# Missouri Public Service Commission

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Missouri Public
Service Commission

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

**RE: Case No. HX-99-443 - Affiliate Transaction Rules for Regulated Heating Companies**

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of the **ANSWER OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION TO MOTION TO ADOPT CONTESTED CASE PROCEDURES.**

Thank you for your attention to this matter.

Sincerely yours,

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LLS/wf
Enclosure
cc: Counsel of Record

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

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| In the Matter of 4 CSR 240-20.015 Proposed Rule - Steam Heating Utilities Affiliate Transactions. | ) ) ) | Case No. ~~EE~~ HX-99-443 |

**ANSWER OF THE STAFF OF**
**THE MISSOURI PUBLIC SERVICE COMMISSION**
**TO MOTION TO ADOPT CONTESTED CASE PROCEDURES**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its answer to the Joint Motion for Implementation of Contested Case Procedures by UtiliCorp United, d/b/a Missouri Public Service, The Empire Electric Company, and St. Joseph Power and Light (Movants); and the Motion to Adopt Contested Case Procedures of Associated Natural Gas, Laclede Gas Company, Missouri Gas Energy, and Trigen Kansas City Energy Corporation (Joint Movants) states:

The Missouri Public Service Commission (Commission) should reject the motions to adopt contested case procedures. Joint Movants argue rigorously that this is a contested case.[1] They are wrong. The procedures in a contested case are inapplicable to the rulemaking (legislative-type or quasi-legislative) process as defined in the Missouri Administrative Procedure Act (Chapter 536 or Missouri APA).[2] The process of promulgating the affiliate transactions rules is a quasi-legislative function, and adoption of contested case procedures now would mean invalidating the current process and beginning again.

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[1] Joint Motion for Implementation of Contested Case Procedures of Joint Movant's (Joint Movant's Motion) at 5.

[2] Chapter 536, RSMo (Supp. 1998).

In considering these motions, it is important for the Commission to remember that the rulemaking procedures under the Missouri APA provides all of the due process to which the Movants and Joint Movants, and any other participants in the process, are entitled.

**I. This is not a contested case proceeding.**

In this case, the Commission, as a state agency[3] is engaging in its quasi-legislative, or rulemaking function. Joint Movants argue strenuously that this is a contested Case proceeding under § 536.100 RSMo (Supp. 1998). Staff will demonstrate that this proceeding is not a contested case, and the Motions to Adopt Contested Case Procedures not only should, but must be rejected.

**A. Definition of rulemaking.**

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 the agency."[4] "The term 'rule,' as used in Chapter 536, RSMo 1986 does not include a determination, decision, or order in a contested case."[5] Indeed, the definition of a rule found in 536.010(4) specifically excludes a decision[6] or determination in a contested case proceeding. A rule, by statutory definition, cannot be a final decision in a contested case.[7]

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[3] Chapter 386, RSMo (Supp. 1998).

[4] Section 536.010(4), RSMo (Supp. 1998).

[5] State *ex rel.* City of Springfield v. Public Service Comm'n of State of Missouri, 812 S.W.2d 827 (Mo. App. W.D. 1991) *citing* Sec. 536.010(4)(d). RSMo 1986 (overruled on other grounds, Missouri Municipal League v. State of Misouri, 932 S.W.2d 400, 403 (Mo. banc 1996).

[6] Section 536.090 states that "[e]very decision and order in a contested case shall be in writing, and ... shall include or be accompanied by findings of fact and conclusions of law."

[7] Section 536.010(4). RSMo (Supp. 1998). The Commission must hold a hearing in this rulemaking because it involves § 386.250(6) as its statutory authority for the proposed rules.

**B. Definition of a contested case.**

In contrast to a rulemaking, the Missouri Administrative Procedure Act (APA)[8] defines a 'contested case' 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."[9] In *Hagely*[10] the Supreme Court interpreted the statute saying: "[t]his Court has explained that a "contested case" within the meaning of the Act does not mean that every case in which there may be a contest about 'rights, duties or privileges' but instead one in which the contest is required by law to be decided in a hearing before an administrative agency.'"[11] The Court continued:

> We think this means that a 'contested case' . . . is a case which must be contested before an administrative agency because of a requirement (by constitutional provision, statute, municipal charter provision, or ordinance...) for a hearing before it of which a record must be made unless waived. Section 536.060.

