ER-97-82 File:
Complete Interim
Rate Case

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the matter of The Gas Service Company of Kansas City, Missouri, for authority to file interim tariffs increasing rates for gas service provided to customers in the Missouri service area of the Company.	))))))	Case No. GR-83-207

INITIAL BRIEF OF THE STAFF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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I. PROCEDURAL HISTORY

On December 16, 1982 The Gas Service Company ("Company") filed with the Missouri Public Service Commission interim revised rate schedules reflecting proposed increased rates for retail natural gas service in the Company's Missouri service area. The interim revised rate sheets bear an effective date of January 15, 1983. Said rate sheets would have the net effect of increasing the Company's gross utility revenue within Missouri $7,841,328, exclusive of gross receipts and franchise taxes, during the eight-month period from February 1, 1983 through September 30, 1983. On an annual basis the revised rates proposed by the Company would produce $12,195,242 above current rates. The Company's transmittal letter referred to the Company's need for "immediate adequate rate relief" and stated: "Gas Service is willing and hereby offers to refund any monies collected if appropriate after consideration by the Commission of the sales levels and earnings of the Company during the interim period."

Also, on December 16, 1982 the Company filed an Application For Expedited Hearing and prepared direct testimony and exhibits. In Its Application For Expedited Hearing, the Company states no less than four times that it is seeking or requires "emergency interim relief". The Company requested that the Commission set its filing for hearing at a date no later than January 5, 1983.

The Staff of the Missouri Public Service Commission ("Staff") caused to be filed on December 21, 1982 its Response To Application For Expedited Hearing. In said Response, the Staff stated that based upon the current rate case proceedings and Staff resources, the Staff would be unable to submit testimony at any hearing scheduled on or before January 5, 1983 and would be unable to advise the Commission and other parties whether the Company's financial condition justifies an interim increase or the amount of interim relief that may be necessary. The Staff further stated that it would not have any accounting or financial analysis personnel available to audit the Company's request until March, 1983 and the results of a Staff audit could not be presented in a hearing before the Commission until early April, 1983. Finally, the Staff noted that the Commission's Utility Division lacks the necessary financial resources to hire an outside

auditing firm to conduct an audit of the Company's interim rate request.

On December 23, 1982, the Office of the Public Counsel ("Public Counsel") filed Public Counsel's Response To Application For Expedited Hearing. Citing the holding of the Missouri Supreme Court in State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979) that the Commission must consider all relevant factors in deciding rate cases, the Public Counsel asserted inter alia that "unverified allegations by the Gas Service Company concerning its financial condition could not form the basis for a Commission decision allowing increased rates." The Public Counsel requested the Commission to suspend the Company's interim tariffs and set a schedule of proceedings that would allow the other parties adequate time to engage in discovery and conduct an investigation into the allegations contained in the Company's filing.

On December 29, 1982 the Company filed the Reply Of The Gas Service Company To Commission Staff's And Public Counsel's Responses To The Application For Expedited Hearing. No less than four times in said pleading, the Company refers to its December 16, 1982 filing as an emergency interim request. Although the Staff would take issue with some statements made by the Company in its Reply, the Staff would not dispute the Company's statement that the Staff's "present lack of available resources is not suggested by Staff as a basis for delaying hearing or otherwise rejecting the Company's interim need. . . ."

It should be noted that the Company's Reply states what the Company's filing and direct testimony and exhibits implies: the Company expects expedited treatment of its permanent filing. The Company states in Paragraph 4 of its Reply:

> . . . Gas Service proposes interim relief to occur from February 1, 1983, through September 30, 1983, and the additional amount to be so collected during that period is $7,841,328. The Company does not intend that it collect the interim increase during a full twelve-month period. It will file its permanent tariffs on or before December 30, 1982. If an expedited schedule is applied to that proceeding, a decision could reasonably be anticipated in October, 1983 . . . .

(Emphasis supplied).

Midwest Gas Users Association ("Midwest") and Armco Inc. ("Armco") filed on December 30, 1982 an Application For Order Allowing Intervention Of Midwest Gas Users Association And Armco Inc. On January 3, 1983, Midwest caused a letter to be filed with the Commission. In said letter Midwest stated that it had "no major difficulty with the Commission directing a hearing on an expedited basis on the Company's allegations of financial peril." Midwest suggested that the Commission consider a brief suspension of the Company's tariffs, order a prehearing conference, and schedule a hearing to follow one or two weeks later.

The Commission issued its Suspension Order And Notice Of Hearing on January 4, 1983. In said Order, the Commission stated that "given the Company's assertion as to emergency, good cause exists for holding an expedited hearing upon the Company's interim request." The Commission further said that "Public Counsel, Staff and all interested parties should appear and present evidence relevant to the reasonableness of the Company's request and shall cross-examine the Company's witnesses offered at the hearing." (Emphasis supplied). Commissioner John C. Shapleigh issued a concurring opinion in which he stated, inter alia:

> . . . I would urge the parties, in addition to evidence and argument which they now intend to present at the hearing in this matter, also present evidence and argument that would permit the Commission to make a determination as to the reasonableness of the Company's request based upon the same (or similar) standard which I have set forth on prior occasions.
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> . . . .
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> Finally, with respect to evidence and argument concerning whether or not The Gas Service Company request meets the Commission's "emergency standard" for interim relief, I respectfully request that the Company, Staff and Public Counsel offer expert opinion with respect to whether or not there exists a substantial probability that such an emergency exists, whether or not expert witnesses for said parties have been able to make a final determination.

On December 30, 1982, the Company caused to be filed with the Commission permanent revised rate schedules bearing an effective date of January 29, 1983 and designed to produce additional gross operating revenue, exclusive of cities' gross receipts and franchise taxes, in the amount of $20,966,511. The amount requested in the

permanent rate sheets apparently is inclusive of the amount being sought in the Company's emergency interim rate request. The Company's permanent filing was docketed as Case No. GR-83-225 and on January 18, 1983, the Commission issued a Suspension Order And Notice Of Proceedings therein. In said Order, the Commission, inter alia, suspended the Company's permanent revised tariff sheets to November 29, 1983.

Hearings were conducted herein on January 11 and 12, 1983. Counsel for the Company characterized the Company's filing as an emergency interim request. (Tr. 11, 37).

On January 11, 1983, in the course of the hearing ordered herein by the Commission, the Commission set a further schedule of proceedings, providing for briefing and the possibility of reopening the record for further hearing. The Company filed on January 12, 1983 The Gas Service Company's Motion For Reconsideration Of Schedule Of Proceedings. Therein, in several places, the Company referred to its filing in this proceeding as an emergency interim request. The Staff filed on January 14, 1983 Staff's Comments Concerning The Schedule Of Proceedings Set By The Commission On January 11, 1983 And Motion For A Post-Hearing Conference. Staff's Comments And Motion stated in part:

> 1. That after the conclusion of two days of hearings in The Gas Service Company's emergency interim rate request filing, the Staff is still in no position to make a recommendation to the Commission as to whether the Company's financial condition justifies an emergency interim increase or the amount of emergency interim rate relief that may be necessary . . . .[1] At the hearing on January 11, 1983, the Staff advised the Commission that the Staff still could not render a recommendation to the Commission respecting the Company's emergency interim rate request. The Staff has some concern that the Commission may be under the impression that the schedule of proceedings which it set on January 11, 1983 will permit the Staff to render a recommendation on the Company's emergency interim filing. That is not the case. The Staff will not be able to complete or even commence an audit by February 11, 1983 which is the date that the Commission has set for possibly reopening the record for further hearings and oral argument.
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> 2. That after the conclusion of two days of hearings in Case No. GR-83-207, the Staff has a better

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1/ In the testimony of Staff accountant Steven C. Carver, the Staff did make a recommendation respecting the interest rate that should be ordered by the Commission to be paid on refunds, should the Commission authorize any level of emergency interim rate relief.

> understanding of the details of the Company's filing and the support thereof, in the absence of a Staff audit. In the course of the hearings, the Staff requested, and the Company agreed to provide to the Staff, certain materials which the Staff believes would be of assistance in reviewing the Company's filing if the Staff had the time and resources to audit the Company. The Staff is not in a position where it can commence even an abbreviated two to four week audit of the Company before mid-to late March, 1983, at the earliest. Nonetheless, the materials requested by the Staff and the information elicited from the Company at the hearing should prove to be of assistance in any subsequent audit of the Company related to this proceeding, were the Commission to authorize interim rate relief, and in the audit of the Company respecting its permanent rate case filing, docketed as Case No. GR-83-225. Although the record that was created on January 11 and 12, 1983 might enable the Commission to better determine whether the Company has carried its burden of proof respecting its emergency interim filing, the Staff will not be able to make a recommendation to the Commission absent an audit of the Company.

On January 18, 1983, Midwest submitted a letter to the Commission supporting the Staff's Motion For A Post-Hearing Conference. The Company filed with the Commission on January 19, 1983 Motion Of The Gas Service Company For Prehearing Conference And Taking Of Additional Evidence. Therein, the Company referred once again to its request for interim emergency rate relief.

The Commission on January 21, 1983 issued its Order Scheduling Post-Hearing Conference And Denying Company's Motion To Withdraw Schedule Of Proceedings.

On January 24, 1983, the Company submitted to the Commission a Motion To Reconsider Order Denying Taking Of Additional Evidence and accompanying affidavits. In said Motion the Company urged the Commission to "grant the necessary emergency interim relief, subject to refund, required to save Gas Service's financial integrity." (Emphasis supplied). On January 26, 1983 the Commission issued its Order Granting Motion And Altering Scheduling Of Procedures wherein it granted the Company's Motion filed on January 24, 1983, but set February 10, 1983 as the date for reopening the record and taking additional evidence.

