipulating parties (MAWC, Staff and Public Counsel) filed a Motion to Modify the Procedural Schedule in order to permit the case to be quickly disposed of pursuant to the NUSA. The Commission issued its Notice and Order Regarding the Filing of the Non-unanimous Stipulation and Agreement on February 25. On the 28<sup>th</sup>, the Public Counsel moved to compel discovery and requested an extension of time to file testimony and expedited consideration. On March 1, 2000, a group of fourteen intervenors<sup>6</sup> jointly filed an objection to the NUSA and a request for hearing on "all issues in the case." On the same day, the stipulating parties filed testimony in support of the NUSA. On March 3, MAWC filed its Response to Public Counsel's Motion to Compel, Request for Extension of Time to File Testimony, and Request for Expedited Consideration. As previously noted, the Commission on this date issued its order denying the SJ Industrials' applications for rehearing and stating that a hearing would be held on MAWC's motion for reconsideration with respect to the AAO. This hearing, the order stated, would be held in conjunction with the hearing on the NUSA mandated by Rule 4 CSR 240-2.115.

On March 7, the SJ Industrials applied for rehearing of the March 3 order and responded in partial opposition to the stipulating parties' motion to modify the procedural schedule. The stipulating parties, in turn, replied in opposition to the SJ Industrials on March 13. On March 15, the Commission extended the due date for direct testimony by all parties except MAWC, which had already filed its direct testimony in November. Also on March 15, Public Counsel filed suggestions in opposition to MAWC's motion for reconsideration as to the AAO. On March 22, Public Counsel moved to suspend the procedural schedule and for expedited treatment.

On March 23, 2000, the Commission issued its Order Concerning Non-unanimous Stipulation & Agreement, Denying Motion to Modify Procedural Schedule, Granting Reconsideration as to AAO, and Denying Motion to Compel. By its Order of March 23, the Commission determined that the case could not be disposed on the basis of the NUSA: "[t]his procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission." State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 43 (Mo. App., W.D. 1982), *cert. den.*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). As the NUSA was a dead issue, so was the joint motion to modify the procedural schedule. The Commission revisited the AAO issue, and pointed out that MAWC did not need Commission authorization under the Uniform System of Accounts (USOA), adopted by Commission rule and mandatory for regulated utilities, to defer depreciation and to capitalize post-in-service AFUDC on the new St. Joseph plant. Finally, the Commission denied Public Counsel's motion to compel as moot.

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<sup>6</sup> AG Processing, Inc., a Cooperative, Friskies Petcare, a Division of Nestle USA, Wire Rope Corporation of America, Inc., St. Charles County, the cities of St. Peters, Warrensburg, O'Fallon, Weldon Spring, and Joplin, Hawker Energy Products, Inc., Harmon Industries, Inc., Stahl Specialty Company, Swisher Mower and Machine Company, and Central Missouri State University.

On March 31, 2000, Public Counsel filed its Second Motion to Compel and Request for Expedited Consideration. On the same day, a Joint Motion to Modify the Procedural Schedule was filed; the Commission granted this motion on April 4, 2000. A week-long prehearing conference began on April 3, 2000. Also on April 3, the parties other than MAWC filed direct testimony on all issues except rate design; additional testimony was filed on April 6, 7 and 14. On April 4, Public Counsel moved for an order scheduling LPHs and for expedited consideration. Also on April 4, the Commission shortened the time to respond to Public Counsel's second motion to compel; MAWC responded on April 6 and the Commission dismissed Public Counsel's motion as abandoned on April 11, 2000.

On April 7 and again on April 10, several intervenors filed suggestions in support of Public Counsel's motion for an order scheduling LPHs, as well as a motion to add an additional LPH in the St. Charles District. Public Counsel filed suggestions supporting the motion for an additional LPH on April 10. MAWC responded on April 12 and, on April 17, the Commission issued its order scheduling LPHs, including an additional LPH in the St. Charles District. Staff moved on April 11 to amend the procedural schedule; the Commission granted the motion on April 12. On April 13, Staff moved to establish a procedural schedule for the true-up hearing. The Commission adopted a procedural schedule for the true-up hearing on May 1, 2000.

On May 4, 2000, MAWC formally notified the Commission of its withdrawal from the NUSA. Also on May 4, all parties filed rebuttal testimony. LPHs were held at Mexico on May 10, at St. Charles on May 11, at Joplin on May 18, and at Warrensburg and St. Joseph on May 31. The LPHs were all well-attended. On May 25, the parties submitted a list of issues, a list of witnesses, and the agreed order of cross-examination. Also on May 25, the parties filed surrebuttal testimony. On May 30, the parties filed position statements as required by the procedural schedule.

On June 2, 2000, MAWC filed its Motion to Strike Testimony and for Summary Judgment. Public Counsel and the SJ Industrials responded in opposition on June 5. The motion was necessarily taken with the case. True-up testimony, and Staff's true-up accounting schedules, were filed on June 15. Conformed replacement pages were late-filed as Exhibit 109 on July 5.

The Commission held an evidentiary hearing on June 5 through 9, June 15 and 16, and on June 26 through 29. The true-up hearing was held on June 26. All parties were represented at the evidentiary hearing and the true-up hearing.

MAWC filed a Joint Recommendation regarding undisputed issues on July 3. Late-filed Exhibit 120 was filed on July 3. After an extension granted on July 21, briefs were filed on July 24. Reply briefs were filed on August 2. By an order directing filing issued on July 31, the Commission permitted proposed findings of fact and conclusions of law to be filed on or before August 11. Staff filed its proposed findings of fact and conclusions of law on August 11; the SJ Industrials late-filed their proposed findings of fact and conclusions of law on August 14, with a correction on August 16. Also, on August 16, the Municipal Intervenors adopted the proposed findings of fact and conclusions of law filed by the St. Joseph Industrials.

On August 8, the Commission requested as a late-filed exhibit from each party or group of parties, an annotated summary of the financial impact of its position,

including revenue requirement, rate design, and impact on an average ratepayer of each customer class. The requested exhibits were filed by Staff, MAWC and the St. Joseph Area PWSD Intervenors on August 15, by Joplin on August 16, and by Public Counsel on August 21. As Staff's late-filed exhibit was deficient, the Commission requested corrections by order issued on August 17; Staff filed its corrected exhibit on August 22. Also on August 22, the City of St. Joseph concurred in the late-filed exhibit submitted by the St. Joseph Area PWSD Intervenors.

On August 17, 2000, the St. Joseph Industrials filed objections to the Commission's receipt of the annotated late-filed exhibits requested on August 8. The same day, the Staff filed an objection to MAWC's annotated late-filed exhibit. MAWC responded to Staff's objection on August 23.

On August 22, 2000, the Commission issued its Order Directing Scenarios. Staff filed its response on August 24. Also on that day, the Commission issued its Second Order Directing Scenarios. On August 24, the SJ Industrials and Joplin filed objections to the Public Counsel's late-filed exhibit and, on August 25, to Staff's corrected late-filed exhibit.<sup>7</sup>

Also on August 25, 2000, the SJ Industrials and the Cities of Joplin and Riverside filed their Applications for Rehearing with respect to both the Commission's Order Directing Filing of August 17, which directed Staff to revise its late-filed exhibit, and the Commission's Order Directing Scenarios of August 23. On the same day, the St. Joseph Area PWSD Intervenors filed their "Response and/or Objections" to Staff's revised late-filed exhibit. Finally, on August 28, 2000, the Cities of Joplin and Riverside and the SJ Industrials filed their Application for Rehearing with respect to the Commission's Second Order Directing Scenarios, issued on August 24.

The Commission sustained the objections of the SJ Industrials and the Cities of Joplin and Riverside to the late-filed exhibits and responses to scenarios, and denied their requests for rehearing as moot, by its order issued on August 31.

**MAWC's Motion to Strike and Motion for Summary Judgment:**

MAWC moved, on June 2, 2000, to strike portions of the testimony of Public Counsel's expert witnesses, Ted L. Bidy<sup>8</sup> and Russell Trippensee,<sup>9</sup> and portions of the testimony of the SJ Industrials' expert witnesses, Ernest Harwig<sup>10</sup> and Charles D. Morris.<sup>11</sup> The testimony in question relates either to the issue of the prudence of MAWC's decision to build the new St. Joseph Water Treatment Plant and related facilities or to the issue of whether the plant was overbuilt. Unsurprisingly, the testimony in question is adverse to MAWC.

MAWC offers four theories to support its motion to strike. First, that the Commission has already determined these issues in Case No. WA-97-46.

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<sup>7</sup> Presumably because Public Counsel's late-filed exhibit was submitted after the objecting parties had filed their first objections.

<sup>8</sup> Direct, p. 4, line 15, through p. 26, line 12; Surrebuttal, p. 1, line 11, through p. 25, line 21.

<sup>9</sup> Direct, p. 15, line 1, through p. 19, line 10.

<sup>10</sup> Direct, p. 2, line 1, through p. 4, line 18.

<sup>11</sup> Direct, p. 5, line 17, through p. 24, line 13; Surrebuttal, p. 2, line 1, through p. 12, line 9.

Second, that the parties sponsoring the testimony in question are equitably estopped from taking positions contrary to those they espoused in Case No. WA-97-46. Third, that the Commission is equitably estopped from redetermining these issues. Fourth, that consideration of the prudence of MAWC's decision to build a new treatment plant and other facilities in St. Joseph is impermissible as a collateral attack on the Commission's decision in Case No. WA-97-46. MAWC's motion must fail on each of these theories.

Three of MAWC's theories turn on the scope of the Commission's decision in Case No. WA-97-46. In its Report and Order in that case, the Commission determined that building a new water treatment plant and related facilities in St. Joseph was a reasonable alternative. Therefore, Commission granted MAWC a certificate of public convenience and necessity, permitting it to go forward with the project. However, the Commission expressly reserved consideration of the prudence of MAWC's decision to go forward with a new plant for a later rate case:

That nothing in this Report and Order shall be considered a finding by the Commission of the prudence of either the proposed construction project or financial transaction, or the value of this transaction for ratemaking purposes, and the Commission reserves the right to consider the ratemaking treatment to be afforded the proposed construction project and financial transaction and their results in cost of capital in any future proceeding.

In the Matter of the Application of Missouri-American Water Company, Case Nos. WA-97-46 and WF-97-241 (Report & Order, issued October 9, 1997), Ordered Paragraph No. 5. The present case is that later rate case.

More importantly, the Commission expressly refused in Case No. WA-97-46 to pre-approve the new St. Joseph plant as MAWC had requested. Consequently, the testimony in question is not subject to being stricken as going to an already-decided issue: the issue has never been decided. Likewise, since those issues were not determined in Case No. WA-97-46, determination of them in this case is not prohibited by Section 386.550, RSMo 1994, as a collateral attack. Finally, for the same reason, the Commission is not equitably estopped from weighing the prudence of MAWC's decision in this case. There has been no detrimental reliance by MAWC on a position later repudiated by the Commission because the Commission had not yet determined that the decision was prudent.

MAWC's remaining ground for striking the subject testimony also relies on the theory of equitable estoppel: MAWC contends that Public Counsel and the SJ Industrials should be estopped from advocating positions in the present case contrary to those they took in Case No. WA-97-46. This argument fails for a number of reasons. First, the Commission is an administrative tribunal, not a court, and cannot do equity. See Soars v. Soars-Lovelace, Inc., 142 S.W.2d 866, 871 (Mo. 1940). Second, the law requires that the Commission consider all relevant factors in setting rates. See State ex rel. Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998); State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704, 719 (Mo. 1957). Sec-

tion 393.270.4, RSMo 1994, which defines the Commission's duties as to ratemaking, states:

In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable rate of return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

This 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." 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). Those powers include the duty to consider all relevant factors when setting just and reasonable rates.

In Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954, 959 (Mo. 1936), the Court stated that:

the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the state to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates.

Likewise, estoppel cannot operate to render the police power of the state powerless to protect the general public. "[T]he authority of the Commission is referable to the police power of the State which power may never be abridged." St. ex rel. Public Service Commission v. Blair, 347 Mo. 220, 228, 146 S.W.2d 865, 868 (banc 1941).

In a similar case, a water company asserted that the Commission was equitably estopped from finding its water storage contract to be imprudent because, among other things, the Commission had approved the contract prior to its execution. St. ex rel. Capital City Water Company v. Public Service Commission, 850 S.W.2d 903, 909 (Mo. App., W.D. 1993). The court held, "equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy." *Id.*, at 910. Equitable estoppel only applies against the government where "the governmental action on which the claim is based constitutes affirmative misconduct." *Id.* MAWC has neither alleged nor shown affirmative misconduct here. See Lynn v. Director of Revenue, 689 S.W.2d 45, 49 (Mo. banc 1985); Coalition to Preserve Education v. Kansas City School District, 649 S.W.2d 533, 539 (Mo. App., W.D. 1983).

Likewise, the Missouri Court of Appeals has recently held that equitable estoppel will not lie to prevent the Commission from setting and regulating utility rates:

Equitable estoppel may run against the state, but only where there are exceptional circumstances and a manifest injustice will result. Equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy, and is limited to those situations where public rights have to yield when private parties have greater equitable rights. The setting and regulation of utility rates by the PSC is a duty of state government.

Missouri Gas Energy v. Public Service Commission, 978 S.W.2d 434, 439 (Mo. App., W.D. 1998) (citations omitted).

Because the testimony which MAWC sought to strike is not, in fact, subject to being stricken for the reasons asserted by MAWC, the motion to strike must be denied. Likewise, MAWC's motion for summary judgment on the issue of prudence, which depended upon the motion to strike, is also denied.

#### **Discussion**

Pursuant to the Commission's Order Adopting Procedural Schedule, the parties jointly developed a list of contested issues to be resolved by the Commission and filed position statements in which each party set out its position with respect to each of these issues:

**1. St. Joseph Treatment Plant and Related Facilities Valuation:**

**What valuation should be included in rate base for the water treatment plant and related facilities necessary to provide water for the St. Joseph District?**

**2. St. Joseph Treatment Plant and Related Facilities Capacity:**

**What is the appropriate capacity for St. Joseph Treatment Plant and Related Facilities that should be included in rate base?**

**3. AFUDC Capitalization Rate:**

**Should MAWC's rate base be adjusted to reflect a different capitalization rate for AFUDC?**

**4. Accounting Authority Order (AAO):**

**Should MAWC be allowed to include in the cost of service, through rate base and expense adjustments, amounts related to post-in-service AFUDC and deferred depreciation**

**expense for the period from the in-service date of the new St. Joseph water treatment plant to the operation of law date in this case?**

**5. Premature Retirement:**

**Shall the net plant investment associated with the existing St. Joseph water treatment plant facilities that are no longer providing service to St. Joseph customers be included in MAWC's rate base and amortized to expense?**

**6. Deferred Income Taxes:**

**Should MAWC's rate base be adjusted to reflect the amount of deferred taxes existing on the books of Missouri Cities Water Company prior to its acquisition by MAWC? If so, what is the appropriate adjustment?**

**7. Return on Equity:**

**What return on equity is appropriate for MAWC?**

**8. Rate Design:**

**a. Single Tariff Pricing, District Specific Pricing or Compromise:**

**Shall MAWC's rates be designed consistent with a single-tariff rate design, district-specific rate design, or some other methodology?**

**b. Phase-In:**

**Should MAWC's rate increase be phased in over a number of years? If so, what is the appropriate phase-in amount, and what is the appropriate phase-in period?**

**c. Allocation of Corporate District Expense:**

**What is the proper allocation of MAWC's corporate district investment and expense?**

**d. Allocation of Cost/Revenue Among Classes:**

**On what basis shall the portion of revenues to be borne by MAWC's various customer rate classes be determined?**

There were also certain uncontested issues:

**a. Sewer Rates:**

Increase proposed of \$2,363.00.

**b. Depreciation:**

MAWC agrees to perform study prior to filing next rate case; to provide actuarial retirement histories to Staff in Gannett-Fleming format; to provide at least 15 years of cost of removal and gross salvage date.

**c. Collection and Provision of Billing Information:**

MAWC and Staff agree to cooperate in collecting and sharing billing information to be used for weather normalization.

**d. Change to Monthly Billing in St. Joseph District:**

The Commission will order MAWC to change to monthly meter reading and billing in its St. Joseph District.

**e. Pension and Other Post-Retirement Employee Benefits:**

MAWC agrees to make adjustments in determining revenue requirement, in future rate cases, using the methodology proposed by Staff, for pension and other post-retirement employee benefits expenses, which amortize unrealized gains and losses.

**f. Capital Structure:**

MAWC, Staff and Public Counsel have agreed to use the capital structure and embedded cost of preferred stock and long-term debt as of April 30, 2000, as described by Roberta McKiddy in her True-up Direct Testimony, Ex. 110.

**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:**

MAWC is a public utility engaged in providing water service and sewer service to the public in the State of Missouri, subject to the jurisdiction of the Commission.

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.]" Section 386.071, RSMo 1994.<sup>12</sup>

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]" Sections 386.700 and 386.710.

<sup>12</sup> Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 1994.

Some of the remaining parties are political subdivisions located within MAWC's service areas and whose residents, in part or in whole, receive water service from MAWC.<sup>13</sup> Others are political subdivisions which purchase water from MAWC for resale to their residents.<sup>14</sup> Still others are industrial, commercial or institutional water customers of MAWC.<sup>15</sup> One is a competitor of MAWC.<sup>16</sup> Three others are industrial customers of a sister corporation of MAWC.<sup>17</sup> The final party is an association of trade unions.<sup>18</sup>

**The Company:**

MAWC provides public water service to 94,962 customers in seven, noncontiguous districts in Missouri, and public sewer service to 101 customers in one district.<sup>19</sup> MAWC acquired all of these districts, except Joplin and St. Joseph, by its purchase on August 31, 1993, of Missouri Cities Water Company and subsequent merger. MAWC paid \$15.9 million for the common stock of MCWC. MAWC's water customers are organized into six classes on the basis of the use made of the water and the nature of the customer, as follows:

**Number of Customers in Each Class in Each District:**

<b>District</b>	<b>Residential</b>	<b>Commercial</b>	<b>Industrial</b>	<b>O.P.A.<sup>20</sup></b>	<b>Resale</b>	<b>Pvt. Fire</b>
Brunswick	398	73	3	6	1	5
Joplin	18,502	3,085	60	135	8	268
Mexico	4,321	479	13	99	2	63
Parkville	4,043	303	11	45	3	60
St. Charles	25,002	807	2	59	0	101
St. Joseph	27,237	3,188	107	191	11	334
Warrensburg	5,207	587	14	127	2	60
TOTAL:	84,710	8,522	210	662	27	891

Additionally, MAWC treats its corporate headquarters as a separate district and attributes certain assets, income and expenses to it.

Pursuant to the rates approved by this Commission, effective November 14, 1997, MAWC realized revenue from its public water service and public sewer service operations, and incurred operational expenses, on an annual basis as follows:<sup>21</sup>

<sup>13</sup> The cities of Joplin, Mexico, O'Fallon, Riverside, St. Joseph, St. Peters, Warrensburg, and Weldon Spring, and St. Charles County.

<sup>14</sup> The St. Joseph Area PWSD Intervenors, including PWSD Nos. 1 and 2 of Andrew County, PWSD No. 1 of DeKalb County, and PWSD No. 1 of Buchanan County

<sup>15</sup> AGP, Central Missouri State University, Friskies, Harmon Industries, Hawker Energy, Stahl Specialty, Swisher Mower & Machine, and Wire Rope.

<sup>16</sup> PWSD No. 1 of St. Charles County.

<sup>17</sup> MIEC, comprised of Boeing, Ford Motor Co., and Hussman Refrigeration, customers of St. Louis County Water Company.

<sup>18</sup> St. Joseph Building & Construction Trades Council.

<sup>19</sup> The single sewer district is Parkville.

<sup>20</sup> "O.P.A." stands for "other public authority."

<sup>21</sup> For the twelve months ended September 30, 1999 (the "test year"), adjusted for known and measurable changes through December 30, 1999, and trued-up with respect to certain quantities as of April 30, 2000.

**Assets, Income and Expenses by District:**

District <sup>22</sup>	Assets (Dollars)	Income (Dollars)	Expense <sup>23</sup> (Dollars)	Net Income (Dollars)	Net Income (% of Assets)
Brunswick	805,489	112,039	227,994	-115,955	-14.3956
Joplin	19,491,941	7,491,426	5,391,985	2,099,441	10.7708
Mexico	11,306,701	1,557,551	1,423,061	134,490	1.1894
Parkville					
Water	8,231,735	1,514,285	1,498,226	16,059	0.1951
St. Charles	24,297,209	7,941,428	6,072,223	1,869,205	7.6931
St. Joseph	84,259,978	9,989,687	8,095,364	1,894,323	2.2481
Warrensburg	8,774,520	1,867,376	1,428,373	439,003	5.0031
TOTAL					
WATER:	157,167,573	30,473,792	24,137,226	6,336,566	4.0317
Parkville Sewer <sup>24</sup>	39,691	47,196	90,381	-43,185	-109.0778
TOTAL					
COMPANY:	157,207,264	30,520,988	24,227,607	6,293,381	4.0032

Although MAWC earned sufficient annual revenue, based on the test year, to meet its obligations and to realize a net profit on its Missouri operations, its actual effective rate of return on its assets dedicated to public service was only 4.0032 percent. On October 15, 1999, therefore, MAWC filed its proposed tariff sheets seeking an additional \$16,446,277 in water service revenue, an increase of 53.97 percent, and an additional \$2,363 in sewer service revenue, an increase of 5.0 percent, which would yield a rate of return of approximately 11.0 percent.<sup>25</sup> In support of its request for a rate increase, MAWC pointed out that it had invested approximately \$96,000,000 in additional water service assets, including about \$74,684,000 for a new water treatment plant, pipeline and well field in St. Joseph; \$4,500,000 for a hydrogen sulfide removal plant in Warrensburg; and \$5,050,000 for plant improvements in Mexico.<sup>26</sup> MAWC further stated:

Missouri-American must have income to sufficiently and properly provide for all expenses of an efficient public utility, to market its securities, to attract replacement capital for maturing debt and to attract new capital, all at reasonable costs. The

<sup>22</sup> The corporate district is not shown because its assets, income and expenses are here allocated to the operating districts and included in their figures.

<sup>23</sup> Including operating expenses, other operating expenses, and income taxes.

<sup>24</sup> In considering the Parkville Sewer figures, it is important to note that the system was operated at a loss of only \$6,239 before income taxes and that most of the negative Net Operating Income figure results from a deduction of \$41,351 in deferred income taxes.

<sup>25</sup> Calculated as follows: \$6,293,381 plus 66% of the increase (a "gross down" for income taxes; \$16,446,277 + \$2,363 = \$16,448,640 x 0.66 = \$10,856,102) equals \$17,149,483, which is 10.909 percent of \$157,207,264.

<sup>26</sup> The cited improvements amount only to \$84,234,000.

rates presently charged by the Company are insufficient to meet its requirements, because they no longer are compensatory and are therefore unfair, unreasonable and unjust.

*Statement of Reason for Rate Increase*, filed on October 15, 1999.

**Capital Structure and Return on Equity:**

Historically, MAWC's dividend-payout ratio has varied from a high of 94.31 percent in 1994 to a low of 69.97 percent in 1998. MAWC's dividend-payout ratio has averaged 75.00 percent over the last two years. MAWC's return on year-end common equity steadily increased from 7.95 percent in 1994 to 11.18 percent in 1996, with a decline to 9.40 percent by 1998. MAWC's 1998 return on year-end common equity of 9.40 percent was below the average of 10.40 percent earned by other water utilities according to The Value Line Investment Survey: Ratings & Reports, February 4, 2000. Value Line also estimates that the water utility industry will earn 11.00 percent return on equity for both 1999 and 2000.

MAWC's pre-tax interest coverage ratio for 1998 was 2.21 times, which is below the industry average of 3.12 times as reported by Edward Jones & Company's Financial & Common Stock Information – Water Utility Industry, June 30, 1999.

As of April 30, 2000, MAWC's capital structure was as follows:

Common stock equity:	\$ 62,693,188	42.27 percent
Preferred Stock:	2,702,806	01.69 percent
Short-term Debt:	0	0 percent
Long-term Debt:	<u>89,765,483</u>	<u>56.05 percent</u>
	\$160,161,477	100.00 percent

The embedded cost of preferred stock on that date was 9.09 percent. The embedded cost of long-term debt was 6.77 percent. Because MAWC's common stock is not publicly traded, its cost of common equity cannot be determined using standard methods. However, the common stock of MAWC's parent, American Water Works Company (AWWC), is publicly traded. Staff expert Roberta McKiddy testified that she used the Discounted Cash Flow (DCF) method to determine AWWC's cost of common equity, and then applied that value to its wholly owned subsidiary, MAWC. This attribution was reasonable, Ms. McKiddy testified, because AWWC and MAWC are in the same line of business and have comparable capital structures. McKiddy testified, and the Commission finds, that MAWC and AWWC have a similar level of risk. Ms. McKiddy's calculation resulted in a range of figures, from 9.5 percent to 10.75 percent. The result is expressed as a range, rather than as a single value, because the growth rate variable used by Ms. McKiddy was a range rather than a single value.

As a check on the cost of equity determined by the method above, Ms. McKiddy performed a risk premium cost of equity analysis for AWWC. The result was a range between 10.70 percent and 10.94 percent. Ms. McKiddy also performed a capital asset pricing model analysis for AWWC, and produced a range between 9.30 percent and 9.82 percent.

Ms. McKiddy testified that the return on equity range that she proposes for MAWC, 9.50 percent to 10.75 percent, yields a pre-tax interest coverage ratio range

of 2.79 times to 3.02 times. This range is in line with Standard & Poor's "A" rating and "Average" business position water utilities benchmark of 2.95 times. Ms. McKiddy further testified that the low end of her suggested range permits MAWC to meet its Net Earnings Requirement of one and one-half times the annual interest requirements pursuant to provisions of its Supplemental Indenture.

**Deferred Income Taxes:**

In 1993, MAWC purchased Missouri Cities Water Company (MCWC) from its parent, Avatar. The Commission approved the acquisition in Case No. WM-93-255. MCWC had an amount on its books for deferred income taxes, which amount remained with Avatar and was not acquired by MAWC. The effect for ratepayers was an increase in rate base, and thus in rates. Staff has proposed to reduce rate base by \$712,191 to reflect these deferred income taxes.

**The New St. Joseph Water Treatment Plant and Related Facilities:**

On November 6, 1997, when the Commission issued its Report and Order concluding MAWC's last rate case, the new treatment plant and related facilities in St. Joseph were planned, but work had not yet started. In the Matter of Missouri-American Water Company's Tariffs Designed to Increase Rates for Water Service Provided to Customers in the Missouri Service Area of the Company, Case Nos. WR-97-237, SR-97-238, WO-97-249 (*Report & Order*, issued November 6, 1997), at page 9. The cost of the planned project was estimated at about \$76,000,000.<sup>27</sup> *Id.*, at page 10.

An important factor in MAWC's decision to build the new St. Joseph Water Treatment Plant and related facilities was the flood of the Missouri River in the summer of 1993. That flood was unprecedented in size; it surpassed the previous record high water level at St. Joseph, set in 1881, by 5.5 feet. The flood caused MAWC's existing water treatment plant in St. Joseph to cease operation for four days. Water initially entered the plant in 1993 from the landward side, where a ballasted railroad embankment prevented MAWC from erecting a levee. For some days before the plant flooded, the high water conditions prevented normal entry and egress of the plant and chemicals and personnel had to be delivered to the plant by boat. MAWC considered this practice to be unduly hazardous to its employees. This problem also seriously impaired MAWC's ability to flood-proof the old plant. In 1989, an unusually low river level had also caused the old St. Joseph plant to cease operations for some days.

MAWC's existing water treatment plant in St. Joseph was located in the flood plain, four miles north of the city, directly adjacent to the river. It drew its water supply from the river and was, consequently, subject to interference by both high water and low water river conditions. Some parts of the structure were over 100 years old.<sup>28</sup> A riverine water source poses public health concerns not encountered with well water. Additional processing is necessary to remove dangerous organisms and agricultural chemical runoff from the water.

The old plant included two raw water intakes, raw and finished water pumping equipment, pre-sedimentation clarifiers, flocculation and sedimentation basins,

<sup>27</sup> Specifically, \$74,684,000.

<sup>28</sup> Construction began on the old plant in 1881.

filtration, chemical feed systems, and finished water storage. Its rated capacity was 21 million gallons daily, although this capacity was historically exceeded from time to time. Its site was selected because of convenient access to the river, to the railroad, and to adjacent 300 foot high bluffs where finished water was stored in a reservoir. Gravity fed water from the reservoir to the city distribution system. Coal-fired steam boilers originally provided power for drawing water from the river and pumping it up to the reservoir; they were eventually replaced with electric pumps in 1963.

The old plant was modified and renovated numerous times after 1881. Sedimentation basins and rapid sand filters were added. Chemical and flocculation facilities were added. Numerous modifications were made to the raw water intakes. However, many additional renovations and improvements were needed by 1996. Filter and pump equipment were outdated and close to the end of their useful lives; filter capacity was deficient. Chlorine handling was unsatisfactory and potentially very dangerous, due to inadequacies in the chemical facilities. The extreme turbidity of the river water, and the large amount of sediment dissolved in it, required numerous additional treatment steps, some of which were difficult given the design of the plant. The water quality laboratory facilities were inadequate and were a fire hazard. The old plant returned to the river the impurities and toxins removed during the treatment process. Increasingly stringent federal standards were expected to require the construction and operation of a waste treatment facility to treat this effluent in the near future. Likewise, increasingly stringent processing to remove biological toxins was also likely to be required. It was not clear whether the road to the plant could be improved or replaced. Finally, the river water presented ongoing aesthetic problems that proved difficult to resolve. Some of these conditions could not be remedied at the existing plant location.

While MAWC planned to renovate and upgrade its existing St. Joseph plant prior to 1993, it changed its plan in the light of the flood and determined to build a new plant, with a new supply source, above the limit of the flood. At the height of the flood in August 1993, the design work on a renovation of the old plant was about 30 percent complete. At about that time, in May 1993, the construction costs alone of the proposed renovation project were estimated at \$26,630,000 (in 1993 dollars). This estimate did not include AFUDC, engineering costs, other project management costs, or subsequent improvements. A revised total project cost estimate, prepared in June 1993 and based upon the May 1993 construction cost estimate, amounted to \$44,100,000 (in 1993 dollars). This figure did not include an intake, low service pumps, a third pre-sedimentation clarifier, ozonation, flood protection, switchgear for the distributive pumps, or replacement of the distributive pumps.

In late 1995, when MAWC determined that the cost of necessary improvements to the old plant almost equaled the cost of a new one, MAWC decided to pursue the new plant and new water supply source option.<sup>29</sup> This option was selected by

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<sup>29</sup> MAWC's 1996 Feasibility Study compared the estimated cost of renovation of the old plant, at \$63,300,000, to the estimated cost of the new plant (without AFUDC) at \$63,700,000 (1995 dollars).

MAWC from among four options: (1) improvements to the existing surface water plant; (2) new surface water plant; (3) new ground water plant; and (4) interconnection with Kansas City. These four options were first proposed in December 1994, following the 1993 flood, in a planning study. In 1996, a detailed feasibility study was produced to formally present the various factors considered by MAWC in evaluating the economic aspects of each of the four options.

In addition to the serious limitations and problems of the old plant itself, ground water is superior to river water as a source of public drinking water for a number of reasons. Its characteristics, such as temperature, hardness, mineral content, organic content, and turbidity are much more consistent. Rapid changes do not occur and such changes as do occur happen slowly. River water, on the other hand, is subject to drastic, rapid changes with respect to these characteristics. Dangerous organisms, such as chlorine-resistant *cryptosporidium* and *lamblia giardia*, are more common in river water than in ground water.

MAWC's new St. Joseph water treatment plant and its related facilities—well field and pipeline—were constructed for a total project cost of \$70,097,840, which is several million dollars less than the estimated cost of the project. The new plant is located above the flood plain. It draws its water supply from an alluvial well field. These wells, while close enough to the Missouri River that they are recharged by it, are located more than 200 feet away from it and, consequently, are free from certain public health dangers posed by river water.<sup>30</sup> The new plant is largely automated and is designed to operate with a minimum number of employees present. This feature is possible only with raw water of consistent characteristics, that is, ground water.

The new plant has a firm capacity of 30 million gallons of water daily, of which 28.5 million gallons are available for distribution; the remaining 1.5 million gallons are used by the plant for its internal purposes. "Firm capacity" means that the plant can operate at the rated capacity even with the largest unit of any major component out of service. With every component in service at operating at rated capacity, the plant's daily capacity is 36,288,000 gallons daily. However, for the first year of operation, the Missouri Department of Natural Resources (DNR) has imposed a limitation on the plant so that it will operate at a firm capacity of only 21,600,000 gallons daily; 25,920,000 if all components are on-line.<sup>31</sup>

Peak day demand in St. Joseph has consistently been 23.0 million gallons daily for some years; average daily demand in 1999 was 16.0 million gallons. In 1991, with about 3,000 fewer customers, MAWC pumped 25.6 million gallons per day in St. Joseph. MAWC projects maximum day demand for the St. Joseph district in 2009 to be 27.7 million gallons daily. MAWC used 2009 as the design year for the new plant. The Design Guide for Community Public Water Supplies of the

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<sup>30</sup> Much attention was paid at hearing to the question of whether or not the water from the new well field is to be classified as "ground water under the influence of surface water." It is clear from the licensing documents for the new facilities that the water is not to be so classified.

<sup>31</sup> These calculations have to do with the plant's filters. There are six filters, each with a surface area of 750 feet. They are rated at 5.6 gallons per minute per foot; however, DNR will not permit operation at more than 4.0 gallons per minute per foot for the first year.

Missouri Department of Natural Resources (DNR), at section 2.1, states that “[t]he system shall be designed for maximum day demand at the design year.”

The peak day demand of 23.0 million gallons daily that the plant is presently producing could have been met with only five vertical wells at the well field, rather than seven; two clarifiers rather than three; and three 300-horsepower distributive pumps rather than two 300-horsepower pumps and two 200-horsepower pumps which MAWC actually installed. The clearwell could have been constructed as two 750,000 gallon units rather than as two 1,000,000 gallon units. The aggregate capital cost represented by these unnecessary items is \$2,271,756.

During the construction in St. Joseph, beginning on November 14, 1997, and continuing until April 30, 2000, MAWC capitalized AFUDC with respect to the new plant using the rate of return authorized in its most recent rate case, Case No. WR-97-237. MAWC typically uses short-term debt to finance construction projects. On December 31, 1999, MAWC had approximately \$35 million outstanding in short-term debt. The adjustment of MAWC’s pre-in-service AFUDC to reflect the carrying charges of its short-term debt would mean a reduction of rate base of \$1,289,674.

The St. Joseph project entered service on April 30, 1999, approximately four and one-half months prior to the earliest date on which the new construction could be included in rate base. Under the Uniform System of Accounts (USOA), made mandatory by Commission Rule 4 CSR 240-50.030(1), MAWC was required to start depreciating the new St. Joseph facilities, and to stop capitalizing the associated carrying costs, as of the in-service date. These expense items, depreciation and carrying costs, amount to an aggregate of \$319,000 monthly, and \$1.6 million over the four and one-half month period. If these deferred items were entirely disallowed by the Commission, MAWC’s return on equity for 12-month periods ending on the last day of April, May, June, July, August, and September, 2000, would fluctuate between 9.14 percent and 13.71 percent. For the same periods, MAWC’s interest coverage ratios would fluctuate between 3.33 times to 2.72 times.

On the day that the old St. Joseph plant was taken out of service, its value was \$2,832,906. Its original book value was \$6,885,094 and accumulated depreciation by April 1, 2000, equaled \$4,052,188. MAWC estimated that it would cost about \$500,000 to retire the old St. Joseph plant. Mr. Young testified in June 2000 that the old plant had been demolished.

**Other New Construction:**

In addition to the new facilities in St. Joseph, MAWC also made capital investments and built new, or improved old, facilities in Warrensburg, Mexico, Joplin, and Parkville.

In Warrensburg, MAWC added ozonation and phosphate sequestration processes to its treatment plant in order to address aesthetic concerns; the cost was \$3,950,000. These concerns centered on hydrogen sulfide odors and scaling. MAWC also added an additional well with necessary equipment and facilities. Hydrological studies and several test wells were necessary as part of this project to ensure acceptable water quality. The cost was \$950,000, for a total Warrensburg cost of \$4,900,000.

In Mexico, MAWC refurbished its existing plant and increased its capacity from 3.0 million gallons daily to 4.5 million gallons daily. A new lime feed building with

two feeders was installed, together with a new lime storage facility; a new mixing-chamber and flocculator were installed; as well as two new concrete settling basins, a third sand filter, a filter surface wash system, a fourth high service pump, and new controls and monitors. Finally, MAWC also added an additional well and raw water main in Mexico. The cost of the Mexico project was \$5,050,000.

In the Parkville district, MAWC constructed a new water tank and booster station. MAWC also automated the water treatment plant, installed a new chlorine storage and feed system and chlorine scrubber, replaced the lime feeder and slaker, installed an ammonia storage and feed system, upgraded the plant water system, and installed an ion exchange water softener. These new facilities will increase total water supply in that district. The cost of the water tank and booster station was \$2,338,000 and the cost of the plant automation was \$1,828,535, for a total of \$4,166,535.

In Joplin, a dam on Shoal Creek, which creates an impoundment used as a source of supply, was reinforced and refurbished. This project cost \$225,000.

All of these facilities are now in service. Staff engineer Jim Merciel testified that each of these projects was reasonable and necessary. The aggregate cost of these facilities is \$14,341,535.

#### **Conclusions of Law**

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

##### **Jurisdiction:**

The Missouri Public Service Commission has jurisdiction over MAWC's services, activities, and rates pursuant to Section 386.250 and Chapter 393, RSMo.

##### **Burden of Proof:**

Section 393.150.2 provides in part, "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, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

##### **Applicable Statutes and Legal Standards:**

The Missouri Public Service Commission was created by the General Assembly in 1913. State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979). The General Assembly delegated to the Commission the police power to establish utility rates, subject to judicial review of the question of reasonableness. State ex rel. City of Harrisonville v. Public Service Commission of Missouri, 291 Mo. 432, 236 S.W. 852 (1922); City of Fulton v. Public Service Commission, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd* 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; City of St. Louis v. Public Service Commission of Missouri, 276 Mo. 509, 207 S.W. 799 (1919); Kansas City v. Public Service Commission of Missouri, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd* 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348 (1951).

The Commission's purpose is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. *Id.*; May Dep't Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, 48 (1937). While "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), the Commission must also permit the utility to recover a "just and reasonable" return on the assets it has devoted to the public service. Utility Consumers' Council, 585 S.W.2d at 49. "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment." State ex rel. Missouri Public Service Co. v. Fraas, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).

In 1925, the Missouri Supreme Court stated:

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. \* \* \* These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

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

The Public Service Commission has exclusive jurisdiction to establish public utility rates. May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, \_\_\_, 107 S.W.2d 41, 57 (1937). A public utility has no right to fix its own rates and cannot charge or collect rates that have not been established by the Public Service Commission, *Id.*; neither can a public utility change its rates without first seeking authority from the Commission. Deaconess Manor Ass'n v. Public Service Com'n, 994 S.W.2d 602, 610 (Mo. App., W.D. 1999). A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and reasonable. May Department Stores, *supra*, 341 Mo. at \_\_\_, 107 S.W.2d at 50.

Section 393.130, in pertinent part, requires a utility company's charges to be just and reasonable and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine just and reasonable rates. A "just and reasonable" rate is one that is just and reasonable to both the utility and its customers. State ex rel. Valley Sewage Co. v. Public Service Commission, 515 S.W.2d 845 (Mo. App., K.C.D. 1974). A just and reasonable rate is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." State ex rel. Washington University, *supra*.

Section 393.150, in pertinent part, authorizes the Commission to suspend for a period of time any schedule stating new rates, charges, rules, regulations, or practices, and to hold "a hearing concerning the propriety of such rate, charge, . . . rule, regulation or practice." Section 393.270 provides in paragraph 4 that in determining the price to be charged, "the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . ." The courts have held that this statute means that the Commission's determination of the proper rate must be based on consideration of all relevant factors. State ex rel. Missouri Water Co. v. Public Service Comm'n, 308 S.W.2d 704, 719 (Mo. 1957); State ex rel. Midwest Gas Users' Ass'n v. Public Service Commission, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998); State ex rel. Office of Public Counsel v. Public Service Com'n of Missouri, 858 S.W.2d 806 (Mo. App., W.D. 1993). Section 393.230.1 authorizes the Commission to value the property of water and sewer utilities in Missouri.

Finally, Section 393.270 provides:

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2. After a hearing and after such investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of . . . water or sewer service not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement . . . in the distribution or supply of water, in the collection, carriage, treatment and disposal of sewage, or in the methods employed by such persons or corporation as will in its judgment be adequate, just and reasonable.

3. The price fixed by the commission under sections 393.110 to 393.285 shall be the maximum price to be charged by such corporation or person for . . . water for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years, except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation or person interested, fix a higher or lower maximum price of . . . water or sewer service to be thereafter charged.

4. In determining the price to be charged for . . . water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually

expended and to the necessity of making reservations out of income for surplus and contingencies.

5. In determining the price to be charged for sewer service the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies.

**Uncontested Issues:**

MAWC submitted its Joint Recommendation with respect to certain uncontested issues. These include: a rate increase for sewer service amounting to \$2,363.00; the performance by MAWC of a depreciation study prior to its next rate case and its sharing of certain depreciation and weather normalization information with Staff; the change to monthly meter reading and billing in the St. Joseph District; and changes by MAWC with respect to the determination of revenue requirement associated with pensions and other post-retirement employee benefits. No party objected to the Joint Recommendation.

**The New St. Joseph Plant—Valuation:**

Several parties, notably the SJ Industrials and Public Counsel, question the prudence of MAWC's decision to build a new treatment plant in St. Joseph and contend that only the cost of renovating the old plant should be included in rate base. Based on the estimations made by the expert witnesses sponsored by the SJ Industrials and Public Counsel, this would amount to a disallowance of approximately half the cost of the new plant and related facilities, that is, about \$35,000,000.

As a preliminary matter, MAWC contends that this prudence issue has already been litigated and determined by the Commission in MAWC's favor. MAWC is incorrect and evidently misunderstands the Commission decision upon which it relies.

MAWC relies on the Commission's prior decision, In the Matter of Missouri-American Water Company, Case Nos. WA-97-46 and WF-97-241 (*Report and Order*, issued October 9, 1997), which has already been discussed herein in connection with MAWC's motion to strike. In that pair of cases, MAWC sought a certificate of public convenience and necessity for the new project, necessary because it is located in part outside of MAWC's original St. Joseph service area, as well as approval of the financing for the project. MAWC attempted in that case to also secure preapproval by the Commission of the project. However, after a lengthy analysis, the Commission refused to preapprove the project, stating:

Therefore, the Commission will make no finding regarding the prudence of the actual costs incurred and the management of construction of the proposed project. However, based on the extensive evidence presented, the Commission finds that the proposed project, consisting of the facilities for a new groundwater source of supply and treatment at a remote site, is a reasonable alternative.

Missouri-American Water Company, *supra*, at page 11 (internet version). This language, together with the reservation of ratemaking treatment in Ordered Paragraph No. 5, already quoted in full herein, make it plain that the Commission purported to do no more in Case Nos. WA-97-46 and WF-97-241, than to grant a certificate of public convenience and necessity and to approve a proposed scheme of financing.

We turn now to the issue of prudence. The Commission has previously had occasion to inquire into the reasonableness of a transaction or other decision made by a public utility. State ex rel. Capital City Water Co. v. Missouri Public Service Commission, 850 S.W.2d 903, 912 (Mo. App., W.D. 1993); State ex rel. General Telephone Company v. Public Service Commission, 537 S.W.2d 655, 664 (Mo. App., W.D. 1976). The Commission's power and duty to inquire into the reasonableness of the conduct or decision in question includes the right to determine a reasonable standard of judgment consistent with statutory and constitutional limitations. *Id.*

The Federal Power Act imposes on the Company the "burden of proof to show that the increased rate or charge is just and reasonable." Edison relies on Supreme Court precedent for the proposition that a utility's cost are [sic] presumed to be prudently incurred. However, the presumption does not survive "a showing of inefficiency or improvidence." As the Commission has explained, "utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent."

In the Matter of Union Electric Company, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (*quoting Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)) (*citations omitted*).

The Commission has adopted a standard of reasonable care requiring due diligence as the standard for evaluating the prudence of a utility's conduct. Union Electric, 27 Mo.P.S.C. (N.S.) at 194. The Commission has described this standard as follows: "The Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" *Id.*

To recapitulate: In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." *State ex rel. City of St. Joseph v. Public Service Commission*, 325 Mo. 209, 223, 30 S.W.2d 8, 14 (banc 1930). The Commission notes, as well, that the burden of a public utility engaged in building a new plant is "to build the best plant at the lowest cost." *Union Electric, supra*, at 208.

Turning to the case at hand, we first ask whether the challengers herein have made a showing of inefficiency or improvidence sufficient to require MAWC to prove the prudence of its decision? In *Union Electric, supra*, for example, the sufficient showing was a two billion dollar cost overrun. *Id.*, at 193.

The challengers attempted to make this showing through the expert testimony of Charles D. Morris, Ph.D., and Ted Bidy. Dr. Morris, sponsored by the SJ Industrials, is a professor of engineering at the University of Missouri-Rolla. Dr. Morris teaches the design of water treatment plants and has participated in many such projects. Dr. Morris testified that, in his expert opinion, MAWC's decision to replace an existing and operational plant and riverine source was imprudent. Dr. Morris further testified that, in his opinion, MAWC inflated its estimates of the cost of renovating and improving the old plant in order to justify its decision. Dr. Morris opined that \$40.3 million dollars would have sufficed to flood-proof and renovate the old St. Joseph plant.

Ted Bidy is a civil engineer and surveyor. He has served as supervising engineer on a number of water treatment and wastewater treatment projects. Mr. Bidy testified that, in his professional opinion, MAWC's decision to build a new treatment plant and to develop a new ground water supply source "was not prudent at all" and was undertaken in the absence of "detailed studies of the engineering and economic feasibility of expanding and upgrading the existing plant to meet functional requirements at a cost-effective price." Mr. Bidy opined that \$36.3 million would have been sufficient to renovate and improve the old St. Joseph plant.

On cross-examination, Mr. Bidy admitted that he had never designed a water treatment plant supplying public drinking water from a surface water source. He had participated in the 1960s, as one of six design engineers, in the design and construction of a large surface water plant that produced non-potable water for industrial cooling. In 37 years of practice, this was the extent of his experience with surface water treatment. He had not studied the soil conditions at the old plant site to determine whether or not a levee could be undermined.

On cross-examination, Dr. Morris admitted that his figures represented preliminary cost estimates, based on experience rather than on detailed design and engineering analysis. He admitted that any levee or flood-proofing work at the old

plant site would require detailed soil analyses, in apparent contradiction to Mr. Bidby's position.

Jim Merciel of the Commission Staff testified in rebuttal to Mr. Bidby and Dr. Morris. Mr. Merciel testified that, in his opinion, MAWC would have been imprudent to retain the existing St. Joseph plant in operation. Mr. Merciel reviewed Mr. Bidby's proposed improvements to the old plant and found them to be inadequate. Mr. Merciel suggested that Mr. Bidby had not estimated the price of his proposed alternative properly and that Mr. Bidby's estimate was too low.

Likewise, Mr. Merciel criticized the figures proposed by Dr. Morris. For example, Dr. Morris believed that certain figures derived from a Company document included costs for residuals handling when, in fact, they did not. Dr. Morris proposed significantly more construction than did Mr. Bidby, for not much more money. Mr. Merciel testified that this discrepancy caused him to doubt Dr. Morris' estimates. Mr. Merciel also testified that Dr. Morris unreasonably discounted the flood risk at the old plant site. John Young, an engineer employed by an affiliate of MAWC, criticized other aspects of Dr. Morris' cost estimates, such as his failure to include any amounts for project administration, construction supervision, inspection, material testing, shop drawing review, and the like. Mr. Young also criticized Dr. Morris' failure to recognize the cost impact of AFUDC. Mr. Young noted that, including AFUDC, all nonconstruction-related costs would likely amount to 30 to 35 percent of construction costs. Dr. Morris estimated \$3.0 million for a new river intake, whereas, according to Mr. Young, American Water System is presently building a smaller intake at Alton, Illinois, for about \$6.0 million. Finally, Mr. Young criticized Dr. Morris' five percent contingency figure as inadequate for a preliminary cost estimate. Mr. Young testified that 20 percent was a more realistic figure for that type of rough cost projection. Mr. Young testified that Mr. Bidby and Dr. Morris both had proposed improvements and renovations of inadequate scope and that they both had underestimated both construction costs and nonconstruction costs.

The Commission finds the testimony of Mr. Merciel and Mr. Young to be credible and persuasive. Additionally, the Commission notes that Mr. Bidby was shown on cross-examination to be inexperienced in the design of surface water treatment plants. Both Mr. Bidby and Dr. Morris were shown on cross-examination to have misunderstood planning and financial documents obtained from the Company through discovery. Both Mr. Bidby and Dr. Morris relied on very rough and preliminary cost figures which they used as a basis to criticize the far more detailed estimates developed by MAWC. Under all the circumstances, the Commission finds the cost estimates of Mr. Bidby and Dr. Morris to not be credible. The Commission finds that Dr. Morris has not substantiated his allegation that MAWC purposefully understated the cost of the ground water source/new treatment plant option. The Commission expressly finds the testimony of Bidby and Morris to lack credibility and to be unpersuasive.

The Commission concludes that the challengers have not made a showing of inefficiency or improvidence sufficient to require MAWC to prove the prudence of its decision. Nonetheless, evidence was tendered on this question and the Commission will consider it under the reasonable care requiring due diligence standard.

The record shows that MAWC was aware in late 1995, when the decision to build the new St. Joseph plant and related facilities was made, that extensive renovations and improvements were needed in St. Joseph. The nature of the existing plant site made some of these renovations and improvements difficult, or perhaps impossible. The regulatory and environmental outlook was such that the use of a riverine source, and the return of residuals to that source, would necessarily result in ever-increasing costs to the company. There were aesthetic problems with the river water that could not be readily resolved. Finally, the flood of 1993 demonstrated that the reliability of St. Joseph's public water supply could not be assured in the case of a treatment plant located in the flood plain.

MAWC assessed four options, one being to renovate and improve the existing plant, and another, that ultimately selected, being the construction of a new plant above the flood plain, the development of a ground water source of supply, and a pipeline linking the two. The other options were a new surface water treatment plant above the flood plain and interconnection with the Kansas City system. The preliminary numbers developed by MAWC suggested that the ground water source/new plant option was about as expensive as any of the other options, and perhaps less expensive than some of them. This option would include all the benefits associated with a ground water supply source: consistent raw water characteristics; diminished public health concern with organisms and other toxins; easier control of aesthetic factors, among others. Likewise, this option would remove the threat posed by another flood.

On the basis of the record made in this case, the Commission finds and concludes that the management of MAWC did use due diligence to address all relevant factors and information known or available to it when it assessed the situation and reached the decision to build a new treatment plant and develop a new ground water source of supply in St. Joseph. Consequently, the Commission must conclude that the decision to build the new plant and related facilities was not imprudent. Therefore, the total project cost of \$70,097,840 shall be recognized in rate base.

The reasonable care test does not ask, and the Commission does not conclude, that the decision actually made by management was the best possible decision. "In accepting a reasonable care standard, the Commission does not adopt a standard of perfection." Union Electric, *supra*, at 194. Neither does the test ask whether the members of the Commission would have made the same decision were they controlling the company. The Commission's authority to regulate does not include a right to dictate the manner in which a company shall conduct its business. State ex rel. Kansas City Transit, Inc. v. Public Service Commission, 406 S.W.2d 5, 11 (Mo. banc 1966).

**The New St. Joseph Plant - Capacity:**

The Staff contends that not all of the capacity of the new plant and related facilities is presently used and useful and that the sum of \$2,271,756 should consequently be excluded from rate base. Public Counsel proposes that 19.55 percent of the cost of the new St. Joseph plant and related facilities should be excluded from rate base, based on Mr. Biddy's estimate that only 80.45 percent of the new plant is used and useful.

The record shows that the available portion of the rated capacity of the new plant, 28.5 million gallons daily, is in excess of present needs, whether those needs are expressed as the average day figure of 16.0 million gallons or the peak day figure of 23.0 million gallons. Two methods have been proposed by which to deduct this excess capacity from rate base. Public Counsel's proposal is to simply estimate the percentage of capacity that is excess and then to trim that percentage of the cost of the plant from rate base. This method yields a disallowance of \$13,704,127. Staff, on the other hand, proposes a disallowance of \$2,271,756, based on Mr. Merciel's identification and valuation of specific items and components built to an excess capacity. It is within the province of the Commission to determine the methodology used for ratemaking. Missouri Gas Energy v. Public Service Com'n, State of Mo., 978 S.W.2d 434, 440 (Mo. App., W.D. 1998); State ex. rel. Associated Natural Gas Co. v. Public Service Com'n of Missouri, 706 S.W.2d 870, 880, 882 (Mo. App., W.D. 1985). The Commission concludes that the method proposed by Staff is the better method, because not all items included in rate base are equally susceptible to a straight-line, percentage reduction for excess capacity. The amount of \$2,271,756 shall be deducted from the value of the new St. Joseph plant included in rate base.

**Capitalization Rate for AFUDC:**

Allowance for Funds Used During Construction (AFUDC) is the carrying cost that a utility is allowed to capitalize and recover as part of the cost of a construction project. In the absence of specific Commission authorization to the contrary, capitalization of AFUDC ceases when the construction ends and the new facility becomes used and useful. The AFUDC at issue here is pre-in-service AFUDC relating to the new St. Joseph plant.

MAWC has proposed capitalizing AFUDC at the rate of return on rate base authorized in its most recent rate case. MAWC contends that this is consistent with the approach taken by the Company in past rate cases. Staff, on the other hand, contends that applying the previous rate case's rate of return to the monthly balances of Construction Work in Progress (CWIP) overstates the amount of AFUDC.

Staff proposes that AFUDC should be capitalized at a modified rate, reflecting the carrying charges on the outstanding amount of short-term debt available to the Company. Staff proposes that the rate for the construction balance in excess of the amount of short-term debt should then be based on the composite rate of the other sources of financing available to the Company during the construction period.

MAWC responds that, if the proposed capitalization rate is adopted by the Commission, the Company would be required to record this adjustment in the month of September 2000, resulting in an immediate write-off of \$1,257,930.<sup>32</sup> MAWC argues that, if the Commission decides the AFUDC rate should change, it should do so only on a going forward basis.

The Commission agrees that the actual carrying costs of MAWC's \$35 million in short-term debt should be reflected in rates. The use of the actual cost of any

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<sup>32</sup> Staff's figure is \$1,289,674.

item is preferred, where known. The amount of \$1,289,674 shall be deducted from rate base to reflect this change in the capitalization rate of AFUDC.

**Accounting Authority Order (AAO):**

Another issue relating to the construction in St. Joseph has to do with an Accounting Authority Order (AAO). As noted in the discussion of the previous issue, MAWC is permitted to capitalize the carrying costs of its construction financing from the beginning of the construction project to the moment the new facility becomes used and useful. For MAWC's St. Joseph plant, the in-service date was April 30, 2000. However, the earliest that the new facility can be recognized in rates is September 14, 2000, about four and one-half months later. During this lag period, although MAWC is earning nothing on its new plant, it must depreciate the plant and can no longer capitalize the carrying costs, that is, it must recognize two new significant items of expense, without the offset of any new revenue. The value of these two expense items is \$319,000 each month, aggregating \$1.6 million for the period between April 30, 2000, and September 14, 2000. Consequently, MAWC sought an AAO to permit it to continue to capitalize the AFUDC, and to defer depreciation, between April 30, 2000, and September 14, 2000. The Commission granted the AAO on March 30, 2000. The issue now is whether to permit recovery in rates of any of the deferred expenses.

MAWC contends that elimination of the post-in-service AFUDC and deferred depreciation results in an interest coverage ratio of only 1.81 times for the 12-month period ending April 30, 2000, through September 30, 2000. Staff, in response, contends that none of the deferred amounts at issue here should be recovered because none of them is extraordinary. The construction of a water treatment facility is, after all, Staff observes, hardly an unusual or extraordinary activity for a water utility. Staff suggests that MAWC's true motive here is to reduce regulatory lag.

An AAO is an accounting mechanism that permits deferral of costs from one period to another. In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d 200, 202 (Dec. 20, 1991). The items deferred are booked as an asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period. *Id.* During a subsequent rate case, the Commission determines what portion, if any, of the deferred amounts will be recovered in rates. AAOs should be used sparingly because they permit ratemaking consideration of items from outside the test year:

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. State ex. rel. Union Electric Company v. Public Service Commission, 765 S.W.2d 618, 622 (Mo. App. 1988).

Missouri Public Service, 1 Mo.P.S.C.3d at 205.

The Commission agrees with Staff that none of the post-in-service deferred amounts may be recovered. As the Commission has said previously, "Lessening regulatory lag by deferring costs is not a reasonable goal unless the costs are associated with an extraordinary event." Missouri Public Service, *supra*, at 207. MAWC's witness, James Salser, testified that MAWC seeks to insulate its shareholders from the effects of regulatory lag. MAWC has entirely failed to show any extraordinary or unusual event such as would support permitting recovery of any of these deferred amounts in rates.

The Commission has also said previously that "[m]aintaining the financial integrity of a utility is also a reasonable goal." *Id.* However, the Commission agrees with Staff that MAWC has failed to show that any financial emergency will result from this disallowance. MAWC's customers are being asked to accept significantly higher rates as a result of MAWC's decision to build a new plant and related facilities in St. Joseph.

**Premature Retirement:**

Another issue arising from the St. Joseph project is that of the premature retirement of the old St. Joseph plant. Depreciation is an accounting convention that approximates an asset's loss of value through use. At the end of its useful life, the asset is considered to have lost all value except residual salvage value. If the accounting convention were perfect, an asset would be fully depreciated at time it is actually retired, that is, removed from service. See In the Matter of St. Louis County Water Company, 4 Mo.P.S.C.3d 94, 102-3 (1995); In the Matter of Depreciation, 25 Mo.P.S.C. (N.S.) 331. In the case of the old St. Joseph treatment plant, the accounting convention yielded an imperfect result and the plant was not yet fully depreciated at the moment of its retirement.

MAWC and Staff agreed that the original cost of the plant should be deducted from both plant-in-service and accumulated depreciation in order to "preserve" the old plant's remaining, undepreciated value of \$2,832,906 until a proper depreciation study can be performed. Additionally, the retirement cost for the plant—estimated at \$500,000—should also be deducted from accumulated depreciation, thereby "preserving" \$3,332,906, at the time when the retirement actually occurs. MAWC and Staff would then cooperate in performing the necessary depreciation study.

Public Counsel opposes the treatment proposed by MAWC and Staff. Testimony presented by the Public Counsel asserted that the normal accounting process representing the retirement of a utility plant is to remove the original cost of the plant from both the utility plant-in-service and the depreciation reserve accounts. Public Counsel contends that this would be inappropriate in this case because it would result in a net increase to rate base of \$2,832,906, thus causing ratepayers to pay for a plant no longer in service. This would occur because the original cost of the plant exceeds the accumulated depreciation on the plant by its net original cost of \$2,832,906. Thus, deducting the original cost of the plant from the depreciation reserve would diminish that reserve by more than the depreciation accumulated therein with respect to the old St. Joseph plant, causing a net increase in rate base. As an alternative, Public Counsel proposes that the original cost of the plant should be deducted from utility plant-in-service, while only the recorded

amount of depreciation should be deducted from the accumulated depreciation reserve. The difference should be written off.

MAWC is permitted a reasonable return only on the value of its assets actually devoted to public service. From the moment of its retirement, a moment controlled by MAWC, the old plant was no longer used and useful in public service. In an early case involving the retirement of utility assets, the Missouri Supreme Court stated:

The abandonment of property which is never replaced, but is superseded by another instrumentality, as gas lamps by electric lights, or by another agency or company, is an extraordinary supersession. Its loss is "one of the hazards of the game," just as the extraordinary increase in values following the war was an unexpected gain . . . . It follows that the abandoned property, lights, service mains, and the like should not be considered for the purpose of determining the annual depreciation reserve.

State ex rel. City of St. Louis v. Public Service Com'n of Missouri, 329 Mo. 918, 941, 47 S.W.2d 102, 111 (1931).

It follows that the treatment proposed by Public Counsel is correct. Utility plant-in-service will be reduced by the original cost of the old St. Joseph plant, while the depreciation reserve will be reduced only by the amount of depreciation accumulated with respect to the plant. The difference, the plant's net original cost of \$2,832,906, will be written off. Likewise, any amount expended by MAWC to retire the old plant is also not recoverable in rates.

**Property Taxes:**

This is yet another issue arising from the new St. Joseph plant. MAWC will eventually face a net increased local property tax liability with respect to the new plant. Staff contends that this cost should be excluded from revenue requirement because it will not be due and payable until well after the end of even the true-up period, much less the test year. MAWC responds that this is a typical true-up item as it is a known quantity. Staff suggested, and MAWC insists, that a refundable surcharge be authorized to collect the amount of the net increased property tax liability, to be reviewed as part of the next rate case and any overcollection refunded.

The Commission will authorize MAWC to collect a reasonable amount for the net increased property tax liability through a surcharge to begin on January 1, 2001. This issue will be reviewed as part of the next rate case and any overcollection refunded to the ratepayers.

**Other New Construction:**

The record shows that MAWC undertook new construction in several other districts in addition to St. Joseph. Testimony offered by the Staff confirms that these new facilities are in service and are reasonable and necessary. No party has raised any objection to any of these facilities, much less made any showing of imprudence with respect to them. Consequently, their aggregate cost of \$14,341,535 will be added to rate base.

**Deferred Income Taxes:**

This issue arises from MAWC's purchase, in 1993, of Missouri Cities Water Company (Mo Cities). The Commission approved the acquisition in Case No. WM-93-255. Mo Cities had an amount on its books for deferred income taxes, which amount remained with its parent, Avatar, and was not acquired by MAWC. Staff has proposed to reduce rate base by \$712,191 to reflect these deferred income taxes.

Deferred income taxes are an artifact of the differing treatment accorded depreciation for federal income tax purposes as opposed to regulatory purposes. Rates are calculated using straight-line depreciation, while taxes are paid using accelerated depreciation. The result is that the utility collects money for taxes from its ratepayers now that it need not actually pay until later. Consequently, the utility finds itself holding a pool of interest-free cash, contributed by ratepayers with respect to the utility's income tax liability. Like other donations and contributions, this money is deducted from rate base because the company has no right to earn a return on it.

When MAWC purchased Mo Cities, the rate base increased by the value of the deferred income taxes because the offsetting cash did not transfer to MAWC. The effect on ratepayers was a rate increase. Staff seeks to re-establish the offset for the pre-merger deferred income taxes and thereby to reduce rates.

MAWC contends that this issue has already been resolved by the Commission in MAWC's 1995 rate case, *In the Matter of Missouri-American Water Company*, Case Nos. WR-95-205 and SR-95-206, 4 Mo.P.S.C.3d 205 (1995). In that case, the Commission denied MAWC's attempt to recover the acquisition premium it paid on its purchase of Mo Cities, largely because of the impact on ratepayers of the deferred income taxes issue:

The Commission finds in this case that the Company has failed to justify an allowance for the acquisition adjustment. The Commission finds that as argued by OPC, the ratepayers will already suffer one negative effect from the sale of MCWC stock. Because the transaction is considered a "sale of assets" for federal tax purposes, the deferred taxes that have accumulated throughout the life of the property will be lost.

Missouri-American Water Company, *supra*, at 217.

The Commission agrees with MAWC. Having already dealt once with the issue of the pre-merger deferred income taxes, it is not appropriate to deduct any amount from rate base now with respect to those taxes.

**Capital Structure, Return on Equity and Rate of Return:**

MAWC and Staff have agreed to use the capital structure outlined by Staff's expert, Roberta McKiddy, in her True-up Direct Testimony, Exhibit 110.

The cost of capital for a utility company may be determined by calculating the weighted cost of each capital component by multiplying its dollar value as of a specific moment in time by its appropriate embedded cost or, in the case of common equity, its estimated cost. The sum of these figures is the total weighted cost of capital, which is synonymous with the fair rate of return for the utility.

A matter of dispute is the value to be used for the cost of common equity, also referred to as the Return on Equity (ROE). Staff suggests the range of values developed by Ms. McKiddy, 9.50 percent to 10.75 percent. MAWC proposes a value of 11.654 percent. Public Counsel proposes 9.92 percent.

Staff's position was developed using the Discounted Cash Flow (DCF) model. The Commission has favored this method, Staff reminds the Commission, for over 30 years. MAWC's position was supported by the testimony of its expert witness, Harold Walker. Walker developed his figure by comparing MAWC to other water utilities and determining its comparable risk level. In Walker's opinion, MAWC presents greater risk than many other water utilities because of its small size, its greater proportion of debt in capital, and its capital intensity. Mr. Walker also employed the DCF model. Public Counsel's expert witness, Mark Burdette, also used the DCF method to develop his proposal. The Commission notes that Public Counsel's figure is within the range proposed by Staff.

As Staff points out, the DCF method is one which "the Commission has approved in many previous cases." In the Matter of Missouri Cities Water Company, 1 Mo.P.S.C.3d 119, 128 (1991):

The Commission has consistently found Discounted Cash Flow (DCF) analyses to be appropriate for determining a rate of return on equity. . . . This is because it is relatively simple to apply and measures investor expectations for a specific company. . . . [T]he DCF analysis is considerably more systematic and allows this Commission to treat all utilities it regulates in a consistent manner.

In the Matter of the Joint Application of Missouri Cities Water Company, 26 Mo. P.S.C. (N.S.) 1, 26-27 (1983). However, in this case, all three competing positions were developed using the DCF method.

The DCF method is used to determine the cost of common equity. Where, as here, the common stock is not publicly traded, the DCF method must be modified. The three proposals before the Commission differ in part in the nature of the modifications each relies upon. Staff simply applied the DCF method to the publicly-traded common stock of MAWC's parent, AWWC, and imputed that result to MAWC. MAWC contends that Staff's modification to the DCF method is inappropriate because MAWC differs from AWWC in having a higher risk. MAWC's higher proposed ROE reflects this higher risk. Another point of difference between the proposals is the growth factor. MAWC used a higher growth factor than did Public Counsel.

After considering all of the evidence and the arguments of the parties, the Commission determines that the appropriate ROE for MAWC is 10.00 percent. This figure is within the range proposed by Staff and close to the value proposed by Public Counsel. It is somewhat higher than Public Counsel's proposal to reflect the fact that the method employed is, after all, an estimation rather than a measurement.

Using this ROE figure, a weighted total cost of equity figure can be developed:

<b>Type of Capital:</b>	<b>Percentage Of Total:</b>	<b>Embedded Cost:</b>	<b>Weighted Cost:</b>
Common Stock	42.27%	10.00%	4.22%
Preferred Stock	1.69%	9.09%	0.15%
Long-term Debt	56.05%	6.77%	3.79%
Short-term Debt	0.00%	0.00%	0.00%
	100.00%		8.16%

The total weighted cost of capital figure, 8.16 percent, is also the overall rate of return (R) used in the following formula under the Cost of Service method to calculate MAWC's Revenue Requirement, where the Cost of Service equals the Revenue Requirement:

$$RR = C + (V - D) R$$

RR = Revenue Requirement

C = Prudent Operating Costs, including Depreciation and Taxes

V = Gross Value of Utility Plant in Service

D = Accumulated Depreciation

R = Overall Rate of Return

#### **Rate Design:**

Perhaps the most difficult issue presented by this case is the issue of rate design. In resolving this issue, the Commission notes that it has broad discretion to set just and reasonable rates. St. ex rel. Utility Consumers Council, v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979); St. ex rel. Capital City Water Co. v. Missouri Public Service Com'n, 850 S.W.2d 903, 911 (Mo. App., W.D. 1993). A "just and reasonable" rate is one that is fair to the ratepayer and fair to the utility. It is one which covers the cost of service and a reasonable return on assets dedicated to public use, and no more. See State ex rel. Washington University, supra, 308 Mo. at 344-45, 272 S.W. at 973. "[I]t is not methodology or theory but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and non-discriminating." State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri, 706 S.W.2d 870, 879 (Mo. App., W.D. 1985).

Much public attention was devoted to the debate between the proponents of Single Tariff Pricing (STP) and District Specific Pricing (DSP). The former is a rate design theory under which all customers of a system with multiple service areas, whether interconnected or not, pay the same rate, regardless of differences in the actual cost of providing the service to the various customers. DSP, on the other hand, sets different rates for each of the service areas, based upon the discrete cost of service in each district. MAWC, along with its parent and affiliates, favors STP. In the past, this Commission has permitted MAWC to move toward STP in its rate design, although that goal was never attained.

The Staff opposes STP and endorses DSP, as does the Public Counsel. The SJ Industrials, together with the City of Riverside, oppose STP strongly. They contend that it is, in fact, unlawful. The Cities of Joplin, Warrensburg, O'Fallon, and

Weldon Spring, St. Charles County, and the Warrensburg Industrials also oppose STP. They, too, contend that it is unlawful in Missouri. The St. Joseph Area PWSD Intervenors, on the other hand, argue for the continuation of STP, as does the City of St. Joseph.

The Commission will move away from STP and toward DSP. One factor for consideration in determining just and reasonable rates is public perception. The testimony adduced at the Local Public Hearings held in this matter was strongly in favor of DSP. MAWC, therefore, must set its rates separately for each service area in order to recover the appropriate revenue requirement for each service area. As the Company requested, no phase-in of rate increases shall be permitted. In moving toward DSP, however, the Commission will adhere to the principle that no district will receive a rate decrease.

As an alternative to DSP, MAWC suggests modifying an STP rate design by use of a Capital Addition Surcharge. With respect to major projects such as the new St. Joseph plant and supply source, part of the rate impact would be distributed to all of the districts under STP and the rest recovered solely from the St. Joseph district by means of a surcharge. The St. Joseph Area PWSD Intervenors strongly oppose this option as "the worst of all possible worlds." Staff also opposes it, as do the Municipal Intervenors. The Commission will not adopt MAWC's surcharge proposal because it is in conflict with the Commission's basic decision to move toward DSP.

The Commission's decision herein should not be read to suggest that the Commission agrees with those parties that contend that STP is not lawful in Missouri. Their theory is that STP creates undue preferences for some customers and unlawfully discriminates against others, in violation of Section 393.130. The Commission agrees with the Staff that the Missouri Supreme Court disposed of that view some years ago:

We are able to discern no legitimate reason or basis for the view that a utility must operate exclusively either under a systemwide rate structure or a local unit rate structure, or the view that an expense item under a systemwide rate structure must of necessity be spread over the entire system regardless of the nature of the item involved. Experts in utility rates may well conclude that a 'hybrid system' or a 'modified system' of rate making, wherein certain expense items are passed on to certain consumers and certain items are thereby treated on a local unit basis and others on a systemwide basis, is the system which will produce the most equitable rates. And it would appear to be the province and duty of the commission, in determining the questions of reasonable rates, to allocate and treat costs (including taxes) in the way in which, in the commission's judgment, the most just and sound result is reached.

State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 933 (banc 1958).

In determining rates under a DSP methodology, the assets, liabilities, income, and expenses booked by MAWC to its Corporate District must be allocated among the operating districts. MAWC and Staff have suggested the use of different factors by which to allocate these amounts. Staff suggests allocation based on composite payroll factors, following the practice of the Federal Energy Regulatory Commission; MAWC advocates allocation based on corporate labor. The difference between the two options is minimal; MAWC stated in its brief, "[I]t is the Company's expectation that the use of Staff's allocation factors with a comparable revenue requirement and rate base would produce results very close to those that the Company developed." Having considered the evidence and the arguments of the parties, the Commission concludes that the composite payroll allocation method proposed by Staff is superior and ought to be utilized.

The final issue in the rate design is the allocation of rate increases in each district across customer classes. Some parties have proposed inter-class allocation shifts, others oppose them.

Both Staff and MAWC advocate the use of the Base-extra Capacity (BXC) method to allocate costs among the various customer classes of within each district. This method allocates costs in proportion to each class's use of the commodity, facilities and services involved. Its purpose is to accurately allocate costs on a causal basis. Once costs are allocated to customer classes using this method, rates can be developed to recover the necessary revenue from each class.

The BXC method considers four categories of costs: base costs, extra capacity costs, customer costs, and fire protection costs. Base costs vary with usage and are the costs of providing service under average load conditions. Extra capacity costs are costs incurred to meet usage in excess of average load. Customer costs are those costs associated with providing water service regardless of usage, such as billing and collections, and meter reading. Finally, fire protection costs are associated with meeting peak fire protection demands. Each category of costs is allocated among the customer classes using allocation factors. Rates are then developed to recover the allocated cost from each class.

Staff witness Randy Hubbs applied the BXC method on a DSP basis; MAWC's witness Stout applied it on a company-wide, STP basis. Staff and MAWC are evidently in agreement that, if the Commission adopts a DSP rate design, then Mr. Hubbs' class cost of service study should be employed; if the Commission adopts an STP rate design, then Mr. Stout's class cost of service study should be used.

The St. Joseph Area PWSD Intervenors urge that any rate increase in any district be spread on an across-the-board basis throughout the Company's existing rate schedule for that district. The Municipal Intervenors agree. Staff objects that significant inter-class subsidies will exist in such a design.

Public Counsel advocated a rate design that shifted increases away from residential customers to industrial and resale customers. While Public Counsel's expert, Hong Hu, purportedly used the BXC method, she modified it to recognize what she termed "economies of scale." Her class cost of service study was criticized by almost all of the other parties.

Having considered the evidence and the arguments of the parties, the Commission concludes that Staff's class cost of service study, developed using the BXC

method, is the appropriate method by which to allocate costs among customer classes in each district and to design rates by which to recover appropriate revenues within each district.

*IT IS THEREFORE ORDERED:*

1. That the Motion to Strike Testimony and for Summary Determination filed by Missouri-American Water Company on June 2, 2000, is denied.
2. That all other pending motions and applications, not specifically ruled herein, are denied.
3. That the water service tariff sheets filed by Missouri-American Water Company on October 15, 1999, Tariff File No. 00000366, are rejected.
4. That the sewer service tariff sheets filed by Missouri-American Water Company on October 15, 1999, Tariff File No. 00000367, are approved for service rendered on and after September 14, 2000. The specific tariff sheets approved are:

**Form No. 13, P.S.C. Mo. No. 2**

**2<sup>nd</sup> Revised Sheet No. 4, cancelling 1<sup>st</sup> Revised Sheet No. 4**

5. That Missouri-American Water Company is directed to comply with the provisions of the Joint Recommendation filed herein, including changing to a monthly meter-reading and billing schedule in its St. Joseph service area.
6. That Missouri-American Water Company is hereby authorized to file proposed tariff sheets in compliance with this Report and Order.
7. That this Report and Order shall become effective on September 14, 2000.

Lumpe, Ch., Schemenauer and Simmons, CC., concur;  
Drainer, C., dissents, with dissenting opinion attached;  
Murray, C., dissents, with dissenting opinion to follow;  
certify compliance with the provisions  
of Section 536.080, RSMo 1994.

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**DISSENTING OPINION OF VICE CHAIR M. DIANNE DRAINER**

Although I find that Missouri American Water Company (MAWC) presented evidence that clearly supported its decision to construct the new groundwater treatment plant and demonstrated that the expenses incurred in that construction were prudent, I must nevertheless respectfully dissent from the Report and Order as I disagree with numerous positions taken by the majority.

With respect to the return on equity (ROE) that should be authorized for MAWC, the evidence clearly demonstrated that by using the traditional discounted cash flow (DCF) method supported by the Missouri Public Service Commission Staff (Staff) and presented in MAWC testimony, 10.5 percent is the fair and reasonable ROE. Since 1992 this Commission has authorized ROE rates in 37 cases from a high of 13 percent to a low of 10.5 percent, with an average of 10.95 percent using the DCF method. Even Staff presented a midpoint ROE above 10 percent. Therefore, I find the 10 percent ROE authorized in this case to be an unreasonable departure from established setting of such rates by the DCF method in the past,

detrimental to MAWC and unsupported by the weight of the evidence. Thus the 10 percent ROE is neither a fair nor a reasonable return for MAWC's investment.

With respect to the issue of excess capacity, I disagree with the majority's disallowance for excess capacity. The evidence in the record clearly showed that MAWC management has built in less than a 10 percent growth rate for the new plant and that it will reach full capacity in fewer than 10 years. MAWC management would have been imprudent had they not built in some minimum level of growth. It would indeed have been both imprudent and economically inefficient to construct two 750,000-gallon-clearwell units only to replace them in fewer than ten years with two 1,000,000-gallon-clearwell units as suggested by Staff. Therefore, I find that the minimum excess capacity built into the St. Joseph plant to be both a reasonable and prudent management decision.

With respect to the issue of premature retirement, Staff proposed that neither the net plant investment nor the cost of removal and demolition be amortized until a depreciation study is performed to evaluate the accuracy of the reserve and depreciation rates for the major accounts of MAWC. MAWC agreed to perform such a study prior to the filing of its next rate case. The approach taken by Staff and MAWC would have allowed the retirement issue to be addressed in the most reasonable and comprehensive manner.

With respect to the rate design established by the majority, I have my most serious objections. The rates established by the Commission must be just and reasonable for ALL customers of the utility. The issue of rate design impact must be analyzed for all customer classes in all districts served by MAWC. In the past the move to a single tariffed price (STP) for the customers of MAWC has resulted in rates that were just and reasonable and resulted in no undue rate shock. All MAWC customer classes would continue to have rates that are just and reasonable under STP with no undue rate shock. Unfortunately, because of the complexity of the Staff rate design proposal for district specific pricing (DSP) one must analyze very closely the impact of Staff's proposal on all customer classes in all districts to understand the detrimental impact this proposal has on the public. Although the public hearings indicated a preference for DSP over STP, nowhere was the public informed of the actual impact of DSP on their district rates for each customer class. Rather the public was given only the worse case scenario of a 51 percent increase in rates from STP with the false indication that DSP would result in lower rates for all customers. The reality is that DSP will have a far different impact on customers' rates as can be seen from a review of the Staff's revenue requirement that will be the approximate outcome from this case. For example, Staff's rate design proposal adopted in this case will result in increased rates to residential customers in Mexico and Parksville of over 60 percent while Joplin and St. Charles will have little or no rate increase for their residential customers. (It should be noted that in a past rate case St. Charles capital improvements have been spread over the other districts.) Mexico, Parksville and St. Joseph sale for resale customers (the water districts) will receive rate increases of approximately 197 percent, 171 percent and 268 percent respectively, while Joplin's sale for resale customers receive no rate increase. Industrial customers in Mexico and St. Joseph will receive rate increases of approximately 135 percent and 200 percent respectively, while Joplin's industrial customers receive no rate increase.

Although the Commission can and should look at the cost of service to each district and each customer class in a rate case, cost of service is only one of the guidelines reviewed by the Commission. Other guidelines the Commission should review in setting rates are equity issues in changing rates among customer classes and gradualism in changing rates to avoid excessive rate shock. The final responsibility of the Commission is to assure that all rates set in a rate case are just and reasonable. The Commission should have continued its support of STP rate design. MAWC offered a viable modification to straight STP with a proposed surcharge on the St. Joseph district. All customers would have received rate increases far less detrimental with STP and the surcharge added to the St. Joseph district. The modified STP alternative should have been adopted by the Commission in order to maintain fair, reasonable and just rates for all the customers in all the MAWC districts.

Therefore, I find that not only specific districts but specific customer classes, such as the residential, sale for resale and industrial customers in many of the districts will receive such a rate shock from this case that their future rates can only be viewed as unjust and unreasonable. Further, I find the rate design adopted in this case results in gross inequities and is detrimental to the public interest.

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#### **DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY**

This Commission is charged with setting just and reasonable rates for water and sewer utilities. In order to be just and reasonable to both the utility and its customers, the rates should be fully compensatory for all prudently incurred costs of service. Otherwise, customers may eventually suffer the very severe harm of having no financially viable utility to provide their essential water and sewer services. The rates set herein by the majority fall far short of being fully compensatory. Furthermore, the rate design adopted by the majority creates for certain customers a disproportionate burden that amounts to unnecessary rate shock. For these reasons, I respectfully dissent from the Report and Order.

I agree with the majority to the extent that it found that MAWC acted prudently in its decision to build a new treatment plant in St. Joseph. The Commission's Report and Order in Case Nos. WA-97-46 and WF-97-241, issued on October 9, 1997, stated that we had reviewed extensive evidence in those cases and found the proposed project to be a reasonable alternative. There was nothing convincing presented in the record herein to prove that the decision to build a new plant was anything other than a prudent, reasonable alternative.

This opinion will address my areas of disagreement with the majority in the order in which those issues were addressed in the Report and Order.

#### **The New St. Joseph Plant—Capacity**

The Company was not imprudent in designing and sizing the St. Joseph plant to meet anticipated needs of the district until the year 2009. To the contrary, it would seem imprudent *not* to design and size a new plant to meet the needs of the district beyond the immediate time period. Therefore, I would not have adjusted the value of the new St. Joseph plant on the grounds of excess capacity.

**Capitalization Rate for AFUDC**

I do not agree with the majority that the method of capitalizing AFUDC should be changed in this proceeding. If such a change is warranted it should only be made prospectively.

**Premature Retirement**

I agree with Staff and MAWC that a depreciation study should be conducted to determine the appropriate amount and recovery period for the remaining net plant investment that was never depreciated, as well as for the cost of removal of the old plant. The majority's disallowance of over three million dollars for this issue is, in my opinion, not supported by the record.

**Return on Equity and Rate of Return**

I would allow a return on equity that appropriately reflects the unique risk characteristics of MAWC and not adopt Staff's DCF analysis that uses the parent company, AWWC, for comparables and makes no adjustment for risk. It is MAWC, not its parent, which we regulate and which provides service to Missouri ratepayers. Staff's comparison to AWWC without risk adjustment resulted in an inadequate return on equity and an inadequate rate of return.

The majority quoted, on page 37 of its Report and Order, from a 1925 Missouri Supreme Court opinion. It is appropriate to make reference here to that same quote, because I believe that the majority did not follow those directions from the Supreme Court in setting this company's return on equity and rate of return.

**Rate Design**

I would adopt the company's alternative proposal, which is a hybrid single-tariff pricing with a capital addition surcharge (CAS). I would spread the increases evenly among the classes, as proposed by the St. Joseph Area PWSD Interveners and the Municipal Interveners. The result would more closely approximate reasonable increases for all districts and all classes of customers. This Commission would thereby maintain its previously declared support for the concept of system-wide rates for the company.

The record supports a rate design that spreads costs uniformly except where, as here, expenditure in one district exceeds 15% or 20% of present revenues. The record also supports mitigation of the impact of the St. Joseph Treatment Plant on the rates in other districts by applying a surcharge to bills in the St. Joseph district. Such a surcharge could be applied to other districts that experience capital additions in the future that have an impact on total company revenues that exceed 15% or 20%. That approach would permit maintenance of unified rates and simultaneously allow districts that incur capital costs above the threshold to take on more of the burden of paying such costs. The evidence of record demonstrates that a hybrid rate design using a CAS based on a 15% threshold results in rate increases to all districts except St. Joseph of approximately 28%, and to St. Joseph of approximately 89%. The evidence demonstrates that using a 20% threshold results in a rate increase to St. Joseph of approximately 79% and to all other districts

of approximately 33%. Spreading these increases evenly among the classes within the districts would avoid rate shock to any particular class, but it would also cause St. Joseph to bear the heaviest burden where the heaviest capital addition costs are caused by St. Joseph. By contrast, the rate design adopted by the majority will result in increases to some classes in some districts of as much as 269%.

#### Conclusion

For the reasons stated herein, I respectfully dissent.

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### In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996.\*

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Case No. TO-99-483  
Decided September 7, 2000

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**Telecommunications §1.** The Commission found that the Metropolitan Calling Area (MCA) service continues to meet the needs and desires of many customers in the St. Louis, Kansas City, and Springfield metropolitan areas and the service is in the public interest.

**Telecommunications §1.** The Commission held that competitive local exchange carriers (CLECs) may participate in the Metropolitan Calling Area (MCA) service plan on a voluntary basis under the same terms and conditions as the Commission previously ordered *In re: the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges*, 2 MPSC 3d. 1 (1992), with the exception of pricing flexibility.

**Telecommunications §12.** Subsection 253(b) of the federal Telecommunications Act of 1996 authorizes the Commission to impose, on a competitively neutral basis, requirements necessary to preserve and advance the public welfare, ensure quality of telecommunication services, and safeguard the rights of consumers.

#### APPEARANCES

*Paul G. Lane*, General Attorney-Missouri, and *Mimi B. MacDonald*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Paul S. DeFord*, Lathrop & Gage, 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Linda K. Gardner*, Senior Attorney, Sprint Corporation, 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Missouri, Inc.; Sprint Communications Company L.P.; and Sprint Spectrum L.P. d/b/a Sprint PCS.

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\*The Commission, in an order issued on February 15, 2001, denied a motion for clarification. See page 318 for another order in this case.

9 Mo. P.S.C. 3d

*Charles Brent Stewart*, Stewart & Keevil, L.L.C., 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, and

*Scott Sapperstein*, Attorney at Law, Intermedia Communications, Inc., 3625 Queen Palm Drive, Tampa, Florida 33619, for Intermedia Communications Inc.

*James M. Fischer*, and *Larry W. Dority*, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for GTE Midwest Incorporated.

*W.R. England, III*, and *Brian T. McCartney*, Brydon, Swearengen & England P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for: ALLTEL Missouri, Inc.; Cass County Telephone Company; Citizens Telephone Company of Higginsville, Missouri, Inc.; Grand River Mutual Telephone Corporation; Green Hills Telephone Corporation; Lathrop Telephone Company; and Orchard Farm Telephone Company.

*Craig S. Johnson*, Andereck, Evans, Milne, Peace & Johnson, L.L.C., 305 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102, for: Alma Telephone Company, Chariton Valley Telephone Corporation Mid-Missouri Telephone Company, Northeast/Modern Missouri Rural Telephone Company, Peace Valley Telephone Company, Inc., Choctaw Telephone Company; and MoKan Dial, Inc. (the Missouri Independent Telephone Group, formerly known as the Mid-Missouri Group of Local Exchange Companies).

*Carl J. Lumley*, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for: MCI WorldCom Communications, Inc.; MCImetro Access Transmission Services, Inc.; MCI WorldCom Network Services, Inc. (f/k/a MCI Telecommunications Corporation); BroadSpan Communications, Inc., d/b/a Primary Network Communications; and Gabriel Communications of Missouri, Inc.

*Peter Mirakian III*, Spencer, Fane, Britt & Browne, LLP, 1000 Walnut Street, Suite 1400, Kansas City, Missouri 64016-2140, for Birch Telecom of 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.

*Marc D. Poston*, Senior Counsel, and *Julie A. Kardis*, 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: Nancy Dippell, Senior.