841 S.W.2d at 668.

Accordingly, the requirement of a hearing by statute or otherwise is an important distinction between a contested and a non-contested case under Chapter 536 RSMo (Supp. 1998). While it is true that § 386.250 RSMo (Supp.1998),[12] requires the Commission to promulgate rules only after

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[8] Section 536.018 *et seq.* RSMo (Supp. 1998).

[9] Hagely v. Board of Education of Webster Groves School Dist., 841 S.W.2d 663 (Mo. 1992) (citations omitted).

[10] *Id.* at 664.

[11] *Id.* (emphasis added).

[12] Subsection (6) says that the Commission authority extends "[t]o the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service. All such proposed rules shall be filed with the secretary of state and published in the Missouri Register as provided in chapter 536, RSMo, and a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule;

a hearing in which the Commission is to take evidence of the reasonableness of its proposed rule, as Professor Neely[13] points out in *Missouri Practice and Procedure,* many statutes require that a hearing be held before a state agency may engage in rulemaking.[14]

Joint Movants argue that because "a hearing is clearly and unambigiously required before the commission may exercise the authority upon which it has relied in issuing the Proposed Rules, the instant proceeding must be considered a 'contested case . . .'"[15] Prof. Neely disagrees,[16] saying

> "[t]hat such statutes 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. 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." [T]he agency "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."

There is no indication of any legislative intent to require contested case type proceedings when the Commission engages in its rulemaking function. The legislature is quite capable of expressing its intent that certain procedures be followed. The "Division of Health cannot promulgate rules on radiation . . . 'except after a public hearing to be held after ten days' notice by public advertisement of the date, time and place of a hearing . . .' This represents a legislative judgment that notice in the *Missouri Register* is not sufficient and that the added expense of published notice

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[13] 20 Alfred S. Neely, Missouri Administrative Practice and Procedure §6.39 (1995).

[14] *Id.*

[15] Joint Movants Motion at 5.

[16] 20 Alfred S. Neely, Missouri Administrative Practice and Procedure §6.39 (1995).

is worthwhile in light of the increased likelihood of public awareness and participation".[17]

Prof. Neely also notes that "[o]ther provisions pertaining to the conduct and participation in the public hearing . . .[include] afford[ing] a right to submit a written statement in rebuttal folowing the hearing."[18] As is obvious from these examples, the legislature is perfectly capable of clearly expressing their intent when they believe that certain procedures should be followed when an agency engages in its rulemaking function. The legislature has expressed a clear intent that the Commission hold a hearing at which interested persons may appear and support or oppose the rule. They have imposed no additional requirements.

"A hearing that is not held pursuant to the procedural format necessary under [Missouri] APA does not qualify as a contested case, even though the hearing is required by law."[19] This hearing should not be held according to the procedural requirements in the MAPA for a contested case because the contested case procedures are inapplicable to the rulemaking process. Were the contested case procedures used exclusively it would not be possible to issue a final order of rulemaking, because the required procedures for promulgation of a rule would not have been followed.[20]

**C. Other distinctions between a rulemaking and a contested case.**

There are important differences between a rulemaking proceeding and a contested case.

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[17] *Id.*

[18] *Id. citing* Section 260.400 (hazardous waste facilities and hazardous waste generators).

[19] Hagely v. Board of Education of Webster Groves School Dist., 841 S.W.2d 663 (Mo. 1992) (citations omitted).

[20] Sec. 536.010(4) RSMo Cumm. Supp. 1998.

In a rulemaking there are no Parties as such, the form of notice differs significantly and the nature of the hearing is different.