II. DEFINITION OF COMPETENT AND SUBSTANTIAL EVIDENCE, DUE PROCESS, AND THE SCOPE OF JUDICIAL REVIEW

A very brief discussion of what constitutes competent and substantial evidence, due process, and the scope of judicial review seems to be in order due to (1) the fact that the Staff has not been

able to perform an audit of the Company and, as a consequence, has not and will not make a recommendation to the Commission whether the Company's financial condition justifies an interim increase or the amount of interim relief that may be necessary, (2) the Public Counsel's Response To Application For Expedited Hearing which states, inter alia, that under the UCCM decision, 585 S.W.2d at 49, "unverified allegations by the Gas Service Company concerning its financial condition could not form the basis for a Commission decision allowing increased rates" and Public Counsel's opening statement delivered at the hearing on January 11, 1983, and (3) the Reply Of The Gas Service Company To Commission Staff's And Public Counsel's Responses To The Application For Expedited Hearing and the Company's response to the Public Counsel's opening statement.

Article V, Section 18, Constitution of Missouri (1945), as amended, provides that judicial review of final orders of administrative agencies, such as the Commission, shall include, in cases in which a hearing is required by law, a determination of "whether the same are supported by competent and substantial evidence upon the whole record."

Section 386.270, RSMo 1978, provides that all rates fixed by the Commission "shall be prima facie lawful . . . until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter."

Pursuant to Section 386.430, RSMo 1978, any party seeking to set aside an order of the Commission shall have the burden of proof "to show by clear and satisfactory evidence that the . . . order of the commission complained of is unreasonable or unlawful as the case may be."

Finally, the provisions of Section 386.510, RSMo 1978, although providing for review of the Commission's decisions by the Circuit Court, specifically limit the scope of review to a determination of the lawfulness or reasonableness of the order appealed, and state that suits brought to review the orders and decisions of the Commission shall be tried and determined as suits in equity.

The Missouri Supreme Court stated in the UCCM case, 585 S.W.2d at 47:

> On appeal, our role is to determine whether the commission's report and order was lawful and, if so, whether it was reasonable, State ex rel. Dyer v. Public Service Comm'n., 341 S.W.2d 795, 802 (Mo. 1960), cert. denied, 366 U.S. 924, 81 S.Ct.1351, 6 L.Ed.2d 384 (1961).
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> The commission order has a presumption of validity and the burden is on those attacking it to prove its invalidity. Id. at 800; State ex rel. St. Louis-San Francisco R. Co. v. Public Service Comm'n., 439 S.W.2d 556, 559-60 (Mo. App. 1969). In determining the statutory authorization for, or lawfulness of, the order we need not defer to the commission, which has no authority to declare or enforce principles of law or equity, Bd. of Public Works of Rolla v. Sho-Me Power Corp., 362 Mo. 730, 244 S.W.2d 55 (banc 1952). However, as to matters of reasonableness we cannot substitute our judgment for that of the commission if it is supported by substantial and competent evidence on the record as a whole, State ex rel. National Trailer Convoy, Inc. v. Public Service Comm'n., 488 S.W.2d 942, 944 (Mo. App. 1972).

Thus, the standard on review is a two-pronged test. The Court's duty is to determine (1) whether the Commission's Order is lawful, and if so, (2) whether it is reasonable and based on competent and substantial evidence upon the whole record. State ex rel. Hotel Continental v. Burton, 334 S.W.2d 75, 78 (Mo. 1960). The second prong of the test is sometimes conversely stated as the determination whether an order of the Commission is arbitrary or capricious or is against the overwhelming weight of the evidence. State ex rel. Chicago, Rock Island & Pac. R.R. Co. v. Public Service Commission, 312 S.W.2d 791, 796 (Mo. banc 1958).

An Order's lawfulness turns on whether the Commission had the statutory authority to act as it did. State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 217 (Mo. App. 1973). As to what constitutes competent and substantial evidence, those terms were defined in State ex rel. Rice v. Public Service Commission, 359 Mo. 109, 220 S.W.2d 61 (Mo. banc 1949):

> . . . It is now our express duty, under the new constitution, in reviewing an order of the commission to determine whether it is "supported by competent and substantial evidence upon the whole record." Art. V, Sec. 22, Const. 1945, Mo.R.S.A. By "substantial evidence" is meant evidence which, if true, would have a probative force upon the issues. Berkemeier v. Reller, 317 Mo. 614, 296 S.W. 739. The term "substantial evidence" implies and comprehends competent, not incompetent evidence. Mississippi Valley Trust Co. v. Begley, 310 Mo. 287, 275 S.W. 540.

(220 S.W.2d at 64; Emphasis supplied).

. . . .

> Rice objects to the findings of the commission because they ignore his evidence. He contends that since there was no other evidence adduced which contradicted his figures and calculations, or even disputed them, that the commission is bound to accept them as true. Accordingly he contends his evidence is the only substantial evidence in the record. In asserting his contention he overlooks that on cross examination his evidence was discredited to such an extent that the commission held it not entitled to credence. And certainly if evidence is not credible, it does not meet the required test of being substantial. An appellate court as a matter of law passes upon the matter of substance and not of credibility. In other words an appellate court may say that particular evidence is substantial if the triers of the facts believed it to be true. Keller v. Butcher's Supply Co., Mo.Sup., 229 S.W. 173.
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> . . . It may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it. The rule is established in this State that the triers of fact under their duty to weigh the evidence may disbelieve evidence although it is uncontradicted and unimpeached. Wiener v. Mutual Life Ins. Co., 352 Mo. 673, 179 S.W.2d 39, Woehler v. City of St. Louis, 342 Mo. 237, 114 S.W.2d 985.

(Id. at 65; Emphasis supplied).

Respecting due process and the conduct of hearings before the Commission, the most recent judicial pronouncement appears in the November 9, 1982 Opinion of the Western District Court of Appeals in State ex rel. Fischer v. Public Service Commission, No. WD 33,143:

> Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. Tonkin v. Jackson County Merit System Commission, 599 S.W.2d 25, 32-33[7] (Mo. App. 1980) and Jones v. State Department of Public Health and Welfare, 354 S.W.2d 37, 39-40[2] (Mo. App. 1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty, 330 A.2d 370, 373-374[7] (N.J. Super. Ct. App. Div. 1974).

It should be noted that Section V.A.2., hereinbelow, contains a discussion of the hearing required in a contested case.

The Court's function is not to substitute its judgment for that of the Commission with respect to issues within the field of the Commission's expertise. The Court's function is to determine whether the Commission's order was lawful and reasonable. State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 933

(Mo. banc 1958). In State ex rel. Chicago, Rock Island and Pac. R.R. Co. v. Public Service Commission, 312 S.W.2d 791, 796 (Mo. 1958), the Court stated:

> . . . [Courts of review] do not examine the record under review for the purpose of determining what order they would have made. As long as the commission acts in accord with due process of law and its findings and decisions do not run afoul of constitutional and statutory requirements and the inherent powers of the courts, it is engaged in an exercise of the police power of the state, with which it is not the province of the courts to interfere. It is, therefore, meaningfully stated in subsection 5 of Section 536.140, as amended in 1953, "the court shall not substitute its discretion for discretion legally vested in the agency."

(Emphasis supplied). In State ex rel. Dyer v. Public Service Commission, 341 S.W.2d 795, 802 (Mo. banc 1960), the Court stated that by law a large area of discretion is delegated to the Commission and many of its decisions necessarily are based in the exercise of its sound judgment. In State ex rel. City of St. Joseph v. Busby,. 274 S.W. 1067, 1071 (Mo. banc 1925), the Court noted that it cannot find value or fix rates and that neither the trial court nor the Supreme Court is authorized to set aside the order of the Commission, if the rates granted are reasonable on any theory.

III. STAFF'S POSITION THAT IT CANNOT MAKE A RECOMMENDATION TO THE COMMISSION WITHOUT AN AUDIT OF THE COMPANY

Staff accountant Steven C. Carver testified that he could not render an opinion as to the Company's asserted need for interim rate relief "[w]ithout adequate review of the Company's books and records as well as budgetary process . . ." (Ex. 4, p. 9) Mr. Carver outlined in detail that there is not appropriate Staff available at this time to perform an abbreviated audit of the Company, why such Staff is not available, and when such Staff would likely be available. (Id. at 2-3; See Tr. 277). He estimated that even if Staff were available to investigate the Company's request, it would likely take two Staff members, with prior experience auditing the Company, approximately two to four weeks to perform a review of limited scope, if information were provided to the Staff immediately upon request. (Id. at 5). Furthermore, he stated that it is his understanding that the funds necessary to retain an outside auditing firm to perform

the required review are not available to the Commission's Utility Division. (Id. at 3).

Mr. Carver identified with some specificity the concerns of the Commission's Accounting Department respecting the Company's filing. He noted that the Company relied on budgeted data in quantifying the amount of interim rate relief which it requested. Mr. Carver indicated that review of budgeted data requires substantial audit time and, respecting budgeted test years, the Commission's minimum filing requirements generally direct the filing of a historical comparison or reconciliation of budgeted data with actual operations, as well as the filing of budget variance reports. (Id. at 4; 4 CSR 240-40.070(5)(O)).