#### **REPORT AND ORDER** **Procedural History**

On March 9, 1998, MoKan Dial, Inc. (MoKan), and Choctaw Telephone Company (Choctaw) jointly filed an application to determine certain aspects surrounding continued provisioning of Metropolitan Calling Area (MCA) service (Case No. TO-98-379). On April 22, 1999, the Staff of the Missouri Public Service Commission (Staff) filed a Motion to Open Docket and Set Technical Conference. In that Motion, Staff requested the Missouri Public Service Commission (Commis-

sion) to establish a case for the purpose of investigating "certain aspects surrounding the provisioning of metropolitan calling area service after the passage and implementation of the Telecommunications Act of 1996." Staff also requested the Commission to close Case No. TO-98-379 and make all parties to that case automatic parties to a newly created investigation docket. Staff recommended that the Commission set a date for a technical conference to be held in July or August so that the parties could continue discussions on 14 specific issues that the Staff set forth in its motion.

On May 26, 1999, the Commission issued an Order Establishing Case, Directing Notice, and Adding Parties. The Commission specified that the case was established for the purpose of investigating the continued provisioning of MCA Service after the passage of the Telecommunications Act of 1996 (the Act). The Commission directed the Records Department of the Commission to send notice to all interexchange carriers and local exchange telecommunications companies. The Commission determined that the petitioners and intervenors to Case No. TO-98-379 would be made parties to the case without the need for intervention. The Commission identified those parties as: Choctaw Telephone Company; MoKan Dial, Inc.; Southwestern Bell Telephone Company (SWBT); Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Green Hills Telephone Company, Lathrop Telephone Company, and Orchard Farm Telephone Company;<sup>1</sup> Sprint Missouri, Inc., d/b/a Sprint, and Sprint Spectrum, L.P., d/b/a Sprint PCS;<sup>2</sup> AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., AT&T Wireless Services, Inc., and TCG Kansas City, Inc.;<sup>3</sup> and Gabriel Communications, Inc. (Gabriel). The Commission also granted the requests for participation without intervention of MCI Telecommunications Corporation and MCImetro Access Transmission Service, L.L.C., which were filed on May 24, 1999. The Commission directed any other party wishing to intervene or to participate without intervention to file an application to do so no later than June 25, 1999. Finally, the Commission set a technical conference for July 20-21, 1999, at 9:00 a.m.

Subsequently, Sprint Communications Company, L.P.; BroadSpan Communications, Inc., d/b/a Primary Network Communications (Primary); ALLTEL Missouri, Inc. (ALLTEL)<sup>4</sup>; GTE Midwest Incorporated and GTE Communications Corporation (GTE); Alma Telephone Company, Chariton Valley Telephone Corporation, Mid-Missouri Telephone Company, Northeast/Modern Missouri Rural Telephone Company, and Peace Valley Telephone Company, Inc.;<sup>5</sup> Grand River Mutual Telephone Corporation (Grand River);<sup>6</sup> and Birch Telecom of Missouri, Inc. (Birch), filed timely applications to intervene. On July 12, 1999, the Commission granted intervention to each of these parties.

<sup>1</sup> This group is collectively referred to as "Cass."

<sup>2</sup> Sprint Missouri, Inc., d/b/a Sprint, Sprint Spectrum, L.P., and Sprint Communications Company, L.P., are collectively referred to as "Sprint."

<sup>3</sup> This group is collectively referred to as "AT&T."

<sup>4</sup> ALLTEL is also a member of the group referred to herein as "Cass."

<sup>5</sup> This group, along with Choctaw Telephone Company and MoKan Dial, Inc., was collectively referred to as the Mid-Missouri Group, and are now known as the Missouri Independent Telephone Group.

<sup>6</sup> Grand River is also a member of the group referred to herein as "Cass."

On August 20, 1999, the Commission issued an Order Directing Filings. In that order, the Commission noted that the parties met on July 20, 1999, and held a technical conference in order to develop a tentative list of the issues for this case. The Commission also noted that Staff filed a Status Report indicating that the parties agreed to postpone the second day of the technical conference until August 24, 1999. The Commission ordered Staff to file a status report regarding the progress of the August 24, 1999, technical conference no later than September 6, 1999. The Commission also ordered the parties to file a proposed procedural schedule no later than September 6, 1999.

On September 7, 1999, the Staff filed a Status Report and Proposed Procedural Schedule. On October 8, 1999, AT&T, ALLTEL, Grand River, Sprint, Staff, the Office of the Public Counsel (Public Counsel), Gabriel, and Birch filed a Non-Unanimous Stipulation and Agreement. The Stipulation and Agreement did not provide for the settlement of the actual issues in dispute; rather, it provided for an interim measure that would permit competitive local exchange carriers (CLECs) to join in the MCA service pending the Commission's final decision.

On October 12, 1999, the Mid-Missouri Group filed a Partial Opposition to Non-Unanimous Stipulation and a Request for Hearing. On October 18, 1999, SWBT filed a Request for Hearing. On November 1, 1999, AT&T filed a Motion for Expedited Hearing.

On November 30, 1999, the Commission issued its Order Rejecting Non-Unanimous Stipulation and Agreement, Granting Intervention, and Establishing Procedural Schedule. In that order, the Commission granted Intermedia Communications, Inc.'s (Intermedia) Application to Intervene Out of Time, rejected the non-unanimous stipulation, and adopted a procedural schedule.

On December 28, 1999, McLeodUSA Telecommunications Services, Inc. (McLeod), filed an Application to Intervene and Request to Accept Out of Time. On December 29, 1999, the Commission received a Notice of Group Name Change indicating the Mid-Missouri Group had changed its name to Missouri Independent Telephone Group.<sup>7</sup> On January 5, 2000, Nextlink Missouri, Inc. (Nextlink) filed an Application to Intervene Out of Time. Also on January 5, 2000, SWBT filed a Motion for Protective Order. On January 6, 2000, the Commission held a prehearing conference in this matter. That same day, January 6, 2000, MCI WorldCom Network Services, Inc., f/k/a MCI Telecommunications Corporation, and MCImetro Access Transmission Services, L.L.C., filed a motion requesting that the Commission allow a substitution of parties, making the proper participant in this case MCI WorldCom Communications, Inc.

On January 27, 2000, the Commission issued an order granting the applications of McLeod and Nextlink to intervene out of time. The Commission also granted SWBT's Motion for Protective Order and recognized the group name change of the Mid-Missouri Group to the Missouri Independent Telephone Group (MITG).

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<sup>7</sup> The Missouri Independent Telephone Group's Notice of Group Name Change did not include Peace Valley Telephone Company.

On February 1, 2000, interested parties filed Direct Testimony pursuant to the procedural schedule that had been adopted in this case.

On February 29, 2000, the Commission issued an Order Scheduling Local Public Hearings. In that order, the Commission ordered five public hearings to be held: one in Springfield, Missouri; two in the St. Louis, Missouri, metropolitan area; and two in the Kansas City, Missouri, metropolitan area. These public hearings proceeded as scheduled.

On March 1, 2000, interested parties filed Rebuttal Testimony and on March 28, 2000, interested parties filed Surrebuttal Testimony pursuant to the procedural schedule.

On April 11, 2000, Staff filed a List of Issues. On April 21, 2000, Staff filed a Proposed Order of Witnesses and Order of Cross-Examination. That same day, April 21, 2000, Staff filed a Motion for Leave to File Supplemental Direct Testimony. On April 25, 2000, interested parties filed Statements of Position.

On May 4, 2000, the Commission issued an Order Granting Leave to File Supplemental Direct Testimony and Granting Motion to Compel. In that Order, the Commission granted Staff leave to file the Supplemental Direct Testimony of William L. Voight and the Supplemental Direct Testimony of Amonia L. Moore. The Commission ordered any interested party to file Supplemental Surrebuttal Testimony to the Supplemental Direct Testimony of William L. Voight and the Supplemental Direct Testimony of Amonia L. Moore no later than May 11, 2000.

On May 9, 2000, the Commission issued its Order Granting Motions to Accept Testimony Out of Time and Substituting Parties. In that order, the Commission substituted MCI WorldCom Communications, Inc. (MCI), for MCI WorldCom Network Services, Inc., f/k/a MCI Telecommunications Corporation, as a participant without intervention in this proceeding. The Commission also granted the motions to accept testimony out-of-time of McLeod and Cass.

On May 11, 2000, interested parties filed Supplemental Surrebuttal.

An evidentiary hearing was held from May 15-19, 2000, at the Commission's offices in Jefferson City, Missouri. Interested parties were represented at the hearing. Thereafter, interested parties filed Initial Briefs, Reply Briefs, and Proposed Findings of Fact and Conclusions of Law.

#### **Late-Filed Exhibits**

At the hearing, Exhibit No. 51 was reserved for AT&T to file portions of the language regarding compensation mechanisms in its interconnection agreement with GTE. Exhibit No. 53HC was reserved for McLeod to file the number of access lines it provides in the State of Missouri. Exhibit No. 57 was reserved for Gabriel to file a copy of its "Millennium" tariff. Exhibit No. 71 was reserved for Cass to file a copy of Section 37 of the interconnection agreement between SWBT and McLeod as approved in Commission Case No. TO-2000-26. No objections to those exhibits were filed and Exhibit Nos. 51, 53HC, 57, and 71 are received into the record.

Exhibit No. 67HC<sup>9</sup> was reserved for Staff to file corrected direct and supplemental direct testimony of Amonia L. Moore. On June 5, 2000, SWBT filed a response to Exhibit No. 67HC indicating that not all of the testimony of Amonia L. Moore had been corrected, but that only select portions were updated. SWBT stated that it did "not object to the changes because they do not appear to affect a significant issue in this matter. SWBT does object, however, to selective updating of material shown to be incorrect at the hearing." No other responses or objections to Exhibit No. 67HC were received.

It is unclear from SWBT's Response whether it truly objects to Exhibit No. 67HC coming into this record or not. SWBT does request in its prayer for relief that the Commission consider its arguments when evaluating the information supplied in the exhibit. Ms. Moore made corrections to her prefiled testimony during the evidentiary hearing. Staff then asked at the close of the hearing to be allowed to file as a late-filed exhibit those corrections. Because the parties will not have had an opportunity to cross-examine Ms. Moore with regard to Exhibit No. 67HC, and because SWBT admits that the corrections to the testimony of Amonia L. Moore do not significantly affect the pending issues in this case, the Commission will exclude Exhibit No. 67HC from the evidence. The exhibit will, however, be preserved in the record as an offer of proof. The Commission will treat SWBT's responses as an objection and will sustain the objection.

#### **Pending Motions**

##### **Motion to Strike**

On July 10, 2000, Cass filed a Motion to Strike the last three sentences of the first full paragraph on page ten of the Initial Brief of Intermedia and Attachment I to Intermedia's Initial Brief. Cass averred that Attachment I was not included in any of Intermedia's prefiled testimony nor was it ever introduced into evidence at hearing.

On July 14, 2000, Intermedia filed its response. Intermedia argued that its statements in its brief and its Attachment I was offered in response to a question from Vice Chair Drainer during the evidentiary hearing. Intermedia stated that it did not offer the Attachment for its substantive content.

On July 19, 2000, Cass filed a reply to Intermedia's response. In that reply, Cass stated that the third full sentence on page 28 of Intermedia's Reply Brief should also be stricken because it contains facts which are not in evidence. Intermedia responded on July 28, 2000, to Cass's additional motion to strike.

The Commission rules provide: "No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the Commission." 4 CSR 240-2.130(8). The questions which Vice Chair Drainer asked all of the parties to brief were related only to the legal issues. Although Intermedia states that the information was not submitted as substantive evidence, if it is accepted, that is the only purpose that it can serve. Therefore, the Commission will sustain Cass's motion and strike portions of Intermedia's Initial Brief.

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<sup>9</sup>When this exhibit was first received the Regulatory Law Judge inadvertently marked it as Exhibit No. 72HC; however, a Notice of Correction was issued on June 9, 2000 correcting that error.

For the same reasons, the Commission will strike portions of Intermedia's Reply Brief. However, not all of the sentence in the reply brief that Cass cites is supplemental evidence. Therefore, the Commission will strike only the words "as early as 1997" as ordered below.

**Motion to Establish Case**

On June 6, 2000, Public Counsel filed a motion to establish a case to consider modification to MCA service. Public Counsel stated that as a result of the public hearings and media coverage of this case, telephone customers outside of the MCA have requested that the MCA be expanded. Public Counsel stated that it has received correspondence from over 250 businesses and customers in the City of Lexington and inquiries from the Innsbrook community in Warren County requesting expansion of the MCA. Public Counsel also stated that it received electronic mail messages from telephone customers in the City of Greenwood and from the Ozark County Commission regarding MCA rates.

Staff also proposed potential changes to the MCA service that were referred to as MCA-2<sup>9</sup>. Staff responded to Public Counsel's motion on June 16, 2000. Staff states that it is premature to open a new case to explore changes to the MCA until the Commission enters a final decision in this case and it becomes more clear what issues may or may not need to be resolved. Staff recommended that if the Commission opened a new case it should give the parties specific direction as to the scope of that proceeding.

As the issues in this case became established, it was clear to the Commission that the foremost issues were the ability of the CLECs to provide the MCA service and the intercompany compensation. There was insufficient evidence presented to determine if calling scope modifications were needed.

The Commission will establish an Industry Task Force to investigate issues related to price and the effects of an expanded MCA on pricing. Because the Commission intends to investigate the MCA service further, and because the issues being decided in this case may have an impact on MCA service, the Commission finds that it is premature to open a new case to examine the consumer pricing and calling scope issues. Therefore, Public Counsel's motion will be denied.

**Discussion**

**The Issues:**

In compliance with the Commission order establishing a procedural schedule, Staff submitted a list of issues for determination by the Commission. Each party also filed a statement indicating its position with respect to those issues. The issues formulated by the parties as presented by Staff and the general position of the parties at the close of the evidentiary hearing were as follows:

- a. **Are competitive local exchange carriers (CLECs) currently included in the MCA plan, and, if not, should CLECs be permitted/required to participate in the MCA plan?**

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<sup>9</sup> MCA-2 in the context of this case is discussed further below.

All parties agree that CLECs should be able to participate in the MCA service on a going-forward basis. The incumbent local exchange carriers (ILECs) contend that CLECs are not currently participating. The CLECs, Staff and Public Counsel contend that the ILECs are unlawfully interfering with CLEC participation in the MCA and that the Commission must stop such interference immediately to restore the full operation and benefits of the service.

- b. If permitted to participate in the MCA plan, should CLECs be required to follow the parameters of the MCA plan with regard to (a) geographic calling scope, (b) bill-and-keep intercompany compensation, (c) use of segregated NXXs for MCA service, and (d) price?**

Most of the ILECs generally contend that if CLECs offer MCA service, it must be on exactly the same terms and conditions as the ILECs offer it. The other parties generally contend that CLECs should continue to have the flexibility afforded them as competitive carriers. There does not appear to be a real dispute regarding calling scopes, with all parties agreeing that CLECs should offer the same calling scope for MCA service as the ILECs and that CLECs should also be able to offer additional outbound toll-free calling in conjunction with MCA service, but under a different service name, as the ILECs already do. The other issues are discussed below.

- c. Should there be any restrictions on the MCA plan (for example resale, payphones, wireless, internet access, etc.)?**

A few parties seek restrictions on the use of MCA service for calling wireless carriers and internet service providers. The other parties oppose any new restrictions.

- d. What pricing flexibility should ILECs and/or CLECs have under the MCA plan?**

Staff, Public Counsel, the CLECs, and several other parties contend that CLECs should have pricing flexibility as competitive companies. Public Counsel suggests that current ILEC MCA prices should serve as a cap. The others contend such a cap is not permitted, but the ILEC prices will serve as such a cap for all practical purposes. Most of the ILECs assert that the CLECs should only have the same flexibility as the ILECs.

- e. How should MCA codes be administered?**

Nearly all parties agree that separate NXX codes are still required for the provision of MCA service. Staff would like to avoid the continued use of separate NXX codes. Some parties advocate a verified notification procedure for identifying MCA NXX codes, others advocate use of the Local Exchange Routing Guide (LERG) tables, and others seek third party code administration.

- f. What is the appropriate intercompany compensation between LECs providing MCA services?**

Staff and the CLECs propose that intercompany compensation between carriers operating in adjoining areas should continue to be handled on a bill-and-keep basis, and that reciprocal compensation should continue to be used between carriers competing against each other in the same service areas. Other parties propose to override interconnection agreements and use bill-and-keep arrangements for all MCA traffic.

**g. Is the compensation sought in the proposed MOU appropriate?**

SWBT is the only party that defends the proposed Memorandum of Understanding (MOU) compensation. Other parties that take a position oppose SWBT's proposal as an unlawful surcharge upon delivery of local dialing parity and a competitive loss recovery device.

**h. Should the MCA plan be retained as is, modified (such as Staff's MCA-2 proposal) or eliminated?**

All parties agree that MCA service should be retained. Some parties propose commencement of another proceeding to investigate future modifications to the service.

**i. If the current MCA plan is modified, are ILECs entitled to revenue neutrality? If so, what are the components of revenue neutrality and what rate design should be adopted to provide for revenue neutrality?**

Several ILECs indicate that revenue neutrality would be appropriate if the service were to be modified in the future. Only SWBT claims any revenue neutrality is required in this case, and it proposes the MOU surcharge be used. Other parties that take a position assert there is no need to address revenue neutrality in this case and oppose the surcharge, as indicated above.

**j. Should MCA traffic be tracked and reported, and if so, how?**

The small ILECs express concern about their ability to identify MCA traffic being delivered to them. The other parties generally contend that there is no need to track MCA traffic being delivered to the ILECs because it is delivered on a bill-and-keep basis.

### **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 telephone companies serving the Kansas City, St. Louis, and Springfield metropolitan areas have been pressured by their customers to provide flat-rate, expanded local calling plans. For over 25 years, the Commission and the telecommunications industry have responded to economic development and public interest concerns by developing, implementing, and refining expanded calling plans.

In the mid-1970s, the Commission adopted an Extended Area Service (EAS) plan in order to recognize the calling patterns of Missouri customers. Specifically, the Commission recognized that school districts, places of employment, medical facilities, places of worship, and shopping facilities often crossed exchange boundaries. The Commission observed that the calling patterns of businesses also crossed exchange boundaries. Accordingly, the Commission implemented

the EAS plan in order to meet the economic development and public interest needs of Missouri customers.

The Commission revisited Missouri's calling scope issues about ten years later, and it withdrew the prior EAS rule and ordered the industry to implement an experimental Extended Measured Service (EMS) plan.<sup>10</sup> A new case was opened to investigate the experimental EMS, and it was in this case that the Commission ordered Community Optional Service (COS).<sup>11</sup> The industry also proposed and attempted to implement an Extended Local Calling Scope (ELCS) program.<sup>12</sup>

In 1991, the Commission continued to address Missouri calling scope issues by initiating a task force representing various communities, state agencies, and company officials. This task force developed a report, and in 1992 the Commission held hearings in Case No. TO-92-306. On December 23, 1992, the Commission issued its Report and Order that revised the COS and established the Metropolitan Calling Area (MCA) service and the Outstate Calling Area (OCA) service.<sup>13</sup>

In the Report and Order in Case No. TO-92-306, the Commission defined the calling scope of the MCA service. The Commission structured the MCAs in tiers radiating out from the centers of St. Louis, Kansas City, and Springfield. In St. Louis and Kansas City, there are six tiers, the Center tier and MCA tiers 1-5. In Springfield, there are three tiers, the Center tier and MCA tiers 1 and 2. In St. Louis and Kansas City, the Center tier, MCA-1 and MCA-2 comprise the metropolitan exchange. In Springfield, the Center tier and MCA-1 comprise the Springfield metropolitan exchange. Unlike the metropolitan exchanges in St. Louis, Kansas City, and Springfield, the optional MCA tiers 3, 4, and 5 in St. Louis and Kansas City, and the optional tier 2 in Springfield, are actually composed of several individual exchanges within each MCA tier.

The Commission ordered MCA Service to be a mandatory service offering in MCA-Central, MCA-1, and MCA-2 in St. Louis and Kansas City, as well as MCA-Central and MCA-1 in Springfield. The Commission determined in these exchanges, MCA service would replace basic local service, except for those customers who choose local measured service where that service is available. The Commission further determined that MCA service would be an optional service to which a customer could subscribe in MCA-3, MCA-4, and MCA-5 in St. Louis and Kansas City, as well as MCA-2 in Springfield. Additionally, the Commission mandated the rates to be charged for MCA service.

The Commission recognized MCA as a local service offering, while COS and OCA were classified as toll offerings. The form of intercompany compensation was also differentiated. MCA was provided under a bill-and-keep compensation arrangement where each carrier billed its own end-user customers rather than

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<sup>10</sup> See In the Matter of the Investigation into All Issues Concerning the Provision of Extended Area Service (EAS) in the State of Missouri under Commission Rule 4 CSR 240-30.030, Case No. TO-86-8, *Report and Order*, Mar. 20, 1987.

<sup>11</sup> See In the Matter of the Investigation of Experimental Extended Measured Service (EMS), Case No. TO-87-131, *Report and Order*, Dec. 29, 1989.

<sup>12</sup> *Id.*

<sup>13</sup> In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges, Case No. TO-92-306, *Report and Order*, Dec. 23, 1992.

creating billing records and billing other carriers for interexchange traffic. (COS and OCA, on the other hand, were recognized as toll services and were therefore access-based compensation plans.)

Since its implementation, MCA service has met the public interest, and customer complaints about calling scopes have been greatly reduced. In 1996, however, federal and state telecommunications legislation greatly changed the landscape of the telecommunications industry in Missouri. This legislation allowed for competition in the local telecommunications services market, and the entrance of new telecommunications providers led to confusion about the availability of MCA service. On July 16, 1998, two small ILECs filed a motion to clarify the situation. The Commission opened Case No. TO-98-379 for this purpose.<sup>14</sup>

On April 22, 1999, the Commission's Staff filed a motion requesting an investigation of the provisioning of metropolitan calling area service after the passage and implementation of the Telecommunications Act of 1996, 47 U.S.C. 151, *et seq.* In response, the Commission opened the present case.

The evidence in this case indicates that the MCA service ordered by the Commission in Case No. TO-92-306 is still in the public interest. The evidence also indicates that Missouri telephone customers in the three major metropolitan areas desire MCA service and find it a valuable feature. No party has proposed eliminating MCA service.

#### **CLEC Participation in MCA Service.**

MCA service was established before the entry of CLECs into Missouri. It was not until Congress passed the Telecommunications Act of 1996 (the Act) that the "competitive" part of "competitive local exchange carrier" came into existence. Whether or not the CLECs could or could not have participated in the MCA in the past, although defined by the parties as an issue in this case, is not a proper issue for this case. This case was established to determine the status of the MCA service from this point forward and therefore any damages sustained by what the CLECs allege was illegal action by the ILECs is more properly raised in a complaint case.

The evidence indicates that the participation of CLECs in MCA service will serve the public interest just as the provision of MCA service by the ILECs has served the public interest since 1992. The public policy considerations and needs addressed by this Commission in Case No. TO-92-306 still exist today, and it is in the public interest to issue an Order that will clarify and facilitate the expeditious participation of CLECs. As explained more fully below, the Commission finds that CLECs should be allowed to participate in MCA service on a voluntary basis under the same terms and conditions that were ordered by the Commission for the Incumbent Local Exchange Carriers (ILECs) in Case No. TO-92-306 with the exception of pricing.

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<sup>14</sup> In the Matter of MoKan Dial, Inc. and Choctaw Telephone Company's Joint Request for Clarification and Determination of Certain Aspects as to the Continued Provisioning of MCA Service. This case was later closed and the present case, Case No. TO-99-483, became the lead case for the resolution of MCA plan issues.

**Geographic Calling Scope.**

When MCA service was established, the calling scopes and the cost of transporting services from those exchanges were carefully examined based on the existing networks and revenue streams that they replaced. The evidence presented shows that the MCA service's present calling scope is reasonable and continues to serve the public interest.

Nothing in this order will prohibit CLECs from offering their own expanded calling plans in addition to the existing MCA service, and the evidence shows that the CLECs are willing to pay the appropriate access charges for expanded calling that exceeds the boundaries of the MCA. For example, Gabriel acknowledges that it must pay terminating access charges to ILECs in adjoining areas for any toll-free calling outside the scope of the MCA. Similarly, Sprint recognizes that if CLEC calling scopes differ from the present MCA calling scope, then other LECs should not be required to treat their outbound calls as local calls for any area larger than the Commission-defined MCA. Public Counsel commented that no CLEC or ILEC should be required to accept a call under any expanded calling plans as a non-toll call if it is a toll call under the MCA service.

In order to prevent any confusion within the telecommunications industry, the Commission will clarify that any expanded calling to areas outside the scope of the present MCA is subject to the appropriate terminating access charges. This is true if either a CLEC or an ILEC chooses to expand the local calling scope for its customers beyond the current bounds of the MCA.

To prevent any confusion for Missouri's telephone customers in the metropolitan areas, the Commission finds that any plans with calling scopes that differ from the present MCA calling scopes should not be called "Metropolitan Calling Area" or "MCA" service.

**Intercompany Compensation.**

In Case No. TO-92-306, the Commission ordered that intercompany compensation for MCA traffic be handled on a bill-and-keep basis. Under the bill-and-keep method, carriers do not reimburse each another for traffic within the MCA. Rather, carriers bill their own end-user customers for MCA service and keep these MCA revenues. Intercompany compensation currently exists as bill-and-keep between ILECs. Between ILECs and CLECs, intercompany compensation is currently subject to the terms of interconnection agreements.

Abandoning MCA service's current bill-and-keep intercompany compensation method in favor of usage-based reciprocal compensation agreements could introduce upward pressure on rates for MCA service because the cost of providing the service could increase. This could ultimately threaten the viability of the MCA service.

The Commission prescribed MCA rates as part of an overall plan to maintain revenue neutrality among the LECs that it required to provide MCA service. Specifically, the amount of lost toll that the LECs would experience once the MCA service was implemented was included in the revenue-neutrality calculations. The market has changed with the implementation of the Act. However, only general evidence regarding pricing was offered in this case, because this was not the time and place for those decisions to be made.

The imposition of a transiting charge on MCA traffic will also produce upward pressure on rates for MCA service because the cost of provisioning the service will increase. This will also threaten the viability of MCA service.

MCA service has used a bill-and-keep method since its outset, and bill-and-keep is a competitively neutral method of intercompany compensation that will help ensure the continued provision of MCA service. Therefore, the Commission finds that the bill-and-keep method of intercompany compensation is best suited to preserve MCA service, and the use of bill-and-keep intercompany compensation is necessary to ensure the continued quality of telecommunications services in Missouri.

No showing of a traffic imbalance between carriers has been made in this case that would preclude the Commission from ordering that MCA service continue to be provisioned on a bill-and-keep basis. None of the CLECs have presented any evidence of a traffic imbalance even though intercompany compensation has been an issue in this case from its outset.

The Commission finds that bill-and-keep intercompany compensation is the most appropriate form of intercompany compensation for MCA service at this time.

#### **MCA NXX Codes.**

NXX codes are the first three digits of a seven-digit local telephone number. The NXX code specifies the carrier and the central office that serve that number. NXX codes are used by the current MCA service to distinguish between MCA customers and non-MCA customers. This arrangement requires a single carrier to acquire two NXX codes to serve customers in a single exchange. NXX codes are issued in blocks of 10,000. NXX codes are a limited resource and conservation measures are warranted.

Although MCA service uses a greater number of NXX codes than other services, at this time the public interest in preserving a popular and successful expanded calling plan justifies the use of the extra codes. NXX code depletion associated with MCA service may also be mitigated by the advent of 1000-block number pooling. The use of dedicated MCA NXXs remains the only reasonable method of providing MCA service and, while the Commission is cognizant of the concerns regarding number exhaustion, the continued utilization of this method will not put the industry in a jeopardy situation.

Currently, the LERG tables are used by the local exchange carriers (LECs) to determine which NXX codes are MCA service codes. The Commission further finds that the LERG is an appropriate mechanism to identify the MCA NXX codes. However, the parties will be asked to address this issue in the context of an appropriate long-term solution, as a subject to be considered by the Industry Task Force. CLECs and ILECs shall be required to use segregated NXXs for MCA service as explicitly set forth in the original MCA order in Case No. TO-92-306.

In addition, each certificated LEC within the MCA shall send a letter to each other certificated LEC in the MCA in which the LEC is operating. The letter shall specifically identify the LEC's NXX codes that are MCA service codes and which codes are for optional MCA service. The Commission will also order new LECs and any LEC adding a new NXX for MCA service to notify each certificated LEC within the MCA of the addition of that code as ordered below.

**Pricing of MCA Service.**

MCA service is a Commission-mandated service that has not been cost based and ILECs have been required to offer the service at set rates as established in Case No. TO-92-306. The current MCA rates were based upon distance from the central tiers.

CLECS are already certificated to provide MCA service and do not need further authority. Some CLECs also have approved tariffs to provide MCA service some of which are at rates below ILEC rates and may be in conjunction with additional outbound toll-free calling or other services. Consumer benefits would diminish if companies were forced to provide the MCA service at the exact price as its competitors.

The goal of creating a competitive local exchange service market, as envisioned by the Act, generates the need to allow CLECs flexibility in their service offerings. This is a necessary incentive for customers if they are to switch to a competitor's service.

Restricting CLECs from pricing MCA service downward would contradict the purposes of opening local markets to competitive entry and be contrary to the public interest. There is also no reason to require CLECs which are charging lower rates for MCA service to increase those rates. Because MCA service comprises the vast majority of local traffic in the metropolitan areas, without competitive pricing and competitive outbound calling scopes, consumers would receive no benefits from local competition. Also, in the mandatory zones where MCA is basic local service, without pricing flexibility, there would be no basic local price competition. Furthermore, any pricing flexibility permitted under MCA service must apply equally to all participating companies to ensure competitive neutrality.

The Commission finds that it is reasonable, necessary, and in the public interest to allow downward pricing flexibility for CLECs participating in the MCA Service.

The Commission also finds that it is in the public interest to allow ILECs to exercise the full pricing flexibility that they are statutorily entitled to have. The Commission determines that ILECs are allowed to change their MCA service charges in response to competition brought on by flexible pricing of MCA service by CLECs, subject to statutes and other safeguards against predatory pricing. For price cap companies, that means that pricing flexibility subject to maximum allowable prices under Section 392.245, RSMo. For rate-of-return companies, that means pricing flexibility subject to total earning limitations under Sections 392.220-240, RSMo.

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.

**MCA Service Restrictions.**

Except for the prohibition against resale, existing tariff restrictions on MCA service should be continued (e.g., payphone restrictions). The existing tariff restrictions are lawful and reasonable, and there has been no evidence presented that would allow the Commission to find otherwise.

So long as the existing bill-and-keep intercompany compensation method is maintained, MCA subscribers may use MCA service for purposes of accessing the Internet.

**Tracking and Recording of MCA Traffic.**

The evidence indicates that very few of the CLECs are tracking, recording, and reporting their traffic to the small ILECs. If CLECs choose to participate in the Commission's MCA service, then the CLECs must create the necessary records that will allow Missouri's small ILECs to distinguish between MCA and non-MCA traffic sent by the CLEC to the small ILEC. Most of the CLECs concede that they will be responsible for paying terminating access charges on non-MCA traffic, yet the small ILECs have no way to bill for this traffic if the CLECs do not track the traffic and create the appropriate records. Therefore, CLECs must: (1) separately track and record MCA and non-MCA traffic, and (2) send reports to the small ILECs for all non-MCA traffic. Alternatively, the CLECs may choose to separately trunk their MCA traffic. Either of these alternatives will help to assure that Missouri's small ILECs are compensated for traffic that CLECs send to the small ILECs' non-MCA customers.

**Memorandum of Understanding.**

An additional issue that was included in the issues identified for this proceeding is the dispute of Intermedia and SWBT regarding their MOU. Intermedia executed the MOU on December 3, 1999.

Intermedia is a competitive facilities-based local telecommunications company authorized by the Commission to provide basic local telecommunications service within the Company's approved service territory within the State of Missouri. Intermedia received Commission approval of its first interconnection agreement with SWBT in Case No. TO-97-260 by order issued on March 7, 1997, and Commission approval of its second interconnection agreement with SWBT, which was an adoption of the SWBT/AT&T arbitrated agreement, in Case No. TO-2000-364 by order issued on January 25, 2000. Intermedia received its conditional certificate of service authority to provide facilities-based basic local telecommunications service in Case No. TA-97-264 by order issued on September 10, 1997. Intermedia's certificate was made fully effective when the Commission approved Intermedia's Missouri Local Telecommunications Tariff, P.S.C. Mo. No. 3, effective December 12, 1997.

The evidence reflects that in the spring of 1999, Intermedia was offering toll-free expanded local calling service to its customers in and around the St. Louis metropolitan area, including exchanges located in the MCA-3 and MCA-4 tiers. Intermedia's switch translations and rate center configurations in use at that time allowed calls to and from Intermedia's NXX codes to be completed and rated as local calls just as if Intermedia's customers were SWBT MCA service customers.

On or about April 19, 1999, SWBT notified Intermedia that it had erroneously translated Intermedia's NXX codes and that it would begin re-translating Intermedia's NXX codes from local to toll the following week. Re-translation of Intermedia's NXX codes would have eliminated the toll-free return calling feature for Intermedia's MCA customers. At Intermedia's request, on April 26, 1999, SWBT agreed to postpone its switch re-translation of Intermedia's NXX codes to allow the parties time to negotiate a resolution to the matter.

Intermedia and SWBT continued their negotiations through the following summer and fall. In September 1999, SWBT began re-translating Intermedia's NXX codes. SWBT subsequently reversed its September switch re-translations but on or about October 26, 1999, SWBT again notified Intermedia that it would begin re-translating Intermedia's NXX codes from local to toll starting November 5, 1999. On December 3, 1999, Intermedia executed the MOU. Since signing the MOU, Intermedia's customers have continued to receive the MCA service toll-free return calling feature and all calling features of MCA service.

On December 22, 1999, Intermedia filed a revision to its existing tariff which mirrored the customer rates, terms and conditions found in SWBT's MCA tariff for service in the St. Louis area. The Commission approved Intermedia's tariff changes effective January 22, 2000.

The Commission concludes that the MOU is a modification of the interconnection agreement between those parties. The MOU was not approved by the Commission pursuant to Section 252 of the Act or pursuant to the orders of the Commission. Because the MOU was not properly approved, the Commission determines that the agreement is unlawful. Furthermore, it is not necessary for the Commission to determine whether the compensation sought in the MOU is appropriate because the Commission has determined the appropriate pricing for MCA service and the method for intercompany compensation, as set out above.

#### **Conclusions of Law**

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

##### **State Law.**

Under the provisions of Section 386.250, RSMo Supp. 1999, the Commission has jurisdiction and supervisory powers over telecommunications companies that operate in the state of Missouri. Section 392.240, RSMo 1994, grants the Commission authority over the rates and charges that are charged or collected by telecommunications companies operating in Missouri. Under Section 392.470, RSMo 1994, the Commission has the authority to impose conditions that it deems reasonable and necessary upon any carrier providing telecommunications service if such conditions are in the public interest. Under Section 392.361, RSMo 1994, the Commission has the authority to require competitive telecommunications companies to comply with any conditions reasonably made necessary to protect the public interest.

Pricing flexibility for price cap companies is subject to maximum allowable prices under Section 392.245, RSMo Supp 1999. Pricing flexibility for rate-of-return companies is subject to the total earning limitations under Sections 392.220-240, RSMO Supp 1999.

On December 23, 1992, the Commission ordered the implementation of the MCA service in its Report and Order, In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges, Case No. TO-92-306, December 23, 1992. For the three MCAs, the Commission explicitly defined the terms and conditions that would apply to MCA service. The Commission retains continuing jurisdiction to review the MCA service.

**Federal Law.**

Section 253(b) of the Act authorizes the Commission to impose, on a competitively neutral basis, requirements necessary to preserve and advance the public welfare, ensure continued quality of telecommunications services, and safeguard the rights of consumers. Section 251(d)(3)(A) of the Act allows the Commission to enforce any regulation, order, or policy that establishes access and interconnection obligations of local exchange carriers. Section 252(e)(3) of the Act allows the Commission to establish or enforce other requirements of state law in its review of interconnection agreements.

The Commission has found that the existing MCA service continues to meet the expanded calling scope needs and desires of many customers in Missouri's three major metropolitan areas. There has been unanimous agreement among the parties that MCA service should continue. The Commission has found that MCA service is in the public interest and the rates are just and reasonable. The Commission concludes that allowing CLECs to participate in the MCA on a voluntary basis is in the public interest so long as CLECs participate under the same terms and conditions as ordered by the Commission in Case No. TO-92-306 with the exception of pricing flexibility.

The fact that the MCA service was created before the passage of the federal Telecommunications Act of 1996 should not serve as an impediment to CLEC participation in the MCA service, nor should it serve as a rationale to undermine the uniformity of terms and conditions which are critical to the service's continued viability.

**The Commission's Authority over Interconnection Agreements.**

Some parties have raised the issue of the Commission's authority over existing and future interconnection agreements. Because CLECs will be allowed to voluntarily participate in MCA service under the terms and conditions as ordered by the Commission, it is not necessary to address the terms of existing or future interconnection agreements. Those CLECs that wish to offer MCA service must do so under the same terms and conditions as ordered by the Commission in Case No. TO-92-306 and in this current case with regard to pricing flexibility and notice of NXX codes. Specifically, CLECs that choose to offer MCA service must offer the same geographic calling scope, with prices no more than those set in Case No. TO-92-306, and under the same bill-and-keep intercompany compensation method.

Two regulated utilities cannot contract around an order from the Commission, and the terms of a private agreement cannot override the terms of a preexisting, Commission-mandated calling plan. Under Section 392.240, RSMo 1994, the Commission has authority over the rates and charges that are charged or collected

by telecommunications companies operating in Missouri. Moreover, a Commission order will supercede the terms of a contract agreement between two telephone companies as to the service rates they charge each other. Oak Grove Home Telephone Co. v. Round Prairie Telephone Co., 209 S.W. 552, 553[4] (Mo. Ct. App. 1919).

**Bill-and-Keep Intercompany Compensation.**

Sections 51.705 and 51.713 of the Act allow the Commission to order that intercompany compensation for MCA service continue on a bill-and-keep basis. However, some parties have questioned the authority of the Commission to issue such an order. These arguments confuse the elements of the FCC's rule and the burden on the parties. The FCC explains:

***States may, however, apply a general presumption that traffic between carriers is balanced and is likely to remain so. In that case, a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists.*** Under such a presumption, ***bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof.*** We also find that states that have adopted bill-and-keep arrangements prior to the date this order becomes effective, either in arbitration or rulemaking proceedings, may retain such arrangements, unless a party proves to the state commission that traffic is not roughly balanced.

*First Report and Order*, CC Docket Nos. 96-98, 95-185, para. 1113 (emphasis added). Therefore, this Commission may presume that traffic is balanced and is likely to remain so. None of the CLECs in this case have presented evidence to the contrary. Thus, no showing has been made in this case that would prevent the Commission from ordering that MCA traffic continue to be exchanged on a bill-and-keep basis.

Requiring all telecommunications providers to use the same bill-and-keep intercompany compensation mechanism is a competitively neutral requirement that will ensure the continued provision of MCA service. Preserving the present MCA service will help to ensure the continued quality of telecommunications services and safeguard the rights of consumers. Therefore, the Missouri Commission has the authority to order that all CLECs that choose to participate in MCA service must use the same bill-and-keep intercompany compensation mechanism that is used by the ILECs today.

**Memorandum of Understanding.**

Section 252 of the Act requires all interconnection agreements between incumbent local exchange carriers and CLECs be submitted to the Commission for approval. SWBT's MOU with Intermedia constitutes an interconnection agreement under Section 252 of the Act because it involves "the transmission and routing of telephone exchange service and exchange access" under Section 251(c)(2)(a) of the Act and because it purports to modify the intercompany compensation arrangements for the exchange of local traffic specified in the Commission-

approved SWBT/Intermedia interconnection agreement. As a matter of state law, the Commission's order issued in Case No. TO-97-260 required the parties to submit any amendments or modifications to their existing interconnection agreements to the Commission for approval. The MOU by its terms purports to modify the terms of the parties' existing interconnection agreement and is therefore also an amendment to the parties' existing agreement. The failure of the parties to submit the MOU is a direct violation of a prior Commission order and is therefore unlawful under Section 386.570, RSMo 1994. The Commission concludes that the MOU between SWBT and Intermedia is unlawful since it was not submitted to the Commission for approval under applicable federal and state law.

*IT IS THEREFORE ORDERED:*

1. That the Motion to Establish Case to Consider Modifications to the PSC's Metropolitan Calling Area Plan is denied.
2. That the objection of Southwestern Bell Telephone Company to Exhibit No. 67HC is sustained.
3. That Exhibit Nos. 51, 53HC, 57, and 71 are received into the record.
4. That the motion to strike portions of the Initial Brief of Intervenor Intermedia Communications, Inc., filed by Cass County Telephone Company, et al., on July 10, 2000, is granted.
5. That the three sentences beginning "Shortly after the hearing" and ending "the issue in this proceeding", including footnote 2 on page 10 and Attachment I of the Initial Brief of Intervenor Intermedia Communications, Inc., are stricken.
6. That the motion to strike portions of the Reply Brief of Intervenor Intermedia Communications, Inc., filed by Cass County Telephone Company, et al., on July 19, 2000, is granted in part as specified in Ordered Paragraph 7.
7. That the words "as early as 1997" in the last sentence of Section V., page 28 of the Reply of Intervenor Intermedia Communications, Inc., are stricken.
8. That all other pending motions and applications, not specifically ruled upon herein, are denied.
9. That any telecommunications company which has been granted a certificate of service authority to provide basic local telecommunications service by the Commission may continue to provide Metropolitan Calling Area service pursuant to such certificate and tariffs approved thereunder, including by resale of incumbent LEC services or by means of its own facilities (including leased facilities such as unbundled elements), or may file tariffs offering such service for approval, and any telecommunications company which is granted such a certificate in the future may likewise provide such service pursuant to such certificate and tariffs approved thereunder.
10. That any telecommunications company that is providing Metropolitan Calling Area service shall offer the full calling scope prescribed in Case No. TO-92-306, without regard to the identity of the called party's local service provider. Any company may offer additional toll-free outbound calling or other services in conjunction with Metropolitan Calling Area service, but in any such offering the company shall not identify any calling scope other than that prescribed in Case No. TO-92-306 as "Metropolitan Calling Area" or "MCA" service.
11. That each certificated local exchange carrier providing Metropolitan Calling Area service shall send a letter within 10 days of the effective date of this Report and Order to each

other certificated local exchange carrier in the same Metropolitan Calling Area, and shall send a copy of that letter to the Office of the Public Counsel and the Staff of the Missouri Public Service Commission, and shall file a copy of that letter in this case. The letter shall: (1) identify the NXX codes being used; (2) confirm that such NXX codes are associated with rate centers within the exchanges comprising the Metropolitan Calling Areas as established in Case No. TO-92-306; (3) confirm that numbers within the designated NXX code(s) are being assigned to customers purchasing the calling scope prescribed in Case No. TO-92-306, either independently or in conjunction with other services and calling scopes; and (4) provide contact information (address, telephone, fax, e-mail) so that other companies may provide it with copies of their notifications. Companies reselling MCA service or providing MCA service in conjunction with ported numbers of former subscribers to another company's MCA service may rely upon the notifications of the other companies regarding the involved NXX codes. All other companies shall accept such notices from other companies as true for all purposes including administration of their MCA calling scopes unless otherwise ordered by the Commission and shall provide MCA service to their customers in accordance therewith.

12. That the Staff of the Missouri Public Service Commission shall aide the carriers in identifying which carriers are certificated in each Metropolitan Calling Area.

13. That with the exception of the notice ordered above, the Metropolitan Calling Area NXX codes shall be identified using the Local Exchange Routing Guide.

14. That each telecommunication company offering Metropolitan Calling Area service shall charge rates for such service which are no greater than the rates set forth in TO-92-306, by filing those rates in tariffs approved by the Commission. That each telecommunications company offering Metropolitan Calling Area service may propose changes in such rates by filing revised tariffs for review and approval under the statutes applicable to that company and its proposed tariff revision.

15. That all the telecommunications companies providing Metropolitan Calling Area service shall exchange that traffic on a bill-and-keep basis as ordered in Case No. TO-92-306.

16. That the Memorandum of Understanding between Southwestern Bell Telephone Company and Intermedia Communications, Inc., is unlawful.

17. That no telecommunications company shall charge any other telecommunications company any amount for the origination or termination of Metropolitan Calling Area traffic being exchanged by the companies.

18. That the Commission will, as a separate matter, establish an Industry Task Force to examine pricing, the expansion of the Metropolitan Calling Areas, and the other issues described herein.

19. That the competitive local exchange carriers shall separately track and record Metropolitan Calling Area traffic and send reports to the small incumbent local exchange carriers for all non-MCA traffic. Alternatively, the competitive local exchange carriers may choose to separately trunk their Metropolitan Calling Area traffic.

20. That this Report and Order shall become effective on September 19, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur;  
Murray, C., dissents, with dissenting opinion attached;  
certify compliance with the provisions of Section 536.080, RSMo 1994.

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**DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY**

While I agree with the majority that the existing MCA service should be continued and that CLECs should be allowed to participate, I must dissent from the Report and Order herein because I think the CLECs who choose to participate in MCA service should be ordered to do so under the same terms and conditions that were ordered by the Commission for the ILECs in Case No. TO-92-306. The majority chooses to apply the same terms and conditions, *with the exception of pricing*.

MCA service is a Commission-mandated service that has not been cost based and ILECs have been required to offer the service at set rates as established in Case No. TO-92-306. The current MCA rates were based upon distance from the central tiers. Although the service is offered over the toll network, access rates are not imposed because retail rates would not support the access fees.

CLECs are free to develop and price their own expanded calling plans above and beyond the MCA plan. Also, as Office of Public Counsel witness Barbara Meisenheimer pointed out, the CLECs would be free to bundle other services with MCA which would allow them to provide competitive offerings, even if the price for MCA service were fixed. Allowing CLECs to have pricing flexibility for MCA service while requiring ILECs to conform to Commission-mandated rates will provide CLECs with a regulatory-imposed competitive advantage, and it may endanger the viability of the MCA plan.

The finding of the majority that "it is reasonable, necessary, and in the public interest to allow downward pricing flexibility for CLECs participating in the MCA service" is particularly puzzling in light of the finding that the "Commission will establish an Industry Task Force to investigate issues related to price and the effects of an expanded MCA on pricing." The majority stated that there was insufficient evidence in this case about calling scope modification for the Commission to make any determinations regarding those issues. At the same time the majority made a significant determination about the pricing issues, while admittedly needing to establish an Industry Task Force to investigate those issues.

The rates for MCA service ordered in Case No. TO-92-306 continue to be just and reasonable. If a CLEC opts to provide MCA service, then it should be required to offer MCA service under the same rates that were ordered by the Commission in Case No. TO-92-306. Uniform prices for MCA service would ensure that neither CLECs nor ILECs obtain a financial or competitive advantage. Thus, uniform prices would level the competitive playing field between competing providers of local exchange service without jeopardizing the continued existence of the MCA plan. Uniform prices would eliminate the possibility of predatory pricing by large CLECs.

Therefore, I respectfully dissent.

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**ORDER DENYING REHEARING AND GRANTING MOTIONS  
FOR CLARIFICATION**

A Report and Order was issued on September 7, 2000, effective September 19, 2000. On September 12, 2000, the Missouri Independent Telephone Group (MITG) filed an Application for Clarification and Rehearing.

On September 21, 2000, Gabriel Communications, Inc., BroadSpan Communications, Inc., d/b/a Primary Network Communications, Inc., MCI WorldCom Communications, Inc., and MCImetro Access Transmission Services, LLC, filed a response to MITG's application. In their response, those companies requested that the Commission deny the application for rehearing. On September 22, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a response to MITG's application and motion. Staff recommended that the Commission deny MITG's application for rehearing. On September 22, 2000, a response from Southwestern Bell Telephone Company (SWBT) was filed which also requested that the Commission deny MITG's application for rehearing and request for clarification.

Section 386.500, RSMo 1994, provides that the Commission shall grant rehearing if, in its judgment, there is sufficient reason to do so. MITG has not raised any issues in its application for rehearing which were not considered in the Commission's Report and Order. Therefore, the Commission does not find sufficient reason to rehear or reconsider this case. The application of MITG for rehearing and motion for reconsideration are denied.

On September 18, 2000, an Application for Rehearing or Reconsideration was filed by AT&T Communications of the Southwest, Inc., TCG-St. Louis, and TCG-Kansas City (collectively referred to as "AT&T"). As part of its pleading, AT&T requested that the Commission clarify that the incumbent local exchange carriers' (ILECs) unilateral actions (or lack of action) taken with regard to the Metropolitan Calling Area (MCA) service will not be tolerated in the future.

In its September 22, 2000, response, Staff recommended that the Commission deny AT&T's request for rehearing. However, Staff did not oppose AT&T's request for clarification regarding future actions of ILECs.

On September 28, 2000, SWBT filed a response to AT&T's application for rehearing. SWBT argued that the Commission should deny AT&T's request for rehearing.

On October 2, 2000, Cass County Telephone Co., et al. (Cass County), filed a response to AT&T's application and to Staff's response. Cass County stated that it has no opinion as to whether the Commission should clarify its order with regard to past or future anticompetitive behavior; however, Cass County argued that not all ILECs should be included in that clarification. Cass County pointed out that it was two small ILECs which first came to the Commission for clarification of the implications of competition for MCA.<sup>1</sup>

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<sup>1</sup> See Case No. TO-98-379, In the Matter of MoKan Dial, Inc. and Choctaw Telephone Company's Joint Request for Clarification and Determination of Certain Aspects as to the Continued Provisioning of MCA Service.

AT&T has not raised any issues in its application for rehearing that were not considered in the Commission's Report and Order. Therefore, the Commission does not find sufficient reason to rehear or reconsider this case. The application of AT&T for rehearing and motion for reconsideration are denied with the exception of its request for clarification. The Commission clarifies that any action on part of local exchange carriers to prohibit the full implementation of competition will not be tolerated by the Commission.

Southwestern Bell Telephone Company (SWBT) filed a Motion for Clarification on September 19, 2000. In its motion SWBT stated that "the Commission did not order certificated local exchange carriers to provide valid test numbers from each certificated local exchange carrier so that the other certificated local exchange carriers could perform tests in order to ensure that their routing translations have been appropriately implemented." SWBT requested that the Commission expand the scope of its order to provide for those test numbers.

SWBT also requested that the Commission clarify the time frame in which it must perform the switch translations. SWBT requested until November 13, 2000, to perform translations for MCA NXX codes which are received on or by October 2, 2000. SWBT requests that the Commission allow 45 days for translation of certificated local exchange carriers' (CLECs) MCA NXX codes if those codes are received after October 2, 2000.

Finally SWBT indicated that there could be a problem if a CLEC provides SWBT with an NXX code that is not currently working. Thus, SWBT requested that the Commission limit its Ordered Paragraph 11, regarding notification of NXX codes, to "NXX codes that are being used today and will be used on a going forward basis as MCA NXX codes."

Staff's September 20, 2000, pleading included a response to SWBT's requests for clarification. Staff suggested that SWBT's requests be granted. Staff also suggested that the test numbers recommended by SWBT be assigned for each 1000-block of numbers (as opposed to 10,000-block of numbers) to the extent such assignments are made in that manner.

In its pleading, Staff also requests that the Commission clarify its Report and Order in two respects. First, Staff recommends that the Report and Order be clarified so that the cap on MCA service does not apply to prepaid resellers of MCA service. Secondly, Staff recommends that the Report and Order be clarified to state the "if the cap applies only in areas where the MCA is an option to basic local service . . . or if the Commission intended for the cap to apply in areas where MCA is said to be mandatory."

SWBT included a reply to Staff's response in its September 28, 2000, pleading. In that reply, SWBT stated that 1000-block number pooling has not yet been implemented in Missouri and therefore, it would not be appropriate for the Commission to require assigned test numbers on that basis at this time. SWBT also indicated that the issue of permanent maintenance of the test numbers would be better addressed by the industry task force to be set up by the Commission.

The Commission has considered the requests for clarification by SWBT. The Commission has also considered the response of Staff and Staff's requests for further clarification. The Commission finds that the Report and Order should be clarified.

The Commission intended for the MCA cap to apply to prepaid resellers of MCA service. Therefore, the Commission will not clarify that point in the manner requested by Staff.

The Commission will clarify, as Staff suggests, that the cap on MCA prices applies only in the optional tiers of the MCAs. Basic local service and MCA are not distinguishable in the "mandatory" tiers. Therefore, as Staff suggests, to apply the cap in the "mandatory" tiers would place a cap on the price of basic local service. The Commission only intended to apply the cap on the optional tier prices.

The Commission will further clarify the order regarding MCA NXX codes as ordered below.

On September 18, 2000, Staff filed a list of certificated carriers in each MCA in order to help each of those carriers comply with the Commission's Report and Order. On September 20, 2000, Staff filed a motion to substitute the list of incumbent local exchange carriers. No objections were received to Staff's motion. The Commission has considered Staff's motion and finds that it should be granted.

*IT IS THEREFORE ORDERED:*

1. That the Application for Rehearing and Motion for Reconsideration filed by MITG is denied.
2. That the Application for Rehearing or Reconsideration of AT&T Communications of the Southwest, Inc., TCG-St. Louis, and TCG-Kansas City is denied and clarification is granted as set out herein.
3. That the Motion for Clarification filed by Southwestern Bell Telephone Company on September 19, 2000, is granted as set out below.
4. That the requests for clarification of the Staff of the Missouri Public Service Commission are granted in part and denied in part as set out herein.
5. That the Report and Order issued on September 7, 2000, is clarified by adding the following requirements and limitations to Ordered Paragraph 11, so that it now reads:

11. That each certificated local exchange carrier providing Metropolitan Calling Area service shall send a letter within 10 days of the effective date of this Report and Order to each other certificated local exchange carrier in the same Metropolitan Calling Area, and shall send a copy of that letter to the Office of the Public Counsel and the Staff of the Missouri Public Service Commission, and shall file a copy of that letter in this case. The letter shall: (1) identify the NXX codes being *that are being used today and will be used on a going-forward basis as MCA NXX codes*; (2) confirm that such NXX codes are associated with rate centers within the exchanges comprising the Metropolitan Calling Areas as established in Case No. TO-92-306; (3) confirm that numbers within the designated NXX code(s) are being assigned to customers purchasing the calling scope prescribed in Case No. TO-92-306, either independently or in conjunction with other services and calling scopes; (4) *providing a valid test number for each block of MCA NXX code*; and (5) provide contact information (address, telephone, fax, e-mail) so that other companies may provide it with copies of their notifications. Companies reselling MCA service or providing MCA service in conjunction with ported numbers of former subscribers to another company's MCA service may rely upon the notifications of the

other companies regarding the involved NXX codes. All other companies shall accept such notices from other companies as true for all purposes including administration of their MCA calling scopes unless otherwise ordered by the Commission and shall provide MCA service to their customers in accordance therewith.

6. That the Report and Order issued on September 7, 2000, is clarified by adding the following Ordered Paragraphs:

21. That each local exchange carrier shall have until November 13, 2000, to translate the other local exchange carrier's MCA NXX codes that have been received no later than October 2, 2000.

22. That each local exchange carrier shall have 45 days from the date received to translate the other certificated local exchange carrier's MCA NXX codes that are received after October 2, 2000.

7. That Staff's Motion to Substitute List of ILECs Certificated in Each MCA is granted.

8. That this order shall become effective on October 22, 2000.

9. That this case may be closed on October 23, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur.  
Murray, C., not participating.

Dippell, Senior Regulatory Law Judge

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**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.\***

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*Case No. WR-2000-281  
Decided September 12, 2000*

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**Rates §118.** The Commission's rate design was such that the revenue realized from one of the Company's seven non-contiguous districts did not change. This did not mean that that district did not contribute to the Company's increased revenue requirement, however, because the record showed that the result of the shift from single tariff pricing to district specific pricing was a rate *decrease* in the district in question. By maintaining rates at the existing level, a surplus was realized which the Commission used to ameliorate rate increases in other districts.

**Rates §121.** The Commission's rate design was such that, while revenues were not decreased with respect to any district, various classes within each district experienced rate decreases or rate increases as the Staff's class cost of service study dictated.

**Rates §§3, 6.** Although there is no specific statutory authority permitting the Commission to clarify its rate orders, it has been the Commission's practice since 1913 and the Commission will continue to do so as appropriate.

### **ORDER OF CLARIFICATION**

The Commission issued its Report and Order herein on August 31, 2000. Thereafter, on September 6, 2000, Missouri-American Water Company (MAWC) filed its Motion for Clarification and for Expedited Treatment. On September 7, 2000, the Staff of the Missouri Public Service Commission (Staff) filed its Motion for

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**\*Petitions to circuit court for writs of review:** Between September 19, 2000 and October 18, 2000, this case was appealed to Cole County Circuit Court (Case Nos. 00CV325014, 00CV325196, 00CV325206, 00CV325217, 00CV325218, 00CV325220 and 00CV325222). On October 16, 2000, this case was appealed to Buchanan County Circuit Court (00CV73667). On October 17, 2000, this case was appealed to Jasper County Circuit Court (Case Nos. 00CV680808 and 00CV680824).

**Petitions to appellate courts for writs of prohibition:** Court of Appeals, Western District (WD59387 filed on December 14, 2000 and WD59483 filed on January 9, 2001); Court of Appeals, Southern District (SD24034 filed on January 12, 2001); Missouri Supreme Court (SC83414 filed on March 1, 2001 and SC83484 filed on March 30, 2001).

**Appeals to appellate courts:** Court of Appeals, Western District (WD60080 filed on June 1, 2001, WD60166 filed on July 2, 2001, WD60167 filed on July 3, 2001, WD60548 filed on October 12, 2001, WD60549 filed on October 12, 2001, WD60550 filed on October 12, 2001 and WD60551 filed on November 7, 2001. Missouri Supreme Court (SC84236 filed on February 1, 2002).

See pages 78 and 254 for other orders in this case.

Clarification and Expedited Treatment. The Commission issued its Notice Setting Time for Response on September 7, 2000. On September 11, 2000, responses were filed by the City of Joplin, the St. Joseph Industrial Intervenors together with the City of Riverside, and the St. Joseph Area Public Water Supply District Intervenors.

In providing the requested clarifications, the Commission is mindful that "it is not methodology or theory but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and non-discriminating." State ex rel. Associated Natural Gas Co. v. Public Service Com'n of Missouri, 706 S.W.2d 870, 879 (Mo. App., W.D. 1985).

**Discussion:**

MAWC states in its motion, "this means that the revenues derived from Joplin will remain unchanged and the increased revenue requirement of \$10,268,551 will be spread among the remaining six districts." MAWC is mistaken in this assertion. Joplin will contribute approximately \$880,000 toward the total water system increased revenue requirement, as Staff correctly points out in its Motion.

MAWC must calculate its revenue requirement separately for each of its seven districts, as though each were a stand-alone water company, applying the Commission's Report and Order as appropriate. The Commission stated in its Report and Order that it "will move away from STP and toward DSP" because it is clear, on the extensive record developed in this case, that the Joplin district will produce surplus revenue.<sup>1</sup> Staff is correct in its suggestion that this surplus will be used to ameliorate the rate increase impact on the other six districts. A portion of the surplus, approximately \$225,000, will be allocated as Staff suggests to the Brunswick district so that rates there will not exceed the highest rates established in any other of the company's districts. The remaining \$655,000, will be allocated among the other five water districts, St. Joseph, Warrensburg, Parkville, Mexico, and St. Charles, to ameliorate the increased revenue requirement in each of these districts. The allocation to each of these districts will be in proportion to the increase of the revenue requirement for each district over the amount of revenue previously generated by that district.

MAWC also seeks a clarification of the application of Staff's Class Cost of Service (COS) study. Under that study, some classes will receive rate decreases, while others receive rate increases. That is the result intended by the Commission. While no *district* will receive a rate decrease, a *class* of customers within a district may receive a rate decrease, as determined by application of Staff's COS study.

All three responses assert that the Commission's procedural rules lack any mechanism for the clarification of a Report and Order and that, consequently, the Commission cannot do so. However, clarifications such as those requested here have been issued by the Commission on a regular basis since the agency was created. Consequently, the objections raised by the responses must be denied.

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<sup>1</sup>"STP" is single tariff pricing; "DSP" is district-specific pricing.

*IT IS THEREFORE ORDERED:*

1. That the Motions for Clarification and for Expedited Treatment filed by Missouri American Water Company and by the Staff of the Missouri Public Service Commission are granted in part and denied in part. The Report and Order issued herein on August 31, 2000, is clarified as described in this order.
2. That the objections contained in the responses filed on September 11, 2000, by the City of Joplin, the St. Joseph Industrial Intervenors acting with the City of Riverside, and the St. Joseph Area Public Water Supply Districts are denied.
3. That this order shall become effective on September 22, 2000.

Lumpe, Ch., Schemenauer, and Simmons, CC., concur.  
Drainer, C., dissents. Murray, C., not participating.

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**Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission, Complainant, v. Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre, Respondent.\***

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*Case No. MC-2000-818*  
*Decided September 13, 2000*

**Evidence, Practice and Procedure §§ 24, 27.** The Commission finds good cause to grant reconsideration, to set aside the order finding default, and to extend the filing date for the answer after considering Respondent's allegations why it failed to timely file an answer to a complaint.

**ORDER GRANTING RECONSIDERATION,  
SETTING ASIDE ORDER OF DEFAULT,  
AND EXTENDING DATE FOR RESPONSE**

On June 14, 2000, the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Missouri Public Service Commission (Complainant) filed a complaint with the Missouri Public Service Commission (Commission) against Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre (Respondent).

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\*See pages 222 and 352 for other orders in this case. On December 20, 2000, the PSC Staff filed a motion to reopen the case. On December 22, 2000, the Commission issued an order granting the motion to reopen the case, establishing a prehearing conference and directing the filing of a procedural schedule. Notice of satisfaction of the complaint was filed on April 18, 2001. The Commission issued a notice of dismissal and closing of the case on April 23, 2001.

Notice of the complaint was mailed to the Respondent by certified mail on June 19, 2000. The official case file reflects a postal service receipt showing that Respondent accepted delivery on July 3, 2000. In that notice of complaint, the Respondent was given 30 days from the date of the notice of complaint (i.e., until July 19, 2000) to respond to the complaint by filing an answer, a notice that the complaint had been satisfied, or a written request that the complaint be referred to a neutral third-party mediator for voluntary mediation of the complaint.

The Respondent did not respond to the complaint. The Commission entered an order finding default on July 27, 2000, an effective date of August 8, 2000.

On August 11, 2000, Respondent filed a motion for "rehearing and reconsideration." The Complainant did not respond to the Respondent's motion.

Commission Rule 4 CSR 240-2.070(9) states:

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.

Commission Rule 4 CSR 240-2.160(2) states:

Motions for reconsideration of procedural and interlocutory orders may be filed within ten (10) days of the date the order is issued, unless otherwise ordered by the commission. Motions for reconsideration shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable.

Thus, according to these Commission rules, Respondent's motion was actually a combination of a motion for reconsideration, since the order finding default was in the nature of an interlocutory and not a final order, plus a motion to set aside the order finding default. Respondent's motion was filed out of time regardless of how the motion is classified.

Respondent, in its motion, stated, *inter alia*, that on or about July 5, 2000, the President of Respondent, Michael J. Havicon (Havicon), met with Blaine Beard<sup>1</sup> in order to have the matter resolved with the purchasers of the mobile home, which is the subject matter of this complaint. Respondent further related that on July 26, 2000, Havicon met with Gene Winn, a member of the Complainant's staff, and attempted to get an extension for the scheduled work. The remaining work, alleged

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<sup>1</sup> Respondent does not explain who this is.

the Respondent, was scheduled to be completed during the weekend of July 29, 2000. Around the date of August 2, 2000, the Respondent stated that most of the scheduled work had been completed, with the exception of the stairwell; a copy of the factory material and service authorization accepted by the purchasers of the mobile home was attached to the motion as an exhibit.

Respondent alleged that it did not hire a lawyer or respond to the complaint or otherwise file an answer because it did not realize the importance of such a failure.

Respondent stated the good cause supporting its motion was that it was in substantial compliance and only had the stairwell to complete and had that work scheduled for "this weekend." Respondent further pointed out that its failure to timely file an answer was based on inadvertence, excusable neglect, and the failure to hire legal counsel. Respondent claimed to have a meritorious defense and also alleged that no party would be prejudiced if the Commission set aside its order finding default and granted Respondent additional time within which to answer the complaint and show compliance.

The Commission finds good cause, based on Respondent's assertions set forth in the immediately preceding paragraph, to grant reconsideration, to set aside the order finding default, and to extend the filing date for the answer.

*IT IS THEREFORE ORDERED:*

1. That the order finding default issued by the Missouri Public Service Commission on July 27, 2000, against Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre, is hereby set aside.
2. That Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre shall have until no later than September 28, 2000, to file an answer, a notice that the complaint has been satisfied, or a written request that the complaint be referred to a neutral third-party mediator for voluntary mediation of the complaint.
3. That this order shall become effective on September 25, 2000.

Bill Hopkins, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 1994.

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**In the Matter of Missouri Gas Energy's Tariff Sheets Designed  
to Increase Rates for Gas Service in the Company's Service  
Area.**

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*Case No. GR-96-285  
Decided September 14, 2000*

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**Evidence, Practice & Procedure §§2, 22, 23. Gas §§2, 7. Public Utilities §7.** The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to Commission Rule 4 CSR 240-2.116(3).

**Evidence, Practice & Procedure §§1, 2, 23, 24. Gas §§7, 18. Rates §§3, 120.** The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.

**ORDER GRANTING MOTION TO DISMISS PARTIES PURSUANT  
TO RULE 4 CSR 240-2.116(3) AND ORDER DENYING PUBLIC  
COUNSEL'S MOTION TO DISMISS CASE AS MOOT  
AND SUSPEND BRIEFING SCHEDULE**

The Missouri Public Service Commission (Commission) held an evidentiary hearing in this matter on August 8 and 9, 2000. At the commencement of the hearing on August 8, 2000, Missouri Gas Energy (MGE) moved to dismiss all other parties who were not present at the prehearing conference and were not present at hearing on August 8 and 9, 2000, pursuant to Commission Rule 4 CSR 240-2.116(3). There were no objections to MGE's motion. The Commission took the motion under advisement at the time of hearing.

The parties who were present for the prehearing conference on June 29, 2000, were: MGE, Staff of the Commission (Staff), the Office of the Public Counsel (Public Counsel), Missouri Gas Users' Association (MGUA), Central Missouri State University (CMSU) and the University of Missouri-Kansas City (UMKC). The following three parties filed correspondence with the Commission indicating that they would not actively participate in the remand proceeding so long as the rate design issue was the only matter before the Commission: Home Builders Association of Kansas City, Riverside Pipeline Company, L.P./ Mid-Kansas Partnership (Riverside/Mid-Kansas) and Gas Service Retirees Association of Missouri, Inc. Each of these parties requested that they remain a party of record in this proceeding for the purposes of receiving pleadings and Commission orders.

The parties present at the hearing held on August 8 and 9, 2000, were MGE, Staff, Public Counsel, MGUA, CMSU and UMKC. Also appearing were the City of Kansas City (KCMO) and Riverside/Mid-Kansas. Both KCMO and Riverside/Mid-Kansas stated that it was not their intention to participate in this case as long as

the issues were only those relating to rate design. KCMO and Riverside/Mid-Kansas requested that they be permitted to remain a party, that they be permitted to file briefs, if they believed it necessary, and that they be excused from the hearing. Both parties were advised that the Commission does not routinely excuse parties from attending hearing and if a party is not present, that party waives any objections to any request or ruling made during the hearing. Both KCMO and Riverside/Mid-Kansas acknowledged that they understood.

The parties who did not attend the prehearing conference and the hearing, and did not otherwise contact the Commission regarding its appearance, are Kansas City Power & Light Company, Williams Natural Gas Company, Mountain Iron & Supply Company, County of Jackson, Missouri, Local 53 of International Brotherhood of Electrical Workers AFL-CIO, St. Joseph Light & Power Company, UtiliCorp Energy Services, and the City of St. Joseph, Missouri.

The Commission finds that those parties who did not attend the prehearing conference and the hearing, and did not otherwise contact the Commission regarding their appearance at the prehearing or hearing, shall be dismissed as parties from this case pursuant to Commission Rule 4 CSR 240-2.116(3).

On August 14, 2000, Public Counsel requested the Commission dismiss this proceeding as moot. Public Counsel stated that the Commission should dismiss this proceeding for good cause because the Commission had held the required hearing and that a decision on the rate design issues of class cost of service and revenue shifts is inappropriate, unnecessary and is not in the interest of the efficient administration of justice. Further, Public Counsel pointed out that the rates set in this proceeding would never become effective rates because the Commission had already established the rates for MGE in Case No. GR-98-140 which superseded the rates that would be established by the Commission issuing an order in this case, and therefore, this case is moot. Public Counsel also requested that the Commission suspend the briefing schedule in this proceeding until this Motion to Dismiss has been ruled upon by the Commission.

On August 23, 2000, MGE and Staff filed their responses to Public Counsel's Motion to Dismiss and Request to Suspend Briefing Schedule. MGE stated that it agrees with Public Counsel that the rates set in Case No. GR-98-140 superseded the rates set in GR-96-285, and that ordinarily such an event would render issues from Case No. GR-96-285 moot. MGE stated that this is not an "ordinary" situation because revenues otherwise due MGE have been impounded in the Circuit Court of Cole County, Missouri (Circuit Court) as a result of the Commission's failure to hold a hearing in Case No. GR-96-285. MGE noted that the Commission was ordered by the Circuit Court to give the parties a hearing on those issues the Commission rejected in the Stipulation and Agreement regarding the rate design issues of class cost of service and revenue shifts. MGE stated that the proper role of the Commission is to comply with the order of the court, allow the parties due process through the filing of briefs on the evidence, and reach a decision on the merits of the issues presented allowing the case to take its course in the courts.

MGE also pointed out that the Circuit Court remanded this case to the Commission "for action by the Commission." MGE also pointed out that the Western District of Missouri Court of Appeals (Court of Appeals) affirmed the Circuit

Court and said "Upon remand, the Commission will determine how much of that aggregate revenue due MGE would be paid by Midwest." State ex rel. Midwest Gas Users' Assn. v. Public Service Commission, 996 S.W.2d 608 (Mo. App. 1999).

In regard to the effect of the Commission's Report and Order in Case No. GR-98-140, MGE stated that both the Court of Appeals and the Circuit Court were aware of the Commission's later ruling but neither the Court of Appeals nor the Circuit Court accepted MGE's suggestions of mootness. MGE alleged that granting Public Counsel's motion would not permit the Commission to reach a conclusion on the merits of the issues presented to it after affording the parties due process. MGE requested that the Commission deny Public Counsel's Motion to Dismiss and Suggestions in Support Thereof and Request to Suspend Briefing Schedule.

Staff also recommended that the Commission deny Public Counsel's motion to dismiss and motion to suspend briefing schedule. Staff stated that the Commission is compelled by the Circuit Court's November 26, 1997 order to hold a hearing and make findings. Staff stated that any issues of mootness must be addressed to the Circuit Court. Staff stated that achieving a final disposition of this case by having this case briefed and decided by the Commission was the result clearly anticipated by both the Circuit Court and the Court of Appeals. Staff also noted that, absent a corpus of funds established by the Circuit Court's Stay Order, this case would be moot. However, Staff stated that this case is now ripe for Commission decision, and should be decided now in order to provide a complete record for the Court of Appeals.

On August 24, 2000, MGUA sent a Motion to Extend Time for Response by One Day by facsimile transmission, which was filed on August 25, 2000. MGUA noted that by Commission Rule 4 CSR 240-2.080(16) response to Public Counsel's motion would be due August 24, 2000. Due to other commitments, MGUA's counsel was unable to complete a response by the end of the day on August 24, 2000. MGUA stated that the requested extension of one day would not delay the Commission processing of the matter. No objections were received. The Commission will grant MGUA the extension of time to August 25, 2000, to file its response to Public Counsel's motions.

On August 25, 2000, MGUA did file its response to Public Counsel's motion to dismiss and to suspend briefing schedule. MGUA stated that the remand hearing was held because it was ordered by the Circuit Court, and that aspect of the remand, subject to pending motions, has been achieved. MGUA pointed out that the Circuit Court declared that the rates fixed by the Commission without a hearing on an essential part of the rate design issue were unlawful. MGUA further noted that MGE did not appeal this judgment of the Circuit Court and therefore, the Circuit Court's finding the rates unlawful was final. MGUA stated that the distribution of the impound fund is solely within the discretion of the Circuit Court despite any suggestions MGE appears to make. MGUA stated that this may be an appropriate time to bring this case to a close and endorsed Public Counsel's motion to suspend the briefing schedule until the more basic matter of mootness is determined by the Commission. MGUA does not clearly state that it supports or opposes Public Counsel's Motion to Dismiss this case as moot.

Several of the parties referred to the Circuit Court's decision rendered on November 26, 1997. In its order entitled Findings of Fact, Conclusions of Law and Judgment on November 26, 1997, the Circuit Court found that the "parties are entitled to decisions on the issues that they bring before the Commission." Exhibit 182, Schedule BL-1, p. 5. The Circuit Court also stated that "Findings of fact on disputed issues are a legal requirement for the Commission to reach its ultimate determination," citing Section 386.420.2 RSMo (1994), Century State Bank v. State Banking Board of Mo., 523 S.W.2d 856, 859 (Mo. App. 1975) and Glasnapp v. State Banking Board, 545 S.W.2d 382, 387 (Mo. App. 1976). Exhibit 182, Schedule BL-1, p. 5. The Circuit Court stated that "By failing or refusing to decide the issue, the Commission permits the tariff to continue, but denies the parties due process and the potential of an appeal or other review as to the basis of the Commission's decision." Exhibit 182, Schedule BL-1, p. 6. The Circuit Court concluded its decision by reversing and remanding the Commission's Orders of January 22, 1997, January 31, 1997, March 18, 1997 and March 20, 1997 to the Commission for further action. Exhibit 182, Schedule BL-1, p. 7.

If the Commission were to grant Public Counsel's Motion to Dismiss, the Commission would again not be deciding all the issues in this case. The Commission would again be denying the parties due process and the potential of an appeal or other review as to the basis of the Commission's decision. The Circuit Court remanded this case to the Commission for further action. Failure to render a decision after holding a hearing would constitute an incomplete action. The Commission does not believe that the Circuit Court would direct the Commission to hold an unnecessary hearing where no decision was expected to be rendered. Therefore, the Commission finds that it should now decide the issues heard on August 8 and 9, 2000, considering the evidence admitted into the record, and provide a complete record for reviewing courts. Public Counsel's Motion to Dismiss and to Suspend the Briefing Schedule will be denied.

*IT IS THEREFORE ORDERED:*

1. That Kansas City Power & Light Company is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
2. That Williams Natural Gas Company is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
3. That Mountain Iron & Supply Company is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
4. That the County of Jackson, Missouri, is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
5. That Local 53 of International Brotherhood of Electrical Workers AFL-CIO is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
6. That St. Joseph Light & Power Company is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
7. That UtiliCorp Energy Services is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).
8. That the City of St. Joseph, Missouri, is dismissed as a party from this case pursuant to Commission Rule 4 CSR 240-2.116(3).

9. That Midwest Gas Users' Association's Motion to Extend Time for Response by One Day, filed on August 25, 2000, is granted.

10. That the Office of the Public Counsel's Motion to Dismiss and Suggestions in Support and Request to Suspend Briefing Schedule filed on August 14, 2000, is denied.

11. That this order shall become effective on September 26, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur

Register, Regulatory Law Judge

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**In the Matter of the Application of Le-Ru Telephone Company  
for Authority to Borrow an Amount Not to Exceed \$9,164,700  
from the Rural Utilities Service, the Rural Telephone Bank  
and the Federal Financing Bank and in Connection there-  
with to Execute an Amending Telephone Loan Contract  
Amendment, Promissory Notes, and a Restated Mortgage,  
Security Agreement and Financing Statement.\***

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*Case No. TF-2000-428  
Decided September 21, 2000*

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**Security Issues §16.** The Commission issued Modified Order Approving Financing upon motion of applicant because it was necessary for the Commission to find in its authorization for the financing that the proposed debt issue or its proceeds has been or is reasonably required for the purpose specified.

**Security Issues §21.** The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.

**Security Issues §76.** The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.

**Security Issues §69.** The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs through the issuance of long term mortgage notes.

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\*See pages 229 and 336 for other orders in this case.

**MODIFIED ORDER APPROVING FINANCING**

This Modified Order Approving Financing is issued concurrently with the Commission's Order Withdrawing and Modifying Order Approving Financing Pursuant to Motion for Clarification and/or Modification.

On January 18, 2000, Le-Ru Telephone Company (Le-Ru or Company) filed an application with the Commission requesting authority under Section 392.310, RSMo 1994, and 4 CSR 240-2.060 to borrow certain sums, not to exceed \$9,164,700, from the Rural Utilities Service, the Rural Telephone Bank, and the Federal Financing Bank in order to fund capital improvements and to finance its operating needs.

On May 16, 2000, the Commission's Staff filed its recommendation and memorandum in this case, recommending that the Commission issue an order approving Le-Ru's application but with a reduction in the amount Le-Ru would be authorized to borrow to \$7,800,606 and with certain conditions. The Staff stated that the Company's application meets the requirements of Section 392.310, RSMo 1994, and recommended approval subject to modification of the amount and the conditions specified.

On July 7, 2000, the Commission held a hearing on the Company's application. On July 24, 2000, the Company submitted suggested ordered paragraphs for the Commission's consideration. The Commission issued its Order Approving Financing on August 15, 2000. A Notice Correcting Order Nunc Pro Tunc was issued on August 16, 2000, to accurately restate the vote on the August 15, 2000, order. Le-Ru filed its Motion for Clarification and/or Modification on August 22, 2000. The Commission issued its Order Directing Filing on August 29, 2000. The Commission's Staff filed Staff's Response to Motion for Clarification and/or Modification and Recommendations for Modification Order on September 12, 2000.

**Le-Ru's Application**

Le-Ru is a Missouri corporation based in Stella, Missouri, and provides telecommunication services to approximately 1,400 customers in two exchanges in Newton and McDonald Counties. Le-Ru proposes to use the proceeds of the loan it is requesting to improve and upgrade its existing facilities, and to extend its capacity and facilities to meet forecasted growth of five percent per year. Specifically, Le-Ru proposes to use the loan proceeds for: 1) replacement of air core cable; 2) replacement of air core service entrances; 3) integration of fiber feeder cable in the local loop; 4) utilization of electronic serving area (ESA) terminals; 5) providing for maximum length non-loaded subscriber loops of 15,000 feet; 6) further improvements in the fiber toll network; 7) generic updates of digital switches; 8) engineering and constructing new outside plant that will allow virtually all customers access to digital services; and 9) breaking outside plant into multiple Customer Serving Areas in order to manage growth and eliminate the need to continually reinforce feeder plant.

Le-Ru proposes to enter a loan agreement with the Rural Utility Service (RUS) and execute three mortgage notes in varying amounts payable to the United States of America (acting through the Administrator of the RUS); to the Rural Telephone

Bank (RTB); and to the Federal Financing Bank (FFB). As security, Le-Ru will deliver a restated mortgage, security agreement, and financing statement on substantially all of its assets. Le-Ru attached copies of the proposed forms for its notes and agreements as Appendices 1-6. Le-Ru also attached Appendix 7, an original Resolution of the Board of Directors of Le-Ru Telephone Company authorizing the loan and the execution of the necessary documents.

Le-Ru stated that none of the loan proceeds would be used to refund existing indebtedness and, thus, the amounts borrowed would be subject to the fee schedule set forth in Section 386.300, RSMo 1994. Finally, Le-Ru provided a pro forma balance sheet and a pro forma income statement to show the effect of the proposed financing for the Company and a capitalization expenditure schedule, as required by Section 392.310, RSMo 1994 (Appendices 8 and 9 to the application).

#### **Staff Analysis and Conditions**

The Staff reviewed the information provided by Le-Ru with its application and requested additional financial information that it analyzed. The Staff engaged in discussions and negotiations with the Company concerning the financing. Pursuant to the application and the information provided by Staff, the moneys borrowed would be payable over a term of up to 21 years and the estimated interest rate would be 6.39 percent. Final terms and conditions would be determined as the funds are borrowed.

Based on the pro forma financial statements filed with the application, Staff indicated that the capital structure of the Company would be 25.56 percent equity and 74.44 percent long-term debt. Staff stated that these ratios would be compatible with a company of very poor credit quality. In addition the Staff stated a concern that Le-Ru's cash flow ratios would be diminished as a result of the proposed financing.

Staff reviewed and discussed its concerns with Le-Ru and as a result, Staff states Le-Ru agreed as follows:

1. To reduce the loan amount requested to \$7,800,606.
2. To limit dividends to the amount required for payment of taxes until such time as the equity ratio of the Company reaches 40 percent.
3. To use cash and cash equivalent working capital to pay down long-term debt no later than December 31, 2007, to reach an equity ratio of 40 percent.
4. To file semiannual surveillance reports beginning January 1, 2003, and ending December 31, 2007, or when the Company's equity ratio reaches 40 percent.

The Staff summarized Le-Ru's recent past system and facility upgrades and provided details concerning customer and service area growth, inadequacies in current facilities, immediate demands for service and delays meeting those demands, and deficiencies in current facilities and systems due to age and obsolescence. Staff's review and comments confirmed Le-Ru's need for its financing and for the proposed improvements. Staff recommended that the Commission approve the application subject to conditions 1-4 above.

### **Hearing**

At the hearing for this case, the parties presented witnesses that verified the matters presented in the application and the basis for the conditions suggested by Staff and accepted by the Company and the Office of the Public Counsel. The parties further agreed to a modification of the first suggested condition. Based on the modification, the parties would suggest that the Commission approve the loan in the original amount submitted to the Commission, but condition any draw of funds beyond \$7,800,606 upon the Company making further application to the Commission. This would avoid jeopardizing the loan application process already undertaken by the Company and permit the Company the option to come before the Commission at a later date to request authority to expand the scope of the financing to include all the work originally planned.

The witnesses for the Company and the Staff also presented information to the Commission to demonstrate the benefits to the ratepayers and public in terms of additional services and service reliability that would accrue as a result of making the improvements proposed to be financed with the loan transaction presented in this case.

### **Findings and Conclusions**

Based on the application and the Staff recommendation, the Commission finds that the money, property or labor procured or to be procured or paid for by the proposed debt issue or its proceeds has been or is reasonably required for the purpose specified. The Commission further finds that the financing is not detrimental to the public interest. However, Staff's recommendation and Le-Ru's agreement to conditions also demonstrate that there is a need to monitor and assure the soundness of Le-Ru's financial condition.

The Commission finds that the proposed financing is not detrimental to the public interest and should be approved upon the terms presented by the Company, subject to conditions agreed to between Le-Ru and Staff and presented in the Staff's recommendation and at the hearing. Le-Ru and Staff shall maintain their records to ensure that the authorization of this order is not exceeded, that terms and conditions are adhered to, and that required fees are paid.

#### *IT IS THEREFORE ORDERED:*

1. That Le-Ru Telephone Company is authorized to execute and deliver such instruments and to undertake such other acts as are necessary to consummate the financing transaction as presented in the application and described in this order including the execution of documents to borrow an aggregate amount not to exceed \$9,164,700 from the Rural Utilities Service, the Rural Telephone Bank and the Federal Financing Bank subject to the requirements of this order, including a limit on the portion of this debt that the Le-Ru Telephone Company may draw upon without further application to the Commission.
2. That Le-Ru Telephone Company is authorized to draw down and obtain debt proceeds as provided in this order in amount up to \$7,800,606 aggregate principal amount through mortgage notes payable under terms and conditions as described in the application and in this order.
3. That Le-Ru Telephone Company may make a later application to the Commission to utilize the remainder of the financing authority approved in this order.

4. That Le-Ru Telephone Company shall submit to the Commission's Financial Analysis Department the final terms and conditions of each financing security as the transaction or transactions are closed.

5. That Le-Ru Telephone Company shall limit dividends to the net amount required for payment of the Company related tax liability of its shareholders until such time as the equity ratio reaches 40 percent.

6. That Le-Ru Telephone Company shall use cash and cash equivalent working capital to pay down long-term debt no later than December 31, 2007, as may be required to reach an equity ratio of 40 percent.

7. That Le-Ru Telephone Company shall file semiannual surveillance reports beginning January 1, 2003, and ending December 31, 2007, or ending when the Company's equity ratio reaches 40 percent.

8. That Le-Ru Telephone Company shall submit all fees due as required under Section 386.300, RSMo 1994.

9. That nothing in this order shall be considered as a finding by the Commission of the reasonableness of the particular issuance, or of the value for ratemaking purposes of the transactions undertaken under the authority of this order.

10. That the Commission reserves the right to consider the ratemaking treatment to be afforded the transactions herein involved, and the resulting cost of capital, in any later proceeding.

11. That Le-Ru Telephone Company and Staff shall maintain their business records to ensure that the authorization and conditions of this order are not exceeded or violated.

12. That in the event any modification, investigation, or other action related to the subject financing is required, a new case file may be opened or this case reopened.

13. That this order shall become effective on October 1, 2000.

Lumpe, Ch., Drainer, and Schemenauer, CC., concur.  
Murray, C., not participating. Simmons, C., absent.

Thornburg, Regulatory Law Judge

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**In the Matter of the Application of Le-Ru Telephone Company for Authority to Borrow an Amount Not to Exceed \$9,164,700 from the Rural Utilities Service, the Rural Telephone Bank and the Federal Financing Bank and in Connection therewith to Execute an Amending Telephone Loan Contract Amendment, Promissory Notes, and a Restated Mortgage, Security Agreement and Financing Statement.\***

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*Case No. TF-2000-428  
Decided September 21, 2000*

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**Evidence Practice and Procedure §1.** The Commission granted a Motion for Clarification and /or Modification and issued Modified Order Approving Financing upon motion of applicant because it was necessary for the Commission to find in its authorization for the financing that the proposed debt issue or its proceeds has been or is reasonably required for the purpose specified.

**Evidence Practice and Procedure §1.** The Commission granted a Motion for Clarification and /or Modification and issued Modified Order Approving Financing to clarify that financing approval was not subject to arbitrary cancellation. Commission does retain authority to modify its orders upon appropriate circumstances.

**ORDER WITHDRAWING AND MODIFYING ORDER APPROVING  
FINANCING PURSUANT TO MOTION FOR CLARIFICATION  
AND/OR MODIFICATION**

On January 18, 2000, Le-Ru Telephone Company (Le-Ru or Company) filed an application with the Commission requesting authority under Section 392.310, RSMo 1994, and 4 CSR 240-2.060 to borrow certain sums, not to exceed \$9,164,700, from the Rural Utilities Service, the Rural Telephone Bank, and the Federal Financing Bank in order to fund capital improvements and to finance its operating needs.

On May 16, 2000, the Commission's Staff filed its recommendation and memorandum in this case, recommending that the Commission issue an order approving Le-Ru's application but with a reduction in the amount Le-Ru would be authorized to borrow to \$7,800,606 and with certain conditions. The Staff stated that the Company's application meets the requirements of Section 392.310, RSMo 1994, and recommended approval subject to modification of the amount and the conditions specified.

On July 7, 2000, the Commission held a hearing on the Company's application. The Commission issued its Order Approving Financing on August 15, 2000. A

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\*See pages 229 and 331 for other orders in this case.

