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July 12, 1999

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED

JUL 12 1999

Missouri Public
Service Commission


**RE: Proposed Electric Affiliate Transactions
Case No. EX-99-442**

Dear Mr. Roberts:

Enclosed for filing please find the original and fourteen copies of **Public Counsel's Response in Opposition to Implement or Adopt Contested Case Procedures**. I have on this date mailed or hand-delivered copies to all counsel of record. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,


Douglas E. Mischeel
Senior Public Counsel

DEM/mk

Enclosures

cc: Counsel of Record

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

FILED

JUL 12 1999

Missouri Public
Service Commission

In The Matter Of 4 CSR 240-20.015)
Proposed Rule – Electric Utilities) Case No. EX-99-442
Affiliate Transactions.)

In The Matter of 4 CSR 240-80.015,)
Steam Heating Utilities Affiliate) Case No. HX-99-443
Transactions)

In The Matter Of 4 CSR 240-40.015)
Proposed Rule – Gas Utilities) Case No. GX-99-444
Affiliate Transactions.)

In The Matter Of 4 CSR 240-40.016)
Proposed Rule – Gas Utilities,) Case No. GX-99-445
Marketing Affiliate Transactions.)

**Public Counsel's Response in Opposition To Implement
Or Adopt Contested Case Procedures**

Comes Now the Office of the Public Counsel ("Public Counsel") and for its Response In
Opposition To Implement Or Adopt Contested Case Procedures states as follows:

1. On or about July 1, 1999 UtiliCorp United Inc., d/b/a Missouri Public Service
("MPS"); The Empire District Electric Company ("Empire") and St. Joseph Light & Power
Company ("SJLP") filed their "Joint Motion For Implementation Of Contested Case Procedures"
in EX-99-442, HX-99-443, GX-99-444 and GX-99-445.

2. On or about July 1, 1999 Associated Natural Gas Company, Laclede Gas Company, Missouri Gas Energy and Trigen-Kansas City Energy Corporation filed their "Motion To Adopt Contested Case Procedures" in HX-99-43, GX-99-444 and GX-99-445.

3. The Missouri Utilities request that the Commission adopt "contested case" procedures in the above referenced rulemaking proceedings. Public Counsel opposes the Missouri Utilities request because the rulemaking proceedings are not "contested cases" pursuant to Missouri law and the procedures established by the Commission in the rulemaking proceedings are wholly consistent with Missouri law.

4. The Missouri Utilities assert that pursuant to certain provisions of Section 386.250 RSMo. 1998 and 393.140 RSMo. 1994 the Commission is required to "conduct a hearing before it takes any action" with respect to the rulemaking proceedings at issue. Based upon these assertions the Missouri Utilities allege that the rulemaking proceedings at issue are "contested cases" within the meaning of the Administrative Procedure Act. A contested case is defined in Section 536.010(2) as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." (emphasis added). Of course, what the Missouri Utilities neglect, is the fact that the rules proposed in the above referenced proceeding are not determining legal rights, duties or privileges of specific parties. Rulemaking, by its nature involves an agency statement that affects the rights of individuals in the abstract. Baugas v. Director of Revenue, 878 S.W.2d 39, 42 (Mo. banc 1994) citing Bonfield, State Administrative Rulemaking, § 3.3.1 (1986). A Rule is defined as an "... agency statement of general applicability that implements, interprets, or prescribes law or policy,

or that describes the organization, procedure, or practice requirements of an agency.” § 536.010(4). The term “rule” as used in Chapter 536, does not include a determination, decision or order in a contested case.” § 536.010(4)(d). State ex rel. City of Springfield v. Public Service Commission, 812 S.W.2d 827, 834 (Mo. App 1991). Because the rules proposed in the above referenced proceedings are not determinations of the rights of specific parties but are rules of general applicability that are prospective in nature, the Missouri Utilities attempt to strap the Commission to the procrustean bed of contested case procedures should be rejected.

5. Rulemaking requirements for administrative agencies such as the Commission are wholly different from when the Commission is acting in the quasi-judicial or adjudication mode. Unlike the process of administrative adjudication (i.e. contested cases) in which constitutional principles of due process play an important role, procedural opportunities such as notice and an opportunity to be heard in some kind of adjudicatory hearing are not required in rulemaking under traditional motions of administrative law and procedural due process. See, e.g. Vermont Yankee nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542, 98 S. Ct. 1197, 1210-11, 55 L.Ed2d 460, 478 (1978).

6. Moreover, the Missouri Utilities apparently have chosen to cite only to the provision of § 393.140, subsection (5) and (8) that mention a hearing requirement while ignoring subsection (4) and subsection (11) that do not have the alleged hearing requirement. Subsection (4) of 393.140 provides in pertinent part:

(4) Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, electrical corporations, water corporations and sewer

corporations engaged in the manufacture, sale or distribution of gas and electricity for light, heat or power, or in the distribution and sale of water for any purpose whatsoever, or in the collection, carriage, treatment and disposal of sewage for municipal, domestic or other necessary beneficial purpose.

Subsection (11) provides in pertinent part:

The Commission shall:

... have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

These two statutory sections give the Commission the authority to promulgate the rules in this proceeding without a hearing at all. Of course, the Commission has granted a hearing with respect to all of the rules.

7. Next, the Missouri Utilities claim that the citation to § 386.250(6) entitles the utilities to a “contested case” hearing. That Section 386.250(6) may require a “hearing” does not mean that the hearing must take the form of an adjudicatory, trial-type hearing in the nature of that in a contested case. As noted in Missouri Practice Volume 20 2nd Ed. § 639 at page 152:

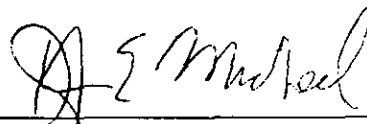
In the absence of a clear indication of legislative intent that more is required, the presence of the mandate for hearing in a rulemaking context means only that the agency cannot promulgate the rule on the basis of an invitation for written comments on its proposal. It must meet interested members of the public face to face with an opportunity for oral presentation and comment, but the legislative quality of rulemaking assures that nothing more is expected than a legislative-style hearing, not unlike that which a legislative committee might hold on a bill before the legislature.

The Commission consistent with the Legislative-style hearing has schedule an opportunity for oral presentation and comment with regard to the above referenced rules. nothing more is required of the Commission.

WHEREFORE: The Office of the Public Counsel requests that the Commission deny the Missouri Utilities request to implement or adopt contested case procedures in the above referenced rulemaking cases.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 
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CERTIFICATE OF SERVICE

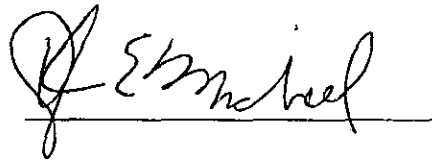
I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 12th day of July, 1999:

Dan Joyce
Missouri Public Service Commission
P.O. Box 360
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A handwritten signature, likely "J. E. McNeil", is written over a horizontal line.