Mr. Carver did recommend that if the Commission granted the Company some interim rate relief that the rates be interim, subject to refund, at an interest rate equal to the interest rate stipulated to by the Staff and the Company in the Company's last emergency interim rate case, Case No. GR-81-257:

> . . . I recommend that any interim rate relief the Commission may authorize should be made interim subject to refund at an interest rate equal to 1.04 times the average daily prime rate in effect at the Company's major bank from the effective date of the interim increase until the effective date of the permanent rates to be authorized in the Company's current permanent proceeding (GR-83-225).

Staff financial analyst Ronald L. Shackelford testified that he could not make a recommendation to the Commission respecting the Company's interim rate relief request:

> . . . Without a verification by the Commission's Accounting Staff of the Company's projected financial data for 1983, I am in no position to form an opinion for this Commission as to whether the Company requires emergency rate relief at this time and, if so, what amount the interim rate relief should be.

(Ex. 3, pp. 2-3).

> Without a testing and verification of the Company's budgetary process, I cannot verify or reject the Company's projections regarding an immediate need for interim rate relief.

(Id. at 7). Mr. Shackelford stated that since the Commission's Financial Analysis Staff is presently preparing testimony on other rate cases, neither he nor any other Staff member has been able to

make a rate of return determination respecting the Company's interim request. (Id. at 2; See Tr. 273).

IV. WHETHER THERE IS A SUBSTANTIAL PROBABILITY THAT THE COMPANY WILL RECEIVE IN ITS PERMANENT CASE RATE RELIEF AT LEAST EQUAL TO ALL OR A PORTION OF THE COMPANY'S REQUEST FOR INTERIM RELIEF

In his concurring opinion to the Commission's January 4, 1983 Suspension Order And Notice Of Hearing, Commissioner Shapleigh requested, inter alia, that:

> . . . the parties be prepared to present their expert opinion with respect to this standard, including but not limited to, in particular, whether or not there exists a substantial probability that The Gas Service Company will receive, in the permanent case which they have now filed, rates which are at least equal to all or a portion of the Company's request for interim relief. . . .

Mr. Carver, in his prepared testimony, attempted to respond to Commissioner Shapleigh's questions. He stated that the Company did not base its interim request upon the level of permanent relief which may be granted as a result of its permanent filing. (Ex. 4, p. 3). Mr. Carver explained why he would not recommend that The Gas Service Company be granted in January, 1983, interim rate relief equal to that amount of relief which the Company may receive as a result of its permanent rate case, GR-83-225, now pending before this Commission, which permanent case will not be heard for possibly another six months:

> . . . If the Staff were to prepare a permanent rate recommendation based on information currently available, the resulting recommendation would not be the same as a recommendation prepared six months from now. For example, the Staff would not include a full twelve months annualization of a June 1, 1983, payroll increase in permanent rates to become effective immediately. However, if those same rates were to become effective six months from now, the Staff would include a full twelve months annualization of that same payroll increase in its recommendation. Assuming everything else were to remain constant, the timing of the payroll increase in relation to the effective date of the permanent rates has a significant impact on the level of permanent rate relief recommended.

(Id. at 6).

Furthermore, respecting Commissioner Shapleigh's question related above, it should be noted that although the Company has its permanent rate case filed, the Company has not yet filed testimony and

exhibits or minimum filing requirements in its permanent case. At this time, Company has only filed revised permanent tariff sheets in Case No. GR-83-225. (Tr. 103-104; Ex. 4, p. 6).

Mr. Kenneth E. Holeman testified on behalf of the Company respecting Commissioner Shapleigh's question regarding the probability of the Company receiving in its permanent case, rates which are at least equal to all or a portion of the Company's request for interim relief. He stated that he reviewed the Company's case in light of the Staff's audits and recommendations in the Company's last two to three rate cases:

> . . . I believe that it would be very conservative to say that we would have a $111 to $112 million rate base in this case [Case No. GR-83-225] based on Staff's filing. That alone, assuming that the Staff audited and determined adjustments to cost of service as they have in the prior case and the company were not to win any contested issues, would produce more than $10 million on an annual basis. I believe that we have a very good basis for winning issues to bring us above the $12 million to $13 or 14 million level. . . .

(Tr. 98; 96-98). In response to a question from Commissioner Larry W. Dority, Mr. Holeman stated that a rate of return anywhere near either the midpoint or even the low point of the rate of return range recommended by the Staff in the Company's last permanent rate case, Case No. GR-82-151, would produce above $10 million in rate relief. (Tr. 98-99) Mr. Robert A. Poindexter noted in his testimony in this proceeding that the Staff's filing in Case No. GR-82-151, which was a settled case, recommended a rate of return range of 11.69% to 12.09% and a return on common equity range of 15.2% to 16.2%. (Ex. 1, Poindexter, p. 10).

Regardless of Mr. Holeman's testimony, in attempting to answer Commissioner Shapleigh's question, another matter must be considered. The Commission's January 18, 1983, Suspension Order And Notice Of Proceedings in Case No. GR-83-225 stated in part:

> ORDERED: 20. That Company and Staff shall, and other parties may, unless otherwise ordered by the Commission, undertake to provide evidence and argument sufficient for the Commission to determine:
>
> > A. The degree to which the Company has "efficient and economical management"; further, whether a Commission determination on this point should be utilized by the Commission in making its determination of the

> Company's authorized return on equity or rate base and, if so, how it should be so utilized; further, whether a Commission determination on this point should be utilized after its determination of Company's authorized return on equity or rate base as an adjustment thereto, and, if so, how it should be so utilized. In particular, and in light of the frequent financial emergencies alleged by the Company which result in virtually annual requests for emergency rate relief, the Commission specifically directs the Staff to fully investigate, using Staff personnel or outside consultants, if necessary, the quality and efficiency of top financial management policies, procedures and personnel, and submit Staff report or recommendations with respect thereto.

Thus, if the Staff is able, given time, personnel, and funding constraints, to investigate whether the Company has "efficient and economical management", the Staff may make a recommendation to the Commission, or the Commission on its own may determine that an adjustment to the Company's authorized return on equity or rate base is appropriate. The Commission made such an adjustment in Re Missouri Public Service Company, Case Nos. ER-82-39 and WR-82-50, Report And Order at 58-62 (1982).

One final matter must be addressed in attempting to answer Commissioner Shapleigh's question whether there exists a substantial probability that the Company will receive in its permanent case relief which is at least equal to all or a portion of the Company's request for interim relief, is whether Commissioner Shapleigh posed his question with an eye to aggregate relief or with reference to the amount of relief per the individual classes of customers. This matter is a rate design question and is a matter of considerable controversy among the various parties to the interim case.

Although the Staff did not make a recommendation respecting rate design or how the proposed interim rate relief should be distributed among and collected from the various classes of customers, Staff engineer Mr. Bohdan Matisziw did identify certain concerns respecting any interim rate design:

> . . . I believe specific refund tracking safeguards should be stated and addressed in an interim request. Such tracking safeguards should be specific enough to determine any over or under collections during the period of interim rates so that the various customer classes are adequately protected.

> A situation could occur wherein the total increase granted in the permanent case is equal to or greater than that of the interim request, thereby not requiring a refund when considered on an aggregate basis. However, if the Commission adopts a different rate design in the permanent case than in the interim case, then certain classes of customers may have been overcharged during the interim period while others may have been undercharged.

(Ex. 2, pp. 2-3).

Dr. Steven Andersen, who appeared on behalf of the Office of the Public Counsel, recommended a rate design other than the rate design proposed by the Company for the collection of any interim rate relief that the Commission might authorize to be collected. (Tr. 282). Furthermore, he testified that any difference between the interim rate design and the permanent rate design will result in a situation of under or overrecovery of any interim level of relief authorized by the Commission. (Id.). Dr. Andersen's analysis was based on a review of under or overrecovery for a specific customer class, the general service class, which class includes residential customers. (Tr. 279). Dr. Andersen testified that if the Company's interim rate design proposal for this customer class were accepted by the Commission, and in the permanent case the Commission authorized for this customer class the same level of rate relief as in the interim, but adopted a different rate design to collect that level of rate relief, then the Company would receive funds for the first twelve months after interim relief is granted that are in excess of the level of rate relief that was authorized to be collected from that customer class. (Ex. 5; Tr. 280, 282). He stated that "[t]he overrecovery is exclusively the product of that period during which you go through a transition from one rate design to the other." (Tr. 285).

Dr. Andersen indicated that under a converse set of facts underrecovery could occur. If the Commission adopted his proposed interim rate design for the general service (residential) customer class, and in the permanent case the Commission authorized for this customer class the same level of rate relief, but adopted a different rate design to collect that level of rate relief, then the Company would receive funds for the first twelve months after interim relief is granted that are less than the level of rate relief that was

authorized to be collected from that customer class. (Tr. 281-282, 293-295).

Mr. Harold W. Steenbergen, Director of Rates and Tariffs for the Company, stated that "the method of collection" which the Company has filed in this case for the interim relief which it is seeking "is not exactly a rate design." (Tr. 229). He testified that the method by which the Company has proposed to collect interim rate relief is a cents per MCF on an annual basis, using a specific level of annual sales in all classes, applied to the eight month period February 1 to September 30, 1983. (Id. at 229, 232, 246; Schedules HWS-4, 5, 6). Although the Company allocated the interim rate relief to the general service class on a cents per MCF basis, it is seeking to recover said interim rate relief on a per bill basis from the general service class. (Tr. 232, 236). Mr. Steenbergen testified that although he developed the method of collection of interim rate relief, Mr. Larry Loos of Black & Veatch designed the rates in the Company's pending permanent rate case. (Id. at 238-239).