Notice Correcting Order Nunc Pro Tunc was issued on August 16, 2000, to correct the vote recorded on the August 15, 2000, order.

On August 22, 2000, Le-Ru filed its Motion for Clarification and/or Modification requesting that the Commission make an additional finding pursuant to Section 392.310.2, RSMo 1994, "that in the opinion of the commission the money, property or labor procured or to be procured or paid for by such issue or its proceeds has been or is reasonably required for the purpose specified in the order." Le-Ru also requested that the Commission modify ordered paragraph 11 that states "[t]his order shall be effective until such time as the financing authorized is exhausted or is canceled by the Commission." Le-Ru asks that the Commission "make clear that the approval granted by the Commission cannot be canceled until such time as the authorized financing has been utilized by the Applicant."

On August 29, 2000, the Commission issued its Order Directing Filing directing the Commission's Staff to respond to Le-Ru's motion, and providing an opportunity for additional input from Le-Ru and the Office of the Public Counsel, and providing an opportunity for the parties to submit proposed modifications separately or jointly no later than September 12, 2000.

On September 12, 2000, Staff filed Staff's Response to Motion for Clarification and/or Modification and Recommendations for Modification Order. Staff stated that both Le-Ru and the Office of the Public Counsel reviewed the changes recommended by Staff in response to Le-Ru's motion and that Le-Ru and the Office of the Public Counsel support the recommended modifications. No other party filed a response to the Order Directing Filing.

With respect to Le-Ru's request for an additional finding pursuant to Section 392.310, RSMo 1994, the Staff suggested that the Commission find "that the money, property and labor to be procured by said transaction is reasonably required for the purposes specified above, and that no part of the proceeds shall be reasonably chargeable to operating expenses or to income." The proposed language simply mirrors that found in Section 392.310.2. Le-Ru did not originally request this finding in its suggested language filed on July 24, 2000. However, the record in this case, and in particular, the testimony presented at the hearing for this matter, demonstrates that the improvements that will be procured with the proceeds of the financing are reasonably required for the purposes described in the Commission's Order Approving Financing. Therefore, the Commission will modify is Order Approving Financing to include this finding.

With respect to Le-Ru's request that the Commission clarify or modify ordered paragraph 11, Le-Ru expressed concern that its lenders might misconstrue the order as an insufficient authorization to enter into a loan agreement. Ordered paragraph 11 states: "That this order shall be effective until such time as the financing authorized is exhausted or is canceled by the Commission." In its response, Staff suggests removing ordered paragraph 11 from the August 15, 2000, order, "in the interest of conveying a sense of certainty," presumably to Le-Ru's lenders.

It was not the Commission's intent to curtail the very financing transaction that the Commission authorized in its order. The fact that Le-Ru is requesting a clarification or modification, and Staff's support for the clarification and modifica-

tion, indicate that the parties do not question the Commission's authority to modify an order. In this case the Commission will modify its order as requested by removing this language from the ordered paragraphs.

The Commission's Order Approving Financing issued on August 15, 2000, is withdrawn concurrently with the issuance of this order and the issuance of a Modified Order Approving Financing.

*IT IS THEREFORE ORDERED:*

1. That the Commission's Order Approving Financing issued on August 15, 2000, is withdrawn concurrently with the issuance of this order and the issuance of a Modified Order Approving Financing.

2. That this order shall become effective on October 1, 2000.

Lumpe, Ch., Drainer, and Schemenauer, CC., concur.  
Murray, C., not participating. Simmons, C., absent.

Thornburg, Regulatory Law Judge

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**Southwestern Bell Telephone Company's Complaint Against Mid-Missouri Telephone Company for Blocking Southwestern Bell's 800 MaxiMizer Traffic and Request for an Order Requiring Mid-Missouri to Restore the Connection.**

**Southwestern Bell Telephone Company's Complaint Against Goodman and Seneca Telephone Companies and Request for an Order Prohibiting Them from Cutting Off Southwestern Bell's 800 MaxiMizer Traffic.**

**Southwestern Bell Telephone Company's Complaint Against Chariton Valley Telephone Corporation and Request for an Order Prohibiting Chariton Valley from Cutting Off Southwestern Bell's 800 MaxiMizer Traffic.**

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*Case Nos. TC-2000-325, TC-2000-401 & TC-2000-402  
Decided September 26, 2000*

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**Telecommunications §36.** The decision of the respondent small telephone companies to refuse to allow Southwestern Bell Telephone Company to originate MaxiMizer 800 calls in their exchanges using Feature Group C was not forbidden by any provision of law, or any rule or order or decision of the Commission and could not be the basis for a complaint against the respondents.

**Telecommunications §36.** If Southwestern Bell Telephone Company wishes to originate interexchange, intraLATA toll calls within the exchanges served by the respondent small telephone companies it must comply with the respondents' tariffs, including the obligation to use Feature Group D rather than Feature Group C.

**Telecommunications §7.** Section 392.240.3, RSMo gives the Commission the authority to order that Southwestern Bell Telephone Company's Feature Group C connection with the respondent small telephone companies be restored if the public convenience and necessity would thereby be served. No such public convenience and necessity was shown in this case.

#### APPEARANCES

*Leo J. Bub*, Attorney at Law, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company

*W.R. England, III*, Attorney at Law, P.O. Box 456, Jefferson City, Missouri 65102, for Seneca Telephone Company/Goodman Telephone Company

*Craig Johnson*, Attorney at Law, P.O. Box 1438, Jefferson City, Missouri 65102, for Mid-Missouri Telephone/Chariton Valley Telephone

*Michael Dandino*, Attorney at Law, P.O. Box 7800, Jefferson City, Missouri 65102-7800, for Office of the Public Counsel and the Public

*Keith R. Krueger*, Attorney at Law, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission

SENIOR REGULATORY LAW JUDGE: Morris L. Woodruff

### REPORT AND ORDER

#### PROCEDURAL HISTORY

On November 10, 1999, Southwestern Bell Telephone Company (SWBT) filed a complaint against Mid-Missouri Telephone Company (Mid-Missouri). That complaint was assigned Case No. TC-2000-325. SWBT's complaint alleged that Mid-Missouri had violated a Commission order by blocking SWBT's 800 MaxiMizer traffic. SWBT asked the Commission to find that Mid-Missouri's unilateral blocking of SWBT's 800 MaxiMizer traffic violates the Commission's June 10, 1999 Report and Order in Case No. TO-99-254. SWBT also asked that the Commission order Mid-Missouri to restore SWBT's MaxiMizer traffic.

The Commission issued a Notice of Complaint, directed to Mid-Missouri, on November 22. Mid-Missouri had already responded to SWBT's complaint on November 17, by filing a Motion to Dismiss Complaint. SWBT filed a Response to Mid-Missouri's Motion to Dismiss on November 30. Mid-Missouri filed its answer to SWBT's complaint on December 21.

On December 30, SWBT filed essentially identical complaints against Seneca and Goodman Telephone Companies (Seneca-Goodman) and against Chariton Valley Telephone Corporation (Chariton Valley). The complaint against Seneca-Goodman was assigned case number TC-2000-401 and the complaint against Chariton Valley was assigned case number TC-2000-402. The Commission issued a Notice of Complaint in both cases on January 3, 2000. Chariton Valley

filed its answer to SWBT's complaint on January 10 and Seneca-Goodman filed its answer on January 20. Chariton Valley and Seneca-Goodman also filed separate motions to dismiss along with their answers. SWBT filed a response to Chariton Valley's motion to dismiss on January 26. SWBT filed a response to Seneca-Goodman's motion to dismiss on January 31.

On January 26, SWBT filed a Motion to Consolidate and to Schedule an Early Prehearing Conference in all three complaint cases. Mid-Missouri had previously indicated its consent to consolidation of the complaint cases in a pleading filed on January 14. Chariton Valley also indicated its consent to consolidation on January 14 and Seneca-Goodman consented to consolidation on January 21. On February 1, the Commission issued an order that granted SWBT's motion to consolidate. Case numbers TC-2000-401 and TC-2000-402 were consolidated with and into case number TC-2000-325.

On February 10, the Commission issued an order denying the motions to dismiss complaint that had been filed in each of the three cases. That order also scheduled an early prehearing conference for February 23. On March 1, following the prehearing conference, the Staff of the Commission (Staff), on behalf of itself and SWBT, Mid-Missouri, Chariton Valley, Seneca-Goodman and the Office of the Public Counsel (Public Counsel), filed a proposed procedural schedule. The Commission adopted the procedural schedule proposed by the parties and this matter was set for hearing on June 1 and 2.

The hearing was commenced, and completed on June 1. SWBT, Seneca-Goodman, Chariton Valley and Mid-Missouri and Staff filed initial briefs on July 26, and reply briefs on August 9. On July 17, Mid-Missouri and Chariton Valley filed a Petition to Reopen the Record for the Taking of Additional Evidence. Seneca-Goodman filed a similar Petition to Reopen the Record on July 24. SWBT filed a pleading indicating its opposition to both petitions on July 28. On August 15, the Commission issued an Order Denying Petitions to Reopen Record for the Taking of Additional Evidence.

At the hearing, questions arose concerning the current access rates of Seneca and Goodman Telephone Companies. On June 19, Seneca-Goodman submitted the requested access rate information and that document was denominated as late-filed Exhibit No. 11. On June 20, the Commission issued a Notice Regarding Late Filed Exhibit, which notified any party wishing to make an objection to the late-filed exhibit that it must do so no later than June 30. The notice also indicated that if no objections were filed, the late-filed exhibit would be admitted into evidence. No party filed any objections to late-filed Exhibit No. 11, and it will be admitted into evidence.

#### **FINDINGS OF FACT**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather the omitted material was not dispositive of the issues before the Commission.

### **I. Evidence Presented**

Joyce L. Dunlap and Thomas Hughes presented testimony on behalf of SWBT. Ms. Dunlap testified that she is employed by SWBT as Area Manager-Industrial Relations. Mr. Hughes testified that he is employed by SWBT as Vice President-Regulatory for the state of Missouri. SWBT's witnesses explained that MaxiMizer 800 service is an interexchange service offered by SWBT that allows MaxiMizer 800 subscribers to be called on a toll free basis by any end user within the 800 subscriber's LATA. Some of those calls could originate from customers of the Respondents. The toll charges would be paid by the 800 subscriber, a customer of SWBT. SWBT has offered MaxiMizer 800 service to its customers since 1990.

SWBT indicated that the Respondents are currently blocking MaxiMizer 800 calls that originate in their exchanges. SWBT asserted that the traffic is being blocked in an effort to force SWBT to switch from Feature Group C (FGC) to Feature Group D (FGD)<sup>1</sup>. SWBT objects to being required to use FGD to originate its MaxiMizer 800 calls because it has always used FGC, which is set up as the system used for LEC to LEC transmissions. FGD is set up as the system used for LEC to IXC transmissions. SWBT says that it is not an IXC, it does not have a Carrier Identification Code (CIC)<sup>2</sup>, and should not be required to use FGD.

SWBT asserts that the Commission's Report and Order in Case No. TO-99-254 did not require that the LEC to LEC network be converted from FGC to FGD. SWBT points out that the issue of conversion of FGC to FGD is again before the Commission in Case No. TO-99-593, a case that was set up to consider issues left unresolved after the elimination of the Primary Toll Carrier (PTC) plan. SWBT argues that the Respondents should be permitted to raise their concerns in that case but should be prevented from acting unilaterally to block SWBT's MaxiMizer 800 traffic until the questions about that traffic are resolved by the Commission.

David Jones (President of Mid-Missouri), W. Jay Mitchell (Vice President of Seneca and Assistant Vice President of Goodman), and William Biere (General Manager of Chariton Valley) offered testimony on behalf of the Respondents. Their testimony indicated that when the PTC plan was eliminated, SWBT relinquished the right to originate traffic in the exchanges of the Respondents. Respondents assert that if SWBT wants to continue to originate interexchange calls in the Respondents' exchanges, it is required by the Respondents' tariffs to submit an access service request or access order. SWBT would then be permitted to originate calls over FGD in the same manner as any other IXC provider.

Arthur Kuss testified on behalf of Staff. Kuss testified that he is employed by the Commission as a Utility Engineering Specialist. He indicates that Staff did not interpret the Report and Order in Case No. TO-99-254 as mandating the use of FGD rather than FGC for terminating traffic to secondary carrier exchanges, such as the

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<sup>1</sup> Feature Group C and Feature Group D are different forms of signaling protocol used for the trunking and routing of an end user's call. FGC routes calls directly to a specific telephone number based on NPA-NXX (the area code plus the first three digits of a seven-digit telephone number). FGD routes calls to an IXC, based on a Carrier Identification Code.

<sup>2</sup> The Carrier Identification Code is used to identify the carrier of interexchange traffic so that the LEC can bill the appropriate carrier for those calls.

Respondents' exchanges. Kuss indicates that the provisioning of toll-free traffic was not specifically addressed in Case No. TO-99-254. On behalf of Staff, Kuss recommends that the Respondents be directed to restore the FGC connection for SWBT's use until the Commission can directly address the issue in pending Case No. TO-99-593.

The Office of the Public Counsel participated in the hearing but did not call any witnesses or present any evidence.

## **II. Discussion**

Prior to the hearing, on May 5, the parties submitted a List of Issues that they believed were raised by SWBT's Complaint. Each of the identified issues will be addressed in turn.

### **1. Were the actions of Respondents, which resulted in the inability to originate SWBT MaxiMizer 800 calls from the exchanges of Respondents, improper or unauthorized?**

SWBT has brought this action before the Commission as a complaint. Section 386.390.1, RSMo 1994, provides that a complaint to the Commission must set forth "any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for 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." SWBT does not allege that the respondent telephone companies have violated any provision of law or regulation. Instead, SWBT argues that the Respondents have violated the Commission's report and order issued in case number TO-99-254.

In its report and order in case number TO-99-254, issued on June 10, 1999, the Commission eliminated the Primary Toll Carrier (PTC) plan. One of the requirements of the PTC plan was that secondary carriers, such as the respondent telephone companies, were required to deliver all 1+ dialed intraLATA toll traffic to a primary toll carrier, such as SWBT. In eliminating the PTC plan the Commission considered a number of issues regarding the telephone network, including appropriate signaling protocols. Some of the secondary carriers argued that all calls terminating in their exchanges should be required to terminate using FGD rather than FGC. The Commission declined to mandate the use of FGD for calls terminating to the secondary carriers. However, the Commission never considered the proper signaling protocol for MaxiMizer 800 calls originating in the exchanges of the secondary carriers.

SWBT concedes that the traffic at issue in this case is originating rather than terminating in the exchanges of the secondary carriers. SWBT agrees that the Commission never directly addressed the issue of originating traffic in case number TO-99-254. However, SWBT argues that the question of whether SWBT should be able to continue to originate its MaxiMizer 800 traffic in the exchanges of the Respondents using FGC is a loose end that should properly be considered by the Commission in case number TO-99-593, the case that the Commission has set up for the purpose of considering loose ends from the elimination of the PTC plan. SWBT argues that because the Commission has not acted to require the use of FGD, the Respondents are forbidden to impose the use of that signaling protocol on SWBT.

SWBT is correct in pointing out that the proper signaling protocol for origination of MaxiMizer 800 traffic in the exchanges of the Respondents has not yet been addressed by the Commission. However, that does not mean that the Respondents have acted improperly in taking steps to prevent SWBT from continuing to originate such traffic using FGC. The fact that the Commission has not ordered the Respondents to do something does not mean that they have done anything wrong by doing it. The Respondents are free to make many business decisions without obtaining the approval of the Commission. The Respondents made a business decision to not allow SWBT to continue to originate MaxiMizer 800 calls in their exchanges. That decision is not forbidden by "any provision of law, or of any rule or order or decision of the commission." Therefore, the Respondents were within their rights when they acted to prevent SWBT from continuing to originate MaxiMizer 800 traffic in their exchanges using FGC. The Commission's report and order in case number TO-99-254 cannot be the basis for a complaint against the Respondents.

**1a. Does Southwestern Bell Telephone Company have the authority to originate interexchange traffic, including MaxiMizer 800 traffic, in the exchanges of Respondents?**

**1b. If the answer to Issue 1a is in the affirmative, what, if any, terms and conditions must Southwestern Bell Telephone Company comply with in order to originate MaxiMizer 800 traffic in the exchanges of Respondents?**

Under the PTC plan, all intraLATA interexchange calls from the Respondent's exchanges were required to be carried by SWBT. When the PTC plan was eliminated, the origination of interexchange traffic in the exchanges of the Respondents was opened up to competition. The customers of the Respondents were required, for the first time, to choose an intraLATA interexchange carrier. SWBT was, and is free to choose to compete to provide interexchange service to Respondents' customers, but it has chosen not to enter that competition.

If SWBT does wish to compete to provide interexchange service to Respondents' customers, it may do so by complying with the Respondents' lawful tariffs, as do all other carriers that wish to originate interexchange intraLATA toll calls within the exchanges served by the Respondents. The Respondents' tariffs would require SWBT to submit an Access Service Request, or Access Order and pay a modest fee. SWBT is also required to provide the Respondents with certain billing information, including a Carrier Identification Code (CIC). The Respondents' tariffs require that such service be provided over FGD, not FGC<sup>3</sup>.

SWBT asserts that it is unable to order access over FGD because it does not have access to the required Carrier Identification Code, and will have difficulty obtaining the use of a CIC. When using FGC, as SWBT was allowed to do under the PTC plan, no CIC was necessary as SWBT was responsible for all IntraLATA toll calls. With the elimination of the PTC plan that is no longer true. The Respondents must be allowed to identify who is using their networks. The only

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<sup>3</sup> Section 6.3.3(A)(7) of the Oregon Farmers Mutual Telephone Company tariff, the tariff adopted by each of the Respondent companies, indicates that "when FGD switching is available, FGC switching will not be provided."

practical way that Respondents can make that identification is through the use of a CIC. The fact that SWBT may have problems obtaining the use of a CIC does not allow it to ignore the Respondents' identification requirements.

SWBT also asserts that it should be allowed to continue to use FGC because it is a LEC, not an IXC, and FGC was created as a pathway for traffic from one LEC to another. SWBT is, of course, a LEC. However, when the PTC plan was eliminated, SWBT's relationship to the Respondents changed. For the purpose of originating intraLATA interexchange traffic, SWBT is now essentially just another intraLATA IXC, which may, if it chooses to comply with the Respondents' respective tariffs, originate traffic in the Respondents' exchanges. As an intraLATA IXC, competing for business with other IXCs, SWBT must comply with the Respondents' tariffs by using FGD.

**2. Should the Commission require Respondents to restore the connection between their exchanges and SWBT's exchanges so that Respondents' customers can call SWBT's MaxiMizer 800 customers on a toll-free basis?**

As previously indicated, the Commission has found that the Respondents have not violated any statute, regulation or Commission order by refusing to allow SWBT to continue to originate intraLATA interexchange toll calls within their exchanges unless SWBT complies with their tariffs. That finding dictates that there is no basis for requiring Respondents to restore the FGC connection used when the PTC plan was in effect.

Staff argues that Section 392.240.3 gives the Commission the authority to order that the FGC connections be restored. Section 392.240.3 would give the Commission the authority to order that the connection be restored if the public convenience and necessity would thereby be served. However, there has been no showing that the public convenience and necessity requires that the connection be restored. All parties agree that the number of MaxiMizer 800 calls originating in the Respondents' exchanges is minimal. There was no evidence to show that SWBT or the public would incur any great cost or hardship if the connection is not restored. Under these circumstances, Section 392.240.3 does not require the restoration of the FGC connection between SWBT and the Respondents' exchanges.

**CONCLUSIONS OF LAW**

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

1. SWBT, Mid-Missouri, Chariton Valley and Seneca-Goodman are telecommunications companies subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo Supp. 1999.
2. Section 386.390, RSMo 1996, grants the Commission the authority to hear complaints regarding any "act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for 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."
3. Section 386.400, RSMo 1996, provides that "any corporation, person or public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, . . ."

Based upon the Commission's review of the applicable law and its findings of fact, the Commission concludes that SWBT's complaints against Mid-Missouri, Chariton Valley and Seneca-Goodman should be dismissed.

*IT IS THEREFORE ORDERED:*

1. That the complaint filed by Southwestern Bell Telephone Company against Mid-Missouri Telephone Company on November 10, 1999, is dismissed.
2. That the complaint filed by Southwestern Bell Telephone Company against Seneca Telephone Company and Goodman Telephone Company on December 30, 1999, is dismissed.
3. That the complaint filed by Southwestern Bell Telephone Company against Chariton Valley Telephone Corporation on December 30, 1999, is dismissed.
4. That late-filed exhibit number 11 is admitted into evidence.
5. That any evidence the admission of which was not expressly ruled upon is admitted into evidence.
6. That any objection that was not expressly ruled upon is overruled.
7. That any motions not expressly ruled upon are denied.
8. That this Report and Order shall become effective on October 6, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur  
and certify compliance with the provisions of Section 536.080,  
RSMo 1994.

Simmons, C., not participating

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**In the Matter of Missouri Gas Energy's Tariff Sheets Designed  
to Increase Rates for Gas Service in the Company's Mis-  
souri Service Area.\***

**In the Matter of Missouri Gas Energy's Proposed Modifications  
to Its Facilities Extension Policy.**

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*Case Nos. GR-98-140 & GT-99-237*

*Decided October 10, 2000*

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**Rates §44.** The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.

**Accounting § 42.** The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.

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\*On October 31, 2000, the Commission issued an order denying rehearing in this case. On November 2, 2000, this case was appealed to Cole County Circuit Court (OOCV325408). See page 394, Volume 7, MPSC 3d, and page 2, Volume 8 MPSC 3d for other orders in this case. In addition, see page 170 for another order in this case.

**Rates § 113.** The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.

**Gas § 22.** The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.

**Gas, § 8.** The Commission found that the issue of an Internal Revenue Code violation was not an appropriate issue for rehearing because it was not an issue preserved for rehearing under Section 386.500, RSMo 1994, and the Commission's rule 4 CSR 240-2.160.

#### APPEARANCES:

*Robert J. Hack*, Vice President, Pricing & Regulatory Affairs, Missouri Gas Energy, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy, a division of Southern Union Company.

*Stuart W. Conrad*, Finnegan, Conrad & Peterson, L.C., 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for the Midwest Gas Users' Association.

*Mark W. Comley*, Newman, Comley & Ruth, P.C., 601 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102, for the City of Kansas City, Missouri.

*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, 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.

### REPORT AND ORDER ON REHEARING

#### Procedural History

The Missouri Public Service Commission (Commission) issued a Report and Order in these consolidated cases on August 21, 1998. The Report and Order was corrected by order issued August 26, 1998. The Report and Order authorized Missouri Gas Energy, a division of Southern Union Company (MGE) to file tariff sheets to provide for a general rate increase of \$13,297,499. A number of parties filed motions for rehearing, including MGE which filed its Application for Rehearing and Motion for Reconsideration on September 1, 1998.

The Commission granted rehearing to MGE on two issues: (A) whether a rate base offset for accumulated deferred income taxes, attributable to MGE's service line replacement program (SLRP) deferrals, is appropriate in light of the Commission's exclusion of the SLRP deferrals from rate base; and, (B) an appropriate adjustment for the gross-up of revenues for uncollectibles and gross-down of revenues for late payment charge revenues.

On December 11, 1998, MGE filed a motion for clarification of the Commission's order granting rehearing. The case was then stayed pending circuit and appellate

court appeal. A hearing was scheduled twice but as a result of actions taken by the Cole County Circuit Court and the Western District of the Missouri Court of Appeals, both scheduled hearing dates were canceled. On April 25, 2000, the Missouri Supreme Court denied the application to transfer Case Nos. WD57089 and WD57147 from the Western District of Missouri Court of Appeals and as a result, the Commission regained jurisdiction to proceed with the hearing. On April 27, 2000, MGE notified the Commission that judicial review was final and renewed its motion for clarification.

An order granting the motion for clarification and motions to strike certain rehearing testimony was issued on June 15, 2000. The order clarified that the only two issues for rehearing were those cited in the order granting rehearing. The order also struck portions of the Direct Rehearing Testimony and the Rehearing Rebuttal Testimony of MGE's witness, Charles B. Hernandez. In addition, the order struck portions of the Rehearing Rebuttal Testimony of the Staff of the Missouri Public Service Commission's (Staff) witness, Phillip K. Williams.

Rehearing on the two issues was held on July 5, 2000. The parties appearing at the rehearing were MGE, Public Counsel, Staff, Midwest Gas Users' Association (MGUA), and the City of Kansas City. At the hearing the City of Kansas City asked to be excused from attending the hearing and Riverside Pipeline Company, L.P., and Mid-Kansas Partnership had previously filed written requests to be excused. The parties were not excused from the hearing and forfeited their rights to participate in the hearing by not being present.

During the evidentiary hearing, the Commission requested that MGE provide as a late-filed exhibit, Internal Revenue Service Letter Ruling No. 945008, and the parties were given until July 24, 2000, to file written objections to the exhibit. The letter ruling was received and marked for identification as Exhibit No. 241.

On July 24, 2000, objections to late-filed Exhibit No. 241 were filed by MGUA and the Public Counsel. An order sustaining the objections to Exhibit No. 241 was issued on August 10, 2000.

Initial briefs were filed by interested parties on August 17, 2000, and reply briefs were filed on September 11, 2000.

#### **Rehearing Issues**

The Commission granted rehearing on two issues. The issue of the gross-up and gross-down factors and how they apply to the corrected revenue requirement was stipulated to at the hearing by all the parties present. The remaining issue was contested.

MGE argued that the rate base should not be reduced for deferred income taxes associated with the unamortized balance of the Safety Line Replacement Program (SLRP) deferrals. These deferrals were excluded from rate base in the original Report and Order. Public Counsel and Staff proposed to include as an offset to rate base the deferred income taxes associated with the unamortized balance of SLRP deferrals that have been excluded from rate base. MGUA agreed with Staff and Public Counsel. Public Counsel further argued that this item was included in its original calculations and was not an issue that was "omitted" by the parties as MGE contended.

MGE also argued that because the entire unamortized balance of the SLRP deferrals was excluded from rate base, none of the associated deferred income taxes should have been used to reduce rate base. MGE argued that to do otherwise would be a violation of the United States Internal Revenue Code (IRC).

#### **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.

#### **Inclusion in Rate Base of Accumulated Deferred Income Taxes from SLRP Deferrals**

MGE is involved in an accelerated program to replace customer service lines as ordered by the Commission. While implementing the SLRP, MGE has been granted a series of accounting authority orders that permit MGE to accumulate expenditures that would normally be expensed in the period in which they were incurred. These items are depreciation expense, property tax expense, and carrying costs associated with the installed SLRP plant after the actual SLRP plant was placed in service, but prior to these related expenses being directly reflected in rates.

In Case No. GR-96-285, the Commission permitted MGE to include these expensed deferrals in rate base as well as to amortize the deferrals over a 20-year period. By including the expense deferrals in rate base, MGE earned a return on the unamortized deferred amounts. In the present case, the Commission excluded those deferrals from rate base, but accelerated MGE's total recovery of the costs from 20 to ten years.

MGE argues that since the shareholders are financing the investment that gave rise to deferred income taxes, the benefit of those deferred income taxes should flow to the shareholders (in other words, the deferred income taxes should not be an offset to rate base). The Commission was not persuaded by MGE's arguments or the testimony of its witnesses and determines that the use of the SLRP accumulated deferred income taxes, as an offset to rate base, is appropriate as explained below.

Deferred income taxes, including MGE's accumulated deferred income taxes for SLRP deferrals, result from the timing difference between when a company currently deducts an expense on its income tax return and when it later deducts the expense on its financial statement records. This is also known as a book-tax timing difference. MGE's accumulated deferred income taxes for SLRP deferrals are created by a book-tax timing difference.

The purpose of including an offset to rate base for accumulated deferred income taxes is to recognize that ratepayers have provided money through rates for the payment of taxes that the utility has deferred paying until a later period. The

utility may use the ratepayers' money until the payment of the deferred income taxes is made.

MGE's witness, June Dively, testified to the fact that MGE was "enjoying" the benefits of those deferred taxes. Therefore, MGE's deferred income tax reserve represents a prepayment of income taxes by the ratepayers from which MGE "enjoys" a financial benefit.

MGE's witness Dively further admitted that MGE's taxes would not be affected by whether or not the item was included or excluded from rate base. Because it is the book-tax timing difference which gives rise to the benefit that MGE receives, and not the SLRP deferrals that have been excluded from rate base, the Commission finds that the SLRP accumulated deferred income taxes are not related to the actual SLRP expense deferrals for purposes of inclusion in rate base. Therefore, the SLRP accumulated deferred income taxes should continue to be included as an offset to MGE's rate base.

MGE also claims that the Commission's treatment of the deferred taxes would violate the IRC. MGE's SLRP facilities are depreciated at an accelerated rate for income tax purposes under the provisions of the IRC. Sections 168(f)(2), (1)(9) and (i)(10) of the IRC provide that normalization requirements must be met in order for an owner of public utility property to use accelerated depreciation for income tax purposes.

MGE argued that violating the normalization rules of the IRC would disqualify MGE from making use of accelerated depreciation for income tax purposes, thus eventually causing MGE's customer rates to increase because no further deferred income taxes would arise to reduce MGE's rate base. However, MGE did not present any evidence which would support its claim that the Commission's decision in this matter would be a violation of the IRC. In fact, MGE's witness Dively testified that no ruling had been made by the Internal Revenue Service specifically related to MGE that would support its theory regarding IRC violation.

Public Counsel argued that there is no IRC violation. MGE's witness Dively testified that although the Commission's Report and Order had not treated its SLRP expenditures in a manner MGE thought was appropriate, MGE's SLRP was still in progress, and MGE was currently recording deferred taxes related to the current amortization of SLRP deferrals in accordance with the normalization rules of the IRC.

Public Counsel also argued that MGE should not be allowed to raise the potential IRC violation argument in the rehearing because that theory was not specifically mentioned in MGE's application for rehearing as required by the Commission's rule 4 CSR 240-2.160.<sup>1</sup> Public Counsel is correct that MGE did not specifically set forth a potential violation of the IRC as a ground for which MGE

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<sup>1</sup> The Commission's rule 4 CSR 240-2.160 was rescinded and readopted effective April 30, 2000. However, former section (1) of that rule restates Section 386.500, RSMo 1994, which says that applications for rehearing "shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable." Current section (1) of 4 CSR 240-2.160 merely states that applications for rehearing shall be made in compliance with the statute.

considered the Commission's order unlawful. Furthermore, even if MGE had included that argument in its application for rehearing, there was not sufficient evidence nor convincing arguments presented for the Commission to find that an IRC violation will occur.

Therefore, the Commission finds that the question of an IRC violation is not an appropriate issue for rehearing because it was not an issue preserved for rehearing under Section 386.500, RSMo 1994, and the Commission's rule 4 CSR 240-2.160.

#### **Gross-up/Gross-down**

This issue was brought before the Commission on rehearing to correct an inadvertent error regarding the valuation of the revenue requirement. MGE's witness Hernandez explained the error in his prefiled Direct Rehearing Testimony marked as Exhibit 237. At the evidentiary hearing the parties participating presented an oral stipulation that the mathematical calculations as presented in Schedule CBH1 and CBH8 to Exhibit 237 are accurate.

Those numbers represent that a factor of 1.100306 should be used to gross up revenue to account for uncollectibles and that a factor of .997761 should be used to gross down revenues for late payment revenue. Those factors when properly applied to the Commission's corrected revenue requirement of \$13,297,499 result in a revenue requirement of \$13,228,311. No party has objected to these calculations. The Commission previously found that the revenue requirement was in the public interest and now finds that the revenue requirement should be corrected using the factors as stipulated to by the parties at the rehearing.

#### **Conclusions of Law**

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

Missouri Gas Energy, a division of the Southern Union company, is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

The Commission has authority under Chapter 393, RSMo 1994, to set just and reasonable rates for the provision of service by regulated gas utilities.

The orders of the Commission must be based on substantial and competent evidence, taken on the record as a whole, and must be reasonable and not arbitrary, capricious, or contrary to law. In that regard, and in setting rates which are just and reasonable, the Commission has considered all relevant evidence and determines, as set out in the findings of fact, that the stipulation of the parties at the hearing as to the gross-up and gross-down factors applied to the corrected revenue requirement which results in a revenue requirement of \$13,228,311 is in the public interest and is approved.

Section 386.500, RSMo 1994, provides in part:

1. After an order or decision has been made by the commission, the public counsel or any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and

the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted the same shall be determined by the commission within thirty days after the same shall be finally submitted.

2. No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. . . .

Current Commission rule 4 CSR 240-2.160, effective April 30, 2000, provides in part that "[a]pplications for rehearing may be filed pursuant to statute." The Commission rule 4 CSR 240-2.160 in effect at the time MGE filed its application restated the requirements in Section 386.500, RSMo 1994.

26 U.S.C. Section 168 provides that normalization requirements must be met in order for an owner of public utility property to use accelerated depreciation for income tax purposes.

*IT IS THEREFORE ORDERED:*

1. That the stipulation of the parties to the gross-up factor of 1.100306 and the gross-down factor of .997761 is approved.
2. That the accumulated deferred income taxes related to the Safety Line Replacement Program deferral continues to be included as an offset to Missouri Gas Energy's rate base.
3. That no later than November 10, 2000, Missouri Gas Energy, a division of Southern Union Company, shall file revised tariff sheets with a thirty day effective date which are consistent with the previous orders in this case and with the final revenue requirement of \$13,228,311.
4. That all objections not specifically ruled upon are overruled and all motions not specifically ruled upon are denied.
5. That this Report and Order on Rehearing shall become effective on October 10, 2000.

Lumpe, Ch., Schemenauer, and Simmons, CC., concur; Murray, C., dissents; and certify compliance with the provisions of Section 536.080, RSMo 1994. Drainer, C., absent.

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**Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission, Complainant, v. Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre, Respondent.\***

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*Case No. MC-2000-818  
Decided October 12, 2000*

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**Evidence, Practice and Procedure §§ 24, 25, 27.** The Commission finds the averments in the complaint are deemed admitted after Respondent's second failure to respond to a complaint.

**SECOND ORDER FINDING DEFAULT**

On June 14, 2000, the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Missouri Public Service Commission (Complainant) filed a complaint with the Missouri Public Service Commission (Commission) against Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre (Respondent).

Notice of the complaint was mailed to the Respondent by certified mail on June 19, 2000. The official case file reflects a postal service receipt showing that Respondent accepted delivery on July 3, 2000. In that notice of complaint, the Respondent was given 30 days from the date of the notice of complaint (i.e., until July 19, 2000) to respond to the complaint by filing an answer, a notice that the complaint had been satisfied, or a written request that the complaint be referred to a neutral third-party mediator for voluntary mediation of the complaint.

The Respondent did not respond to the complaint. The Commission entered an order finding default on July 27, 2000, with an effective date of August 8, 2000.

On August 11, 2000, Respondent late-filed a motion for "rehearing and reconsideration." The Complainant did not respond to the Respondent's motion.

On September 13, 2000, the Commission entered its order setting aside the order finding default and ordering the Respondent to file no later than September 28, 2000, an answer, a notice that the complaint has been satisfied, or a written request that the complaint be referred to a neutral third-party mediator for voluntary mediation of the complaint.

Respondent did not comply with that order.

Commission Rule 4 CSR 240-2.070(9) states:

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\*See pages 222 and 324 for other orders in this case. On December 20, 2000, the PSC Staff filed a motion to reopen the case. On December 22, 2000, the Commission issued an order granting the motion to reopen the case, establishing a prehearing conference and directing the filing of a procedural schedule. Notice of satisfaction of the complaint was filed on April 18, 2001. The Commission issued a notice of dismissal and closing of the case on April 23, 2001.

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.

The Respondent did not comply with Commission Rule 4 CSR 240-2.070(9) in that it failed to file a timely answer and is thus in default.

The Commission will enter its second order finding default.

*IT IS THEREFORE ORDERED:*

1. That the averments in the complaint filed on June 14, 2000, by the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Missouri Public Service Commission against Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre are deemed admitted.
2. That Manufactured Housing Services of Bonne Terre d/b/a Oakcreek Village of Bonne Terre is found in default.
3. That this order shall become effective on October 22, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur

Hopkins, Senior Regulatory Law Judge

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**In the Matter of the Application of UtiliCorp United Inc. d/b/a  
Missouri Public Service for a Waiver of Commission Rules  
4 CSR 240-40.015 and 4 CSR 240-40.016 Concerning Capacity  
Release Credits.**

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*Case No. GE-2000-639  
Decided October 17, 2000*

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**Gas §§17, 19, 29, 78.** The affiliate transaction rule need not apply to capacity release transactions between the local distributing company (LDC) and its affiliates since it is released or sold at going market rates and not at fully distributed cost. LDC to forgo any deals with its unregulated marketing affiliates; bulletin board releases, open and available to all marketers, will be allowed.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

On April 12, 2000, UtiliCorp United Inc. d/b/a Missouri Public Service (UtiliCorp) applied to the Missouri Public Service Commission (Commission) for waiver from Commission Rules 4 CSR 240-40.015(2)(A) and 4 CSR 240-40.016(3)(A) concerning capacity release credits. According to the application, UtiliCorp sought the waiver so it could continue operating in accordance with the process reviewed by the Commission in cases number GR-95-273 and GR-96-192. In those cases, the Commission examined the process by which UtiliCorp released capacity to unregulated affiliate entities and the credits provided in exchange for those releases. Releases to regulated affiliates and non-affiliates were not in dispute.

On June 28, 2000, the Staff of the Commission (Staff) filed its memorandum which contained a recommendation that the waiver be granted and set forth several conditions that Staff concluded that UtiliCorp should follow.

UtiliCorp filed its response July 28, 2000, which stated that it had an alternative proposal which it believed would be more straightforward and satisfy the objectives identified by the Staff.

Although no party formally asked for a prehearing conference, the Commission found that this case was contested. Thus, on August 16, 2000, the Commission scheduled a prehearing conference and also set a date for the filing of a proposed procedural schedule. The prehearing conference was held as scheduled on September 18, 2000.

On September 26, 2000, all of the parties (i.e., Staff, UtiliCorp and the Office of the Public Counsel (Public Counsel)) filed a unanimous stipulation and agreement (Agreement), which is attached hereto as Attachment A.

The parties informed the Commission that the Agreement was the result of discussion between the parties, and the parties stated that they now believe that the areas of disagreement have been resolved in a way that is reasonable and just. Accordingly, the Agreement stated that the Commission should issue an order granting UtiliCorp a temporary waiver for good cause from Commission Rules 4 CSR 240-40.015(2)(A) and 4 CSR 240-40.016(3)(A) solely for natural gas pipeline capacity release transactions for a two-year trial period with conditions.

The conditions, briefly set forth, are:

- a) Before releasing capacity to a non-regulated affiliate, UtiliCorp shall post (or offer) such available capacity for bid on the interstate pipelines' electronic bulletin boards. UtiliCorp will not prearrange a release to a non-regulated affiliate;<sup>1</sup> and,
- b) UtiliCorp be required to collect, retain and include in the Company's annual actual cost adjustment (ACA) filing evidence of the posting of the capacity and a summary of the capacity releases which have been awarded by the interstate pipeline in

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<sup>1</sup>The Agreement noted that UtiliCorp would be allowed to perform prearranged capacity release transactions with non-affiliates. Likewise, according to the Agreement, UtiliCorp does not propose to post (or offer) for bid capacity releases by one regulated Missouri operation to another regulated Missouri operation. The Agreement made clear that this does not reflect any prejudgment of these transactions by the Staff or Public Counsel for ratemaking purposes.

the relevant time period. Copies of screens printed from the interstate pipelines' electronic bulletin boards reflecting the capacity being offered and capacity releases which have been awarded shall satisfy this requirement.

- c) UtiliCorp be required (for all capacity release transactions involving any regulated entity, affiliate, or division) to collect, retain and include in the Company's annual ACA filing (1) a summary of the prearranged capacity release transactions which have been awarded to Company's regulated entities in the relevant time period and (2) copies of screens printed from the electronic bulletin boards reflecting the capacity being offered and capacity releases which have been awarded for all similar transactions on the date of any prearranged deals to regulated entities of UtiliCorp.

Briefly, the Agreement also contained provisions that:

1. None of the Parties shall be bound in this or any other proceeding, except as specified;
2. Because the Agreement resulted from negotiations, the terms are interdependent. If the Commission does not approve the Agreement, then it is void;
3. If the Commission approves the Agreement, the Parties waive their rights to call, examine and cross-examine witnesses; to present oral argument or written briefs; to the reading of the transcript by the Commission; to seek rehearing; and to judicial review. If the Commission does not approve the Agreement, the Parties requested that a procedural schedule be established which provides for the filing of testimony and a hearing, to include the opportunity for cross-examination.
4. The Staff shall have the right to submit to the Commission a memorandum explaining its rationale for entering into the Agreement. Each party shall be served and shall be entitled to respond.
5. The Staff shall also have the right to provide, at an agenda meeting, whatever oral explanation the Commission requests.

On September 28, 2000, the Commission issued its order directing Staff to file its recommendation and memorandum concerning the stipulation and agreement.

On the same day, Staff filed its suggestions in support of the stipulation and agreement, setting forth the following reasons why it was requesting the Commission to issue an order granting UtiliCorp's temporary waiver for a period of two years from Commission Rules 4 CSR-40.015(2)(A) and 4 CSR 240-40.016(3)(A) with regard to capacity release transactions only in conformity with the Agreement:

The [Agreement] recognizes that the affiliate transaction rule need not apply to capacity release transactions between the [local distributing company (LDC)] and its affiliates in that

capacity is released or sold at going market rates and not at the fully distributed cost (FDC) of the capacity. The FDC value of released capacity would be much greater than the market rates and if used would cause the capacity to be very difficult to sell in the market place.

The [Agreement] requires UtiliCorp to forgo any prearranged deals with its unregulated marketing affiliates. The only capacity release transactions between the LDC and its unregulated marketing affiliates which will be allowed are bulletin board releases which are open and available to all marketers whether affiliated or not.

The [Agreement] requires UtiliCorp to provide detailed documentation to the Staff of all of its capacity releases to affiliates whether those affiliates are regulated or unregulated.

The [Agreement] is for a temporary period of two years. This time period will allow the Staff to monitor the program and review the documentation. The Staff will be able to determine if the program is working properly and that the documentation is adequate. Staff can determine if the waiver should be extended, made permanent, modified or allowed to terminate.

No party filed a response to Staff's suggestions in support of the stipulation and agreement.

In the Agreement, the parties requested that the Commission issue its order approving all of the specific terms and conditions of the Agreement.

There is no need for an evidentiary hearing since no party requested an evidentiary hearing and the Commission will cancel the remainder of the procedural schedule.

The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no party requests an evidentiary hearing, the Commission may determine that an evidentiary hearing is not necessary and that the Commission may make a decision based on the Agreement. See State ex rel. Defenderfer Enterprises, Inc. v. P.S.C., 776 S.W.2d 494, 496 (Mo. App. 1989).

The Commission concludes that all issues were settled by the Agreement. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in a case, pursuant to Section 536.060 RSMo Supp. 1999.

The Commission will approve the Agreement.

*IT IS THEREFORE ORDERED:*

1. That the Missouri Public Service Commission approves the unanimous stipulation and agreement filed on September 28, 2000, signed by all the parties, and whose terms are set forth in Attachment A.

2. That those portions of the procedural schedule which have not been fulfilled, shall be canceled.
3. That this order shall become effective on October 27, 2000.
4. That this case may be closed on October 28, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur  
Hopkins, Senior Regulatory Law Judge

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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.

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**In the Matter of the Filing of Missouri Gas Energy, a Division of  
Southern Union Company, Pursuant to 4 CSR 240-40.17(8).**

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*Case No. GE-2000-808  
Decided October 17, 2000*

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**Certificates §§1, 2, 3. Gas §§2, 17, 78.** Missouri Gas Energy (MGE) was granted its application for an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8), which prohibits regulated gas utilities from engaging in activities that qualify as heating, ventilation, and air conditioning (HVAC) services. The Commission found that MGE has been providing HVAC services for a period that includes and predates the five-year period ending August 28, 1998, thus allowing MGE a statutory exemption.

**ORDER GRANTING EXEMPTION**

On June 8, 2000, Missouri Gas Energy (MGE) filed with the Missouri Public Service Commission (Commission) an application for an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8). MGE is engaged in activities that qualify as heating, ventilation, and air conditioning (HVAC) services, according to the application. MGE alleged that it has been providing these services for a period that includes and predates the five-year period ending August 28, 1998.

Section 386.756.7 RSMo Supp. 1999, states:

A utility engaging in HVAC services in this state for five years prior to August 28, 1998, may continue providing, to existing as

well as new customers, the same type of services as those provided by the utility five years prior to August 28, 1998.

Commission Rule 4 CSR 240-40.017(8) states:

A regulated gas corporation engaging in HVAC services in this state for five years prior to August 28, 1998, may continue providing, to existing as well as new customers, the same type of services as those provided by the regulated gas corporation five years prior to August 28, 1998.

(A) To qualify for this exemption, the regulated gas corporation shall file a pleading before the commission for approval.

On September 29, 2000, the Staff of the Commission (Staff) filed a pleading which recommended that the Commission issue an order acknowledging that MGE qualifies for an exemption for certain specific services, which is attached to this order as Appendix A. Staff informed the Commission that Staff's review indicates that MGE has been performing these services in excess of the five-year statutory requirement.

MGE did not file a response to Staff's recommendation.

The Commission has reviewed MGE's application and the Staff recommendation, and determines that MGE has met the requirements of Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8).

*IT IS THEREFORE ORDERED:*

1. That Missouri Gas Energy is granted an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8).
2. That this order shall become effective on October 27, 2000.
3. That this case may be closed on October 28, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Hopkins, Senior Regulatory Law Judge

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**In the Matter of Union Electric Company d/b/a AmerenUE for  
Authority to File Tariffs Increasing Rates for Gas Service  
Provided to Customers in the Company's Missouri Service  
Area.**

*Case No. GR-2000-512  
Decided October 17, 2000*

**Rates §§8, 20, 23, 108.** The Commission authorized AmerenUE to file tariff sheets containing schedules for natural gas service revising these rates: Residential Service, General Service, Interruptible Service, Natural Gas Transportation Service, and Miscellaneous Charges. AmerenUE required to: establish weatherization program; revise its depreciation rates; and book expense levels associated with pensions and post-retirement benefits. In future rate cases, annual revenues attributable to AmerenUE's existing special contract to be handled according to the terms of the stipulation and agreement. AmerenUE's Gas Supply Incentive Plan shall remain unchanged.

**ORDER APPROVING UNANIMOUS  
STIPULATION AND AGREEMENT**

On February 18, 2000, Union Electric Company d/b/a AmerenUE (AmerenUE) submitted to the Missouri Public Service Commission (Commission) proposed tariffs reflecting increased rates for gas service provided to customers in AmerenUE's Missouri service area. The proposed tariffs contained a requested effective date of April 2, 2000, and were designed to produce an annual increase of approximately 14 percent (i.e., about \$12 million) in AmerenUE's revenues exclusive of applicable taxes. The proposed tariffs contained several rate design modifications, changes to the terms and conditions applicable to transportation service, and a clarification concerning the application of AmerenUE's Purchased Gas Adjustment Clause to interruptible service. The tariffs also contained proposed changes to AmerenUE's Gas Supply Incentive Plan (GSIP), including the expansion of the GSIP to incorporate a gas procurement incentive, and proposed an extension of the GSIP to March 31, 2004.

By order dated March 3, 2000, the Commission suspended the proposed tariffs for a period of 120 days plus an additional six months beyond the proposed effective date until January 27, 2001. The order established a schedule for interventions, the pre-filing of direct testimony and exhibits, and an evidentiary hearing.

By order dated March 31, 2000, the Commission adopted a procedural schedule. The Commission issued subsequent orders granting the late-filed applications for intervention filed by the Midwest Gas Users' Association (MGUA) and the Missouri Department of Natural Resources (MoDNR), and scheduling five local public hearings which were subsequently held as scheduled.

Pursuant to the procedural schedule, a prehearing conference was convened on August 28, 2000. AmerenUE, the Staff of the Commission (Staff), the Office of

the Public Counsel (Public Counsel), MGUA, and MoDNR appeared and participated at the prehearing conference. During the prehearing conference, on August 30, 2000, MGUA filed a motion for leave to withdraw its intervention, which was granted by the Commission's order issued on September 12, 2000. As a result of the prehearing conference and subsequent negotiations, AmerenUE, Staff, Public Counsel, and MoDNR (collectively, Parties) filed a unanimous stipulation and agreement (agreement), which is attached hereto as Attachment A.

On September 21, 2000, the Commission issued a notice setting a hearing on the agreement for October 4, 2000, which was held as scheduled.

On September 27, 2000, Staff and MoDNR each filed their separate responses to the agreement, both stating that neither requested an evidentiary hearing and neither had any objections to the agreement.

Briefly explained, the agreement concurred on the following points:

1. AmerenUE shall be authorized to file revised tariff sheets containing rate schedules for natural gas service designed to produce an increase in overall Missouri jurisdictional gross annual gas revenues of \$4.2 million, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, for services rendered on and after November 1, 2000;
2. The tariff sheets set out in Schedule 1 attached to the agreement reflect the Parties' agreements as to various rates, including:
  - a. Revisions to AmerenUE's Residential Service Rate (Tariff Sheet No. 5);
  - b. Revisions to AmerenUE's General Service Rate (Tariff Sheet No. 6);
  - c. Revisions to AmerenUE's Interruptible Service Rate (Tariff Sheet Nos. 7 and 8);
  - d. Revisions to AmerenUE's Natural Gas Transportation Service Rate (Tariff Sheet Nos. 10, 12, 13 and 15) and an addition to Miscellaneous Charges (Tariff Sheet No. 20.1);
3. AmerenUE shall establish a new weatherization program, to be funded by AmerenUE's ratepayers at an annual rate of \$125,000. This amount is allowed to be recovered from AmerenUE's ratepayers as outlined in the Stipulation and Agreement. The details of this program will be determined through a collaborative process among representatives of AmerenUE, Staff, Public Counsel and MoDNR;
4. AmerenUE shall be required to revise its depreciation rates to the depreciation rates set forth in Schedule 2 attached to the agreement;
5. AmerenUE shall continue to book, for financial purposes, expense levels associated with pensions and post-retirement benefits other than pensions in accordance with Financial Accounting Standards Board Statements 87, 88 and 106, respectively;

6. The Parties agree that in AmerenUE's future natural gas rate cases, they will recommend that the annual revenues attributable to AmerenUE's existing special contract dated November 1, 1997 (which is the last special contract referenced in AmerenUE's response to Public Counsel's Data Request No. 34) be handled in specific ways set out in the agreement;
7. The Parties agree that AmerenUE's Gas Supply Incentive Plan, as set forth in Original Tariff Sheet Nos. 29.5 through 29.9, shall remain unchanged;
8. The agreement is being entered into solely for the purpose of settling this case only. None of the signatories to the agreement shall be deemed to have approved or acquiesced in any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation, depreciation or revenue related methodology or any service or payment standard, and none of the signatories shall be prejudiced or bound in any manner by the terms of the agreement in this or any other proceeding, except as otherwise expressly specified therein;
9. The agreement resulted from extensive negotiations among the signatories and the terms are interdependent. In the event the Commission does not approve the agreement or approves the agreement with modifications or conditions (other than a modification to the recommended effective date of the tariff sheets attached to the agreement as Schedule 1) that a Party to this proceeding objects to prior to the effective date of the order approving the agreement, then the agreement shall be void and no signatory shall be bound by any of the provisions thereof;
10. In the event the Commission accepts the specific terms of the agreement, the Parties waive, with respect to the issues resolved therein: their respective rights pursuant to Section 536.080.1, RSMo 1994, to present testimony, to cross-examine witnesses, and to present oral argument and written briefs; their respective rights to the reading of the transcript by the Commission pursuant to Section 536.080.2, RSMo 1994; and their respective rights to judicial review pursuant to Section 386.510, RSMo 1994;
11. The Parties agree that all of the prefiled testimony submitted in this proceeding by AmerenUE, Staff, Public Counsel, and MoDNR shall be received into evidence without the necessity of their respective witnesses taking the stand.

The Parties requested that the Commission issue its order approving all of the specific terms and conditions of the agreement.

There is no need for an evidentiary hearing since no party requested an evidentiary hearing and the Commission will cancel the remainder of the procedural schedule, including the evidentiary hearing.

The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no party requests an evidentiary hearing, the Commission may determine that an evidentiary hearing is not necessary and that the Commission may make a decision based on the agreement. See State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C., 776 S.W.2d 494, 496 (Mo. App. 1989).

The Commission concludes that all issues were settled by the agreement. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in a case, pursuant to Section 536.060 RSMo Supp. 1999.

The Commission will approve the agreement.

*IT IS THEREFORE ORDERED:*

1. That the Missouri Public Service Commission approves the unanimous stipulation and agreement filed on September 20, 2000, signed by all the parties, and whose terms are set forth in Attachment A.
2. That those portions of the procedural schedule which have not been fulfilled, shall be canceled, including the evidentiary hearing which was scheduled to begin on October 30, 2000.
3. That this order shall become effective on October 27, 2000.
4. That this case may be closed on October 28, 2000.

Lumpe, Ch., and Drainer, C., concur with opinion Murray and Simmons, CC., concur Schemenauer, C., dissents with opinion

Hopkins, Senior Regulatory Law Judge

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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.

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**Concurring Opinions of Chair Sheila Lumpe  
& Vice Chair M. Dianne Drainer**

We concur with the Commission's decision to approve the Stipulation and Agreement. Although we recognize that much negotiation by all parties went into the final terms and conditions of this agreement we respectfully must address the following concern. We are concerned with the increase of the residential customer charge from \$8 a month to \$9 a month. An increase in the monthly charge on the residential customers can have regressive impacts on this customer class. We would ask that serious consideration be given first to all other usage charges in future rate design for residential customers before increasing the monthly fixed charge further.

**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission in the approval of this Stipulation and Agreement.

My concerns with the Agreement are as follows:

- The increase in the residential customer charge from \$8 a month to \$9 a month is not cost justified. The reason given for the increase is that it had not been increased since February 1998. This residential customer charge is regressive. I would prefer that this revenue be recovered through the product delivery charge.
- The revenue requirement includes an annual amortization of \$148,000 for merger costs resulting from the Union Electric and CIPS merger. These costs should be borne by stockholders and not ratepayers. This is a slippery slope to start up and one which the Commission should avoid.
- The Agreement inserts \$338,000 into the revenue requirement for some unexplained reasons. Staff indicates that it is a concession to the Company for the continuation of its GSIP in lieu of adopting a different GSIP.

For these reasons I respectfully dissent.

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**In the Matter of Laclede Gas Company's Purchased Gas Adjustment Factors to be Audited in Its 1998-1999 Actual Cost Adjustment.**

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*Case No. GR-99-316  
Decided October 19, 2000*

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**Gas §17.1.** The Commission adopted the recommendations of the Staff of the Missouri Public Service Commission regarding its audit of the 1998-1999 Actual Cost Adjustment period. Staff indicated that no adjustments to the Actual Cost Adjustment balance were necessary. Staff also made five recommendations in order to ensure that sufficient capacity, but not excess capacity, is available to meet peak day requirements.

**ORDER ADOPTING STAFF RECOMMENDATIONS**

On November 4, 1999, Laclede Gas Company (Laclede) filed its monitoring report for the third and final year of its original Gas Supply Incentive Plan (GSIP). Laclede filed a revised tariff sheet on November 5, 1999, encompassing changes to all three components of the company's PGA factors: the Current Purchased Gas Adjustment, the Actual Cost Adjustment (ACA), and refunds.

On November 16, 1999, the Staff of the Missouri Public Service Commission (Staff) filed a Memorandum in which it requested that it be allowed to submit its results and recommendations regarding information included in the Actual Cost Adjustment to the Commission by September 1, 2000. Staff's request was based on the short time available to review the documentation supporting the ACA factor

represented in the November 1999 filing. The Commission issued an Order Approving Interim Rates on November 18, 1999, which provides that the tariff sheet submitted by Laclede on November 4, 1999, is approved on an interim basis. Staff was directed to conduct its audit of this ACA period and submit its results and recommendations regarding this ACA filing by September 1, 2000.

On August 14, 2000, Staff filed its memorandum. Staff notes that Laclede's report indicates total savings of \$28,362,173.96 related to the Procurement Incentive Provision, Capacity Release Provision, Firm Transportation Discounts provision and Off-System Sales Provision. Laclede's share of the total incentive plan savings is \$5,411,251.37.

Staff states that based upon a review of the monitoring report and supporting documentation, Staff believes that no adjustments to the Actual Cost Adjustment (ACA) balance are necessary. Staff also makes five specific recommendations in order to ensure that sufficient capacity, but not excess capacity, is available to meet peak day requirements. Staff recommends that Laclede do the following:

- a. Continue to provide an updated annual reliability report;
- b. Provide estimates of peak day demand and annual demand;
- c. Review and update company assumptions made to estimate the peak and annual demand;
- d. Provide details of the capacity available to meet this demand; and
- e. Include the following information:

1. In addition to a winter season peak day, include a discussion of how capacity will meet the demand of a February peak day occurrence when the Lange underground storage volume will be at a reduced inventory level;

2. In the peak day analysis, Laclede should reevaluate withdrawal capabilities from storage for its design season to determine whether the capacity of the Lange underground storage and Lange and Catalan propane facilities allow transportation capacity to be reduced;

3. Submit a comparison of actual sendout and heating degree days for two or more recent peak days (within the last three years) to the estimated demand for those conditions (heating degree days and number of customers). Provide an explanation when the model does not reasonably agree with the actual load encountered;

4. Submit an estimate of the peak day reserve margin for the 1999/2000 ACA period and for each of the following three to five years. Include the reserve margin for both an early winter and late winter peak day.

In addition, Staff recommends that the Commission order Laclede to:

- 1) Establish the Firm Sales non-LVTSS ACA balance at an \$8,077,217 overrecovery;
- 2) Establish the Firm Sales LVTSS ACA balance at a \$172,455 underrecovery;
- 3) Establish the Interruptible Sales ACA balance at a \$132,284 underrecovery;
- 4) Establish the LP Sales ACA balance at a \$3,664 underrecovery;
- 5) Establish the Firm Transportation ACA balance at a \$347,158 underrecovery;
- 6) Establish the Basic Transportation ACA balance at a \$9 underrecovery;
- 7) Provide the Staff with all of the reliability and peak day information discussed in the Summary Section of this ACA recommendation and include the information with the 1999/2000 ACA submittal.

On September 26, 2000, Laclede filed its Response to the Staff Recommendation. Laclede concurs in Staff's recommendations and requests that the Commission adopt the recommendations and close the case as there are no disputed issues. However, Laclede did briefly respond to Staff's statement that the company does not engage in "peak day" planning. Laclede argues that while its planning process takes into account what would be required to meet a single peak day demand, it must also consider and reflect other factors as well. Laclede takes into account how early or how late the peak day may occur in the winter season, the extent to which seasonal demands will have already reduced available storage and propane capacity at the time the peak day occurs, and the amount of storage and propane capacity that must be retained to meet potential demand over the remaining portion of the winter season. Laclede alleges that by planning for the peak requirements that would be imposed throughout a design winter, its planning process allows a "more robust and necessary evaluation of the interplay between peak day requirements and changes in available resources to take place."

The Commission has reviewed the Staff Memorandum, Laclede's Response, and the official case file. The Commission notes that Staff and Laclede are in agreement regarding the recommendations, and will adopt the Staff recommendations.

*IT IS THEREFORE ORDERED:*

1. That Laclede Gas Company shall continue to provide an updated annual reliability report.
2. That Laclede Gas Company shall provide estimates of peak day demand and annual demand.

3. That Laclede Gas Company shall review and update company assumptions made to estimate the peak and annual demand.
4. That Laclede Gas Company shall provide details of the capacity available to meet this demand, and shall include the following information:
  - a. In addition to a winter season peak day, include a discussion of how capacity will meet the demand of a February peak day occurrence when the Lange underground storage volume will be at a reduced inventory level;
  - b. In the peak day analysis, Laclede should reevaluate withdrawal capabilities from storage for its design season to determine whether the capacity of the Lange underground storage and Lange and Catalan propane facilities allow transportation capacity to be reduced;
  - c. Submit a comparison of actual sendout and heating degree days for two or more recent peak days (within the last three years) to the estimated demand for those conditions (heating degree days and number of customers). Provide an explanation when the model does not reasonably agree with the actual load encountered;
  - d. Submit an estimate of the peak day reserve margin for the 1999/2000 ACA period and for each of the following three to five years. Include the reserve margin for both an early winter and late winter peak day.
5. That Laclede Gas Company shall establish the Firm Sales non-LVTSS ACA balance at a \$8,077,217 overrecovery.
6. That Laclede Gas Company shall establish the Firm Sales LVTSS ACA balance at a \$172,455 underrecovery.
7. That Laclede Gas Company shall establish the Interruptible Sales ACA balance at a \$132,284 underrecovery.
8. That Laclede Gas Company shall establish the LP Sales ACA balance at a \$3,664 underrecovery.
9. That Laclede Gas Company shall establish the Firm Transportation ACA balance at a \$347,158 underrecovery.
10. That Laclede Gas Company shall establish the Basic Transportation ACA balance at a \$9 underrecovery.
11. That Laclede Gas Company shall provide the Staff with all of the reliability and peak day information discussed in the Summary Section of the ACA recommendation and include the information with the 1999/2000 ACA submittal.
12. That this order shall become effective on October 19, 2000.
13. That this case may be closed on October 20, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur.

Ruth, Regulatory Law Judge

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**In the Matter of the Petition of the North American Numbering Plan Administrator, on Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.\***

*Case No. TO-2000-374  
Decided October 24, 2000*

**Telecommunications §7.** Pursuant to its general jurisdiction under Sections 386.250 and 392.520 of the Revised Statutes of Missouri and pursuant to delegations of authority from the Federal Communications Commission, the Missouri Public Service Commission has jurisdiction and authority to determine the method and implementation of numbering relief for the 314 and 816 area codes, to determine and implement certain numbering conservation methodologies, to review, audit and verify use of numbering resources, and to hear and determine certain requests or disputes related to the use or procurement of numbering resources.

**Telecommunications §6.** The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e).

**Telecommunications §6.** The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e). The Federal Communications Commission may delegate all or any portion of this authority to state commissions or other entities. Id.

**APPEARANCES:**

*Kimberly Wheeler*, Morrison & Foerster, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006, for NeuStar, Inc., the North American Numbering Plan Administrator.

*Paul G. Lane*, General Attorney-Missouri, and *Mimi B. MacDonald*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Thomas E. Pulliam*, Ottsen, Mauzé, Leggat & Belz, L.C., 112 South Hanley Road, St. Louis, Missouri 63105, for Verizon Wireless, formerly known as Ameritech Cellular™.

*Cathleen Anne Martin*, Newman, Comley & Ruth, 601 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102, for Nextlink Missouri, Inc.

*James M. Fischer*, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for GTE Midwest Incorporated, d/b/a Verizon Midwest.

*Linda K. Gardner*, Senior Attorney, Sprint Corporation, 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Missouri, Inc., Sprint Spectrum L.P., d/b/a Sprint PCS, and Sprint Communications Company L.P.

*Paul S. DeFord*, Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108-2684, for AT&T Communications of the Southwest, Inc.

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\*See page 499 for another order in this case.

*Leland B. Curtis*, Curtis, Oetting, Heinz, Garrett & Soule, 130 South Bemiston, Suite 200, St. Louis, Missouri 63105, for MCImetro Communications, Inc., Gabriel Communications of Missouri, Inc., and Primary Network Communications, Inc.

*Peter Mirakian, III*, Spencer, Fane, Britt & Browne, LLP, 1000 Walnut Street, Suite 1400, Kansas City, Missouri 64106-2140, for ExOp of Missouri, Inc.

*Martin C. Rothfelder*, The Rothfelder Law Offices, 625 Central Avenue, Westfield, New Jersey 07090, for Nextel West, Inc.

*Lisa Cole Chase*, Andereck, Evans, Milne, Peace & Johnson, 700 East Capitol Avenue, Post Office Box 1438, Jefferson City, Missouri 65102, for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., and Northeast Missouri Rural Telephone Company (the Midwest Independent Telephone Group).

*Kenneth L. Judd*, Senior Counsel, Southwestern Bell Wireless, Inc., 13075 Manchester Road, First Floor, St. Louis, Missouri 63131, for Southwestern Bell Wireless, 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.

*Julie A. Kardis*, Assistant General Counsel, and *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: Keith Thornburg.

## **REPORT AND ORDER**

### **Background and Overview**

This case addresses the need to provide additional telephone numbers in the areas served by the 314 and 816 area codes as well as the consideration and implementation of numbering resource optimization strategies to make more efficient use of limited numbering resources. The Commission is vested with the authority to decide the method of relief as well as to consider and implement certain numbering resource optimization strategies.

The North American Numbering Plan (NANP) was established in the early 1940s, when American Telephone and Telegraph (AT&T) realized a need to integrate telephone networks into a nationwide network. The NANP is a numbering architecture in which every station in the areas served by the NANP is identified by a unique ten-digit address, i.e. a telephone number. With the break-up of AT&T and the introduction of competition into the telecommunications market, the federal Communications Act of 1934 (the Act) was amended to address various matters including administration of the NANP. Amendments to the Act vested United States

jurisdiction for the NANP in the Federal Communications Commission (FCC) under Section 251(e)<sup>1</sup>.

Pursuant to its authority, the FCC has designated a contracted administrator for the NANP. The designated North American Numbering Plan Administrator (NANPA) is NeuStar Inc. FCC Order No. 99-346 (November 17, 1999). The NANPA acts as a neutral, third-party administrator and is charged to exercise its administrative functions in an impartial manner toward the various carriers and service providers that require numbering resources. In addition, the FCC, in various proceedings and orders, has delegated certain authority to state commissions, including the authority to determine the method of code relief when a numbering plan area (NPA or area code) is nearing exhaustion of numbering resources.

Exhibit 23 is a copy of the NPA Code Relief Planning and Notification Guidelines (Guidelines) developed by the Industry Numbering Committee (INC) that the NANPA follows in carrying out its duties. The Guidelines define terms, functions, processes and timeframes to develop and implement Numbering Plan Area (NPA) relief and describe relief methods that are currently used when an NPA is nearing exhaustion of numbering resources.

Relief typically takes the form of assigning a new NPA code for an NPA split or overlay. Another option is to change the boundaries of NPAs to match the respective demands for numbering resources, extending the life of the NPA nearing exhaustion.

The NPA code is also called an area code and occupies the first three positions in the ten-digit NANP format (NPA-NXX-XXXX). Geographic NPAs correspond to discrete geographic areas. Nongeographic NPAs are associated with attributes, functionalities or requirements that transcend specific boundaries. A common example of the latter is the N00 format, e.g., 800.

The second three digits in a ten-digit telephone number designate the Central Office Code (CO code). The CO code uses the NXX format (N represents any number 2 through 9 and X represents any number 0 through 9). The CO code is also referred to as the NXX code.

A CO code has 10,000 numbers. Under present industry practices and under the Guidelines, there are 792 assignable CO codes within an NPA. A service provider requires at least one CO code (10,000 number block) for each rate center in which it provides service for routing, rating and billing, irrespective of the actual number of telephone numbers a service provider may require for its customers.

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<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) Act). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. §§ 151-174. 47 U.S.C. § 251(e)(1) provides:

The Commission shall designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to the State commissions or other entities all or any portion of such jurisdiction.

In order to utilize telephone numbers more efficiently, the FCC is in the initial stages of implementing thousands-block (NXX-X) number pooling on a national basis. Thousands-block number pooling is a number administration assignment process which breaks up the 10,000 numbers in the NXX code into thousands-blocks (NXX-Xs) and allocates numbers by thousands-block increments within the NXX code. Individual state commissions have successfully petitioned the FCC for authority to implement thousands-block number pooling on a trial basis. See FCC CC Docket No. 99-200, July 20, 2000.

Under the Guidelines, the NANPA monitors projected code exhaustion dates, develops initial NPA relief plan alternatives and moderates an industry forum to develop an industry consensus NPA relief plan for consideration by the applicable state commission. Pursuant to FCC delegation, a final determination of an NPA relief plan and the ultimate authority to approve or reject a plan is vested with the state commission.

The Guidelines provide a flexible process for NPA relief planning, review, approval and implementation, taking into account historical and anticipated NXX code growth demands and the particular considerations and factors in a given case. If NPA relief is not in place prior to anticipated code exhaustion and forecasted or actual demand for NXX codes will exceed the known supply during the planning and implementation interval for code relief, the NPA is declared to be in "jeopardy" and a rationing plan for NXX codes is implemented. In this situation numbering resources allocated to carriers and service providers may be insufficient to fully satisfy customer and competitive demands.

This case was initiated by the NANPA filing a petition on behalf of the Missouri telecommunications industry requesting approval of the industry consensus NPA relief plans proposed for the 314 and 816 NPAs.

#### **Procedural History**

The NANPA filed its petition on behalf of the Missouri telecommunications industry on December 17, 1999. Eight applications and one late-filed application to intervene filed on behalf of various telecommunications industry entities were granted by the Commission on March 1, 2000. Subsequently, three additional late-filed applications to intervene were filed and the same were granted, two in orders issued on May 23, 2000, June 9, 2000, and the third, by the presiding officer on July 31, 2000, during the hearing for this matter. In addition, the Commission's Staff participated in this case represented by the Commission's General Counsel, and the Office of the Public Counsel was also a party.

The Commission adopted a procedural schedule for this case on March 1, 2000. That schedule was modified in an order issued on March 20, 2000. An order scheduling local public hearings was issued on April 13, 2000. Pursuant to the procedural and scheduling orders, six local public hearings were held to provide the public an opportunity to offer comments. The local public hearings were held at locations in the 314 NPA on April 24, 2000, with hearings in St. Louis, Chesterfield, and O'Fallon, and at locations in the 816 NPA on May 3, 2000, with hearings in Kansas City, St. Joseph, and Blue Springs. Forty witnesses presented sworn comments at the local public hearings.

The Staff, the Office of the Public Counsel and seven of the intervening parties filed testimony presenting eleven witnesses. Direct testimony was due on May 10, 2000; rebuttal testimony was due on June 23, 2000; and surrebuttal testimony was due on July 12, 2000. All the witnesses appeared for cross-examination at the hearing for this case.

A prehearing conference was held on July 17, 2000. A proposed list of issues and order of witnesses and order of cross-examination was filed on July 19, 2000. Position statements of the parties were due on July 24, 2000. On July 21, 2000, the Commission issued an order allowing supplemental position statements to be filed no later than July 27, 2000, to further address number resource optimization strategies in view of a July 20, 2000, FCC order in CC Docket No. 99-200 and No. 96-98. Some of the intervening parties did not file position statements or took neutral positions on some or all of the issues presented.

On July 27, 2000, the Commission ordered its Staff to file a copy of the Commission's previous petition to the FCC regarding additional delegated numbering authority. On July 28, 2000, the Commission ordered its Staff to file documentation showing the 100 largest Metropolitan Statistical Areas (MSAs) in the United States. The Commission's Staff filed these materials on July 28, 2000. No objections to the filing of these documents were received.

The Office of the Public Counsel filed a motion on August 3, 2000, requesting that the Commission petition the FCC for authority for a state number pooling trial in the 816 NPA. The Commission's Staff supported the motion in a response filed on August 14, 2000. Southwestern Bell Telephone Company opposed the motion in a response filed on August 11, 2000. The Commission issued an order on September 1, 2000, directing the Commission's General Counsel to file a petition or supplemental petition with the FCC to request a grant of authority for a state number pooling trial in the 816 NPA.

Other proceedings having a bearing on this case include notification by the NANPA on April 19, 2000, that it had declared the 314 NPA to be in jeopardy with resulting rationing of NXX codes.

On March 31, 2000, the FCC released In the Matter of Numbering Resource Optimization, CC Docket No. 99-200 (*Report and Order and Further Notice of Proposed Rule Making*, FCC issued March 31, 2000) (hereafter NRO 1). NRO 1 addresses number resource optimization by defining necessary terms and setting reporting standards to promote the management of numbering resources and initiates the implementation of national thousands-block number pooling. NRO 1 also grants to states the authority to direct the NANPA to reclaim unactivated or unused NXX codes. NRO 1 is included in the record for this case as Exhibit 24.

On July 20, 2000, the FCC released In the Matter of Numbering Resource Optimization, CC Docket No. 99-200 and 96-98 (*Order*, FCC issued July 20, 2000) (hereafter NRO 2), conditionally granting the petitions of several states, including Missouri, to implement numbering resource optimization strategies and reempha-

sizing past delegations of authority. NRO 2 is included in the record of this case as Exhibit No. 26.<sup>2</sup>

On July 11, 2000, the FCC released a Public Notice that addressed questions concerning NRO 1, presented to the FCC by NeuStar, the Industry Numbering Council (INC), certain telecommunications companies and several state commissions. This document is included in the record of this case as Exhibit No. 25.

This case was heard on July 31 and August 1, 2000. Briefs were due no later than September 18, 2000. Ten briefs were filed.

### **Positions of the Parties and Discussion of the Evidence**

#### **NPA Relief**

The NANPA initiated this case on behalf of the Missouri telecommunications industry, but is a neutral party and did not advocate a particular relief method.

The NANPA presented the industry with four alternative relief methods for the 314 NPA. The alternatives consisted of a distributed overlay<sup>3</sup> of the 314 NPA, two split alternatives, and a boundary realignment. The last alternative would erase the boundary between the 314 and 636 NPAs (NANPA and the parties referred to the latter as a “retroactive overlay”). The industry consensus was to support the retroactive overlay. A factor noted by the NANPA as in support of the retroactive overlay was that the St. Louis area 911 system (encompassing four NPAs – 314, 636, 573 and 618) could be compromised by the introduction of a fifth NPA code into the 911 system, absent a longer lead time to upgrade capacity. The parties to this proceeding later verified and agreed that there was not a lack of capacity that would prevent or delay implementing a fifth NPA code in the St. Louis area 911 system.

The NANPA presented the industry with five alternative relief methods for the 816 NPA. The alternatives consisted of a distributed overlay of the 816 NPA, three split alternatives, and a concentrated overlay. The industry consensus was to support a distributed overlay.

The parties<sup>4</sup> taking positions regarding the 314 NPA were as follows: Southwestern Bell Telephone Company (SWBT), Southwestern Bell Wireless, Inc. (SWBW), and Sprint Corporation (Sprint) supported the retroactive overlay as a first choice and an overlay of 314 only as a second choice; GTE Midwest Inc. (GTE), CyberTel Cellular Telephone Company (CyberTel), and AT&T Communications of

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<sup>2</sup> In NRO 1, the FCC notes that the rapid depletion of numbering resources nationwide and the potential it creates for NANP exhaustion are national problems that must be dealt with at the national level. NANP expansion would be costly to implement. The FCC noted that there would be considerable value in extending the life of the NANP by using numbering resources more efficiently. There is not agreement on when the NANP might exhaust absent more efficient use of numbering resources, but, the NRO 1 cited NANPA and North American Numbering Council projections falling in the range from 2006 to 2012 and 2005 to 2016 respectively.

<sup>3</sup> Any reference to an overlay will be an “all services overlay” unless noted. Some parties and public comments considered specific service overlays where an NPA is designated for a specific service such as cell phones.

<sup>4</sup> The parties are described generally. In some cases principal corporations and affiliates were represented and in some case multiple companies were represented in a single intervention.

the Southwest (AT&T) supported the retroactive overlay; the Commission's Staff (Staff) and the Office of the Public Counsel (Public Counsel) supported an overlay.

The parties taking positions regarding the 816 NPA were as follows: SWBT, SWBW, GTE, Sprint, AT&T, ExOp of Missouri, Inc. (ExOp), and the Commission's Staff supported an overlay. The Public Counsel advocated delaying a decision, expressed general support for a geographic split roughly following the Missouri River but did not rule out an overlay.

The persons offering testimony at the local public hearings generally supported overlay relief for the 314 and 816 NPAs rather than a split. Four persons supported the geographic split method of NPA relief. Four persons also suggested that the Commission consider assigning service-specific NPA codes, for example, establishing an NPA for cell phones and for pagers. The FCC has declined to authorize service-specific overlays in its proceedings but has indicated that it might reconsider this issue in the future. NRO 2, par. 64 (rejecting Pennsylvania's request).

Local hearing support for the overlay relief methods was generally based on avoiding the costs and confusion of requiring customers to change their telephone numbers which would be required if a geographic split relief method was chosen; a view that an overlay would avoid dividing communities of interest compared to artificial divisions that might result from a geographic split; and a view that moving to required ten-digit local dialing with an overlay avoids confusion in knowing when to dial seven versus ten digits. An overlay always requires ten-digit local dialing. A geographic split retains seven-digit local dialing within the NPA.

Another concern that was expressed at the local public hearings was that any relief plan should provide long-term relief to reduce, limit or avoid costs and confusion associated with implementing any NPA relief plan and a desire that further NPA relief should not be required for a significant period of time.

The majority of persons testifying at the local public hearings represented municipalities, chambers of commerce and economic development officials. These persons were concerned with minimizing economic costs to businesses, communities and consumers associated with any NPA relief. These persons tended to give less weight to the benefit of keeping a seven-digit dialing pattern for local dialing.

#### **Delayed Decision or Implementation**

Public Counsel advocated that relief implementation be delayed in the 314 NPA and 816 NPA until 90 CO codes remained in the 314 NPA and 100 CO codes in the 816 NPA. The Public Counsel argued that delaying implementation benefits the public interest by postponing the expenses and confusion attendant with NPA relief, and that numbering conservation and optimization strategies might be implemented during this period that would further extend the life of these NPA codes. In the case of the 816 NPA, Public Counsel further argued that a decision on the relief method also be postponed "so that the best approach can be selected to respond to numbering status at that time."

The Public Counsel presented testimony and evidence that questioned the NANPA estimates of code exhaustion dates. The Commission notes that the FCC has recognized the "difficulty in accurately projecting code exhaust" and stated

“area code exhaust, at this time, cannot be reliably projected.” NRO 1, par. 66. The FCC stated that NANPA’s continual revision of exhaustion dates and changes in code issuance growth rates “demonstrates that change can happen very quickly.” *Id.*

#### **NPA Relief - 314**

##### **Geographic Split Method of Relief**

A geographic split relief method was not favored by any of the parties presenting testimony and these parties presented various reasons to support their position. A geographic split would require residents and businesses in the new NPA to suffer the confusion and expenses associated with having to change telephone numbers. In the 314 NPA, it would be difficult to fashion a dividing boundary that would avoid splitting the mandatory local calling scope. It would also be difficult to fashion a dividing boundary that would result in two or more NPAs with balanced lives. One NPA might have a long projected life and the other a short projected life. A short projected life results in the need to revisit area code relief and its attendant expenses again in a relatively short time period. In addition, while a split would preserve seven-digit local dialing within an NPA, ten-digit local dialing would be required between NPAs in the same extended local calling area as noted by the NANPA in its planning documents.

The NANPA planning documents submitted with its petition showed that the two proposed splits presented for the 314 NPA would have unbalanced lives of 2.4/16.4 years and 11.4/3.4 years, respectively, with variation depending on which NPA code wireless carriers used to home their switches. Thus, one of the resulting NPA areas in each split alternative would have a relatively short projected life.

The Office of the Public Counsel summarized the problems with a split in the 314 NPA as a recognition that carving up the already small 314 area into smaller pieces in order to retain geographic identity and seven-digit dialing does not produce sufficient benefits to outweigh the inconvenience of making customers change their area code.

##### **Overlay Method of Relief**

The overlay relief alternatives presented by the NANPA included an all services distributed overlay and a “retroactive” overlay. The all services distributed overlay (overlay) would assign a second NPA code to the 314 NPA. The retroactive overlay would be achieved by erasing the boundary line for the 636 NPA to combine the 314 and 636 NPAs. In this case, the two NPA codes would then serve the same geographic area.

The projected life submitted in the planning documents filed with the petition showed a life of 6.3 years for the overlay and 4.4 years for the retroactive overlay. The 636 NPA code would exhaust more quickly if it were used to retroactively overlay the present 314 NPA. If the 636 NPA were not used to retroactively overlay the 314 NPA, its current exhaustion date is the first quarter of 2008. This reflects a life of approximately 7.4 years.

With an overlay, ten-digit local dialing would be required within the 314 NPA. Seven-digit local dialing would be preserved within the 636 NPA if it were not used for a retroactive overlay of the present 314 and 636 NPAs.

Proponents of both the overlay and retroactive overlay relief methods asserted that once an overlay of any kind is implemented, future relief is more easily implemented since customers become accustomed to ten-digit dialing. Proponents also argued that a significant benefit with overlay relief is that it does not require customers to change their telephone numbers, in contrast to a split method of relief. The Office of the Public Counsel noted that once an overlay method of relief is adopted, other methods of relief are essentially precluded and the Commission's options are accordingly narrowed.

The proponents of an overlay favored this approach because it would avoid burdening customers in the recently created 636 NPA. The 636 NPA was created in a prior NPA relief case by splitting it from the 314 NPA. An overlay for the 314 NPA would also provide a longer relief period for the 314 NPA and avoid shortening the life of the 636 NPA.<sup>5</sup>

Proponents of a retroactive overlay favored this approach because it delays the implementation of a third NPA code in the St. Louis area. One proponent argued that a benefit of combining these NPAs would be implementation of number pooling in the area presently defined in the 636 NPA at the same time number pooling is implemented in the 314 NPA. Proponents also argued that this choice reflected a more "efficient" use of numbering resources by using numbering resources from 636 NPA to delay the introduction of a new NPA code; and that shifting codes to the areas with the highest demand presented a more efficient usage of numbering resources.

Proponents for the retroactive overlay also argued that the introduction of ten-digit dialing for local calls within the present 636 NPA would not be unduly burdensome since customers had become accustomed to dialing ten digits when calling into the 314 NPA.

The proponents favoring a retroactive overlay as a first choice and an overlay as a second choice generally distinguished their preference on the basis that this choice would postpone the need for a new NPA code, which was asserted to reflect efficiency. Proponents also asserted that eliminating the possibility of unbalanced growth in CO code usage between the 314 and 636 NPAs was beneficial. Preference for a retroactive overlay was also based on the assertion that always requiring ten-digit local dialing in the present 636 NPA would be less confusing for customers than preserving present seven-digit local dialing.

#### **NPA Relief- 816**

##### **Geographic Split Method of Relief**

The NANPA presented three split alternatives for the 816 NPA for the industry's consideration. The proposals followed rate center boundaries and gave some consideration to the scope of the Metropolitan Calling Area local calling plan. One

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<sup>5</sup> The 636 NPA was established pursuant to a geographic split of the 314 NPA approved by the Commission in Case No. TO-98-212. The Commission's decision, adopting a split, was presented in its Report and Order issued on July 22, 1998. The implementation of the 314/636 split was completed on March 25, 2000, following a nine-month permissive dialing period.

split alternative produced NPAs with projected lives of 1.1 and 94 years, respectively. Another presented projected lives of 6.3 and 7.1 years. A third presented projected lives of 3.1 and 15.4 years.

The Office of the Public Counsel was the only party that suggested the Commission consider a geographic split for the 816 NPA and offered its own proposal to split the NPA “roughly along the Missouri River.” However, the Public Counsel was not firm in its support for any particular relief, stating that the Commission should “postpone the final decision” and direct the industry to develop contingency plans to implement “either a geographic split” or an “overlay of the entire 816 area.” The Office of the Public Counsel did not present any evidence regarding the projected life of its proposed split.

#### **Overlay Method of Relief**

The NANPA presented two overlay proposals for the 816 NPA. One proposal was for an all services distributed overlay (overlay) for the NPA. The second was for a concentrated overlay. With the latter variation the second NPA code is used to overlay the portion of the NPA with the highest growth demands. The concentrated overlay can later be extended to cover the entire NPA. The projected life of the overlay is 6.7 years. The concentrated overlay has the same projected life as an overlay for the entire 816 NPA since the footprint of the second NPA code can be expanded to cover the entire 816 NPA to satisfy demand for CO codes. The NANPA planning documents showed an estimated life of 2.9 years for the “unconcentrated” portion of the 816 NPA. Thus, the concentrated NPA would be projected for extension to the entire 816 NPA in that time.

The industry consensus favored the overlay method of relief. The concentrated overlay was rejected because it provided a relatively short relief period for the area outside the initial footprint of the concentrated overlay, and because later expanding the new NPA code would result in the additional expense and disruption of having two or more implementation schedules and customer education periods.

With the exception of the Office of the Public Counsel, all the parties that took a position in this case favored the overlay method of relief for the 816 NPA.

#### **Numbering Resource Optimization**

In this proceeding, the parties addressing numbering optimization and conservation generally favored the Commission moving forward with accountability and optimization strategies vested in all state commissions consistent with parameters set by the FCC. Differences arise with regard to determining the most effective strategies and the most efficient implementation of these strategies including, whether the forum for implementation should be state or national. Some parties have asserted that the Commission should refrain from exercising certain interim authority delegated specifically to this Commission from the FCC.

The Commission does not intend in this proceeding to limit its authority or foreclose any avenue available in Missouri to use numbering resources more efficiently or for verifying and assuring the efficient use of numbering resources. The Commission’s intent is to address or implement numbering resource optimization strategies when it is timely and beneficial to do so, whether in the context of this case or at any time in the future.

The FCC has referred to itself as the “guardian of numbering resources” and has stated:

Section 251(e) of the Communications Act of 1934 (Communications Act), as amended, grants this Commission plenary jurisdiction over the North American Numbering Plan (NANP) and related telephone numbering issues in the United States. In fulfilling this statutory mandate, we have identified two primary goals. One is to ensure that the limited numbering resources of the NANP are used efficiently, to protect consumers from the expense and inconvenience that result from the implementation of new area codes, some of which can be avoided if numbering resources are used more efficiently, and to forestall the enormous expense that will be incurred in expanding the NANP. The other goal is to ensure that all carriers have the numbering resources they need to compete in the rapidly growing telecommunications market place.

Exhibit 24, In the Matter of Numbering Resource Optimization, CC Docket No. 99-200 (*Report and Order and Further Notice of Proposed Rule Making*, FCC issued March 31, 2000), par. 1 (NRO 1). The role of the state commissions to manage numbering resources is defined by delegation from the FCC pursuant to Section 251(e) of the Act.

In NRO 1 the FCC determined that significant savings to the United States economy, the telecommunications industry and consumers could be achieved by delaying or avoiding costs associated with numbering relief and extending the life of the NANP by optimizing the use of existing numbering resources.

In this case the Public Counsel indicated that in the 314 NPA, carriers use only about 63 percent of the numbering resources assigned. Public Counsel asserted that utilization rates would be even lower in less densely populated areas. The FCC has cited NANPA estimates that utilization rates nationwide range between 5.7 percent and 52.6 percent, depending on the industry segment, with an industry-wide average of 34 percent. NRO 1, par. 6.

If numbering resources were used more efficiently by the industry, the life of NPA codes could be greatly extended and the expense and burden of NPA relief delayed or avoided.

In exercising its authority, the Commission is cognizant of the FCC delegations and the parameters under which those delegations are made. The Commission has an obligation to ensure that numbers are made available on an equitable basis; that numbering resources are made available on an efficient and timely basis; that the Commission's policies not unduly favor or disfavor any particular telecommunications industry segment or group of telecommunications consumers; and that the Commission not favor one telecommunications technology over another. Number conservation measures under delegated authority may not be used as a substitute for unavoidable and timely area code relief. Ex. 26, In the Matter of Numbering Resource Optimization, CC Docket No. 99-200 and 96-98 (*Order*, FCC issued July 20, 2000), pars. 7, 10-11 (NRO 2).