**1. Notice**

First, the form of notice is different for the two forms exercising of administrative functions. In a contested case, the agency must notify all necessary parties.[21] In contrast, in accordance with § 536.021.1 RSMo Supp. 1998, notice of proposed rulemaking and a subsequent order of rulemaking are to be published in the *Missouri Register,* a notice to the public that a public hearing will be held, the date and time . . . . Section 536.021.6 RSMo Supp. 1998, directs that rules of state agencies are void unless made in compliance with § 536.021 notice provisions.

"[T]he purpose of the notice procedure (in a rulemaking) is to allow the opportunity for comment by supporters or opponents of the measure (rule) and so to induce a modification."[22] In a contested case, by contrast, the agency is required by § 536.067 to send notice to all necessary parties.[23] There are no necessary parties in a rulemaking so that the form of notice required of a contested case is not even possible.

**2. Participants**

Second, the participants differ. Contested cases have "specific parties" whose specific,

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[21] Section 536.067.

[22] State *ex rel.* City of Springfield v. Public Service Comm'n. of State of Missouri, 812 S.W.2d 827 (Mo. App. W.D. 1991) *citing* St. Louis Christian Home v. Missouri Commission On Human Rights, 634 S.W.2d 508, 515 (Mo. App. 1982).

[23] In a contested case, the agency must provide notice to all necessary parties. § 536.067. At the hearing, oral evidence must be taken on oath or affirmation; the parties may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach any witness, and rebut the evidence; a record of the proceedings must be made and preserved; and evidentiary rules must be followed. § 536.070. Depositions may be taken, subpoenas may be issued, and briefs may be filed. §§ 536.073, RSMo Supp.1991; 536.077, 536.080. Decisions must be in writing and must include findings of fact and conclusions of law. § 536.090.

individual rights the decision will bind. These parties generally must receive notice and be given the right to an adversarial hearing on the record before the Commission.

In the rulemaking in which the Commission is engaged, interested persons are invited by notice published in the Missouri Register to attend the public hearing and to comment on the Proposed Rule, but the final order of rulemaking will apply to the "public." In other words, the rule will apply to all persons in the affected class, whether they appear or not. The final order will be a rule of general applicability and will not apply to "specific parties."

**3. Adversity is required.**

Despite the fact that this rulemaking may be controversial, or that the participants in the hearings may actively oppose the rule, this is not an "adversarial process." "A case is not necessarily a contested case because a statute requires a hearing,"[24] and "[t]he existence of opposing interests alone falls short of meeting the statutory definition of a contested case."[25] "As used in § 536.010 'hearing' means an adversary hearing."[26]

A parole hearing case is especially informative.[27] The Eastern District noted that "[o]ur

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[24] Shawnee Bend Special Road District v. Camden County Commission, 800 S.W.2d 455, 456 (Mo. App. S.D. 1990) *citing* St. Louis County v. State Tax Commission, 608 S.W.2d 413, 414 (Mo. banc 1980) (other citation omitted).

[25] *Id.*

[26] *Id.* (citations omitted).

[27] State *ex rel.* Mitchell v. Dalton 831 S.W.2d 942, (Mo. App. E.D. 1992). (*citing* City of Richmond). Our Supreme Court has said that not every case in which there is a contest about rights, duties or privileges is a "contested case," even though a hearing may be held. *e.g.*, City of Richmond Heights v. Bd. of Equalization, 586 S.W.2d 338, 342 (Mo. banc 1979). Moreover, in using the term "hearing" in § 536.100, the General Assembly contemplated an "adversary hearing," *Id.* at 342-43, and, thus, the element of adversarial parties is essential to the definition of a "contested case." St. Louis County v. State Tax Comm'n., 608 S.W.2d 413, 414 (Mo. banc 1980). More specifically, an adversary hearing is "a contest of opponents favoring divergent results in the decision to be made by the agency." Benton-Hecht Moving & Storage, Inc. v. Call, 782 S.W.2d 668, 671 (Mo. App. 1989). Some procedural indicia of the adversarial nature of a "contested case" are a hearing, required notice to all necessary parties, the use of only sworn