Mr. Steenbergen testified that if in total in the permanent case the Commission were to grant on an annual basis the amount of rate relief that it had authorized in the interim case on an annual basis, then there would not be any need of a refund to any customer class, regardless of the situation that under this scenario a customer class may receive less of an increase in the permanent case than it received in the interim case because the Commission adopted a different rate design in the permanent case than it adopted in the interim case. (Tr. 247-250). He indicated that even though the corollary of the above scenario of overcollection from one customer class is that some other customer class will receive more of an increase in the permanent case than it received in the interim case, the Company could not recover "retroactively" any undercollection that occurred in the interim period based on the Commission's adoption of a different rate design in the permanent case than it adopted in the interim case. (Id. at 260, 231). Mr. Steenbergen also indicated that if the Commission authorized the Company an amount in permanent relief less than the amount it had authorized in interim relief on an annual basis, there would be a refund, assuming a refund provision. Such

refund, according to Mr. Steenbergen, should be flowed back to the customer classes in the same manner as the interim increase was allocated. (Id. at 231, 248). He stated that he did not see any reason why the method of collection for the interim rate relief period has to follow the exact rate design that is determined in the permanent case. (Id. at 250).

V. THE EMERGENCY INTERIM RELIEF STANDARD AND COMMISSIONER JOHN C. SHAPLEIGH'S PROPOSED INTERIM RELIEF STANDARD[1]

A. Judicial and Legislative Restraints

1. Substantive Restraints

The case of State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976), is the only reported Missouri case dealing directly with the issue of the substantive standard to be employed in the granting of interim relief. The Court first firmly concluded that the Commission did possess authority to grant interim relief, as will be discussed hereinbelow. Having found statutory authority by grant of Section 393.150, RSMo 1978, the Court went on to state at 566:

> . . . Simply by non-action, the Commission can permit a requested rate to go in effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion.

(Emphasis supplied). The Court held at 567 that "the Commission has power in a proper case to grant interim increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation."

The Court affirmed the trial court's decision which concluded that "'[t]he exercise of the Commission's discretionary power over the suspension of rates filed with it, is a matter of

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1/ This section of the Staff's Initial Brief has previously appeared, in principal part, in Staff's Brief Addressing Company's Motions To Place Partial Increase In Effect Subject To Refund in Re Union Electric Company, Case No. ER-82-52 (1982) and Comments Of The Staff in Re In the matter of the inquiry into certain matters of concern to the Commission, Case No. OO-82-277 (1982).

administrative discretion . . .'" (Id.). The Court, in the context of its discussion of preliminary issues, noted the "wide discretion" and "large area of discretion . . . liberally recognized by the courts" which has been conferred upon the Commission. (Id. at 568).

Finally, the Court asked the question, "[w]hat is the proper test to be applied for the allowance of an interim rate increase?" (535 S.W.2d at 568). The Court's answer, the only clear judicial guidance in this area, deserves to be quoted at length:

> A majority of the Commission follows the principle that the purpose of a special hearing concerning interim rates is to ascertain whether emergency conditions exist which call for especially speedy relief, and the Report and Order expresses the view that an interim increase should be granted only "where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity." Laclede admits that if this be the proper test to be applied, then the ruling in this case must be against it. As it states in its brief, "Appellant has not and does not now contend that Respondent's order would not be based on competent and substantial evidence if the interim rate tests applied by Respondent and the lower Court are the tests lawfully to be applied to interim rates. . . ."
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> However, Laclede strenuously contests the propriety of the Commission's test. It contends that the Commission has a broader duty than merely to grant interim increases in the case of emergency. Laclede insists that the Commission must also grant such relief in any case where necessary to afford the utility a fair and reasonable return upon its invested capital, and it argues that under the facts proved its existing approved rates are so unreasonbly low as to be confiscatory.
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> In support of the test urged by it, Laclede argues that a duty to set rates sufficient to furnish a fair and reasonable return is imposed upon the Commission by both statutory and constitutional provisions. With respect to the alleged statutory duty, Laclede points to Section 393.140(5). . . . The quoted provision, properly interpreted, appears to refer to a proceeding against a utility having for its purpose a reduction of rates. . . . In any event, it would be unreasonable to construe this statutory section as imposing a duty upon the Commission to set "just and reasonable rates" in a special hearing for the limited purpose of considering an interim increase, since the setting of fair rates is the purpose and subject of the full rate hearing. To construe Section 393.140(5) as applicable here would make the hearing on interim rates coextensive with that on the permanent rates and would therefore in practical effect make accelerated action on interim rates impossible.

Turning now to Laclede's constitutional argument, it contends that the due process clauses of the United States and Missouri constitutions and the prohibition in the Missouri constitution against taking property without just compensation join in requiring that the test to be applied in any rate hearing (whether for permanent or interim increases) be that the rates be sufficient to produce a fair return on the property invested. Every utility does have an undoubted constitutional right to such a fair and reasonable return, and this is a continuing right which does not cease after beginning rates are initially determined. (Citations omitted). The Commission does not challenge this rule. While it did speak in its Report and Order of an interim increase being permissible "only" pursuant to its emergency test, it does not repeat that broad claim in this Court. Instead, it limits its response to Laclede's constitutional argument to the narrow proposition that Laclede has failed to carry its burden of proving facts amounting to confiscation. (Footnote omitted).

However, whether the rates in effect at any given time are just and reasonable depends upon many facts and can only be determined after rather extended investigation and study. . . . Because of the necessity to make these investigations, hold hearings and permit arguments with respect thereto, the proceedings before regulatory bodies for rate increases inevitably entail considerable time and have led to delay in the granting of increases which is generally referred to as "regulatory lag". While this delay is regrettable, the courts have recognized that some lag is unavoidable and have generally held that no deprivation of constitutional rights occur because of suspension of the proposed increase pending a hearing thereon, provided the delay for purposes of such hearing is not unreasonably long. . . .

Laclede does not challenge that doctrine and refers to regulatory lag only to a limited extent by way of background. As its principal argument to show that its present rates have become unjust, Laclede relies principally upon a mathematical computation showing that its income during the test year 1973 and as projected for 1974 will fail to produce the rate of return on invested capital which was allowed to it by the last rate order issued by the Commission in 1969. In this respect, Laclede points out that the Commission's staff evidence showed that Laclede for the calendar year 1973 earned a rate of return of 7.20%. Laclede then compares that rate of return to those which were produced from the rates approved by the Commission in 1969, under which Laclede would receive a rate found to be approximately 7.76% under the staff figures and 7.36% applying the company's figures. Referring then to a finding in the 1969 order that "this is not an unreasonable range," Laclede argues that its 1973 return of only 7.20% must necessarily be deemed below the reasonable range. . . .

This same basic argument has been presented to a number of courts through the country and the judicial reaction has been divergent. However, the majority and better view rejects the argument

> that any return less than the rate previously set must be deemed prima facie unreasonable. . . .

(535 S.W.2d at 568-570; Emphasis supplied).

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> . . . There remains only to review briefly the factors shown by the record which affirmatively support the Commission's declination to grant an interim increase and which amply show that declination to be at least reasonably debatable.
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> . . . Laclede was able to serve its customers, it had continued to pay dividends to its stockholders, its bond coverge continued to be in excess of the coverage required by its bond indentures, and it ran no risk of a lowering of its bond rating during the period of maximum suspension pending completion of the permanent rate hearing. . . . Because of the shortness of time afforded by this special interim rate proceeding, the Commission Staff had been unable to audit either those figures or any of the other financial data and exhibits submitted by Laclede. On top of all this, Laclede's permanent rate application was also concurrently in progress and indeed the Commission's report in the permanent rate increase proceeding was issued on August 22, 1974, which was less than four months after the order in the interim rate case.

(Id. at 573).

> . . . .
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> Laclede seemingly realizes the inconclusiveness of the proof offered by it in this interim rate proceeding, and it attempts to flesh out its proof by making reference to evidence submitted and findings made in the permanent rate proceeding, Case No. 18,015. . . . Rather than helping Laclede, this reference simply emphasizes the desirability of leaving the whole question of just and reasonable rate (unless imperative facts require to the contrary) to the permanent rate proceeding in which all the facts can be developed more deliberately with full opportunity for an auditing of financial figures and a mature consideration by the Commission of all factors and all interests.
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> It may be theoretically possible even in a purposefully shortened interim rate hearing for the evidence to show beyond reasonable debate that the applicant's rate structure has become unjustly low, without any emergency as defined by the Commission having as yet resulted. Although some future applicant on some extraordinary fact situation may be able to succeed in so proving, Laclede has singularly failed in this case to carry the very heavy burden of proof necessary to do so.

(Id. at 574; Emphasis supplied).

Two things are obvious from the discussion just quoted: (1) the Court views the Commission's discretion in this area to be very broad and although it strongly approved of the Commission standard for

interim relief, it in no way prohibited or limited the Commission's discretion to apply a different standard; and (2) the Court clearly rejected the concept of setting just and reasonable rates in a limited hearing, finding that applying that standard would "in practical effect make accelerated action on interim rates impossible". (Id. at 569).

It should be noted that the Supreme Court of Missouri in the UCCM case cited the Court of Appeals decision in the Laclede case and in doing so added its strong approval of the Commission standard. In fact, dicta in that case quotes the standard almost as if it were judicially or legislatively established and exclusive:

> . . . An interim rate increase may be requested where an emergency need exists, (Citation omitted).
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> . . . .
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> . . . If the electric companies are faced with an "emergency" situation because of rising fuel costs, they can take advantage of the method set up by the legislature to deal with such situations and file for an interim rate increase on the basis of an abbreviated hearing, (Citation omitted).