**Rate Center Consolidation**

Rate centers are generally the creation of incumbent local exchange carriers and are designed to facilitate billing and routing of local calls. Rate center consolidation involves creating larger geographic areas in which individual NXX (CO) codes can be used. This is accomplished by combining existing rate centers. Carriers, such as competing wireline local exchange carriers, require NXX codes in most or all rate centers in an NPA to establish a competitive "footprint." Establishing larger rate centers means fewer CO codes are required to provide service in the NPA; thus, rate center consolidation has significant potential to reduce the demand for NXX codes. NRO 2, pars. 3 and 60.

The FCC has found that rate center consolidation falls under the authority and jurisdiction of state commissions. *Id.* State commissions need no additional authority to engage in rate center consolidation, and the FCC has strongly encouraged states to proceed expeditiously with rate center consolidation. *Id.*

The Commission has previously ordered rate center consolidation in the 314 NPA in Case No. TO-99-914 in its Report and Order issued on September 30, 1999. SWBT was responsible for implementing the rate center consolidation and testified in this case that the number of rate centers in the 314 NPA was reduced from fourteen to seven without impacting local calling scopes. SWBT stated that it supports rate center consolidation when consolidation would not negatively impact consumers' existing calling scopes, SWBT is able to remain revenue neutral, and all incumbent local exchange (ILECs) and competitive local exchange companies (CLECs) comply with the rate center consolidation. SWBT indicated that further rate center consolidation could not occur in the 314 NPA without changing local calling scopes and rates.

SWBT indicated that it has begun investigation of rate center consolidation in the 816 NPA and initially anticipates that rate centers could be reduced from thirteen to five without impacting local calling scopes or rates. SWBT intends to move forward with its review of rate center consolidation in the 816 NPA and recommended that if a rate center consolidation plan is approved, that the Commission require ILECs and CLECs to comply with the rate center consolidation plan.

The Commission's Staff agreed with SWBT that the benefits of further rate center consolidation in the 314 NPA would not justify the potential costs and customer impacts. Staff also agreed with SWBT that rate center consolidation in the 816 NPA should proceed. Staff stated that rate consolidation would enhance other number conservation efforts and extend the life of any relief plan. There were no arguments presented that opposed rate center consolidation in the 816 NPA.

**Reclamation of Numbering Resources**

Reclamation refers to the process by which service providers are required to return numbering resources to the NANPA or to a pooling administrator. This matter was addressed in NRO 1, pars. 232-240. Reclamation of unused numbering resources can apply to both CO codes and NXX-X blocks. *Id.*, par. 238. The FCC has delegated authority to state commissions to investigate and make decisions on reclaiming CO codes and NXX-X blocks. *Id.*, pars. 232-240. The FCC found that code reclamation presented one of the easiest and quickest measures of num-

bering optimization to implement and that state commissions may be able to resolve such issues more quickly and decisively than an industry consensus process. *Id.*, par. 237.

In their position statements and testimony, the parties expressing a position on reclamation of unused numbering resources recommended that the Commission proceed with this process consistent with the FCC's delegation. The Public Counsel supported code reclamation. No party opposed reclamation of unused numbering resources.

#### **Sequential Number Assignment**

In NRO 1 the FCC mandated that carriers first assign all available telephone numbers within an open thousands-block before opening another thousands-block, unless the available numbers in the opened thousands-block are insufficient to meet a customer request. NRO 1, par. 244. The FCC determined that implementation of this requirement would maintain clean or lightly contaminated thousands-blocks and would increase the efficiency of pooling. Under the FCC directive, carriers that depart from this standard for sequential number assignment must be prepared to demonstrate to the state commission: 1) a genuine request from a customer detailing a specific need for telephone numbers; and 2) the inability of the carrier to meet the specific customer request from a currently activated thousands-block. NRO 1, par. 245.

All of the parties that addressed sequential numbering assignment in their position statements or testimony supported implementation consistent with the FCC requirements. No parties opposed implementation of sequential number assignment.

#### **Maintaining Rationing Procedures Following NPA Relief**

The FCC granted this Commission the authority to maintain code rationing procedures for six months following implementation of NPA relief in NRO 2. NRO 2, pars. 2, 62-63. SWBT, in its supplemental position statement, stated that code rationing is not necessary after code relief is implemented. AT&T stated in its supplemental position statement that such a transition mechanism should be assessed in light of current provisions in place that limit consumption of numbering resources. In its supplemental position statement, the Public Counsel did not believe post-NPA relief rationing would be necessary if carriers complied with the NRO requirements and the Commission used its delegated authority to monitor code requests and usage and acted to reclaim unused codes. Sprint testified that rationing procedures following area code relief would not be necessary if numbering conservation measures and allocation standards are in place.

#### **Claims for Numbering Resources Outside of Rationing Process**

The FCC granted this Commission's request to respond to requests from individual carriers to obtain NXX codes outside of the rationing process in NRO 2. NRO 2, pars. 2, 53-54. The FCC's delegation of authority provides the Commission with discretion and authority to obtain the information necessary to act and to determine such a request. *Id.* The FCC stated that this authority would allow customers to retain their choice of service provider and ensure that carriers in dire

need of numbering resources can obtain the numbering resources necessary to continue to provide service. *Id.*

In its supplemental position statement AT&T supported this delegation of authority subject to the Commission adopting a nondiscriminatory and efficient hearing procedure. The Public Counsel, in its supplemental position statement, supported this delegation of authority provided the Commission affords Public Counsel a full opportunity to participate and the Commission requires carriers to document and support their requests to the full extent identified by the FCC. Sprint testified that such a procedure should only take place in the context of a jeopardy NPA situation.

#### **NXX Code Sharing**

In NRO 2 the FCC delegated authority to this Commission to implement NXX code sharing. NRO 2, pars. 2, 61. Code sharing would permit an NXX code associated with a particular rate center to be distributed among various service providers that serve that rate center. *Id.* The FCC conditioned its delegation of this authority by providing that the Commission investigate and study the technical and economic feasibility of NXX code sharing and implement NXX code sharing on a trial basis if the Commission finds it is technically feasible and economically viable. *Id.*

SWBT, in its supplemental position statement, recommended against proceeding with this authority and recommended instead that the Commission focus its resources and industry resources on number pooling. In its supplemental position statement, AT&T expressed doubt that the FCC standards and conditions could be met. Public Counsel stated in its supplemental position statement that the Commission should focus its efforts on approved number conservation methods because they are most likely to produce meaningful results in a timely manner versus study and validation of this method. Sprint testified that NXX code sharing does not meet the competitive neutrality requirement because one carrier controls the terminating traffic for the NXX. Sprint also testified that local number portability requirements already allow two or more wireline carriers to compete in an area and potentially use a common NXX code under certain circumstances.

#### **Frequency of Utilization Reports**

The FCC has established reporting requirements for numbering resource utilization and forecast data by carriers. In NRO 1, the basic reporting frequency provided is semiannually. NRO 1, par. 67. The FCC recognized certain circumstances where less frequent reporting may be sufficient, and authorized state commissions to reduce the requirement to annual reporting. Semiannual reporting is for the periods ending December 31 and June 30 with reports due February 1 and August 1, respectively. Annual reporting is for the period ending June 30 with the report due August 1. *Id.*

SWBT supported the FCC's reporting requirements. No party advocated or presented circumstances for the Commission to exercise its delegated authority to reduce reporting requirements.

**Audit, Verification and Review of Numbering Resource Utilization and Reporting**

In NRO 2, the Commission was delegated authority by the FCC to conduct audits of carriers' use of numbering resources within the parameters of NRO 1. This delegation is subject to future FCC enactment of national rules or policies relating to auditing carriers' use of numbering resources. NRO 2, par. 60.

In its supplemental position statement, SWBT supported this delegation of authority as conditioned by the FCC. AT&T described this as a "prudent activity" for the Commission to undertake in its supplemental statement of position. The Public Counsel deemed this action "critical" and stated the Commission "must have an independent avenue" to obtain information about code usage in its supplemental position statement.

In testimony filed prior to the issue of NRO 2, Sprint testified that an audit process was not necessary in light of the processes identified on NRO 1. GTE testified that regularly scheduled audits were not needed and that for-cause or random audits would meet the needs for ensuring compliance with applicable numbering policies.

**Thousands-block Number Pooling**

The FCC delegated this Commission authority to implement thousands-block number pooling in the 314 NPA in NRO 2. NRO 2, par. 35. This grant of authority is subject to the conditions provided in NRO 2 and by reference is subject to conformance to parameters defined in NRO 1 and prior orders delegating pooling authority to other states. NRO 2, par. 17, and pars. 13-22. State commissions must also provide for cost recovery mechanisms according to FCC parameters and the transition of those mechanisms to the as-yet-nonexistent national cost recovery plan. NRO 2, par. 21.

The FCC emphasized that state commissions considering or adopting number pooling must take necessary steps to prepare NPA relief plans for NPAs in imminent danger of being exhausted and that while a state commission may initiate number pooling, it must be prepared to implement a "back-up" NPA relief plan prior to exhaustion of numbering resources. NRO 2, par. 17.

**Thousands-block Number Pooling in the 314 and 816 NPAs**

Industry parties in this case were supportive of thousands-block number pooling on the basis of national implementation, but many opposed interim implementation by Missouri. In their position statements SWBT stated that in light of national pooling and FCC requirements, a state number pooling trial was not feasible, and in the case of the 314 NPA would not delay the need for relief; GTE supported state implementation where there would be sufficient relief to justify deployment; CyberTel supported only national number pooling; ExOp supported only national number pooling citing technical and implementation hardships for CLECs; Sprint supported only national number pooling; AT&T supported state implementation of number pooling but in the context of a retroactive overlay in the 314 NPA in order to extend number pooling to the area presently in the 636 NPA.

Staff recommended establishment of implementation teams in the 314 and 816 NPAs made of representatives from the industry, Staff and the Office of the

Public Counsel. Many of the parties were supportive of implementation teams and no party objected to establishing such teams.

The Office of the Public Counsel suggested that number pooling be pursued in the 816 NPA because of a potentially greater benefit for extending the life of that NPA as opposed to a lesser potential in the 314 NPA. In response to the Public Counsel's motion and suggestion in this proceeding, the Commission has petitioned the FCC for additional delegated authority in the 816 NPA to consider and implement thousands-block number pooling on a state trial basis. In the Matter of the Petition of the North American Numbering Plan Administrator, on Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes, Case No. TO-2000-374 (*Order Directing Staff to File Petition or Supplemental Petition Requesting Additional Numbering Authority*, Mo. P.S.C. issued August 22, 2000).

In testimony, Sprint stated that cost recovery should be under the federal cost recovery mechanism to eliminate having to establish cost recovery at both the state and federal levels. A witness for GTE asserted the FCC proposed that costs incurred to implement state "mandated" thousands-block number pooling trials are intrastate costs and should be attributable to the state jurisdiction. GTE provided no citation to support this statement. GTE went on to state that if a state trial were in conjunction with the FCC ordered national rollout, then cost recovery would be through a nationally mandated surcharge. GTE provided a timeline for implementation of a California Pooling Trial with its testimony showing an approximate six-month implementation period for a state trial of thousands-block number pooling. GTE testified that a pooling administrator would have to be selected by the third month to maintain this timeline.

CyberTel testified that it supports number conservation efforts in strict compliance with delegation guidelines in NRO 1 and with input and comment from the industry. ExOp's witness supported thousands-block number pooling in areas capable of local number porting.

SWBT's witness testified that SWBT supported national thousands-block number pooling. But the witness testified that despite the uncertainties associated with a national rollout of thousands-block number pooling, a state pooling trial would not provide significant benefits in relation to its costs, including particularly implementation of a state cost recovery plan. SWBT's witness testified that waiting for a national rollout would enable Missouri to avoid addressing cost recovery and selection of a pooling administrator. SWBT further testified that implementation of a state trial would take at least five months. SWBT's witness supported establishment of an implementation team to prepare for thousands-block number pooling.

Staff testified that planning should begin for thousands-block number pooling, but noted that it could be more efficient to await a national rollout. Staff cited costs and difficulties with contracting a pooling administrator and developing a cost recovery mechanism for the industry as obstacles to a state pooling trial. However, Staff supported the Office of the Public Counsel in its request to petition the FCC for thousands-block number pooling authority in the 816 NPA. In the Matter of the Petition of the North American Numbering Plan Administrator, on Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314

and 816 Area Codes, Case No. TO-2000-374 (*Order Directing Staff to File Petition or Supplemental Petition Requesting Additional Numbering Authority*, Mo. P.S.C. issued August 22, 2000). Staff's position was that if national number pooling is delayed, a state pooling trial in the 816 NPA could be undertaken sufficiently in advance of national number pooling to justify the costs in relation to the benefits.

The Office of the Public Counsel testified in support of pooling trials under delegated FCC authority and planning for number pooling through establishment of technical working groups. In moving the Commission to petition the FCC for delegated authority in the 816 NPA, the Public Counsel argued that thousands-block number pooling could have a substantial and beneficial impact on alleviating and delaying exhaustion of numbering resources in the 816 NPA and postponing the cost, inconvenience and confusion associated with NPA relief.

#### **Substitution of NPA in National Rollout of Thousands-Block Number Pooling**

To permit a greater level of state participation in the choice of NPAs which will be pooled, the FCC determined that it would permit state commissions to substitute the NPA listed in the national rollout schedule with an alternative NPA. NRO 1, par. 165. To exercise this authority, the Commission must be prepared to timely notify the number pooling administrator. *Id.* This authority will permit state commissions a role in responding to the particular needs of their state during the national rollout period for thousands-block number pooling.

#### **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.

#### **Delayed Decision or Implementation**

The Commission finds that it has authority to determine and prepare and implement NPA relief in the 314 and 816 NPAs. The Public Counsel has requested that the Commission delay implementation of NPA relief, and in the case of the 816 NPA, to delay a decision determining the method of NPA relief. The Commission declines to delay its decision for the 816 NPA.

The Commission's obligation is to act in order that numbering resources are made available on an efficient and timely basis, in order that all carriers have the numbering resources they need to compete, and in order that no consumer is denied a choice of carriers or services based on the unavailability of numbering resources. Public Counsel's evidence did not refute the imminent need for additional numbering resources in the 314 and 816 NPAs, particularly in light of the recognized difficulty in precisely projecting code exhaustion dates. The implementation dates for the NPA relief methods approved in this case will be determined,

reviewed and approved by the Commission when it reviews the implementation plans for each NPA as submitted to the Commission.

#### **Relief – 314 NPA**

The Commission finds that it is in the public interest to provide an all services distributed overlay as the method of relief for the 314 NPA.

The 314 NPA presents a geographic area that is too small to support a split method of relief that would result in areas that present reasonably balanced lives or that would adequately preserve local calling scopes with seven-digit dialing. A further concern is that one of the resulting NPAs with either split alternative would have an unacceptably short life, presenting the expense and confusion of additional NPA relief within too short a time frame.

The proposed “retroactive overlay” presents no significant advantages over the distributed overlay and presents some distinct disadvantages. First, the consumers in the 636 NPA would be disrupted with direct involvement in another NPA relief plan after having recently suffered the burdens associated with the split of the 636 NPA from the 314 NPA. The 636 NPA was only fully implemented in the first quarter of 2000. These consumers have already completed the transition to new calling patterns that preserved seven-digit local calling within the new NPA. A retroactive overlay would significantly change these calling patterns, eliminating all seven-digit dialing, whereas the only change for 636 NPA consumers with the distributed overlay is dialing a new NPA for new numbers assigned in the 314 NPA.

Another significant disadvantage of the retroactive overlay is that it would shorten the life of the 636 NPA and would provide a shorter projected life for the 314 NPA than a distributed overlay. Many of those testifying and offering public input at the local public hearings suggested that the Commission fashion a long-term relief plan. The retroactive overlay does not provide the longest-term relief that is available in this instance.

Some of the industry parties suggested that a retroactive overlay was more efficient than a distributed overlay because it delayed use of an NPA, possibly prolonging the life of the NANP. This is a concern and matter that is not within the scope of this Commission’s delegated jurisdiction. The Commission’s jurisdiction is to select the best relief method for this Missouri NPA. Delaying the introduction of an NPA with the retroactive overlay also does not present, and should not be confused with, number resource optimization or conservation. Carriers will not utilize numbering resources any more efficiently because they are being drawn out of one, two or three NPA codes. The key to achieving greater efficiency is not the number of NPA codes in use but the fill or utilization rates for assigned codes or blocks of numbers. Finally, based on current projections of exhaustion and expected lives for alternative relief plans, it is likely that a third NPA will be needed in the St. Louis area before the NANP itself is exhausted or a permanent solution to NANP exhaustion is determined.

#### **Relief - 816 NPA**

The Commission finds that it is in the public interest to provide an all services distributed overlay as the method of relief for the 816 NPA.

The geographic split alternatives presented by the NANPA were generally characterized by unbalanced lives. Two of the three split alternatives each presented one NPA that provided only short-term relief. One NANPA alternative presented balanced lives and reasonable projected lives for each NPA. However, no party supported any of these proposals.

The Public Counsel presented a proposal for a split but did not present any evidence to support the efficacy of its proposal.

The split alternatives all presented the prospect of significant ten-digit local dialing across NPA boundaries which diminishes the benefit of retaining seven digit local dialing within an NPA. The split alternatives all present consumers in the new NPA with the costs and confusion of obtaining and using new telephone numbers. While a few witnesses at the local public hearings expressed frustration at the prospect of required ten-digit dialing that results with an overlay method of relief, more witnesses expressed serious concerns with dividing community and economic interests artificially with an area code split and concern with the costs and confusion of changing telephone numbers due to NPA relief by means of a geographic split.

The proposal for a concentrated overlay presents the negatives of a relatively short time period before the new NPA has to be extended with its resultant costs and confusion associated with more than one customer education and transition period. Thus, it is not preferable to an overlay in this case.

#### **Rate Center Consolidation**

The Commission finds that further consolidation of rate centers in the 314 NPA is not warranted at this time. The Commission finds that rate center consolidation in the 816 NPA should proceed as expeditiously as possible. The Commission further finds that all incumbent local exchange carriers and competitive local exchange carriers in the 816 NPA shall comply with the rate center consolidation.

Rate center consolidation provides significant benefits in optimizing and conserving numbering resources because carriers require fewer CO codes to serve an NPA.

The 314 NPA has already undergone rate center consolidation and that consolidation was successfully implemented without significant expense or burden to carriers or to consumers. Further rate center consolidation in the 314 NPA could adversely affect calling scopes and would be difficult to obtain while maintaining revenue neutrality for carriers.

Rate center consolidation in the 816 NPA has the potential to reduce the number of rate centers from thirteen to five with little disruption to calling scopes while being revenue-neutral for carriers. Rate center consolidation is most effectively implemented if all carriers comply.

#### **Reclamation of Numbering Resources**

The Commission finds that reclamation of unused numbering resources should be implemented in Missouri. Reclamation of numbering resources represents one of the easiest and quickest measures of numbering resource optimization to implement.

The Commission will direct its Staff to work with the NANPA and any designated pooling administrator to reclaim CO codes and thousands-blocks. The Staff and carriers seeking review of reclamation disputes may utilize existing Commission procedural rules and practices if necessary to resolve reclamation disputes. If Staff or any person or entity believes such procedural rules and practices to be inadequate, that matter, or the need to address the Commission's practices and procedures, may be brought to the Commission's attention or otherwise addressed by any appropriate means.

#### **Sequential Number Assignment**

The Commission finds that carriers in Missouri must adhere to sequential numbering assignment to preserve and maintain clean or uncontaminated thousands-blocks. Carriers that depart from this standard for sequential number assignment must be prepared to demonstrate to the Commission: 1) a genuine request from a customer detailing a specific need for telephone numbers; and 2) the inability of the carrier to meet the specific customer request from a currently activated thousands-block.

Sequential number assignment is required by FCC directives and facilitates numbering resource optimization strategies, particularly thousands-block number pooling.

The Staff and carriers seeking review of any dispute or finding regarding sequential number assignment may utilize existing Commission procedural rules and practices if necessary to resolve the disagreement. If Staff or any person or entity believes such procedural rules and practices to be inadequate, that matter, or the need to address the Commission's practices and procedures, may be brought to the Commission's attention or otherwise addressed by any appropriate means.

#### **Maintaining Rationing Procedures Following NPA Relief**

The Commission finds that it will not implement or extend rationing procedures for six months following implementation of NPA relief in this case. The FCC delegated this additional authority to the Commission. At this time it appears that other numbering optimization, conservation and management strategies and requirements being implemented by the FCC and by the states should be the Commission's focus, and rationing may be unnecessary if these other strategies prove effective.

#### **Claims for Numbering Resources Outside of Rationing Process**

The Commission finds that it will exercise its delegated authority to hear claims of carriers for numbering resources outside of the rationing process. This authority will allow customers to retain their choice of service provider and will ensure that carriers in dire need of numbering resources can obtain the numbering resources necessary to continue to provide service.

The carrier making application for numbering resources outside of the rationing process and the Staff, the Office of the Public Counsel or any interested party may utilize existing Commission procedural rules and practices, if necessary, to request numbering resources or to dispute a request for additional numbering

resources. If Staff or any person or entity believes such procedural rules and practices to be inadequate, that matter, or the need to address the Commission's practices and procedures, may be brought to the Commission's attention or otherwise addressed by any appropriate means.

#### **NXX Code Sharing**

The Commission finds that it will not implement NXX code sharing in this case. The FCC delegated this additional authority to the Commission. At this time it appears that other numbering optimization, conservation and management strategies and requirements being implemented by the FCC and by the states should be the Commission's focus, and NXX code sharing may be unnecessary if these other strategies prove effective.

#### **Frequency of Utilization Reports**

The Commission finds that it will not reduce FCC reporting frequency for numbering resource utilization and forecast data by carriers. The FCC reporting requirements are appropriate and conducive to numbering resource optimization and conservation by providing necessary information for accounting and managing numbering resources in a timely fashion.

#### **Audit, Verification and Review of Numbering Resource Utilization and Reporting**

The Commission finds that it is in the public interest for the Commission to conduct audits of carriers' use of numbering resources within the parameters set by the FCC. Audit and review of numbering resources and their utilization by carriers provides the Commission a basis to independently verify the appropriate and efficient use of limited public resources. The Commission at this time will not implement particular audits or audit schedules. The Staff shall report to the Commission as necessary regarding audits it deems appropriate. The Office of the Public Counsel or any interested party may bring a request for audit to the Commission informally or formally via an application or motion.

#### **Thousands-block Number Pooling**

The Commission finds that thousands-block number pooling is in the public interest, and the Commission will order its Staff and the industry to begin planning and preparation for thousands-block number pooling. The Commission will not, however, order a pooling trial in this Report and Order, but will reserve its authority to do so in a later proceeding.

Thousands-block number pooling will extend the life of NPAs by providing higher utilization rates for numbering resources assigned to carriers and other service providers. Extending the life of NPAs and, ultimately, of the NANP will benefit carriers and consumers by avoiding or delaying the exhaustion of NPAs and the NANP and the resultant costs and burdens associated with providing numbering relief.

At this time the Commission has authority to implement a state pooling trial in the 314 NPA and has a request pending for similar authority in the 816 NPA. The Commission must conform its implementation of a thousands-block pooling trial to the requirements of the FCC's delegation of authority.

The primary tasks confronting the Commission regarding implementation of a thousands-block number pooling trial in Missouri consist of performing or contracting for the performance of a pooling administrator and developing a cost recovery plan. Both of these tasks involve investments of money, time and energy that should be weighed in the context of the national rollout of number pooling by the FCC. In other words, the benefits of a decision to proceed with a state pooling trial must be weighed against its costs and the length of time that Missouri would benefit from having its trial in place prior to merging the trial into the national program. It makes less sense to invest in state number pooling if national number pooling quickly succeeds the state effort.

Preparations for thousands-block number pooling in Missouri should proceed in conformance with FCC and national standards because these actions will be necessary under either a national rollout or a state trial. The Commission's Staff should identify the procedures, including any abbreviated procedures, that may be available to the Commission to request proposals for and to contract for a pooling administrator or alternative options to perform this function in-house or through an independent contractor. The Staff should develop and review with the Commission the requirements for a request for proposal. The Staff should obtain preliminary information regarding costs and functionalities and potential vendors, and report these matters to the Commission.

Staff should review and report to the Commission the feasibility of developing a state cost recovery mechanism that adopts the future national model and defers cost recovery for carriers so that costs may be recovered under the national model. Staff should also begin initial development of an independent state cost recovery model that does not defer cost recovery.

#### **Substitution of NPA in National Rollout of Thousands-Block Number Pooling**

The Commission finds that it would be in the public interest for the Commission to be prepared to substitute an NPA in the national rollout schedule. Staff shall prepare the necessary internal review and reporting triggers to timely bring a recommendation to the Commission regarding NPA substitution.

To permit a greater level of state participation in the choice of NPAs which will be pooled, the FCC determined that it would permit state commissions to substitute the NPA listed in the national rollout schedule with an alternative NPA. NRO 1, par. 165. To exercise this authority, the Commission must be prepared to timely notify the number pooling administrator. *Id.* This authority will permit state commissions a role in responding to the particular needs of their state during the national rollout period for thousands-block number pooling.

The Commission may choose to exercise this option in conjunction with or in lieu of a state pooling trial in order to maximize the benefits of thousands-block number pooling in Missouri and obtain these benefits in an accelerated fashion.

#### **Technical and Planning Committees**

The Commission finds that it is in the public interest to establish technical and planning committees for both the 314 and the 816 NPAs. Each technical and planning committee shall be made up of representatives of the Commission's

Staff, the Office of the Public Counsel, the parties in this case, and industry representatives of facilities-based carriers in each respective NPA. In addition, any interested party may request and may be granted intervention for the limited purpose of participating on the 314 or 816 technical and planning committee.

The Commission's Staff shall coordinate the meetings and activities of the technical and planning committees, and prepare and file or provide for the preparation and filing of reports through assignment to one or more committee members. To the extent possible, reports of the technical and planning committees shall present a consensus position and recommendation for the Commission to consider. Any party or member of the technical and planning committees may file a response or comments to the reports within ten days of filing.

The following reports will be required:

1. An NPA relief implementation plan and schedule for NPA relief in the 314 NPA – within 30 days of the issue date of this Report and Order.
2. An NPA relief implementation plan and schedule for NPA relief in the 816 NPA – within 60 days of the issue date of this Report and Order.
3. A status report or survey regarding the required but incomplete industry preparations and their status for thousands-block number pooling in the 314 NPA – within 60 days of the issue date of this Report and Order.
4. A status report or survey regarding the required but incomplete industry preparations and their status for thousands-block number pooling in the 816 NPA – within 60 days of the issue date of this Report and Order.
5. A status report and implementation plan and schedule for rate center consolidation in the 816 NPA – within 60 days of the issue date of this Report and Order.

#### **Conclusions of Law**

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

The Commission has jurisdiction over the subject matter of this case pursuant to Section 386.250 and Section 392.520, RSMo 1994. These statutes provide the Commission with regulatory authority over the operations of the telecommunications companies within its jurisdiction, including conditions and methods of providing service.

The Federal Communications Commission (FCC) is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e). The FCC has authority to delegate all or any portion of this authority to state commissions or other entities. *Id.*

Pursuant to its statutory and delegated authority, the Commission has authority and jurisdiction to determine the matters presented in this proceeding, including, in particular, authority to determine the method and implementation of numbering

relief for the 314 and 816 Numbering Plan Areas, to determine and implement certain numbering resource optimization and conservation methodologies, to review, verify and audit the use of numbering resources, and to hear and determine certain requests or disputes related to the use or procurement of numbering resources.

*IT IS THEREFORE ORDERED:*

1. That the Commission adopts an all services distributed overlay as the method of relief for the 314 NPA.
2. That the Commission adopts an all services distributed overlay as the method of relief for the 816 NPA.
3. That rate center consolidation shall occur in the 816 NPA as expeditiously as possible and that all incumbent local exchange and competitive local exchange carriers shall comply with the rate center consolidation.
4. That reclamation of unused numbering resources shall be implemented in Missouri, and that the Commission's Staff shall implement all necessary procedures for number reclamation.
5. That carriers in Missouri utilizing numbering resources shall assign numbers sequentially to preserve and maintain clean or lightly contaminated thousands-blocks.
6. That the Commission shall consider any application for numbering resources outside of the rationing process.
7. That the Commission's Staff shall implement procedures to audit, verify and review numbering resource utilization and reporting as necessary to determine the appropriate and efficient use of limited public resources.
8. That thousands-block number pooling shall be implemented in Missouri pursuant to a national program or pursuant to authority delegated to the Commission.
9. That the Commission shall preserve its authority to choose and substitute a Numbering Plan Area in the national program schedule for thousands-block number pooling. In this regard, this authority shall be exercised by the Commission independently of this case and pursuant to a timely-filed Staff recommendation.
10. That a technical and planning committee shall be established for the 314 NPA as described in this Report and Order.
11. That a technical and planning committee shall be established for the 816 NPA as described in this Report and Order.
12. That the respective technical and planning committees shall file the following plans, schedules and reports as follows:
  - a. An NPA relief implementation plan and schedule for NPA relief in the 314 NPA – within 30 days of the issue date of this Report and Order.
  - b. An NPA relief implementation plan and schedule for NPA relief in the 816 NPA – within 60 days of the issue date of this Report and Order.
  - c. A status report or survey regarding the required but incomplete industry preparations and their status for thousands-block number pooling in the 314 NPA – within 60 days of the issue date of this Report and Order.
  - d. A status report or survey regarding the required but incomplete industry preparations and their status for thousands-block number pooling in the 816 NPA – within 60 days of the issue date of this Report and Order.

- e. A status report and implementation plan and schedule for rate center consolidation in the 816 NPA – within 60 days of the issue date of this Report and Order.
13. That any response to a plan, schedule or report filed by a technical and planning committee in this proceeding shall be due ten days after filing.
  14. That the Commission's Staff shall proceed with planning and implementation of the numbering resource optimization strategies and authority adopted in this Report and Order including, but not limited to, providing advice and notice to the Commission regarding substitution of a Numbering Plan Area for scheduling on a national number pooling program and the matters described in this Report and Order relating to establishing a number pooling program in Missouri.
  15. That the Commission's Staff shall promptly notify the Commission regarding any additional delegated authority for a number pooling program in Missouri.
  16. That the Commission's Staff shall periodically report and advise the Commission of its conclusions and recommendations regarding implementation of a state number pooling program and shall file a final report not later than 120 days following the issue date of this Report and Order. The Staff shall obtain and present the input of the technical and planning committees regarding procedures or standards it proposes for a state number pooling program. The Staff shall specifically address the Commission's options for performing or obtaining pooling administrator functions, provide draft purchasing or contracting documents, provide preliminary information regarding costs, functionalities and potential vendors, and address development of a state cost recovery mechanism and the feasibility of deferring costs and adopting the national model for cost recovery.
  17. That this Report and Order shall become effective on November 3, 2000.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions of  
Section 536.080, RSMo 1994.

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**In the Matter of Missouri Gas Energy's Tariff Sheets Designed  
to Renew for an Additional Year the Price Stabilization Fund.**

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*Case No. GO-2001-215  
Decided October 26, 2000*

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**Gas §§17.2 18.** The Commission rejected a tariff that would have extended Missouri Gas Energy's authority to purchase financial instruments to implement a previously approved price stabilization fund.

**ORDER DENYING APPLICATION TO RENEW PRICE STABILIZATION  
FUND AND REJECTING TARIFF**

On September 27, 2000, Missouri Gas Energy (MGE) filed a pleading entitled Application to Renew Price Stabilization Fund on Either a Modified or Unchanged Basis. MGE's application indicated that the price stabilization fund was in place for the 1997-1998, 1998-1999 and 1999-2000 winter heating seasons. On August 1, 2000, the Commission approved a stipulation and agreement that reauthorized the price stabilization fund for another year. That stipulation and agreement provided that the financial instruments needed to implement the program would need to be purchased for the upcoming heating season no later than September 30, 2000. MGE indicates that since the reauthorization was approved, market conditions have precluded MGE from purchasing those financial instruments within the parameters fixed by the Commission. MGE requests that the price stabilization fund be extended either with modifications proposed by MGE or on an unchanged basis by simply removing the requirement that the financial instruments be purchased by September 30. Along with its application, MGE filed a proposed tariff that would renew the Price Stabilization Fund for another year. That tariff carried an effective date of October 27.

MGE requested expedited consideration of its application and tariff because of the need to have the Price Stabilization Fund in place for the upcoming winter heating season. MGE requested that the Commission rule on its application no later than October 26, 2000. On October 2, the Commission issued an order that directed the Staff of the Commission (Staff) to respond to the motion for expedited consideration by filing a statement indicating whether or not it would be able to file a Staff recommendation regarding the application by October 18. On October 3, Staff filed a Notice indicating that it would file its recommendation not later than October 18. On October 4, the Commission issued an order that granted MGE's Motion for Expedited Treatment and directed Staff to file its recommendations no later than October 18. That order also directed that any party that wished to file a response to Staff's recommendation should do so not more than three days after the filing of the recommendation. Staff filed its recommendation on October 17 and MGE filed a response in opposition to that recommendation on October 24.

Staff's Recommendation and Memorandum indicates that MGE has the authority to hedge its gas costs using financial instruments without the need for an extension of the price stabilization fund. Such hedging would be reviewed in the appropriate actual cost adjustment filing. MGE's hedging decisions would be subject to prudence review as are MGE's other gas supply choices. Staff also requests that the Commission remove MGE's existing authority to charge 4.7 cents per Mcf, effective November 1, 2000. Staff further recommends that MGE's proposed tariff be rejected.

MGE's response in opposition to Staff's recommendation argues that Staff is attempting to change well-established Commission practice regarding the use of financial instruments to obtain price protection. MGE suggests that now, a time of extreme volatility in the wholesale gas market, is not a good time to implement such a policy change. MGE asserts that Staff's suggestion of prudence review of hedging decisions is undesirable for MGE because the analysis or factors Staff or the Commission might see fit to use in assessing the reasonableness of decisions regarding the use of such instruments is unknown. Moreover, such a prudence review would deny MGE the opportunity to make a profit from the use of such instruments and would place substantial risks on MGE because of the probability that Staff would propose to disallow those costs in a prudence review.

The Commission has reviewed MGE's application, the proposed tariff, Staff's recommendation and memorandum and MGE's response to that recommendation. The Commission concludes that MGE's application should be denied. The stipulation and agreement by which the price stabilization fund was extended for another year specifically provided that the required financial instruments were to be purchased by September 30. The Commission is not willing to modify that provision of the stipulation and agreement without the approval of the parties unless MGE is able to show a good reason to do so. MGE has not made such a showing. Staff is correct when it states that MGE should apply reasonable purchasing practices based upon its own evaluation of risks in its gas supply portfolio. MGE's business decisions will be subject to prudence review as are MGE's other gas supply choices.

In its recommendation, Staff also requests that MGE's authority to charge 4.7 cents per Mcf be removed effective November 1, 2000. It is not clear what Staff means by this recommendation. MGE's response indicates that this is a reference to the existing price stabilization charge in MGE's PGA. The Commission will not take any action on this recommendation. If Staff wishes to pursue the removal of the existing price stabilization charge it shall file an appropriate motion.

*IT IS THEREFORE ORDERED:*

1. That Missouri Gas Energy's Application to Renew Price Stabilization Fund on Either a Modified or Unchanged Basis is denied.
2. That the tariff issued by Missouri Gas Energy on September 27, 2000 (tariff file number 200100337) with an effective date of October 27, 2000, is rejected. The tariff rejected is:

**P.S.C. Mo. No. 1**

**First Revised Sheet No. 24.29 Canceling Original Sheet No. 24.29**

3. That this order shall become effective on October 27, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur  
Murray, C., dissents with opinion

Woodruff, Regulatory Law Judge

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**DISSENTING OPINION OF**  
**COMMISSIONER CONNIE MURRAY**

With the current situation of extreme natural gas price volatility, price spikes are a very realistic concern. The modified price stabilization program proposed by MGE in its renewal application has the potential to provide customers significant price protection for the winter of 2000-2001. I would grant MGE's application for renewal with a condition that the terms of the proposed modification be clarified to conform more closely to those approved by this Commission on September 28, 2000 for Laclede Gas Company in Case No. GO-2000-394.

I respectfully dissent from the opinion of the majority.

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**The Staff of the Missouri Public Service Commission, Com-  
plainant, v. Union Electric Company d/b/a AmerenUE Re-  
spondent.**

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*Case No. EC-2000-795*  
*Decided October 31, 2000*

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**Electric §§ 1, 20, 21. Rates §§ 65, 104.** At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to the ratepayers.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On February 17, 2000, Union Electric Company d/b/a AmerenUE (AmerenUE) filed its Final Earnings Report for the first year sharing period of the second Experimental Alternative Regulation Plan (EARP). On April 25, 2000, both the Office of the Public Counsel (Public Counsel) and the Staff of the Missouri Public Service Commission (Staff) filed their separate pleadings notifying the Commission of the areas of disagreement each had with the Final Earnings Report filed by AmerenUE. On May 17, 2000, the Commission issued an Order Directing Filing of Direct Testimony and Proposed Procedural Schedule, directing Staff and Public Counsel to file direct testimony concerning their areas of disagreement on or before May 30,

2000. On May 30, 2000, Staff and Public Counsel filed testimony concerning their areas of disagreement as well as a proposed procedural schedule.

On May 30, 2000, Staff also filed a formal complaint in Case No. EC-2000-795, pursuant to Section 7.f.vi. of the Stipulation and Agreement approved by the Commission on February 21, 1997, alleging that the operating results referred to in AmerenUE's Final Earnings Report for the first year sharing period of the second EARP had been manipulated to reduce amounts to be shared with customers. On June 2, 2000, the Commission issued a Notice of Complaint serving AmerenUE with the complaint.

On June 9, 2000, AmerenUE filed a Corrected Final Earnings Report along with its responsive pleading to Staff and Public Counsel's filings of April 25, 2000. AmerenUE's Corrected Final Earnings Report corrected two errors identified by Staff with respect to the calculation of income taxes. On June 16, 2000, AmerenUE filed its answer to the complaint filed by Staff in Case No. EC-2000-795. On July 10, 2000, AmerenUE notified the Commission that the parties had reached an agreement in principle on all outstanding issues for the first sharing period of the second EARP and requested the Commission postpone setting a procedural schedule to give the parties an opportunity to complete a stipulation and agreement.

On August 25, 2000, identical documents entitled Stipulation and Agreement were filed in Case No. EM-96-149 and in Case No. EC-2000-795. The Stipulation and Agreement filed in Case No. EC-2000-795 was signed by all parties. A copy of the Stipulation and Agreement filed in this case is affixed to this order as Attachment A.

In the Stipulations and Agreements filed in Case No. EM-96-149 and Case No. EC-2000-795, AmerenUE, Staff and Public Counsel resolved the issues before the Commission by agreeing to specific adjustments to AmerenUE's Corrected Final Earnings Report filed June 9, 2000. The parties identified each issue in the Stipulations and Agreements and recited how that issue would be resolved. The Stipulations and Agreements addressed all of the areas of disagreement cited by Staff and Public Counsel in Case No. EM-96-149 and resolved the complaint filed by Staff in Case No. EC-2000-795. The parties submitted a Settlement Final Earnings Report, reflecting the agreed upon adjustments, which is marked as Attachment 1 and attached to the Stipulation and Agreement filed in each case. AmerenUE, Staff and Public Counsel request that the Commission approve the Stipulations and Agreements which will result in the total dollar amount of \$20,214,000 in sharing credit to be distributed to ratepayers.

The Commission has reviewed the Stipulations and Agreements submitted by the signatory parties, as well as Staff's Suggestions in Support of the Stipulations and Agreements filed on October 23, 2000. The Commission finds the proposed sharing credit to be reasonable. The Commission will approve the credit as set out in the Stipulations and Agreements filed in Case No. EM-96-149 and Case No. EC-2000-795 on August 25, 2000, and order the one-time credit to be implemented on retail electric customers' bills. As the issue in Case No. EC-2000-795 is resolved by the Stipulation and Agreement, Case No. EC-2000-795 may be closed.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed in Case No. EC-2000-795 on August 25, 2000, by the Union Electric Company d/b/a AmerenUE, the Staff of the Missouri Public Service Commission and the Office of the Public Counsel is approved.
2. That this order shall become effective on November 10, 2000.
3. That this case may be closed on November 11, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, concur Simmons, C., absent  
Register, Regulatory Law Judge

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**In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) The Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) In Connection Therewith, Certain Other Related Transactions.\***

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*Case No. EM-96-149  
Decided October 31, 2000*

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**Electric §§1, 20, 21. Rates §§65, 79, 104.** At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to ratepayers.

**ORDER APPROVING FIRST YEAR SHARING CREDIT OF THE  
SECOND EXPERIMENTAL ALTERNATIVE REGULATION PLAN AND  
ORDER APPROVING STIPULATION AND AGREEMENT**

On February 17, 2000, Union Electric Company d/b/a AmerenUE (AmerenUE) filed its Final Earnings Report for the first year sharing period of the second Experimental Alternative Regulation Plan (EARP). On April 25, 2000, both the Office of the Public Counsel (Public Counsel) and the Staff of the Missouri Public Service Commission (Staff) filed their separate pleadings notifying the Commission of the areas of disagreement each had with the Final Earnings Report filed by AmerenUE. On May 17, 2000, the Commission issued an Order Directing Filing of Direct

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\*See pages 25 and 399 for other orders in this case. In addition, see page 28, Volume 6, MPSC 3d and page 157, Volume 5 MPSC 3d for other orders in this case.

Testimony and Proposed Procedural Schedule, directing Staff and Public Counsel to file direct testimony concerning their areas of disagreement on or before May 30, 2000. On May 30, 2000, Staff and Public Counsel filed testimony concerning their areas of disagreement as well as a proposed procedural schedule.

On May 30, 2000, Staff also filed a formal complaint in Case No. EC-2000-795, pursuant to Section 7.f.vi. of the Stipulation and Agreement approved by the Commission on February 21, 1997, alleging that the operating results referred to in AmerenUE's Final Earnings Report for the first year sharing period of the second EARP had been manipulated to reduce amounts to be shared with customers. On June 2, 2000, the Commission issued a Notice of Complaint serving AmerenUE with the complaint.

On June 9, 2000, AmerenUE filed a Corrected Final Earnings Report along with its responsive pleading to Staff and Public Counsel's filings of April 25, 2000. AmerenUE's Corrected Final Earnings Report corrected two errors identified by Staff with respect to the calculation of income taxes. On June 16, 2000, AmerenUE filed its answer to the complaint filed by Staff in Case No. EC-2000-795. On July 10, 2000, AmerenUE notified the Commission that the parties had reached an agreement in principle on all outstanding issues for the first sharing period of the second EARP and requested the Commission postpone setting a procedural schedule to give the parties an opportunity to complete a stipulation and agreement.

On August 25, 2000, identical documents entitled Stipulation and Agreement were filed in Case No. EM-96-149 and in Case No. EC-2000-795. The stipulation and agreement in Case No. EM-96-149 was not signed by all parties and was, therefore, a nonunanimous stipulation and agreement. A nonunanimous stipulation and agreement is an agreement filed by fewer than all parties and the Commission may treat it as a unanimous stipulation and agreement if no party requests a hearing within seven days from the filing of the nonunanimous stipulation and agreement. *4 CSR 240-2.115 Nonunanimous Stipulations and Agreements*. No party requested a hearing in either Case No. EM-96-149 or Case No. EC-2000-795, and the Commission will treat the identical Stipulations and Agreements as unanimous. A copy of the Stipulation and Agreement filed in this case is affixed to this order as Attachment A.

In the Stipulations and Agreements filed in Case No. EM-96-149 and Case No. EC-2000-795, AmerenUE, Staff and Public Counsel resolved the issues before the Commission by agreeing to specific adjustments to AmerenUE's Corrected Final Earnings Report filed June 9, 2000. The parties identified each issue in the Stipulations and Agreements and recited how that issue would be resolved. The Stipulations and Agreements addressed all of the areas of disagreement cited by Staff and Public Counsel in Case No. EM-96-149 and resolved the complaint filed by Staff in Case No. EC-2000-795. The parties submitted a Settlement Final Earnings Report, reflecting the agreed upon adjustments, which is marked as Attachment 1 and attached to the Stipulation and Agreement filed in each case. AmerenUE, Staff and Public Counsel request that the Commission approve the Stipulations and Agreements which will result in the total dollar amount of \$20,214,000 in sharing credit to be distributed to ratepayers.

The Commission has reviewed the Stipulations and Agreements submitted by the signatory parties, as well as Staff's Suggestions in Support of the Stipulations and Agreements filed on October 23, 2000. The Commission finds the proposed sharing credit to be reasonable. The Commission will approve the credit as set out in the Stipulations and Agreements filed in Case No. EM-96-149 and Case No. EC-2000-795 on August 25, 2000, and order the one-time credit to be implemented on retail electric customers' bills.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed in Case No. EM-96-149 on August 25, 2000, by the Union Electric Company d/b/a AmerenUE, the Staff of the Missouri Public Service Commission and the Office of the Public Counsel is approved.
2. That Union Electric Company d/b/a AmerenUE shall issue credits to its retail electric customers in the amount of \$20,214,000 for the first year sharing period of the second experimental alternative regulation plan approved by the Commission in Case No. EM-96-149.
3. That Union Electric Company d/b/a AmerenUE shall notify the Commission upon the completion of the issuance of the first year sharing credits to retail electric customers as directed in Ordered Paragraph No. 2 of this order.
4. That this order shall become effective on November 10, 2000.

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur  
Simmons, C., absent

Register, Regulatory Law Judge

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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.

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**In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) The Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) In Connection Therewith, Certain Other Related Transactions.\***

*Case No. EM-96-149  
Decided November 9, 2000*

**Electric § 40. Evidence, Practice & Procedure §§2, 18, 24, 29.** Discovery procedures set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and the evaluation of the EARP process pursuant to Section 7(g) of the Stipulation and Agreement approved by the Commission, based upon the specific terms of the stipulation and agreement as reviewed by the Commission.

**Electric § 40. Evidence, Practice & Procedure §§2, 18, 24, 29.** Failure to file a specific objection to data requests in a timely manner in compliance with the requirements of Commission Rule 4 CSR 240-2.090 acted as a waiver of the objection and the motion to compel was denied.

**ORDER GRANTING IN PART STAFF'S MOTION TO COMPEL,  
ORDER DENYING IN PART STAFF'S MOTION TO COMPEL AND  
ORDER DENYING AMERENUE'S MOTION FOR RECONSIDERATION**

**Procedural Facts**

On October 25, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a motion to compel discovery and a Motion for Expedited Treatment of Staff's Motion to Compel. On October 27, 2000, the Commission directed Staff to file a copy of the documents containing Union Electric Company d/b/a AmerenUE (AmerenUE)'s written objections no later than 12 p.m. on October 30, 2000. Staff filed its response on October 30, 2000, complying with the Commission's request and adding DRs 88R-107R to its motion to compel. Staff stated that it received AmerenUE's objection to DRs 88R-107R on October 27, 2000, in a letter dated October 26, 2000.

On October 31, 2000, the Commission issued its order directing AmerenUE to answer Data Requests (DRs) 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 no later than November 10, 2000. The Commission also granted AmerenUE until November 3, 2000, to file a response to the remaining portion of Staff's motion to compel filed October 25, 2000, as amended October 30, 2000.

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\*See pages 25 and 396 for other orders in this case. In addition, see page 28, Volume 6, MPSC 3d and page 157, Volume 5 MPSC 3d for other orders in this case.

On November 2, 2000, AmerenUE filed its Motion for Reconsideration of the Commission's Order Granting in Part the Motion to Compel. AmerenUE stated that it should have been given an opportunity to respond to Staff's Motion before the Commission ruled on DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 because its argument was that the discovery procedures applied by the Commission do not apply to the Second EARP.

On November 3, 2000, AmerenUE filed its opposition to Staff's motion to compel.

On November 8, 2000, Staff filed a reply to AmerenUE's suggestions in opposition to Staff's motion to compel and a reply to AmerenUE's motion for reconsideration.

**Motion For Reconsideration of the Commission's Motion  
Granting in Part the Motion to Compel**

AmerenUE alleged in its motion for reconsideration that the Commission, by acting before receiving AmerenUE's response to Staff's Motion to Compel, was unaware of a "procedural ambiguity" regarding the application of the normal discovery procedure to the operation of the Experimental Alternative Regulation Plan (Second EARP). In fact, AmerenUE raised that issue in its general objections filed October 3, 2000. AmerenUE also raised the procedural issue in its objection letters dated October 5, October 9, October 11, October 19, and October 26, 2000. In each of those letters, AmerenUE stated that it did not believe that the normal discovery procedures applied.

If AmerenUE believed that the normal discovery procedures did not apply, when Staff began submitting its DRs pursuant to Commission rule 4 CSR 240-2.090, AmerenUE was nonetheless bound by the rule invoked to respond within 10 days with its objection that the process did not apply. AmerenUE could have requested an extension of time from Staff and set a time by agreement with the parties or AmerenUE could have asked the Commission to extend the time for objections. AmerenUE failed to take any action before the 10 days expired, and therefore, AmerenUE waived its objections for any DR where the objections were not timely filed.

In its motion for reconsideration, AmerenUE stated that the Commission's order issued October 31, 2000, is "particularly unfair" because AmerenUE was required to comply with the time frames established in a rule that AmerenUE claims does not apply "in this context." AmerenUE further stated that the Second EARP contains specific disclosure provision defining the information needed and governing information disclosure in lieu of the usual discovery process. *Motion for Reconsideration, p. 3.* AmerenUE identifies those provisions as Section 7.e. and Section 7.f.iv. of the Second EARP. Section 7.e. sets out the nine categories of reports and data to be provided. AmerenUE specifically notes that the Second EARP states "UE will not be required to develop any new reports." AmerenUE also points out that Section 7.f.vi. requires AmerenUE to prepare a "preliminary earnings report," followed by a "final earnings report," for each Sharing Period. Therefore, AmerenUE argues that nothing is included in the Second EARP that either adopts or incorporates the familiar data request process.

AmerenUE does not provide any new information that was not already available to the Commission when it rendered its decision on October 31, 2000, when it found that AmerenUE objections to DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 were untimely, and ordered AmerenUE to answer those DRs no later than November 10, 2000. Therefore, the Commission, having considered AmerenUE's additional arguments, finds no reason to change its order issued October 31, 2000.

**General Objection: Applicability of Discovery to Second EARP**

The remaining DRs included in Staff's motion to compel are DRs 59, 61-72, 74-78, 80, 82-107.<sup>1</sup> AmerenUE filed timely objections to DRs 59, 61-72, 74-78, 80, and 82-107. In its letter dated October 3, 2000, AmerenUE stated its general objection that it believed that "the discovery strategy being pursued by Staff is unauthorized by § 7(g), or anything else in the EARP."<sup>2</sup>

AmerenUE pointed out that the Second EARP expressly provided that Staff, Public Counsel and other signatories may not file, encourage or assist others to file a rate reduction case through June 30, 2001, except in certain circumstances. *Second EARP, Section 7(c)*. AmerenUE stated that rate reduction proceedings, including the various forms of discovery that make up much of those proceedings, were not to begin before the conclusion of the Second EARP.

On October 5, 2000, AmerenUE filed a second letter objecting to DRs 59, 61-72, and 74-77, alleging that these DRs "are part of a discovery process that is not mandated or contemplated by the EARP," are not expressly authorized by the Second EARP and are outside the scope of any provision of the EARP. AmerenUE made the same objection to DRs 78, 80, 82-87 and 88-107 in its objection letters dated October 9, October 11, October 19, and October 26, 2000, respectively. In addition, AmerenUE raised two specific objections in regard to DRs 74 and 87 submitted by Staff in its letters dated October 12 and October 19, 2000, respectively, along with its general objection. These specific objections will be addressed in the next section.

In previous decisions, the Commission has not found general objections to data requests acceptable. *In the Matter of Sho-Me Power Corporation*, 29 Mo. P.S.C. 409, Case Nos. EA-87-49, EA-87-101 and EA-87-105, June 2, 1987. Objections to discovery requests should specifically set forth the grounds for each objection as found in the Missouri Rules of Civil Procedure (Mo.R.Civ.P.). Commission Rule

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<sup>1</sup> DRs 50, 55, 74, 78, 80, 82-87, and 88-107 are marked as such on the data requests as issued but are referred to in Staff's response to Commission Order Directing Filing filed October 30, 2000, and in AmerenUE objection letters as DRs 50R, 55R, 74R, 78R, 80R, 82-87R, and 88R-107R. There is no explanation for addition of the "R" to the original DR number, but it does appear that the DR numbers referred to on the request and the DR number followed by the letter R on the Staff's response and AmerenUE's objection refer to the same DR. This order will refer to the DR by its original number only.

<sup>2</sup> Section 7(g) refers to the Stipulation and Agreement approved by the Commission in its Report and Order issued in this case on February 21, 1997. (Section 7 of this Stipulation and Agreement was entitled "New Experimental Alternative Regulation Plan (New Plan).") This entire Stipulation and Agreement is referred to as the "Second EARP" for the purposes of this order.)

4 CSR 240-2.090(1) states that “[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court.” The standard for discovery is set out in Rule 56.01(b)(1), Mo.R.Civ.P.<sup>3</sup> AmerenUE failed to set forth specific objections to DRs 59, 61-72, 73, 75-78, 80, 82-86 and 88-107 in its letters dated October 3, October 5, October 9, and October 26, 2000.

The Commission has also reviewed AmerenUE’s general objection. AmerenUE alleged that “the discovery strategy being pursued by Staff is unauthorized by § 7(g), or anything else in the EARP,” which requires the Commission to look at the Second EARP. There are various sections in the Second EARP that lead the Commission to the conclusion that normal discovery procedures do apply in Case No. EM-96-149 like any other case. Section 7(e) of the Second EARP sets out the “monitoring” provisions, including “reports and data identified below.” Specifically, Section 7(e) states that

Monitoring of the New Plan will be based on UE supplying to Staff and OPC, on a timely basis, the reports and data identified below. These reports and data must be provided as part of the New Plan . . . Staff, OPC and the other signatories participating in the monitoring of the New Plan **may follow up with data requests, meetings and interviews, as required, to which UE will respond on a timely basis.** UE will not be required to develop any new reports, but information presently being recorded and maintained by UE may be requested. (emphasis added.)

Section 7(e) sets out the reports and data that must be provided on an ongoing basis throughout the three-year period and specifically authorizes data requests.

Section 7(g) states that AmerenUE, Staff, Public Counsel and other signatories must meet to review “the monitoring reports and additional information required to be provided.” Section 7(g) does not contain restrictive language that would limit the additional information available to that identified under Section 7(e).

Section 8 of the Second EARP is entitled State Jurisdictional Issues. Under Section 8(a), AmerenUE agrees to make available “all books and records and employees and officers of Ameren, UE and any affiliate or subsidiary of Ameren as provided under applicable law and Commission rules,” subject to Ameren’s right to object. The applicable law and Commission rules that would apply would be Commission Rule 4 CSR 240-2.090(1) and Rule 56.01(b)(1), Mo.R.Civ.P.

Section 8(b) specifically states “UE, Ameren and any affiliate or subsidiary thereof agree to continue voluntary and cooperative discovery practices.” Section

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<sup>3</sup> See Rule 56.01(b)(1): Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

11 of the Second EARP states "Nothing in this Stipulation and Agreement is intended to impinge or restrict in any manner the exercise by the Commission of any statutory right, including the right of access to information, and any statutory obligation." Reading all of these sections together, the Second EARP does not change the existence or applicability of Commission Rule 4 CSR 240-2.090 regarding discovery. In fact, Section 8(b) of the Second EARP is clearly on point where "UE, Ameren and any affiliate or subsidiary" agree to continue voluntary and cooperative discovery practices.

In its written opposition filed on November 3, 2000, AmerenUE argues that Section 7(e) relating to monitoring reports and Section 7.f.iv. relating to preliminary and final earnings reports provide the Staff with "more than enough information to fulfill every task under the EARP."

In light of Section 8(b), AmerenUE cannot reasonably argue that it did not expect the use of discovery in these Second EARP proceedings. Therefore, the Commission finds that normal discovery procedures as set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and its implementation specifically as it relates to the evaluation of the EARP process pursuant to Section 7(g) of the Second EARP.

AmerenUE failed to file a specific objection to DRs 59, 61-72, 73, 75-78, 80, 82-86, and 88-107, and therefore, the Commission will direct AmerenUE to file its answers to DRs numbers 59, 61-72, 73-78, 80, 82-86, and 88-107 within the time period required by Commission Rule 4 CSR 240-2.090(2), and if the time for answering a DR has passed, the Commission will allow AmerenUE additional time for filing its answer. The Commission finds that, after considering AmerenUE's general objection, even if the objection had been specific enough, AmerenUE's substantive argument was incorrect.

#### **Specific Objections to DRs**

In a letter dated October 12, 2000, AmerenUE raised an additional objection to DR 74 on the grounds that the request made in DR 74 is vague, overly broad, and unduly burdensome. AmerenUE alleges that this request fails to specify any given time frame for the information requested. DR 74 states

**DR 74:** Please describe all actions the Company has undertaken to improve plant efficiency and to reduce fuel costs for each Ameren generating facility. Provide all cost savings or production savings achieved.

DR 74 does lack a time frame for the information requested by Staff. AmerenUE states that it is being asked to "expend many manhours to produce a response containing volumes and volumes of information which would not lead to the discovery of relevant, admissible evidence." Because of the lack of adequate time parameters in DR 74, the Commission will deny Staff's Motion to Compel as the data request is overbroad as written. Staff may issue a DR relating to the same subject matter as long as the request includes a reasonable time frame.

In AmerenUE's objection letter dated October 19, 2000, AmerenUE also objected to DR 87 on the grounds that this request is vague, overly broad and unduly burdensome. DR 87 states

**DR 87:** Provide a copy of all interviews (internal and external) and all internal correspondence from all Ameren employees in relation to the Venice power plant outage. Provide for the period covering the time of the accident through the present.

Unlike its specific objection to DR 74, AmerenUE does not specify why it believes that DR 87 is “vague, overly broad and unduly burdensome.” Therefore, the Commission will direct AmerenUE to respond to DR 87.

*IT IS THEREFORE ORDERED:*

1. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is granted in part in that Union Electric Company d/b/a AmerenUE shall answer Data Request numbers 59, 61-72, 73, 75-78, 80 and 82-87 as soon as possible, but in no event later than November 19, 2000.
2. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is granted in part in that Union Electric Company d/b/a AmerenUE shall answer Data Request numbers 88-107 within the time period required by Commission Rule 4 CSR 240-2.090(2).
3. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is denied in part in that Data Request 74 is found to be overly broad because it failed to provide time frames for which the data was requested.
4. That the motion for reconsideration filed by Union Electric Company d/b/a AmerenUE on November 2, 2000, is denied.
5. That this order shall become effective on November 19, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur  
Murray, C., dissents with dissenting opinion

Register, Regulatory Law Judge

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**DISSENTING OPINION OF  
COMMISSIONER CONNIE MURRAY**

The Commission acted prematurely when we granted in part Staff’s Motion to Compel, ordering UE to answer 16 Data Requests prior to receiving UE’s response to that motion. Therefore, we should grant UE’s motion for reconsideration. UE’s motion adequately explains its failure to timely object to data requests under a discovery procedure that arguably does not apply to the instant proceeding.

The information required of UE under the terms of the EARP does not include, as Staff claims it does, the degree of information required in a “revenue cost of service audit”. As UE points out, we have not directed Staff to perform such an audit. Staff’s task under the EARP is merely to file a recommendation as to the future of the second EARP. The EARP explicitly states the type of information to be provided. Staff does not have a right to demand, in this proceeding, information beyond that relevant to the recommendation that it must file by February 1, 2001.

The proper direction for this Commission to give the parties at this juncture would be to order them to meet for the purpose of reaching an agreement about the information to be provided. If no such agreement could be reached within a reasonable time, we could order an on-the-record presentation of the legal arguments concerning the motions.

For these reasons, I respectfully dissent.

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**In the Matter of Southern Missouri Gas Company, L.P. for  
Authority to File Tariffs Increasing Rates for Gas Service  
Provided to Customers in the Company's Missouri Service  
Area.**

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*Case No. GR-2000-485  
Decided November 16, 2000*

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**Gas §18.** The Commission approved a stipulation and approved a rate increase for Southern Missouri Gas Company of \$390,000.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On February 8, 2000, Southern Missouri Gas Company L.P. (SMG) submitted to the Commission tariffs reflecting increased rates for natural gas service provided to customers in the Missouri service area of the Company. The proposed tariffs were assigned tariff number 200000712 and bear a requested effective date of March 9, 2000. The proposed tariffs are designed to produce an annual increase of approximately six percent (\$390,000) in the SMG's revenues.

On February 24, 2000, the Commission suspended the proposed tariffs, ordered that notice of the filing be given, and established certain procedural dates.

On October 19, 2000, the parties filed a unanimous stipulation and agreement, attached hereto as Attachment A. On October 23, 2000, the Staff of the Commission filed suggestions in support of the stipulation. The stipulation provided that other parties shall have the right to file responsive suggestions. Accordingly, the Commission issued, on October 24, 2000, a notice allowing the other parties until November 2, 2000 to file responsive suggestions. On October 24, 2000, SMG filed a letter stating that it did not intend to respond. The only other party, the Office of the Public Counsel, also did not respond.

The stipulation provides that SMG should be allowed to increase its Missouri revenues by \$390,000 on an annual basis, and included sample tariff sheets demonstrating the rates that would be changed to achieve this revenue increase. The parties agreed to the rate design embodied in the sample tariffs, including the creation of a Large General Service class. The parties also agreed to continue SMG's current policy related to the calculation of a pressure factor, and to include this policy in the tariff.

Finally, the parties requested that the Commission approve the stipulation by October 26, 2000, and that the new tariffs be approved for service after November 4, 2000, or as expeditiously as possible. Because the parties also stipulated that parties be allowed to respond to Staff's suggestions (which were filed October 23, 2000), these dates are patently unrealistic.

Staff, in its suggestion in support of the stipulation, states that it performed an analysis of SMG's requested increase. Staff's accounting analysis resulted in a higher revenue requirement than that sought by SMG. Staff also described the adjustment made to the Residential class rate design, and noted the creation of a Large General Service class.

Pursuant to Section 536.060, RSMo 1994, the Commission may accept the Stipulation and Agreement as a resolution of the issues in this case. The Commission has reviewed the stipulation and finds it to be reasonable and in the public interest and will, therefore, approve it.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed on October 19, 2000, is approved.
2. That Southern Missouri Gas Company is authorized to file tariffs consistent with the Stipulation and Agreement and the sample tariffs attached thereto.
3. That this order shall become effective on November 26, 2000.

Drainer, Murray, Schemenauer, and Simmons, CC., concur  
Lumpe, Ch., absent

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 Missouri Public Service Commission.

**In the Matter of the Chapter 33 Tariff Filing of Miller Telephone Company.**

*Case No. TT-2001-257*  
*Decided December 12, 2000*

**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

## APPEARANCES:

*W. R. England, III and Sondra B. Morgan*, Attorneys at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

*Lisa Chase and Craig S. Johnson*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.

*Ruth O'Neill*, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

*Marc Posten*, Senior 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

**REPORT AND ORDER**

On September 28, 2000, Miller Telephone Company (Miller) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Miller indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 19, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Miller's proposed tariff is unlawful because Miller is not authorized to introduce a new late-payment charge outside of a rate case. Miller filed suggestions in opposition to Staff's recommendation on October 24.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Miller's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Miller's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-

267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Miller filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Miller pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Miller asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Miller Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny Miller's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Miller is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Miller. Miller's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late- payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See. State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d

<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Miller Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Miller Telephone Company on September 28, 2000 (Tariff File No. 200100344) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Cass County Telephone Company.**

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*Case No. TT-2001-265  
Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 20, 2000, Cass County Telephone Company (Cass County) filed a proposed tariff with the Public Service Commission. The proposed tariff originally carried an effective date of October 20, 2000. The effective date of the tariff was subsequently extended to October 30, 2000, at the request of Cass County. Cass County indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would increase from \$1.20 to \$5.00 the late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Cass County's proposed tariff

is unlawful because Cass County is not authorized to introduce a new late-payment charge outside of a rate case. Cass County filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Cass County's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Cass County's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Cass County filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Cass County pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Cass County asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Cass County Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny Cass County's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Cass County is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions increasing the late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Cass County. Cass County's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The tariff filed by the telephone companies to increase its late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it “may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies.” The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users’ Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users’ Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission’s rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company’s ability to collect delinquent accounts by removing a customer’s incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that “a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company’s tariff.” The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Cass County Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Cass County Telephone Company on September 20, 2000 (Tariff File No. 200100305) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Ellington Telephone Company.**

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*Case No. TT-2001-269*  
*Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

## APPEARANCES:

*W. R. England, III and Sondra B. Morgan*, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

*Lisa Chase and Craig S. Johnson*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.

*Ruth O'Neill*, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

*Marc Posten*, Senior 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

### **REPORT AND ORDER**

On September 29, 2000, Ellington Telephone Company (Ellington) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Ellington indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Ellington's proposed tariff is unlawful because Ellington is not authorized to introduce a new late-payment charge outside of a rate case. Ellington filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Ellington's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Ellington's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Ellington filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Ellington pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Ellington asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Ellington Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Ellington's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Ellington is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Ellington. Ellington's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this

provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Ellington Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Ellington Telephone Company on September 29, 2000 (Tariff File No. 200100346) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Holway Telephone Company.**

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*Case No. TT-2001-268*  
*Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

APPEARANCES:

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 29, 2000, Holway Telephone Company (Holway) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Holway indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Holway's proposed tariff is unlawful because

Holway is not authorized to introduce a new late-payment charge outside of a rate case. Holway filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Holway's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Holway's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Holway filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Holway pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Holway asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Holway Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Holway's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Holway is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Holway. Holway's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See, State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Holway Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Holway Telephone Company on September 29, 2000 (Tariff File No. 200100387) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Seneca Telephone Company.**

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*Case No. TT-2001-267*  
*Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 29, 2000, Seneca Telephone Company (Seneca) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Seneca indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Seneca's proposed tariff is unlawful because Seneca is not authorized to introduce a new late-payment charge outside of a rate case. Seneca filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Seneca's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Seneca's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Seneca filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Seneca pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Seneca asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Seneca Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Seneca's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Seneca is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Seneca. Seneca's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See. State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Seneca Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Seneca Telephone Company on September 29, 2000 (Tariff File No. 200100391) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of New Florence Telephone Company.**

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*Case No. TT-2001-280*  
*Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 20, 2000, New Florence Telephone Company (New Florence) filed a proposed tariff with the Public Service Commission. The proposed tariff originally carried an effective date of October 20, 2000. The effective date of the tariff was subsequently extended to October 30, 2000, at the request of New Florence. New Florence indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or

more days past due. Staff argued that New Florence's proposed tariff is unlawful because New Florence is not authorized to introduce a new late-payment charge outside of a rate case. New Florence filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. New Florence's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended New Florence's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, New Florence filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, New Florence pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. New Florence asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by New Florence Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny New Florence's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

New Florence is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for New Florence. New Florence's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it “may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies.” The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See. State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users’ Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users’ Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission’s rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company’s ability to collect delinquent accounts by removing a customer’s incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that “a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company’s tariff.” The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That New Florence Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by New Florence Telephone Company on September 20, 2000 (Tariff File No. 200100304) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Steelville Telephone Exchange, Inc.**

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*Case No. TT-2001-278*  
*Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan*, Attorneys at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

*Lisa Chase and Craig S. Johnson*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.

*Ruth O'Neill*, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

*Marc Posten*, Senior 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

**REPORT AND ORDER**

On September 29, 2000, Steelville Telephone Exchange, Inc. (Steelville) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Steelville indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Steelville's proposed tariff is unlawful because Steelville is not authorized to introduce a new late-payment charge outside of a rate case. Steelville filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Steelville's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Steelville's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Steelville filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Steelville pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Steelville asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Steelville Telephone Exchange, Inc. and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny Steelville's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Steelville is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Steelville. Steelville's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this

provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Steelville Telephone Exchange, Inc.'s Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Steelville Telephone Exchange, Inc. on September 29, 2000 (Tariff File No. 200100352) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of KLM Telephone Company.**

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*Case No. TT-2001-279  
Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Tele-*

phone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

*Lisa Chase and Craig S. Johnson*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.

*Ruth O'Neill*, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

*Marc Posten*, Senior 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

### **REPORT AND ORDER**

On September 29, 2000, KLM Telephone Company (KLM) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. KLM indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that KLM's proposed tariff is unlawful because KLM is not authorized to introduce a new late-payment charge outside of a rate case. KLM filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. KLM's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended KLM's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, KLM filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, KLM pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. KLM asks that the Commission

<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by KLM Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny KLM's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

KLM is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for KLM. KLM's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for

telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That KLM Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by KLM Telephone Company on September 29, 2000 (Tariff File No. 200100388) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Lathrop Telephone Company.**

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*Case No. TT-2001-275  
Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 29, 2000, Lathrop Telephone Company (Lathrop) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Lathrop indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for all bills paid after the due date specified on the bill.

Staff argued that Lathrop's proposed tariff is unlawful because Lathrop is not authorized to introduce a new late-payment charge outside of a rate case. Lathrop filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Lathrop's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Lathrop's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Lathrop filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Lathrop pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Lathrop asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Lathrop Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Lathrop's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Lathrop is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Lathrop. Lathrop's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it “may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies.” The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See. State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users’ Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users’ Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission’s rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company’s ability to collect delinquent accounts by removing a customer’s incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that “a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company’s tariff.” The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Lathrop Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Lathrop Telephone Company on September 29, 2000 (Tariff File No. 200100325) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of BPS Telephone  
Company.**

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*Case No. TT-2001-273  
Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

## APPEARANCES:

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

### **REPORT AND ORDER**

On September 29, 2000, BPS Telephone Company (BPS) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. BPS indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would increase from \$1.20 to \$5.00 the late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that BPS's proposed tariff is unlawful because BPS is not authorized to introduce a new late-payment charge outside of a rate case. BPS filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. BPS's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended BPS's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, BPS filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, BPS pointed out that the portion of the tariff that would increase the late payment charge is only a small portion of the entire tariff filing that has been suspended. BPS asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that increases the late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by BPS Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the BPS's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

BPS is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions increasing the late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for BPS. BPS's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to increase its late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this

provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That BPS Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by BPS Telephone Company on September 29, 2000 (Tariff File No. 200100347) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Farber Telephone Company.**

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*Case No. TT-2001-270  
Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company,*

Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

*Lisa Chase and Craig S. Johnson*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.

*Ruth O'Neill*, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

*Marc Posten*, Senior 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

### **REPORT AND ORDER**

On September 29, 2000, Farber Telephone Company (Farber) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Farber indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Farber's proposed tariff is unlawful because Farber is not authorized to introduce a new late-payment charge outside of a rate case. Farber filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Farber's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Farber's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

On October 27, Farber filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Farber pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Farber asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Farber Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Farber's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Farber is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Farber. Farber's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See, State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather,

they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Farber Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Farber Telephone Company on September 29, 2000 (Tariff File No. 200100350) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Modern Telecommunications Company.**

*Case No. TT-2001-274  
Decided December 12, 2000*

**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 29, 2000, Modern Telecommunications Company (Modern) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Modern indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Modern's proposed tariff is unlawful because Modern is not authorized to introduce a new late-payment charge outside of a rate

case. Modern filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Modern's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Modern's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing that was filed by several of the telephone companies, not including Modern.

After considering the tariff filed by Modern Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the companies' Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

Several of the telephone companies, not including Modern, ask that the Commission suspend only that portion of their tariff filings that deal with the imposition of the late-payment charge. The tariff filings include numerous tariff sheets. The companies suggest that the Commission suspend only one page of the tariff filings while allowing the others to go into effect. The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

The companies are, of course, free to control what they include in its tariff filing. If they wish to refile their tariff without the provisions imposing a late-payment fee, they may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for the companies. The Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That the tariff issued by Modern Telecommunications Company on September 29, 2000 (Tariff File No. 200100374) is rejected.
2. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Granby Telephone Company.**

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*Case No. TT-2001-272*  
*Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

## APPEARANCES:

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.*

*Lisa Chase and Craig S. Johnson, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.*

*Ruth O'Neill, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.*

*Marc Posten, Senior 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

**REPORT AND ORDER**

On September 29, 2000, Granby Telephone Company (Granby) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Granby indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would increase from \$1.19 to \$5.00 the late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Granby's proposed tariff is unlawful because Granby is not authorized to introduce a new late-payment charge outside of a rate case. Granby filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Granby's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Granby's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

On October 27, Granby filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Granby pointed out that the portion of the tariff that would increase the late payment charge is only a small portion of the entire tariff filing that has been suspended. Granby asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that increases the late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Granby Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Granby's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Granby is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions increasing the late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Granby. Granby's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to increase its late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather, they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this

provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Granby Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Granby Telephone Company on September 20, 2000 (Tariff File No. 200100341) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Chapter 33 Tariff Filing of Goodman Telephone Company.**

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*Case No. TT-2001-277  
Decided December 12, 2000*

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**Rates §71.** Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.

**Rates §69.** The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.

**APPEARANCES:**

*W. R. England, III and Sondra B. Morgan, Attorneys at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company, Cass County Telephone Company, Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby*

Telephone Company, Holway Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Miller Telephone Company, New Florence Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

*Lisa Chase and Craig S. Johnson*, Attorneys at Law, Andereck, Evans, Milne, Peace & Johnson, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Modern Telecommunications Company.

*Ruth O'Neill*, Associate Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

*Marc Posten*, Senior 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

### **REPORT AND ORDER**

On September 29, 2000, Goodman Telephone Company (Goodman) filed a proposed tariff with the Public Service Commission. The proposed tariff carried an effective date of October 30, 2000. Goodman indicated that the purpose of the tariff was to comply with changes to Chapter 33, Service and Billing Practices for Telephone Companies.

On October 24, the Staff of the Commission (Staff) filed a Motion to Reject or Suspend Tariff Filing. Staff pointed out that a portion of the tariff would introduce a \$5.00 late-payment charge for customer accounts with an unpaid balance 21 or more days past due. Staff argued that Goodman's proposed tariff is unlawful because Goodman is not authorized to introduce a new late-payment charge outside of a rate case. Goodman filed suggestions in opposition to Staff's recommendation on October 25.

On October 26, the Commission issued an order that granted Staff's motion to suspend. Goodman's tariff was suspended for a period of 150 days beyond October 30, 2000 to March 29, 2001. In the same order the Commission scheduled an on-the-record presentation at which the parties were directed to appear and answer questions from the Commission. At the same time that the Commission suspended Goodman's tariff, it took identical actions regarding similar tariffs filed by other small telephone companies. The following tariff cases were consolidated only for purposes of the on-the-record presentation: TT-2001-257, TT-2001-265, TT-2001-267, TT-2001-268, TT-2001-269, TT-2001-270, TT-2001-271<sup>1</sup>, TT-2001-272, TT-2001-273, TT-2001-274, TT-2001-275, TT-2001-277, TT-2001-278, TT-2001-279, and TT-2001-280.

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<sup>1</sup> TT-2001-271 regards the tariff filed by Kingdom Telephone Company. Kingdom Telephone Company is a cooperative and the Commission subsequently determined that it did not have jurisdiction to suspend or reject its tariff. The Commission did not take action against Kingdom Telephone Company's tariff and it was allowed to go into effect by operation of law on October 30, 2000.

On October 27, Goodman filed a pleading entitled, Motion to Lift Suspension of Noncontested Portions of Tariff Filing. In that motion, Goodman pointed out that the portion of the tariff that would institute a late payment charge is only a small portion of the entire tariff filing that has been suspended. Goodman asks that the Commission lift the suspension of those sheets involving other matters and allow them to go into effect, while continuing the suspension of only the particular tariff sheet that institutes a late payment charge.

An on-the-record presentation was held on November 7, 2000. Counsel for the various telephone companies, for the Office of the Public Counsel (Public Counsel) and for Staff appeared to answer questions from the Commission regarding the tariffs and the Motion to Lift Suspension of Noncontested Portions of Tariff Filing.

After considering the tariff filed by Goodman Telephone Company and the written and oral arguments presented by the parties, the Commission makes the following conclusions of law, which are dispositive of the issues presented:

**The Commission will not suspend or reject only a portion of a company's tariff filing and therefore will deny the Goodman's Motion to Lift Suspension of Noncontested Portions of Tariff Filing.**

The Commission has not in the past approved or rejected only portions of a tariff filing. Instead, if any portion of the tariff filing is objectionable, the entire tariff will be suspended or rejected.

Goodman is, of course, free to control what it includes in its tariff filing. If it wishes to refile its tariff without the provisions imposing a late-payment fee, it may do so. The Commission will then give that new tariff filing due consideration. But the Commission will not depart from its long-time practice by separating the tariff provisions for Goodman. Goodman's Motion to Lift Suspension of Noncontested Portions of Tariff Filing will be denied.

**The tariff filed by the telephone companies to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected.**

Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid condemnation as single-issue ratemaking, the telephone companies argue that the proposed late-payment fee is not a rate at all. Rather,

they contend that it is simply a charge that would be assessed to customers who fail to pay their bills on time. That contention is not persuasive.

The tariff changes that are the subject of this action arise from revisions to Chapter 33 of the Commission's rule regarding service and billing practices for telecommunications companies. 4 CSR 240-33.070(2) now provides that telecommunications companies may not disconnect basic local telecommunications service for customer nonpayment of a delinquent charge for other than basic local telecommunications services. The companies argue that this change will significantly affect a company's ability to collect delinquent accounts by removing a customer's incentive to pay a delinquent bill to avoid losing basic local telephone service.

4 CSR 240-33-040(5) provides that "a telecommunications company may assess a penalty charge upon a delinquent account. Such charge shall be specifically stated in the company's tariff." The companies suggest that this provision was included in the regulation in recognition of the fact that the companies might have more difficulty in collecting delinquent accounts. They argue that the penalty charge is merely an attempt to prompt customers to pay their bills and not an effort to enhance the revenue of the companies.

The telephone companies concede that there are no statutes or court decisions that would define the difference between a rate that can be implemented only through a rate case and a fee that could be reviewed in isolation without considering all factors. The Commission concludes that the late-payment charges at issue are rates for which the Commission must consider all factors before they may be implemented. The Commission does not have the ability to consider all factors without turning these cases into rate cases. The counsel for the telephone companies indicated that they are not interested in turning these proceedings into rate cases over these small rate increases. Therefore, the tariffs will be rejected.

*IT IS THEREFORE ORDERED:*

1. That Goodman Telephone Company's Motion to Lift Suspension of Noncontested Portions of Tariff Filing is denied.
2. That the tariff issued by Goodman Telephone Company on September 29, 2000 (Tariff File No. 200100389) is rejected.
3. That this order shall become effective on December 22, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**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.\***

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*Case No. EM-2000-292  
Decided December 14, 2000*

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**Electric §4.** Volatility in the wholesale electric market might place a small utility at a financial disadvantage and would justify approval of a merger with a larger utility better able to compete in the wholesale electric market.

**Electric §4.** The arguments of the Staff of the Commission that the costs of the proposed merger between two electric utilities would exceed the benefits of such merger were found to be unpersuasive.

**Electric §4.** The fact that the long-term debt of the acquiring company carried a BBB rating and the acquired company's long-term debt carried an A- rating did not, by itself, constitute a detriment to the rate-payers of the acquired company so as to require rejection of the proposed merger.

**Electric §4.** As a condition on its approval of a merger between two electric companies, the Commission required the acquiring company to file monthly reports regarding customer service for one year following the merger.

**Electric §4.** The Commission declined to order the performance of market power studies as a condition on approval of a merger between two electric utilities.

**Electric §4.** The Commission is required to approve the merger between two utilities if it can be shown that the merger will not be detrimental to the public. The public need not benefit from the merger, so long as it is not harmed.

**Electric §4.** The Commission rejected a regulatory plan proposed by the acquiring company that included a five-year rate freeze because such plan would be contrary to the Commission's statutory obligation to provide continuous regulation of the public utilities of this state, because the Commission cannot prevent an appropriate party from bringing a rate complaint during the period of the freeze, and because a five-year rate freeze would not be good public policy.

**Electric §4. Rates §69.** The Commission declined to decide rate case type issues, including recovery of an acquisition premium, in a merger case, because to do so would be to engage in single-issue rate-making.

**Electric §9.** The Commission found that a intervenor's issues regarding a merger's effect on transmission access and reliability, concern the transmission of power across service territories for purpose of wholesale deliveries and as such are properly regulated by the FERC and are not subject to regulation by the Commission.

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\*On January 9, 2001, the Commission issued an order denying applications for rehearing, motion for reconsideration and request for a stay. On January 10, 2001, this case was appealed to Cole County Circuit Court (01CV323152). On September 26, 2001, this case was appealed to the Missouri Court of Appeals-Western District (WD60631).

## APPEARANCES

*James C. Swearingen, Paul Boudreau, Dean Cooper, and Gary Duffy*, Attorneys at Law, Brydon, Swearingen & England, 312 East Capitol Avenue, Jefferson City, Missouri 65101, and *Karl Zobrist and Christina Egbarts*, Attorneys at Law, Blackwell, Sanders, Peper, Martin, LLP, 2300 Main, Suite 1100, Kansas City, Missouri 64108, for UtiliCorp United Inc.

*Mark W. Comley*, Attorney at Law, Newman, Comley & Ruth, 601 Monroe, Suite 301, Jefferson City, Missouri 65102 and *Gary L. Myers*, Attorney at Law, St. Joseph Light & Power Company, 520 Francis Street, St. Joseph, Missouri 65402, For St. Joseph Light & Power Company.

*Stuart W. Conrad and Jeremiah D. Finnegan*, Attorneys at Law, Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, for AG Processing Inc.

*Shelley Woods and Cheryl Nield*, Assistant Attorneys General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102, for The Department of Natural Resources.

*James J. Cook*, Attorney at Law, P.O. Box 66149, St. Louis, Missouri 63166, for Union Electric Company d/b/a AmerenUE.

*Jeffrey A Keevil*, Attorney at Law, Stewart & Keevil, 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for The City of Springfield, Missouri, through the Board of Public Utilities.

*Douglas E. Micheel and John Coffman*, Attorneys at Law, P.O. Box 7800, Jefferson City, Missouri 65102-7800 for The Office of the Public Counsel and the Public.

*Steven Dottheim, Dana K. Joyce, Keith R. Krueger, Dennis Frey, Bruce Bates, Nathan Williams, Robert Franson*, Attorneys at Law, 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**  
**PROCEDURAL HISTORY**

On October 19, 1999, UtiliCorp United Inc. (UtiliCorp) and St. Joseph Light & Power Company (SJLP) filed a Joint Application seeking authority to merge SJLP with and into UtiliCorp. Following the filing of the application, the Commission, on October 26, 1999, issued an Order and Notice that provided notice of the filing of the application and notified interested parties that if they wished to intervene they should file an application with the Commission on or before November 15, 1999. Timely applications to intervene were received from the City of Springfield, Missouri, through the Board of Public Utilities (Springfield), Union Electric Company, d/b/a AmerenUE (AmerenUE), the Missouri Department of Natural Resources (MDNR), and AG Processing Inc., a cooperative (AGP). On November 17, 1999, the Commission granted the applications to intervene of Springfield, AmerenUE, MDNR and AGP.

Following a prehearing conference held on December 9, 1999, and after the filing by various parties of competing proposed procedural schedules, the Commission, on December 21, 1999, issued an order adopting a procedural schedule that set this case for hearing on July 10 through July 14, 2000. On February 10, 2000, the Commission denied separate motions filed by the Office of the Public Counsel (Public Counsel) and MDNR that would have consolidated this case with Case No. EM-2000-369, which is the case established for consideration of UtiliCorp's proposed merger with The Empire District Electric Company (Empire). Testimony was prefiled by the various parties and an evidentiary hearing was held beginning on July 10 and continuing through July 14, 2000. Post-hearing briefs were filed on September 5, 2000, with reply briefs filed on October 3, 2000.

#### **FINDINGS OF FACT**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather the omitted material was not dispositive of the issues before the Commission.

UtiliCorp is a Delaware corporation with its principal office and place of business located in Kansas City, Missouri. UtiliCorp is authorized to conduct business in Missouri through its Missouri Public Service (MPS) operating division and, as such, is engaged in providing electrical and natural gas utility service in Missouri to customers in its service areas. UtiliCorp has regulated energy operations in seven other states. UtiliCorp also operates in New Zealand, Australia and Canada. SJLP is a Missouri corporation with its principal office and place of business located in St. Joseph, Missouri. SJLP is engaged in the business of providing electrical, natural gas and industrial steam utility services in Missouri to customers in its service areas.

#### **A. Approval of Merger:**

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

In large part, SJLP's difficulties in continuing to provide low-cost power result from the advent of competition in the wholesale electric market. UtiliCorp and SJLP's witness, Stephen L. Ferry, explained the impact of wholesale competition on SJLP:

Prior to wholesale competition, the price of purchased power was regulated by the Federal Energy Regulatory Commission on a cost-plus basis. Even during periods of high demand and limited availability, the price would remain reasonably stable since it was tied to actual production cost. With the advent of

wholesale competition, the price of purchased power is now market driven. The price will be whatever the market will bear, and during periods when demand approaches or exceeds supply, the price can be very volatile, rising very rapidly to levels much greater than the cost of generating the energy.

Ferry Surrebuttal, Ex. 23, at p. 4

This volatility in the wholesale market may place a small company, such as SJLP, at a disadvantage because it may lack sufficient financial resources to compete with larger utilities for purchased power. The merger of SJLP with UtiliCorp will permit SJLP's customers to be served by a substantially larger utility better able to compete in the wholesale energy market.

**Costs of Merger Exceed Benefits:**

Several parties argued that the proposed merger would be detrimental to the ratepayers of both SJLP and UtiliCorp and for that reason it should not be approved by the Commission. In particular, Staff, joined by other parties, contended that the costs associated with the merger would exceed the savings attributable to the merger. If this is true, then the merger might be detrimental to the ratepayers of both companies because the cost of service for the combined company would be higher than it would have been without the merger and the higher cost of service would ultimately be reflected in higher rates.

Staff bases its arguments about increased cost of service on various adjustments it has made to the estimates of merger savings set forth by UtiliCorp and SJLP. Staff challenges the estimates of merger savings in two areas. First, Staff argues that most of the savings in the area of projected energy cost savings from the joint dispatch of the power supply of the merging companies that UtiliCorp and SJLP claim as a benefit of the merger could, in fact, be achieved by SJLP as a stand-alone company even if there is no merger. Second, Staff argues that UtiliCorp's and SJLP's assumption about the inflation rate for UtiliCorp's overhead costs results in a significant overstatement of the possible savings to be expected from the merger.

Staff's arguments are not convincing for several reasons. First, with regard to the projected savings from joint dispatch, Staff overestimates the extent to which SJLP, as a stand-alone company, could take advantage of increased sales opportunities in the wholesale generation market. The evidence presented by UtiliCorp and SJLP demonstrates that its savings assumptions were based on the premise that, absent a merger, UtiliCorp and SJLP would continue to generate approximately the same level of normalized wholesale volumes and margins over the ten-year study period as those generated in recent years. After the merger, it was assumed that the combined company would make all wholesale market sales at market rates and that the combined company would be able to increase its wholesale market penetration. Under this scenario the merger would result in both an increase in the volume of wholesale sales and an increase in profitability due to use of market-based rates.