Supreme Court has said that not every case in which there is a contest about rights, duties or privileges is a 'contested case,' even though a hearing may be held."[28] "Moreover in using the term 'hearing' in § 536.100., the General Assembly contemplated an 'adversary hearing' and thus the element of adversarial parties is essential tot he definition of a 'contested case.'" The court went on to say "specifically an adversary hearing is 'a contest of opponents favoring divergent results in the decision to be made by the agency.'"[29]

**II. The Commission should not adopt contested case procedures.**

**A. All of the due process to which Movants and Joint Movants are entitled will be provided.**

The Commission should not deviate from the rulemaking procedures that it follows in every rulemaking in which it engages. Joint Movants argue that public policy, the nature of the matters addressed by these proposed rules, and the interests of consumers in general demand that the Commission adopt contested case procedures.[30] However, neither public policy, the subject matter of rules, nor the interest of consumers determines the due process requirements of rulemaking.

The due process requirements of rulemaking are determined by Missouri statutes. Specifically, § 536.021.1 requires that before making, amending or rescinding a rule, the Commission must first file a notice of proposed rulemaking with the secretary of state. Section

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testimony, the parties' right to call and examine witnesses and to cross-examine opposing witnesses, and evidentiary rules. §§ 536.063-536.090; City of Richmond Heights, supra, 586 S.W.2d at 342; Welsch v. Dept. of Elem. and Secondary Education, 731 S.W.2d 450, 453 (Mo. App. 1987).

[28] 831 S.W.2d at 943.

[29] *Id.*

[30] Joint Movant's Motion at 2.

536.021.2 RSMo (Supp. 1998) requires that the notice must contain . . . "[n]otice that anyone may file a statement in support of or in opposition to the proposed rulemaking" . . and "[n]otice of the time and place of a hearing on the proposed rulemaking if a hearing is ordered . . ." Section 386.250 (6) RSMo (Supp. 1998) requires a hearing on rules granted under its grant of authority. As noted above, the requirement of hearing, alone, does not require contested case procedures. Section 386.410 states that "[a]ll hearings before the commission . . . shall be governed by rules to be adopted and prescribed by the commission." The Commission has prescribed such procedures in 4 CSR 240-2.180.

The Commission has followed the requirements of § 536.021.1 and 536.021.2 and provided proper public notice. Interested persons have already participated in numerous discussions with Staff, have received the required notice, and have submitted both initial and reply comments. The Commission will hold the appropriate hearing(s) for its rulemaking procedure, as published in the *Missouri Register*. Thus all process that is due will be afforded Movants, Joint Movants and any other interested person or entity. As the Western District recently noted a person or entity "is entitled only the process that is *due*. In this case, that is the process due under Missouri Statutes."[31]

**III. Why the Commission must not adopt contested case procedures.**

Acceptance of this matter as a contested case would invalidate the Commission's ability to issue a Final Order of Rulemaking. The result of a contested case proceeding before the Commission is generally a final decision or determination in the form of a Final Order. As noted above, a decision or determination issued in a contested case is specifically excluded from the

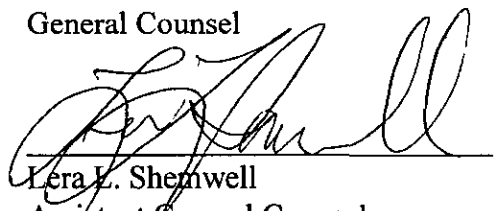
[31] Cade v. State, 1999 WL 55825 (Mo. App. W.D. 1999).

definition of a rule. If the Commission were to adopt contested case procedures, and not then issue a decision, but instead try to issue a final order of rulemaking, that order could be challenged on the basis that contested case procedures require issuance of a final decision and not a final order of rulemaking. This could leave the Commission without the ability to issue a Final Order of Rulemaking.

The current rulemaking proceeding that is underway will provide the Commission with all of the information it needs concerning the reasonableness of the rules in order to issue its final order of rulemaking. Interested persons have the opportunity to address their concerns to the Commission face-to face and the current procedures will allow the Commission to complete the process in a timely manner.

Respectfully submitted,

DANA K. JOYCE
General Counsel



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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, as shown on the attached service list this 12th day of July, 1999.

Lera L. Shemwell

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**July 12, 1999**

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