(585 S.W.2d 41, at pp. 48 and 57). Both UCCM and Laclede express a preference for the full rate case process over abbreviated interim relief procedures for the determination of rates. (535 S.W.2d at 574; 585 S.W.2d at 49).

Staff must conclude from the authorities cited above that the Commission can, should it in exercising its sound discretion desire to do so, alter its well-established standard and apply some rational alternative in its place. The Staff finds no clear restraint upon the Commission's discretion to liberalize the substantive standard and, in fact, believes such action is within the Commission's lawful discretion. The Commission should keep in mind, however, that the standard currently employed has received strong approval from both the former Kansas City District Court of Appeals and the Supreme Court of Missouri.

2. Procedural Restraints

Section 393.150, RSMo 1978, is the statute dealing with what is commonly referred to as the "file and suspend" procedure. Said statutory section provides in pertinent part:

> 1. Whenever there shall be filed with the commission by any gas corporation . . . any schedule stating a new rate or charge . . . the commission shall have, and it is hereby given, authority. . . upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, . . . and pending such hearing and the decision thereon, the commission . . . may suspend the operation of such schedule and defer the use of such rate, . . . beyond the time when such rate, . . . would otherwise go into effect; and after full hearing, whether completed before or after the rate, . . . goes into effect, the commission may make such order in reference to such rate, . . . as would be proper in a proceeding initiated after the rate . . . had become effective.
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> 2. . . . At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

In the Laclede case at 567, the Court relied in part on the "file and suspend" statutes as authority for the Commission granting interim rate increases:

> We hold that the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.

In fact, language in the Laclede case at 566 and 568 would indicate that the "file and suspend" statutes are the sole source of that authority, although other statutory provisions would speak to the breadth of discretion in its exercise:

> The "file and suspend" provisions of the statutory sections quoted above lead inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate to go into effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion.

(Id. at 566; Emphasis supplied).

> . . . .
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> The Commission and the trial court treated this case on the assumption that Laclede was proceeding within the general scope of the file and suspend

> procedures provided by Sections 393.140 and 393.150. This treatment was favorable to Laclede, since otherwise its entire proceeding for interim rate increase in this case would have been of very doubtful effectiveness.
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> . . . In short, the Commission need not look to Section 393.150 as a source for discretion. Rather, it relied on that section as the source of its authority to grant any interim relief. Once that authority was found, ample basis for discretion in the exercise thereof exists wholly apart from Section 393.150.

(Id. at 568; Emphasis supplied).

Clearly the "file and suspend" procedure contemplates either non-action on the part of the Commission or action after a hearing. The first suspension is for the purpose of entering upon a hearing and to suspend the operation of the rate or charge "pending such hearing and the decision thereon . . ." The second suspension is justified "[i]f any such hearing cannot be concluded within the period of suspension . . ." first authorized. (Section 393.150, RSMo 1978.)

Article V, Section 18 of the Constitution of Missouri is the starting point for determining the hearing required in a contested case. It provides in pertinent part:

> All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination of whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record. . . .

Section 536.070, RSMo 1978, addresses evidentiary requirements in any contested case and requires, inter alia, that oral evidence be taken on oath or affirmation, that all parties may call and cross-examine witnesses and introduce exhibits, that all proceedings be suitably recorded and preserved, and that records and documents of the agency to be considered in the case shall be offered in evidence, the same as any other evidence.

Kenneth Culp Davis, in his Administrative Law Treatise, Second Edition, Vol. 1 (1978) summarizes the requirements of a contested case hearing at pages 13-14:

> "Informal action" means, in the prevailing usage, any action (or determination in favor of inaction) that is taken without a trial-type hearing. . . . Adjudication without a trial is informal, and adjudication with a trial is formal. But of course a dozen or more elements of a trial can be identified; when some are present and some absent, deciding whether or not a proceeding is a trial may be difficult. The key to a trial is probably opportunity to meet opposing evidence with rebuttal evidence, cross-examination, and argument. See the treatments of elements of a trial in Goldberg v. Kelly, 397 U.S. 254 (1970); Morrissey v. Brewer, 408 U.S. 471 (1972); for procedural protection short of trial, see Goss v. Lopez, 419 U.S. 565 (1975). (Ibid., pp. 13-14).

A reading of Goldberg v. Kelly and Morissey v. Brewer, cited by Davis, leads to the conclusion that a hearing which comports with due process requires at a minimum: (1) notice; (2) disclosure of evidence; (3) opportunity to be heard and present witnesses and documentary evidence; (4) right to cross-examination of adverse witnesses; (5) an impartial hearing body; and (6) a written decision stating the evidence relied on and the reasons for the decision. (397 U.S. at 269-271; 408 U.S. at 488-489).

The "file and suspend" statutes clearly contemplate either an informal "determination in favor of inaction" or formal action requiring a "trial-type hearing" since Section 393.150, RSMo 1978, requires a "full hearing" after suspension. As stated by the Missouri Supreme Court in the UCCM case, 585 S.W.2d at 48:

> Pursuant to Section 393.150, a utility may file a schedule stating a new rate or charge, rule or regulation, which shall become valid unless suspended by the commission, see State ex rel. Jackson County v. Public Service Comm'n., 532 S.W.2d 20, 28-29 (Mo. banc 1975), cert. denied, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), on its own motion or upon complaint of interested parties as authorized by the statute. If suspended, the commission must within a specified period hold a hearing concerning the propriety of the new rate, charge, rule or regulation.

(Emphasis supplied).

There is other language in the UCCM case which states that even in deciding that no hearing is required and the filed rate should not be suspended, the Commission must consider all relevant factors in reaching said determination:

> Even under the file and suspend method, by which a utility's rates may be increased without

> requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended. See State ex rel. Misouri Water Co. v. Public Service Comm'n, 308 S.W.2d 704, 718-19, 720 (Mo. 1957). However, a preference exists for the rate case method, at which those opposed to as well as those in sympathy with a proposed rate can present their views. See State ex rel. Laclede Gas Co. v. Public Service Comm'n, 535 S.W.2d at 574.

(Emphasis supplied).

If the Commission may without a hearing determine to not suspend a rate, how then could a reviewing court possibly determine whether the requirement to consider "all relevant factors" has been met? The only reasonable reconciliation of these holdings in the UCCM and Laclede cases can be found in an examination of the particular facts of the UCCM case. At issue in the UCCM case was the fuel adjustment clause ("FAC") authorized by the Commission:

> A fuel adjustment clause (FAC), once authorized by the commission as a part of the utility's rate structure, enables the utility to pass on to the consumer any increase (or decrease) in the cost of fuel automatically and without any need for further consideration of compensatory decreases (or increases) in other operating expenses. As such, it is a radical departure from the usual practice of approval or disapproval of filed rates, in the context of a general rate case. . . .

(585 S.W.2d at 49). The Court further stated:

> Not only would a fuel adjustment clause permit new "rates" to go into effect without consideration of other factors and thus without a framework in which to determine if overall rates are reasonable, it would also negate the effect of Section 393.140(11), by which all rates are printed and open for public inspection. The purpose of thus providing the customer with a method of ascertaining what rates are in effect and enabling him to take the appropriate steps to challenge those rates would be destroyed with a fuel adjustment clause. Upon reference to the filed rate schedule of the utility, the consumer would be confronted with a formula and a rate filed as a result thereof. While it is debatable that representatives of large industrial or commercial customers might understand such a system, the average consumer could not be expected to do so. It is no answer to say that few understand the rates previously filed; this argument merely demonstrates the need to avoid further complication.
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> Finally, as noted supra, the rationale behind a fuel adjustment clause could be used to justify other automatic adjustment clauses for most remaining operating expenses. Having established a toehold with our decision in Hotel Continental, we will not travel further down the "slippery slope" and risk a dismantling of the carefully balanced fixed rate system established by the legislature. While in itself the

> clause looks innocuous, and while the cost of fuel may look high, to permit such a clause would lead to the erosion of the statutorily-mandated fixed rate system.

(Id. at 57).

In the context of the UCCM case the Court was confronted with an established procedure which was designed to and in fact considered only one item of expense in determining rates. Thus, the requirement to "consider all relevant factors" was patently lacking. The Court appeared to be concerned with the "radical departure from the usual practice of approval or disapproval of filed rates, in the context of a general rate case." Finally, the Court was concerned with the impact upon the notice provisions requiring rates to be "printed and open for public inspection." Instead of notice that a rate would be increased from "X" amount to "Y" amount, the FAC tariff published a complicated formula which the court doubted a commercial or industrial consumer could understand, much less "the average consumer".

The non-emergency interim relief proposal of Commissioner Shapleigh does have the appearance of considering all relevant factors. Construing Laclede and UCCM together, this should be sufficient. If the Staff is able to perform an audit and file a case, then the Staff would contend that its case considers "all relevant factors". In fact, a company's filed tariffs supported by direct testimony and exhibits arguably consider all relevant factors, thus allowing for non-suspension under Laclede. The proposed non-emergency interim relief standard may be viewed as a "radical departure from the usual practice of approval or disapproval of filed rates, in the context of a general rate case" in light of the Western District Court of Appeals opinion in State ex rel. Fischer v. Public Service Commission, No. WD 33,143, filed on November 9, 1982. Commissioner Shapleigh's proposal contemplates partial immediate relief within the context of and during the pendency of a general rate case. It is a radical departure from the standard historically applied to determine whether the Commission should exercise its discretion to grant interim relief. Finally, the notice problem is not necessarily present under the Commissioner's proposed standard in that the company will have published tariffs proposing an identifiable

increase to existing rates and local hearings will have been held.