Staff's argument assumes that SJLP, even without the merger, could make the same power sales on the wholesale market. Thus, according to Staff, the

increased profit from those sales should not be counted as a benefit of the merger. Staff's assumption overstates SJLP's ability to compete in the wholesale market. SJLP has not been and is not now active in the wholesale market. SJLP does not currently have a wholesale marketing group dedicated to pursuing the wholesale market and does not have plans to create such a group. Even if it wished to develop such a marketing group, as one of the smallest investor-owned electric utilities in the nation, SJLP's size and limited resource mix could make it costly to develop and sustain an effective wholesale marketing group. Furthermore, SJLP elected not to separate its transmission and generation functions due to cost. Thus, it does not have FERC approval to sell energy at market-based rates and must sell its excess energy at cost-based rates. UtiliCorp's MPS division, on the other hand, has been an effective player in the wholesale market since 1996. It has separated its generation and transmission functions and can sell energy at market-based rates. MPS maintains a fully staffed wholesale marketing group to pursue opportunities in the wholesale market.

It is not reasonable to assume that SJLP could effectively and efficiently create the marketing knowledge and resources needed to operate in the wholesale market and obtain the same results as those that could be obtained after a merger with UtiliCorp. The evidence does not indicate precisely how much merger savings could be obtained through increased activity in the wholesale market, but it is reasonable to assume that there could be savings.

Staff's argument about the inflation rate for UtiliCorp's overhead costs is unpersuasive. In calculating the expected cost of future UtiliCorp corporate allocations that are to be charged to the SJLP operating division after the merger, UtiliCorp assumed that the corporate allocations would increase each year by an inflation rate of two and a half percent. Staff argued that an inflation factor of five percent was more appropriate given the much larger annual increases in corporate overhead costs allocated by UtiliCorp to its MPS operating division in previous years. If an inflation factor of five percent is used, then the level of estimated savings resulting from the merger will be reduced.

UtiliCorp responded by pointing out that Staff's review of corporate overhead costs was overstated by Staff's failure to take into account the fact that the large annual increases in corporate allocations experienced in previous years could be attributed to the increased operational cost of reengineering initiatives that were implemented in 1997, 1998 and 1999 over the entire UtiliCorp system.

The Commission does not need to determine an appropriate inflation factor for corporate allocations in order to decide this case. In any future rate case, the cost of UtiliCorp's corporate allocations will be a known factor. If, in that future rate case, those allocations are shown to be excessive, then the Commission will be able to consider that fact when setting the rates for UtiliCorp's SJLP operating division. Higher rates for SJLP's customers cannot result from this merger unless the Commission approves those rates in a future rate case.

Indeed, the same considerations apply to all of Staff's arguments about possible increased costs of service resulting from the merger. As Staff repeatedly testified, it is very difficult to speculate about what SJLP's cost of service might be in five or ten years. Staff used that fact to argue that merger savings could not be reliably established at this time. However, the same difficulty applies to Staff's

argument about the costs of the merger exceeding the benefits. If UtiliCorp and SJLP's representations of merger savings are speculative, then so are Staff's representations of excessive merger costs. Speculation about what may happen in a future rate case is not a valid basis for refusing to allow UtiliCorp and SJLP to complete their merger.

**Costs of Merger Exceed Benefits for Gas and Steam Services:**

Although SJLP is primarily an electric company, it also provides natural gas service to several cities, and industrial steam to a number of industrial customers in St. Joseph. An argument was raised by AGP, one of SJLP's steam customers, suggesting that the costs of the merger would exceed the benefits obtained for the natural gas and steam customers of SJLP, even if costs did not exceed benefits for the company as a whole. It was argued that this is a clear detriment that should prompt the Commission to reject the proposed merger.

In support of this argument, AGP cited Exhibit 503, which is a summary of synergy benefits, net costs to achieve prepared by UtiliCorp and SJLP and provided in response to a data request submitted by counsel for AGP. AGP argues that while Exhibit 503 shows a benefit for SJLP's electric customers, it shows annual detriments of \$34,000 for SJLP's steam customers and \$35,000 for its natural gas customers.

Mr. John McKinney, testifying on behalf of UtiliCorp, stated that Exhibit 503 does not support AGP's argument. He indicated that the exhibit only shows a method of allocating the costs and the premiums to the various jurisdictional areas. He also indicated that the methodology that UtiliCorp proposes to use to allocate costs and premiums has changed since exhibit 503 was produced.

Exhibit 503 does not justify a finding that the UtiliCorp/SJLP merger should be blocked. The numbers set forth in Exhibit 503 are only preliminary estimates of how costs and premiums are to be allocated to the various operations of SJLP. Those numbers are not absolute results and may be changed. If those proposed allocations are unfair to SJLP's natural gas and steam customers they certainly can be changed. Indeed, Maurice Brubaker, witness for AGP, suggests that "even if the merger is permitted to go forward and even if the regulatory plan is approved in much the same form as proposed, adjustments to the allocations must be made to ensure that the gas and steam customers do not experience these detriments." Brubaker Rebuttal, Ex. 500, at p. 13. Clearly these proposed allocations can be changed to avoid a detriment to SJLP's gas and steam customers. In any event, UtiliCorp's internal allocation of costs and premiums cannot, by itself, create a detriment to any customer. Such a detriment could only occur if UtiliCorp were to adjust the rates charged to those customers to reflect an unfair allocation of costs and premiums. UtiliCorp cannot change its rates without the approval of the Commission and the Commission will ensure that the rates charged by UtiliCorp to its gas and steam customers are just and reasonable.

**Increased Financial Risk for SJLP Ratepayers:**

Public Counsel points out that SJLP's long-term debt bears a credit rating of A-. On the other hand, UtiliCorp's long-term debt bears a credit rating of BBB. After the merger the credit rating of the combined UtiliCorp/SJLP will likely be the BBB

rating of UtiliCorp. Public Counsel argues that the downgraded credit rating will increase the cost of debt for SJLP's ratepayers above the cost of debt for SJLP absent the merger. Public Counsel argues that this will lead to higher rates for SJLP's ratepayers and constitutes a detriment that should lead to the rejection of the merger.

Public Counsel's argument is not persuasive. First, UtiliCorp's credit rating of BBB, while lower than SJLP's current rating, is still considered to be investment grade. There is no evidence to support that UtiliCorp is financially unstable or that the merger with UtiliCorp will put SJLP's ratepayers at any great risk. Second, no evidence was presented that would quantify the amount that the cost of debt attributable to SJLP would increase because of the merger. Indeed, there is no way to reliably quantify such an amount. Certainly there is no guarantee that SJLP's credit rating would remain at A- if the merger does not proceed. Third, the cost of debt is just one factor the Commission will consider when setting future rates for UtiliCorp's SJLP unit. If the company's cost of debt is unreasonable, appropriate adjustments can be made to protect the ratepayers. Finally, even if it is assumed that the merger will result in an increased cost of debt for SJLP's ratepayers, that fact alone does not require the Commission to reject the merger. The risk of an increased cost of debt is just one more factor for the Commission to weigh when deciding whether or not to approve the merger.

After considering all the evidence and the arguments of the parties, the Commission concludes that the merger between UtiliCorp and SJLP will not be detrimental to the public and should be approved. In addition to approving the merger itself, UtiliCorp and SJLP ask that the Commission approve what they refer to as a Regulatory Plan. The Commission will not do so for reasons fully explained in its Conclusions of Law.

**B. Proposed Conditions on Approval:**

Several parties identified what they believe to be particular problems with the merger as proposed. They ask that various conditions be imposed upon the Commission's approval of the merger so that the alleged problems will not create a detriment to ratepayers. Those various conditions will be addressed in turn.

**Stranded Costs Condition:**

Staff defines stranded costs as those costs presently charged by electric utilities in rates that may not be recoverable when and if electric utilities must set their prices based upon a competitive market. Obviously such a competitive market and resulting stranded costs will not occur unless the Missouri legislature or the United States Congress acts to deregulate the electric industry. Staff does not believe that SJLP is currently facing possible stranded costs because it appears that its electric generating assets are worth more in an unregulated marketplace than under continued regulation. However, Staff is concerned that "if electric restructuring occurs, it is possible that the Joint Applicants in the future may argue that any failure to recover UtiliCorp's valuation of SJLP's assets (i.e., the portion of the acquisition adjustment allocable to generation operations) would constitute a 'stranded cost.'" Oligschlaeger Rebuttal, Ex. 713, at 55. Staff asserts that this possibility constitutes a detriment to the customers of SJLP and asks that the

Commission require that UtiliCorp and SJLP commit not to seek recovery of such stranded costs in any future Missouri regulatory proceeding. Staff further recommends that that UtiliCorp and SJLP be required to commit not to seek or endorse legislation in Missouri that would mandate the recovery of all or a portion of the acquisition adjustment as part of claimed stranded costs.

The Commission will not attempt to impose the condition requested by Staff. If UtiliCorp ever attempts to recover stranded costs for its SJLP unit it will presumably have to do so before the Commission. If it asks for an inappropriate recovery, the Commission will deal with such a request at the time that it is made. Therefore, there is no need to impose a condition that would limit in advance UtiliCorp's ability to make an argument before the Commission.

Staff apparently fears that UtiliCorp will attempt an end-run around the Commission by seeking relief before the legislature. Thus, the second part of Staff's condition would have the Commission attempt to limit UtiliCorp's right to lobby the legislature to enact legislation regarding stranded costs. Staff does not indicate where the Commission would find the authority to forbid a utility from communicating with the legislature. The Commission will not impose the condition requested by Staff.

**Pension Funds Condition:**

Staff recommended that as a condition for approval of the merger, UtiliCorp be required to maintain SJLP's pre-merger pension plan funded status in order to eliminate a significant increase to SJLP's cost of service for pension costs resulting solely from a post-merger decision to combine SJLP's pension assets with those of UtiliCorp. At the hearing it was announced that Staff and UtiliCorp had reached an agreement regarding this issue. UtiliCorp agreed that in post-merger cases involving UtiliCorp's SJLP operating division, UtiliCorp will maintain the pre-merger funded status of the SJLP pension fund by accounting for it separately. UtiliCorp will, however, be allowed to combine the assets. The accounting on a going-forward basis would start with a market value of asset evaluation performed by SJLP's actuarial firm at the time of merger closing. On a going-forward basis the net rate of return (actual earned return income earned on the assets during the year less benefits paid) on the combined pension assets will be used.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Access to Books and Records Condition:**

Public Counsel argues that the proposed merger will result in increased size, scope and complexity of transactions between UtiliCorp and its affiliates. Public Counsel recommends that, as a condition to its approval of the merger, the Commission require UtiliCorp to agree to provide Public Counsel and Staff access to the books, records, employees and officers of all corporate entities for which UtiliCorp or its wholly-owned subsidiaries have an ownership interest of 10 percent or more. UtiliCorp replies that the access sought by Public Counsel is already mandated by Commission rule and that it is not necessary to require it to pledge to comply with a rule that it is already legally obligated to obey.

The Commission has promulgated extensive rules to govern transactions between utilities and their affiliates. For electric utilities that affiliate transaction rule is found at 4 CSR 240-20.015. That rule addresses the concerns raised by Public Counsel. So long as that rule is in effect there is no reason to extract a promise from UtiliCorp that it will comply with the regulation. Its compliance is already expected and required. The affiliate transactions rule has been challenged in court by several utilities, although not by UtiliCorp. If the validity of the rule is upheld, then UtiliCorp will continue to be bound to comply with the rule. If the rule is struck down by a reviewing court, then there is no reason to attempt to force UtiliCorp to continue to comply with a rule that would not apply to any other utility in this state. The requested condition regarding access to books and records will not be imposed.

**Affiliate Transaction Condition:**

Public Counsel proposed that, as a condition to its approval of the merger, the Commission require UtiliCorp to agree to comply with the Commission's affiliate transaction rule. In its initial brief, Public Counsel asks that the Commission state in any order approving the merger that the Commission will "commit to close scrutiny of the merged entity with regard to compliance with the terms of the Commission's affiliate transaction rules." (Initial Brief of the Office of the Public Counsel at p. 41) UtiliCorp replies that it will, of course, comply with all the Commission's regulations and that it should not be required to pledge to do so.

As previously indicated with regard to the books and records condition, there is no reason to extract a promise from UtiliCorp that it will comply with the regulations of the Commission. The Commission will continue to scrutinize UtiliCorp for compliance with the affiliate transaction rules, as it does all other utilities in this state that are required to comply with those rules. The Commission will not impose the requested affiliate transaction condition.

**Income Taxes Condition:**

Staff indicated that neither it nor UtiliCorp expect that the merger transaction will be ruled a taxable event by the Internal Revenue Service (IRS) to SJLP. However, Staff expressed concern that if the IRS were to determine that the merger transaction is a taxable event to SJLP, then SJLP would be required to extinguish its accumulated deferred income taxes, which for ratemaking purposes is treated as a reduction to rate base. This would result in a detriment to SJLP's ratepayers. UtiliCorp agreed that if the merger is determined to be a taxable event and deferred taxes of SJLP are thereby lost, UtiliCorp will include an amount equal to those deferred taxes in future SJLP rate proceedings as an offset to rate base.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Surveillance Condition:**

Surveillance data reporting is a tool that is used by the Commission Staff to closely monitor the finances of public utilities for over-earnings. Staff requested that UtiliCorp be required to submit separate surveillance data reports for UtiliCorp's MPS and SJLP divisions after the merger. UtiliCorp agreed to continue to file separate surveillance reports for UtiliCorp's MPS and SJLP operating divisions following the closing of the merger.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Customer Service Indicators Condition:**

Staff is concerned that the pressures and dislocations associated with the merger might lead to a decrease in the quality of service that UtiliCorp would provide to the former customers of SJLP. In order to protect SJLP's customers, Staff proposed that UtiliCorp be required to adopt several changes to its customer service program. Specifically, Staff asked the Commission to require UtiliCorp to:

1. Continue to track and monitor the level of customer complaints separately for the MPS and SJLP divisions after the merger;
2. Continue a Service Guarantee Program, initiated by SJLP in 1997, by which SJLP credits \$25.00 to a customer's account if it fails to provide specified services within a specified time;
3. Continue SJLP's policy of administering monthly transactional surveys of its customers;
4. Provide monthly reports to Staff regarding Call Center Abandoned Call Rate (ACR), Call Center Average Speed of Answer (ASA), Distribution Reliability Customer Average Interruption Duration (CAIDI), Distribution Reliability System Average Interruption Frequency Index (SAIFI), and Distribution Reliability System Average Interruption Duration Index (SAIDI). Staff also recommends that UtiliCorp be required to provide information regarding staffing level at Customer Call Centers and that UtiliCorp be required to spend reasonable and appropriate amounts within the next year to improve customer service relating to any performance indicator that did not meet expectations;
5. Establish specified objectives that UtiliCorp would be required to meet for its ACR and ASA indicators; and
6. Maintain the SAIFI, SAIDI and CAIDI reliability measures separately for the MPS and SJLP divisions.

UtiliCorp replies to Staff's proposed requirements by pointing out that UtiliCorp has provided quality service in Missouri for more than 80 years. UtiliCorp argues that there is no reason to believe that it will not continue to provide quality service after the merger and that it would be unfair to require it to comply with remedial measures and reporting requirements that are not required of every other utility in Missouri.

As UtiliCorp indicates, it does have a history of providing quality service to its Missouri customers. The evidence presented by Staff indicated that the service provided by UtiliCorp to the customers of its MPS division differed somewhat from that provided by SJLP to its customers. However, that evidence did not show that the customer service currently provided by MPS was substantially inferior to that provided by SJLP. Staff's witness, Deborah Bernsen, conceded that "both compa-

gies are doing a pretty good job in terms of what is coming into our consumer services department for complaints. Both show a trend downward and both figures are relatively – they are reasonable.” The mere fact that UtiliCorp seeks to acquire SJLP does not require that the Commission endeavor to micromanage UtiliCorp’s customers service program by imposing special conditions that are not applicable to the other utilities in this state.

Certainly the Commission expects that its Staff will continue to monitor the level of customer service provided by UtiliCorp in both its MPS and SJLP divisions. If Staff notes problems with the level of service provided by UtiliCorp, it has the responsibility to bring those problems to the attention of the Commission through all appropriate means. However, with one exception, the Commission will not impose the conditions on the merger requested by Staff.

The only customer service condition that the Commission will impose is a requirement that UtiliCorp provide Staff with monthly reports for one year following the merger. It is certainly possible that the merger process could cause disruptions in the level of service that both UtiliCorp and Staff expect to be provided to UtiliCorp’s customers. While Staff could obtain the information it needs to monitor customer service levels by performing repeated audits on UtiliCorp, the regular reporting of information by UtiliCorp is the most efficient and effective method by which Staff can fulfill its responsibility to monitor the quality of service UtiliCorp is providing to its customers.

**Gas Supply RFP Condition:**

Staff asked that the Commission require UtiliCorp to continue to issue requests for proposals (RFPs) for procuring natural gas for resale. Staff explained that an RFP is a document that UtiliCorp or SJLP would send to natural gas suppliers requesting a price quote for gas supply for the MPS division of UtiliCorp or for the SJLP division of UtiliCorp. Staff indicated that both UtiliCorp and SJLP currently issue RFPs. UtiliCorp agreed to issue RFPs for natural gas for resale which include price ceilings, price floors, fixed prices and index pricing and provide documentation of analysis of these bids to Staff as part of its annual ACA audit process.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Gas Peak Load Study Condition:**

Staff asked that UtiliCorp be required to perform a peak design day study to ensure that UtiliCorp has evaluated the newly acquired SJLP system for adequate and reasonable natural gas supply and transportation to meet the heating needs of its SJLP division residential customers and other retail customers. UtiliCorp agreed to conduct a peak design day study of the SJLP natural gas distribution system to be completed 90 days after the effective date of the Commission’s Report and Order approving the merger of UtiliCorp and SJLP, subject to data availability.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Market Power Conditions:**

Several parties expressed concerns about whether the merger would result in UtiliCorp acquiring greater horizontal or vertical retail market power. Before this issue can be discussed, it is important to understand the meanings of the terms, horizontal and vertical market power. The testimony of Ryan Kind, Public Counsel's witness, presents definitions of these terms developed by this Commission's Education Working Group to the Task Force on Retail Electric Competition, established in Case No. EW-97-245. Those definitions are as follows:

*Market Power* is the ability of a firm, alone or in concert with other firms to profitably maintain the price of a product above the competitive market level for an extended period of time. Suppliers with vertical or horizontal market power could charge unfair prices and realize excessive profits.

*Vertical* market power involves the ability of a firm to control an essential element in the vertical production chain and, through that control, cause competitors to be at a disadvantage through either restricted access or higher costs for the products or services required to produce and deliver the specific product.

*Horizontal* market power exists when a single firm or small group of firms have the ability to affect the price of a product. In the case of a single firm, horizontal market power is present when a firm dominates a market where entry barriers protect it from competition. In the case of a small group of firms, horizontal market power can occur through explicit collusive behavior or through strategies that jointly maximize the self-interest of each of the firms.

Kind Rebuttal, Ex. 201, p. 40-41

Staff, Public Counsel, AGP, and Springfield argue that the merger will permit UtiliCorp to exercise greater vertical and horizontal retail<sup>1</sup> market power to the possible future detriment of the public.<sup>2</sup> In order to deal with these possible detriments, various parties asked the Commission to impose various conditions on its approval of the merger.

1. Staff proposed that UtiliCorp and SJLP be required to join the same regional transmission entity that meets the eleven ISO principles enumerated in FERC Order No. 888 before the October 15, 2000 deadline imposed by FERC Order No. 2000. UtiliCorp replied that it would meet the FERC deadline for joining a regional transmission entity and indicated that it did not believe that it should be required to announce its intentions any sooner than any other utility. It is unclear

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<sup>1</sup> The merger may also affect wholesale market power. However, wholesale market power is an area that is subject to regulation by FERC and will not be addressed in this Report and Order.

<sup>2</sup> Retail market power could become a detriment only if retail electric competition is authorized in Missouri. Currently SJLP and UtiliCorp are subject to cost-based regulation and that status will continue after the merger.

as to whether Staff meant that UtiliCorp and SJLP should join the same regional transmission entity before the deadline or simply that it should be required to comply with the deadline. However, the deadline is now past and this proposed condition is moot.

2. Staff is concerned that harmful horizontal market power could develop in load pockets following the advent of retail electric competition. Load pockets are geographic areas within the service territories where the transmission system will not allow competitive generation to provide services to a significant percentage of end-use customer loads on a year-round basis. Staff proposed that UtiliCorp should be required to agree to submit a study showing what percentage of load can be served from competitive generation sources throughout their merged service territory. Staff would require UtiliCorp to prepare and present this study at the time that retail competition is approved in Missouri. UtiliCorp replied that it would be willing to perform such a study if ordered to do so at the time that retail electric competition is instituted but that it should not be ordered to perform such a study at this time.

Staff and other parties request that the Commission order UtiliCorp to perform market power studies at some future time when retail electric competition may become a reality in Missouri. However, no one can possibly know when, or if that competition will arrive. Neither can anyone predict what form that competition may take. None of the parties have provided a satisfactory explanation of why the Commission should order the completion of these studies now, in this Report and Order, rather than waiting until the circumstances of retail electric competition become more clear. Under these circumstances the Commission will not impose the condition sought by Staff. If, at the time that retail electric competition becomes a reality, it finds that a market power study is needed, the Commission will exercise its authority to order the completion of any needed studies.

3. Public Counsel suggests that UtiliCorp should be compelled to agree to the same market power conditions that were approved by the Commission in the KCPL/Western Resources merger case, Case No. EM-97-515. Those conditions would require UtiliCorp to do the following:

- a. Agree to perform a horizontal market power study that meets specified conditions. The market power study would be performed at the time that retail electric competition is commenced in Missouri;
- b. Address vertical market power concerns by agreeing to become a member of a Regional Transmission Organization;
- c. Agree to various restrictions on its retail market power including restrictions on the use of the name of SJLP for marketing of unregulated products and services provided by UtiliCorp or its affiliates; and
- d. Agree that it will not propose or otherwise support legislation in Missouri designed to prohibit or substantially limit the Commission from addressing market power issues.

UtiliCorp replies that the KCPL/Western Resources merger was a different case with different circumstances and there is no reason to impose those conditions upon UtiliCorp in this merger case.

The KCPL/Western Resources merger was a very different case from this merger. The primary difference is that the earlier merger was resolved through the

filing of a stipulation and agreement. That means that the merging parties agreed to the imposition of those conditions. The lack of agreement in this case most clearly impacts the proposed condition that would limit UtiliCorp's right to propose or support legislation. While a party can certainly agree not to propose or support certain legislation it is not clear that the Commission has the authority to order a utility to refrain from exercising its right to petition the legislature.

With regard to the other proposed conditions, the Commission has previously indicated that it will not now order the performance of market power studies. UtiliCorp is already obligated to become a member of an RTO by FERC order 2000. Finally, any necessary restrictions on UtiliCorp's retail market power may be imposed at such time as it is no longer subject to cost-based regulation. Public Counsel's proposed conditions will not be imposed upon UtiliCorp.

4. Springfield argued that the merger of SJLP and UtiliCorp would create a detriment to the public in that it would give the resulting entity the opportunity, ability and incentive to utilize scarce electrical transmission resources for its own use, leaving other utilities no economic alternatives for delivery of needed power supplies. Springfield suggests several conditions that should be imposed to avoid these detriments. Those conditions are closely related to Springfield's concerns about transmission access and reliability and will be discussed along with those issues in the Conclusions of Law.

**Load Research Condition:**

Staff raised an issue regarding the Load Research programs maintained by UtiliCorp and SJLP. Load Research refers to a program designed to provide hourly electric load data for use in calculating hourly class loads. A load research program helps the utility understand how its customers use energy. The cost of generating electricity varies by the hour or even shorter intervals. However, electrical use for most customers is measured by the month because monthly data is used for billing. A load research program permits the utility to more closely measure how certain classes of customers actually use electricity during the month and during the day so that appropriate rates can be established.

Staff is pleased with SJLP's current load research program and is less pleased with UtiliCorp's current load research program for its MPS division. Staff would like to see MPS's program brought up to the level of SJLP's program and to that end has proposed that UtiliCorp be required to agree to:

1. continue to treat the SJLP service territory separately from the MPS service territory for load research purposes;
2. maintain SJLP's load research program at its current standard of timeliness and quality;
3. provide hourly class load data, selected individual customer hourly load research data for the SJLP service territory and the checks and balances performed on that data to the Staff on an on-going basis;
4. improve MPS' current load research program to match the current SJLP standard of timeliness and quality; and
5. provide hourly class load data, selected individual customer hourly load research data and checks and balances performed on that data for the MPS service territory to the Staff on an on-going basis.

UtiliCorp replied that it does intend to treat MPS and SJLP separately for load research purposes for as long as they have separate rate structures. UtiliCorp agrees that SJLP currently has an excellent load research program. UtiliCorp also indicates that it is taking steps to improve the load research program for MPS. However, UtiliCorp disagrees with Staff's other proposed conditions regarding its load research program. UtiliCorp argues that it would be unfair to hold its load research program to a higher standard than is applied to other similar utilities. UtiliCorp suggests that if Staff believes that higher standards are needed it should determine those standards through consultation with the industry as a whole. UtiliCorp also argues that it should not be required to periodically report its research data to Staff because such a requirement would be unnecessarily costly.

The Commission expects that UtiliCorp will continue to provide high quality load research for both its SJLP and MPS divisions. While Staff indicates that SJLP's load research program is superior to that of UtiliCorp, it did not present any evidence to indicate that UtiliCorp's current program, or the program it plans to use after the merger, fails to comply with any statute, regulation or industry standard. The Commission will not attempt to micromanage UtiliCorp's business by ordering that it hire a certain number of workers for its load research program. Neither will it attempt to establish any firm standards for UtiliCorp to meet. If Staff believes that such standards are necessary, it should use the rulemaking process to establish those standards for all similarly situated utilities. UtiliCorp will not be singled out for special scrutiny. For these reasons, the Load Research Conditions suggested by Staff will not be imposed upon UtiliCorp.

**Tariff Conditions:**

Staff recommends that if the merger is approved, rather than filing entirely new tariffs for its SJLP unit, UtiliCorp should file an adoption notice adopting the tariffs on file for SJLP. UtiliCorp agreed that after the closing of the merger it would file with the Commission an adoption notice in SJLP's electric, gas, and steam tariffs containing language similar to that found at page 3 of the rebuttal testimony of Daniel I. Beck.

There is no dispute between the parties and Staff does not ask the Commission to actually order UtiliCorp to make any specific changes to its tariffs. Daniel Beck's testimony instead indicates that while UtiliCorp could file a new set of tariffs it would be more efficient to file an adoption notice. Since no specific condition has been requested and there is no dispute between the parties, no such condition will be ordered.

**Gas Safety Program Condition:**

Staff asked that UtiliCorp be required to continue a five-year natural gas yard line replacement program to which SJLP and Staff agreed in 1999. SJLP agreed to replace 162 yard lines by January 1, 2005. UtiliCorp indicated that after the closing of the merger, it will complete the agreed upon yard line replacement program.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Fuel Energy Cost Information Condition:**

Staff and UtiliCorp agreed that after the closing of the merger, UtiliCorp will provide historical actual hourly generation, energy purchases and sales data, and other information required by Commission Rule 4 CSR 240-20.080 in electronic format accessible by a spreadsheet program for both the MPS and SJLP units of UtiliCorp. UtiliCorp will also provide access to such additional documents as may be necessary for the Staff to analyze fuel and energy costs.

Given the agreement of the parties, the Commission will impose the agreed upon condition.

**Energy Conditions:**

The Missouri Department of Natural Resources alleged that the merger between UtiliCorp and SJLP would result in disproportionate harm to the low-income customers of UtiliCorp and SJLP. MDNR proposed that the Commission impose numerous conditions upon the merger in order to alleviate that alleged harm. MDNR proposed that UtiliCorp be required to:

1. Enter into a partnership with MDNR and other interested parties to market and leverage funds for the development of energy efficiency programs;
2. Develop or retain low-income service packages to meet customer needs, reduce energy costs and provide a return to UtiliCorp;
3. Offer additional renewable energy options to Missouri customers;
4. Target outreach to customers that are income eligible and encourage them to take advantage of the opportunity to reduce energy consumption and to improve home affordability;
5. Amend the cooperative agreement between UtiliCorp and Kansas City, Missouri to permit averaging unit cost within the agreement to maximize the opportunity to assist customers;
6. Eliminate tying the dollar amount to specific measures to maximize the energy conservation measures installed in each home and shall permit any energy efficient measure that is deemed cost-effective as a result of computer analysis, as stated in the agreement between UtiliCorp and Kansas City, Missouri;
7. Permit energy-efficiency assistance to all eligible households and allow funds to be spent on non-electric appliances;
8. Implement a 25-site Benefit Outreach and Screening Software (BOSS) pilot project, and expand the program, as appropriate, if found to successfully deliver benefits to low-income customers;
9. Implement a base load and space heating electric energy efficiency program directed toward high use payment-troubled, low-income customers.
10. Implement a pilot solar energy program directed toward high use low-income customers;
11. Implement a periodic survey process through which the merged company will take pro-active efforts to identify which of its payment-troubled customers represent low-income households;
12. Implement an Outcome-based Performance Reporting System (OPRS) through which the customer service outcomes to low-income customers can be systematically tracked over time.

UtiliCorp replied that it opposed making acceptance of any of MDNR's proposals a condition upon approval of the merger. UtiliCorp indicated that it is willing to discuss with MDNR and other parties options for additional or different types of programs related to energy and low-income weatherization or assistance as long as discussions also involve methods of recovery of increased costs for these programs. UtiliCorp indicated that it intends to continue to participate in low-income and energy efficiency programs and supports a number of them currently through funding and other measures.

MDNR argues that the Commission must impose the conditions it has listed in order to avoid possible detriment to UtiliCorp's low-income customers. MDNR suggests that the Commission must "define the markets that will be affected by the merger" and then "determine whether the benefits of the merger are appropriately 'passed-on' within each market." (Initial Brief of Missouri Department of Natural Resources at p. 1) MDNR argues that the low-income customers currently served by SJLP and UtiliCorp are a separate market that will be harmed because the benefits of the merger will not be fairly passed on to them.

MDNR's framework for analyzing this merger is based on that used by Federal Courts in evaluating mergers under federal anti-trust laws. Obviously, this is not an anti-trust case and this Commission is not obligated to follow federal precedent established for the application of anti-trust laws. Nevertheless, the Commission agrees that it should consider the possible impact of the merger on all the customers of SJLP and UtiliCorp when making its determination of whether or not the proposed merger is detrimental to the public. However, it is not clear that low-income customers can properly be considered as a separate class when considering the impact of the merger.

Low-income customers have not previously been accorded status as a separate class of consumer when utility rates are designed. Standard rate design treatment attempts to match revenue requirement determination with cost causation by class. In other words, the class of consumers that causes a cost to a utility should be required to pay those costs through rates. The evidence presented by MDNR suggests that low-income consumers have special problems that UtiliCorp should address through additional programs. Those programs of course bear a cost. Thus, if the Commission were to require UtiliCorp to institute costly new programs to better serve its low-income consumers, without subsidization from other classes of consumers, it might be necessary to increase the rates charged to the class of low-income consumers in order to pay for those programs. Obviously, such a result would not be practical or desirable from the standpoint of the low-income consumers. But neither would it be fair and reasonable for the Commission to order UtiliCorp to institute such programs without giving it an opportunity to recover the cost of those programs through rates. As previously indicated, this case is not about establishing rates. It is not about adjusting UtiliCorp's class cost of service.

MDNR suggests that such programs could be paid for through the passing on of the synergy benefits of the merger to the consumers. However, absent a rate or complaint case, UtiliCorp is under no obligation to pass any merger savings on to consumers. MDNR's proposed conditions will not be imposed upon UtiliCorp. MDNR also argues that the Commission should impose conditions on the merger

to require UtiliCorp to institute additional energy efficiency programs. It suggests that the flow of money out of Missouri to pay for non-renewable sources of energy is a detriment to the public and suggests that UtiliCorp be required to make a commitment to renewable energy sources. While the increased use of renewable energy may be a laudable goal, MDNR has not made any showing that would link renewable energy to this merger. The fact that UtiliCorp is seeking to merge with SJLP will not increase the reliance of the resulting company on non-renewable energy. There is no evidence that this merger will cause any detriment with regard to the use of renewable energy sources and MDNR's proposed conditions will not be imposed upon UtiliCorp.

**Public Counsel's Regulatory Plan Condition:**

Public Counsel proposes that the Commission adopt an alternative to the regulatory plan proposed by UtiliCorp. Public Counsel suggests that UtiliCorp should be required to file a rate case for each of its Missouri operating divisions within one year of the approval of both the merger between UtiliCorp and SJLP and the merger between UtiliCorp and Empire. UtiliCorp opposed this condition.

Public Counsel's proposed condition is unnecessary. UtiliCorp can decide for itself when it wishes to propose rate adjustments for its Missouri operations. If Public Counsel believes that UtiliCorp is over-earning, it is free to bring an appropriate complaint. The Commission will not upset that balance by arbitrarily ordering UtiliCorp to institute a rate case at a particular time.

**CONCLUSIONS OF LAW**

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

**A. Requirements for Approval of the Merger:**

UtiliCorp and SJLP have asked the Commission to approve their merger pursuant to the provisions of Section 393.190.1, RSMo 1994.<sup>3</sup> In interpreting the requirements of this statute, the Commission and the courts that have reviewed its decisions, have consistently held that a proposed utility merger must be approved if such approval is in the public interest. This does not mean that the public must receive a benefit from the proposed merger. Instead, the Missouri Supreme Court has established a standard that holds that the requirement that the merger be "in the public interest" can mean no more than that the merger is "not detrimental

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<sup>3</sup> Section 393.190.1, RSMo 1994 provides in relevant part as follows:

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 any 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.

to the public.” State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). Therefore, the Commission is required to approve this merger if it can be shown that the merger will not be not detrimental to the public.

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

#### **B. Burden of Proof:**

Who then has the burden of proving that this merger is not detrimental to the public? The Missouri Supreme Court has stated that “the relevant inquiry in determining which party has the burden of proof is to identify who, as is disclosed from the pleadings, asserts the affirmative of an issue. Generally that party has the burden of proof.” Anchor Centre Partners, Ltd. V. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. banc 1991); see also Dycus v. Cross, 869 S.W.2d 745 (Mo. banc 1994). The joint applicants, UtiliCorp and SJLP, are asserting that their merger will not be detrimental to the public. Therefore, they have the burden of proving that assertion. However, simply assigning the general burden of proof on UtiliCorp and SJLP does not resolve all questions about burden of proof.

UtiliCorp and SJLP must prove that their proposed merger is not detrimental to the public. However, other parties have asserted that the merger is detrimental in one or more specific areas. It is not enough for a party to assert that a detriment exists and demand that UtiliCorp and SJLP prove them wrong.

While the burden of proof never shifts throughout a trial, the burden of going forward with evidence may shift if a prima facie case is made. Anchor Centre Partners at 30. Therefore, the parties asserting that the merger is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions.

#### **C. The Regulatory Plan:**

UtiliCorp summarizes its proposed regulatory plan as follows:

1. Upon the closing of the merger, a five-year rate moratorium for the SJLP operating division will be put in place (Rate Freeze);
2. During the fifth year of the rate moratorium, UtiliCorp will initiate general rate cases for the retail electric, gas and steam operations of the SJLP division with the new rates to take effect at the conclusion of the moratorium. The rate filings will include an accounting of the merger synergies realized during the moratorium period and the balance of the acquisition premium yet to be recovered (5th year rate case);
3. In the rate cases and for ratemaking purposes, fifty percent (50%) of the

unamortized balance of the acquisition premium paid by UtiliCorp for SJLP will be included in the rate bases of the SJLP division's retail electric, gas and steam operations and the annual amortization of the acquisition premium will be included in the expenses allowed for recovery in cost of service, provided that UtiliCorp proves to the Commission that merger synergies are at least equal to 50% of the premium costs and other costs to achieve the synergies. The return allowed on this premium, for the recovery period, will be based on the capital structure of sixty percent (60%) debt and forty percent (40%) equity (Partial Recovery of Premium in Rates);

4. The balance of the retail electric, gas and steam rate bases will be allowed a return based upon a SJLP division capital structure of forty-seven percent (47%) debt and fifty-three (53%) equity for the period covered by the Regulatory Plan which approximates the capital structure recommended by the Staff in SJLP's last rate case (frozen capital structure);

5. The allocation of UtiliCorp's corporate and intra-business unit costs to UtiliCorp's MPS division shall exclude for ratemaking purposes the SJLP factors from the methodology for the period covered by the Regulatory Plan (MPS Allocations).

UtiliCorp asserts that approval of this regulatory plan is necessary to allow its shareholders the opportunity to recover the \$270 million dollar investment required to acquire the ownership of SJLP. Every element of the regulatory plan drew sharp opposition from the other parties.

**The Five-Year Rate Moratorium:**

UtiliCorp proposed that after completion of the merger, the rates for the SJLP division would be frozen for a period of five years. UtiliCorp would be bound to not request a rate increase during those five years barring certain unforeseen catastrophic circumstances that might justify a rate increase. In return, UtiliCorp asks that the Commission order that its rates not be decreased during the same five years. Such a rate freeze would allow UtiliCorp to recover at least a portion of its investment through the effect of regulatory lag. In other words, UtiliCorp anticipates that its cost of service will go down because of the savings resulting from the merger. It wants assurance that the Commission will not reduce its rates until it has had a chance to benefit from that decreased cost of service.

The Commission has approved a rate freeze as part of other merger cases. However, in each case the rate freeze was a part of a stipulation and agreement submitted for the Commission's approval by all the parties. In this case, UtiliCorp is asking that the Commission impose a rate freeze on unwilling parties. For a number of reasons, UtiliCorp's request cannot be granted.

First, the imposition of a five-year rate freeze would be contrary to the Commission's statutory obligation to provide continuous regulation of the public utilities of this state. In describing the authority and responsibility of the Public Service Commission, the Missouri Supreme Court has stated that the Commission is:

a fact finding body, exclusively entrusted and charged by the legislature to deal with and determine the specialized problems arising out of the operation of public utilities. . . . 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.

State ex rel. Chicago, R. I. & P. R. Co. v. Public Service Commission, 312 S.W.2d 791, 796 (Mo. 1958). In rejecting a proposed stipulation and agreement that would have limited the Commission's ability to entertain complaints against a Missouri utility, the Commission stated as follows:

The Commission cannot agree to relinquish its statutory duties as proposed by the parties. The Commission is essentially a creation of the Legislature and, as such, is empowered by statute to carry out certain functions. Among the various statutory responsibilities incumbent on the Commission to perform are the setting of rates (Section 393.150, RSMo), the provision of safe and adequate service (Section 393.130, RSMo), the proper litigation of complaints (Section 386.400, RSMo) and other general powers (Section 393.150). The Commission cannot proceed in a manner contrary to the terms of a statute and may not follow a practice which results in nullifying the express will of the Legislature.

Public Counsel v. Missouri Gas Energy 6 Mo. P.S.C. 3d 464, 465 (1997). The views expressed by the Commission in that earlier case are still appropriate. Imposition of a five-year rate freeze would purport to deprive the Commission of the legislatively imposed duty to adjust UtiliCorp's rates to meet changing conditions. The Commission will not agree to relinquish its statutory duties.

Second, even if the Commission were willing to agree to a five-year rate moratorium, it is apparent that such a rate moratorium could not be effective to actually freeze UtiliCorp's rates. Section 386.390.1, RSMo, 1996, permits the Commission, the Office of the Public Counsel, municipal and county officials, or a group of not less than twenty-five ratepayers, to bring a complaint before the Commission seeking to challenge the reasonableness of the rates charged by an electrical corporation. The Commission clearly cannot prevent the Office of the Public Counsel, municipal or county officials or qualifying groups of ratepayers from bringing a rate complaint against UtiliCorp within the proposed five-year moratorium. John McKinney, testifying on behalf of UtiliCorp acknowledged as much, but he asked that the Commission bar its Staff from participating in or assisting in any complaint brought by another party. Further, he asked that the Commission not "entertain an earnings investigation on the company during the five-year period." Essentially then, UtiliCorp would have the Commission go through the motions of providing a fair hearing for a rate complaint brought during the five-year rate

moratorium, but it would expect the Commission to have prejudged that complaint in favor of UtiliCorp. Obviously, such a practice would be both illegal and unethical.

The Commission cannot prevent appropriate parties from bringing a rate complaint during the five-year rate moratorium, nor can it prevent UtiliCorp or even a future Commission from violating such a moratorium. In a 1975 case, State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. banc. 1975) the Missouri Supreme Court reversed a circuit court decision that would have prevented the Commission from granting a rate increase during a two-year moratorium established by the Commission in a previous rate case. The court held that "to rule otherwise would make section 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers." Jackson County at 29-30. Therefore, UtiliCorp would be free to seek increased rates and the Commission would be free to establish revised rates despite the existence of a moratorium.

Third, even if all the legal barriers to an effective rate moratorium could be surmounted, a five-year rate moratorium would not be good public policy either from the perspective of UtiliCorp or its ratepayers. Robert K. Green, President and Chief Operating Officer of UtiliCorp, testified that the electric utility marketplace has seen "phenomenal change" since he became president of UtiliCorp in 1996. Certainly there is no reason to believe that the pace of change will diminish in the next five years. The cost of fuel might fluctuated significantly, plans for possible deregulation of the electric industry are under consideration in the legislature and there is always the possibility of an unforeseen event such as the June, 2000 unplanned outage at SJLP's Lake Road generating plant. Attempting to lock in a rate now to remain in effect until 2006 simply is not fair to either UtiliCorp or its ratepayers and is not good public policy.

**Other Aspects of the Regulatory Plan:**

In addition to the proposed five-year rate freeze, UtiliCorp's proposed regulatory plan would have the Commission establish, in this case, several facts that would be used to establish UtiliCorp's rates in a post-moratorium rate case. In particular, UtiliCorp would have the Commission decree that for the post-moratorium rate case, it would utilize a hypothetical capital structure for the SJLP unit based on a capital structure of fifty-three percent equity and forty-seven percent long-term debt. Such a capital structure would be similar to the hypothetical capital structure that Staff proposed for SJLP in its most recent rate case.

UtiliCorp utilizes a more highly leveraged capital structure closer to forty percent equity and sixty percent debt. UtiliCorp's preference for a capital structure more reliant on long-term debt enables it to acquire capital at the relatively low rates that are available for debt financing, rather than the relatively high rates that are required for equity financing. By utilizing, for ratemaking purposes, a hypothetical capital structure that overstates the use of equity financing, UtiliCorp would receive a higher rate than it would otherwise receive and thus would be able to recover a portion of the acquisition premium. UtiliCorp argues that because SJLP's capital structure probably would not change absent the merger, the use of a hypothetical capital structure would merely maintain the status quo for SJLP's ratepayers and thus would not be a detriment to them.

Similarly, UtiliCorp asks the Commission to declare that in post-moratorium rate cases the allocation of UtiliCorp's corporate and intra-business unit costs to UtiliCorp's MPS operating division would exclude the SJLP factors. Thus, UtiliCorp asks the Commission to ignore the effect that the addition of the SJLP division to UtiliCorp would have on the costs allocated to MPS. The fact that the SJLP division had been added to the UtiliCorp corporate structure would tend to reduce the amount of corporate and intra-business unit costs that would be allocated to each of UtiliCorp's operating divisions. By ignoring the addition of the SJLP division, UtiliCorp's plan would have the effect of preventing a decrease in the MPS division's cost of service and would keep the rates paid by MPS's ratepayers somewhat higher than they might otherwise be if the addition of the SJLP division were allowed to be included. UtiliCorp argues that such a result is fair because those corporate allocations will not be reduced if the merger is not completed.

In addition, UtiliCorp asks the Commission to determine that it will be allowed to recover transaction costs and costs to achieve associated with the merger. Again, UtiliCorp argues that such costs are part of the costs that must be incurred to achieve the savings that will result from the merger.

Essentially, in each matter, UtiliCorp asks the Commission to state now how it will rule on certain issues in future rate cases. The Commission will not do so. Section 393.270.4, RSMo 1994 provides that when the Commission determines the rate that can be charged by a utility, it "may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies." The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid single-issue ratemaking, the Commission has avoided making decisions about rate case matters outside of the context of a rate case. In fact, the Commission typically includes language in non-ratemaking cases that specifically provides that the ratemaking treatment to be afforded a transaction will be considered in a later proceeding. The ratemaking factors that UtiliCorp asks the Commission to decide in this case can only be properly considered within the context of all relevant factors in a subsequent rate case. The Commission will not engage in single-issue ratemaking and will decline UtiliCorp's invitation to prejudge certain factors that can only be properly considered in a future rate case.

**Recovery of the Acquisition Premium:**

UtiliCorp's shareholders agreed to pay \$23 per share to acquire SJLP's stock. That purchase price is approximately 36 percent above the trading value of SJLP's stock just before the merger was announced. Thus, UtiliCorp's offer creates an acquisition premium of an estimated \$92 million. UtiliCorp's proposed regulatory plan asks 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 proposes that this recovery would be contingent upon UtiliCorp proving to the Commission that merger synergies are equal to fifty percent of the premium costs and other costs to achieve the synergies. In other words, UtiliCorp asks 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.

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

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

**D. Transmission Access and Reliability Conditions:**

Springfield raised numerous issues regarding the possible effects that the merger would have on the transmission of electricity within and between the service territories of UtiliCorp's MPS division and SJLP, and on the transmission of electricity destined to other electric service providers, such as Springfield. Springfield presented expert testimony that purported to show that the merger and the ensuing joint dispatch of the electricity resources of the merged companies could have negative effects upon the flow of electricity on the transmission system of the combined company and surrounding electric service providers. Springfield proposed several conditions that would require UtiliCorp to further study the flow of electricity and would require UtiliCorp to take steps to correct any problems identified by those studies. UtiliCorp replied that the FERC has exclusive jurisdiction over these issues and that they should not be addressed by this Commission.

The question of whether the Commission has jurisdiction over the transmission access and reliability issues raised by Springfield is answered through a review of applicable federal law. In 1935, Congress passed the Federal Power Act,

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<sup>4</sup> "Vertically integrated utilities use their own facilities to generate, transmit, and distribute electricity to their customers. Traditionally the customer paid one combined rate for both the power and its delivery, thus the industry refers to such sales as 'bundled.'" Transmission Access Policy Study Group v. F.E.R.C., 225 F3d 667, 691 (D.C. Cir. 2000)

which created Federal jurisdiction over the “transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.” 16 U.S.C. §824(a) That act also provides that the various states retain jurisdiction over “facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.” 16 U.S.C. §824(b) In 1996 the FERC issued Order No. 888, which interprets the Federal Power Act as leaving regulation of only bundled retail transmissions<sup>4</sup> to the various states. FERC’s order asserts federal jurisdiction over all unbundled retail transmissions as well as wholesale transmissions. The FERC, in Order No. 888, adopted a seven factor test to determine whether the activities of the facility in question are used for local distribution and thus are subject to state jurisdiction. That seven factor test is as follows:

- (1) Local distribution facilities are normally in close proximity to retail customers.
- (2) Local distribution facilities are primarily radial in character.
- (3) Power flows into local distribution systems; it rarely, if ever, flows out.
- (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market.
- (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
- (7) Local distribution systems will be of reduced voltage.

FERC’s interpretation of the Federal Power Act was recently upheld by the United States Court of Appeals for the District of Columbia Circuit in Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667 (DC Cir. 2000).

If FERC’s seven factor test is applied to the issues raised by Springfield, it is apparent that Springfield’s concerns do not relate to unbundled retail transmissions as they are defined by the FERC. Springfield’s fundamental concern is that the merger will disrupt the flow of wholesale power that it receives through the service territories of UtiliCorp and SJLP. The Commission will not attempt to determine the validity of Springfield’s concerns and will instead defer to the jurisdiction of the FERC.

Springfield’s issues regarding transmission access and reliability concern the transmission of power across service territories for purpose of wholesale deliveries. They are properly regulated by the FERC and are not subject to regulation by this Commission. For that reason the conditions proposed by Springfield regarding transmission access and reliability will not be imposed.

#### **E Jurisdiction**

UtiliCorp is an “electrical corporation,” a “gas corporation” and a public utility as those terms are defined in Section 386.020, RSMo Supp. 1999, and is subject to the jurisdiction of the Commission pursuant to Section 386.250, RSMo Supp. 1999. SJLP is an “electrical corporation,” a “gas corporation, a “heating company” and a “public utility as those terms are defined in Section 386.020, RSMo Supp. 1999, and is subject to the jurisdiction of the Commission pursuant to Section 386.250, RSMo Supp. 1999.

Based upon the Commission's review of the applicable law and its findings of fact, the Commission concludes that the proposed merger between UtiliCorp and SJLP is in the public interest because it is not detrimental to the public.

*IT IS THEREFORE ORDERED:*

1. That St. Joseph Light & Power Company is authorized to merge with and into UtiliCorp United Inc. with UtiliCorp United Inc. being the surviving corporation, and to otherwise accomplish the merger, all as more particularly described in and pursuant to the terms of the Agreement and Plan of Merger.

2. That St. Joseph Light & Power Company is authorized, through the merger, to transfer to UtiliCorp United Inc. all the properties, rights, privileges, immunities and obligations of St. Joseph Light & Power Company, including, but not limited to, those under St. Joseph Light & Power Company's certificates of public convenience and necessity, works, systems and franchises, and all securities, evidences of indebtedness and guarantees, effective as of the date of the closing of the merger.

3. That UtiliCorp United Inc. is authorized to acquire and assume the stocks and bonds, other indebtedness and other obligations of St. Joseph Light & Power Company, all as more particularly described in and pursuant to the terms of the Agreement and Plan of Merger.

4. That St. Joseph Light & Power Company and UtiliCorp United Inc. are authorized to perform in accordance with the terms of the Agreement and Plan of Merger.

5. That St. Joseph Light & Power Company is authorized to terminate its responsibilities as a public utility in the State of Missouri as of the effective date of the merger.

6. That UtiliCorp United Inc., the surviving corporation, is authorized to provide electric, natural gas and industrial steam service in the current service territories of St. Joseph Light & Power Company in accordance with the rules, regulations, rates and tariffs of St. Joseph Light & Power Company as may be on file with and approved by the Commission as of the effective date of the merger, except as otherwise provided for herein or as otherwise ordered by the Commission. Further that the transfer of all St. Joseph Light & Power Company's customers to UtiliCorp United Inc. is authorized as contemplated by Section 393.106, RSMo 1994.

7. That the Regulatory Plan proposed by UtiliCorp United Inc. is rejected.

8. That St. Joseph Light & Power Company and UtiliCorp United Inc. are authorized to enter into, execute and perform in accordance with the terms of all other documents and to take any and all actions which may be reasonably necessary and incidental to the performance of the Agreement and Plan of Merger.

9. That the Commission's approval of the merger of St. Joseph Light & Power Company with and into UtiliCorp United Inc. is subject to UtiliCorp United Inc.'s agreement to the following conditions:

a. That in post-merger cases involving UtiliCorp United Inc.'s St. Joseph Light & Power Company operating division, UtiliCorp United Inc. will maintain the pre-merger funded status of the St. Joseph Light & Power Company pension fund by accounting for it separately.

b. That if the merger is determined to be a taxable event and deferred taxes of St. Joseph Light & Power Company are thereby lost, UtiliCorp United Inc. shall include an amount equal to those deferred taxes in future rate proceedings for its St. Joseph Light & Power Company operating division as an offset to rate base.

c. That UtiliCorp United Inc. shall continue to file separate surveillance reports for its Missouri Public Service and St. Joseph Light & Power Company operating divisions following the closing of the merger.

d. That for one year following the closing of the merger, UtiliCorp United Inc. shall provide the Staff of the Commission with monthly reports regarding Call Center Abandoned Call Rate (ACR), Call Center Average Speed of Answer (ASA), Distribution Reliability Customer Average Interruption Duration (CAIDI), Distribution Reliability System Average Interruption Frequency Index (SAIFI), and Distribution Reliability System Average Interruption Duration Index (SAIDI).

e. That UtiliCorp United Inc. shall issue Requests for Proposals (RFPs) for natural gas for resale which include price ceilings, price floors, fixed prices and index pricing and provide documentation of analysis of these bids to the Staff of the Commission as part of its annual ACA audit process.

f. That UtiliCorp United Inc. shall conduct a peak design day study of the St. Joseph Light & Power Company natural gas distribution system to be completed and provided to Staff 90 days after the effective date of this report and order.

g. That UtiliCorp United Inc. shall, after the closing of the merger, complete the five-year natural gas yard line replacement program to which St. Joseph Light & Power Company and the Staff of the Commission agreed in 1999.

h. That UtiliCorp United Inc. shall provide historical actual hourly generation, energy purchases and sales data, and other information required by Commission Rule 4 CSR 240-20.080 in electronic format accessible by a spreadsheet program for both the Missouri Public Service and St. Joseph Light & Power Company operating divisions of UtiliCorp United Inc. UtiliCorp United Inc. shall also provide access to such additional documents as may be necessary for the Staff of the Commission to analyze fuel and energy costs.

10. That any evidence the admission of which was not expressly ruled upon is admitted into evidence.

11. That any objection that was not expressly ruled upon is overruled.

12. That any motions not expressly ruled upon are denied.

13. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions herein involved.

14. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

15. That this Report and Order shall become effective on December 24, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the Matter of the Application of St. Joseph Light & Power  
Company for the Issuance of an Accounting Authority Order  
Relating to its Electrical Operations.**

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*Case No. EO-2000-845  
Decided December 14, 2000*

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**Accounting §4.** Section 393.140(4), RSMo 1996, authorizes the Commission to prescribe a uniform method of keeping accounts for electric utilities subject to Commission jurisdiction.

**Accounting §4.** In 4 CSR 240-20.030, the Commission directs that electric utilities are to keep all accounts in conformity with the Uniform System of Accounts (USOA) Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act, as prescribed by the Federal Energy Regulatory Commission.

**Accounting §4.** Section 393.140(8), RSMo 1996, grants the Commission the power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

**Accounting §42. Electric §43.** The test that the Commission has used for determining whether or not to grant an accounting authority order is whether the expense to be deferred is "extraordinary, unusual and unique and not recurring".

**Accounting §42. Electric §43.** The Commission denied an electric utilities' request for an accounting authority order to allow it to defer incremental costs incurred as a result of an explosion and outage at a generating plant because there was no reason why the expenses to be deferred could not be immediately included for recovery in a rate case.

APPEARANCES:

*Gary W. Duffy*, Attorney at Law, P.O. Box 456, Jefferson City, Missouri 65102, for St. Joseph Light & Power Company.

*Stuart W. Conrad*, Attorney at Law, and *Jeremiah D. Finnegan*, Attorney at Law, 1209 Penntower, 3100 Broadway, Kansas City, Missouri 64111, for AG Processing Inc.

*Douglas E. Micheel*, Attorney at Law, and *John B. Coffman*, Attorney at Law, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Nathan Williams*, Attorney at Law, 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**  
**Procedural History**

On June 23, 2000, St. Joseph Light & Power Company (SJLP) filed an Application for Accounting Authority Order relating to its electrical operations. SJLP's Application indicated that a turbine failure and fire at its Lake Road Power Plant on June 7, 2000, resulted in the unplanned shutdown of Turbine 4 and Boiler

6 unit (Unit 4/6). The Application estimated that Unit 4/6 would be unavailable for power production until approximately September 1, 2000. SJLP indicated that as a result of the loss of Unit 4/6, it would be required to purchase significant portions of its customer's energy requirements on the open market at prices considerably in excess of the energy cost that would have been experienced had Unit 4/6 been available. In its Application SJLP estimated that the cost of incremental replacement energy above the energy cost of Unit 4/6 and repair cost, net of insurance proceeds, would be \$7,105,000. SJLP estimated that the incremental cost, net of income taxes, would represent approximately fifty percent of its 1999 earnings, excluding merger-related expenses.

SJLP asked that the Commission issue an order authorizing SJLP to defer and record in Uniform System of Accounts, account 182.3, the incremental costs (net of any insurance proceeds) incurred by SJLP as a result of and in connection Plant. This deferral would continue until the effective date established in SJLP's next general electric rate case. SJLP requested that the Commission's order authorizing the requested accounting procedures be effective no later than year-end 2000.

On June 30, 2000, AG Processing Inc. (AGP) filed an Application to Intervene in which it indicated its opposition to SJLP's request for an Accounting Authority Order. On July 3, 2000, the Staff of the Commission (Staff) filed a response to SJLP's application for an Accounting Authority Order. Staff indicated that it opposed the granting of the requested accounting authority. Also on July 3, 2000, the Office of the Public Counsel (Public Counsel) filed a motion asking the Commission to dismiss SJLP's application or in the alternative asking that the matter be set for hearing.

On July 17, 2000, the Commission issued an order that granted AGP's request to intervene. The same order provided notice of the application and directed that interested parties would be allowed until August 16, 2000, to file a request to intervene. The order also scheduled an early prehearing conference for August 31, 2000, and directed the parties to file a proposed procedural schedule no later than September 11, 2000. On August 1, 2000, the Commission denied Public Counsel's Motion to Dismiss. No additional parties sought to intervene.

On September 14, 2000, the Commission issued an Order Adopting Procedural Schedule. That procedural schedule provided that SJLP would file direct testimony on September 18, 2000. All other parties were directed to file rebuttal testimony on October 10, 2000, and surrebuttal and cross-surrebuttal testimony on October 17, 2000. An evidentiary hearing was held on October 26 and 27, 2000. Initial briefs were filed on November 21, 2000, with final briefs filed on December 4, 2000.

#### **Discussion**

SJLP indicates that all that it is requesting from the Commission is the authority to defer certain costs<sup>1</sup> on its books until the Commission can have the opportunity

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<sup>1</sup> SJLP indicated that as of September 30, 2000, the actual costs, net of insurance, that it was requesting to be deferred was \$3,332,931. This amount is substantially less than the loss of \$7,105,000 that SJLP estimated it would sustain at the time it filed its request for an AAO.

to examine them in a future rate case. The Commission could grant such authority by issuing what is referred to as an Accounting Authority Order (AAO). SJLP argues that its expenses arising from the Lake Road incident meet the test used by the Commission in deciding whether or not an AAO is appropriate in that the costs are "extraordinary" and "nonrecurring." SJLP argues that so long as the costs meet that two-prong test then the Commission need not look at any other circumstances before granting the AAO.

Staff, Public Counsel and AGP argue that the Commission should not grant the requested AAO because the Lake Road incident resulted directly from the acts or omissions of SJLP. They argue that SJLP should not be allowed to recover in rates the costs it incurred through its own imprudence and negligence.

#### **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 essential facts of what happened at SJLP's Lake Road Power Plant on June 7, 2000 are not disputed by any party. The parties do, however, have serious disagreements about the responsibility for those events and the impact of those events on whether or not the Commission should grant the AAO requested by SJLP.

SJLP's Lake Road power plant is located in south St. Joseph, Missouri, on the east bank of the Missouri River. The plant consists of four steam turbine-generators, three combustion turbines, and six fuel-fired steam boilers. Turbine-generator number 4 and boiler number 6, referred to as Unit 4/6, is primarily fueled by coal and, by itself, has a nominal generating capacity of 97 megawatts.

In the spring of 2000, Unit 4/6 was out of service for its annual spring outage, starting on May 2 and concluding on June 2. During this outage, routine boiler and plant maintenance were carried out. In addition, a new turbine-generator control system and a new static generator excitation system were installed.

On the afternoon of June 7, 2000, Unit 4/6 was running at near full capacity when it "tripped off." The turbine and generator were spinning at 3,600 revolutions per minute. When the trip occurred, stop valves on the turbine immediately interrupted the flow of steam from the boiler to the turbine, stopping the blades of the turbine.

Immediately after the unit tripped, the supply of lubricating oil to the unit's bearings and seal oil to the generator's hydrogen seals was interrupted. The loss of lubricating oil caused the bearings to almost instantly overheat with resulting mechanical damage. The loss of oil to the hydrogen seals allowed the hydrogen that is inside the generator to escape. The escaping hydrogen came in contact with the overheated bearings resulting in an explosion and fire and more damage to the unit.

The unit's supply of lubricating and seal oil is provided by three oil pumps. The first two were powered by AC current supplied by the Unit 4/6 generator. In other words, in normal operation the generator is generating the electric power neces-

sary to run its own oil pumps. When the generator tripped and ceased generating power, the two AC oil pumps stopped working. The unit contains a back up, battery powered, DC oil pump that is supposed to sense the loss of oil pressure and automatically kick in to keep the oil flowing. When the unit tripped on June 7, the DC oil pump did not start as expected and the resulting loss of oil pressure caused the damage to the unit.

The DC oil pump did not start because the control for the pump was in an incorrect position, preventing the oil pump from automatically starting when oil pressure dropped. The parties vehemently disagreed about why the control was not in the correct position. SJLP argued that it resulted from an unforeseen trap created when General Electric installed a new turbine-generator control system during the planned spring outage. The other parties argued that the control was in the wrong position because SJLP had not tested and verified the revised design of the control system before putting the unit back into service. It was also alleged that SJLP had failed to ensure that its operators were properly trained before placing the unit back into service. For reasons explained in the Commission's Conclusions of Law, it will not be necessary for the Commission to determine, in this proceeding, exactly why the Lake Road incident occurred. Neither will it be necessary, nor appropriate, for the Commission to assess blame for the incident in this case.

#### **Conclusions of Law**

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

SJLP is an "electrical corporation" and a "public utility" as those terms are defined in Section 386.020, RSMo Supp. 1999, and is subject to the jurisdiction of the Commission pursuant to Section 386.250, RSMo Supp. 1999.

Section 393.140(4), RSMo 1996, authorizes the Commission to prescribe a uniform method of keeping accounts for electric utilities subject to Commission jurisdiction. Pursuant to that authority, in 4 CSR 240-20.030, the Commission directs that such electric utilities are to keep all accounts in conformity with the Uniform System of Accounts (USOA) Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act, as prescribed by the Federal Energy Regulatory Commission.

Section 393.140(8), RSMo 1996, grants the Commission the power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

In its application, SJLP requests authority to:

defer and record in Uniform System of Accounts, account 182.3, the incremental costs (net of insurance proceeds) incurred by SJLP as a result of and in connection with the June 7, 2000, incident at the Lake Road Plant . . . through the effective date of rates to be established in SJLP's next general electric rate case. SJLP also proposes that in such rate case, the incremental costs which are deferred and recorded in account

182.3 be amortized in rates over a five-year period, . . . (Application at p. 3-4)

The deferral of costs from one period to another period for the development of a revenue requirement violates the traditional method of setting rates whereby the Commission considers all relevant expenses in a particular historical test year to determine a reasonable revenue requirement for the future. The deferral of costs distorts the expenses recognized in that test year by importing costs from a previous period. For that reason, the Commission has considered requests for AAOs on a case-by-case basis and has granted them only under limited circumstances.

The test that the Commission has used for determining whether or not to grant an AAO is whether the expense to be deferred is "extraordinary, unusual and unique and not recurring." In the Matter of Missouri Public Service, 1 MPSC 3d 200, 205 (1991). However, the simple fact that an expense is extraordinary and nonrecurring is not enough to justify the deferral of that expense. Implicit in the Commission's previous orders regarding requests for AAOs is a requirement that there must be some reason why the expense to be deferred could not be immediately included for recovery in a rate case.

A representative of SJLP testified that SJLP could have filed an immediate rate case in which it could attempt to recover its costs resulting from the Lake Road incident. It did not do so because it did not wish to "muddy the water" regarding SJLP's pending merger with UtiliCorp United Inc. (UtiliCorp). Approval of the UtiliCorp/SJLP merger is before the Commission in case number EM-2000-292. Part of the proposed regulatory plan put forward by UtiliCorp in that case would have the Commission impose a five-year rate moratorium on the SJLP unit after the merger. That would mean that SJLP could not bring a rate case within that five-year period. It is understandable that the existence of a rate freeze proposal by its merger partner would prompt SJLP not to propose a rate case while the merger case was pending.

However, the Commission has now issued its ruling in the SJLP/UtiliCorp merger case and has rejected UtiliCorp's proposed regulatory plan including the five-year rate moratorium. Therefore, SJLP, either as a stand-alone company or as a unit of UtiliCorp, is now free to file a rate case. If SJLP chooses to file a rate case within a reasonable amount of time, at least before June of 2001, it is likely that the appropriate test year would include the Lake Road Incident of June 7, 2000. There is, therefore, no longer any reason why the expenses should be deferred through an AAO.

The Commission will not now make any determination about whether or not SJLP should be allowed to recover in rates the costs for which it was seeking an AAO. Such a determination is a rate case issue and this is not a rate case.

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that SJLP's Application for an Accounting Authority Order should be denied.

*IT IS THEREFORE ORDERED:*

1. That the Application for Accounting Authority Order filed by St. Joseph Light & Power Company on June 23, 2000, is denied.

2. This Report and Order shall become effective on December 24, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,  
concur and certify compliance with the provisions  
of Section 536.080, RSMo 1994. Murray, C., absent

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**In the matter of the Application of Union Electric Company (d/b/  
a AmerenUE) for an Order to Approve the Change of Trustee  
for its Tax Qualified Nuclear Decommissioning Trust Fund  
and to Approve Related Changes to the Trust Agreement.\***

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*Case No. EO-2001-245  
Decided December 14, 2000*

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**Electric §§17, 45. Evidence, Practice and Procedure § 9.** The Application for Approval to Change the Trustee of its Tax Qualified Nuclear Decommissioning Trust Fund and for Approval of a New Investment Manager, filed by Union Electric Company d/b/a AmerenUE, is granted in all respects except for certain provisions which shall be taken under advisement until the resolution of In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company d/b/a AmerenCIPS and, in Connection Therewith, Certain Other Related Transactions, under Case No. EM-2001-233.

**ORDER DENYING MOTION FOR LEAVE TO AMEND APPLICATION  
AND ORDER APPROVING THE APPLICATION OF UNION ELECTRIC  
COMPANY FOR APPROVAL TO CHANGE THE TRUSTEE OF ITS TAX  
QUALIFIED NUCLEAR DECOMMISSIONING TRUST FUND AND FOR  
APPROVAL OF A NEW INVESTMENT MANAGER**

**Procedural History**

On October 13, 2000, Union Electric Company d/b/a AmerenUE (AmerenUE) filed with the Missouri Public Service Commission (Commission) an application pursuant to Commission Rules 4 CSR 240-2.060 (i.e., the general procedural rule on applications) and 4 CSR 240-20.070(4)(A) (i.e., the decommissioning trust fund rule) for (1) approval of the replacement of Banc of America Capital Management, Inc. with The Bank of New York (BNY) as the fixed income investment manager for AmerenUE's tax-qualified nuclear decommissioning trust fund (trust fund); (2) approval of the corresponding Investment Management Agreement between

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\*This order contains changes approved by the Commission in an order issued on January 11, 2001.

AmerenUE and BNY; (3) approval of the replacement of Bankers Trust Company with BNY as trustee of its Third Amended and Restated Tax Qualified Decommissioning Trust; (4) approval of the corresponding Schedule of Fees to be charged by BNY for administering the Trust Fund; (5) the amendments to the Third Amended and Restated Tax Qualified Decommissioning Trust (Trust Agreement); (6) approval of the changes to the Investment Guidelines for the Callaway Plant Tax Qualified and Non-Tax Qualified Nuclear Decommissioning Trust Funds; and (7) conditioning the approval of the aforementioned requests upon the approval of the same by the Illinois Commerce Commission<sup>1</sup>. AmerenUE supplemented its Application by the filing, as Appendix 1, of the direct testimony of Kevin L. Redhage (Redhage Testimony) which set forth in detail the changes requested and the reasons therefor.

AmerenUE also requested that the Commission issue an order authorizing the changes requested in its pleading by December 15, 2000. This request for expedited treatment was granted on November 6, 2000.

On November 27, 2000, AmerenUE filed a motion for leave to submit an amendment to its original application (motion for leave).

#### **Issues**

In its motion for leave, AmerenUE stated that on November 16, 2000, Staff, and the Office of Public Counsel (Public Counsel) met with AmerenUE to discuss the issues. According to AmerenUE, the parties determined that for Staff and Public Counsel to support the application filed by AmerenUE, minor wording changes would have to be made to the Trust Agreement filed as Schedule 6 of the Redhage Testimony.

AmerenUE noted that on November 20, 2000, it submitted to Staff draft language to which Staff responded with additional recommended language, which AmerenUE also agreed to include in the Trust Agreement.

AmerenUE thus requested leave of the Commission to amend its pleading beyond the limitation provided in Commission Rule 4 CSR 240-2.080(21).

Commission Rule 4 CSR 240-2.080(21) states: "Any pleading may be amended within ten (10) days of filing, unless a responsive pleading has already been filed, or at any time by leave of the commission."

For its good cause, AmerenUE stated that it could not have known within such ten-day limitation that the amendment requested would be necessary.

On December 1, 2000, Public Counsel filed its motion to reject certain substantive changes to AmerenUE's trust agreement and investment guidelines, or, in the alternative to request an evidentiary hearing.

In its motion, Public Counsel stated that it does not object to the requested change in Trustee and Investment Manager. Public Counsel stated that no evidence it has reviewed would suggest that BNY would not be a suitable trustee,

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<sup>1</sup>AmerenUE failed to explain why the approval of its requests by the Illinois Commerce Commission was necessary. Thus, this part of AmerenUE's pleading was not taken into consideration by the Commission.

and "...most of the requested changes to the Trust Fund and Investment Guidelines are objectionable (*sic*)<sup>2</sup>."

Public Counsel's position is that AmerenUE has characterized all of the proposed language changes to the Trust Agreement and the Investment Guideline as "minor." Public Counsel quotes AmerenUE as stating that the proposed changes to the Investment Guidelines were "...not material in nature and only served to clarify and better define certain aspects of the guidelines." Public Counsel again quotes AmerenUE: "None of the changes made to the Investment Guidelines will affect the purpose, intent or scope of the Investment Guideline."

Public Counsel disagrees with AmerenUE's characterization and believes that language changes in three specific areas significantly alter the potential scope of the Trust Agreement: (1) granting AmerenUE the ability to inject itself improperly in the management of the Trust, (2) elimination of the definition of decommissioning costs, and (3) modifying the provisions of trust fund disbursement due to the sale of the Callaway nuclear plant.

Public Counsel stated that it discussed these issues with AmerenUE. According to Public Counsel, while AmerenUE asserted no reason why the language changes to which Public Counsel objected were necessary, AmerenUE would not agree to revise its proposed language, merely stating its concern that any further changes to its proposed language could possibly cause a delay.

Public Counsel stated that AmerenUE's revisions to its application do not address the concerns raised by Public Counsel. Public Counsel alleges that it did not propose the revisions contained in AmerenUE's motion for leave and never asserted that these changes would address its concerns. Public Counsel argues that the revisions to the Trust Agreement added in the motion for leave merely state what should be obvious, i.e., that the Trust Agreement must comply with statutory requirements and regulatory decisions. To the extent that the motion for leave suggests that these revisions would eliminate Public Counsel's objection to language changes, Public Counsel stated that AmerenUE's motion for leave is in error.

Rejecting AmerenUE's proposed language in the three areas outlined above will not, according to Public Counsel, prevent the Commission from granting the requested replacement of the Trust Fund Fixed Income Investment Manager or the replacement of the Trustee, or granting any of the other language changes and relief requested by AmerenUE in its Application. Therefore, it is Public Counsel's position that the Commission should grant all of the relief requested by AmerenUE except the changes to which Public Counsel objects.

However, Public Counsel urges that if the Commission chooses not to reject these substantive language changes, it should establish a procedural schedule with an evidentiary hearing to allow the parties to litigate these three issues further. A third alternative proposed by Public Counsel would be a deferral of these three issues until a decision is reached by the Commission in the pending AmerenUE application to transfer AmerenUE assets in Illinois, filed under Case No. EM-2001-

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<sup>2</sup>It is assumed that Public Counsel meant "not objectionable."

233. Public Counsel believes that it is possible that further amendments to the Trust Agreement will be necessary if the Commission grants certain relief requested in that case, and these issues could be resolved at the time the Commission issues its Report and Order.

Also on December 1, 2000, Staff filed its recommendation and memorandum which advocated that the Commission approve AmerenUE's motion for leave. However, Staff stated, if the Commission should choose not to allow the Application to be amended, Staff would then recommend that the change in Trustee (and Schedule of Fees), investment manager, and the Investment Management Agreement (and Investment Guidelines) be approved, but that the Third Amended and Restated Tax Qualified Decommissioning Trust document portion in the initial Application, as filed on October 13, 2000, not be approved.

#### **Findings**

The Commission finds that the arguments by Public Counsel against the modification of language in the trust agreement are persuasive. The injection of AmerenUE into the management of the trust, the elimination of the Commission's definition of "decommissioning costs" as set forth in Case No. EO-85-17 *et al.*, and the change allowing AmerenUE to direct the fund disbursement after the sale of the Callaway nuclear plant, are not in the public interest. The Commission finds that it would be ill-advised to change the language as requested by AmerenUE before a resolution of Case No. EM-2001-233. The Commission finds that the other amendments requested by AmerenUE are reasonable and in the public interest.

#### **Decision**

The Commission will deny AmerenUE's motion to amend its application as set forth in its motion for leave filed on November 27, 2000. This case will remain open until after the resolution of Case No. EM-2001-233 at which time the Commission will decide the remaining issues. However, the Commission will grant all of the other requests of AmerenUE as set forth in its original application filed on October 13, 2000.

#### **Conclusions of Law**

The Commission has the authority to approve changes dealing with Nuclear Decommissioning Trusts. Section 393.292, RSMo 1994, states:

Notwithstanding any other provision of law to the contrary, the public service commission shall have the power, pursuant to regulations, to review and authorize changes to the rates and charges contained in the schedules of an electric corporation as a result of a change in the level or annual accrual of funding necessary for its nuclear power plant decommissioning trust fund only after a full hearing and after considering all facts relevant to such funding level or accrual rate. The commission shall also have the authority to adopt regulations to govern the procedure for submission, examination, hearing and approval of such tariff changes and to ensure that the amounts collected from ratepayers and paid into such trust funds will be neither

greater nor lesser than the amounts necessary to carry out the purposes of the trusts.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Except for a conditional request in the alternative by Public Counsel, since no one has requested a hearing in this case, the Commission may grant the relief requested based on the application.

In addition, Commission Rule 4 CSR 240-20.070(4)(A) states, in part that “[a]ny change in the trust agreement, trustee or investment manager(s) ...shall be submitted to the commission for approval.”

*IT IS THEREFORE ORDERED:*

1. That the Application for Approval to Change the Trustee of its Tax Qualified Nuclear Decommissioning Trust Fund and for Approval of a New Investment Manager, filed by Union Electric Company d/b/a AmerenUE on October 13, 2000, is granted in all respects except as set forth below.

2. That the disposition of the following proposed revisions filed by Union Electric Company d/b/a AmerenUE on October 13, 2000, in its Application shall be taken under advisement by the Missouri Public Service Commission until the resolution of In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company d/b/a AmerenCIPS and, in Connection Therewith, Certain Other Related Transactions, filed under Case No. EM-2001-233:

- a. A proposed addition to a paragraph in Article V, Section B of the Investment Guidelines for the Callaway Plant Tax Qualified and Non-Tax Qualified Nuclear Decommissioning Trust Funds, as set forth on page 3 of both Schedules 9 and 10 (Subsection C. Missouri Jurisdictional Sub-Account) of the Direct Testimony of Kevin L. Redhage filed as Appendix 1 of the Application of Union Electric d/b/a AmerenUE;
- b. A proposed addition to Article II, Section 2.01 of the Third Amended and Restated Tax Qualified Decommissioning Trust, as set forth on page 6 of both Schedules 6 and 7 of the Direct Testimony of Kevin L. Redhage filed as Appendix 1 of the Application of Union Electric d/b/a AmerenUE; and
- c. A proposed elimination of a sentence in Article I, Section 1.01 of the Third Amended and Restated Tax Qualified Decommissioning Trust, as set forth on page 4 of Schedule 7 of the Direct Testimony of Kevin L. Redhage filed as Appendix 1 of the Application of Union Electric d/b/a AmerenUE.
- d. A proposed replacement of part of a sentence in Article III, Section 3.05 of the Third Amended and Restated Tax Qualified Decommissioning Trust, as set forth on page 10 of Schedule 7 of the Direct Testimony of Kevin L. Redhage filed as Appendix 1 of the Application of Union Electric d/b/a AmerenUE.

3. That this order shall become effective on December 24, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur  
Murray, C., absent

Hopkins, Senior Regulatory Law Judge

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**In the Matter of the Request of Raytown Water Company for a  
Small Company Rate Increase.**

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*Case No. WR-2001-291  
Decided December 14, 2000*

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**Water §16.** Pursuant to the small company rate increase procedures, the Commission approved a rate increase for Raytown Water Company of \$198,431.

**ORDER APPROVING TARIFF**

Pursuant to the Commission's informal rate procedure, on November 1, 2000, Raytown Water Company (Raytown) filed a tariff designed to increase its rate for water service by approximately 8.5 percent. Raytown also filed a letter requesting that its revised tariff sheets be approved, and an *Agreement Regarding Disposition of Small Company Rate Increase Request* that it had entered into with the Staff of the Commission.

On December 8, 2000, Staff filed a recommendation in which it recommended that the Commission approve Raytown's tariff. On December 11, 2000, Staff filed a supplement to its recommendation to include several attachments not included with the recommendation. Based upon its audit of Raytown's books and records, an evaluation of the company's depreciation rates and an analysis of the company's capital structure and cost of capital, Staff concluded that Raytown could justify an increase of \$198,431 (approximately 8.5%) in its annual water service operating revenues.

On November 27, 2000, the Office of the Public Counsel (Public Counsel) filed a Statement of Position indicating that it believes the increase to be reasonable, and stating that it agrees with the proposed tariff sheets.

The Commission finds the proposed tariff sheet submitted on November 1, 2000, to be reasonable and will approve it for service on or after December 18, 2000.

***IT IS THEREFORE ORDERED:***

1. That the following tariff sheets, filed November 1, 2000, by Raytown Water Company, and assigned Tariff File No. 200000777, are approved for service on or after December 18, 2000:

**P.S.C. Mo. No. 3**

29th Revised Sheet No. 1, Canceling 28th Revised Sheet No. 1  
3rd Revised Sheet No. 2a, Canceling 2nd Revised Sheet No. 2a  
7th Revised Sheet No. 3, Canceling 6th Revised Sheet No. 3  
4th Revised Sheet No. 3b, Canceling 3rd Revised Sheet No. 3b  
3rd Revised Sheet No. 11, Canceling 2nd Revised Sheet No. 11  
3rd Revised Sheet No. 14, Canceling 2nd Revised Sheet No. 14  
2nd Revised Sheet No. 16, Canceling 1st Revised Sheet No. 16

2. That this order shall become effective on December 18, 2000.
3. That this case may be closed after December 19, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur  
Murray, C., absent

Mills, Deputy Chief Regulatory Law Judge

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**In the Matter of Laclede Gas Company Regarding an Incident at  
1904 Birchwood Drive, Barnhart, Missouri, on February 7,  
2000.**

**The Staff of the Missouri Public Service Commission, Com-  
plainant, v. Laclede Gas Company, Respondent.**

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*Case Nos. GS-2000-525 & GC-2001-19  
Decided December 19, 2000*

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**Gas § 16, Evidence, Practice and Procedure § 9.** After an incident involving a natural gas explosion, fire, and loss of life in Jefferson County, Missouri, the parties were involved in both a gas safety and complaint case. The parties stipulated and agreed, *inter alia*: (a) Laclede's procedures for responding to emergencies shall be revised; (b) Laclede's coordination of mobile communications equipment shall be enhanced; (c) Laclede shall incorporate into its employee training program procedures for preventing or reducing third-party damage; and (d) the parties shall continue to promote efforts at preventing third-party damage. The Commission approved the stipulation and agreement in the gas safety case and dismissed the complaint case.

**ORDER APPROVING UNANIMOUS STIPULATION  
AND AGREEMENT**

Case number GS-2000-525 was established by the Missouri Public Service Commission (Commission) on March 1, 2000, for receiving a gas incident report from the Staff of the Commission (Staff) and the response of Laclede Gas Company

(Laclede), concerning an incident on February 7, 2000, involving a natural gas explosion, fire, and loss of life at 1904 Birchwood Drive in Barnhart, Missouri.

Case number GC-2001-19 involves a complaint filed on July 11, 2000, by Staff against Laclede, alleging that in the incident set forth above, Laclede violated Commission Rule 4 CSR 240-40.030(14)(C), concerning gas leaks.

On August 16, 2000, Laclede filed its answer and motion to dismiss Staff's complaint which was denied on September 29, 2000.

The cases were consolidated on September 13, 2000, and a prehearing conference was held on October 18, 2000. Laclede, Staff and the Office of the Public Counsel filed their proposed unanimous stipulation and agreement (Agreement) on November 2, 2000, which is attached hereto as Attachment 1.

The Agreement stated, *inter alia*, that the Staff may submit to the Commission a memorandum explaining its rationale for entering into the Agreement. Thus, on November 3, 2000, the Commission ordered that a memorandum from Staff be filed no later than December 6, 2000, with any party wishing to respond to do so no more than five days after it had been served with Staff's memorandum. In that same order, the Commission noted that on September 19, 2000, it had ordered a procedural schedule be filed no later than November 2, 2000. But, because of the developments in the case, the filing of the procedural schedule should be stayed until further notice.

Briefly, the Agreement stated:

- (a) Laclede's procedures for responding to emergencies shall be revised;
- (b) Laclede's coordination of mobile communications equipment shall be enhanced;
- (c) Laclede shall incorporate into its employee training program procedures for preventing or reducing third-party damage; and
- (d) The parties shall continue to promote efforts at preventing third-party damage.

The parties also recommended that Staff's complaint in case number GC-2001-19 be dismissed and that both cases be closed.

Staff filed its recommendation on December 6, 2000. Staff stated, *inter alia*, the revisions Laclede has implemented will enhance Laclede's ability to respond to emergencies and will reduce the number and magnitude of incidents of third-party damage to Laclede's facilities. Staff urged the Commission to approve the Agreement.

No party responded to Staff's recommendation.

There is no need for an evidentiary hearing since no party requested an evidentiary hearing. The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no party requests an evidentiary hearing, the Commission may determine that an evidentiary hearing is not necessary and that the Commission may make a decision based on the Agreement. See State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C., 776 S.W.2d 494, 496 (Mo. App. 1989).

The Commission concludes that all issues were settled by the Agreement. The Commission has the legal authority to accept a stipulation and agreement as

offered by the parties as a resolution of issues raised in a case, pursuant to Section 536.060 RSMo Supp. 1999.

The Commission will approve the Agreement.

*IT IS THEREFORE ORDERED:*

1. That the Missouri Public Service Commission approves the unanimous stipulation and agreement filed on November 3, 2000, signed by all the parties, and whose terms are set forth in Attachment 1.
2. That the complaint filed by the Staff of the Missouri Public Service Commission on July 11, 2000, in case number GC-2001-19, be dismissed.
3. That this order shall become effective on December 29, 2000.
4. That both of these cases may be closed on December 30, 2000.

Lumpe, Ch., Murray, Schemenauer, and Simmons, CC., concur  
Drainer, C., absent

Hopkins, Senior Regulatory Law Judge

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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.

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**In the Matter of the Application of House Springs Sewer Company, Inc.'s Request for a Rate Increase for Sewer Service Pursuant to the Public Service Commission's Small Company Rate Increase Procedure.**

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*Case No. SR-2001-303  
Decided December 26, 2000*

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**Sewer §14.** Despite the continued failure of a small sewer company to obey the Commission's orders, pay its Commission assessments and file annual reports with the Commission, the Commission would nonetheless allow the Company to seek a rate increase via the small company procedure because the interests of its customers would otherwise be seriously harmed.

**ORDER GRANTING WAIVER, GRANTING RATE INCREASE, APPROVING TARIFF AND CLOSING CASE**

**Discussion and Findings of Fact:**

On November 7, 2000, House Springs Sewer Company, Inc. (House Springs or Company), filed its proposed tariff sheet, with an effective date of December 29,

2000, and cover letter seeking a rate increase pursuant to the Commission's small company rate increase procedure, Regulation 4 CSR 240-2.200(1)(D). In its cover letter, House Springs explicitly consented to an extension of the 150-day period set out in Rule 4 CSR 240-2.200, the Small Company Rate Increase procedure.

On November 22, 2000, the Commission issued its Order Directing Response, requiring the Office of the Public Counsel (Public Counsel) to file no later than December 4, 2000, a pleading indicating its agreement or disagreement with the tariff sheet filed on November 7, 2000, or a request for a public hearing. Public Counsel filed its pleading on December 4, and stated therein that it considered the recommended revenue requirement and rate design to be reasonable. Public Counsel also states therein that, despite the Commission's order in Case No. SC-96-427, Public Counsel has received no quarterly surveillance reports from House Springs since September 30, 1998. Public Counsel further states that it is unsure whether House Springs has complied in all respects with the accounting system improvements ordered in Case No. SC-96-427. Public Counsel states that its consent to the rate increase is conditioned upon amelioration of its concerns.

On December 19, 2000, the Staff of the Missouri Public Service Commission (Staff) filed its Memorandum and Recommendation. Staff recommends that the Commission grant the requested rate increase, on certain conditions. In its Memorandum, Staff explains that House Springs initiated this small company rate increase request by a letter to the Secretary of the Commission on February 23, 2000. Therein, House Springs stated that it sought to generate an increase in revenues of \$83,640 from its 689 sewer service customers. Staff thereupon conducted an audit and investigation of House Springs. Staff concluded that increased revenues up to \$100,055 are justifiable based upon the Company's financial data. Staff states that its findings and work papers were transmitted to Company and Public Counsel on October 6, 2000.

Staff's audit revealed that House Springs has net income available of (\$72,981.54)<sup>1</sup> against its net operating income requirement of \$27,073.00.<sup>2</sup> Its capital structure is as follows:

	<u>Percent of Total</u>	<u>Cost</u>	<u>Wtd Cost</u>
Common Equity	73.70	11.52	8.49
Preferred Stock	0.00	0.00	0.00
Long Term Debt	26.30	9.00	2.37
Short Term Debt	0.00	0.00	0.00
	=====		=====
	100.00		10.86

Thus, the additional net operating income needed is calculated as \$27,073.00 less (\$72,981.54), for a total of \$100,054.54.

<sup>1</sup>Total operating revenue of \$234,857.08 less total operating expenses of \$281,573.36, depreciation of \$18,707.81 and interest expense of \$7,557.45.

<sup>2</sup>The net original cost rate base of \$318,879.92 multiplied by 0.0849, the weighted cost of equity.

Negotiations between Staff and House Springs after October 6, 2000, resulted in an agreement (the Agreement). The Agreement provides for a revenue increase of \$83,640 and imposes certain conditions upon Company. On November 7, 2000, as stated above, House Springs filed an executed copy of the Agreement and proposed tariff sheets implementing the Agreement. Public Counsel did not join in the Agreement, but filed a statement on December 4, 2000, recommending that the proposed tariff sheets be approved under certain conditions.