B. Commission Precedent

The historical standard applied by the Commission since 1949 has consistently required a showing of some emergency or immediate need for rate relief. This standard was first enunciated in a nascent form in Re Southwestern Bell Telephone Company, Case No. 11,634, 2 Mo. P.S.C. (N.S.) 131 (June, 1949), but evolved into a more detailed articulation. In addition to Re Southwestern Bell Telephone Company, the emergency or immediate need standard has been applied by the Commission in a long line of cases: Re Sho-Me Power Corporation, Case No. 17,381 (1972); Re Union Electric Company, Case No. 17,965 (1974); Re Laclede Gas Company, Case No. 18,021 (1974); Re Missouri Public Service Company, Case No. 18,502 (1975); Re St. Joseph Light & Power Company, Case No. ER-77-93 (1977); Re Missouri Public Service Company, Case No. ER-79-59 (1978); Re Kansas City Power & Light Company, Case No. ER-80-204 (1980); Re Kansas City Power & Light Company, Case No. ER-81-42 (1981); Re Missouri Public Service Company, Case No. ER-81-154 (1981); Re The Empire District Electric Company, Case No. ER-81-229 (1981); Re Missouri Power & Light Company, Case Nos. GR-81-355 and ER-81-356 (1981); and Re Sho-Me Power Corporation, Case No. ER-83-20 (1982).

The existing standard can be summarized by quoting in part from the Commission's decisions in Re Missouri Public Service Company, Case No. 18,502, 20 Mo. P.S.C. (N.S.) 244 (1975) and Re Missouri Power & Light Company, Case Nos. GR-81-355 and ER-81-356 (1981), respectively:

> Under the present circumstances, the mechanism of interim rate relief exists to fill a void in the regulatory process. It is recognized that the machinery of permanent rate relief does at times grind exceedingly slow and that the companies under the jurisdiction of the Commission may, from time to time, find themselves facing emergencies which require timely action by the Commission. However, the fact that time is of the essence in an interim case creates certain constraints which would otherwise not be present in a normal proceeding. The Commission must accept at face value the evidence presented to it by the Company, because time does not permit extensive verification of this evidence by the Commission and its Staff.

> Therefore, it is incumbent upon the Company to demonstrate conclusively that an emergency does exist. The Company must show that (1) it needs additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief.
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> . . . [T]he Company has not conclusively demonstrated that the funds for 1975 construction will not be available and, hence, that said expenditures must be postponed. . . .
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> Finally, the Company in its testimony did not clearly demonstrate that no source of funds other than interim rate relief is available to it until its permanent case is decided. The Company did demonstrate that its alternative would either be painful to accept or difficult to obtain, but not that they were unavailable. Other sources of funds do exist for the Company until its permanent rate case is settled during the first-half of 1976. At the risk of dilution, common stock could be sold. Adequate interest coverage does exist for some long-term borrowings during the first-half of 1976, though probably coverage will not be adequate for the funding of the entire $15,000,000 in April of 1976 as proposed by the Company. The Company's Series U bonds could be used to raise additional short-term funds even at the risk of reducing its reserve collateral or called in order to improve its interest coverage -- again at the risk of reducing its reserve collateral and creating assets which will be unpledgable in the future.

(Re Missouri Public Service Company, Case No. 18,502, 20 Mo. P.S.C. (N.S.) at 250-251 (1975)).

> The Commission has generally used interim rate relief to prevent emergency or near-emergency financial conditions from jeopardizing a company's ability to continue to render adequate service during a period of time in which a permanent rate request is being considered. Although the Commission has, on occasion, granted interim rate relief in a nonemergency situation, those instances are few and in response to particular pressing circumstances.
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> The evidence in the present case finds Missouri Power & Light Company with inadequate interest coverages, an inability to pay common dividends out of current earnings, and an inability to reasonably engage in equity financing. To disallow interim rate relief in this case would, in the Commission's opinion, result in damage to the Company's financial integrity and the Company's ability to render safe and adequate service. Therefore, the Commission is of the opinion that the stipulation and agreement as presented by the Company and the Staff of the Missouri Public Service Commission in this matter

> is reasonable and proper and should be accepted. . . .

(Re Missouri Power & Light Company, Case Nos. GR-81-355 and ER-81-356, Report And Order at 6 (1981)).

The only exceptions to the consistent application of the emergency or immediate need standard are found in two cases. In Re Missouri Power & Light Company, Case No. 17,815 (1973), no precise standards were discussed; however, it may very well have been a silent application of the immediate need standard since the Company was earning 2.89% on common equity in 1973 in contrast to the 11.9% return authorized by the Commission in 1970. In the other case, Re Missouri Power and Light Company, Case No. GR-78-122 (1978), a "good cause shown" standard was purportedly applied. However, the peculiar facts of the case explain the anomaly. The parties had reached a stipulation in a permanent case as to revenue requirement but the stipulation was rejected by the Commission due solely to rate design. The Company subsequently filed for and received interim relief in the amount previously stipulated to in the permanent rate case.

Two other cases deserve more detailed treatment in the context of the issues raised by Commissioner Shapleigh's proposal. In Case No. ER-81-42, the Commission in its Order Dismissing Motion For Interim Relief, stated in part at 3-4:

> The Commission has considered the Motions, Suggestions and Responses herein enumerated, and concludes that Staff's "Motion to Dismiss Motion for Immediate Suspension and Interim Rate Relief" should be granted. In a proper case, the Commission does have the discretionary power to grant an interim rate increase. State ex rel. Laclede Gas Co. v. Missouri Public Service Commission, 535 S.W.2d 561, 567 (Mo. App. K.C. Dist. 1976). The source of that power is "the broad discretion implied from the Missouri file and suspend statutes [Section 393.140 and Section 393.150, RSMo 1978] and from the practical requirements of utility regulation." Id. The Court in Laclede Gas went on to say:
>
> > The Commission and the trial court treated this case on the assumption that Laclede was proceeding within the general scope of the file and suspend procedures provided by Sections 393.140 and 393.150. [Footnote omitted]. This treatment was favorable to Laclede, since otherwise its entire proceeding for interim rate increase in this case would have been of very doubtful effectiveness. (Id., at 568).

> In light of the Court's holdings in Laclede Gas, the Commission concludes that the appropriate method for filing a request for interim rate relief is the filing of interim tariffs, as a separate case, under the file and suspend method prescribed by Sections 393.140 and 393.150, RSMo 1978. Since an interim proceeding under any other method would be of "very doubtful effectiveness," it would be in the best interest of neither the Company nor the Commission to proceed by such other method.
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> In this case, the Company is seeking to request interim rate relief by a Motion for Interim Rate Relief with proposed interim tariffs attached thereto as an "exhibit". A proper tariff filing under the file and suspend method requires, inter alia, that tariffs plainly state "the time when the change will go into effect." Section 393.140(11). The proposed interim tariffs which are an exhibit to the Company's Motion in this case bear no effective date. Nor were those proposed interim tariffs filed under a docket number separate from the Company's permanent tariff filing herein (ER-81-42).
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> The Commission concludes that the "Motion for Immediate Suspension and Interim Rate Relief" filed by Kansas City Power and Light Company in this case should be dismissed.

(Emphasis supplied).

In light of the facts before the Commission in Case No. ER-81-42, the strict requirement of "the filing of interim tariffs . . . under the file and suspend method" is well founded. However, had a hearing to address specific standards concerning interim relief been held in the context of the permanent case, then the Company would have been proceeding under the file and suspend statutes since its permanent request followed that procedure.

The key to the Order in Case No. ER-81-42 goes back to the statutory and judicial procedural requirements discussed hereinabove. Without a hearing, the Commission may determine not to suspend a company's tariffs and decide to allow the company's tariffs to become effective. However, if the Commission is to act pursuant to suspension, it must hold a hearing (except, arguably, if the Commission's action pursuant to suspension was simply to revoke the suspension and allow the Company's tariffs to go into effect).

Finally, in Case No. T-49,100, In the matter of the interim rates and charges of Motor Common Carriers -- Middlewest Motor Freight Bureau, the Staff and the Middlewest Motor Freight Bureau entered into a stipulation proposing interim rate relief which stipulation was

approved by the Commission. In the concurring opinion of Commissioner John C. Shapleigh, Report and Order, Case No. T-49,100 (1981), the Commissioner atated a proposed standard for interim relief different from the current emergency or immediate need standard. The Commissioner's proposed standard had been previously articulated in Case No. ER-81-229 and Case Nos. GR-81-355 and ER-81-356, but said proposal is most completely developed in the concurring opinion in Case No. T-49,100 at 1-2:

> The standards for interim relief suggested in these earlier opinions are directly analogous to standards used by our court system for many years in cases where temporary injunctive relief is sought by a party in a civil case, and are well-known to attorneys in practice before the Commission. They are:
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> 1. A substantial probability that the carriers [or utility] will receive, in the permanent case, rates which are at least equal to or greater than the interim relief;
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> 2. Irreparable injury to the carriers [or utility] if interim relief is not granted;
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> 3. No substantial harm to the ratepaying shippers [or customers] if the interim relief is granted;
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> 4. No harm to the public interest if the interim relief is granted;
>
> 5. Based on Items 2-4 above, the potential hardships to the carriers [or utility] of the loss of the revenue during the interim period outweigh the potential hardships to the ratepaying shippers [or customers] in the event that the interim relief is greater than relief allowed in the permanent case; and
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> 6. Safeguards for the protection of the ratepaying shippers [or customers].

The Commissioner disagreed with the Staff that Case No. T-49,100 was "unique" in comparison to electric, gas, telephone, water and sewer rate cases, at least at that point when a hearing has been concluded in such cases or at the "close of the evidence". Commissioner Shapleigh's concurring opinion suggests that at said point an appropriate level of interim relief can be found "by identifying the position of the particular party in any given case making the lowest recommendation for rate relief."

In the opinion of Staff, applying the Commissioner's proposed standard at the close of either a hearing in a permanent rate case or a hearing to address this proposed standard does not run afoul

of any legal restraint on the Commission's discretion. However, Staff respectfully contends that the disposition of Case No. T-49,100 was "unique" for the following reasons:

(1) The Middlewest Motor Freight Bureau formally represents 700 to 800 motor common carriers in Missouri. In utility cases generally the rates of a single company are at issue.

(2) In motor common carrier cases annualizations (an important part of the process of forward-looking rates) are not as precise as in other utility cases. This situation is simply due to a lack of specific data regarding last-known quantities of specific inputs.

(3) Some undeterminable number of the 700 to 800 motor common carriers almost certainly met the standard of immediate need. Several motor common carriers had gone bankrupt during 1981.

(4) There is greater competition among motor carriers than other utilities although there is limited entry in the common carrier industry.

(5) The permanent case in T-47,154, the case upon which interim relief in T-49,100 was based, had been pending since February 27, 1981. The relief granted in T-49,100 was effective no earlier than January 4, 1982, a full ten months later.

(6) The permanent case was filed in the form of an application or complaint and not pursuant to the file and suspend method. Therefore, there was no "operation of law date". Briefs had not yet been filed in that case.

(7) There had been a full hearing on the permanent case wherein the lowest recommended amount was clear. This is not the situation generally in other utility cases at the time interim relief is requested. Normally interim requests precede the hearing in the permanent case by several months. (Case No. GR-78-122 was a unique exception.)

(8) The disposition of T-49,100 was by stipulation. The stipulation contained the customary provision that no principle or procedure of ratemaking was acquiesced in by the parties and further that the stipulation's approval would not establish any legal precedent. This fact alone always makes the case distinguishable. When a stipulation is entered into, the Commission can choose to accept the acquiescence of all parties to a dollar settlement which produces no binding precedent.

Commissioner Shapleigh's alternative standard can be easily translated into allowing interim relief any time there is an earnings shortfall, that is, the utility is earning less than some reasonable rate of return appropriate at the time the relief is requested. Each of the criterion will be addressed to illustrate this point, saving the first criterion for last.

Criterion Number 2. The Company will always suffer irreparable injury, assuming it is experiencing an earnings shortfall,

if irreparable injury is defined as a loss of revenues. The Commission may not set rates retroactively at some later date to recoup these losses. (585 S.W.2d at 59; Board of Public Utility ›mmissioners v. New York Telephone Co., 271 U.S. 23, 31 (1926).

Criterion Number 3. No substantial harm will occur to the ratepayers because if an earnings shortfall is being experienced and the interim relief is designed only to remedy the shortfall then the ratepayer is theoretically paying only what he should be paying.

Criterion Number 4. Continuing with this simple analysis, there is no harm to the public interest when just and reasonable rates are established. This is one of the primary functions of the Commission.

Criterion Number 5. Assuming the interim relief is subject to refund, the potential hardship to the utility, irreparable loss of revenue, will always outweigh the potential hardship to the ratepayer, temporary reduction of cash flow.

Criterion Number 6. Safeguards can and should always be provided. The rates should be subject to refund at some reasonable rate of interest. Further, the satisfaction of Criterion Number 1 theoretically provides reasonable assurance that the ratepayer is paying no more than he should.

Criterion Number 1. Finally, the first criterion requires one to speculate as to the probability of a given level of rate relief in the permanent case. The permanent case is the proceeding by which just and reasonable rates are to be determined by the Commission. If the level of interim relief is no greater than the amount expected in the permanent case then the criterion is satisfied. The level of speculation required will depend directly on the time allotted to investigate the appropriate level of rates on a permanent basis. Since interim rates by definition require speedy action or some limited form of investigation and hearing, then it follows that in determining what level of permanent relief may be appropriate in the context of an interim case, one must devote less time and investigation than would otherwise be devoted to the task.

From the foregoing, the Staff respectfully concludes that the proposed standard as a whole does nothing more than run a

full circle back to the standard employed in a permanent case, that is, what is a just and reasonable level of rates? The Staff must further conclude that the proposal is an attempt to answer that question quicker with either a limited investigation and hearing or less than full and complete deliberation on the evidence adduced at a hearing in a permanent case.

Hereinabove, that portion of the Laclede decision which directly confronts the same issue is quoted. The test for interim relief urged by the Laclede Gas Company in that case was that interim relief should be granted "in any case where necessary to afford the utility a fair and reasonable return upon its invested capital." (535 S.W.2d at 569). The Kansas City District, Court of Appeals concluded "the majority and better view rejects the argument that any return less than the rate previously set must be deemed prima facie unreasonable." (Id. at 570). (Note, however, that the proposed non-emergency standard does not address the earning of less than the previously authorized rate of return but requires speculation as to a return to be found in the upcoming permanent case).

The Staff would urge the Commission not to adopt the proposed standard for interim relief. The proposal basically takes the standard of just and reasonable rates and attempts to address that standard outside the context of a permanent rate case. With the already crowded docket, to adopt a standard for interim relief that requires only an earnings shortfall would undoubtedly open "the flood gates to numerous requests of regulated utilities for interim relief which do not afford the public, the Commission Staff, and the Commission an opportunity to thoroughly investigate the true operating results of the utilities. . . ." (Re Union Electric Company, Case No. 17,965, Report and Order at 11 (1974). The Court in Laclede has already rejected the logic of this proposal.

If in its sound discretion the Commission concludes that the process of permanent relief should be speeded up, then alternatives exist which will accomplish that objective, although always at some sacrifice. The Commission has commenced the practice of scheduling rate cases on an expedited basis. If such a policy is to be followed it should not be followed under the guise of a new standard for

interim relief. The Staff would also urge that even if such a policy is continued, the old standard for interim relief should not be discarded. Almost certainly, circumstances will continue to arise which will find utilities in need of speedy relief outside the context of a permanent case or at least prior to completion of the audit or hearing in a permanent case. In such circumstances the existing standard provides admirably for emergency or immediate need.

The Staff is not suggesting nor has it ever suggested that the goal of speeding up the process of determining and establishing just and reasonable rates is without merit. In fact, the Staff has strained to meet, whenever possible, the expedited schedules that the Commission has been setting.

C. Alternatives and Recommended Procedure for Interim Tariffs in the Context of a Permanent Case

The Staff's chief recommendation is to maintain the existing standards and procedures for both interim and permanent relief before the Commission. However, if some change is determined to be desirable the following alternatives and recommendations are pertinent:

(1) The Commission could continue the same procedure it has historically in interim cases, that is a separate docket and a separate hearing, but apply a new substantive standard such as the one proposed in the concurring and dissenting opinions of Commissioner Shapleigh.

(2) The Commission could adopt the proposed standard for interim relief as a rationale for authorizing the use of interim tariffs as a means to speed up the effectiveness of permanent relief. This could be done in basically three ways:

(a) Authorize companies to file interim tariffs immediately after the testimony of all parties is filed, designed to recover either the lowest recommendation of the Staff, exclusive of any known and measurable or true-up allowance, or the lowest recommendation taking the testimony of all parties together. Such tariffs should bear an effective date 30 days after their filing to comply with the notice provisions of Section 393.140(1), RSMo 1978. The Commission then by mere non-action or non-suspension could allow such tariffs to go into effect.

(b) The Commission could schedule a hearing for the limited purpose of addressing the proposed standard for speedy relief sometime after the filings of all parties in the permanent case. The major issue at such a hearing would be the issue of the substantial probability of Company's receiving less than either the lowest recommendation of the Staff or of all parties taken together as a result of the permanent case. The prefiled testimony of all parties could at

that time be introduced into the record, with cross-examination confined to that which would address the limited issues and all other cross-examination reserved for the hearing respecting the permanent tariffs.

(c) Utilizing the proposed standard as the rationale, the Commission could authorize companies to file interim tariffs immediately after the close of the hearing in the permanent case. The order so authorizing could find that based on a preliminary review of all the evidence adduced at the hearing in the permanent case the Commission finds a substantial probability that the Company will receive as a result of the final Report and Order an amount equal to or greater than the lowest filed recommendation of the Staff, exclusive of any known and measurable or true-up allowance, or the lowest filed recommendation of all parties taken together.

These comments, of course, are not an exhaustive list of all alternatives. A myriad of variations on these four basic themes can be found. However, all of them are arguably within the Commission's discretion and satisfy the procedural requirements of either non-action on or non-suspension of Company filed tariffs without a hearing, or action modifying Company filed tariffs after a hearing.

All of the alternatives are potentially troublesome. Any time one embarks on a previously uncharted course one can't possibly foresee all potential problems unless one possesses the gift of precognition. However, some of the more obvious problems will be addressed.

As noted hereinabove, Staff strongly urges that the first alternative be rejected. This alternative basically takes the standard of just and reasonable rates and attempts to address that standard outside the context of a permanent rate case. As previously noted, the Court in Laclede rejected the logic of this proposal.