House Springs notified each of its customers by letter of the proposed sewer service rate increase on March 17, 2000, and again on October 24, 2000. In response to the notice of March 17, 2000, Staff received two telephone calls and six letters or faxes, including a petition containing fifty signatures of residents of Woodridge Estates Mobile Home Park. Public Counsel received four letters or faxes. In response to the second notice of October 24, 2000, Staff received two telephone calls and one letter. None of these contacts were favorable to the increase.

Also on December 19, 2000, Staff and House Springs filed a Joint Motion for Waiver from Commission. Therein, joint movants remind the Commission that House Springs was required to seek, and had received, permission from the Commission to pursue a rate increase via the small company rate procedure in Case No. SR-2000-302. In the Matter of House Springs Sewer Co., Case No. SR-2000-302 (*Order Granting Variance and Closing Case*, issued February 1, 2000). In the absence of this waiver, House Springs could not have pursued this rate increase because of its delinquent annual reports and unpaid Commission assessments. The Order of February 1, 2000, required that House Springs agree in writing to a date certain when its delinquent and current assessments would be paid and, further, that House Springs "cooperate with Staff to consummate this agreement in writing before any general rate increase tariffs are approved."

The Commission had previously ordered on July 6, 1999, in Case No. SC-99-135, that House Springs pay its delinquent assessments either upon the sale of House Springs' assets<sup>3</sup> or upon distribution of the proceeds from the sale of the assets of Imperial Utility Corporation (Imperial), an affiliate of House Springs. As of September 22, 2000, however, House Springs' assets remained unsold and on-going litigation<sup>4</sup> prevented the distribution of the proceeds from the Imperial sale. Thus, House Springs' delinquent assessments remain unpaid.<sup>5</sup> Further, House Springs asserts that the delinquent assessments cannot be paid until either House Springs' assets are sold or the proceeds from the sale of Imperial's assets are distributed.

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<sup>3</sup>House Springs is subject to a consent decree requiring it to sell its assets by December 31, 2000. At present, there are no buyers for House Springs' assets and House Springs is seeking an extension of the sale deadline.

<sup>4</sup>House Springs is also engaged in litigation with a former large customer concerning a substantial unpaid bill for sewer service.

<sup>5</sup>House Springs' unpaid assessments, for 1997 through 2001, amount to \$88,043.12.

Staff and Company address the matter of House Springs' delinquent assessments in the Joint Motion. First, House Springs will make quarterly payments toward its FY 2002 assessment when that assessment is received. Second, House Springs will make a lump sum payment toward its delinquent assessments when, and if, it successfully concludes its pending litigation against a former customer for unpaid sewer service bills. The lump sum payment will equal one-third of the proceeds of that suit or \$30,000, whichever is greater. The remaining portion of the delinquent assessments will be paid from the proceeds of the sale of either House Springs' assets or Imperial's assets, when either amount becomes available.

**Conclusions of Law:**

The Commission has reviewed the application, Agreement and tariff filed by House Springs, as well as Staff's memorandum and recommendation and the joint motion for waiver. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). Since no one has requested a hearing, the Commission may grant the relief requested based on the pleadings and other documents on file. The Commission concludes that the record shows that the requested rate increase is just and reasonable and should be granted.

With respect to the joint motion for waiver, the Commission concludes that, in the present financial situation of the Company, it is unable to pay the delinquent assessments out of operating income. Thus, as Company asserts, the payment of these delinquencies must await the availability of the proceeds from the sale of either House Springs' assets or Imperial's assets. The Commission finds, as well, that House Springs has been unable to comply with the Commission's Order of February 1, 2000, because it is simply unable to predict the date upon which the proceeds from either sale will become available. However, the Commission also finds that House Springs has not shown any excuse for its failure to provide surveillance reports to Public Counsel as previously ordered by the Commission. The record does not show whether or not House Springs has complied with the accounting system improvements ordered in Case No. SC-96-427 and the Commission can only conclude that it has not.

Against this record of repeated delinquencies and noncompliance, the Commission must weigh the need of House Springs' 689 customers for continued sewer service. By refusing to grant the requested waiver, or to grant the requested rate increase, the Commission would injure those customers. Despite House Springs' continued poor performance, the public interest is best served by meeting the need of those customers for continued sewer service. Therefore, the Commission will grant the requested waiver and rate increase, upon the conditions suggested by Staff and Public Counsel. Given House Springs' record of noncompliance with Commission orders, the Commission will require that Staff continuously monitor House Springs' performance of the conditions contained in this order, as well as applicable conditions contained in previous

Commission orders. In the event that House Springs fails to perform as ordered, the Staff shall promptly so advise the Commission.

*IT IS THEREFORE ORDERED:*

1. That the Agreement Regarding Disposition of Small Company Rate Increase Request entered into by House Springs Sewer Company, Inc., and the Staff of the Missouri Public Service Commission on November 3, 2000, and to which the Office of the Public Counsel consented on December 4, 2000, is hereby approved. The Commission deems the Agreement to include the conditions set out in Paragraph 11 of the Joint Motion for Waiver from Commission Order filed herein on December 19, 2000. House Springs Sewer Company, Inc., is hereby ordered to comply with the terms of the Agreement, including the conditions referred to above.

2. That the proposed revised tariff sheet filed by House Springs Sewer Company, Inc., on November 7, 2000, Tariff No. 200100533, is approved for service rendered on and after December 29, 2000. The specific sheet approved is:

**P.S.C. Mo. No. 2**

**1<sup>st</sup> Revised Sheet No. 3, Canceling Original Sheet No. 3**

3. That House Springs Sewer Company, Inc., shall no later than January 5, 2001, resume compliance with this Commission's Order issued in Case No. SC-96-427, including providing quarterly surveillance reports to the Staff of the Commission and to the Office of the Public Counsel.

4. That the Staff of the Missouri Public Service Commission shall continuously monitor House Springs Sewer Company, Inc.'s compliance with this and other applicable orders of the Commission and, in the event of noncompliance, the Staff of the Commission shall promptly so notify the Commission by filing a Complaint.

5. That House Springs Sewer Company, Inc., shall file its delinquent annual reports on or before January 5, 2001.

6. That this order shall be effective on December 29, 2000.

7. That this case shall be closed on December 30, 2000.

Lumpe, Ch., Drainer, Murray,  
Schemenauer, and Simmons, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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**In the Matter of the Petition of the North American Numbering Plan Administrator, on Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.\***

*Case No. TO-2000-374*  
*Decided December 26, 2000*

**Telecommunications §8.** The Commission approves the Numbering Plan Area relief implementation plan for the 314 area code with the exception that optional, per company, permissive 1+ 10-digit local dialing is disapproved.

**Telecommunications §26.** The Commission approves the Numbering Plan Area relief implementation plan for the 314 area code with the exception that optional, per company, permissive 1+ 10-digit local dialing is disapproved.

**ORDER APPROVING THE 314 NPA RELIEF IMPLEMENTATION PLAN AS MODIFIED AND DIRECTING FILING**

On October 24, 2000, the Commission issued its Report and Order (R&O) adopting an all services distributed overlay as the method of relief for the 314 Numbering Plan Area (NPA). The R&O established a technical and planning committee for the 314 NPA to develop an NPA relief implementation plan and schedule. The R&O required a consensus plan and schedule to be filed and allowed for responses to the plan and schedule to be filed.

On November 22, 2000, a letter from NeuStar, Inc., was filed in this case showing that the North American Numbering Plan Administrator (NANPA) had assigned 557 to serve as the overlay area code for relief of the 314 NPA. On November 22, 2000, NANPA, acting through NeuStar, Inc., and acting for the 314 technical and planning committee, filed the relief implementation plan and schedule as required under the R&O. On December 4, 2000, the Commission's Staff filed a response to the plan and schedule. On December 6, 2000, the Office of the Public Counsel (Public Counsel) filed a response to the plan and schedule.

The proposed plan and schedule provides for:

- 1) A permissive dialing period that begins at 12:01 a.m. CT on June 2, 2001, and ends at 12:01 a.m. CT on October 6, 2001.
- 2) Mandatory dialing beginning at 12:01 a.m. CT on October 6, 2001.
- 3) End of intercept announcements period on December 6, 2001.
- 4) Earliest effective date of Central Office (CO) code duplication in 557 NPA established as December 6, 2001.

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\*See page 367 for another order in this case.

- 5) A dialing plan requiring 10-digit local dialing within the 314 and 557 NPA.
- 6) A dialing plan allowing optional, per company, permissive 1+ 10-digit local dialing.
- 7) A dialing plan requiring 1+ 10-digit dialing for toll calls within the 314 and 557 NPA.
- 8) Southwestern Bell Telephone Company to hold a test code for the industry to use to test equipment in the 557 NPA.
- 9) Establishment of a subcommittee to address technical implementation issues.
- 10) Establishment of a subcommittee to address customer education for implementing the NPA relief plan.

The Staff response objected to item six, above, optional, per company, permissive 1+ 10-digit local dialing. Staff stated that such a dialing plan would be confusing to the public and consumers because implementation by the carriers would not be uniform. Staff stated further that neighbors using different telecommunications carriers could have different dialing requirements. A change in provider could require a burdensome change in dialing patterns. Staff also stated that consumers might not realize in advance of billing whether a toll call has been placed if 1+ 10-digit local dialing is permitted.

The Public Counsel concurred in the Staff concerns regarding 1+ 10-digit local dialing. The Public Counsel stated that 1+ 10-digit local dialing would not be in the public interest and would confuse consumers about what is or is not a toll call. The Public Counsel did not oppose the remainder of the plan and schedule but suggested that, should code utilization slow or should unused codes be reclaimed, the Commission give consideration to modifying the schedule to delay implementation of the relief 557 NPA. No other responses to the plan and schedule were received.

On December 14, 2000, Southwestern Bell Telephone Company (SWBT) filed a reply to the responses filed by Staff and the Public Counsel. SWBT stated that it did not suggest permissive 1+ 10-digit local dialing and that it did not intend to use it if it were authorized, but that it believed that "there is some confusion" regarding the proposal, presumably on the part of Staff and the Public Counsel. SWBT stated that some carriers, and especially wireless carriers, might desire a 1+ dialed local call to be completed so that their customers would not have to "guess" which dialing pattern to use and end up dialing twice in some instances. SWBT stated that it understood why some carriers would desire this option.

SWBT's response offers one rationale for 1+ 10-digit local dialing, but it fails to address the concerns raised by Staff and the Public Counsel, and particularly, confusion that consumers may have in determining when a toll call is being placed. Further, the responses of Staff and Public Counsel do not reflect any confusion that

this proposal was optional for carriers and reflected an option for permissive dual dialing patterns rather than an option for an exclusive required dialing pattern.

The Commission finds that the proposed relief implementation plan and schedule are acceptable and in the public interest, with one exception. The Commission determines that a dialing plan allowing optional, per company, permissive 1+ 10-digit local dialing is not in the public interest in that it allows nonuniform dialing patterns that could burden and confuse consumers and cause uncertainty for consumers in determining whether a toll call is being placed. Therefore, the Commission finds that optional, per company, permissive 1+ 10-digit local dialing should not be approved. With this exception, the proposed relief implementation plan and schedule is acceptable and will be approved by the Commission.

Technical implementation issues that cannot be resolved by the technical implementation subcommittee for the 314 and 557 NPA may be brought to the Commission. The customer education subcommittee shall file a summary of the customer education plan with the Commission prior to its implementation and not later than February 21, 2001. The Commission will neither approve nor disapprove the plan; however, the Commission will hear any motions presenting objections or suggestions for the customer education plan and may order changes or supplements to the plan pursuant to objections or suggestions presented by motion or based upon the Commission's independent consideration of the plan.

*IT IS THEREFORE ORDERED:*

1. That the Commission approves the 314 and 557 NPA relief implementation plan and schedule as filed on November 22, 2000, with the exception that a dialing plan allowing optional, per company, permissive 1+ 10-digit local dialing is disapproved.
2. That technical implementation issues that cannot be resolved by the technical implementation subcommittee for the 314 and 557 NPA may be brought to the Commission.
3. That the customer education subcommittee shall file a summary of the customer education plan with the Commission prior to its implementation and not later than February 21, 2001. The Commission will neither approve nor disapprove the plan; however, the Commission will hear any motions presenting objections or suggestions for the customer education plan and may order changes or modifications to the plan pursuant to objections or suggestions presented by motion or based upon the Commission's independent consideration of the plan.
4. That this order shall become effective on January 5, 2001.

Lumpe, Ch., Drainer, Murray,  
Schemenauer, and Simmons, CC., concur.

Thornburg, Regulatory Law Judge

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**In the Matter of the Application of Osage Water Company for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Water and Sewer System for the Public Located in an Unincorporated Portion of Camden County, Missouri, Known as Eagle Woods.\***

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*Case No. WA-99-437*  
*Decided December 26, 2000*

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**Water §2.** The Commission determined that Osage Water Company met its burden of proof under the legal standards articulated by the Commission and the courts for the grant of a certificate of public convenience and necessity, and granted Osage's application for a certificate of public convenience and necessity.

**SECOND REPORT AND ORDER<sup>1</sup>**

**APPEARANCES:**

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

*Gary W. Duffy*, Brydon, Swearingen and England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri, 65101, for City of Osage Beach.

*Shannon Cook*, Assistant Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

*Keith R. Krueger*, Deputy 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: Lewis Mills

**REPORT AND ORDER**

**I. Procedural History**

On April 5, 1999, Osage Water Company (Osage) filed an application pursuant

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\*On January 26, 2001, this case was appealed to Cole County Circuit Court (Petition for Writ of Prohibition-Case No. 01cv323240). On February 15, 2001, this case was appealed to Cole County Circuit Court (Petition for Writ of Review-Case No. 01cv323402).

<sup>1</sup>The Commission's initial Report and Order, Issued February 10, 2000, was appealed by the City of Osage Beach to the Cole County Circuit Court. On September 28, 2000, the Cole County Circuit Court reversed the Commission's initial Report and Order. The effect of this reversal is to "nullify the [initial Report and Order] and to leave the case standing as if no such [Report and Order] had ever been rendered." *State ex rel. Hofman v. Public Service Commission*, 530 S.W.2d 434, at 437 (Mo App. 1975). Accordingly, the Commission now issues this Second Report and Order.

to Section 393.170, RSMo 1994<sup>2</sup>, requesting that the Missouri Public Service Commission (Commission) grant it a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a water and sewer system for the public located in an unincorporated portion of Camden County known as Eagle Woods.

On April 12, 1999, the Commission issued an order and notice of application, directing interested parties to file applications to intervene no later than April 29, 1999. On April 28, 1999, the City of Osage Beach (City) filed a timely application to intervene and also filed motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment. On May 3, 1999, Osage filed its response to the application to intervene by the City, stating that it opposed the intervention of the City and also filed a response to the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment. On May 5, 1999, the City filed its replies to Osage's responses to the City's motions. On May 10, 1999, the Staff of the Commission (Staff) filed its response to the application to intervene filed by the City and also filed its response to the motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment.

On May 10, 1999, Osage filed its response to a motion to compel filed by the City. However, the official case filings do not reflect such a motion by the City being filed.

The City's application to intervene was granted by order of the Commission entered on May 11, 1999, which order also set a prehearing conference for June 11, 1999, which was held as scheduled. The order also denied the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment, and instead set a deadline for the parties to file a procedural schedule no later than June 21, 1999. On May 14, 1999, the City filed its application for a rehearing on the order denying consolidation. On May 17, 1999, Staff filed its motion to reconsider the order denying the motion to reconsider (*sic*) and a "motion to compel"<sup>3</sup>. On May 26, 1999, Osage filed its response to the motion for rehearing by City and to the motion to reconsider by Staff. On June 21, 1999, Office of the Public Counsel (Public Counsel) filed its clarification of its position, stating that it had decided to oppose Osage's application.

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<sup>2</sup>All references herein to sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 1994.

<sup>3</sup>Although the caption of the motion filed by Staff indicated that it was, *inter alia*, a "motion to compel," there was nothing in the body of the motion which consisted of a motion to compel.

On June 22, 1999, the Commission entered its order denying the City's application for rehearing filed on May 14, 1999, and also denying the Staff's response to the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment, filed on May 10, 1999, and Staff's motion to reconsider order denying motion to reconsider (sic) and motion to compel, filed on May 17, 1999.

On June 23, 1999, Osage filed a motion to establish a procedural schedule. Osage stated that all parties agreed on the procedural schedule set forth. On June 24, 1999, the Commission entered its order adopting procedural schedule which, *inter alia*, set an evidentiary hearing for December 2 and 3, 1999. The Commission filed a notice of correction of the order adopting procedural schedule on June 30, 1999, which corrected a date for rebuttal testimony to be filed. On August 12, 1999, the Commission entered its order scheduling a local public hearing for September 16, 1999, which was held as scheduled.

On November 1, 1999, Staff filed its proposed list of issues, order of witnesses, and order of cross-examination, which Staff stated that all parties agreed upon. On the same date, both Staff and City each filed its statement of position on the issues. Osage filed its statement of position on November 5, 1999. Included in that statement was also an objection by Osage to that part of Staff's proposed list of issues, order of witnesses, and order of cross-examination which indicated that Public Counsel possibly intended to call unidentified "public witnesses." On November 19, 1999, the Commission entered its order partially granting Osage's objection to public witnesses. The Commission ordered that the objection to the proposed order of witnesses filed by Osage was granted insofar as to prohibit the introduction of the testimony of any witness which did not comply with applicable rules of the Commission or statutes of the State of Missouri.

On November 9, 1999, the Commission issued a notice changing the dates for the evidentiary hearing to December 1 and 2, 1999. On November 16, 1999, Staff, City and Public Counsel filed a joint motion to strike portions of the prepared testimony of William P. Mitchell (Mitchell), Osage's engineering witness. On November 24, 1999, Public Counsel filed its statement of position and its motion for leave to file its statement of position out of time.

On November 29, 1999, the Commission filed its notice of official notice, stating that it had taken official notice of Osage's 1998 annual report.

An evidentiary hearing was held on December 1 and 2, 1999. All the parties were represented. On December 17, 1999, the Commission entered its order adopting a briefing schedule. Also on December 17, 1999, the Commission filed its notice regarding motions and notice of *ex parte* contact. The notice stated, *inter alia*, that at the evidentiary hearing, the joint motion to strike portions of the prepared surrebuttal testimony of Mitchell was denied on the record. The motion filed by Public Counsel for leave to file its statement of position out of time was granted on the record. Also at that hearing, the Commission notified the parties of an *ex parte* contact made with the Commission on November 30, 1999, by way of a letter sent from and signed by Linda Hulett.

At the hearing, the Commission also took official notice of the following: Department of Natural Resources rule 10 CSR 20.610, a copy of the recorded restrictions on Eagle Woods subdivision, small water company rate cases (2000-345 and 2000-346), and Section 644.141, RSMo. At the hearing, Exhibit Number 9 was reserved for accounting documents, Exhibit Number 11 was reserved for copies of restrictions on Eagle Woods, and Exhibit Number 12 was reserved for a copy of a Department of Natural Resources sewer construction permit. All of the late-filed exhibits were filed by Osage on December 15, 1999, and are received and made a part of the record of this matter.

## **II. 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.

As discussed below, the Commission has determined that Osage has met its burden of proof under the legal standards articulated by the Commission and the courts for the grant of a certificate of public convenience and necessity. For the reasons stated herein, the Commission will grant Osage's application for a certificate of public convenience and necessity.

### **A. Osage Water Company Proposal**

Osage is a Missouri corporation duly organized and existing under the laws of the State of Missouri with its principal office and place of business located at Highway 54 West, Osage Beach, Missouri 65065. It is a public utility proposing to render water and sewer service to the public under the jurisdiction of the Commission in the proposed service area. Osage is currently certificated to provide water and sewer utility services to the public in various portions of Camden County, Missouri.

The proposed service area is legally described as all of Eagle Woods Subdivision and all of Eagle Woods Subdivision II, which consists of part of Section 7, Township 39 North, Range 16 West, County of Camden, State of Missouri. The service area consists of two new subdivisions located on Turkey Bend, which is an unincorporated portion of Camden County located on State Route KK, near Tan-Tar-A resort. The project is designed to contain 53 lots and, at the time evidence was presented, around 12 lots had been improved and sold. The first phase consists of 25 lots, all of which, at the time evidence was presented, were basically complete. The second phase consists of an additional 28 lots that were, at the time evidence was presented, under construction by the developer.

In its application and feasibility study, Osage proposed a recirculating sand filter system which will be constructed in treatment modules designed to serve approximately 30 single family homes each. Each resident in the subdivision would be connected to a septic tank, and each septic tank would be connected to a gravity effluent collection sewer which would transmit the effluent to the sand filter. The

current water system in Eagle Woods consists of two multi-family wells permitted to serve eight houses each. The system would be constructed with an initial investment of \$500 per customer for the sewer service and \$250 per customer for the water service.

The following issues generally follow the factors outlined in In Re Tartan Energy, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994) (the Tartan Energy Case).

**B. Is there a need for service?**

In their statements of position, Osage, City, and the Public Counsel all agreed that there was a public need for water service and sanitary sewer service in the proposed service area. Staff, in its statement of position, did not address this issue. Instead, Staff stated that Osage "has not demonstrated that there is a need for service that will not be adequately met by other providers, such as the City of Osage Beach or the homeowners association for the Eagle Woods Subdivision."

All parties except Staff agreed on this issue. The Commission finds that there is a public need for water and sewer service in the proposed service area.

**C. Is Osage qualified to provide the service?**

In their statements of position, Osage stated that it was qualified to provide water and sewer service to the public in the Eagle Woods Subdivision, while Staff, City and Public Counsel all agreed that Osage was not qualified to provide water and sewer service to the public in the Eagle Woods Subdivision.

Osage presented evidence as to its experience in the water and sewer utility industry along with its technical experience and knowledge regarding engineering and safety. Osage also showed that it had the ability to properly construct and operate a water and sewer system for the proposed service area. This evidence was substantial and unrefuted.

Osage witness Mitchell testified extensively concerning Osage's qualifications. Mitchell has been operating water and sewer utilities since 1981, and has been with Osage since 1987 when it was originally formed by his parents and him to provide regulated water utility service in the Lake of the Ozarks area. He is a member of the Board of Directors of Osage and participates in all meetings that affect the policies and management of Osage, and is involved in the day-to-day operations of Osage. Mitchell is the vice-president of operations for Osage and is the principal of Jackson Engineering and Water Laboratory Company. He holds a Class A license, the highest type of license available, from the Missouri Department of Natural Resources (MDNR) for both water and wastewater.

Osage's president is an attorney whose practice includes real estate, taxation, and public utilities. Osage employs a construction foreman and various individuals from time to time as construction laborers for the purpose of performing construction of new water and sewer main extensions, service connections, and repairs to water and sewer lines and systems. Osage owns a mini-excavator and a bobcat for use in new construction and repairs. Osage therefore possesses the necessary technical expertise with which to operate not only the physical facilities needed for the proposed service area, but also the necessary general overhead and support staff required to conduct its water and sewer utility operations.

Osage has an operation contract with both Jackson Engineering and Water Laboratory Company under the terms of which those companies provide regular operation, maintenance, and testing of all of Osage's water supplies and sewage treatment facilities. The two companies also provide basic office operations for Osage, including secretarial support, telephone, meter reading, and billing.

Osage has both a water and sewer tariff on file with the Commission, and currently operates a number of other water and sewer systems under the Commission's regulation. Osage owns three sewage treatment facilities of the same recirculating sand filter design as that proposed for the Eagle Woods service area, and one of those is of the extended aeration type. Mitchell has experience operating both kinds of systems as well as numerous other sewage treatment systems. Mitchell testified regarding the history, workings and development of recirculating sand filters, including the fact that MDNR has been promoting the use of that technology.

Osage has also constructed, owns, and operates several water systems, including large capacity public drinking water supplies. These systems serve both small subdivisions comparable to Eagle Woods, as well as large commercial districts, such as downtown Osage Beach.

Mitchell's testimony more than adequately displayed his knowledge of water and sewer systems, plus his knowledge of the operation of the equipment needed to run a water and sewer system. This experience is valuable to the operation of any water and sewer system. Osage and its principals have substantial knowledge regarding engineering, safety, and the technical ability and equipment to provide the service needed for the proposed water and sewer system.

Osage has the burden of proof to demonstrate that it is qualified to provide the service and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that it is qualified to provide the service.

#### **D. Does Osage have the financial ability to provide the service?**

In their statements of position, Osage stated that it had the financial ability to provide the water and sewer service, while Staff, Public Counsel, and City all agreed that Osage did not have the financial ability to provide the service.

Osage is required to show that it has the financial ability to provide the proposed service. Both Osage's application and its testimony reflect that the project developer has and is willing to make contributions in aid of construction of either cash or water systems and sewer collection systems; Osage need only provide the labor and equipment to assemble the necessary components for the sewage treatment plant, which is substantially complete. Osage does not require any additional capital beyond that offered by the project developer in order to have the financial ability to provide water and sewer utility service to Eagle Woods. The proposed capital structure for the project leaves the risk of the success of the development with the project developer, rather than requiring a level of investment by Osage that would not be supported by an established customer base.

Concerning the water system, the Eagle Woods developer has agreed to contribute an existing well and distribution system to Osage, and to construct or pay the cost of construction of any distribution system expansions. Mitchell also pointed

out that Osage has constructed public water systems similar to that proposed for Eagle Woods. For example, Osage constructed the water well at Shoney's Restaurant in its Osage Beach North service area in 1993, the water well at the Super 8 motel in 1995, the water well at Parkview Bay in 1997, and Osage is currently completing construction of a new water well at Chelsea Rose.

Osage has the burden of proof to demonstrate that it has the financial ability for completing this proposal and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that it has the financial ability for completing this proposal.

#### **E. Is Osage's proposal economically feasible?**

In their statements of position, Osage stated that its proposal was economically feasible, while Staff, Public Counsel, and City all agreed that Osage's proposal was not economically feasible.

Osage prepared and attached a feasibility study to its Application, which calculated the anticipated financial impact on Osage of the extension of water and sewer service to Eagle Woods. Osage anticipated using its current sewer tariff rate of \$23.90 per customer per month for the service rate in the proposed service area. Also, Osage anticipated using its current metered water tariff rate of \$7.75 per customer per month, plus \$2.07 for each 1,000 gallons used in excess of 1,000 gallons per month for all new residences in Eagle Woods. The financial analysis in its feasibility study indicated that the proposed service is economically feasible at Osage's current tariff rates.

The proposal in this case places the principal burden on the subdivision developer, as he is contributing the bulk of the necessary capital in the form of cash and completed systems. Osage's shareholders also bear some risk as a result of Osage's injection of capital in the form of labor and equipment used to construct the sewage treatment facility. The feasibility study indicates a positive net marginal revenue should be derived from both the water and sewer systems, with a positive net cash flow generated after the payment of a return on invested capital. If Osage has underestimated the economic feasibility of the project, the loss will be borne by Osage and the project developer (i.e., the investors) and not by Osage's ratepayers.

Osage has the burden of proof to demonstrate the economic feasibility of this proposal and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that the proposal is economically feasible.

#### **F. Does Osage's proposal promote the public interest?**

In their statements of position, Osage stated that its proposal was in the public interest, while Staff, Public Counsel, and City all agreed that Osage's proposal was not in the public interest.

The Tartan Energy Case stands for the proposition that a positive finding for the first four standards will, in most cases, support a finding that granting an application for a certificate promotes the public interest.

Because there is a need for the service, because Osage is qualified to fill that need, and because its plan to fill that need appears feasible, the Commission concludes that granting Osage a certificate is in the public interest.

**G. Could the service be provided by another entity?**

The Cole County Circuit found the initial Report and Order to be unlawful because the Commission professed itself unable to consider alternate suppliers of sewer service.<sup>4</sup> Accordingly, in this case the Commission will examine the evidence and make findings as to the possibility of sewer service being provided by another entity.

The Commission finds that, at the time the record was closed, there was not a functional sewer main across Highway KK from Eagle Woods. However, even if there were a main across Highway KK from Eagle Woods, the existing system would have to be substantially redesigned to allow it to pump sewage to it. The Commission finds that moving sewage from Eagle Woods to the proposed City force main is not just a simple matter of installing a short length of sewer pipe; it would require construction of a collection sewer system and at least one lift station that would transmit both solids and liquids to the north end of Eagle Woods<sup>5</sup>, and into a sewer main located across Highway KK from Eagle Woods, and at least one length of sewer main installed under Highway KK. Osage witness Mitchell testified, and the Commission finds, that it would be more expensive to treat the sewage at the regional treatment plant than at Osage's treatment plant. Furthermore, the discharge from Osage's treatment plant will be of a higher quality than would be the discharge from the regional treatment plant.

Based on the evidence of record, the Commission finds that the City is not as able as Osage to provide sewer service to Eagle Woods. The Commission finds that the evidence of record shows that the City is generally no more qualified to provide sewer service than Osage. The Commission determines that the evidence presented concerning the City as an alternate supplier does not support a conclusion that granting the requested certificates is not necessary or convenient for the public service.

**V. Conclusions of Law**

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

Osage is a public utility and a water and sewer corporation subject to the Commission's jurisdiction under Section 386.250, RSMo, and Section 393.170, RSMo. The Commission has authority pursuant to Section 393.170, RSMo, to grant certificates of convenience and necessity.

In Re Tartan Energy, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994), articulated the legal standard to be met by an applicant for a certificate of convenience and necessity: (1) there must be a need for the service; (2) the applicant must be

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<sup>4</sup>No party has contended that there are alternate suppliers of water service that the Commission should consider.

<sup>5</sup>Staff witness Hummel speculated at the hearing about another possible alternative to move sewage from Eagle Woods to the proposed City force main across Highway KK. Staff witness Hummel stated that this possible alternative "hasn't had any evaluation much at all." There was almost no competent and substantial evidence presented on the cost, or the economic or engineering feasibility, of this alternative.

qualified to provide the service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. See also Re Intercon Gas, Inc., 30 Mo. P.S.C.(N.S.) 554, 561 (June 28, 1991); State ex rel. Intercon Gas v. Public Service Commission, *loc. cit.* This standard has also been historically applied to water and sewer certificate cases. See Re M.P.B. Inc., 28 Mo. P.S.C. (N.S.) 55, 73 (November 15, 1985).

The authority for the issuance by the Commission of a certificate of convenience and necessity to provide water and sewer service is contained in Section 393.170, RSMo. Subsection 1 of that statute states in part, that no ". . . water corporation or sewer corporation shall begin construction of . . . a water system or sewer system without first having obtained the permission and approval of the commission." Subsection 3 of that statute states in part, "The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction . . . is necessary or convenient for the public service."

The courts have held that "necessity," as used in the term "convenience and necessity," does not mean essential or absolutely indispensable, but rather that an additional service would be an improvement justifying the cost and that the inconvenience to the public occasioned by the lack of a utility is so sufficiently great as to amount to a necessity. See State ex rel. Public Water Supply District No. 8 v. Public Service Commission, 600 S.W.2d 147, 154 (Mo. App. 1980); State ex rel. Intercon Gas v. Public Service Commission, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993)(*Intercon*); and State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 219 (Mo. App. 1973).

As noted in Footnote 1, on September 28, 2000, the Cole County Circuit Court reversed the Commission's initial Report and Order. In the Circuit Court's order it stated, "It is therefore suggested that since its order is being reversed by this Judgment, the Commission may wish to take additional evidence on this matter before issuing another Report and Order." The Circuit Court clearly contemplated that the Commission would issue another Report and Order, and suggested that the Commission could, if it wished, take additional evidence before doing so. By issuing this Second Report and Order, the Commission is following the direction of the Circuit Court.

In addition, the Commission has the authority to consider alternate providers of service. State ex rel. Public Water Supply District No. 8 v. Public Service Commission, 600 S.W.2d 147 (Mo.App. 1980). The Commission has considered the merits of the City as an alternate supplier. The Commission's findings with respect to the City as an alternate supplier support the conclusion that granting the requested certificates is necessary or convenient for the public service.

The Commission has found that Osage, and its proposed plan to serve Eagle Woods, meet the requirements of the Tartan Energy case, concludes that granting the requested certificates is necessary or convenient for the public service, and will grant the requested certificates.

*IT IS THEREFORE ORDERED:*

1. That late-filed Exhibits 9, 11, and 12 are hereby received into the record.
2. That the certificate of convenience and necessity referenced in ordered paragraph 7 shall become effective simultaneous with the effective date of the tariff sheets required to be filed and approved pursuant to ordered paragraph 3.
3. That, if necessary, Osage Water Company shall file with the Commission revised tariff sheets modifying its water and sewer service areas to reflect the additional service area granted herein.
4. That nothing in this order shall be considered a finding by the Commission of the reasonableness of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.
5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.
6. That any motions which have not been previously ruled upon, if any, are hereby denied.
7. That the Application filed by Osage Water Company for a certificate of public convenience and necessity authorizing Osage to construct, own, operate, control, manage, and maintain a water and sewer system for the public located in an unincorporated area of Camden County, Missouri, as more fully described in its Application, is hereby granted.
8. This Report and Order shall become effective on January 5, 2001.
9. That this case may be closed on January 6, 2001.

Lumpe, Ch., Drainer and Simmons, CC., concur;  
Murray, C., dissents, with dissenting opinion attached;  
certify compliance with the provisions of  
Section 536.080, RSMo 1994.  
Schemenauer, C., not participating

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**DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY**

Once again I respectfully dissent from the decision of the majority to grant Osage Water Company a Certificate of Convenience and Necessity. The Second Report and Order is even more disturbing to me than the Report and Order issued on February 10, 2000, because it continues to ignore selected portions of the record herein while appearing to disregard the judgment rendered by the Cole County Circuit Court on September 28, 2000.

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**In the Matter of the Joint Application of UtiliCorp United Inc. and  
The Empire District Electric Company for Authority to Merge  
The Empire District Electric Company with and into UtiliCorp  
United Inc., and, in Connection Therewith, Certain Other  
Related Transactions.\***

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*Case No. EM-2000-369  
Decided December 28, 2000*

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**Electric §4.** Volatility in the wholesale electric market might place a small utility at a financial disadvantage and would justify approval of a merger with a larger utility better able to compete in the wholesale electric market.

**Electric §4.** The arguments of the Staff of the Commission that the costs of the proposed merger between two electric utilities would exceed the benefits of such merger were found to be unpersuasive.

**Electric §4.** The fact that the long-term debt of the acquiring company carried a BBB rating and the acquired company's long-term debt carried an A- rating did not, by itself, constitute a detriment to the rate-payers of the acquired company so as to require rejection of the proposed merger.

**Electric §4.** As a condition on its approval of a merger between two electric companies, the Commission required the acquiring company to file monthly reports regarding customer service for one year following the merger.

**Electric §4.** The Commission declined to order the performance of market power studies as a condition on approval of a merger between two electric utilities.

**Electric §4.** The Commission is required to approve the merger between two utilities if it can be shown that the merger will not be detrimental to the public. The public need not benefit from the merger, so long as it is not harmed.

**Electric §4.** The Commission rejected a regulatory plan proposed by the acquiring company that included a five-year rate freeze because such plan would be contrary to the Commission's statutory obligation to provide continuous regulation of the public utilities of this state, because the Commission cannot prevent an appropriate party from bringing a rate complaint during the period of the freeze, and because a five-year rate freeze would not be good public policy.

**Electric §4. Rates §69.** The Commission declined to decide rate case type issues, including recovery of an acquisition premium, in a merger case, because to do so would be to engage in single-issue rate-making.

**Electric §9.** The Commission found that a intervenor's issues regarding a merger's effect on transmission access and reliability, concern the transmission of power across service territories for purpose of wholesale deliveries and as such are properly regulated by the FERC and are not subject to regulation by the Commission.

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\*The Commission, in an order issued on January 16, 2001, denied an application for rehearing, motion for reconsideration and request for stay in this case.

## APPEARANCES:

*James C. Swearingen, Dean L. Cooper, and Gary W. Duffy*, Attorneys at Law, Brydon, Swearingen & England P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65101.

and

*Leslie Jackson Parrette, Jr.*, Attorney at Law, UtiliCorp United Inc., 20 West 9th Street, Kansas City, Missouri 66209, for UtiliCorp United Inc. and The Empire District Electric Company.

*Stuart W. Conrad*, Attorney at Law, Finnegan, Conrad & Peterson, L.C., 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, for ICI Explosives USA and Praxair Inc.

*Shelley Woods*, Assistant Attorney General, Office of the Attorney General, Supreme Court Building, Post Office Box 899, Jefferson City, Missouri 65102, for the Missouri Department of Natural Resources.

*Jeffrey A. Keevil*, Attorney at Law, Stewart & Keevil, 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for the City of Springfield, Missouri, through the Board of Public Utilities.

*William A. Jolley*, Attorney at Law, Jolley, Walsh, Hurley & Raisher, 204 West Linwood Boulevard, Kansas City, Missouri 64111, for the International Brotherhood of Electrical Workers, Local 1474.

*James B. Deutsch*, Attorney at Law, Blitz, Bardgett & Deutsch, 308 East High Street, Suite 302, Jefferson City, Missouri 65101, for Albert Fuchs, George Dorsey, Jack De Graffenreid, Richard Vanwinkle, Jack Wilson, Vernon Corkle, Verl Alumbaugh, Donald Crayne, Bill Athey and Glenn D. Rhoads (collectively referred to as the Empire Retirees).

*Douglas E. Micheel*, Senior Public Counsel, *John B. Coffman*, Deputy Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102-7800, for the Office of the Public Counsel and the public.

*Dana K. Joyce*, General Counsel, *Steven Dottheim*, Chief Deputy General Counsel, *Keith R. Krueger*, Deputy General Counsel, *Nathan Williams*, Senior General Counsel, *Dennis L. Frey*, Associate General Counsel, and *Bruce H. Bates*, 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: Morris L. Woodruff.

## REPORT AND ORDER

### PROCEDURAL HISTORY

On December 15, 1999, UtiliCorp United Inc. (UtiliCorp) and The Empire District Electric Company (Empire) filed a Joint Application seeking authority to merge Empire with and into UtiliCorp. The Commission, on December 16, 1999, issued an Order and Notice that provided notice of the filing of the application and notified interested parties that if they wished to intervene they should file an

application with the Commission on or before January 14, 2000. Timely applications to intervene were received from the City of Springfield, Missouri, through the Board of Public Utilities (Springfield), Union Electric Company, d/b/a AmerenUE (AmerenUE), the Missouri Department of Natural Resources (MDNR), Praxair, Inc. (Praxair), ICI Explosives USA, Inc., and International Brotherhood of Electrical Workers, Local Union No. 1474 (IBEW No. 1474). On January 19, 2000, the Commission granted the applications to intervene of IBEW No. 1474, MDNR, AmerenUE<sup>1</sup>, Springfield, Praxair and ICI.

After the filing by various parties of competing proposed procedural schedules, the Commission, on February 10, 2000, issued an order adopting a procedural schedule that set this case for hearing on September 11 through September 15, 2000. In that same order, the Commission denied separate motions filed by the Office of the Public Counsel (Public Counsel) and MDNR that would have consolidated this case with Case No. EM-2000-292, the case established for consideration of UtiliCorp's proposed merger with St. Joseph Light & Power Company (SJLP).

On June 16, 2000, Albert Fuchs, George Dorsey, Jack De Graffenreid, Richard V. Vanwinkle, Jack Wilson, Vernon Corkle, Verl Alumbaugh, Donald Crayne, Bill Athey and Glenn D. Rhoads filed an Application to Intervene. The named individuals are retired former employees of Empire. On July 6, 2000, the Commission issued an order that permitted the named individuals to intervene out of time for good cause shown. The named individuals intervened as individuals and not as a class or a formal group; however, for purposes of convenience, this report and order will refer to them collectively as "the Empire Retirees."

The various parties prefiled testimony and an evidentiary hearing was held beginning on September 11 and continuing through September 15, 2000. Post-hearing briefs were filed on October 31, 2000, with reply briefs filed on November 21, 2000.

### **Stipulations and Agreements**

#### **Empire Retirees, UtiliCorp and Empire**

On October 18, 2000, the Empire Retirees, UtiliCorp and Empire filed a stipulation and agreement that purported to resolve all the issues between them. The stipulation and agreement specifies the plan of retirement benefits for retired Empire employees as further clarification of Section 6.13 of the Agreement and Plan of Merger. On October 25, 2000, Staff filed a request for hearing on that stipulation and agreement. However, following a conference held on November 14, 2000, the Staff, on November 16, 2000, withdrew its request for hearing on the stipulation and agreement.

The stipulation and agreement was entered into only by the Empire Retirees, UtiliCorp and Empire. It was not signed by any other party and is therefore a non-unanimous stipulation. Commission rule 4 CSR 240-2.115(1) provides that if no party requests a hearing regarding a non-unanimous stipulation and agreement, the Commission may treat the stipulation and agreement as a unanimous

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<sup>1</sup> Although AmerenUE was admitted as a party it did not appear for the hearing.

stipulation and agreement. 4 CSR 240-2.115(3) provides that each party shall have seven days from the filing of the non-unanimous stipulation and agreement to file a request for a hearing. Failure to file a timely request for hearing shall constitute a full waiver of that party's right to a hearing. No party has requested a hearing regarding the stipulation and agreement between the Empire Retirees, UtiliCorp and Empire. Therefore, the stipulation and agreement will be treated as a unanimous stipulation and agreement.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised by the Empire Retirees in this case, pursuant to Section 536.060, RSMo Supp. 1999. After considering the matter, the Commission concludes that the stipulation and agreement filed by the Empire Retirees, UtiliCorp and Empire should be approved.

**UtiliCorp, Empire and Staff**

On November 30, 2000, UtiliCorp, Empire and Staff filed a stipulation and agreement that purported to resolve certain issues between them. Staff filed written suggestions in support of the stipulation and agreement on December 5, 2000. No other party has filed a response to the stipulation and agreement.

The stipulation and agreement was entered into only by UtiliCorp, Empire and Staff. It was not signed by any other party and is therefore a non-unanimous stipulation. Commission rule 4 CSR 240-2.115(1) provides that if no party requests a hearing regarding a non-unanimous stipulation and agreement, the Commission may treat the stipulation and agreement as a unanimous stipulation and agreement. 4 CSR 240-2.115(3) provides that each party shall have seven days from the filing of the non-unanimous stipulation and agreement to file a request for a hearing. Failure to file a timely request for a hearing shall constitute a full waiver of that party's right to a hearing. No party has requested a hearing regarding the stipulation and agreement between UtiliCorp, Empire and Staff. Therefore, the stipulation and agreement will be treated as a unanimous stipulation and agreement.

The stipulation and agreement indicates that Staff, UtiliCorp and Empire have negotiated agreements on certain matters that were identified as issues in the List of Issues and Statements of Positions filed prior to the hearing in this case. Staff, UtiliCorp and Empire have reached agreement regarding the following issues:

**Pension Funds Condition:**

UtiliCorp, Empire and Staff agree that in post-merger cases involving UtiliCorp's Empire operating division, UtiliCorp will maintain the pre-merger funded status of the Empire pension fund by accounting for it separately. UtiliCorp will, however, be allowed to combine the assets. The accounting on a going-forward basis will start with a market value of asset evaluation performed by Empire's actuarial firm at the time of merger closing. On a going-forward basis the net rate of return (actual earned return income earned on the assets during the year less benefits paid) on UtiliCorp's combined pension assets will be used to increase (decrease) the market value of pre-merger funded status for the Empire operating division.

**Income Taxes Condition:**

UtiliCorp, Empire and Staff agree that if the merger is determined to be a taxable event and deferred taxes of Empire are thereby lost, UtiliCorp will be required to include an amount equal to those deferred taxes in existence at merger closing in future Empire rate proceedings as an offset to rate base.

**Surveillance Condition:**

UtiliCorp, Empire and Staff agree that UtiliCorp will be required to continue to submit to the Commission's Financial Analysis Department, on a monthly basis, separate surveillance reports for UtiliCorp, on a total company basis; UtiliCorp's Missouri Public Service (MPS) operating division, on a stand-alone basis; and UtiliCorp's Empire operating division, on a stand-alone basis, following the closing of the merger.

**Fuel Energy Cost Information Condition:**

UtiliCorp, Empire and Staff agree that after the closing of the merger, UtiliCorp will be required to provide Staff with historical actual hourly generation, energy purchases and sales data, and other information required by Commission Rule 4 CSR 240-20.080 in electronic format accessible by a spreadsheet program for MPS and Empire. UtiliCorp will also provide access to such additional documents as may be necessary for the Staff to analyze fuel and energy costs.

**Tariff Conditions:**

UtiliCorp, Empire and Staff agree that after the closing of the merger, UtiliCorp will be required to file with the Commission an adoption notice in Empire's electric and water tariffs as follows:

**ADOPTION NOTICE**

Effective [month, day, year], The Empire District Electric Company (EDE), a Kansas corporation, has merged with and into UtiliCorp United Inc. (UtiliCorp), a Delaware corporation, as authorized by the Missouri Public Service Commission in Case No. EM-2000-369. UtiliCorp is the surviving entity. Pursuant to the Commission's Report and Order issued [month, day, year], in said case, UtiliCorp hereby adopts, ratifies and makes its own in every respect, as if the same had been originally filed by it, all tariffs, schedules and rules and regulations of EDE filed with and approved by the Commission before [month, day, year]. UtiliCorp will operate in the area formerly served by EDE using the name "[insert name here]."

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of certain issues raised by the Staff in this case, pursuant to Section 536.060, RSMo Supp. 1999. After considering the matter, the Commission concludes that the stipulation and agreement filed by the Staff, UtiliCorp and Empire should be approved.

**FINDINGS OF FACT**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather the omitted material was not dispositive of the issues before the Commission.

UtiliCorp is a Delaware corporation with its principal office and place of business located in Kansas City, Missouri. UtiliCorp is authorized to conduct business in Missouri through its MPS operating division and, as such, is engaged in providing electrical and natural gas utility service in Missouri to customers in its service areas. UtiliCorp has regulated energy operations in seven other states. UtiliCorp also operates in New Zealand, Australia and Canada.

Empire is a Kansas corporation with its principal office and place of business located in Joplin, Missouri. Empire is engaged in the business of providing electrical and water utility services in Missouri to customers in its service areas.

**A. Approval of Merger:**

UtiliCorp and Empire argued that their proposed merger would not be detrimental to the public and would, in fact, be beneficial for the ratepayers of both companies. Myron McKinney, President and Chief Executive Officer of Empire, explained the benefits of the merger as follows:

We believe that the merger will provide opportunities for our customers, employees, and shareholders to achieve benefits that would not be available if Empire were to remain an independent company and that the merger will result in a combined company that will be well positioned to succeed in the increasingly competitive energy marketplace. Specifically, the combined enterprise can more effectively participate in the increasingly competitive market for the generation of power. Through the elimination of duplicate activities there will be reductions in operating and maintenance expenses. The inherent increase in scale and market diversification will provide increased financial stability and strength, which could not be achieved without the combination of the companies.

M. McKinney Direct, Ex. 1, at p. 4

The merger of Empire with UtiliCorp will permit Empire's customers to be served by a substantially larger utility better able to compete in the wholesale energy market.

**Costs of Merger Exceed Benefits:**

Several parties argued that the proposed merger would be detrimental to the ratepayers of both Empire and UtiliCorp and for that reason it should not be approved by the Commission. In particular, Staff, joined by other parties, contended that the costs associated with the merger would exceed the savings attributable to the merger.

Staff bases its arguments about increased cost of service on various adjustments it has made to the estimates of merger savings set forth by UtiliCorp and Empire. Staff challenges the estimates of merger savings in three areas. First, Staff argues that most of the savings in the area of projected energy cost savings from the joint dispatch of the power supply of the merging companies that UtiliCorp and Empire claim as a benefit of the merger could, in fact, be achieved by Empire as a stand-alone company even if there is no merger. Second, Staff argues that UtiliCorp's and Empire's assumption about the inflation rate for UtiliCorp's overhead costs results in a significant overstatement of the possible savings to be expected from the merger. Third, Staff alleges that labor reductions claimed as merger savings by UtiliCorp might also occur without a merger.

Staff's arguments are not convincing for several reasons. First, with regard to the projected savings from joint dispatch, Staff overestimates the extent to which Empire, as a stand-alone company, could take advantage of increased sales opportunities in the wholesale generation market. UtiliCorp's and Empire's savings assumptions are based on the premise that, absent a merger, UtiliCorp and Empire would continue to generate approximately the same level of normalized wholesale volumes and margins over the ten-year study period as those generated in recent years. UtiliCorp and Empire assumed that after the merger the combined company would make all wholesale market sales at market rates and that the combined company would be able to increase its wholesale market penetration. Under this scenario the merger would result in both an increase in the volume of wholesale sales and an increase in profitability due to use of market-based rates.

Staff's argument assumes that Empire, even without the merger, could make the same power sales on the wholesale market. Thus, according to Staff, the increased profit from those potential sales should not be attributed to the merger. Staff's assumption appears to overstate Empire's ability to compete in the wholesale market. Empire has not been and is not now active in the wholesale market. Empire does not currently have a wholesale marketing group dedicated to pursuing the wholesale market and does not have plans to create such a group. Even if it wished to develop such a marketing group, Empire's size and limited resource mix could make it costly to develop and sustain an effective wholesale marketing group. Furthermore, Empire elected not to separate its transmission and generation functions due to cost. Thus, it does not have FERC approval to sell energy at market-based rates and must sell its excess energy at cost-based rates. UtiliCorp's MPS division, on the other hand, has been an effective player in the wholesale market since 1996. It has separated its generation and transmission functions and can sell energy at market-based rates. MPS maintains a fully staffed wholesale marketing group to pursue opportunities in the wholesale market.

It is not reasonable to assume that Empire could effectively and efficiently create the marketing knowledge and resources needed to operate in the wholesale market and obtain the same results as those that could be obtained after a merger with UtiliCorp. The evidence does not indicate precisely how much merger savings could be obtained through increased activity in the wholesale market, but it is reasonable to conclude that there could be savings.

Second, Staff's argument about the inflation rate for UtiliCorp's overhead costs is also unpersuasive. In calculating the expected cost of future UtiliCorp corporate allocations that are to be charged to the Empire operating division after the merger, UtiliCorp assumed that the corporate allocations would increase each year by an inflation rate of two-and-a-half percent. Staff argued that an inflation factor of five percent was more appropriate given the much larger annual increases in corporate overhead costs allocated by UtiliCorp to its MPS operating division in previous years. If an inflation factor of five percent is used, then the level of estimated savings resulting from the merger will be reduced.

UtiliCorp responded by pointing out that Staff's review of corporate overhead costs was overstated by Staff's failure to take into account that the large annual increases in corporate allocations to MPS experienced in previous years could be attributed to the increased operational cost of reengineering initiatives that were implemented in 1997, 1998 and 1999 over the entire UtiliCorp system.

The Commission does not need to determine an appropriate inflation factor for corporate allocations in order to decide this case. In any future rate case, the cost of UtiliCorp's corporate allocations will be a known factor. If, in that future rate case, those allocations are shown to be excessive, then the Commission will be able to consider that fact when setting the rates for UtiliCorp's Empire operating division. Higher rates for Empire's customers cannot result from this merger unless the Commission approves those rates in a future rate case.

Third, the same considerations apply to Staff's argument about possible labor reductions in the absence of a merger as well as to all of Staff's arguments about possible increased costs of service resulting from the merger. As Staff repeatedly testified, it is very difficult to speculate about what Empire's cost of service might be in five or ten years. Staff used that fact to argue that merger savings could not be reliably established at this time. However, the same difficulty applies to Staff's argument about the costs of the merger exceeding the benefits. If UtiliCorp's and Empire's representations of merger savings are speculative, then Staff's representations of excessive merger costs could also be characterized as speculative. Such speculations are not a valid reason for refusing to allow UtiliCorp and Empire to complete the proposed merger.

**Increased Financial Risk for Empire Ratepayers:**

Public Counsel points out that Empire's long-term debt bears a credit rating of A-. On the other hand, UtiliCorp's long-term debt bears a credit rating of BBB. After the merger the credit rating of the combined UtiliCorp/Empire will likely be the BBB rating of UtiliCorp. Public Counsel argues that the downgraded credit rating will increase the cost of debt for Empire's ratepayers above the cost of debt for Empire absent the merger. Public Counsel argues that this will lead to higher rates for Empire's ratepayers and constitutes a detriment that should lead to the rejection of the merger.

Public Counsel's argument is not persuasive. First, UtiliCorp's credit rating of BBB, while lower than Empire's current rating, is still considered to be investment grade. There is no evidence to support an assertion that UtiliCorp is financially unstable or that the merger with UtiliCorp will put Empire's ratepayers at any great risk. Second, no evidence was presented that would quantify the amount by which

the cost of debt attributable to Empire would increase because of the merger. Indeed, there is no way to reliably quantify such an amount. Certainly there is no guarantee that Empire's credit rating would remain at A- if the merger does not proceed. Third, the cost of debt is just one factor the Commission will consider when setting future rates for UtiliCorp's Empire unit. If the company's cost of debt is unreasonable, appropriate adjustments can be made to protect the ratepayers. Finally, even if it is assumed that the merger will result in an increased cost of debt for Empire's ratepayers, that fact alone does not require the Commission to reject the merger. The risk of an increased cost of debt is just one more factor for the Commission to weigh when deciding whether or not to approve the merger.

After considering all the evidence and the arguments of the parties, the Commission concludes that the merger between UtiliCorp and Empire will not be detrimental to the public and should be approved. In addition to approving the merger itself, UtiliCorp and Empire ask that the Commission approve what they refer to as a Regulatory Plan. The Commission will not do so for reasons fully explained in its Conclusions of Law.

**B. Proposed Conditions on Approval:**

Several parties identified what they believe to be particular problems with the merger as proposed. They ask that various conditions be imposed upon the Commission's approval of the merger so that the alleged problems will not create a detriment to ratepayers. Those various conditions will be addressed in turn.

**Stranded Costs Condition:**

Staff defines stranded costs as those costs presently charged by electric utilities in rates that may not be recoverable when and if electric utilities must set their prices based upon a competitive market. Obviously such a competitive market and resulting stranded costs will not occur unless the Missouri legislature or the United States Congress acts to deregulate the electric industry. Staff does not believe that Empire is currently facing possible stranded costs because it appears that its electric generating assets are worth more in an unregulated marketplace than under continued regulation. However, Staff is concerned that:

if electric restructuring occurs, it is possible that the Joint Applicants in the future may argue that any failure to recover UtiliCorp's valuation of Empire's assets (i.e., the portion of the acquisition adjustment allocable to generation operations) would constitute a 'stranded cost'. Oligschlaeger Rebuttal, Ex. 712, at 68-69.

Staff asserts that this possibility constitutes a detriment to the customers of Empire and asks that the Commission require that UtiliCorp and Empire commit not to seek recovery of such stranded costs in any future Missouri regulatory proceeding. Staff further recommends that that UtiliCorp and Empire be required to commit not to seek or endorse legislation in Missouri that would mandate the recovery of all or a portion of the acquisition adjustment as part of claimed stranded costs.

The Commission will not impose the condition requested by Staff. If UtiliCorp ever attempts to recover stranded costs for its Empire unit, it will presumably have

to do so before the Commission. If it asks for an inappropriate recovery, the Commission will deal with such a request at the time that it is made. Therefore, there is no need to impose a condition that would limit, in advance, UtiliCorp's ability to make an argument before the Commission.

Staff indicates that UtiliCorp may attempt an end-run around the Commission by seeking relief before the legislature. Thus, the second part of Staff's condition would have the Commission attempt to limit UtiliCorp's right to lobby the legislature to enact legislation regarding stranded costs. Staff does not indicate where the Commission would find the authority to forbid a utility from communicating with the legislature. The Commission will not impose the condition requested by Staff.

**Access to Books and Records Condition:**

Public Counsel argues that the proposed merger will result in increased size, scope and complexity of transactions between UtiliCorp and its affiliates. Public Counsel recommends that, as a condition to its approval of the merger, the Commission require UtiliCorp to agree to provide Public Counsel and Staff access to the books, records, employees and officers of all corporate entities for which UtiliCorp or its wholly owned subsidiaries have an ownership interest of ten percent or more. UtiliCorp replies that the access sought by Public Counsel is already mandated by Commission rule and that it is not necessary to require it to pledge to comply with a rule that it is already legally obligated to obey.

The Commission has promulgated extensive rules to govern transactions between utilities and their affiliates. For electric utilities the affiliate transaction rule is found at 4 CSR 240-20.015. That rule addresses the concerns raised by Public Counsel. So long as the affiliate transaction rule is in effect there is no reason to extract a promise from UtiliCorp that it will comply with the regulation. Its compliance is already expected and required. The requested condition regarding access to books and records will not be imposed.

**Affiliate Transaction Condition:**

Public Counsel proposed that, as a condition to its approval of the merger, the Commission require UtiliCorp to agree to comply with the Commission's affiliate transaction rule. In its initial brief, Public Counsel asks that the Commission state in any order approving the merger that the Commission will "commit to close scrutiny of the merged entity with regard to compliance with the terms of the Commission's affiliate transaction rules." (Initial Brief of the Office of the Public Counsel at p. 48)<sup>2</sup> UtiliCorp replies that it will, of course, comply with all the Commission's regulations.

<sup>2</sup> Public Counsel's initial brief also recommends that the Commission require as a condition of the merger that UtiliCorp never propose to charge the Empire division customers for access to the Empire fiber optic system, because Empire's non-regulated operations have never provided any compensation whatsoever to the regulated operations for the use of its right of way, poles, ducts and underground conduit. This recommendation was never identified as an issue by the parties and no evidence was presented regarding such a condition other than a brief, conclusory statement in the rebuttal testimony of Ryan Kind, Exhibit 201, p. 7. In any event, the requested condition is unnecessary because the Commission will exercise its authority to review any future request by UtiliCorp to revise its charges to its customers. The condition requested by Public Counsel will not be imposed.

As previously indicated with regard to the books and records condition, there is no reason to extract a promise from UtiliCorp that it will comply with the regulations of the Commission. The Commission will continue to scrutinize UtiliCorp for compliance with the affiliate transaction rules, as it does all other utilities in this state that are required to comply with those rules. The Commission will not impose the requested affiliate transaction condition.

**Customer Service Indicators Condition:**

Staff is concerned that the pressures and dislocations associated with the merger might lead to a decrease in the quality of service that UtiliCorp would provide to the former customers of Empire. In order to protect Empire's customers, Staff proposed that UtiliCorp be required to adopt several changes to its customer service program. Specifically, Staff asked the Commission to require UtiliCorp to:

1. Continue to track and monitor the level of customer complaints separately for the MPS and Empire divisions after the merger;
2. Continue Empire's support program designed for its elderly and handicapped customers entitled Empire's Action to Support the Elderly (EASE);
3. Continue Empire's policy of permitting flexible payment due dates for Empire customers who sign up for the average payment plan;
4. Continue to perform formalized customer satisfaction surveys;
5. Provide actual monthly performance indicators to Staff on a calendar year quarterly basis following the effective date of the merger. Such reports to Staff would include data regarding Call Center Abandoned Call Rate (ACR), Call Center Average Speed of Answer (ASA), Distribution Reliability Customer Average Interruption Duration (CAIDI), Distribution Reliability System Average Interruption Frequency Index (SAIFI), and Distribution Reliability System Average Interruption Duration Index (SAIDI). Staff also recommends that UtiliCorp be required to provide information regarding staffing level at Customer Call Centers and that UtiliCorp be required to spend reasonable and appropriate amounts within the next year to improve customer service relating to any performance indicator that did not meet expectations;
6. Establish specified objectives that UtiliCorp would be required to meet for its ACR and ASA indicators; and
7. Maintain the SAIFI, SAIDI and CAIDI reliability measures separately for the MPS and Empire divisions.

UtiliCorp replies to Staff's proposed requirements by pointing out that UtiliCorp has provided quality service in Missouri for more than 80 years. UtiliCorp argues that there is no reason to believe that it will not continue to provide quality service after the merger and that it would be unfair to require it to comply with remedial measures and reporting requirements that are not required of every other utility in Missouri.

UtiliCorp has a history of providing quality service to its Missouri customers. The evidence presented by Staff indicated that the service provided by UtiliCorp to the customers of its MPS division differed somewhat from that provided by Empire to its customers. The Commission finds that the customer service currently provided by MPS is not substantially inferior to that provided by Empire. Therefore, the Commission will not impose extensive special customer service conditions that are not applicable to the other utilities in this state.

Certainly the Commission expects that its Staff will continue to monitor the level of customer service provided by UtiliCorp in both its MPS and Empire divisions. If Staff notes problems with the level of service provided by UtiliCorp, it has the responsibility to bring those problems to the attention of the Commission through all appropriate means. However, with one exception, the Commission will not impose the conditions on the merger requested by Staff.

The only customer service condition that the Commission will impose is a requirement that UtiliCorp provide Staff with monthly reports for one year following the merger.<sup>3</sup> It is certainly possible that the merger process could cause disruptions in the level of service that both UtiliCorp and Staff expect to be provided to UtiliCorp's customers. While Staff could obtain the information it needs to monitor customer service levels by performing repeated audits on UtiliCorp, the regular reporting of information by UtiliCorp is the most efficient and effective method by which Staff can fulfill its responsibility to monitor the quality of service UtiliCorp is providing to its customers.

**Market Power Conditions:**

Several parties expressed concerns about whether the merger would result in UtiliCorp acquiring greater horizontal or vertical retail market power. Before this issue can be discussed, it is important to understand the meanings of the terms, horizontal and vertical market power. The testimony of Ryan Kind, Public Counsel's witness, presents definitions of these terms developed by this Commission's Education Working Group to the Task Force on Retail Electric Competition, established in Case No. EW-97-245. Those definitions are as follows:

Market Power is the ability of a firm, alone or in concert with other firms to profitably maintain the price of a product above the competitive market level for an extended period of time. Suppliers with vertical or horizontal market power could charge unfair prices and realize excessive profits.

*Vertical* market power involves the ability of a firm to control an essential element in the vertical production chain and, through that control, cause competitors to be at a disadvantage through either restricted access or higher costs for the products or services required to produce and deliver the specific product.

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<sup>3</sup> Staff asks for monthly data to be provided in quarterly reports. However, the Commission imposed a monthly reporting requirement on UtiliCorp in the merger between UtiliCorp and St. Joseph Light & Power Company, Case No. EM-2000-292. The Commission will impose the same requirement in this case.

*Horizontal* market power exists when a single firm or small group of firms have the ability to affect the price of a product. In the case of a single firm, horizontal market power is present when a firm dominates a market where entry barriers protect it from competition. In the case of a small group of firms, horizontal market power can occur through explicit collusive behavior or through strategies that jointly maximize the self-interest of each of the firms.

Kind Rebuttal, Ex. 201, p. 62-63

Staff, Public Counsel and Springfield argue that the merger will permit UtiliCorp to exercise greater vertical and horizontal retail<sup>4</sup> market power to the possible future detriment of the public.<sup>5</sup> In order to deal with these possible detriments, various parties asked the Commission to impose various conditions on its approval of the merger.

1. Staff proposed that UtiliCorp and Empire be required to join the same regional transmission entity that meets the eleven ISO principles enumerated in FERC Order No. 888 before the October 15, 2000 deadline imposed by FERC Order No. 2000. UtiliCorp replied that it would meet the FERC deadline for joining a regional transmission entity and indicated that it did not believe that it should be required to announce its intentions any sooner than any other utility. It is unclear as to whether Staff meant that UtiliCorp and Empire should join the same regional transmission entity before the deadline or simply that it should be required to comply with the deadline. However, the October 15, 2000 deadline is now past and this proposed condition is moot. The Commission finds that conditioning the approval of the merger upon joining the same regional transmission entity is not necessary. Therefore, the Commission will not impose the requested condition.

2. Staff is concerned that harmful horizontal market power could develop in load pockets following the advent of retail electric competition. Load pockets are geographic areas within the service territories where the transmission system will not allow competitive generation to provide services to a significant percentage of end-use customer loads on a year-round basis. Staff proposed that UtiliCorp should be required to agree to submit a study showing what percentage of load can be served from competitive generation sources throughout their merged service territory. Staff would require UtiliCorp to prepare and present this study at the time that retail competition is approved in Missouri. UtiliCorp replied that it would be willing to perform such a study if ordered to do so at the time that retail electric competition is instituted but that it should not be ordered to perform such a study at this time.

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<sup>4</sup> The merger may also affect wholesale market power. However, wholesale market power is an area that is subject to regulation by FERC and will not be addressed in this Report and Order.

<sup>5</sup> Retail market power could become a detriment only if retail electric competition is authorized in Missouri. Currently, Empire and UtiliCorp are subject to cost-based regulation and that status will continue after the merger.

Staff and other parties request that the Commission order UtiliCorp to perform market power studies at some future time when retail electric competition may become a reality in Missouri. However, no one can possibly know when, or if, that competition will arrive. Neither can anyone predict what form that competition may take. None of the parties have provided a satisfactory explanation of why the Commission should order the completion of these studies now, in this Report and Order, rather than waiting until the circumstances of retail electric competition become more clear. Under these circumstances the Commission will not impose the condition sought by Staff. If, at the time that retail electric competition becomes a reality, the Commission finds that a market power study is needed, the Commission will exercise its authority to order the completion of any needed studies.

3. Public Counsel suggests that UtiliCorp should be compelled to agree to the same market power conditions that were approved by the Commission in the KCPL/Western Resources merger case, Case No. EM-97-515. Those conditions would require UtiliCorp to do the following:

- a. Agree to perform a horizontal market power study that meets specified conditions. The market power study would be performed at the time that retail electric competition is commenced in Missouri;
- b. Address vertical market power concerns by agreeing to become a member of a Regional Transmission Organization;
- c. Agree to various restrictions on its retail market power including restrictions on the use of the name of Empire for marketing of unregulated products and services provided by UtiliCorp or its affiliates; and
- d. Agree that it will not propose or otherwise support legislation in Missouri designed to prohibit or substantially limit the Commission from addressing market power issues.

UtiliCorp replies that the KCPL/Western Resources merger was a different case with different circumstances and there is no reason to impose those conditions upon UtiliCorp in this merger case.

The KCPL/Western Resources merger was different from this merger in that it was resolved through the filing of a stipulation and agreement. That means that the merging parties agreed to the imposition of those conditions. The lack of agreement in this case most clearly impacts the proposed condition that would limit UtiliCorp's right to propose or support legislation. While a party can certainly agree not to propose or support certain legislation, the Commission has no authority to order a utility to refrain from exercising its right to petition the legislature and the Commission will not attempt to do so.

With regard to the other proposed conditions, the Commission has previously indicated that it will not now order the performance of market power studies. UtiliCorp is already obligated to become a member of an RTO by FERC order 2000. Finally, any necessary restrictions on UtiliCorp's retail market power may be imposed at such time as it is no longer subject to cost-based regulation. Public Counsel's proposed conditions will not be imposed upon UtiliCorp.

4. Springfield argued that the merger of Empire and UtiliCorp would create a detriment to the public in that it would give the resulting entity the opportunity, ability and incentive to utilize scarce electrical transmission resources for its own use, leaving other utilities no economic alternatives for delivery of needed power

supplies. Springfield suggests several conditions that should be imposed to avoid these detriments. Those conditions are closely related to Springfield's concerns about transmission access and reliability and will be discussed along with those issues in the Conclusions of Law.

**Load Research Condition:**

Staff raised an issue regarding the Load Research programs maintained by UtiliCorp and Empire. Load Research refers to a program designed to provide hourly electric load data for use in calculating hourly class loads. A load research program helps the utility understand how its customers use energy. The cost of generating electricity varies by the hour or even shorter intervals. However, electrical use for most customers is measured by the month because monthly data is used for billing. A load research program permits the utility to more closely measure how certain classes of customers actually use electricity during the month and during the day so that appropriate rates can be established.

Staff is pleased with Empire's current load research program and is less pleased with UtiliCorp's current load research program for its MPS division. Staff would like to see MPS's program brought up to the level of Empire's program and to that end has proposed that UtiliCorp be required to agree to:

1. Continue to treat the Empire service territory separately from the MPS service territory for load research purposes;
2. Maintain Empire's load research program at its current standard of timeliness and quality;
3. Provide hourly class load data, selected individual customer hourly load research data for the Empire service territory and the checks and balances performed on that data to the Staff on an on-going basis;
4. Improve MPS' current load research program to match the current Empire standard of timeliness and quality; and
5. Provide hourly class load data, selected individual customer hourly load research data and checks and balances performed on that data for the MPS service territory to the Staff on an on-going basis.

UtiliCorp replied that it does intend to treat MPS and Empire separately for load research purposes for as long as they have separate rate structures. UtiliCorp indicates that it is taking steps to improve the load research program for MPS. However, UtiliCorp disagrees with Staff's other proposed conditions regarding its load research program. UtiliCorp argues that it would be unfair to hold its load research program to a higher standard than is applied to other similar utilities. UtiliCorp suggests that if Staff believes that higher standards are needed it should determine those standards through consultation with the industry as a whole. UtiliCorp also argues that it should not be required to periodically report its research data to Staff because such a requirement would be unnecessarily costly.

The Commission expects that UtiliCorp will continue to provide high quality load research for both its Empire and MPS divisions. While Staff indicates that Empire's load research program is superior to that of UtiliCorp, it did not present any evidence to indicate that UtiliCorp's current program, or the program it plans to use after the merger, fails to comply with any statute, regulation or industry standard. The Commission will not attempt to micromanage UtiliCorp's business by ordering

that it hire a certain number of workers for its load research program. Neither will it attempt to establish any firm standards for UtiliCorp to meet. If Staff believes that such standards are necessary, it should use the rulemaking process to establish those standards for all similarly situated utilities. UtiliCorp will not be singled out for special scrutiny. For these reasons, the Load Research Conditions suggested by Staff will not be imposed upon UtiliCorp.

**Energy Conditions:**

The Missouri Department of Natural Resources alleged that the merger between UtiliCorp and Empire would have a detrimental impact on the low-income customers of UtiliCorp and Empire. It also alleged that the merger would have a detrimental impact on energy efficiency and the use of renewable energy resources. MDNR proposed that the Commission impose numerous conditions upon the merger in order to alleviate these alleged harms. MDNR proposed that UtiliCorp be required to:

1. Enter into a partnership with MDNR and other interested parties to market and leverage funds for the development of energy efficiency programs;
2. Develop or retain low-income service packages to meet customer needs, reduce energy costs and provide a return to UtiliCorp;
3. Join with MDNR and a broad range of stakeholders to assess the state's renewable and alternative resources and develop demonstration projects, review and implement policy and market options and put the questions to customers in a deliberative poll;
4. Target outreach to customers that are income eligible and encourage them to take advantage of the opportunity to reduce energy consumption and to improve home affordability;
5. Amend the cooperative agreement between UtiliCorp and Kansas City, Missouri, to permit averaging unit cost within the agreement to maximize the opportunity to assist customers;
6. Eliminate tying the dollar amount to specific measures to maximize the energy conservation measures installed in each home and permit any energy efficient measure that is deemed cost-effective as a result of computer analysis, as stated in the agreement between UtiliCorp and Kansas City, Missouri;
7. Permit energy-efficiency assistance to all eligible households and allow funds to be spent on non-electric appliances;
8. Implement a 25-site Benefit Outreach and Screening Software (BOSS) pilot project, and expand the program, as appropriate, if found to successfully deliver benefits to low-income customers;
9. Implement a base load and space heating electric energy efficiency program directed toward high use payment-troubled, low-income customers;
10. Implement a pilot solar energy program directed toward high use low-income customers;
11. Implement a periodic survey process through which the merged company will take pro-active efforts to identify which of its payment-troubled customers represent low-income households;

12. Implement an Outcome-based Performance Reporting System (OPRS) through which the customer service outcomes to low-income customers can be systematically tracked over time.

UtiliCorp replied that it opposed making acceptance of any of MDNR's proposals a condition upon approval of the merger. UtiliCorp indicated that it is willing to discuss with MDNR and other parties options for additional or different types of programs related to energy and low-income weatherization or assistance as long as discussions also involve methods of recovery of increased costs for these programs. UtiliCorp indicated that it intends to continue to participate in low-income and energy efficiency programs and supports a number of them currently through funding and other measures.

MDNR argues that the Commission must impose the conditions it has listed in order to avoid possible detriment to UtiliCorp's low-income customers. MDNR suggests that the Commission must ensure that the benefits of the merger are appropriately 'passed-on' to UtiliCorp's low-income customers. MDNR argues that the low-income customers currently served by Empire and UtiliCorp are a separate market that will be harmed because the benefits of the merger will not be distributed fairly to all customers.

MDNR's framework for analyzing this merger is based on that used by federal courts in evaluating mergers under federal anti-trust laws. Obviously, this is not an anti-trust case and this Commission is not obligated to follow federal precedent established for the application of anti-trust laws. Nevertheless, the Commission agrees that it should consider the possible impact of the merger on all the customers of Empire and UtiliCorp when making its determination of whether or not the proposed merger is detrimental to the public. However, it is not clear that low-income customers can properly be considered as a separate class when considering the impact of the merger.

Low-income customers have not previously been accorded status as a separate class of consumer when utility rates are designed. Standard rate design treatment attempts to match revenue requirement determination with cost causation by class. In other words, the class of consumers that causes a cost to a utility should be required to pay those costs through rates. The evidence presented by MDNR suggests that low-income consumers have special problems that UtiliCorp should address through additional programs. Those programs, of course, bear a cost. Thus, if the Commission were to require UtiliCorp to institute new programs to better serve its low-income consumers, without subsidization from other classes of consumers, it might be necessary to increase the rates charged to the class of low-income consumers in order to pay for those programs. Obviously, such a result would not be practical or desirable from the standpoint of the low-income consumers. But neither would it be fair and reasonable for the Commission to order UtiliCorp to institute such programs without giving it an opportunity to recover the cost of those programs through rates. As previously indicated, this case is not about establishing rates. It also is not about adjusting UtiliCorp's class cost of service.

MDNR suggests that such programs could be paid for through the passing on of the synergy benefits of the merger to the consumers. However, absent a rate or

complaint case, UtiliCorp is under no obligation to pass any merger savings on to consumers. MDNR's proposed conditions will not be imposed upon UtiliCorp.

MDNR also argues that the Commission should impose conditions on the merger to require UtiliCorp to institute additional energy efficiency and renewable energy programs. It suggests that the flow of money out of Missouri to pay for non-renewable sources of energy is a detriment to the public and suggests that UtiliCorp be required to make a commitment to renewable energy sources. While energy efficiency and the increased use of renewable energy may be a laudable goal, MDNR has not made a showing that would link energy efficiency and renewable energy to this merger. The fact that UtiliCorp is seeking to merge with Empire will not increase the reliance of the resulting company on non-renewable energy, nor will it affect the efficiency of use of energy by the customers of the companies. There is no evidence that this merger will cause any detriment with regard to energy efficiency and the use of renewable energy sources. MDNR's proposed conditions will not be imposed upon UtiliCorp.

**Labor Protective Provisions Condition:**

The IBEW raises concerns about the impact of the proposed merger on the benefits and terms of employment of its members employed by Empire. The IBEW also argues that the possible elimination of some of Empire's bargaining unit employees by UtiliCorp after the merger would have a detrimental impact on the safety and reliability of the electrical service provided by Empire. The concerns raised by the IBEW will be addressed in turn.

First, the IBEW is concerned that after the merger, UtiliCorp will make changes to the medical insurance and retirement benefits currently received by the bargaining unit employees. In particular, UtiliCorp is expected to require the former employees of Empire to pay a larger percentage of the cost of their medical insurance premiums. The IBEW asks that, as a condition for approval of the merger, the Commission require UtiliCorp to continue to maintain medical insurance coverage for bargaining unit employees with no increase in the percentage of employee contributions that is currently required. The IBEW also asks that the Commission require that UtiliCorp not terminate or adversely change the retirement plan, retirement funding or retirement benefits affecting bargaining unit members.

UtiliCorp employees currently pay a greater percentage of the cost of their health insurance than do employees of Empire. UtiliCorp indicates that following the merger it intends to put into effect for Empire employees the same overall healthcare package that exists now for UtiliCorp employees, meaning that the Empire employees will pay more for their health insurance coverage. Thus, the IBEW argues that its proposed condition preventing an increase in the cost of health insurance should be imposed because otherwise the merger will be detrimental to the bargaining unit employees. There was no persuasive evidence or argument to demonstrate that increasing the cost of health insurance for the bargaining unit employees would be detrimental to the public at large.

The IBEW's argument is not persuasive. The terms of employment under which the IBEW's union members will work for Empire or UtiliCorp are subject to negotiation between employer and employee. Such terms are currently embodied

in a collective bargaining agreement between Empire and IBEW. UtiliCorp has indicated that it intends to assume that collective bargaining agreement after the merger. Aside from any possible preclusive effect of the National Labor Relations Act, it is clear that under state law the PSC is an agency of limited jurisdiction and has only such powers as are conferred upon it by statute. Inter-City Beverage Co., Inc. v. Kansas City Power & Light, 889 S.W.2d 875, 877, (Mo. App. W.D. 1994). There is no provision in Missouri's statutes that would justify the Commission's intervention in a collective bargaining agreement in a merger case. Indeed, in Section 386.315.1, RSMo 1994, there is a specific legislative prohibition against such interference with a collective bargaining agreement in the context of establishing the rates to be charged by a utility. Clearly, the Commission has no authority to step into the negotiations between UtiliCorp and the IBEW to impose a particular term favorable either to the employees or to the employer.

The IBEW's second concern regards the safety and reliability of the electrical service that will be provided by UtiliCorp in the area currently served by Empire. UtiliCorp has indicated its intent to eliminate some fifty bargaining unit positions. Some of the positions to be eliminated may include linemen and electricians responsible for maintaining and repairing the electrical service lines in the Empire service territory.<sup>6</sup>

IBEW states that the elimination of these fifty bargaining unit positions may compromise the safety and reliability of the electrical service delivered by UtiliCorp after the merger. It is possible that the safety of the employees could be endangered if too few linemen are available to do the work currently performed by Empire's linemen. Similarly, the reliability of the transmission system could be adversely affected if there are too few workers available to make needed repairs to the electric lines. This could be a particular problem in a widespread outage, such as could result from a major ice storm. In such a situation, UtiliCorp conceded that a reduced crew of linemen would not be able to restore power as quickly. It is also troubling that UtiliCorp has not conducted any specific studies to determine the impact that substantially reducing the number of bargaining unit employees would have on the safe and reliable delivery of service in the Empire service area.

The IBEW suggests that the Commission should deal with its concerns by mandating, as a condition on its approval of the merger, that UtiliCorp not eliminate any bargaining unit positions as a result of the merger. The assertion by IBEW that elimination of bargaining unit positions would have a negative effect on safety or reliability is not supported by sufficient evidence to cause the Commission to conclude that IBEW's proposed condition is warranted. The Commission will not impose such a condition.

Section 386.310, RSMo 1994, gives the Commission the power to require every public utility to maintain and operate its system in such a manner as to "promote and safeguard the health and safety of its employees, customers, and the public." The Commission is always concerned about the safe and reliable

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<sup>6</sup>The positions that UtiliCorp is considering eliminating may be found in UtiliCorp's Response to Data Request No. IBEW-6, which is attached as an appendix to the cross-surrebuttal testimony of Bill Courtney, Exhibit No. 100.

delivery of electrical service. In order to ensure that the health and safety of UtiliCorp's employees, customers and the public are protected after the merger, the Commission will establish, by a separate order, a case to investigate these safety issues.

**Public Counsel's Regulatory Plan Condition:**

Public Counsel proposes that the Commission adopt an alternative to the regulatory plan proposed by UtiliCorp. Public Counsel suggests that UtiliCorp should be required to file a rate case for each of its Missouri operating divisions within one year of the approval of both the merger between UtiliCorp and St. Joseph Light & Power and the merger between UtiliCorp and Empire. UtiliCorp opposed this condition.

Public Counsel's proposed condition is unnecessary. UtiliCorp can decide for itself when it wishes to propose rate adjustments for its Missouri operations. If Public Counsel believes that UtiliCorp is over-earning, it is free to bring an appropriate complaint. The Commission will not upset that balance by arbitrarily ordering UtiliCorp to institute a rate case at a particular time.

**CONCLUSIONS OF LAW**

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

**A. Requirements for Approval of the Merger:**

UtiliCorp and Empire have asked the Commission to approve their merger pursuant to the provisions of Section 393.190.1, RSMo 1994.<sup>7</sup> In interpreting the requirements of this statute, the Commission and the courts that have reviewed its decisions, have consistently held that a proposed utility merger must be approved if such approval is in the public interest. This does not mean that the public must receive a benefit from the proposed merger. Instead, the Missouri Supreme Court has established a standard that holds that the requirement that the merger be "in the public interest" can mean no more than that the merger is "not detrimental to the public." State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). Therefore, the Commission is required to approve this merger if it can be shown that the merger is not detrimental to the public.

What then does it mean for the Commission to find that the proposed merger is "not detrimental to the public"? Furthermore, who is the public that is to be protected from detriment? Several parties suggest that the public that the

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<sup>7</sup> Section 393.190.1, RSMo 1994, provides in relevant part as follows:

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 any 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.

Commission is obligated to protect is the ratepayers and the detriments from which they are to be protected are higher rates or a deterioration in the level of customer service. Certainly the Commission has utilized those definitions in past cases. See, e.g., Laclede Gas Company, 16 Mo P.S.C. (N.S.) 328 (1971). There does not, however, appear to be any controlling authority that would firmly limit the Commission to those definitions. Nevertheless, the Commission will generally adhere to those definitions in this decision.

**B. Burden of Proof:**

Who then has the burden of proving that this merger is not detrimental to the public? The Missouri Supreme Court has stated that “the relevant inquiry in determining which party has the burden of proof is to identify who, as is disclosed from the pleadings, asserts the affirmative of an issue. Generally that party has the burden of proof.” Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. banc 1991); see also Dycus v. Cross, 869 S.W.2d 745 (Mo. banc 1994). The joint applicants, UtiliCorp and Empire, are asserting that their merger will not be detrimental to the public. Therefore, they have the burden of proving that assertion. However, simply assigning the general burden of proof on UtiliCorp and Empire does not resolve all questions about burden of proof.

UtiliCorp and Empire must prove that their proposed merger is not detrimental to the public. However, other parties have asserted that the merger is detrimental in one or more specific areas. It is not enough for a party to assert that a detriment exists and demand that UtiliCorp and Empire prove them wrong.

While the burden of proof never shifts throughout a trial, the burden of going forward with evidence may shift if a prima facie case is made. Anchor Centre Partners at 30. Therefore, the parties asserting that the merger is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions.

**C. The Regulatory Plan:**

The details of UtiliCorp’s proposed regulatory plan are set forth in paragraph 15 of its joint application and may be summarized as follows:

1. A five year rate moratorium for the Empire retail electric energy distribution unit will be put in place on the effective date of the revised rates resulting from the electric rate case which Empire will file in the second half of 2000 (Pre-Moratorium Rate Case)<sup>8</sup> (Rate Freeze);
2. UtiliCorp asks that several determinations regarding the Pre-Moratorium Rate Case be ordered now in this merger case, including test year, update and true-up periods, in-service criteria for Empire’s State Line Combined Cycle plant (SLCC), which is anticipated to be in service on or about June 1, 2001, a list of the categories that would be adjusted in revenues, rate base, and expense, an agreement that the return on equity would be

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<sup>8</sup>The Pre-Moratorium Rate Case was filed on November 3, 2000, and was assigned case number ER-2001-299.

- based on Empire as a stand-alone entity, and an agreement that all open positions in existence because of the merger be built into the cost of service. (Predetermination of Rate Case Issues);
3. During the fifth year of the rate moratorium, UtiliCorp will initiate a general rate case for the electric operations of the Empire unit (the Post-Moratorium Rate Case) with the new rates to take effect at the end of the moratorium period. This rate filing will specifically set out an accounting of the synergies realized as a result of merger and the balance of the acquisition premium not covered by said synergies (Post-Moratorium Rate Case);
  4. In the context of the Post-Moratorium Rate Case and for ratemaking purposes, fifty percent (50%) of the unamortized balance of the premium will be included in the rate base of the Empire unit's electric operations and the annual amortization of the premium will be included in the expenses allowed for recovery in cost of service (Partial Recovery of Premium in Rates);
  5. In the context of the Post-Moratorium Rate Case, and for ratemaking purposes, the return allowed on the premium portion of the rate base will be based on a UtiliCorp capital structure of 60% debt and 40% equity. The return allowed on the balance of the rate base will be based on an Empire unit capital structure as found in the Pre-Moratorium rate case (Frozen Capital Structure); and
  6. The allocation of UtiliCorp's corporate and intra-business unit costs to MPS shall exclude for ratemaking purposes the Empire factors from the methodology for the period covered by the regulatory plan (MPS Allocations).

UtiliCorp asserts that approval of this regulatory plan is necessary to allow its shareholders the opportunity to recover the \$850-900 million investment, including a premium of approximately \$280 million, required to acquire the ownership of Empire. Every element of the regulatory plan drew sharp opposition from the other parties.

**The Five-Year Rate Moratorium:**

UtiliCorp proposed that after completion of the merger and the Pre-Moratorium Rate Case, the rates for the Empire division would be frozen for a period of five years. UtiliCorp would be bound to not request a rate increase during those five years barring certain unforeseen catastrophic circumstances that might justify a rate increase. In return, UtiliCorp asks that the Commission order that its rates not be decreased during the same five years. Such a rate freeze would allow UtiliCorp to recover at least a portion of its investment through the effect of regulatory lag. In other words, UtiliCorp anticipates that its cost of service will go down because of the savings resulting from the merger. It wants assurance that the Commission will not reduce its rates until UtiliCorp's shareholders have had a chance to benefit from that decreased cost of service.

The Commission has approved a rate freeze as part of other merger cases. However, in each case the rate freeze was a part of a stipulation and agreement submitted for the Commission's approval by all the parties. In this case, UtiliCorp is asking that the Commission impose a rate freeze on unwilling parties. For a number of reasons, UtiliCorp's request cannot be granted.

First, the imposition of a five-year rate freeze would be contrary to the Commission's statutory obligation to provide continuous regulation of the public utilities of this state. In describing the authority and responsibility of the Public Service Commission, the Missouri Supreme Court has stated that the Commission is:

a fact finding body, exclusively entrusted and charged by the legislature to deal with and determine the specialized problems arising out of the operation of public utilities. . . . 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.

State ex rel. Chicago, R. I. & P. R. Co. v. Public Service Commission, 312 S.W.2d 791, 796 (Mo. 1958). In rejecting a proposed stipulation and agreement that would have limited the Commission's ability to entertain complaints against a Missouri utility, the Commission stated as follows:

The Commission cannot agree to relinquish its statutory duties as proposed by the parties. The Commission is essentially a creation of the Legislature and, as such, is empowered by statute to carry out certain functions. Among the various statutory responsibilities incumbent on the Commission to perform are the setting of rates (Section 393.150, RSMo), the provision of safe and adequate service (Section 393.130, RSMo), the proper litigation of complaints (Section 386.400, RSMo) and other general powers (Section 393.150). The Commission cannot proceed in a manner contrary to the terms of a statute and may not follow a practice which results in nullifying the express will of the Legislature.

Public Counsel v. Missouri Gas Energy 6 Mo. P.S.C. 3d 464, 465 (1997). The views expressed by the Commission in that earlier case are still appropriate. Imposition of a five-year rate freeze would purport to deprive the Commission of the legislatively imposed duty to adjust UtiliCorp's rates to meet changing conditions. The Commission will not agree to relinquish its statutory duties.

Second, even if the Commission were willing to agree to a five-year rate moratorium, it is apparent that such a rate moratorium could not be effective to actually freeze UtiliCorp's rates. Section 386.390.1, RSMo 1996, permits the Commission, the Office of the Public Counsel, municipal and county officials, or a group of not less than twenty-five ratepayers, to bring a complaint before the

Commission seeking to challenge the reasonableness of the rates charged by an electrical corporation. The Commission clearly cannot prevent the Office of the Public Counsel, municipal or county officials or qualifying groups of ratepayers from bringing a rate complaint against UtiliCorp within the proposed five-year moratorium. Instead, UtiliCorp asks that the Commission bar its Staff from participating in or assisting in any complaint brought by another party. Essentially, then, UtiliCorp would have the Commission go through the motions of providing a fair hearing for a rate complaint brought during the five-year rate moratorium, but it would expect the Commission to have prejudged that complaint in favor of UtiliCorp. Obviously, such a practice would be both illegal and unethical.

The Commission cannot prevent appropriate parties from bringing a rate complaint during the five-year rate moratorium, nor can it prevent UtiliCorp or even a future Commission from ignoring such a moratorium. In a 1975 case, State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. banc. 1975), the Missouri Supreme Court reversed a circuit court decision that would have prevented the Commission from granting a rate increase during a two-year moratorium established by the Commission in a previous rate case. The court held that "to rule otherwise would make section 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers." Jackson County at 29-30. Therefore, UtiliCorp would be free to seek increased rates and the Commission would be free to establish revised rates despite the existence of a moratorium.

Third, even if all the legal barriers to an effective rate moratorium could be surmounted, a five-year rate moratorium would not be good public policy either from the perspective of UtiliCorp or its ratepayers. The electric utility marketplace has seen phenomenal change in recent years. Certainly there is no reason to believe that the pace of change will diminish in the next five years. The cost of fuel might fluctuate significantly, plans for possible deregulation of the electric industry are under consideration in the legislature, and there is always the possibility of an unforeseen event. Attempting to lock in a rate now to remain in effect until 2006 simply is not fair to either UtiliCorp or its ratepayers and is not good public policy.

**Other Aspects of the Regulatory Plan:**

In addition to the proposed five-year rate freeze, UtiliCorp's proposed regulatory plan would have the Commission establish, in this case, several facts that would be used to establish UtiliCorp's rates in a both the Pre-Moratorium and Post-Moratorium Rate Cases. In particular, UtiliCorp would have the Commission decree that for the post-moratorium rate case, the return allowed on the assigned premium would be based on a UtiliCorp capital structure of sixty percent debt and forty percent equity. The return allowed on the balance of the rate base would be based on an Empire stand-alone unit capital structure as determined in the Pre-Moratorium Rate Case.

Empire's stand-alone capital structure is more reliant on equity and less reliant on long-term debt. UtiliCorp utilizes a more highly leveraged capital structure closer to forty percent equity and sixty percent debt. UtiliCorp's preference for a capital structure more reliant on long-term debt enables it to acquire capital at the relatively low rates that are available for debt financing, rather than the relatively high rates

that are required for equity financing. By utilizing, for ratemaking purposes, a hypothetical capital structure that overstates the use of equity financing, UtiliCorp would receive a higher rate than it would otherwise receive and thus would be able to recover a portion of the acquisition premium. UtiliCorp argues that because Empire's capital structure probably would not change absent the merger, the use of a hypothetical capital structure would merely maintain the status quo for Empire's ratepayers and thus would not be a detriment to them.

Similarly, UtiliCorp asks the Commission to declare that in post-moratorium rate cases the allocation of UtiliCorp's corporate and intra-business unit costs to UtiliCorp's MPS operating division would exclude the Empire factors. Thus, UtiliCorp asks the Commission to ignore the effect that the addition of the Empire division to UtiliCorp would have on the costs allocated to MPS. The fact that the Empire division had been added to the UtiliCorp corporate structure would tend to reduce the amount of corporate and intra-business unit costs that would be allocated to each of UtiliCorp's operating divisions. By ignoring the addition of the Empire division, UtiliCorp's plan would have the effect of preventing a decrease in the MPS division's cost of service and would keep the rates paid by MPS's ratepayers somewhat higher than they might otherwise be if the addition of the Empire division were allowed to be included. UtiliCorp argues that such a result is fair because those corporate allocations will not be reduced if the merger is not completed.

In addition, UtiliCorp asks the Commission to determine that it will be allowed to recover transaction costs and costs to achieve associated with the merger. Again, UtiliCorp argues that such costs are part of the costs that must be incurred to achieve the savings that will result from the merger.

Finally, UtiliCorp asks the Commission to establish, in this case, certain items, including the test year and in-service/commercial operation criteria for the State Line Combined Cycle plant, that are at issue in what it refers to as the Pre-Moratorium Rate Case.

Essentially, in each matter, UtiliCorp asks the Commission to state now how it will rule on certain issues in future rate cases. The Commission will not do so. Section 393.270.4, RSMo 1994, provides that when the Commission determines the rate that can be charged by a utility, it:

may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . , with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies.

The law is quite clear that when determining a rate the Commission is obligated to review and consider *all* relevant factors, rather than just a single factor. See State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704 (Mo. 1957); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo banc 1979); and Midwest Gas Users'

Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area. Such a practice is justly condemned as single-issue ratemaking. Midwest Gas Users' Association at 480.

In order to avoid single-issue ratemaking, the Commission has avoided making decisions about rate case matters outside of the context of a rate case. In fact, the Commission typically includes language in non-ratemaking cases that specifically provides that the ratemaking treatment to be afforded a transaction will be considered in a later proceeding. The ratemaking factors that UtiliCorp asks the Commission to decide in this case can only be properly considered within the context of all relevant factors in a subsequent rate case. The Commission will not engage in single-issue ratemaking and will decline UtiliCorp's invitation to prejudge certain factors that can only be properly considered in a future rate case.

**Recovery of the Acquisition Premium:**

UtiliCorp's proposed regulatory plan asks that the Commission find, in this case, that UtiliCorp should be allowed to include in the rate base of the Empire division's retail electric operations in a future rate case, up to fifty percent of the unamortized balance of the acquisition premium paid by UtiliCorp for Empire. UtiliCorp proposes that this recovery would be contingent upon UtiliCorp proving to the Commission that merger synergies are equal to fifty percent of the premium costs and other costs to achieve the synergies. In other words, UtiliCorp asks that it be allowed to recover from Empire's ratepayers, through its rates, the acquisition premium it paid to purchase Empire, to the extent that the ratepayers would benefit from the savings arising from the merger.

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

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

**D. Transmission Access and Reliability Conditions:**

Springfield raised numerous issues regarding the possible effects that the merger would have on the transmission of electricity within and between the service territories of UtiliCorp's MPS division and Empire, and on the transmission of electricity destined to other electric service providers, such as Springfield. Springfield presented expert testimony that purported to show that the merger and the ensuing joint dispatch of the electricity resources of the merged companies could have negative effects upon the flow of electricity on the transmission system of the combined company and surrounding electric service providers. Springfield proposed several conditions that would require UtiliCorp to further study the flow of electricity and would require UtiliCorp to take steps to correct any problems

identified by those studies. UtiliCorp replied that the FERC has exclusive jurisdiction over these issues and that they should not be addressed by this Commission.

The question of whether the Commission has jurisdiction over the transmission access and reliability issues raised by Springfield is answered through a review of applicable federal law. In 1935, Congress passed the Federal Power Act, which created Federal jurisdiction over the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. §824(a). That act also provides that the various states retain jurisdiction over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. §824(b). In 1996 the FERC issued Order No. 888, which interprets the Federal Power Act as leaving regulation of only bundled retail transmissions<sup>9</sup> to the various states. The FERC's order asserts federal jurisdiction over all unbundled retail transmissions as well as wholesale transmissions.

The FERC, in Order No. 888, adopted a seven-factor test to determine whether the activities of the facility in question are used for local distribution and thus are subject to state jurisdiction. That seven-factor test is as follows:

- (1) Local distribution facilities are normally in close proximity to retail customers.
- (2) Local distribution facilities are primarily radial in character.
- (3) Power flows into local distribution systems; it rarely, if ever, flows out.
- (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market.
- (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
- (7) Local distribution systems will be of reduced voltage.

The FERC's interpretation of the Federal Power Act was recently upheld by the United States Court of Appeals for the District of Columbia Circuit in Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667 (D.C. Cir. 2000).

If the FERC's seven-factor test is applied to the issues raised by Springfield, it is apparent that Springfield's concerns do not relate to unbundled retail transmissions as they are defined by the FERC. Springfield's fundamental concern is that the merger will disrupt the flow of wholesale power that it receives through the service territories of UtiliCorp and Empire. The Commission will not attempt to determine the validity of Springfield's concerns and will instead defer to the jurisdiction of the FERC.

Springfield's issues regarding transmission access and reliability concern the transmission of power across service territories for purpose of wholesale deliveries. They are properly regulated by the FERC and are not subject to regulation by

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<sup>9</sup> "Vertically integrated utilities use their own facilities to generate, transmit, and distribute electricity to their customers. Traditionally the customer paid one combined rate for both the power and its delivery, thus the industry refers to such sales as 'bundled'." Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667, 691 (D.C. Cir. 2000)

this Commission. For that reason the conditions proposed by Springfield regarding transmission access and reliability will not be imposed.

#### **E Jurisdiction**

UtiliCorp is an "electrical corporation," a "gas corporation" and a public utility as those terms are defined in Section 386.020, RSMo Supp. 1999, and is subject to the jurisdiction of the Commission pursuant to Section 386.250, RSMo Supp. 1999. Empire is an "electrical corporation," a "water corporation," a "telecommunications company" and a "public utility" as those terms are defined in Section 386.020, RSMo Supp. 1999, and is subject to the jurisdiction of the Commission pursuant to Section 386.250, RSMo Supp. 1999.

Based upon the Commission's review of the applicable law and its findings of fact, the Commission concludes that the proposed merger between UtiliCorp and Empire is in the public interest because it is not detrimental to the public.

#### *IT IS THEREFORE ORDERED:*

1. That The Empire District Electric Company is authorized to merge with and into UtiliCorp United Inc. with UtiliCorp United Inc. being the surviving corporation, and to otherwise accomplish the merger, all as more particularly described in and pursuant to the terms of the Agreement and Plan of Merger.
2. That The Empire District Electric Company is authorized, through the merger, to transfer to UtiliCorp United Inc. all the properties, rights, privileges, immunities and obligations of The Empire District Electric Company, including, but not limited to, those under The Empire District Electric Company's certificates of public convenience and necessity, works, systems and franchises, and all securities, evidences of indebtedness and guarantees, effective as of the date of the closing of the merger.
3. That UtiliCorp United Inc. is authorized to acquire and assume the stocks and bonds, other indebtedness and other obligations of The Empire District Electric Company, all as more particularly described in and pursuant to the terms of the Agreement and Plan of Merger.
4. That The Empire District Electric Company and UtiliCorp United Inc. are authorized to perform in accordance with the terms of the Agreement and Plan of Merger.
5. That The Empire District Electric Company is authorized to terminate its responsibilities as a public utility in the state of Missouri as of the effective date of the merger.
6. That UtiliCorp United Inc., the surviving corporation, is authorized to provide electric, water and telecommunications service in the current service territories of The Empire District Electric Company in accordance with the rules, regulations, rates and tariffs of The Empire District Electric Company as may be on file with and approved by the Commission as of the effective date of the merger, except as otherwise provided for herein or as otherwise ordered by the Commission. Further that the transfer of all The Empire District Electric Company's customers to UtiliCorp United Inc. is authorized as contemplated by Section 393.106, RSMo 1994.
7. That the Regulatory Plan proposed by UtiliCorp United Inc. is rejected.
8. That The Empire District Electric Company and UtiliCorp United Inc. are authorized to enter into, execute and perform in accordance with the terms of all other documents and to take any and all actions which may be reasonably necessary and incidental to the performance of the Agreement and Plan of Merger.
9. That the stipulation and agreement between the Empire Retirees, UtiliCorp United Inc. and The Empire District Electric Company, filed on October 18, 2000, is approved.

10. That the stipulation and agreement between the Staff of the Commission, UtiliCorp United Inc. and The Empire District Electric Company, filed on November 30, 2000, is approved.

11. That the Commission's approval of the merger of The Empire District Electric Company with and into UtiliCorp United Inc. is subject to UtiliCorp United Inc.'s agreement to the following conditions:

a. That in post-merger cases involving UtiliCorp United Inc.'s Empire District Electric Company operating division, UtiliCorp United Inc. will maintain the pre-merger funded status of The Empire District Electric Company's pension fund by accounting for it separately.

b. That if the merger is determined to be a taxable event and deferred taxes of The Empire District Electric Company are thereby lost, UtiliCorp United Inc. shall include an amount equal to those deferred taxes in future rate proceedings for its Empire District Electric Company operating division as an offset to rate base.

c. That UtiliCorp United Inc. shall continue to file separate surveillance reports for its Missouri Public Service and Empire District Electric Company operating divisions following the closing of the merger.

d. That for one year following the closing of the merger, UtiliCorp United Inc. shall provide the Staff of the Commission with monthly reports regarding Call Center Abandoned Call Rate (ACR), Call Center Average Speed of Answer (ASA), Distribution Reliability Customer Average Interruption Duration (CAIDI), Distribution Reliability System Average Interruption Frequency Index (SAIFI), and Distribution Reliability System Average Interruption Duration Index (SAIDI).

e. That UtiliCorp United Inc. shall provide historical actual hourly generation, energy purchases and sales data, and other information required by Commission Rule 4 CSR 240-20.080 in electronic format accessible by a spreadsheet program for both the Missouri Public Service and Empire District Electric Company operating divisions of UtiliCorp United Inc. UtiliCorp United Inc. shall also provide access to such additional documents as may be necessary for the Staff of the Commission to analyze fuel and energy costs.

f. That after the closing of the merger, UtiliCorp United Inc. shall file with the Commission an adoption notice in Empire's electric and water tariffs as follows:

**ADOPTION NOTICE**

Effective [month, day, year], The Empire District Electric Company (EDE), a Kansas corporation, has merged with and into UtiliCorp United Inc. (UtiliCorp), a Delaware corporation, as authorized by the Missouri Public Service Commission in Case No. EM-2000-369. UtiliCorp is the surviving entity.

Pursuant to the Commission's Report and Order issued [month, day, year], in said case, UtiliCorp hereby adopts, ratifies and makes its own in every respect, as if the same had been originally filed by it, all tariffs, schedules and rules and regulations of EDE filed with and approved by the Commission before [month, day, year]. UtiliCorp will operate in the area formerly served by EDE using the name "[insert name here]."

12. That any evidence the admission of which was not expressly ruled upon is admitted into evidence.

13. That any objection that was not expressly ruled upon is overruled.

14. That any motions not expressly ruled upon are denied.

15. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions herein involved.

16. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

17. That this Report and Order shall become effective on January 7, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur and certify  
compliance with the provisions of Section  
536.080, RSMo 1994.

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**In the Matter of Missouri Gas Energy's Purchased Gas Adjustment  
Tariff Revisions to be Reviewed in Its 2000-2001 Actual  
Cost Adjustment.**

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*Case No. GR-2001-382  
Decided January 23, 2001*

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**Gas §17.1.** The Commission granted an interim rate increase to reflect the unexpected and severe natural gas price spike because Company was required to pay significantly greater prices in order to obtain gas.

**ORDER APPROVING INTERIM RATES**

Missouri Gas Energy, a Division of Southern Union Company (MGE), of Kansas City, Missouri, submitted a tariff sheet to the Commission on January 9, 2001, carrying an effective date of January 24, 2001. On January 19, 2001, the Office of the Public Counsel filed a Request for an Emergency Actual Cost Adjustment (ACA) Review of MGE's Purchasing Practices for the Winter 2000-2001 and Motion for Expedited Treatment. Also on January 19, the City of Joplin filed an Application to Intervene. Both of these pleadings will be addressed in a subsequent order.

The proposed tariff sheet was filed to reflect unscheduled changes in MGE's Purchased Gas Adjustment (PGA) factors as the result of current high prices of natural gas which exceed those contained in MGE's scheduled winter heating season PGA tariff.<sup>1</sup> MGE proposes to adjust the Current Cost of Gas (C.C.G.) factor. The net effect of this change will increase the firm PGA factor for the remainder of the 2000-2001 winter season to \$0.98161 per Ccf from the current firm PGA factor of \$0.68056 per Ccf.

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<sup>1</sup>The winter season includes the months of November through March.

The Staff of the Commission (Staff) filed a memorandum and recommendation on January 22, 2001, stating that MGE's Deferred Carrying Cost Balance (DCCB) is currently increasing at a rate in excess of \$1 million daily due to the difference between the Company's current retail rates and the market price of natural gas. The DCCB, plus interest, will be included in the rate calculations used to compute MGE's next ACA factor. This could cause an increase in next year's PGA rates. Staff further states that, if the DCCB becomes overly large, it will negatively impact MGE's ability to borrow money and procure additional supplies of natural gas. Staff states that MGE has informed it that, even with approval of the proposed unscheduled PGA tariff, it anticipates a shortfall of \$18 million for the current heating season which will necessarily be included in the ACA factor that will take effect next winter. Finally, Staff states that the changes in MGE's PGA were calculated in conformance with the Company's approved PGA Clause, and that MGE's tariff permits the filing of proposed PGA tariffs on ten days' notice.

Staff recommends that the Commission approve the tariff sheets to become effective January 24, 2001, on an interim basis, subject to refund, pending a final Commission decision in MGE's pending ACA cases, Case Nos. GR-2000-425, GR-99-304, GR-98-167, and GR-96-450. The Public Counsel has not requested that the proposed tariff sheet be suspended.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum, and finds that the tariff sheet conforms to MGE's Commission-approved PGA Clause and is therefore reasonable. After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission finds that the proposed tariff sheet should be approved for service rendered on and after the requested effective date of January 24, 2001, on an interim basis, subject to refund.

*IT IS THEREFORE ORDERED:*

1. That the tariff sheet submitted on January 9, 2001, by Missouri Gas Energy, a Division of Southern Union Company, of Kansas City, Missouri, is approved on an interim basis, subject to refund, to become effective on January 24, 2001. The tariff sheet approved is:

**P.S.C. Mo. No. 1**

**2<sup>nd</sup> Revised SHEET No. 24.32, Canceling 1<sup>st</sup> Revised SHEET No. 24.32**

2. That this order shall become effective on January 24, 2001.

Lumpe, Ch., Drainer, and Murray, CC., concur.  
Schemenauer, C., dissents, with dissenting opinion attached.  
Simmons, C., dissents, with dissenting opinion attached.

Thompson, Deputy Chief Regulatory Law Judge

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**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission on this case. The purchased gas adjustment clause as used in Missouri allows gas utility companies to recover the cost of the gas purchased and resold to ratepayers from those same ratepayers. I do not disagree and in fact support that concept. What I find most objectionable in this tariff is the negative financial and immediate impact it will have on the households of MGE's customers. Increases of this magnitude should be phased in over two or three billing periods. MGE, as well as other gas utilities, has this option but has evidently decided not to do this.

Contrary to the public debate regarding this case, the Public Service Commission does not manage nor does it make management decisions for the investor owned utilities it regulates. Decisions regarding the strategies used to purchase gas either through hedging options, puts, calls, collars or other market instruments are in the realm of management and rightfully so. MGE has had, and still has, the authority and responsibility to exercise these strategies in a prudent and fiscally responsible manner. That authority and responsibility has not been usurped by the Commission.

Whether or not the Company would be able to recover its cost of hedging or any financial losses it may have as a result of its market decisions is always determined after the fact through a prudence audit accomplished by the Commission Staff. In this instance it appears that the Company chose inaction, to the detriment of its customers, rather than risking a disallowance of the cost of exercising market instruments, which would be a detriment to its stockholders. The prudence of these actions or inactions will, however, be decided in another case and are not the subject of my dissent.

Again, I do not believe that an immediate rate increase of this magnitude, especially after the recent increase already approved, is in the public interest. For these reasons I respectfully dissent.

**Dissenting Opinion of Commissioner Kelvin L. Simmons**

The Missouri Public Service Commission today approves a substantial rate increase for Missouri Gas Energy (MGE) under its Purchased Gas Adjustment (PGA) tariff provision. I dissent in the Commission's decision.

Natural gas prices are volatile; they are subject to rapid and extreme fluctuations. The PGA mechanism permits Missouri natural gas utilities to respond rapidly to fluctuations in natural gas prices. Rates can be quickly raised or lowered, on ten days notice, depending on market conditions. Each gas utility seeks an initial PGA rate order in the late summer, based upon a forecast of gas prices for the upcoming heating season. In the spring, an adjustment is typically made, based on the record of the heating season just completed. If necessary, unscheduled adjustments can be made. Unfortunately, in the present regime of an unusually cold winter and rising prices at the wellhead, MGE is seeking to raise rates.

The PGA mechanism has existed since the 1960s and has been approved by the Missouri courts. See State ex rel. Midwest Gas Users Association v. Public Service Commission of the State of Missouri, 976 S.W.2d 470 (Mo. App., W.D. 1998). Nonetheless, despite its long acceptance and judicial approval, the time has come

for the Commission to reconsider the PGA mechanism. The current heating cost emergency raises an unavoidable question: Are the natural gas utilities doing everything in their power to protect consumers from the effects of unexpected, extreme fluctuations in the price of natural gas? Are they engaging in appropriate hedging programs? Are they storing adequate reserves, purchased when prices are low? Today, the Commission will open an investigation to consider these matters. I am in complete agreement with that decision.

The PGA mechanism was created by the Public Service Commission. Although the courts have upheld the PGA process, the Missouri General Assembly has never yet spoken on the subject. I also believe that the time has come for the General Assembly to provide guidance to the Commission with respect to the PGA mechanism. If the legislature believes the process should be altered or changed completely, then the Commission would be ready to implement those changes. The legislature would also be in a position to recommend the appropriate staffing and resource considerations that would be necessary to carry out the legislature's wishes. Certainly, the legislature has a necessary role to play in protecting consumers from the effects of extreme and unexpected gas price fluctuations.

The Office of the Public Counsel is an independent state agency, expressly created to represent consumers before this Commission. It is noteworthy that the Public Counsel has not asked the Commission to reject or suspend MGE's unscheduled PGA tariff. Rather, the Public Counsel has called for an emergency audit of MGE's gas purchases. I support Public Counsel's request. However, such an audit will take some months to complete.

The current crisis is not limited to Missouri. It is a problem of national dimension. The wells that produce natural gas are not located in Missouri; they are beyond the reach of this Commission. It is the duty of the federal government to examine gas-pricing practices to determine whether or not gas wholesalers are gouging consumers in Missouri and elsewhere. That is an investigation in which the Missouri Attorney General has a vital role to play. I urge the Attorney General to review this matter and to take whatever steps he can to protect Missouri ratepayers.

It appears that the PGA process, which is statutorily silent and upheld in the courts, gives the Commission very limited options but to approve MGE's unscheduled PGA rate increase request. Some would even argue that if we did not approve the increase, MGE would soon exhaust its reserves of gas and cash and find itself in a position in which it was unable to purchase further natural gas supplies. That would not assist Missouri consumers in any way. I, however, remain unconvinced that our current process for evaluating a consistent cost recovery method under these extreme set of circumstances gives rise for automatic approval. ***I look for a way to provide our consumers with close to absolute certainty that the cost for natural gas processed through the PGA mechanism is reliably assured given today's extraordinary volatility with high natural gas prices.*** For these reasons, I respectfully dissent.

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**In the Matter of ALLTEL Missouri, Inc.'s Application for Variance  
of Certain Provisions of Chapter 33, Service and Billing  
Practices for Telecommunications Companies.**

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*Case No. TE-2001-204  
January 23, 2001*

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**Telecommunications §§23, 33.** The Commission approved a unanimous stipulation and agreement by which a telephone company was granted a variance from portions of 4 CSR 240-33.040, Billing and Payment Standards for Residential Customers, and 4 CSR 240-33.070, Discontinuance of Service to Residential Customers.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On September 22, 2000, ALLTEL Missouri, Inc. (ALLTEL) filed an Application for Variance. ALLTEL asked that the Commission grant it a variance from portions of 4 CSR 240-33.040, Billing and Payment Standards for Residential Customers, and 4 CSR 240-33.070, Discontinuance of Service to Residential Customers. ALLTEL represented that these rules would take effect on October 30, 2000, and that it would be unable to change its billing program to comply with the requirements of the rules until March 31, 2001.

On September 28, the Office of the Public Counsel (Public Counsel) filed a pleading indicating its opposition to ALLTEL's Application for Variance. On October 6, ALLTEL filed a response to Public Counsel's pleading and at the same time filed an Amendment to Application for Variance by which it deleted its request for variance of 4 CSR 240-33.070(2) regarding discontinuance of basic local telecommunications service for nonpayment of any charge other than for basic local telecommunications service. The Staff of the Commission (Staff) filed a response to ALLTEL's Amendment to its Application for Variance on October 13. Staff recommended that the Commission deny the variance requested by ALLTEL. On October 16, Public Counsel filed a statement indicating that it concurred in Staff's response.

On October 17, the Commission issued an order that scheduled a prehearing conference for October 30, and directed the parties to file a proposed procedural schedule by November 6. At the request of the parties, the deadline for filing a procedural schedule was extended to November 20.

On November 20, ALLTEL, Staff, and Public Counsel filed a unanimous stipulation and agreement (Agreement). Staff filed Suggestions in Support of the Stipulation and Agreement on January 16. The Agreement purports to resolve all outstanding issues and asks the Commission to approve the variance requested by ALLTEL as modified by the stipulation and agreement. The parties stipulate and agree to the following:

A. ALLTEL should be granted a variance of 4 CSR 240-33.040(6)(F), (G) and (H) and 4 CSR 240-33.040(7) and (8) and should be given until March 31, 2001 to include this information in this format on its bills to customers.

B. ALLTEL should be granted a variance of 4 CSR 240-33.070(6)(E), (G) and (H) and given until March 31, 2001 to include this information in this format in notices of discontinuance to its Missouri customers. During this time, ALLTEL will continue to send its prior notice of discontinuance, which contains the substance of the information, which these provisions require to be set out on the notice.

C. From the current date until the new system is operational, ALLTEL will manually examine each account where service is in danger of being disconnected. ALLTEL will continue to send a Notice to customers who have not paid their accounts setting out the date by which the customer must pay to avoid having their service disconnected. Until the billing system updates are fully operational, ALLTEL will attach a print message to this notice informing the customers of the changes in the Commission's rules regarding discontinuance of service.

In the Agreement, contingent upon the Commission's acceptance of the Agreement, the parties waived their rights to cross-examine witnesses, to present oral argument or briefs, to have the transcript read by the Commission, to seek rehearing, 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 Supp. 1999.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Agreement.

After reviewing the Agreement of the parties and Staff's Suggestions in Support, the Commission finds that the unanimous stipulation and agreement filed on November 20 should be approved.

*IT IS THEREFORE ORDERED:*

1. That the unanimous stipulation and agreement filed on November 20, 2000 by ALLTEL Missouri, Inc., the Staff of the Public Service Commission, and the Office of the Public Counsel, is hereby approved as a resolution of all issues in this case (See Attachment 1).

2. ALLTEL Missouri, Inc. is granted a variance of 4 CSR 240-33.040(6)(F), (G) and (H) and 4 CSR 240-33.040(7) and (8) and is allowed until March 31, 2001 to include this information in this format on its bills to customers.

3. ALLTEL Missouri, Inc. is granted a variance of 4 CSR 240-33.070(6)(E), (G) and (H) and is allowed until March 31, 2001 to include this information in this format in notices of discontinuance to its Missouri customers.

4. That this order shall become effective on February 2, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, 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 a Commission Inquiry into Purchased Gas Cost Recovery.**

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*Case No. GW-2001-398*  
*Decided January 23, 2001*

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**Gas §§1, 17, 29.** The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers.

**ORDER ESTABLISHING CASE AND CREATING TASK FORCE**

Recent price increases in the commodity cost of natural gas have lead to significant increases in the prices paid by customers of natural gas local distribution companies (LDCs). The Commission establishes this case to investigate the process for the recovery of natural gas commodity cost increases by LDCs from their customers. A Natural Gas Commodity Price Task Force will be created to investigate and discuss options on this issue.

The Commission will establish the members of the Task Force in a subsequent order. Anyone wishing to serve on the Task Force or otherwise participate in this case should notify the Commission in the manner explained below. The Commission encourages interested parties to nominate individuals to serve on the Task Force; to advise how the Task Force should be constituted to reflect various stakeholders; and to suggest issues that should be addressed by the Task Force.

The Commission will direct its Records Department to send a copy of this order to all gas utilities providing service within the state of Missouri, including municipal and rural cooperative utilities offering gas service, as well as other participants in the Commission's Natural Gas Roundtables. A copy of this order shall also be sent to all county commissions and county legislatures. The Commission's Information Officer shall send notice of this order to the Office of the Governor, to all members of the General Assembly, and to the publishers of all major newspapers in the state as listed in the newspaper directory of the current **Official Manual of the State of Missouri**.

The Commission wants to hear from the public on the issues raised herein, and to that end, will direct its Staff to propose general time frames and dates for local public meetings around the state.

*IT IS THEREFORE ORDERED:*

1. That Case No. GW-2001-398 is established to investigate the process for the recovery of natural gas commodity cost increases by LDCs from their customers.
2. That a Natural Gas Commodity Price Task Force is established.

3. That applications to serve on the Task Force or otherwise participate in this case shall be filed, no later than February 22, 2001 with:

Secretary of the Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

4. That the Records Department and the Information Officer shall send notice as directed herein.

5. That the Staff of the Commission shall, no later than March 9, 2001, propose general time frames and dates for local public meetings.

6. That this order shall become effective on February 2, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

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**David A. Turner and Michele R. Turner, Complainants, v. Warren  
County Water and Sewer Company, Respondent.**

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*Case No. WC-2000-474  
Decided January 23, 2001*

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**Public Utilities §5. Service §§3, 6, 17, 18, 44, 47. Sewer §§3, 11, 12.** When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.

**Public Utilities§5. Service §§3, 44, 47. Sewer§3.** The Commission directed the Respondent to follow its own tariffs as written or request approval to amend its tariffs to bring its policies into compliance with its tariff because tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. See Bauer v. Southwestern Bell Telephone Company, 958 S.W. 568, 579 (Mo. App. E.D. 1997).

**Public Utilities §5. Service §§3, 13, 16, 17, 18, 44. Sewer §3.** Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.

**Public Utilities §7. Service §§11, 16. Sewer §7.** The Commission does not have the authority to award monetary damages as sought by the Complainants for damages to their property. See Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 905 (Mo. 1971).

**ORDER OF RELIEF**

David A. Turner and Michele R. Turner (the Turners) filed a formal complaint with the Missouri Public Service Commission (Commission) on February 2, 2000, against Warren County Water and Sewer Co., Inc. (Respondent or WCWSC). On February 15, 2000, the Commission issued a Notice of Complaint to the Respondent by certified mail requiring the Respondent to answer by March 16, 2000. The Respondent failed to file an answer and on March 30, 2000, the Commission found the Respondent in default pursuant to Commission rule 4 CSR 240-2.070(9), and the Complainants' allegations were deemed admitted by the Respondent.

In their complaint, the Turners requested the Commission grant the following relief: 1) that the current problems with the lift station be fixed, and 2) that they be compensated for damage to their property resulting from Gary Smith's negligence, that has already occurred or may occur in the future, such as damage to laundry room floor and its surrounding area and its contents.

**Findings of Fact**

The Turners are customers of WCWSC at Incline Village. WCWSC is a water and sewer public utility company subject to the jurisdiction of the Commission. The Complainants became customers of WCWSC when they built their home in Incline Village in December 1998. The Complainants alleged, WCWSC did not deny, and the Commission has deemed admitted that the Turners were told by WCWSC that they had to purchase their lift station from WCWSC. According to Staff's investigation, the Turners purchased the pump unit by contract with Gary Smith and Associates.

The original installed pump did not work properly from December 1998 until April 1999. During this period, the pump malfunctioned, setting off the alarm, sewage not pumping out the tank, sewage over flowing onto the yard and coming up through the laundry room floor drain. In April 1999, the first pump was replaced.

After the second pump was installed, the Turners had no problems until December 1999. Then, the alarm to the pump started going off several times a week. The malfunction that caused the alarm on the pump to activate required manual pumping of the system and if the system did not get pumped manually, the sewage would flow out onto the Turners' yard or back up into their home through the laundry room floor drain. The Turners were required to manually pump the tank, sometimes three times a day, to keep the sewage from backing up onto their laundry room floor. On January 27, 2000, Gary Smith admitted that he did not know how to fix the problem.

On January 28, 2000, the Turners also determined that their reading of the water meter levels did not match the Respondent's readings taken that same day. The Turners looked at the meter immediately after Respondent came by and read the meter. When the Turners read both the meter dial and remote reader, they found a reading of 128,150. Upon receiving the bill, the Respondent's bill reported an actual meter reading of 65,000 on January 28, 2000 and they were billed for 10,000 gallons.

**Staff's Investigation Report**

On June 8, 2000, the Commission directed the Staff of the Commission to investigate violations of statute and rule and report to the Commission any violations found. Staff filed its report on July 24, 2000.

Staff stated in its report that the Respondent sent a letter dated March 6, 1998 to builders, lot owners and the subdivision trustees stating that all pump units must be purchased through WCWSC. Staff reported that, when WCWSC began requiring customers to purchase pump units through the company, the Respondent failed to change its tariff sheet 37, Rule 12C and 12D which permits the customer to either purchase pump unit components from the Company or purchase pump unit components elsewhere which meet the Company's specifications on file at the WCWSC office. *Warren County Water & Sewer Company, Inc. Tariff Sheet 37, Rule 12 C and 12 D*. Staff also noted that Respondent's tariff obligated it to provide maintenance for most of the pump unit even though the resident owns the pump unit. *Warren County Water & Sewer Company, Inc. Tariff Sheet 39, Rule 12K*.

Staff stated that the Turners had contracted with Gary Smith and Associates, in June of 1998 for the purchase and installation of a pump unit. Gary Smith is identified by the Staff as the owner and operator of WCWSC, the Respondent in this case. Staff stated that Gary Smith is also the owner of Gary Smith and Associates, a company which offers construction work associated with utility systems.

During Staff's investigation, Staff noted that pump unit electrical controls were automatically turning the pump on and off, but are working with an electrical jumper in place of a small fuse. Staff stated that the proper course of action to address the problem permanently was to replace the control unit.

Staff stated that in the ordinary course of operation, replacement of the control unit would be the responsibility of the Respondent. Staff noted concern about WCWSC assuming responsibility for this pump unit given the inadequacies and problems associated with the pump unit from the beginning. In essence, if WCWSC assumes the costs, those costs may be unfairly passed on to the customers in rates when Staff believes that the installers, Gary Smith and Associates, might be responsible for the cost incurred.

Staff also reported on the portion of the complaint involving meter reading discrepancies. Staff stated that the Turners and other residents were under-billed for a period of time, which resulted in a large water bill for the Turners after an accurate actual meter reading was taken. On February 2, 2000, Staff members who were investigating this complaint read the meter and saw a reading of 130,300, which indicated to Staff that the Turner's reading on January 28, 2000, was accurate and that the Respondent's reading was not. At the time of its investigation and report, Staff believed that WCWSC was then obtaining and using accurate actual readings for billing purposes for the Turners' account.

Staff concluded that the Respondent is failing to provide safe and adequate service to the Turners in violation of Section 393.130, RSMo 1994<sup>1</sup>, and failing to obtain actual accurate water usage readings in violation of Commission Rule 4 CSR 240-13.020.

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<sup>1</sup>All statutory references are to Revised Statutes of Missouri 1994 unless otherwise indicated.

Staff recommended that 1) Respondent replace the Turner's control unit; 2) Respondent bill customers for charges that should properly be charged by WCWSC, such as connection charges and the supply of pump units and accessories, rather than allow a third party, such as Gary Smith and Associates, or any other contractor to bill these charges; and 3) Respondent be directed to amend its tariff Rule 12C to reflect its actual policy that it supply all pump units.

#### **Conclusions of Law**

Respondent is a water and sewer corporation subject to the jurisdiction of the Commission pursuant to Chapters 386 and 393, RSMo. The Complainants have brought this action pursuant to the Commission's authority granted in Sections 386.330, 386.390, 386.400, and 393.150, RSMo. Section 393.130 requires every water and sewer corporation to furnish and provide safe and adequate service that is "in all respects just and reasonable." Section 393.130, RSMo. In cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof. Margolis v. Union Electric Company, 30 Mo. P.S.C. (N.S.) 517, 523 (1991), Michaelson v. Wolf, 261 S.W.2d 918, 924 (Mo. 1953) and Farnham v. Boone, 431 S.W.2d 154 (Mo. 1968). The burden of proof is met in this case because the Respondent defaulted and the allegations contained in the complaint were deemed admitted.

Section 386.330, subsection 2, permits complaints to be made to the Commission by the Public Counsel or by any person or corporation aggrieved. If the complaint is not resolved after a copy of the complaint is forwarded to the public utility, person or corporation complained of, the Commission may investigate. Section 386.330, subsection 2. The Commission's authority to act upon its findings of fact is discretionary. State ex. rel Beaufort Transfer Company v. Missouri Public Service Comm., 593 S.W.2d 241, 250-251 (Mo. App. W.D. 1979).

The Commission has the authority to determine any reasonable interpretation for the rules it is authorized to promulgate and the authority to apply its own rules. Deaconess Manor Association v. Public Service Comm'n., 994 S.W.2d 602 (Mo. App. W.D. 1999) (citing State ex rel. City of Springfield v. Public Service Comm'n., 812 S.W.2d 827, 833 (Mo. App. W.D. 1991)). If the Commission determines that any corporation, person or public utility has violated a provision of the law or a rule, that corporation, person or public utility is subject to a penalty of not less than \$100 and not more than \$2000 per offense. Section 386.570, RSMo. Actions to recover a penalty or enforce the powers of the Commission may be brought in any circuit court of the state. Section 286.600, RSMo.

Tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. Bauer v. Southwestern Bell Telephone Company, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997)(citing Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Company, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996)). Therefore, a company's failure to comply with its own tariff provisions is a violation of law.

The Commission does not have the authority to award monetary damages as sought by the Complainants for damages to their property. Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 905 (Mo. 1971).

On March 6, 1998, when the Respondent announced its policy to require customers to purchase pump units through WCWSC only, the Respondent was in violation of its own tariff provisions. *Warren County Water & Sewer Company, Inc. Tariff Sheet 37, Rule 12 C and 12 D*. Respondent's tariff sheet 37, Rule 12C and 12D permits Respondent's customer to either purchase pump unit components from the WCWSC or purchase pump components which meet the specifications on file at the WCWSC's office. WCWSC's March 6, 1998 letter to property owners announced a company policy that was not in compliance with Rule 12 D on Tariff Sheet 37 because the Commission had not approved the amendment. In addition, the Respondent failed to even submit a proposed amendment of its tariff consistent with its announced change in policy to the Commission for review.

The Turners allegedly contracted with Gary Smith and Associates in June of 1998 for the purchase and installation of a pump unit. The Turners believed that they were purchasing the pump unit from WCWSC. Gary Smith is the owner and operator of WCWSC, the Respondent in this case. Gary Smith is also the owner of Gary Smith and Associates, a company which offers construction work associated with utility systems. The creation of an implied agency relationship need not be based upon intent of the principal and agent but may be determined by the facts and circumstances of the particular case. *Fielder v. Production Credit Ass'n.*, 429 S.W.2d 307, 313 (Mo. App. 1968); *Vance v. Stout's Turkey Hatchery, Inc.*, 359 S.W.2d 247, 253 (Mo. App. 1962). Since the Respondent required all pumps to be purchased through WCWSC, and the Turner's pump unit was actually provided by Gary Smith and Associates, the Commission finds that Gary Smith and Associates is an agent of the Respondent, providing the pump unit the Turners purchased through the company as required by the WCWSC's own stated policy.

The Commission finds that the Respondent was in violation of its tariff provisions, Tariff Sheet 37 Rule 12C and 12D, when it began requiring its customers to obtain its pump unit and installation through Gary Smith and Associates, as its agent. The Commission will direct the Respondent to submit an amended sheet 37, for Rule 12C and 12D, which accurately reflects the Respondent's policy regarding the purchase of all pump components from WCWSC, or its agents, or to notify all new customers of their options for the purchase of equipment under the current tariff. In addition, the Commission will direct the Respondent to bill all customers directly for equipment and services, such as connection charges and the supply of pump units and accessories, if the customer is required by tariff provision to purchase such equipment and services through WCWSC, even if a third party agent provides the actual service on behalf of the Respondent.

When the Turner's pump unit persisted in malfunctioning, Respondent failed to comply with its own tariff by providing the necessary repairs and maintenance. Respondent's tariff sheet 39, Rule 12K obligated WCWSC to provide maintenance for most of the pump unit even though the pump unit is owned by the resident. Therefore, the Commission finds that the Respondent has violated tariff sheet 39, Rule 12K. The Commission will direct the Respondent to replace the pump unit, or the control unit as recommended by Staff in its report. The Commission's order shall not be considered a finding by the Commission of the value for ratemaking

purposes and the Commission will reserve the right to consider any ratemaking treatment to be afforded the cost of these repairs or replacement of the control or pump unit components in a later proceeding.

Respondent's failure to issue a billing statement based upon actual water usage during the billing period constituted a violation of Commission Rule 4 CSR 240-13.020. The Commission will direct the Respondent to comply with the provisions of Commission Rule 4 CSR 240-13.020 and provide bills for water service that are based upon actual usage during the billing period with only those exceptions as permitted by the rule.

Based upon its failure to comply with its own tariff rules and its failure to repair the Turner's pump unit as required, the Commission finds that the Respondent has failed to provide safe and adequate sewer service in compliance with its Tariff, Commission Rules and State statutes. Section 393.130. The Commission finds that the Respondent has violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Warren County Water & Sewer Company, Inc. Tariff Sheet 37, Rules 12C and 12D, and Warren County Water & Sewer Company, Inc. Tariff Sheet 39, Rule 12K.

The company has failed or refused to comply with the provisions of its tariffs and the Code of State Regulations. Pursuant to Section 386.570, any person or public utility which fails or neglects to obey, observe or comply with any order, rule, direction, demand or requirement, of the Commission is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars, per day, for each offense. Therefore, the Commission shall direct WCWSC to appear and show cause why the Commission should not direct the General Counsel to seek penalties pursuant to Section 386.570, RSMo. The Commission will direct Staff to determine WCWSC's compliance with the Commission's Order of Relief and file a compliance report with the Commission before the show cause hearing.

*IT IS THEREFORE ORDERED:*

1. That Warren County Water and Sewer Co., Inc., shall replace the defective pump unit, or control unit as recommended by the Staff of the Missouri Public Service Commission, which operates to pump the sewage from the property of customers David A. Turner and Michele R. Turner.
2. That Warren County Water and Sewer Co., Inc., shall provide safe and adequate water and sewer service to all customers, in compliance with its Tariff, Commission Rules and State statutes.
3. That Warren County Water and Sewer Co., Inc., shall file an amendment to its tariff which reflects the change in its service in Tariff Rule 12C, to properly reflect the company's policy requirement that all pump units are to be purchased through the company or its agents. All proposed amendments shall be filed in compliance with Commission Rules and State statutes.
4. That Warren County Water and Sewer Co., Inc., shall notify each new customer of its options under the tariff regarding the purchase of equipment such as pump unit components.
5. That Warren County Water and Sewer Co., Inc., shall bill customers for actual charges for services received under the tariff approved for Warren County Water and Sewer Co., Inc., and for services that the customers are required to obtain from Warren County Water

and Sewer Co., Inc., even if actual work is performed by a third party agent or contractor, of Warren County Water and Sewer Co., Inc.

6. That Warren County Water and Sewer Co., Inc. shall appear before the Commission on February 23, 2001, beginning at 10:00 a.m., and show cause why the Commission should not direct the General Counsel to seek penalties pursuant to Section 386.570, RSMo. The show cause hearing shall be held in Room 310, located in the office of the Missouri Public Service Commission in Jefferson City, Missouri, on the main floor of the Governor Office Building, 200 Madison Street. The Governor Office Building meets the accessibility standards required by the Americans with Disabilities Act. If any person needs additional accommodations to participate in the prehearing conference, please call the Missouri Public Service Commission's hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the hearing.

7. That the Staff of the Missouri Public Service Commission shall determine Warren County Water and Sewer Co., Inc.'s compliance with this order and file a compliance report with the Commission no later than February 21, 2001.

8. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the cost of repairs or replacement of the control or pump unit components herein involved.

9. That the Commission reserves the right to consider any ratemaking treatment to be afforded the cost of repairs or replacement of the control or pump unit components herein involved in a later proceeding.

10. That this order shall become effective on February 2, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer,  
and Simmons, CC., concur

Register, Regulatory Law Judge

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**In the Matter of Laclede Gas Company's Purchased Gas Adjustment  
Tariff Revisions to be Reviewed in Its 2000-2001 Actual  
Cost Adjustment.**

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*Case No. GR-2001-387  
Decided January 25, 2001*

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**Gas §§17.1, 114.** The Commission found that an unscheduled increase in rates for a local gas distributing company was necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.

**ORDER APPROVING INTERIM RATES**

Laclede Gas Company (Laclede) submitted a tariff sheet to the Commission on January 12, 2001, carrying an effective date of January 27, 2001. The effective date of the tariff was subsequently changed to January 29, 2001, at the request of

Laclede. The proposed tariff sheet was filed to reflect unscheduled changes in Laclede's Purchased Gas Adjustment (PGA) factors as the result of current high prices of natural gas that exceed those contained in Laclede's scheduled winter heating season PGA tariff.<sup>1</sup> The net effect of the changes proposed by Laclede will increase the firm PGA factor for the remainder of the 2000-2001 winter season to \$0.91311 per therm from the current firm PGA factor of \$0.66311 per therm.

The Staff of the Commission (Staff) filed a memorandum and recommendation on January 23, 2001, stating that Laclede's Deferred Carrying Cost Balance (DCCB) is currently increasing at a rate in excess of \$1 million per day due to the difference between the Company's current retail rates and the market price of natural gas. The DCCB, plus interest, will be included in the rate calculations used to compute Laclede's next ACA factor. This could cause an increase in next year's PGA rates. Staff further states that, if the DCCB becomes overly large, it will negatively impact Laclede's ability to borrow money and procure additional supplies of natural gas. Staff states that the changes in Laclede's PGA were calculated in conformance with the Company's approved PGA Clause, and that Laclede's tariff permits the filing of proposed PGA tariffs on ten days' notice.

Staff recommends that the Commission approve the tariff sheet to become effective January 29, 2001, on an interim basis, subject to refund, pending a final Commission decision in Laclede's pending ACA cases: Case Nos. GR-2000-622; GR-99-316; GR-98-297; and GR-97-222.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum, and finds that the tariff sheet conforms to Laclede's Commission-approved PGA Clause and is therefore reasonable. This unscheduled increase in Laclede's rates is necessary because of the current extraordinarily high price of natural gas. If the price of natural gas drops in coming months, the Commission encourages Laclede to file for an unscheduled reduction in its PGA tariffs.

After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission finds that the proposed tariff sheet should be approved for service rendered on and after the requested effective date of January 29, 2001, on an interim basis, subject to refund.

*IT IS THEREFORE ORDERED:*

1. That the tariff sheet submitted on January 12, 2001, by Laclede Gas Company, is approved on an interim basis, subject to refund, to become effective on January 29, 2001. The tariff sheet approved is:

**P.S.C. Mo. No. 5 Consolidated**

**One Hundred and Eighty-Third Revised Sheet No. 29, CANCELING One Hundred and Eighty-Second Revised Sheet No. 29**

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<sup>1</sup> The winter season includes the months of November through March.

2. That this order shall become effective on January 29, 2001.

Lumpe, Ch., Drainer, Murray, CC., concur  
Schemenauer and Simmons, CC., dissent with dissenting opinions attached

Woodruff, Senior Regulatory Law Judge

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**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission on this case. The purchased gas adjustment clause as used in Missouri allows gas utility companies to recover the cost of the gas purchased and resold to ratepayers from those same ratepayers. I do not disagree and in fact support that concept. What I find most objectionable in this tariff is the negative financial and immediate impact it will have on the households of Laclede's customers. Increases of this magnitude should be phased in over two or three billing periods. Laclede, as well as other gas utilities, has this option but has evidently decided not to request a phase-in of this adjustment.

Again, I do not believe that an immediate rate increase of this magnitude, especially after the recent increase already approved, is in the public interest. For this reason I respectfully dissent.

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**Dissenting Opinion of Commissioner Kelvin L. Simmons**

The Missouri Public Service Commission today approves a substantial rate increase for Laclede Gas Company under its Purchased Gas Adjustment (PGA) tariff provision. I dissent in the Commission's decision.

Natural gas prices are volatile; they are subject to rapid and extreme fluctuations. The PGA mechanism permits Missouri natural gas utilities to respond rapidly to fluctuations in natural gas prices. Rates can be quickly raised or lowered, on ten days notice, depending on market conditions. Each gas utility seeks an initial PGA rate order in the late summer, based upon a forecast of gas prices for the upcoming heating season. In the spring, an adjustment is typically made, based on the record of the heating season just completed. If necessary, unscheduled adjustments can be made. Unfortunately, in the present regime of an unusually cold winter and rising prices at the wellhead, Laclede is seeking to raise rates.

The PGA mechanism has existed since the 1960s and has been approved by the Missouri courts. See Midwest Gas Users Association v. Public Service Commission of the State of Missouri. Nonetheless, despite its long acceptance and judicial approval, the time has come for the Commission to reconsider the PGA mechanism. The current heating cost emergency raises an unavoidable question: Are the natural gas utilities doing everything in their power to protect consumers from the effects of unexpected, extreme fluctuations in the price of natural gas? Are they engaging in appropriate hedging programs? Are they storing adequate

reserves, purchased when prices are low? The Commission has opened a recent case to investigate these matters. I am in complete agreement with that decision.

The PGA mechanism was created by the Public Service Commission. Although the courts have upheld the PGA process, the Missouri General Assembly has never yet spoken on the subject. I also believe that the time has come for the General Assembly to provide guidance to the Commission with respect to the PGA mechanism. If the legislature believes the process should be altered or changed completely, then the Commission would be ready to implement those changes. The legislature would also be in a position to recommend the appropriate staffing and resource considerations that would be necessary to carry out the legislatures wishes. Certainly, the legislature has a necessary role to play in protecting consumers from the effects of extreme and unexpected gas price fluctuations.

The Office of the Public Counsel is an independent state agency, expressly created to represent consumers before this Commission. It is noteworthy that the Public Counsel has not asked the Commission to reject or suspend Laclede's unscheduled PGA tariff. I believe an emergency audit should be conducted as the Public Counsel requested in a recent Purchased Gas Adjustment (PGA) Tariff involving similar companies. However, I caution such an audit will take some months to complete.

The current crisis is not limited to Missouri. It is a problem of national dimension. The wells that produce natural gas are not located in Missouri; they are beyond the reach of this Commission. It is the duty of the federal government to examine gas-pricing practices to determine whether or not gas wholesalers are gouging consumers in Missouri and elsewhere. That is an investigation in which the Missouri Attorney General has a vital role to play. I will continue to urge the Attorney General to review this matter and to take whatever steps he can to protect Missouri ratepayers.

It appears that the current PGA process, which is statutorily silent and upheld in the courts, gives the Commission very limited options but to approve Laclede's unscheduled PGA rate increase request. Some would even argue that if we did not approve the increase, Laclede's would soon exhaust its reserves of gas and cash and find itself in a position in which it was unable to purchase further natural gas supplies. That would not assist Missouri consumers in any way. I however remain unconvinced that our current process for evaluating a consistent cost recovery method under these extreme set of circumstances gives rise for automatic approval. ***I look for a way to provide our consumers with close to absolute certainty that the cost for natural gas processed through the PGA mechanism is reliably assured given today's extraordinary volatility with high natural gas prices.*** For these reasons, I respectfully dissent.

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**In the Matter of United Cities Gas Company's Purchased Gas  
Adjustment Tariff Revisions to be Reviewed in Its 2000-2001  
Actual Cost Adjustment.**

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*Case No. GR-2001-397  
Decided January 30, 2001*

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**Gas §§ 17.1, 114.** The Commission found that the unscheduled increase in rates for a local gas distributing company was necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.

**ORDER APPROVING INTERIM RATES**

United Cities Gas Company (United Cities) submitted a tariff sheet to the Commission on January 18, 2001, carrying an effective date of February 1, 2001. On January 26, United Cities filed a substitute tariff sheet reflecting changes suggested by Staff. The proposed tariff sheet was filed to reflect unscheduled changes in United Cities' Purchased Gas Adjustment (PGA) factors as the result of current high prices of natural gas that exceed those contained in United Cities' scheduled winter heating season PGA tariff.<sup>1</sup> The net effect of the changes proposed by United Cities will increase the firm PGA factor for the remainder of the 2000-2001 winter season in each of United Cities' districts. The changes for each district are as follows:

Palmyra District – Increase the firm PGA factor for the remainder of the winter season from \$0.8050 per Ccf to \$1.1576 per Ccf;

Bowling Green District – Increase the firm PGA factor for the remainder of the winter season from \$0.7006 per Ccf to \$1.0532 per Ccf;

Hannibal/Canton District – Increase the firm PGA factor for the remainder of the winter season from \$0.6861 per Ccf to \$1.0387 per Ccf; and

Neelyville District – Increase the firm PGA factor for the remainder of the winter season from \$0.7675 per Ccf to \$1.0549 per Ccf.

The Staff of the Commission (Staff) filed a memorandum and recommendation on January 26, 2001, stating that United Cities' Deferred Carrying Cost Balance (DCCB) is currently increasing at a rate in excess of \$30,000 per day due to the difference between the Company's current retail rates and the market price of natural gas. The DCCB, plus interest, will be included in the rate calculations used to compute United Cities' next ACA factor. This could cause an increase in next year's PGA rates. Staff further states that, if the DCCB becomes overly large, it will negatively impact United Cities' ability to borrow money and procure additional

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<sup>1</sup> The winter season includes the months of November through March.

supplies of natural gas. Staff states that the changes in United Cities' PGA were calculated in conformance with the Company's approved PGA Clause, and that United Cities' tariff permits the filing of proposed PGA tariffs on ten days' notice.

Staff recommends that the Commission approve the tariff sheet to become effective February 1, 2001, on an interim basis, subject to refund, pending a final Commission decision in United Cities' pending ACA cases: Case Nos. GR-99-280; GR-2000-392; and GR-2001-397.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum, and finds that the tariff sheet conforms to United Cities' Commission-approved PGA Clause and is therefore reasonable. This unscheduled increase in United Cities' rates is necessary because of the current extraordinarily high price of natural gas. If the price of natural gas drops in coming months, the Commission encourages United Cities to file for an unscheduled reduction in its PGA tariffs.

After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission finds that the proposed tariff sheet should be approved for service rendered on and after the requested effective date of February 1, 2001, on an interim basis, subject to refund.

*IT IS THEREFORE ORDERED:*

1. That the tariff sheet submitted on January 18, 2001, by United Cities Gas Company, as amended, is approved on an interim basis, subject to refund, to become effective on February 1, 2001. The tariff sheet approved is:

**P.S.C. Mo. No. 3**

**9th Revised Sheet No. 58, Canceling 8th Revised Sheet No. 58**

2. That this order shall become effective on February 1, 2001.

Lumpe, Ch., Drainer, and Murray, CC., concur  
Schemenauer and Simmons, CC., dissent with dissenting opinions attached

Woodruff, Senior Regulatory Law Judge

**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission on this case. The purchased gas adjustment clause as used in Missouri allows gas utility companies to recover the cost of the gas purchased and resold to ratepayers from those same ratepayers. I do not disagree and in fact support that concept. What I find most objectionable in this tariff is the negative financial and immediate impact it will have on the households of United Cities Gas Company's customers. Increases of this magnitude should be phased in over two or three billing periods. United Cities Gas Company, as well as other gas utilities, has this option but has evidently decided not to request a phase-in of this adjustment.

Again, I do not believe that an immediate rate increase of this magnitude, especially after the recent increase already approved, is in the public interest. For this reason I respectfully dissent.

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**Dissenting Opinion of Commissioner Kelvin L. Simmons**

The Missouri Public Service Commission today approves a substantial rate increase for United Cities Gas Company under its Purchased Gas Adjustment (PGA) tariff provision. I dissent in the Commission's decision.

Natural gas prices are volatile; they are subject to rapid and extreme fluctuations. The PGA mechanism permits Missouri natural gas utilities to respond rapidly to fluctuations in natural gas prices. Rates can be quickly raised or lowered, on ten days notice, depending on market conditions. Each gas utility seeks an initial PGA rate order in the late summer, based upon a forecast of gas prices for the upcoming heating season. In the spring, an adjustment is typically made, based on the record of the heating season just completed. If necessary, unscheduled adjustments can be made. Unfortunately, in the present regime of an unusually cold winter and rising prices at the wellhead, United Cities is seeking to raise rates.

The PGA mechanism has existed since the 1960s and has been approved by the Missouri courts. See Midwest Gas Users Association v. Public Service Commission of the State of Missouri. Nonetheless, despite its long acceptance and judicial approval, the time has come for the Commission to reconsider the PGA mechanism. The current heating cost emergency raises an unavoidable question: Are the natural gas utilities doing everything in their power to protect consumers from the effects of unexpected, extreme fluctuations in the price of natural gas? Are they engaging in appropriate hedging programs? Are they storing adequate reserves, purchased when prices are low? The Commission has opened a recent case to investigate these matters. I am in complete agreement with that decision.

The PGA mechanism was created by the Public Service Commission. Although the courts have upheld the PGA process, the Missouri General Assembly has never yet spoken on the subject. I also believe that the time has come for the General Assembly to provide guidance to the Commission with respect to the PGA mechanism. If the legislature believes the process should be altered or changed completely, then the Commission would be ready to implement those changes. The legislature would also be in a position to recommend the appropriate staffing and resource considerations that would be necessary to carry out the legislature's wishes. Certainly, the legislature has a necessary role to play in protecting consumers from the effects of extreme and unexpected gas price fluctuations.

The Office of the Public Counsel is an independent state agency, expressly created to represent consumers before this Commission. It is noteworthy that the Public Counsel has not asked the Commission to reject or suspend United Cities' unscheduled PGA tariff. I believe an emergency audit should be conducted as the Public Counsel requested in a recent Purchased Gas Adjustment (PGA) Tariff involving similar companies. However, I caution such an audit will take some months to complete.

The current crisis is not limited to Missouri. It is a problem of national dimension. The wells that produce natural gas are not located in Missouri; they are beyond the reach of this Commission. It is the duty of the federal government to examine gas-pricing practices to determine whether or not gas wholesalers are gouging consumers in Missouri and elsewhere. That is an investigation in which the Missouri Attorney General has a vital role to play. I will continue to urge the Attorney General to review this matter and to take whatever steps he can to protect Missouri ratepayers.

It appears that the current PGA process, which is statutorily silent and upheld in the courts, gives the Commission very limited options but to approve United Cities' unscheduled PGA rate increase request. Some would even argue that if we did not approve the increase, United Cities would soon exhaust its reserves of gas and cash and find itself in a position in which it was unable to purchase further natural gas supplies. That would not assist Missouri consumers in any way. I however remain unconvinced that our current process for evaluating a consistent cost recovery method under these extreme set of circumstances gives rise for automatic approval. ***I look for a way to provide our consumers with close to absolute certainty that the cost for natural gas processed through the PGA mechanism is reliably assured given today's extraordinary volatility with high natural gas prices.*** For these reasons, I respectfully dissent.

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**In the Matter of Southern Missouri Gas Company, L.P.'s Purchased Gas Adjustment Factors to be Reviewed in Its 2000-2001 Actual Cost Adjustment.**

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*Case No. GR-2001-388  
Decided January 30, 2001*

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**Gas §17.1, Rates §114.** The Commission found that the unscheduled increase in rates for Southern Missouri Gas Company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to RSMo Section 393.140(11), the Commission approved the proposed tariff sheets for service rendered on and after the requested effective date, on an interim basis, subject to refund.

**ORDER APPROVING INTERIM RATES**

Southern Missouri Gas Company, L.P. (SMGC) filed with the Missouri Public Service Commission (Commission) a tariff sheet on January 16, 2001, carrying a proposed effective date of February 1, 2001. On January 23, 2001, SMGC filed a substitute tariff sheet to correct an error. The tariff sheet, as substituted, was filed to reflect unscheduled changes in SMGC's Purchased Gas Adjustment (PGA) factors as the result of estimated changes in the cost of natural gas for the

remaining winter season.<sup>1</sup> Additionally, the tariff filing, as substituted, reflects an Unscheduled Filing Adjustment Factor.

The net effect of the proposed changes will increase the PGA factor to \$0.8989 per hundred cubic feet (Ccf) from a scheduled 2000-2001 winter season PGA factor of \$0.6628 per Ccf.

The Staff of the Commission (Staff) filed a recommendation and memorandum on January 25, 2001, stating that currently, SMGC's Deferred Carrying Cost Balance (DCCB) is increasing approximately \$4,000 per day due to the difference between the current rates and SMGC's market price for natural gas. Staff noted that any DCCB plus interest will be included in the rate calculations used to compute SMGC's next Actual Cost Adjustment (ACA) factor and could significantly increase next year's PGA rate if the DCCB continues to grow. In addition, Staff claimed, a large DCCB could adversely impact SMGC's credit and procurement arrangements.

Staff pointed out that SMGC has an option to file a Summer PGA change on April 1, 2001. However, Staff continued, unless warranted by market conditions, SMGC does not anticipate filing a Summer PGA change in April 2001. Therefore, Staff surmised, the proposed rates, if approved, would probably remain in effect until November 1, 2001, which is the estimated effective date of SMGC's next scheduled Winter PGA. Staff alleged that maintaining the proposed rates until November 1, 2001, could help reduce SMGC's DCCB.

Staff observed that this case was established to track SMGC's PGA factors to be reviewed in its 2000-2001 ACA filing. Additionally, Staff noted that Case No. GR-2001-39 was established to track SMGC's PGA factors to be reviewed in its 1999-2000 ACA filing. Staff contends that approval on an interim basis, subject to refund, should be granted, pending final Commission decisions in Case Nos. GR-2001-39 and GR-2001-388.

Staff affirmed that it reviewed SMGC's filing and determined that it was calculated in conformance with SMGC's PGA Clause. Staff stated that its recommendation is based on whether the filing is in compliance with the existing tariffs. Staff's opinion is that good cause for approval of the tariff sheet on less than thirty days' notice is demonstrated by SMGC's Commission-approved PGA clause allowing for ten business days' notice for PGA change filings. Therefore, Staff recommended that the tariff sheet, as substituted, be approved on an interim basis, subject to refund, to become effective on February 1, 2001.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum. The Commission finds that the tariff sheet, as substituted, conforms to SMGC's Commission-approved PGA Clause and is therefore reasonable.

This unscheduled increase in SMGC's rates is necessary because of the current extraordinarily high price of natural gas. If the price of natural gas drops in coming months, the Commission encourages SMGC to file for an unscheduled reduction in its PGA tariffs.

After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission finds that the proposed

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<sup>1</sup> The winter season includes the months of November through March.

tariff sheet should be approved for service rendered on and after the requested effective date of February 1, 2001, on an interim basis, subject to refund.

*IT IS THEREFORE ORDERED:*

1. That the revised tariff sheet submitted on January 23, 2001, by Southern Missouri Gas Company, L.P., is approved on an interim basis, subject to refund, to become effective on February 1, 2001. The tariff sheet approved is:

**P.S.C. Mo. No. 1**

**9th Revised Sheet No. 27, Canceling 8th Revised Sheet No. 27**

2. That this order shall become effective on February 1, 2001.

Lumpe, Ch., Drainer, and Murray, CC., concur

Schemenauer and Simmons, CC., dissent with dissenting opinions attached

Register, Regulatory Law Judge

**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission on this case. The purchased gas adjustment clause as used in Missouri allows gas utility companies to recover the cost of the gas purchased and resold to ratepayers from those same ratepayers. I do not disagree and in fact support that concept. What I find most objectionable in this tariff is the negative financial and immediate impact it will have on the households of Southern Missouri Gas Company's customers. Increases of this magnitude should be phased in over two or three billing periods. Southern Missouri Gas Company, as well as other gas utilities, has this option but has evidently decided not to request a phase-in of this adjustment.

Again, I do not believe that an immediate rate increase of this magnitude, especially after the recent increase already approved, is in the public interest. For this reason I respectfully dissent.

**Dissenting Opinion of Commissioner Kelvin L. Simmons**

The Missouri Public Service Commission today approves a substantial rate increase for Southern Missouri Gas Company under its Purchased Gas Adjustment (PGA) tariff provision. I dissent in the Commission's decision.

Natural gas prices are volatile; they are subject to rapid and extreme fluctuations. The PGA mechanism permits Missouri natural gas utilities to respond rapidly to fluctuations in natural gas prices. Rates can be quickly raised or lowered, on ten days notice, depending on market conditions. Each gas utility seeks an initial PGA rate order in the late summer, based upon a forecast of gas prices for the upcoming heating season. In the spring, an adjustment is typically made, based on the record of the heating season just completed. If necessary, unscheduled adjustments can be made. Unfortunately, in the present regime of an unusually cold winter and rising prices at the wellhead, Southern Missouri Gas is seeking to raise rates.

The PGA mechanism has existed since the 1960s and has been approved by the Missouri courts. See Midwest Gas Users Association v. Public Service Commission of the State of Missouri. Nonetheless, despite its long acceptance

and judicial approval, the time has come for the Commission to reconsider the PGA mechanism. The current heating cost emergency raises an unavoidable question: Are the natural gas utilities doing everything in their power to protect consumers from the effects of unexpected, extreme fluctuations in the price of natural gas? Are they engaging in appropriate hedging programs? Are they storing adequate reserves, purchased when prices are low? The Commission has opened a recent case to investigate these matters. I am in complete agreement with that decision.

The PGA mechanism was created by the Public Service Commission. Although the courts have upheld the PGA process, the Missouri General Assembly has never yet spoken on the subject. I also believe that the time has come for the General Assembly to provide guidance to the Commission with respect to the PGA mechanism. If the legislature believes the process should be altered or changed completely, then the Commission would be ready to implement those changes. The legislature would also be in a position to recommend the appropriate staffing and resource considerations that would be necessary to carry out the legislature's wishes. Certainly, the legislature has a necessary role to play in protecting consumers from the effects of extreme and unexpected gas price fluctuations.

The Office of the Public Counsel is an independent state agency, expressly created to represent consumers before this Commission. It is noteworthy that the Public Counsel has not asked the Commission to reject or suspend Southern Missouri Gas Company's unscheduled PGA tariff. I believe an emergency audit should be conducted as the Public Counsel requested in a recent Purchased Gas Adjustment (PGA) Tariff involving similar companies. However, I caution such an audit will take some months to complete.

The current crisis is not limited to Missouri. It is a problem of national dimension. The wells that produce natural gas are not located in Missouri; they are beyond the reach of this Commission. It is the duty of the federal government to examine gas-pricing practices to determine whether or not gas wholesalers are gouging consumers in Missouri and elsewhere. That is an investigation in which the Missouri Attorney General has a vital role to play. I will continue to urge the Attorney General to review this matter and to take whatever steps he can to protect Missouri ratepayers.

It appears that the current PGA process, which is statutorily silent and upheld in the courts, gives the Commission very limited options but to approve Southern Missouri's unscheduled PGA rate increase request. Some would even argue that if we did not approve the increase, Southern Missouri Gas Company would soon exhaust its reserves of gas and cash and find itself in a position in which it was unable to purchase further natural gas supplies. That would not assist Missouri consumers in any way. I however remain unconvinced that our current process for evaluating a consistent cost recovery method under these extreme set of circumstances gives rise for automatic approval. ***I look for a way to provide our consumers with close to absolute certainty that the cost for natural gas processed through the PGA mechanism is reliably assured given today's extraordinary volatility with high natural gas prices.*** For these reasons, I respectfully dissent.

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**In the Matter of Atmos Energy Corporation Purchased Gas  
Adjustment Factors to be Audited in Its 1999-2000 Actual  
Cost Adjustment.**

*Case No. GR-2001-396  
Decided January 30, 2001*

**Gas §§17.1, 114.** The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.

**ORDER APPROVING INTERIM RATES**

Atmos Energy Corporation (Atmos) filed a tariff sheet with the Commission on January 18, 2001, carrying an effective date of February 1, 2001. The tariff sheet reflects unscheduled changes in Atmos' Purchased Gas Adjustment (PGA) factors as the result of changes in the estimated cost of natural gas for the remaining winter heating season. The winter heating season includes the months of November through March. Additionally, the proposed tariff sheet reflects a change in Atmos' Actual Cost Adjustment (ACA) factors.

On January 25, 2001, the Staff of the Missouri Public Service Commission (Staff) filed its Memorandum and Recommendation in this case. Staff recommended that Atmos' proposed tariff sheet be approved for service on and after February 1, 2001, as an interim rate, subject to refund. Staff further advised the Commission that Atmos has shown good cause such that its tariff sheet should be approved on less than 30 days' notice.

For Atmos' Butler District, the effect of these changes will increase the firm PGA factor for the 2000-2001 winter season to \$1.16519 per Ccf from a scheduled winter season firm PGA factor of \$0.70837 per Ccf. For Atmos' Kirksville District, the effect of these changes will increase the firm PGA factor for the 2000-2001 winter season to \$1.07076 per Ccf from a scheduled winter season firm PGA factor of \$0.76588 per Ccf. For Atmos' SEMO District, the effect of these changes will increase the firm PGA factor for the 2000-2001 winter season to \$1.13726 per Ccf from a scheduled winter season firm PGA factor of \$0.78282 per Ccf.

Staff stated that Atmos' Deferred Carrying Cost Balance (DCCB) is increasing at over \$44,000 per day due to the difference between the current rates and the market price for natural gas. Staff noted that any DCCB plus interest will be included in the rate calculations used to compute Atmos' next Actual Cost Adjustment (ACA) factor and could significantly increase next year's PGA rate if the DCCB continues to grow. Staff also stated that a large DCCB could adversely impact Atmos' credit and procurement arrangements.

Staff stated that Atmos' proposed PGA factor changes were calculated in conformity with Atmos' PGA Clause. Staff further stated that Atmos' PGA Clause allows for 10 business days' notice for filings reflecting PGA changes and that,

under the circumstances, good cause exists to approve the proposed tariff sheet on less than 30 days' notice. Staff recommended that the Commission approve the tariff sheet to become effective February 1, 2001, on an interim basis, subject to refund, pending a final Commission decision in Atmos' ACA Case Nos. GR-98-399, GR-99-392, GR-2000-573 and GR-2001-396.

The Commission has reviewed the proposed tariff sheet and Staff's Memorandum and Recommendation. The Commission finds that the tariff sheet conforms to the company's Commission-approved PGA Clause and is therefore reasonable. This unscheduled increase in Atmos' rates is necessary because of the current extraordinarily high price of natural gas. If the price of natural gas drops in coming months, the Commission encourages Atmos to file for an unscheduled reduction in its PGA tariffs.

After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission concludes that the proposed tariff sheet should be approved to become effective on and after the requested effective date of February 1, 2001, interim subject to refund.

*IT IS THEREFORE ORDERED:*

1. That Tariff No. 200100751, submitted in Case No. GR-2001-396, by Atmos Energy Corporation, is approved on an interim basis, subject to refund, for service rendered on and after February 1, 2001. The tariff sheet approved is:

**P.S.C. Mo. No. 1**

**22nd Revised Sheet No. 16T, Canceling 21st Revised Sheet No. 16T**

2. That this order shall become effective on February 1, 2001.

Lumpe, Ch., Drainer, and Murray, CC., concur  
Schemenauer and Simmons, CC., dissent with dissenting opinions attached

Register, Regulatory Law Judge

**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission on this case. The purchased gas adjustment clause as used in Missouri allows gas utility companies to recover the cost of the gas purchased and resold to ratepayers from those same ratepayers. I do not disagree and in fact support that concept. What I find most objectionable in this tariff is the negative financial and immediate impact it will have on the households of Atmos Energy Corporation's customers. Increases of this magnitude should be phased in over two or three billing periods. Atmos Energy Corporation, as well as other gas utilities, has this option but has evidently decided not to request a phase-in of this adjustment.

Again, I do not believe that an immediate rate increase of this magnitude, especially after the recent increase already approved, is in the public interest. For this reason I respectfully dissent.

**Dissenting Opinion of Commissioner Kelvin L. Simmons**

The Missouri Public Service Commission today approves a substantial rate increase for Atmos Energy Corporation under its Purchased Gas Adjustment (PGA) tariff provision. I dissent in the Commission's decision.

Natural gas prices are volatile; they are subject to rapid and extreme fluctuations. The PGA mechanism permits Missouri natural gas utilities to respond rapidly to fluctuations in natural gas prices. Rates can be quickly raised or lowered, on ten days notice, depending on market conditions. Each gas utility seeks an initial PGA rate order in the late summer, based upon a forecast of gas prices for the upcoming heating season. In the spring, an adjustment is typically made, based on the record of the heating season just completed. If necessary, unscheduled adjustments can be made. Unfortunately, in the present regime of an unusually cold winter and rising prices at the wellhead, Atmos Energy is seeking to raise rates.

The PGA mechanism has existed since the 1960s and has been approved by the Missouri courts. See Midwest Gas Users Association v. Public Service Commission of the State of Missouri. Nonetheless, despite its long acceptance and judicial approval, the time has come for the Commission to reconsider the PGA mechanism. The current heating cost emergency raises an unavoidable question: Are the natural gas utilities doing everything in their power to protect consumers from the effects of unexpected, extreme fluctuations in the price of natural gas? Are they engaging in appropriate hedging programs? Are they storing adequate reserves, purchased when prices are low? The Commission has opened a recent case to investigate these matters. I am in complete agreement with that decision.

The PGA mechanism was created by the Public Service Commission. Although the courts have upheld the PGA process, the Missouri General Assembly has never yet spoken on the subject. I also believe that the time has come for the General Assembly to provide guidance to the Commission with respect to the PGA mechanism. If the legislature believes the process should be altered or changed completely, then the Commission would be ready to implement those changes. The legislature would also be in a position to recommend the appropriate staffing and resource considerations that would be necessary to carry out the legislature's wishes. Certainly, the legislature has a necessary role to play in protecting consumers from the effects of extreme and unexpected gas price fluctuations.

The Office of the Public Counsel is an independent state agency, expressly created to represent consumers before this Commission. It is noteworthy that the Public Counsel has not asked the Commission to reject or suspend Atmos Energy's unscheduled PGA tariff. I believe an emergency audit should be conducted as the Public Counsel requested in a recent Purchased Gas Adjustment (PGA) Tariff involving similar companies. However, I caution such an audit will take some months to complete.

The current crisis is not limited to Missouri. It is a problem of national dimension. The wells that produce natural gas are not located in Missouri; they are beyond the reach of this Commission. It is the duty of the federal government to examine gas-pricing practices to determine whether or not gas wholesalers are gouging consumers in Missouri and elsewhere. That is an investigation in which the Missouri Attorney General has a vital role to play. I will continue to urge the

Attorney General to review this matter and to take whatever steps he can to protect Missouri ratepayers.

It appears that the current PGA process, which is statutorily silent and upheld in the courts, gives the Commission very limited options but to approve Atmos Energy's unscheduled PGA rate increase request. Some would even argue that if we did not approve the increase, Atmos Energy would soon exhaust its reserves of gas and cash and find itself in a position in which it was unable to purchase further natural gas supplies. That would not assist Missouri consumers in any way. I however remain unconvinced that our current process for evaluating a consistent cost recovery method under these extreme set of circumstances gives rise for automatic approval. ***I look for a way to provide our consumers with close to absolute certainty that the cost for natural gas processed through the PGA mechanism is reliably assured given today's extraordinary volatility with high natural gas prices.*** For these reasons, I respectfully dissent.

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**In the Matter of Greeley Gas Company's Purchased Gas Adjustment Factors to be Reviewed in Its 2000-2001 Actual Cost Adjustment.**

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*Case No. GR-2001-394  
Decided January 30, 2001*

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**Gas §17.1.** The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.

**Rates §114.** The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.

**ORDER APPROVING INTERIM RATES**

Greeley Gas Company (Greeley) submitted a tariff sheet to the Commission on January 18, 2001, carrying an effective date of February 1, 2001. The proposed tariff sheet was filed to reflect unscheduled changes in Greeley's Purchased Gas Adjustment (PGA) factors as the result of current high prices of natural gas that exceed those contained in Greeley's scheduled winter heating season PGA tariff.<sup>1</sup> The net effect of the changes proposed by Greeley will increase the firm PGA factor

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<sup>1</sup> The winter season includes the months of November through March.

for the remainder of the 2000-2001 winter season to \$0.7339 per Ccf from the current firm PGA factor of \$0.3991 per Ccf.

The Staff of the Commission (Staff) filed a memorandum and recommendation on January 25, 2001. Staff stated that this case was established to track Greeley's PGA factors to be reviewed in its 2000-2001 Actual Cost Adjustment (ACA) filing. Additionally, Staff noted that Case No. GR-2001-36 was established to track Greeley's PGA factors to be reviewed in its 1999-2000 ACA filing. Staff recommends that approval on an interim basis, subject to refund, should be granted, pending final Commission decisions in Case Nos. GR-2001-36 and GR-2001-394.

Staff states that the changes in Greeley's PGA were calculated in conformance with the Company's approved PGA clause. Staff also states that in its opinion good cause for approval of the tariff sheet on less than 30 days' notice is demonstrated by Greeley's Commission-approved PGA Clause allowing for ten business days' notice for PGA change filings. Therefore, Staff recommended that the tariff sheet be approved on an interim basis, subject to refund, to become effective on February 1, 2001.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum, and finds that the tariff sheet conforms to Greeley's Commission-approved PGA Clause and is therefore reasonable. This unscheduled increase in Greeley's rates is necessary because of the current extraordinarily high price of natural gas. If the price of natural gas drops in coming months, the Commission encourages Greeley to file for an unscheduled reduction in its PGA tariffs.

After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission finds that the proposed tariff sheet should be approved for service rendered on and after the requested effective date of February 1, 2001, on an interim basis, subject to refund.

*IT IS THEREFORE ORDERED:*

1. That the tariff sheet submitted on January 18, 2001, by Greeley Gas Company, is approved on an interim basis, subject to refund, to become effective on February 1, 2001. The tariff sheet approved is:

**P.S.C. Mo. No. 1**  
**Forty-Seventh Revised Sheet No. 6,**  
**CANCELING Forty-Sixth Revised Sheet No. 6**

2. That this order shall become effective on February 1, 2001.

Lumpe, Ch., Drainer and Murray, CC, concur.  
Schemenauer, C., dissents, with dissenting opinion attached.  
Simmons, C., dissents, with dissenting opinion attached.

Dippell, Senior Regulatory Law Judge

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**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commission on this case. The purchased gas adjustment clause as used in Missouri allows gas utility companies to recover the cost of the gas purchased and resold to ratepayers from those same ratepayers. I do not disagree and in fact support that concept. What I find most objectionable in this tariff is the negative financial and immediate impact it will have on the households of Greeley Gas Company's customers. Increases of this magnitude should be phased in over two or three billing periods. Greeley Gas Company, as well as other gas utilities, has this option but has evidently decided not to request a phase-in of this adjustment.

Again, I do not believe that an immediate rate increase of this magnitude, especially after the recent increase already approved, is in the public interest. For this reason I respectfully dissent.

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**Dissenting Opinion of Commissioner Kelvin L. Simmons**

The Missouri Public Service Commission today approves a substantial rate increase for Greeley Gas Company under its Purchased Gas Adjustment (PGA) tariff provision. I dissent in the Commission's decision.

Natural gas prices are volatile; they are subject to rapid and extreme fluctuations. The PGA mechanism permits Missouri natural gas utilities to respond rapidly to fluctuations in natural gas prices. Rates can be quickly raised or lowered, on ten days notice, depending on market conditions. Each gas utility seeks an initial PGA rate order in the late summer, based upon a forecast of gas prices for the upcoming heating season. In the spring, an adjustment is typically made, based on the record of the heating season just completed. If necessary, unscheduled adjustments can be made. Unfortunately, in the present regime of an unusually cold winter and rising prices at the wellhead, Greeley is seeking to raise rates.

The PGA mechanism has existed since the 1960s and has been approved by the Missouri courts. See Midwest Gas Users Association v. Public Service Commission of the State of Missouri. Nonetheless, despite its long acceptance and judicial approval, the time has come for the Commission to reconsider the PGA mechanism. The current heating cost emergency raises an unavoidable question: Are the natural gas utilities doing everything in their power to protect consumers from the effects of unexpected, extreme fluctuations in the price of natural gas? Are they engaging in appropriate hedging programs? Are they storing adequate reserves, purchased when prices are low? The Commission has opened a recent case to investigate these matters. I am in complete agreement with that decision.

The PGA mechanism was created by the Public Service Commission. Although the courts have upheld the PGA process, the Missouri General Assembly has never yet spoken on the subject. I also believe that the time has come for the General Assembly to provide guidance to the Commission with respect to the PGA mechanism. If the legislature believes the process should be altered or changed completely, then the Commission would be ready to implement those changes. The legislature would also be in a position to recommend the appropriate staffing

and resource considerations that would be necessary to carry out the legislatures wishes. Certainly, the legislature has a necessary role to play in protecting consumers from the effects of extreme and unexpected gas price fluctuations.

The Office of the Public Counsel is an independent state agency, expressly created to represent consumers before this Commission. It is noteworthy that the Public Counsel has not asked the Commission to reject or suspend Greeley's unscheduled PGA tariff. I believe an emergency audit should be conducted as the Public Counsel requested in a recent Purchased Gas Adjustment (PGA) Tariff involving similar companies. However, I caution such an audit will take some months to complete.

The current crisis is not limited to Missouri. It is a problem of national dimension. The wells that produce natural gas are not located in Missouri; they are beyond the reach of this Commission. It is the duty of the federal government to examine gas-pricing practices to determine whether or not gas wholesalers are gouging consumers in Missouri and elsewhere. That is an investigation in which the Missouri Attorney General has a vital role to play. I will continue to urge the Attorney General to review this matter and to take whatever steps he can to protect Missouri ratepayers.

It appears that the current PGA process, which is statutorily silent and upheld in the courts, gives the Commission very limited options but to approve Greeley's unscheduled PGA rate increase request. Some would even argue that if we did not approve the increase, Greeley Gas Company would soon exhaust its reserves of gas and cash and find itself in a position in which it was unable to purchase further natural gas supplies. That would not assist Missouri consumers in any way. I however remain unconvinced that our current process for evaluating a consistent cost recovery method under these extreme set of circumstances gives rise for automatic approval. ***I look for a way to provide our consumers with close to absolute certainty that the cost for natural gas processed through the PGA mechanism is reliably assured given today's extraordinary volatility with high natural gas prices.*** For these reasons, I respectfully dissent.

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**DIGEST OF REPORTS**

**OF THE**

**PUBLIC SERVICE COMMISSION**

**OF THE**

**STATE OF MISSOURI**



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**ACCOUNTING****I. IN GENERAL**

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- §40. Working capital and current assets
- §41. Expenses generally
- §42. Accounting Authority Orders
- §43. Financial Accounting Standards Board requirements

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**ACCOUNTING**
**I. IN GENERAL****§4. Jurisdiction and powers of the State Commission**

In 4 CSR 240-20.030, the Commission directs that electric utilities are to keep all accounts in conformity with the Uniform System of Accounts (USOA) Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act, as prescribed by the Federal Energy Regulatory Commission.—St. Joseph Light & Power 9 MPSC 3d 481.

Section 393.140(8), RSMo 1996, grants the Commission the power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.—St. Joseph Light & Power 9 MPSC 3d 481.

Section 393.140(4), RSMo 1996, authorizes the Commission to prescribe a uniform method of keeping accounts for electric utilities subject to Commission jurisdiction.—St. Joseph Light & Power 9 MPSC 3d 481.

**II. DUTY TO KEEP PROPER ACCOUNTS****§9. Methods of accounting generally.**

The Commission found that the costs incurred by Missouri Gas Energy, a Division of Southern Union Company (MGE), to prepare for Y2K compliance were extraordinary and met the criteria for deferral. The Commission granted MGE's application and allowed MGE to defer these costs.—Missouri Gas Energy 9 MPSC 3d 37.

**III. PARTICULAR ITEMS****§18. Financing costs**

Where Company deferred post-in-service carrying costs and depreciation expense under an Accounting Authority Order, none of the deferred amount was recovered in rate base because none of it reflected an unusual or extraordinary expense.—Missouri-American Water 9 MPSC 3d 254.

**§42. Accounting Authority Orders.**

The Uniform System of Accounts adopted by the Commission for Water Utilities authorizes the deferral of extraordinary expenses without Commission approval. Thus, seeking an Accounting Authority Order serves only to resolve the question as to whether the expenses in question were indeed extraordinary.—Missouri-American Water 9 MPSC 3d 78.

The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.—Missouri Gas Energy 9 MPSC 3d 345.

The test that the Commission has used for determining whether or not to grant an accounting authority order is whether the expense to be deferred is “extraordinary, unusual and unique and not recurring”.—St. Joseph Light & Power 9 MPSC 3d 481.

The Commission denied an electric utilities’ request for an accounting authority order to allow it to defer incremental costs incurred as a result of an explosion and outage at a generating plant because there was no reason why the expenses to be deferred could not be immediately included for recovery in a rate case.—St. Joseph Light & Power 9 MPSC 3d 481.

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**CERTIFICATES**
**I. IN GENERAL**

- §1. Generally**
- §2. Unauthorized operations and construction**
- §3. Obligation of the utility**

**II. JURISDICTION AND POWERS**

- §4. Jurisdiction and powers generally**
- §5. Jurisdiction and powers of Federal Commissions**
- §6. Jurisdiction and powers of the State Commission**

- §7. Jurisdiction and powers of local authorities
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- §29. Unauthorized operation or construction
- §30. Municipal or county action
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### VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
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- §46.1. Certificate of local exchange service authority
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### VIII. TRANSFER, MORTGAGE OR LEASE

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
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### IX. REVOCATION, CANCELLATION AND FORFEITURE

- §60. Revocation, cancellation and forfeiture generally
  - §61. Acts or omissions justifying revocation or forfeiture
  - §62. Necessity of action by the Commission
  - §63. Penalties
-

**CERTIFICATES****I. IN GENERAL****§1. Generally**

AmerenUE was granted its application for a variance from Commission Rule 4 CSR 240-20.050, which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981.—Union Electric 9 MPSC 3d 115.

Missouri Gas Energy (MGE) was granted its application for an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8), which prohibits regulated gas utilities from engaging in activities that qualify as heating, ventilation, and air conditioning (HVAC) services. The Commission found that MGE has been providing HVAC services for a period that includes and predates the five-year period ending August 28, 1998, thus allowing MGE a statutory exemption.—Missouri Gas Energy 9 MPSC 3d 357.

**§2. Unauthorized operations and construction**

AmerenUE was granted its application for a variance from Commission Rule 4 CSR 240-20.050, which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981.—Union Electric 9 MPSC 3d 115.

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AmerenUE was granted its application for a variance from Commission Rule 4 CSR 240-20.050, which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981.—Union Electric 9 MPSC 3d 115.