Alternative 2(a), the first among three that explicitly addresses speeding up the effectiveness of permanent relief through the use of interim tariffs, has the advantage of being the easiest to administer while accomplishing the expressed goal. No hearing is required by this alternative, whereas alternative 2(b) would require some proceeding to be fitted into the Commission docket sometime between the filing of all testimony and the hearing in the permanent case. If the Commission were to adopt the policy of allowing the lowest recommendation of the Staff, exclusive of any allowance for

known and measurable changes or true-up, the amount could be readily identified. If, however, the Commission adopted the lowest filed recommendation of all parties, then some downward movement from Staff's low would have to be readily quantifiable. This calculation might be accomplished by allowing all other parties to file at some time (at least a week, probably two weeks) after the Staff's filing and requiring other parties to quantify proposed adjustments in terms of the movement from Staff's low.

Of course, the dollar amount recommended in the prefiled testimony of all parties almost always changes, up or down. Generally, it is not until the Hearing Memorandum is submitted that all parties have quantified and narrowed the issues. The interim tariff filing could be authorized at the time the Hearing Memorandum is submitted, with a 30 day effective date provision; this procedure would increase the precision of the interim relief. Generally, the movement between the prefiling and the Hearing Memorandum is not upward to such a drastic extent as to absorb the allowance for known and measurable changes or the true-up allowance. Therefore, it is doubtful such movement would effect the conclusion one would reach under the substantial probability test assuming interim relief would always be exclusive of the true-up allowance. However, this alternative is preferable, if the Commission is to base the interim tariffs on the lowest recommendation of all parties, since the submission of the Hearing Memorandum may be the earliest point at which such positions are specifically quantified.

The 30 day effective date on the proposed interim tariffs would allow for Staff examination to insure their accuracy and allow for a period of time for a complaint to be filed by any party who may be able to allege with specificity why the proposed interim tariffs are greater than some amount that may be granted in the permanent proceeding. If the complaint were convincing enough, the Commission, in its discretion, could then suspend the interim tariffs.

Alternative 2(b) has the disadvantage already referred to of requiring a hearing to be fitted into an otherwise crowded docket. The parties may very well be able to stipulate to some level of interim rate relief and rate design, but the November 9, 1982 opinion

of the Western District Court of Appeals in State ex rel. Fischer v. Public Service Commission, No. WD 33,143 poses additional considerations. Certainly, after all testimony is filed, the parties would be in a weak position to argue against the substantial probability of at least the lowest amount in those filings being granted on a permanent basis. This situation being the case, the hearing would generally serve little or no purpose other than to add a time consuming procedural step to the process. Alternative 2(a) is preferable.

Finally, alternative 2(c) would delay the speeding up of interim relief until after the hearing of the permanent case. In that sense, it is a less preferable alternative in light of the goal presumably sought to be accomplished. The most important and insurmountable problem with this alternative is the requirements of Sections 386.130 and 536.080(2), RSMo 1978. Section 386.130, RSMo 1978, states in part:

> . . . All investigations, inquiries, hearings and decisions of a commissioner shall be and be deemed to be the investigations, inquiries, hearings and decisions of the commission, and every order and decision made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and be deemed to be the order of the commission.

Section 536.080(2), RSMo 1978 states in part:

> In contested cases, each official of an agency who renders or joins in rendering a final decision shall, prior to such final decision, either hear all the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. . . .

The problem with alternative 2(c) is that it merely asks the Commission to speed up the deliberative process. The Commission could require limited and more accelerated briefs to address the limited issue of speedier permanent relief, but in fact no hearing will have been held to address the limited issues unless hearing time is taken away from the permanent case. If the Commission requires briefs on the entire issue of overall revenue requirement, based on the entire record, to be filed more quickly than presently is the case, the quality of that work product will certainly suffer. If the Commission's Court Reporters more timely completed the

transcription of the case, the Commission might receive briefs sooner. The only remaining alternative is for the Commission to itself speed up the deliberative and decision making process by either attending all hearings and reading all prefiled testimony and written rebuttal testimony or reading and considering the entire record at the close of the hearing. For the reasons noted above, alternative 2(c) is the least desirable of all three alternatives under the proposal to speed up permanent relief. The briefing and deliberative process are the most important elements of making a final decision and the quality of either should not be sacrificed.

If the Commission is to exercise its sound discretion by adopting a policy to accelerate permanent relief, the Staff would recommend consideration of some variation of alternative 2(a).

D. Policy Considerations

Having concluded that action by the Commission to speed up the effective date of permanent relief is within its sound discretion and perhaps procedurally attainable, there are policy considerations and practical problems which need to be addressed. By necessity, a candid discussion of the ratemaking process as viewed from the perspective of an advocate is required.

One of the first considerations is the effect such a policy would have on the character of prefiled testimony if the filing of that testimony becomes the act which triggers a certain level of rate relief. Although the Staff would not even suggest that its prefiled testimony would purposefully understate any revenue requirement, there is room for legitimate conservatism in the filing of testimony which would lower the recommended relief. The point has already been made herein in the testimony of Staff accountant Steven C. Carver that the timing of rate relief impacts the amount. Even without considering an allowance for known and measurable changes at the time of true-up, there are items in every case which will change, if the reference point is a time two or more months earlier than would otherwise be the case.

There are numerous groups which seek and are granted intervention by the Commission in major rate cases. Again, not to suggest falsely held accounting or other ratemaking positions, but the

filings of certain parties may be pushed to the outer limits of legitimate argument.

What would be the temptation toward conservatism or forced filings? The parties to a rate case other than the Company have two bargaining chips; the quality of their case and time. By far, time is the most important item because, generally, parties move to a position which is strongly defensible prior to going to hearing, in order that some acceptable level of quality will be present in their cases. Parties generally recognize it is unwise to sacrifice credibility to retain some bargaining position.

Staff surmises that a motivating factor for companies to settle rate cases is to get the new rates into effect at an earlier date than would be the case, if the companies took their cases to hearing. Therefore, the Staff contends that in settling rate cases, companies trade possible additional rate relief for rate relief at an earlier date. The early rate relief is worth dollars to the companies.

This very valuable bargaining chip will all but disappear, if the Commission adopts a new policy by which permanent rate relief is made speedier vis-a-vis interim tariffs. All rate cases would go to hearing. If The Gas Service Company's last rate case, Case No. GR-82-151, had not been settled by the parties, the Commission would have had to decide that case at the same time it was hearing evidence in Southwestern Bell Telephone Company's last rate case, Case No. TR-82-199. Respecting parties other than the companies, the temptation will exist to retain some bargaining position by filing a lower revenue requirement at some sacrifice to the quality of the case.

Not allowing interim tariffs until after full hearing might remedy to some extent these faults in the hypothesized process by putting off the granting of speedy relief by approximately a month, thereby retaining more of the time bargaining chip. However, assuming such relief was still to be based on the parties' filings, it is doubtful that the temptation to present conservative or forced filings would be removed. Nothing short of full deliberation and a decision on the full record will cull the unmeritorious positions.

Basing interim rate relief on a number contained in a party's filing which addresses some time period wholly different from the one for which the increase will be effective is imprecise and speculative. This is not to say that the Company is unlikely to prevail in this or any other case as to the proposed criterion of substantial probability, but it is clear that the amount of revenue relief appropriate at, for example, February 1, 1983, may be significantly different from that appropriate at November 29, 1983.

The Commission and the Staff have made real attempts at addressing specific major items of cost in an attempt to minimize the impact of price increases over time on a utility's earnings. The two major developments in this area are true-up audits and, in a number of cases, an attempt at forecasting coal prices, the largest single expense of an electric company. The impact an earlier effective date would have on the theoretical or accounting validity of these developments is not yet clear, but in shifting the time period that is the point of reference, this is a question which will have to be explored.

There must be some interim rate design accompanying the rate relief. Interim rate design is a major point of controversy in this proceeding and has been a major issue in other interim proceedings because of the impact that rate design has on the determination of whether there should be a refund to certain classes of customers, if the interim rates are authorized subject to refund.

The Commission may lawfully reject the positions of all parties in a case and, based on the evidence in the record, conclude that a revenue requirement lower than that recommended by any party is just and reasonable. Also, parties are free to take positions not expressed in their direct testimony and exhibits and attempt to make a case on cross-examination. However, the refund mechanism would reduce the impact of such a contingency to a temporary loss of cash flow to the ratepayer.

Finally, motions for extensions of time in order for the Staff to complete its audits and prepare and file direct testimony and exhibits will become increasingly controversial and will likely be contested by the companies, as is already the case in some instances.

E. Conclusion

The Staff would strongly advise that the Commission not abandon thirty-three years of precedent in adopting a new standard for interim rate relief.

The Staff would further recommend that the procedures currently maintained in permanent cases not be disturbed. The determination of just and reasonable rates is a delicate and arduous process. The potential problems associated with adopting a policy of utilizing interim tariffs to speed up the effective date of permanent rate relief threaten the delicate balance of interests inherent in that process. However, if such a policy is to be adopted, the Commission should nevertheless maintain its emergency or immediate need standard to deal with extraordinary circumstances occurring outside the context of a permanent or non-emergency interim proceeding.

In conclusion, the Staff would strongly urge that the Commission maintain its current standards and procedures, reaffirming that a full investigation, full hearing and full deliberation are essential elements of the process of setting just and reasonable rates.

Respectfully submitted,

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CERTIFICATE OF SERVICE
I hereby certify that copies of the foregoing have been mailed or hand-delivered to all parties of record on this 31st day of January, 1983.
Kevin A. Rapp

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