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- §2. Right to allowance for depreciation
- §3. Reports, records and statements
- §4. Obligation of the utility

### II. JURISDICTION AND POWERS

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- §6. Jurisdiction and powers of the State Commission
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- §31. Electric and power
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- §34. Telecommunications
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**DEPRECIATION**

No cases in this volume involved the question of depreciation.

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- §3. Recovery of damages for discrimination
- §4. Recovery of discriminatory undercharge
- §5. Reports, records and statements

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- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
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- §9. Competitor's right to equal treatment
- §10. Free service
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- §19. Bases for classification and differences
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- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

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**DISCRIMINATION**

No cases in this volume involved the question of discrimination.

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**ELECTRIC****I. INGENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

**II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

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- §42. Planning and management
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- §45. Decommissioning costs

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- §46. Relations between connecting companies generally
- §47. Physical connection
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- §48.1 Qualifying facilities
- §49. Records and statements

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### ELECTRIC

#### I. IN GENERAL

##### §1. Generally

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and

directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25. The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to the ratepayers.—PSC Staff v. Union Electric 9 MPSC 3d 394.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to ratepayers.—Union Electric 9 MPSC 3d 396.

Where an electric utility sought authority to manage its sulfur dioxide emission allowance inventory, the Commission had previously granted such authority to the Company, no party opposed the application, and the Commission's Staff advised that it be granted on the same terms as the previous authority, the Commission granted the requested authority.—Kansas City Power & Light 9 MPSC 3d 177.

**§2. Obligation of the utility**

AmerenUE was granted its application for a variance from Commission Rule 4 CSR 240-20.050, which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981.—Union Electric 9 MPSC 3d 115.

**§3. Certificate of convenience and necessity**

Upon the unopposed recommendation of Staff, the Commission approved certain transactions relating to the construction, ownership, and operation of a combined cycle generating facility.—Empire District/Westar Generating 9 MPSC 3d 136.

**§4. Transfer, lease and sale**

Upon the unopposed recommendation of Staff, the Commission approved certain transactions relating to the construction, ownership, and operation of a combined cycle generating facility.—Empire District/Westar Generating 9 MPSC 3d 136.

The Commission authorized an electric utility to adopt a shareholder rights plan designed to discourage unsolicited take-over bids. In doing so the Commission rejected conditions suggested by the Commission's Staff's that would have involved the Commission in attempting to determine the propriety of possible competing bids for acquisition of the utility.—Empire District Electric Company 9 MPSC 3d 184.

Volatility in the wholesale electric market might place a small utility at a financial disadvantage and would justify approval of a merger with a larger utility better able to compete in the wholesale electric market.—UtiliCorp United 9 MPSC 3d 454.

The Commission declined to order the performance of market power studies as a condition on approval of a merger between two electric utilities.—UtiliCorp United 9 MPSC 3d 454.

The Commission is required to approve the merger between two utilities if it can be shown that the merger will not be detrimental to the public. The public need not benefit from the merger, so long as it is not harmed.—UtiliCorp United 9 MPSC 3d 454.

The Commission rejected a regulatory plan proposed by the acquiring company that included a five-year rate freeze because such plan would be contrary to the Commission's statutory obligation to provide continuous regulation of the public utilities of this state, because the Commission cannot prevent an appropriate party from bringing a rate complaint during the period of the freeze, and because a five-year rate freeze would not be good public policy.—UtiliCorp United 9 MPSC 3d 454.

The Commission declined to decide rate case type issues, including recovery of an acquisition premium, in a merger case, because to do so would be to engage in single-issue rate-making.—UtiliCorp United 9 MPSC 3d 454.

Volatility in the wholesale electric market might place a small utility at a financial disadvantage and would justify approval of a merger with a larger utility better able to compete in the wholesale electric market.—The Empire District Electric Company 9 MPSC 3d 512.

The arguments of the Staff of the Commission that the costs of the proposed merger between two electric utilities would exceed the benefits of such merger were found to be unpersuasive.—The Empire District Electric Company 9 MPSC 3d 512.

The fact that the long-term debt of the acquiring company carried a BBB rating and the acquired company's long-term debt carried an A- rating did not, by itself, constitute a detriment to the rate-payers of the acquired company so as to require rejection of the proposed merger.—The Empire District Electric Company 9 MPSC 3d 512.

As a condition on its approval of a merger between two electric companies, the Commission required the acquiring company to file monthly reports regarding customer service for one year following the merger.—The Empire District Electric Company 9 MPSC 3d 512.

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## **II. JURISDICTION AND POWERS**

### **§9. Jurisdiction and power of the State Commission**

The Commission found that a intervenor's issues regarding a merger's effect on transmission access and reliability, concern the transmission of power across service territories for purpose of wholesale deliveries and as such are properly regulated by the FERC and are not subject to regulation by the Commission.—The Empire District Electric Company 9 MPSC 3d 512.

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## **III. OPERATIONS**

### **§13. Operations generally**

AmerenUE was granted its application for a variance from Commission Rule 4 CSR 240-20.050, which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981.—Union Electric 9 MPSC 3d 115.

On April 25, 2000, the Commission ordered that the Unanimous Stipulation and Agreement filed on April 3, 2000, is approved, and that Kansas City Power and Light Company's tariff is modified to establish conditions under which a special services contract may be executed by KCPL.—OPC v. KCPL 9 MPSC 3d 119.

### **§14. Rules and regulations**

The Commission granted a variance of Commission Rule 4 CSR 240-20.050, requiring a separate meter be installed for each residence or

commercial unit in a multi-occupancy building, because Bickford House is a building, consisting of 65 assisted living apartments for elderly residents, and the owner is assuming responsibility for payment of the bills for each apartment and the common facilities, thereby lowering the initial construction costs.—Kansas City Power & Light 9 MPSC 3d 11.

**§17. Abandonment and discontinuance**

The Application for Approval to Change the Trustee of its Tax Qualified Nuclear Decommissioning Trust Fund and for Approval of a New Investment Manager, filed by Union Electric Company d/b/a AmerenUE, is granted in all respects except for certain provisions which shall be taken under advisement until the resolution of In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company d/b/a AmerenCIPS and, in Connection Therewith, Certain Other Related Transactions, under Case No. EM-2001-233.—Union Electric 9 MPSC 3d 486.

**§20. Rates**

On April 25, 2000, the Commission ordered that the Unanimous Stipulation and Agreement filed on April 3, 2000, is approved, and that Kansas City Power and Light Company's tariff is modified to establish conditions under which a special services contract may be executed by KCPL.—OPC v. KCPL 9 MPSC 3d 119.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

A prospective intervenor's request to suspend a tariff that created a voluntary load reduction rider was denied where the large industrial customer requesting the suspension failed to allege any specific harm that would result from the tariff and where even a short suspension would prevent the tariff from going into effect during the hot-weather months when it was needed.—St. Joseph Light & Power 9 MPSC 3d 130.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

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## **§21. Refunds**

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to ratepayers.—Union Electric 9 MPSC 3d 396.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement

which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to the ratepayers.—PSC Staff v. Union Electric 9 MPSC 3d 394.

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

### **§31. Equipment**

The Commission granted a variance of Commission Rule 4 CSR 240-20.050, requiring a separate meter be installed for each residence or commercial unit in a multi-occupancy building, because Bickford House is a building, consisting of 65 assisted living apartments for elderly residents, and the owner is assuming responsibility for payment of the bills for each apartment and the common facilities, thereby lowering the initial construction costs.—Kansas City Power & Light 9 MPSC 3d 11.

### **§40. Reports, records and statements**

Discovery procedures set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and the evaluation of the EARP process pursuant to Section 7(g) of the Stipulation and Agreement approved by

the Commission, based upon the specific terms of the stipulation and agreement as reviewed by the Commission.—Union Electric 9 MPSC 3d 399.

The Commission found that the purposes of the Affiliate Transactions Rule could better be accomplished by applying the rule to all the utilities not specifically exempted by the Circuit Court than by exempting all utilities. The Commission did not refrain from enforcing a validly promulgated rule because it was subject to appellate review. The Commission denied the requested waiver.—UtiliCorp/Empire/St. Joseph Light & Power 9 MPSC 3d 132.

**§41. Billing practices**

The Commission granted a variance of Commission Rule 4 CSR 240-20.050, requiring a separate meter be installed for each residence or commercial unit in a multi-occupancy building, because Bickford House is a building, consisting of 65 assisted living apartments for elderly residents, and the owner is assuming responsibility for payment of the bills for each apartment and the common facilities, thereby lowering the initial construction costs.—Kansas City Power & Light 9 MPSC 3d 11.

**§43. Accounting Authority orders**

The Commission denied an electric utilities' request for an accounting authority order to allow it to defer incremental costs incurred as a result of an explosion and outage at a generating plant because there was no reason why the expenses to be deferred could not be immediately included for recovery in a rate case.—St. Joseph Light & Power 9 MPSC 3d 481.

The test that the Commission has used for determining whether or not to grant an accounting authority order is whether the expense to be deferred is "extraordinary, unusual and unique and not recurring".—St. Joseph Light & Power 9 MPSC 3d 481.

**§45. Decommissioning costs**

The Application for Approval to Change the Trustee of its Tax Qualified Nuclear Decommissioning Trust Fund and for Approval of a New Investment Manager, filed by Union Electric Company d/b/a AmerenUE, is granted in all respects except for certain provisions which shall be taken under advisement until the resolution of In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois

Public Service Company d/b/a AmerenCIPS and, in Connection Therewith, Certain Other Related Transactions, under Case No. EM-2001-233.—Union Electric 9 MPSC 3d 486.

## **EVIDENCE, PRACTICE AND PROCEDURE**

### **I. IN GENERAL**

- §1. Generally
- §2. Jurisdiction and powers
- §3. Judicial notice; matters outside the record
- §4. Presumption and burden of proof
- §5. Admissibility
- §6. Weight, effect and sufficiency
- §7. Competency
- §8. Stipulation

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- §9. Particular kinds of evidence generally
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- §22. Parties
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**EVIDENCE, PRACTICE AND PROCEDURE****I. IN GENERAL****§1. Generally**

The Commission found that the motion for clarification should be granted.—Missouri Gas Energy 9 MPSC 3d 170.

The Commission granted a Motion for Clarification and /or Modification and issued Modified Order Approving Financing upon motion of applicant because it was necessary for the Commission to find in its authorization for the financing that the proposed debt issue or its proceeds has been or is reasonably required for the purpose specified.—Le-Ru Telephone 9 MPSC 3d 336.

The Commission granted a Motion for Clarification and /or Modification and issued Modified Order Approving Financing to clarify that financing approval was not subject to arbitrary cancellation. Commission does retain authority to modify its orders upon appropriate circumstances.—Le-Ru Telephone 9 MPSC 3d 336.

The Commission found that the request for rehearing or reconsideration on the issue of the exclusion of the unamortized balance of the SLRP deferrals should be denied and no adjustments should be made to the revenue requirement based upon the specific evidence that was ruled upon in the Report and Order.—Missouri Gas Energy 9 MPSC 3d 170.

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

**§2. Jurisdiction and powers**

Discovery procedures set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and the evaluation of the EARP process pursuant to Section 7(g) of the Stipulation and Agreement approved by the Commission, based upon the specific terms of the stipulation and agreement as reviewed by the Commission.—Union Electric 9 MPSC 3d 399.

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

The Commission's power to hear and determine a complaint brought under Section 393.130.1 is defined by Section 386.390.1, RSMo.—GST Steel v. KCPL 9 MPSC 3d 186.

Section 386.390.1 requires that a complaint concerning the reasonableness of utility rates be brought by certain named plaintiffs or be signed by at least 25 customers of the utility. This rule applied where an industrial customer complained that rates under its special contract were not reasonable because they included certain imprudently-incurred costs. However, Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority and the Commission concluded that it might do so in its Report & Order.—GST Steel v. KCPL 9 MPSC 3d 186.

The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to Commission Rule 4 CSR 240-2.116(3).—Missouri Gas Energy 9 MPSC 3d 327.

**§4. Presumption and burden of proof**

The burden of proof at hearing rests with the complainant in cases where the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions. —GST Steel v. KCPL 9 MPSC 3d 186.

**§5. Admissibility**

The Commission granted the motion to strike portions of direct rehearing testimony because it was outside the scope of the issues on rehearing.—Missouri Gas Energy 9 MPSC 3d 170.

**§6. Weight, effect and sufficiency**

Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. More frequently, an expert offers an opinion "as to the inferences and conclusions that should be drawn

from other evidence.” This sort of testimony is proper where it will “assist the trier of fact to understand the evidence or to determine a fact in issue[.]” Section 490.065. Mr. Ward’s testimony was of the latter sort. Experts are generally permitted in Missouri to offer opinion testimony as to causation, including the causes of such incidents as building collapses, fires and blast damage. Thus, GST offered, and the Commission received, Mr. Ward’s expert opinion as to the cause of the boiler explosion at Hawthorn 5. An expert may rely on hearsay evidence to support an opinion, so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. However, it is also true that an expert’s reliance upon inadmissible evidence does not thereby somehow transform that evidence into competent and substantive evidence. Hearsay evidence is not competent and substantial evidence such as can support a finding, conclusion or decision by this Commission. An expert’s opinion testimony is not the proper vehicle by which to introduce into the record as independent, substantive evidence the evidence upon which the expert relied in reaching that opinion. Most of the information relied on by Mr. Ward was admitted only for the limited purpose of showing the basis of his expert opinion. Because Mr. Ward’s opinion testimony was unsupported by substantive evidence, the Commission accorded it little weight. . —GST Steel v. KCPL 9 MPSC 3d 186.

AT&T was the only entity licensed by the Commission to provide basic interexchange or “long distance” telecommunications service in Missouri on January 1, 1984. Under Section 392.460, RSMo, AT&T was not permitted to “abandon such service . . . unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment shall not deprive any customers of . . . basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest.” The Commission excused AT&T from its “carrier of last resort” obligation upon a showing that over 500 long distance carriers were now certified in Missouri, with 13 of them operating in every exchange.—AT&T 9 MPSC 3d 233.

Where an industrial electric service customer alleged that the explosion that destroyed a generating plant was caused by the utility’s failure to take a sump pump out-of-service while the associated wastewater line was under repair, permitting wastewater to back up in the control room bathroom, drip down into the Burner Management Unit and allow natural gas to enter the boiler and ignite, the customer failed to sustain its burden of proof because it could not exclude the possible intervening negligence of other actors, such as the contractor repairing the wastewater line, the contractor who installed a check valve in that wastewater line, and the manufacturer of the check valve. —GST Steel v. KCPL 9 MPSC 3d 186.

**§7. Competency**

Section 386.410.1, RSMo, provides that “in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence.” Nonetheless, Section 386.510 requires that a Commission decision be both reasonable and lawful. A decision “is lawful if the Commission had statutory authority to issue it”; a decision “is reasonable if it is supported by competent and substantial evidence on the whole record.” “Substantial evidence is evidence that if true has probative force upon the issues[.] Competent evidence is that which is relevant and admissible evidence which is capable of establishing the fact in issue.” Thus, because the Courts have held that a Commission decision must be supported by evidence of record that is both competent and substantial, the technical rules of evidence are indeed very much applicable to Commission proceedings. —GST Steel v. KCPL 9 MPSC 3d 186.

**§8. Stipulation**

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

Where a non-unanimous stipulation and agreement is filed and parties file timely objections to it, the Commission is required to ignore the non-unanimous stipulation and agreement and to proceed with the case on the merits. The Commission understands the case law to mean that it cannot, by any procedural gymnastics, impose a non-unanimous stipulation and agreement on objecting parties and thereby dispose of a contested case. In previous cases, the Commission has stated that it considers a non-unanimous stipulation and agreement "to be merely a change of position by the signatory parties from their original positions to the stipulated position." Likewise, the Commission will proceed in the present matter pursuant to law and its own rules of practice and procedure, granting such relief as, after hearing, it concludes has been shown to be warranted under the law.—Missouri-American Water 9 MPSC 3d 78.

The Commission approved an agreement stipulating that: (1) the Complainants, together with others residing in five single-family residences, are neighbors located in the service area of St. Louis County Water Respondent; (2) the Complainants and the other residents are not presently receiving water service from the Respondent; (3) the Complainants each allege that, including themselves, five of the eight neighbors are willing to bear the cost of an extension of the Respondent's mains that would permit water connections to the main by each of the eight neighbors; (4) three of the neighbors closer to the existing main than the farthest neighbor desiring to obtain service from the Respondent are unwilling to contribute to the initial cost of extending the main; (5) the cost to each of the five neighbors willing to pay for a main extension would be about \$8,000 and that, under the Respondent's tariff, the cost for any of these three neighbors to connect at any time after the main is extended would be approximately \$2,000; (6) the Complainants assert that this is inequitable since, considering refunds that could be available to the Complainants under the Respondent's tariff, the cost to those who originally paid for the main extension could never be reduced to approach the cost to those who connect after the main is extended; (7) the Complainants request the Commission to grant a variance from the Respondent's tariff; and (8) after a new connection is made, those already on the main extension are to be reimbursed by those connecting, in an amount so that after the reimbursement, all those connected to the main extension would have paid the same total dollar amount.—Barker v. St. Louis County Water 9 MPSC 3d 214.

## II. PARTICULAR KINDS OF EVIDENCE

### §9. Particular kinds of evidence generally

The Application for Approval to Change the Trustee of its Tax Qualified Nuclear Decommissioning Trust Fund and for Approval of a New Investment Manager, filed by Union Electric Company d/b/a AmerenUE, is granted in all respects except for certain provisions which shall be taken under advisement until the resolution of In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company d/b/a AmerenCIPS and, in Connection Therewith, Certain Other Related Transactions, under Case No. EM-2001-233.—Union Electric 9 MPSC 3d 486.

After an incident involving a natural gas explosion, fire, and loss of life in Jefferson County, Missouri, the parties were involved in both a gas safety and complaint case. The parties stipulated and agreed, *inter alia*: (a) Laclede's procedures for responding to emergencies shall be revised; (b) Laclede's coordination of mobile communications equipment shall be enhanced; (c) Laclede shall incorporate into its employee training program procedures for preventing or reducing third-party damage; and (d) the parties shall continue to promote efforts at preventing third-party damage. The Commission approved the stipulation and agreement in the gas safety case and dismissed the complaint case.—PSC Staff v. Laclede Gas Company 9 MPSC 3d 492.

On April 25, 2000, the Commission ordered that the Unanimous Stipulation and Agreement filed on April 3, 2000, is approved, and that Kansas City Power and Light Company's tariff is modified to establish conditions under which a special services contract may be executed by KCPL.—OPC v. KCPL 9 MPSC 3d 119.

### §15. Opinions and conclusions; evidence by experts

Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. More frequently, an expert offers an opinion "as to the inferences and conclusions that should be drawn from other evidence." This sort of testimony is proper where it will "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Section 490.065. Mr. Ward's testimony was of the latter sort. Experts are generally permitted in Missouri to offer opinion testimony as to causation, including the causes of such incidents as building collapses, fires and blast damage. Thus, GST offered, and the Commission received,

Mr. Ward's expert opinion as to the cause of the boiler explosion at Hawthorn 5. An expert may rely on hearsay evidence to support an opinion, so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. However, it is also true that an expert's reliance upon inadmissible evidence does not thereby somehow transform that evidence into competent and substantive evidence. Hearsay evidence is not competent and substantial evidence such as can support a finding, conclusion or decision by this Commission. An expert's opinion testimony is not the proper vehicle by which to introduce into the record as independent, substantive evidence the evidence upon which the expert relied in reaching that opinion. Most of the information relied on by Mr. Ward was admitted only for the limited purpose of showing the basis of his expert opinion. Because Mr. Ward's opinion testimony was unsupported by substantive evidence, the Commission accorded it little weight. . —GST Steel v. KCPL 9 MPSC 3d 186.

**§18. Record and evidence in other proceedings**

Discovery procedures set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and the evaluation of the EARP process pursuant to Section 7(g) of the Stipulation and Agreement approved by the Commission, based upon the specific terms of the stipulation and agreement as reviewed by the Commission.—Union Electric 9 MPSC 3d 399.

**III. PRACTICE AND PROCEDURE**

**§22. Parties**

Where an electric corporation filed pleadings containing errors as to its corporate structure and identity and the Commission relied on those errors, the corporation, but not its counsel, was found to have committed misconduct before the Commission. Because this misconduct did not prejudice other parties, no sanction was imposed.—GST Steel v. KCPL 9 MPSC 3d 89.

The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to Commission Rule 4 CSR 240-2.116(3).—Missouri Gas Energy 9 MPSC 3d 327.

**§23. Notice and hearing**

The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to

Commission Rule 4 CSR 240-2.116(3).—Missouri Gas Energy 9 MPSC 3d 327.

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

**§24. Procedures, evidence and proof**

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

The drafting and filing by a corporate entity of an application to be certified as a Seller of Energy Services, pursuant to 4 CSR 240-45.010, required no legal skill or training and therefore was not the practice of law, so as to require the corporate entity to be represented by a licensed attorney.—Strategic Energy, L.L.C. 9 MPSC 3d 122.

The Commission granted the motion to strike portions of direct and rebuttal rehearing testimony because it was outside the scope of the issues on rehearing. The Commission also declined to preserve the evidence in the record or to allow cross-examination because the testimony was repetitious of an issue upon which the Commission specifically denied rehearing.—Missouri Gas Energy 9 MPSC 3d 170.

The Commission finds the averments in the complaint are deemed admitted after Respondent's failure to respond to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 222.

The Commission finds good cause to grant reconsideration, to set aside the order finding default, and to extend the filing date for the answer after considering Respondent's allegations why it failed to timely file an answer to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 324.

The Commission finds the averments in the complaint are deemed admitted after Respondent's second failure to respond to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 352.

Discovery procedures set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and the evaluation of the EARP process pursuant to Section 7(g) of the Stipulation and Agreement approved by the Commission, based upon the specific terms of the stipulation and agreement as reviewed by the Commission.—Union Electric 9 MPSC 3d 399.

**§25. Pleadings and exhibits**

The Commission finds the averments in the complaint are deemed admitted after Respondent's second failure to respond to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 352.

Where an electric corporation filed pleadings containing errors as to its corporate structure and identity, the Commission was not required to dismiss the complaint because of those errors.—GST Steel v. KCPL 9 MPSC 3d 89.

The Commission finds the averments in the complaint are deemed admitted after Respondent's failure to respond to a complaint. —PSC Staff v. Manufactured Housing Services 9 MPSC 3d 222.

**§27. Finality and conclusiveness**

The Commission finds the averments in the complaint are deemed admitted after Respondent's second failure to respond to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 352.

The Commission finds the averments in the complaint are deemed admitted after Respondent's failure to respond to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 222.

The Commission finds good cause to grant reconsideration, to set aside the order finding default, and to extend the filing date for the answer after considering Respondent's allegations why it failed to timely file an answer to a complaint.—PSC Staff v. Manufactured Housing Services 9 MPSC 3d 324.

**§29. Discovery**

Discovery procedures set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and the evaluation of the EARP process pursuant to Section 7(g) of the Stipulation and Agreement approved by the Commission, based upon the specific terms of the stipulation and agreement as reviewed by the Commission.—Union Electric 9 MPSC 3d 399.

**§30. Settlement procedures**

On April 25, 2000, the Commission ordered that the Unanimous Stipulation and Agreement filed on April 3, 2000, is approved, and that Kansas City Power and Light Company's tariff is modified to establish conditions under which a special services contract may be executed by KCPL.—  
OPC v. KCPL 9 MPSC 3d 119.

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**EXPENSE**
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- §1. Generally
- §2. Obligation of the utility
- §3. Financing practices
- §4. Apportionment
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- §6. Accounting

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### EXPENSE

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  - §86. Administrative expense
  - §87. Engineering and superintendence expense
  - §88. Interest expense
  - §89. Preliminary and organization expense
  - §90. Expenses incurred in acquisition of property
  - §91. Demand charges
  - §92. Expenses incidental to refunds for overcharges
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**GAS****I. IN GENERAL****§1. Generally**

The Commission opened this case to receive information concerning the adequacy of Laclede Gas Company's entire copper service line replacement program and the effectiveness of the company's leak survey and investigations. The Commission approved a Unanimous Stipulation and Agreement in which the parties agreed to a resolution of all issues.—Laclede Gas Company 9 MPSC 3d 134.

The Commission approved a Unanimous Stipulation and Agreement that, among other things, provided that Laclede Gas Company's Gas Supply Incentive Plan (GSIP II) will be extended for an additional one-year term, subject to the terms and conditions set forth in the Agreement. The Agreement addressed the maximum level of savings and/or revenues that the company may retain under the provisions of the GSIP II. In addition, the Agreement addressed the possible new contract for pipeline transportation service between Laclede Gas Company and Mississippi River Transmission Corporation, mandatory fixed rate trigger for gas supply commodity costs, and the company's provision of various information.—Laclede Gas Company 9 MPSC 3d 163.

The Commission found that the motion for clarification should be granted.—Missouri Gas Energy 9 MPSC 3d 170.

The Commission found that the request for rehearing or reconsideration on the issue of the exclusion of the unamortized balance of the SLRP deferrals should be denied and no adjustments should be made to the revenue requirement based upon the specific evidence that was ruled upon in the Report and Order.—Missouri Gas Energy 9 MPSC 3d 170.

The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers.—Investigation Purchased Gas Cost Recovery 9 MPSC 3d 547.

**§2. Obligation of the utility**

The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to Commission Rule 4 CSR 240-2.116(3).—Missouri Gas Energy 9 MPSC 3d 327.

Missouri Gas Energy (MGE) was granted its application for an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8), which prohibits regulated gas utilities from engaging in activities that qualify as heating, ventilation, and air conditioning (HVAC) services. The Commission found that MGE has been providing HVAC services for a period that includes and predates the five-year period ending August 28, 1998, thus allowing MGE a statutory exemption.—Missouri Gas Energy 9 MPSC 3d 357.

**§6. Transfer, lease and sale**

The Commission approved an application from a gas company to immediately acquire up to five percent of the outstanding common stock of three out-of-state gas companies in anticipation of a pending merger, with certain conditions, requested by the Staff of the Commission and accepted by the Company, designed to protect the Company's Missouri ratepayers.—Southern Union Company 9 MPSC 3d 93.

The Commission authorized Atmos Energy Corporation to acquire the Missouri assets of Arkansas Western Gas Company, d/b/a Associated Natural Gas Company, subject to the terms and conditions contained within a unanimous stipulation and agreement that was approved by the Commission.—Atmos Energy/Arkansas Western Gas 9 MPSC 3d 117.

**II. JURISDICTION AND POWERS**

**§7. Jurisdiction and powers of the State Commission**

The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to Commission Rule 4 CSR 240-2.116(3).—Missouri Gas Energy 9 MPSC 3d 327.

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

**§8. Jurisdiction and powers of the Federal Commission**

The Commission found that the issue of an Internal Revenue Code violation was not an appropriate issue for rehearing because it was not an issue preserved for rehearing under Section 386.500, RSMo 1994,

and the Commission's rule 4 CSR 240-2.160.—Missouri Gas Energy 9 MPSC 3d 345.

**§11. Leakage, shrinkage and waste**

The Commission approved a Unanimous Stipulation and Agreement regarding the adequacy of Laclede Gas Company's entire copper service line replacement program and the effectiveness of the company's leak survey and investigations.—Laclede Gas Company 9 MPSC 3d 134.

**§16. Safety**

The Commission approved a Unanimous Stipulation and Agreement regarding the adequacy of Laclede Gas Company's entire copper service line replacement program and the effectiveness of the company's leak survey and investigations. Laclede Gas Company is subject to the Commission's jurisdiction regarding safety under Section 386.310, RSMo Supp. 1999.—Laclede Gas Company 9 MPSC 3d 134.

The Commission's Staff filed a complaint against Missouri Gas Energy, a division of Southern Union Company, alleging that MGE had violated Commission Rule 4 CSR 240-40.030 (8)(l)3 in that the curb box containing the shutoff valve serving certain premises in Kansas City, Missouri, served by MGE was not properly documented and the curb box cover was partially covered with cement, inhibiting prompt access. MGE has agreed that it will inspect all of its curb boxes connected to high-pressure gas lines and correct deficiencies it finds. Further, MGE will provide additional training to its employees, including documentation of curb box locations. The Commission concludes that the Agreement of the parties will prevent the occurrence of such violations in the future. Staff has not requested that any penalty be imposed on MGE in this case and the Commission concludes that none is warranted.—PSC Staff v. MGE 9 MPSC 3d 52.

After an incident involving a natural gas explosion, fire, and loss of life in Jefferson County, Missouri, the parties were involved in both a gas safety and complaint case. The parties stipulated and agreed, *inter alia*: (a) Laclede's procedures for responding to emergencies shall be revised; (b) Laclede's coordination of mobile communications equipment shall be enhanced; (c) Laclede shall incorporate into its employee training program procedures for preventing or reducing third-party damage; and (d) the parties shall continue to promote efforts at preventing third-party damage. The Commission approved the stipulation and agreement in the gas safety case and dismissed the complaint case.—PSC Staff v. Laclede Gas Company 9 MPSC 3d 492.

#### **IV. OPERATION**

##### **§17. Operation generally**

The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers.—Investigation Purchased Gas Cost Recovery 9 MPSC 3d 547.

The Commission approved a Unanimous Stipulation and Agreement that, among other things, provides that Laclede Gas Company's Gas Supply Incentive Plan (GSIP II) will be extended for an additional one-year term.—Laclede Gas Company 9 MPSC 3d 163.

Missouri Gas Energy (MGE) was granted its application for an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8), which prohibits regulated gas utilities from engaging in activities that qualify as heating, ventilation, and air conditioning (HVAC) services. The Commission found that MGE has been providing HVAC services for a period that includes and predates the five-year period ending August 28, 1998, thus allowing MGE a statutory exemption.—Missouri Gas Energy 9 MPSC 3d 357.

The affiliate transaction rule need not apply to capacity release transactions between the local distributing company (LDC) and its affiliates since it is released or sold at going market rates and not at fully distributed cost. LDC to forgo any deals with its unregulated marketing affiliates; bulletin board releases, open and available to all marketers, will be allowed. —UtiliCorp United 9 MPSC 3d 353.

##### **§17.1. Purchased Gas Adjustment (PGA)**

The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—Atmos Energy Corporation 9 MPSC 3d 565.

The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—Greeley Gas Company 9 MPSC 3d 568.

The Commission found ANG's adjustment to recover gas costs upon removal of the gas from storage after December 1, 1995 for the same gas accounted for on a dollar-for-dollar basis as it was injected into storage, would result in a double recovery.—Associated Natural Gas 9 MPSC 3d 27.

The Commission found Staff's recommendations, with which the Company concurred, reasonable and directed the adjustments to the Company's firm sales and refund factor be made, as recommended, and the ending ACA balances be established effective November 1, 1999.—Southern Missouri Gas 9 MPSC 3d 44.

The Commission found the ending ACA balances, proposed by Staff in its February 4, 2000 filing, reasonable, and approved the adjustments and ending balances for ACA, Take or Pay, transition costs, deferred carrying cost balance and refund balances effective August 31, 1998.—Missouri Public Service 9 MPSC 3d 46.

The Commission ordered a gas company to adjust its ACA balance in the manner and amounts recommended by Staff, with the concurrence of the company.—Greeley Gas 9 MPSC 3d 168.

Laclede Gas Company's tariffs allowed it to share in demonstrated gas supply savings. The Commission's Staff proposed to disallow some of the savings Laclede claimed based upon Staff's interpretation of the underlying gas supply contract and the tariff language. The Commission found that Laclede's interpretation of the contract and the tariffs was correct and declined to make Staff's proposed disallowances.—Laclede Gas Company 9 MPSC 3d 225.

The Commission adopted the recommendations of the Staff of the Missouri Public Service Commission regarding its audit of the 1998-1999 Actual Cost Adjustment period. Staff indicated that no adjustments to the Actual Cost Adjustment balance were necessary. Staff also made five recommendations in order to ensure that sufficient capacity, but not excess capacity, is available to meet peak day requirements.—Laclede Gas Company 9 MPSC 3d 363.

The Commission found that an unscheduled increase in rates for a local gas distributing company was necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—Laclede Gas Company 9 MPSC 3d 554.

The Commission found that the unscheduled increase in rates for a local gas distributing company was necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—United Cities Gas Company 9 MPSC 3d 558.

The Commission found that the unscheduled increase in rates for Southern Missouri Gas Company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to RSMo Section 393.140(11), the Commission approved the proposed tariff sheets for service rendered on and after the requested effective date, on an interim basis, subject to refund.—Southern Missouri Gas 9 MPSC 3d 561.

The Commission granted an interim rate increase to reflect the unexpected and severe natural gas price spike because Company was required to pay significantly greater prices in order to obtain gas.—Missouri Gas Energy 9 MPSC 3d 541.

#### **§17.2. Purchased Gas-incentive mechanism**

The Commission rejected a tariff that would have extended Missouri Gas Energy's authority to purchase financial instruments to implement a previously approved price stabilization fund.—Missouri Gas Energy 9 MPSC 3d 392.

The Commission found that the unanimous stipulation and agreement of the parties was reasonable and should be approved.—Missouri Gas Energy 9 MPSC 3d 223.

#### **§18. Rates**

The Commission rejected a tariff that would have extended Missouri Gas Energy's authority to purchase financial instruments to implement a previously approved price stabilization fund.—Missouri Gas Energy 9 MPSC 3d 392.

The Commission approved a stipulation and approved a rate increase for Southern Missouri Gas Company of \$390,000.—Southern Missouri Gas 9 MPSC 3d 405.

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact

on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

**§19. Revenue**

The affiliate transaction rule need not apply to capacity release transactions between the local distributing company (LDC) and its affiliates since it is released or sold at going market rates and not at fully distributed cost. LDC to forgo any deals with its unregulated marketing affiliates; bulletin board releases, open and available to all marketers, will be allowed.—UtiliCorp United 9 MPSC 3d 353.

**§22. Weatherization**

The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.—Missouri Gas Energy 9 MPSC 3d 345.

**§29. Costs and expenses**

The Commission found that the costs incurred by Missouri Gas Energy, a Division of Southern Union Company (MGE), to prepare for Y2K compliance were extraordinary and met the criteria for deferral. The Commission granted MGE's application and allowed MGE to defer these costs.—Missouri Gas Energy 9 MPSC 3d 37.

The affiliate transaction rule need not apply to capacity release transactions between the local distributing company (LDC) and its affiliates since it is released or sold at going market rates and not at fully distributed cost. LDC to forgo any deals with its unregulated marketing affiliates; bulletin board releases, open and available to all marketers, will be allowed.—UtiliCorp United 9 MPSC 3d 353.

The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers.—Investigation Purchased Gas Cost Recovery 9 MPSC 3d 547.

**§33. Billing practices**

The Commission denied Public Counsel's motion to suspend and approved a tariff that established an experimental small volume customer aggregation program.—Missouri Public Service 9 MPSC 3d 242.

**§35. Safety**

Commission approved settlement agreement closing complaint case filed by staff. Company agreed to inspect certain curb boxes, change construction techniques to avoid placing shut-off valves underground and provide additional training to employees emphasizing federal and state gas pipeline safety rules.—PSC Staff v. MGE 9 MPSC 3d 54.

**VI. PARTICULAR KIND OF EXPENSES****§78. Payments to affiliated interests**

Missouri Gas Energy (MGE) was granted its application for an exemption pursuant to Section 386.756(7), RSMo Supp. 1999, and Commission Rule 4 CSR 240-40.017(8), which prohibits regulated gas utilities from engaging in activities that qualify as heating, ventilation, and air conditioning (HVAC) services. The Commission found that MGE has been providing HVAC services for a period that includes and predates the five-year period ending August 28, 1998, thus allowing MGE a statutory exemption.—Missouri Gas Energy 9 MPSC 3d 357.

The affiliate transaction rule need not apply to capacity release transactions between the local distributing company (LDC) and its affiliates since it is released or sold at going market rates and not at fully distributed cost. LDC to forgo any deals with its unregulated marketing affiliates; bulletin board releases, open and available to all marketers, will be allowed.—UtiliCorp United 9 MPSC 3d 353.

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**MANUFACTURED HOUSING**
**I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

**II. WHEN A PERMIT IS REQUIRED**

- §6. When a permit is required generally**
- §7. Operations and construction**

**III. GRANT OR REFUSAL OF A PERMIT**

- §8. Grant or refusal generally
- §9. Restrictions or conditions
- §10. Who may possess
- §11. Public safety

**IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION**

- §12. Operations under the permit generally
- §13. Duration of the permit
- §14. Modification and amendment of the permit generally
- §15. Transfer, mortgage or lease generally
- §16. Revocation, cancellation and forfeiture generally
- §17. Acts or omissions justifying revocation or forfeiture
- §18. Necessity of action by the Commission
- §19. Penalties

**MANUFACTURED HOUSING****I. IN GENERAL****§ 1. Generally**

The Director of the Department of Manufactured Homes and Modular Units of the Utility Operations Division, Missouri Public Service Commission, filed a formal complaint with the Commission against Rock Road Trailer Parts and Sales, Inc., alleging that the company failed to comply with setup procedures for a manufactured home and failed to correct code deficiencies within a reasonable amount of time as required by Section 700.100.3(6), RSMo Supp. 1999. The Commission approved a Unanimous Stipulation and Agreement between the parties, in which the company acknowledged that the Director found that the home did not meet the applicable code to which the home was required to be built.— PSC Staff v. Rock Road Trailer Parts & Sales 9 MPSC 3d 175.

**IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION****§16. Revocation, cancellation and forfeiture generally**

The Commission approved a Unanimous Stipulation and Agreement between the parties regarding the complaint that the company failed to comply with setup procedures for a manufactured home and failed to correct code deficiencies within a reasonable amount of time as required by Section 700.100.3(6), RSMo Supp. 1999. The Agreement provides that the company's Dealer Registration will be placed on probation for six months, during which time the complaint will be held in abeyance.— PSC Staff v. Rock Road Trailer Parts & Sales 9 MPSC 3d 175.

**§19. Penalties**

If the Director of the Department of Manufactured Homes and Modular Units of the Public Service Commission chooses not to pursue monetary penalties against a mobile home dealer after the Director has been authorized, but not required, by the Commission to do so, the Director need not request that the Commission withdraw its authorization to pursue penalties.—PSC Staff v. Pitts Mobile Homes 9 MPSC 3d 41.

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**PUBLIC UTILITIES**
**I. IN GENERAL**

- §1. Generally
- §2. Nature of
- §3. Functions and powers
- §4. Termination of status
- §5. Obligation of the utility

**II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

**III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER**

- §10. Tests in general
- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

**IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER**

- §23. Particular organizations generally
- §24. Municipal plants

- §25. **Municipal districts**
- §26. **Mutual companies; cooperatives**
- §27. **Corporations**
- §28. **Foreign corporations or companies**
- §29. **Unincorporated companies**
- §30. **State or federally owned or operated utility**
- §31. **Trustees**

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## PUBLIC UTILITIES

### I. IN GENERAL

#### §1. **Generally**

The Commission assessed a total of \$15,792,730 to public utilities in proportion to their respective gross intrastate operating revenues during the preceding calendar year.—Assessments 9 MPSC 3d 179.

The Commission recognized the proposed name and approved the adoption notice. The Commission also waived the portion of Commission Rule 4 CSR 240-2.060(16)(C), which requires the filing of a revised tariff title sheet, for good cause shown because the original tariff does not have a tariff title sheet.—United Water Missouri 9 MPSC 3d 182.

#### §5. **Obligation of the utility**

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

The Commission directed the Respondent to follow its own tariffs as written or request approval to amend its tariffs to bring its policies into compliance with its tariff because tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. *See Bauer v. Southwestern Bell Telephone Company*, 958 S.W. 568, 579 (Mo. App. E.D. 1997).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

**§7. Jurisdiction and powers of the State Commission**

The Commission does not have the authority to award monetary damages as sought by the Complainants for damages to their property. See Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 905 (Mo. 1971).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Commission approved settlement agreement closing complaint case filed by staff. Company agreed to inspect certain curb boxes, change construction techniques to avoid placing shut-off valves underground and provide additional training to employees emphasizing federal and state gas pipeline safety rules.—PSC Staff v. MGE 9 MPSC 3d 54.

The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, “neither convenience, expediency or necessity are proper matters for consideration in the determination of” whether or not an act of the commission is authorized by the statute.” The Commission is without authority to award money to either GST or KCPL, or to alter, construe or enforce their special contract. The Commission is authorized, after a hearing, to set just and reasonable prospective rates. The Commission also has “plenary power to coerce a public utility corporation into a safe and adequate service.” The Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, as though some portion of that electricity had been generated by Hawthorn 5 at a lower cost. That would constitute a species of equitable relief and this Commission cannot do equity. Likewise, the Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, using insurance proceeds received with respect to the Hawthorn 5 explosion to reduce the cost of replacement power. With respect to charges already paid for service already rendered, the Commission is authorized to determine that GST has been overcharged; GST may then seek a remedy in the courts. ---GST Steel v. KCPL 9 MPSC 3d 186.

The Commission dismissed all parties who did not appear at the prehearing conference and at the hearing without leave pursuant to Commission Rule 4 CSR 240-2.116(3).—Missouri Gas Energy 9 MPSC 3d 327.

**III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER****§13. Acquisition of public utility property**

MAWC seeks authority to acquire 100 percent of the stock of UWM. If the transaction is approved and goes forward, UWM will become a subsid-

iary of MAWC and will likely merge into MAWC at some point in the future. MAWC cannot lawfully acquire the common stock of UWM without Commission approval. Pursuant to Commission Rule 4 CSR 240-2.060(9)(C), the Applicants must show why the proposed acquisition is not detrimental to the public interest. In considering this application, the Commission is mindful that the right to sell property is an important incident of the ownership thereof and that “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” “The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.” 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 asset safely and efficiently. The Commission understands the law to require a showing of a direct and present public detriment. The acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed, is not a present detriment. “[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur.” There is no such compelling evidence in this record and the Commission will approve the application.—Missouri-American Water 9 MPSC 3d 56.

Where parties sought to adjudicate the issue of an acquisition premium in an acquisition case, the Commission refused because that issue was properly part of a future rate case and was not before it in the acquisition case.—Missouri-American Water 9 MPSC 3d 56.

Where Public Counsel sought to apply the so-called “four standards” announced by the Commission in its decision, In the Matter of the Application of UtiliCorp United, Inc., and Colorado Transfer Company (CTC) for Authority for UtiliCorp to Acquire All of the Issued and Outstanding Shares of Stock of CTC and Then to Merge CTC With and into UtiliCorp, and to Acquire Certain Debt Obligations of Centel Corporation, Case No. EM-91-290 (*Order Approving Merger*, issued September 13, 1991), to an acquisition case, the Commission refused because the so-called “four standards” were not applicable because the case in question did not involve a merger and did not involve multi-jurisdictional entities.—Missouri-American Water 9 MPSC 3d 56.

Where a new entrant proposed to purchase and operate a number of rural exchanges from GTE, the Commission found on the record presented that the applicant was qualified and approved the transaction.—GTE Midwest/Spectra Communications 9 MPSC 3d 96.

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**RATES****I. JURISDICTION AND POWERS**

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

**II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS**

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service

- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

### III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

### IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

**V. KINDS AND FORMS OF RATES AND CHARGES**

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

**VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

**VII. EMERGENCY AND TEMPORARY RATES**

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

**VIII. RATE DESIGN, CLASS COST OF SERVICE**

- §118. Method of allocating costs
- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities
- §123. Rate design, class cost of service for telecommunications utilities
- §124. Rate design, class cost of service for heating utilities

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**RATES**
**I. JURISDICTION AND POWERS****§3. Jurisdiction and powers of the State Commission**

Although there is no specific statutory authority permitting the Commission to clarify its rate orders, it has been the Commission's practice since 1913 and the Commission will continue to do so as appropriate.—Missouri-American Water 9 MPSC 3d 322.

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

**§6. Limitations on jurisdiction and power**

Although there is no specific statutory authority permitting the Commission to clarify its rate orders, it has been the Commission's practice since 1913 and the Commission will continue to do so as appropriate.—Missouri-American Water 9 MPSC 3d 322.

**II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS****§8. Reasonableness generally**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

The Commission authorized AmerenUE to file tariff sheets containing schedules for natural gas service revising these rates: Residential Service, General Service, Interruptible Service, Natural Gas Transportation Service, and Miscellaneous Charges. AmerenUE required to: establish weatherization program; revise its depreciation rates; and book expense levels associated with pensions and post-retirement benefits. In future rate cases, annual revenues attributable to AmerenUE's existing special contract to be handled according to the terms of the stipulation and agreement. AmerenUE's Gas Supply Incentive Plan shall remain unchanged.—Union Electric Company 9 MPSC 3d 359.

**§20. Costs and expenses**

The Commission authorized AmerenUE to file tariff sheets containing schedules for natural gas service revising these rates: Residential Service, General Service, Interruptible Service, Natural Gas Transportation Service, and Miscellaneous Charges. AmerenUE required to: establish weatherization program; revise its depreciation rates; and book expense levels associated with pensions and post-retirement benefits. In future rate cases, annual revenues attributable to AmerenUE's existing special contract to be handled according to the terms of the stipulation and agreement. AmerenUE's Gas Supply Incentive Plan shall remain unchanged.—Union Electric Company 9 MPSC 3d 359.

**§23. Efficiency of operation and management**

The Commission authorized AmerenUE to file tariff sheets containing schedules for natural gas service revising these rates: Residential Service, General Service, Interruptible Service, Natural Gas Transportation Service, and Miscellaneous Charges. AmerenUE required to: establish weatherization program; revise its depreciation rates; and book expense levels associated with pensions and post-retirement benefits. In future rate cases, annual revenues attributable to AmerenUE's existing special contract to be handled according to the terms of the stipulation and agreement. AmerenUE's Gas Supply Incentive Plan shall remain unchanged.—Union Electric Company 9 MPSC 3d 359.

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

Several parties questioned the prudence of MAWC's decision to build a new water treatment plant in St. Joseph and contended that only the cost of renovating the old plant should be included in rate base, a disallowance of approximately half the cost of the new plant and related facilities. The Commission has adopted a standard of reasonable care requiring

due diligence as the standard for evaluating the prudence of a utility's conduct. The Commission has described this standard as follows: "The Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." The Commission notes, as well, that the burden of a public utility engaged in building a new plant is "to build the best plant at the lowest cost." The Commission concludes that the challengers have not made a showing of inefficiency or improvidence sufficient to require MAWC to prove the prudence of its decision.—Missouri-American Water 9 MPSC 3d 254.

The record shows that MAWC was aware in late 1995, when the decision to build the new St. Joseph plant and related facilities was made, that extensive renovations and improvements were needed in St. Joseph. The nature of the existing plant site made some of these renovations and improvements difficult, or perhaps impossible. The regulatory and environmental outlook was such that the use of a riverine source, and the return of residuals to that source, would necessarily result in ever-increasing costs to the company. There were aesthetic problems with the river water that could not be readily resolved. Finally, the flood of 1993 demonstrated that the reliability of St. Joseph's public water supply could not be assured in the case of a treatment plant located in the flood plain. MAWC assessed four options, one being to renovate and improve the existing plant, and another, that ultimately selected, being the construction of a new plant above the flood plain, the development of a ground water source of supply, and a pipeline linking the two. The other options were a new surface water treatment plant above the flood plain and interconnection with the Kansas City system. The preliminary numbers developed by MAWC suggested that the ground water source/new plant option was about as expensive as any of the other options, and perhaps less expensive than some of them. This option would include all the benefits associated with a ground water supply source: consistent raw water characteristics; diminished public health concern with organisms

and other toxins; easier control of aesthetic factors, among others. Likewise, this option would remove the threat posed by another flood. On the basis of the record made in this case, the Commission finds and concludes that the management of MAWC did use due diligence to address all relevant factors and information known or available to it when it assessed the situation and reached the decision to build a new treatment plant and develop a new ground water source of supply in St. Joseph. Consequently, the Commission must conclude that the decision to build the new plant and related facilities was not imprudent. Therefore, the total project cost of \$70,097,840 shall be recognized in rate base.—Missouri-American Water 9 MPSC 3d 254.

**§37. Refund and/or reduction**

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

**§44. Taxes**

The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.—Missouri Gas Energy 9 MPSC 3d 345.

**IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO****§62. Initiation of rate and rate changes**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§65. Refunds**

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to ratepayers.—Union Electric 9 MPSC 3d 396.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to the ratepayers. —PSC Staff v. Union Electric 9 MPSC 3d 394.

**§68. Establishment of rate base**

Where a new treatment plant, water source and linking pipeline were built with excess capacity, an amount was deducted from the value of the utility assets recognized in rate base to reflect the fact that not all of the new facility was presently used and useful.—Missouri-American Water 9 MPSC 3d 254.

With respect to the capitalization of the carrying-costs of construction funding, the Commission recognized only the actual carrying-cost of Company's short-term debt in rate base.—Missouri-American Water 9 MPSC 3d 254.

Where Company replaced its existing water treatment plant with a new plant and the value of the old plant had not yet been fully depreciated as of the in-service date of the new plant, the Commission did not permit Company to recover the residual value of the old plant because, as of the day it was taken out of service, it was no longer presently used and useful.—Missouri-American Water 9 MPSC 3d 254.

**§69. Approval or rejection by the Commission**

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Miller Telephone 9 MPSC 3d 406.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Cass County Telephone 9 MPSC 3d 410.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected

unless presented in the context of a rate-case.—Ellington Telephone 9 MPSC 3d 413.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Holway Telephone 9 MPSC 3d 417.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Seneca Telephone 9 MPSC 3d 420.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—New Florence Telephone 9 MPSC 3d 424.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Steelville Telephone 9 MPSC 3d 427.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—KLM Telephone 9 MPSC 3d 430.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Lathrop Telephone 9 MPSC 3d 434.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—BPS Telephone 9 MPSC 3d 437.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Farber Telephone 9 MPSC 3d 440.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Modern Telecommunications 9 MPSC 3d 444.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Granby Telephone 9 MPSC 3d 447.

The tariff filed by a telephone company to institute a late-payment charge constitutes improper single-issue ratemaking and must be rejected unless presented in the context of a rate-case.—Goodman Telephone 9 MPSC 3d 450.

The Commission declined to decide rate case type issues, including recovery of an acquisition premium, in a merger case, because to do so would be to engage in single-issue rate-making.—UtiliCorp United 9 MPSC 3d 454.

The Commission declined to decide rate case type issues, including recovery of an acquisition premium, in a merger case, because to do so would be to engage in single-issue rate-making.—The Empire District Electric Company 9 MPSC 3d 512.

#### **§71. Suspension**

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Cass County Telephone 9 MPSC 3d 410.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Miller Telephone 9 MPSC 3d 406.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Ellington Telephone 9 MPSC 3d 413.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Holway Telephone 9 MPSC 3d 417.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Seneca Telephone 9 MPSC 3d 420.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—BPS Telephone 9 MPSC 3d 437.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—New Florence Telephone 9 MPSC 3d 424.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Steelville Telephone 9 MPSC 3d 427.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—KLM Telephone 9 MPSC 3d 430.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Lathrop Telephone 9 MPSC 3d 434.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Farber Telephone 9 MPSC 3d 440.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Modern Telecommunications 9 MPSC 3d 444.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Granby Telephone 9 MPSC 3d 447.

Based on prior practice of the Commission, the Commission refused to suspend or reject only a portion of a company's tariff filing and therefore denied a company's motion to lift the suspension of noncontested portions of its tariff filing.—Goodman Telephone 9 MPSC 3d 450.

A prospective intervenor's request to suspend a tariff that created a voluntary load reduction rider was denied where the large industrial customer requesting the suspension failed to allege any specific harm that would result from the tariff and where even a short suspension would prevent the tariff from going into effect during the hot-weather months when it was needed.—St. Joseph Light & Power 9 MPSC 3d 130.

**§72. Effective date**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§79. Test or trial rates**

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to ratepayers.—Union Electric 9 MPSC 3d 396.

## **VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

### **§104. Electric and power**

Upon finding that the proposed sharing credit amount was reasonable, the Commission approved the sharing credit in the amount of \$28,375,000 to be distributed to AmerenUE customers from the third year of the first Experimental Alternative Regulation Plan.—Union Electric Company 9 MPSC 3d 21.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to ratepayers.—Union Electric 9 MPSC 3d 396.

At the end of the first year of the second experimental alternative regulation plan, the Commission approved the stipulation and agreement which resolved the objections raised and the complaint filed in Case No. EC-2000-795, resulting in \$20,214,000 sharing credit to be distributed to the ratepayers.—PSC Staff v. Union Electric 9 MPSC 3d 394.

**§108. Gas**

The Commission authorized AmerenUE to file tariff sheets containing schedules for natural gas service revising these rates: Residential Service, General Service, Interruptible Service, Natural Gas Transportation Service, and Miscellaneous Charges. AmerenUE required to: establish weatherization program; revise its depreciation rates; and book expense levels associated with pensions and post-retirement benefits. In future rate cases, annual revenues attributable to AmerenUE's existing special contract to be handled according to the terms of the stipulation and agreement. AmerenUE's Gas Supply Incentive Plan shall remain unchanged.—Union Electric Company 9 MPSC 3d 359.

**§110. Telecommunications**

Commission may determine rates for unbundled network elements presented in arbitration of interconnection agreement presented under Section 252(b) of the Telecommunications Act of 1996.—DIECA Communications 9 MPSC 3d 66.

**§111. Water**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§112. Sewers**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§113. Joint Municipal Utility Commissions**

The Commission found that the use of the service line replacement program (SLRP) accumulated deferred income taxes, as an offset to rate base is appropriate.—Missouri Gas Energy 9 MPSC 3d 345.

**VII. EMERGENCY AND TEMPORARY RATES****§114. Emergency and temporary rates generally**

The Commission found that the unscheduled increase in rates for Southern Missouri Gas Company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to RSMo Section 393.140(11), the Commission approved the proposed tariff sheets for service rendered on and after the requested effective date, on an interim basis, subject to refund.—Southern Missouri Gas 9 MPSC 3d 561.

The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—Atmos Energy Corporation 9 MPSC 3d 565.

The Commission found that an unscheduled increase in rates for a local gas distributing company was necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—Laclede Gas Company 9 MPSC 3d 554.

The Commission found that the unscheduled increase in rates for a local gas distributing company was necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—United Cities Gas Company 9 MPSC 3d 558.

The Commission found that the unscheduled increase in rates for the local distributing company is necessary because of the current extraordinarily high price of natural gas. Thus, for good cause shown pursuant to Section 393.140(11), RSMo 1994, the Commission approved the proposed tariff sheets for service rendered on and after the requested effective dates, on an interim basis, subject to refund.—Greeley Gas Company 9 MPSC 3d 568.

**VIII. RATE DESIGN, CLASS COST OF SERVICE****§118. Method of allocating costs**

The Commission's rate design was such that the revenue realized from one of the Company's seven non-contiguous districts did not change. This did not mean that that district did not contribute to the Company's increased revenue requirement, however, because the record showed that the result of the shift from single tariff pricing to district specific pricing was a rate *decrease* in the district in question. By maintaining rates at the existing level, a surplus was realized which the Commission used to ameliorate rate increases in other districts.—Missouri-American Water 9 MPSC 3d 322.

**§119. Rate design, class cost of service for electric utilities**

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 23.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 23.

The Commission found it just and reasonable to order the permanent rate reduction in the amount of \$16,321,000 effective April 1, 2000, and directed AmerenUE to file the tariff sheets necessary to effectuate the permanent rate reduction.—Union Electric Company 9 MPSC 3d 25.

The Commission found it reasonable to order AmerenUE to begin crediting customers' bills for the excess revenues, that is, the amount of the previously approved rate less the reduced rate approved effective April 1, 2000, billed to customers between September 1, 1998, and April 1, 2000, pursuant to the terms of the Stipulation and Agreement approved by the Commission in Case No. EM-96-149, beginning on May 1, 2000.—Union Electric Company 9 MPSC 3d 25.

**§120. Rate design, class cost of service for gas utilities**

The Commission must hold a hearing and render a decision only on the specific issues remanded to the Commission for further action by the

circuit court even if the Commission's decision will not have an impact on the current rates, when rates collected and impounded in the circuit court registry and distribution of said funds may depend on the Commission's decision on the remaining rate design issues.—Missouri Gas Energy 9 MPSC 3d 327.

**§121. Rate design, class cost of service for water utilities**

Much public attention was devoted to the debate between the proponents of Single Tariff Pricing (STP) and District Specific Pricing (DSP). The former is a rate design theory under which all customers of a system with multiple service areas, whether interconnected or not, pay the same rate, regardless of differences in the actual cost of providing the service to the various customers. DSP, on the other hand, sets different rates for each of the service areas, based upon the discrete cost of service in each district. MAWC, along with its parent and affiliates, favors STP; other parties, not wanting to help underwrite the cost of the new water treatment plant in the St. Joseph district, favor DSP. In the past, this Commission has permitted MAWC to move toward STP in its rate design, although that goal was never fully attained. The Commission considers public perception to be a valid factor for consideration in determining just and reasonable rates. The testimony adduced at the Local Public Hearings held in this matter was strongly in favor of DSP. Therefore, the Commission will move away from STP and toward DSP. MAWC, therefore, must set its rates separately for each service area in order to recover the appropriate revenue requirement for each service area.—Missouri-American Water 9 MPSC 3d 254.

Where the Commission determined that rates would be based on a district-specific scheme rather than on single tariff pricing, the Commission also required class cost-of-service shifts to move each class toward its actual cost of service in order to avoid significant interclass subsidies.—Missouri-American Water 9 MPSC 3d 254.

The Commission's rate design was such that, while revenues were not decreased with respect to any district, various classes within each district experienced rate decreases or rate increases as the Staff's class cost of service study dictated.—Missouri-American Water 9 MPSC 3d 322.

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- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

#### VII. SALE PRICE AND INTEREST RATES

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

**VIII. FINANCING METHODS AND PRACTICES**

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
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- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

**IX. PARTICULAR UTILITIES**

- §76. Telecommunications
- §77. Electric and power
- §78. Gas
- §79. Sewer
- §80. Water
- §81. Miscellaneous

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**SECURITY ISSUES****I. IN GENERAL****§9. Fees and expenses**

Commission approved debt and equity issue conditioned upon gas utility reporting uses of proceeds and submitting applicable fees if any portion of debt is not used to retire existing debt.—Atmos Energy 9 MPSC 3d 62.

**§10. Purchase by utility**

Commission authorized public water utility corporation to sell additional shares to its parent corporation.—Missouri-American Water Company 9 MPSC 3d 13.

**II. JURISDICTION AND POWERS****§14. Jurisdiction and powers of the State Commission**

Commission approved flexible “shelf registration” debt and equity issue permitting gas utility to respond to market conditions to issue most favorable mix of debt and equity securities.—Atmos Energy 9 MPSC 3d 62.

### III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

#### §16. Necessity of authorization by the Commission generally

The Commission issued Modified Order Approving Financing upon motion of applicant because it was necessary for the Commission to find in its authorization for the financing that the proposed debt issue or its proceeds has been or is reasonably required for the purpose specified.—Le-Ru Telephone 9 MPSC 3d 331.

#### §18. Refunding or exchange of securities

Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms.—Union Electric Company 9 MPSC 3d 17.

Commission approved debt and equity issue to be used primarily to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

### IV. FACTORS AFFECTING AUTHORIZATION

#### §21. Factors affecting authorization generally

The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.—Le-Ru Telephone 9 MPSC 3d 331.

The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.—Le-Ru Telephone Co. 9 MPSC 3d 229.

#### §26. Definite plans and purposes

Commission approved debt and equity issue for total fixed amount but allowed flexibility to issue most favorable mix of debt and equity based on market conditions to obtain funds to refund short term debt.—Atmos Energy 9 MPSC 3d 62.

**§28. Use of proceeds**

Commission approved debt and equity issue to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.—Missouri-American Water Company 9 MPSC 3d 13.

Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms.—Union Electric Company 9 MPSC 3d 17.

**§38 Kind of security**

Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.—Missouri-American Water Company 9 MPSC 3d 13.

Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms. Tax-exempt securities would be issued through state authority.—Union Electric Company 9 MPSC 3d 17.

Commission approved debt and equity issue to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

**V. PURPOSES AND SUBJECTS OF CAPITALIZATION****§53. Refunding, exchange and conversion**

Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms.—Union Electric Company 9 MPSC 3d 17.

Commission approved debt and equity issue to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

## **VI. KINDS AND PROPORTIONS**

### **§57. Bonds or stock**

Commission approved debt and equity issue to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.—Missouri-American Water Company 9 MPSC 3d 13.

### **§61. Proportions of stock, bonds and other security**

Commission approved debt and equity issue for total fixed amount but allowed flexibility to issue most favorable mix of debt and equity based on market conditions to obtain funds to refund short term debt.—Atmos Energy 9 MPSC 3d 62.

## **VII. SALE PRICE AND INTEREST RATES**

### **§63. Sale price and interest rates generally**

Commission approved debt and equity issue to refund short term debt on favorable terms. Cap was set for debt interest rates.—Atmos Energy 9 MPSC 3d 62.

### **§64. Bonds**

Commission authorized issuance by public electric utility corporation of up to \$750,000,000 of taxable or tax-exempt debt securities to refund existing debt to obtain more favorable terms. Pricing and interest rates to be determined at sale with savings to be documented by a net present value analysis.—Union Electric Company 9 MPSC 3d 17.

## **VIII. FINANCING METHODS AND PRACTICES**

### **§69. Financing methods and practices generally**

Commission approved issue and sale of common stock to obtain \$19,500,000 and issuance and sale of General Mortgage Bonds to obtain up to \$29,000,000 by public water utility corporation to pay for

## SERVICE

construction, property acquisition, improvement of plant and distribution facilities and refinancing of short term debt.—Missouri-American Water Company 9 MPSC 3d 13.

The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs through the issuance of long term mortgage notes.—Le-Ru Telephone Co. 9 MPSC 3d 229.

The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs through the issuance of long term mortgage notes.—Le-Ru Telephone 9 MPSC 3d 331.

Commission approved debt and equity issue to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

**IX. PARTICULAR UTILITIES****§76. Telecommunications**

The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.—Le-Ru Telephone Co. 9 MPSC 3d 229.

The Commission approved \$9,164,700 financing for telecommunications company participating in federal loan programs but limited initial draw down to \$7,800,606 with the remainder contingent on adequate debt and equity ratios, cash flows and need for facilities improvements.—Le-Ru Telephone 9 MPSC 3d 331.

**§78. Gas**

Commission approved debt and equity issue to refund short term debt on favorable terms.—Atmos Energy 9 MPSC 3d 62.

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**SERVICE**
**I. IN GENERAL**

- §1. Generally**
- §2. What constitutes adequate service**
- §3. Obligation of the utility**
- §4. Abandonment, discontinuance and refusal of service**

- §5. Contract, charter, franchise and ordinance provisions
- §6. Restoration or continuation of service
- §7. Substitution of service
- §7.1. Change of supplier
- §8. Discrimination

## II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally
- §10. Jurisdiction and powers of the Federal Commissions
- §11. Jurisdiction and powers of the State Commission
- §12. Jurisdiction and powers over service outside of the state
- §13. Jurisdiction and powers of the courts
- §14. Jurisdiction and powers of local authorities
- §15. Limitations on jurisdiction
- §16. Enforcement of duty to serve

## III. DUTY TO SERVE

- §17. Duty to serve in general
- §18. Duty to render adequate service
- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
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## IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
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- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

**V. SERVICE BY PARTICULAR UTILITIES**

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

**VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT**

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

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**SERVICE**
**I. IN GENERAL****§1. Generally**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§3. Obligation of the utility**

The Commission directed the Respondent to follow its own tariffs as written or request approval to amend its tariffs to bring its policies into compliance with its tariff because tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. *See Bauer v. Southwestern Bell Telephone Company*, 958 S.W. 568, 579 (Mo. App. E.D. 1997).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

**§6. Restoration or continuation of service**

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

**II. JURISDICTION AND POWERS**

**§11. Jurisdiction and powers of the State Commission**

The Commission does not have the authority to award monetary damages as sought by the Complainants for damages to their property. See Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 905 (Mo. 1971).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§13. Jurisdiction and powers of the courts**

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

**§16. Enforcement of duty to serve**

The Commission does not have the authority to award monetary damages as sought by the Complainants for damages to their property. See Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 905 (Mo. 1971).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

### III. DUTY TO SERVE

#### §17. Duty to serve in general

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

#### §18. Duty to render adequate service

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**IV. OPERATIONS****§25. Operations generally**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§27. Trial or experimental operation**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**V. SERVICE BY PARTICULAR UTILITIES****§43. Water**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§44. Sewer**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

The Commission directed the Respondent to follow its own tariffs as written or request approval to amend its tariffs to bring its policies into compliance with its tariff because tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. *See Bauer v. Southwestern Bell Telephone Company*, 958 S.W. 568, 579 (Mo. App. E.D. 1997).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

## VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

### §47. Duty to install, own and maintain

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

The Commission directed the Respondent to follow its own tariffs as written or request approval to amend its tariffs to bring its policies into compliance with its tariff because tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. *See Bauer v. Southwestern Bell Telephone Company*, 958 S.W. 568, 579 (Mo. App. E.D. 1997).—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

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## SEWER

### I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

### II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

**III. OPERATIONS**

- §10. **Operation generally**
- §11. **Construction and equipment**
- §12. **Maintenance**
- §13. **Additions and betterments**
- §14. **Rates and revenues**
- §15. **Return**
- §16. **Costs and expenses**
- §17. **Service**
- §18. **Depreciation**
- §19. **Discrimination**
- §20. **Apportionment**
- §21. **Accounting**
- §22. **Valuation**
- §23. **Extensions**
- §24. **Abandonment or discontinuance**
- §25. **Reports, records and statements**
- §26. **Financing practices**
- §27. **Security issues**
- §28. **Rules and regulations**
- §29. **Billing practices**
- §30. **Eminent domain**
- §31. **Accounting Authority orders**

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**SEWER**
**I. IN GENERAL****§3. Obligation of the utility**

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

Upon finding that the Respondent violated Section 393.130, RSMo 1994, Commission Rule 4 CSR 240-13.020, Tariff Sheet 37, Rules 12C and 12D, and Tariff Sheet 39, Rule 12K, the Commission directed the Respondent to appear and show cause as to why the Commission should not direct its General Counsel to seek penalties in Circuit Court pursuant to Section 386.570, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

The Commission directed the Respondent to follow its own tariffs as written or request approval to amend its tariffs to bring its policies into compliance with its tariff because tariffs approved by the Commission become law having the same force and effect as a statute enacted by the legislature. See *Bauer v. Southwestern Bell Telephone Company*, 958 S.W. 568, 579 (Mo. App. E.D. 1997).—*Turner v. Warren County Water & Sewer* 9 MPSC 3d 548.

## II. JURISDICTION AND POWERS

### §5. Jurisdiction and powers generally

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—*Terre Du Lac Utilities* 9 MPSC 3d 49.

### §7. Jurisdiction and powers of the State Commission

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—*Terre Du Lac Utilities* 9 MPSC 3d 49.

The Commission does not have the authority to award monetary damages as sought by the Complainants for damages to their property. See *Wilshire Construction Company v. Union Electric Company*, 463 S.W.2d 903, 905 (Mo. 1971).—*Turner v. Warren County Water & Sewer* 9 MPSC 3d 548.

## III. OPERATIONS

### §10. Operation generally

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—*Terre Du Lac Utilities* 9 MPSC 3d 49.

### §11. Construction and equipment

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—*Turner v. Warren County Water & Sewer* 9 MPSC 3d 548.

**§12. Maintenance**

When a certificated sewer service provider failed to comply with its own tariff rules and fails to repair the customer's sewer pump, the Commission found that the Respondent has failed to provide safe and adequate sewer service in compliance with Section 393.130, RSMo.—Turner v. Warren County Water & Sewer 9 MPSC 3d 548.

**§14. Rates and revenues**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

Despite the continued failure of a small sewer company to obey the Commission's orders, pay its Commission assessments and file annual reports with the Commission, the Commission would nonetheless allow the Company to seek a rate increase via the small company procedure because the interests of its customers would otherwise be seriously harmed.—House Springs Sewer Company 9 MPSC 3d 494.

**§16. Cost and expenses**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§17. Service**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

**§19. Discrimination**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

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**STEAM****I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

**II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

**III. OPERATIONS**

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions

- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

#### IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

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### STEAM

No cases in this volume involved the question of steam.

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## TELECOMMUNICATIONS

### I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

### II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

### III. OPERATIONS

- §8. Operations generally
- §9. Public corporations

## TELECOMMUNICATIONS

- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §15. Establishment of a rate base
- §16. Revenue
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- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
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- §26. Service generally
- §27. Invasion of adjacent service area
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- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

## IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

## V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally , or competitive
  - §41. Incentive regulation plans
  - §42. Rate bands
  - §43. Waiver of statutes and rules
  - §44. Network modernization
  - §45. Local exchange competition
  - §46. Interconnection Agreements
  - §46.1 Interconnection Agreements-Arbitrated
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**TELECOMMUNICATIONS****I. IN GENERAL****§1. Generally**

The Commission directed Southwestern Bell Telephone Company to enter into a contract with Ernst and Young consistent with the terms and conditions of a Request for Proposal developed by the Staff.—Southwestern Bell Telephone Company 9 MPSC 3d 181.

The Commission found that the Metropolitan Calling Area (MCA) service continues to meet the needs and desires of many customers in the St. Louis, Kansas City, and Springfield metropolitan areas and the service is in the public interest.—Investigation MCA 9 MPSC 3d 297.

The Commission held that competitive local exchange carriers (CLECs) may participate in the Metropolitan Calling Area (MCA) service plan on a voluntary basis under the same terms and conditions as the Commission previously ordered In re: the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges, 2 MPSC 3d. 1 (1992), with the exception of pricing flexibility.—Investigation MCA 9 MPSC 3d 297.

**§2. Obligation of the utility**

AT&T was the only entity licensed by the Commission to provide basic interexchange or “long distance” telecommunications service in Missouri on January 1, 1984. Under Section 392.460, RSMo, AT&T was not permitted to “abandon such service . . . unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment shall not deprive any customers of . . . basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest.” The Commission excused AT&T from its “carrier of last resort” obligation upon a showing that over 500 long distance carriers were now certified in Missouri, with 13 of them operating in every exchange.—AT&T 9 MPSC 3d 233.

**§3. Certificate of convenience and necessity**

The Commission further concludes that a cap on exchange access rates is reasonably necessary to protect the public interest and is consistent with the purposes and provisions of Chapter 392, RSMo.—Investigation Access Rates 9 MPSC 3d 139.

**§3.3. Certificate of basic local exchange service authority**

The Commission granted a certificate of service authority to provide basic local telecommunications services in the state of Missouri, subject to certain conditions including providing a series of reports concerning QWEST Communications Corporation's resolution of slamming problems to the Commission's Staff.—QWEST COMMUNICATIONS 9 MPSC 3d 156.

**§4. Transfer, lease and sale**

The Commission approved the transfer of assets by Southwestern Bell Telephone Company and SWBT is authorized to take all actions necessary to transfer the assets to SBC Management Services, Inc.—Southwestern Bell Telephone Company 9 MPSC 3d 210.

The Commission approved an application whereby Access Point, Inc., acquired Efficacy Group, Inc.'s interexchange telecommunication service customer accounts, in exchange for Access Point, Inc. stock. After the acquisition, Efficacy Group, Inc. will terminate its business in Missouri, and will file an application to cancel its certificate and tariff. Access Point, Inc., will provide services to the customers of Efficacy Group, Inc., under the same rates, terms and conditions as Efficacy Group, Inc. provided services, with no interruption of service. To facilitate the transfer, the Commission approved the waiver of Commission Rule 4 CSR 240-33.150, the "anti-slamming" rule.—Access Point, Inc. 9 MPSC 3d 204.

**II. JURISDICTION AND POWERS****§6. Jurisdiction and powers of Federal Commissions**

The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e).—Area codes 9 MPSC 3d 367.

The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e). The Federal Communications Commission may delegate all or any portion of this authority to state commissions or other entities. Id.—Area codes 9 MPSC 3d 367.

**§7. Jurisdiction and powers of the State Commissions**

Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996. Under Section 252(e) of the Act, an agreement of portions of an agreement that have been arbitrated by the Commission may only be rejected if the Commission finds the agreement does not meet the requirements of Section 251 of the Act.—DIECA Communications 9 MPSC 3d 218.

Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.—DIECA Communications 9 MPSC 3d 66.

Pursuant to its general jurisdiction under Sections 386.250 and 392.520 of the Revised Statutes of Missouri and pursuant to delegations of authority from the Federal Communications Commission, the Missouri Public Service Commission has jurisdiction and authority to determine the method and implementation of numbering relief for the 314 and 816 area codes, to determine and implement certain numbering conservation methodologies, to review, audit and verify use of numbering resources, and to hear and determine certain requests or disputes related to the use or procurement of numbering resources.—Area codes 9 MPSC 3d 367.

Section 392.240.3, RSMo gives the Commission the authority to order that Southwestern Bell Telephone Company's Feature Group C connection with the respondent small telephone companies be restored if the public convenience and necessity would thereby be served. No such public convenience and necessity was shown in this case.—Southwestern Bell Telephone Company 9 MPSC 3d 338.

**III. OPERATIONS****§8. Operations generally**

The Commission concludes that the record herein clearly and convincingly shows that it is reasonably necessary to promote the public interest, and to promote the purposes and policies of Chapter 392, RSMo, to define exchange access service as a different telecommunications service, dependent on the geographic area or other market within which it is offered. Those parties to this case who provide competitive exchange access services are hereby authorized to submit tariffs providing for originating and terminating exchange access rates equal to or less than those of the directly competing ILEC in each exchange in which they are

authorized to provide such services.—Investigation Access Rates 9 MPSC 3d 139.

The Commission approves the Numbering Plan Area relief implementation plan for the 314 area code with the exception that optional, per company, permissive 1+ 10-digit local dialing is disapproved.—Area codes 9 MPSC 3d 499.

**§10. Abandonment or discontinuance**

Southwestern Bell Telephone Company ordered to make translation and routing changes in its facilities and programs necessary to lawfully discontinue the transport, transit, or termination of all intrastate telecommunications traffic to Mid-Missouri Telephone Company, except for certain interexchange and wireless traffic.—Southwestern Bell Telephone Company 9 MPSC 3d 207.

**§12. Discrimination**

The Commission must reject the suggestion of some of the parties that CLECs be permitted to charge 20 to 50 percent more for access than the directly competing ILEC in order to stimulate the development of competition in the basic local services market. That could constitute an unreasonable disadvantage to the ILEC and, in a regime where ILEC access rates may already be higher than cost, would subject customers to paying more than reasonable charges for telecommunications service, in violation of Sections 392.185(4) and 392.200.3, RSMo.—Investigation Access Rates 9 MPSC 3d 139.

While a cap on access rates is clearly necessary to protect the public interest, no party has adduced evidence sufficient to support a conclusion that the public interest is served by a cap that restricts a CLEC to access rates lower than those of the ILEC against which it seeks to directly compete in any given exchange. An access rate cap at SWBT's rate level is both anticompetitive and a barrier to market entry because it places a significant competitive disadvantage on CLECs and discourages them from entering multiple ILEC service areas. Indeed, the record shows that the ILECs may use excess access charge revenues to reduce the price of their local service and make it more attractive to subscribers. This is a direct and undeniable competitive advantage to an ILEC that charges access rates higher than those allowed to the CLEC. An unreasonable disadvantage is thereby imposed on the CLEC, in violation of Section 392.200.3, RSMo Supp. 1999.—Investigation Access Rates 9 MPSC 3d 139.

Subsection 253(b) of the federal Telecommunications Act of 1996 authorizes the Commission to impose, on a competitively neutral basis, requirements necessary to preserve and advance the public welfare, ensure quality of telecommunication services, and safeguard the rights of consumers.—Investigation MCA 9 MPSC 3d 297.

#### **§14. Rates**

In Case Nos. TO-99-530 and TO-99-254, the Commission required Northeast Missouri Rural Telephone Company to file a general rate case. The Commission determined that Northeast's filing in this case was not a general rate case and rejected it.—Northeast Missouri Rural Telephone 9 MPSC 3d 240.

The Commission approved a promotional tariff offered by an incumbent local exchange carrier, but reiterated its requirement that the carrier make its Local Plus service available for resale by CLECs and IXCs.—Southwestern Bell Telephone Company 9 MPSC 3d 108.

In Case Nos. TO-99-511 and TO-99-254, the Commission required KLM Telephone Company to file a general rate case. The Commission determined that KLM's filing in this case was not a general rate case and rejected it.—KLM Telephone 9 MPSC 3d 245.

In Case Nos. TO-99-507 and TO-99-254, the Commission required Green Hills Telephone Corporation to file a general rate case. The Commission determined that Green Hills' filing in this case was not a general rate case and rejected it.—Green Hills Telephone 9 MPSC 3d 246.

In Case Nos. TO-99-509 and TO-99-254, the Commission required IAMO Telephone Company to file a general rate case. The Commission determined that IAMO's filing in this case was not a general rate case and rejected it.—IAMO Telephone 9 MPSC 3d 248.

In Case Nos. TO-99-519 and TO-99-254, the Commission required Ozark Telephone Company to file a general rate case. The Commission determined that Ozark's filing in this case was not a general rate case and rejected it.—Ozark Telephone 9 MPSC 3d 249.

In Case Nos. TO-99-531 and TO-99-254, the Commission required Peace Valley Telephone Company to file a general rate case. The Commission determined that Peace Valley 's filing in this case was not a general rate case and rejected it.—Peace Valley Telephone 9 MPSC 3d 251.

In Case Nos. TO-99-508 and TO-99-254, the Commission required Holway Telephone Company to file a general rate case. The Commission determined that Holway's filing in this case was not a general rate case and rejected it.—Holway Telephone 9 MPSC 3d 252.

**§23. Rules and regulations**

The Commission approved a unanimous stipulation and agreement by which a telephone company was granted a variance from portions of 4 CSR 240-33.040, Billing and Payment Standards for Residential Customers, and 4 CSR 240-33.070, Discontinuance of Service to Residential Customers.—ALLTEL Missouri 9 MPSC 3d 545.

**§26. Service generally**

The Commission approves the Numbering Plan Area relief implementation plan for the 314 area code with the exception that optional, per company, permissive 1+ 10-digit local dialing is disapproved.—Area codes 9 MPSC 3d 499.

**§33. Billing practices**

The Commission approved a unanimous stipulation and agreement by which a telephone company was granted a variance from portions of 4 CSR 240-33.040, Billing and Payment Standards for Residential Customers, and 4 CSR 240-33.070, Discontinuance of Service to Residential Customers.—ALLTEL Missouri 9 MPSC 3d 545.

**§34. Pricing policies**

The Commission approved tariffs filed by AT&T Communications of the Southwest, Inc. to implement its Overlay Plan. This optional plan allows residential customers in all Southwestern Bell Telephone Company exchanges (both urban and rural) who are pre-subscribed to AT&T for both intraLATA and interLATA toll service to make all intraLATA direct-dialed calls priced at nine cents per minute. The Commission found that approval of the Overlay Plan would provide AT&T customers in SWBT exchanges additional choices that they would not otherwise have had, and would create more competition in the intraLATA market.—AT&T 9 MPSC 3d 124.

**IV. RELATIONS BETWEEN CONNECTING COMPANIES****§36. Relations between connecting companies generally**

Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.—DIECA Communications 9 MPSC 3d 66.

The Commission approved a promotional tariff offered by an incumbent local exchange carrier, but reiterated its requirement that the carrier make its Local Plus service available for resale by CLECs and IXCs.—Southwestern Bell Telephone Company 9 MPSC 3d 108.

The Commission found that applicants cited no authority for their proposition that a collocation tariff was required by law, and had not demonstrated that a collocation tariff was needed.—Birch Telecom 9 MPSC 3d 165.

Southwestern Bell Telephone Company ordered to make translation and routing changes in its facilities and programs necessary to lawfully discontinue the transport, transit, or termination of all intrastate telecommunications traffic to Mid-Missouri Telephone Company, except for certain interexchange and wireless traffic.—Southwestern Bell Telephone Company 9 MPSC 3d 207.

Within the context of a general cap on CLEC access rates at the level of the ILEC's rates in each exchange, the Commission will not prescribe how the rates must be constructed.—Investigation Access Rates 9 MPSC 3d 139.

The cap in any exchange will be the ILEC's access rates at the time the CLEC's access tariff becomes effective. If the ILEC thereafter raises its rates, the CLEC need not follow suit. If the ILEC reduces its rates, the CLEC must also file an appropriate tariff amendment to reduce its rates within 30 days in order to maintain the rate cap.—Investigation Access Rates 9 MPSC 3d 139.

The parties also raised questions concerning the possibility that a CLEC might propose access rates higher than those of the directly competing ILEC. While all of the parties agreed that a CLEC may petition the Commission for authority to set rates in excess of the cap, they did not agree on the standard by which such petitions should be determined. Some of the parties argued that such rates must be cost-justified, while others suggested a more flexible, case-by-case analysis. The Commission concludes that Chapter 392, RSMo, requires that any such petitions be determined on a case-by-case basis. While costs are one important

factor to be considered, that chapter mandates the consideration of other factors as well.—Investigation Access Rates 9 MPSC 3d 139.

The Commission concludes that the public interest would be best served by capping CLEC exchange access rates at the level of the access rates of the directly competing ILEC.—Investigation Access Rates 9 MPSC 3d 139.

The decision of the respondent small telephone companies to refuse to allow Southwestern Bell Telephone Company to originate MaxiMizer 800 calls in their exchanges using Feature Group C was not forbidden by any provision of law, or any rule or order or decision of the Commission and could not be the basis for a complaint against the respondents.—Southwestern Bell Telephone Company 9 MPSC 3d 338.

If Southwestern Bell Telephone Company wishes to originate interexchange, intraLATA toll calls within the exchanges served by the respondent small telephone companies it must comply with the respondents' tariffs, including the obligation to use Feature Group D rather than Feature Group C.—Southwestern Bell Telephone Company 9 MPSC 3d 338.

**§37. Physical connection**

Southwestern Bell Telephone Company ordered to make translation and routing changes in its facilities and programs necessary to lawfully discontinue the transport, transit, or termination of all intrastate telecommunications traffic to Mid-Missouri Telephone Company, except for certain interexchange and wireless traffic.—Southwestern Bell Telephone Company 9 MPSC 3d 207.

Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.—DIECA Communications 9 MPSC 3d 66.

**§38. Contracts**

Southwestern Bell Telephone Company ordered to make translation and routing changes in its facilities and programs necessary to lawfully discontinue the transport, transit, or termination of all intrastate telecommunications traffic to Mid-Missouri Telephone Company, except for certain interexchange and wireless traffic.—Southwestern Bell Telephone Company 9 MPSC 3d 207.

Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.—DIECA Communications 9 MPSC 3d 66.

## V. ALTERNATIVE REGULATION AND COMPETITION

### §40. Classification of company or service as noncompetitive, transitionally, or competitive

Given the locational monopoly enjoyed by LECs in the present state of the industry, the general absence of alternative routes by which IXCs can complete calls, and the experience of jurisdictions where no cap on access rates has been imposed, the Commission concludes that a cap on exchange access rates is reasonable and necessary in order for the service to be classified as a competitive service and for the Commission to suspend or modify the application of its rules or certain statutory provisions.—Investigation Access Rates 9 MPSC 3d 139.

The record herein shows that exchange access is a “bottleneck” service that confers a locational monopoly upon the company providing it. Under Missouri law, exchange access is a distinct telecommunications service. However, so long as CLEC access rates are capped at a reasonable level, none of the parties to this case object to the classification of CLEC access service as a competitive service. The Commission concludes that Sections 392.185(5) and 392.200.4(2) nonetheless permit exchange access service that is capped at a reasonable level to be classified as a competitive telecommunications service.—Investigation Access Rates 9 MPSC 3d 139.

### §43. Waiver of statutes and rules

To facilitate the transfer of the interexchange telecommunication service customer accounts of Efficacy Group, Inc., to Access Point, Inc., the Commission approved the waiver of Commission Rule 4 CSR 240-33.150, the “anti-slamming” rule.—Access Point, Inc. 9 MPSC 3d 204.

### §45. Local exchange competition

Commission may determine disputed issues presented in an interconnection agreement presented for arbitration under Section 252(b) of the Telecommunications Act of 1996.—DIECA Communications 9 MPSC 3d 66.

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**VALUATION****I. IN GENERAL**

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**X. VALUATION OF PARTICULAR UTILITIES**

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**VALUATION**

No cases in this volume involved the question of valuation.

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## WATER

### I. INGENERAL

#### §1. Generally

The Commission recognized the proposed name and approved the adoption notice. The Commission also waived the portion of Commission Rule 4 CSR 240-2.060(16)(C), which requires the filing of a revised tariff title sheet, for good cause shown because the original tariff does not have a tariff title sheet.—United Water Missouri 9 MPSC 3d 182.

#### §2. Certificate of convenience and necessity

The Commission approved the Application filed by Osage Water Company for a certificate of public convenience and necessity authorizing Osage to construct, own, operate, control, manage, and maintain a water and sewer system for the public located in an unincorporated area of Camden County, Missouri.—Osage Water Company 9 MPSC 3d 1.

The Commission determined that Osage Water Company met its burden of proof under the legal standards articulated by the Commission and the courts for the grant of a certificate of public convenience and necessity, and granted Osage's application for a certificate of public convenience and necessity.—Osage Water Company 9 MPSC 3d 502.

The Commission approved the Application filed by Missouri-American Water Company for a certificate of public convenience and necessity authorizing Missouri-American to construct, own, operate, control, manage, and maintain a water and sewer system for the public located in part of Saint Charles County, Missouri.—Missouri-American Water 9 MPSC 3d 127.

## **II. JURISDICTION AND POWERS**

### **§6. Jurisdiction and powers generally**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

### **§8. Jurisdiction and powers of the State Commission**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

In response to action by the legislature, the Commission found that it no longer had jurisdiction over Clarence Cannon Wholesale Water Commission, cancelled its certificates and tariff, and recalculated its assessment to only assess it for the portion of the fiscal year it was under the Commission's jurisdiction.—Clarence Cannon 9 MPSC 3d 86.

### **§11. Territorial Agreement**

Where members of the public at a local public hearing questioned the adequacy of Company's facilities for fire protection and the Commission's Staff suggested that the Commission lacks jurisdiction over the Company for fire protection purposes, the Commission declined to make such a conclusion and granted the requested rate increase.—Quail Run Water 9 MPSC 3d 34.

## **III. OPERATIONS**

### **§12. Operations generally**

Commission approved rates on an interim basis pending Company compliance with agreement addressing safety and adequacy of services and just and reasonable delivery of services.—Terre Du Lac Utilities 9 MPSC 3d 49.

The Commission recognized the proposed name and approved the adoption notice. The Commission also waived the portion of Commission Rule 4 CSR 240-2.060(16)(C), which requires the filing of a revised tariff title sheet, for good cause shown because the original tariff does not have a tariff title sheet.—United Water Missouri 9 MPSC 3d 182.

**§16. Rates and revenues**

Pursuant to the small company rate increase procedures, the Commission approved a rate increase for Raytown Water Company of \$198,431.—Raytown Water Company 9 MPSC 3d 491.

**§26. Abandonment or discontinuance**

In response to action by the legislature, the Commission found that it no longer had jurisdiction over Clarence Cannon Wholesale Water Commission, cancelled its certificates and tariff, and recalculated its assessment to only assess it for the portion of the fiscal year it was under the Commission's jurisdiction.—Clarence Cannon 9 MPSC 3d 86.

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