PEPER, MARTIN, JENSEN, MAICHEL AND HETLAGE
ATTORNEYS AT LAW

2000 MAIN STREET
FORT MYERS, FLORIDA 33901-3050
(813) 337-3850

720 WEST MAIN STREET
BELLEVILLE, ILLINOIS 62220-1515
(618) 234-9574

TWENTY-FOURTH FLOOR
720 OLIVE STREET
ST. LOUIS, MISSOURI 63101-2396

(314) 421-3850
TELEX: 434257
TELECOPY: (314) 621-4834

WRITER'S DIRECT DIAL NUMBER
(314) 444-6404

1625 WEST MARION AVENUE
PUNTA GORDA, FLORIDA 33950-5295
(813) 637-1955

4501 TAMIAMI TRAIL NORTH
NAPLES, FLORIDA 33940-3016
(813) 261-6525

August 29, 1992

via Federal Express

Mr. Brent Stewart
Executive Secretary
Missouri Public Service Commission
Truman Building
301 W. High Street
Jefferson City, Missouri 65102

RE: In the Matter of the Commission's Rulemaking on Electric Utility Resource Planning-- Case No. EX-92-299

Dear Mr. Stewart:

Enclosed for filing is the original and one (1) copy of the Reply Comments of the Missouri Industrial Energy Consumers in the above-styled case.

We appreciate your bringing this filing to the attention of the Commission.

Very truly yours,

Diana Schmidt

Diana M. Schmidt

Enclosures (2)
cc: All parties on the Commission's mailing list w/ enclosure

FILED
AUG 31 1992
PUBLIC SERVICE COMMISSION

STL-61735.1

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Commission's Rulemaking on Electric Utility Resource Planning	)))	Case No. EX-92-299

Reply Comments of the Missouri Industrial Energy Consumers

Pursuant to the Commission's Notice of Public Hearing published in the *Missouri Register Volume 17, Number 13, July 1, 1992,* Ag Processing Inc., Anheuser-Busch Companies, Inc., Archer-Daniels Midland, Barnes Hospital, Chrysler Motors Corporation, Continental Cement Corporation, The Doe Run Company, Emerson Electric Company, Ford Motor Company, General Motors Corporation, Holnam, Inc., MEMC Electronic Materials, Inc., Mallinckrodt Specialty Chemicals Company, McDonnell Douglas Corporation, Mississippi Lime Company, Monsanto Company, Pea Ridge Iron Ore Company, River Cement Company, LaFarge Corporation, and Boehringer Ingelheim Animal Health ("the Missouri Industrial Energy Consumers" or "MIEC") offer the following comments in reply to comments submitted by other interested parties regarding the Commission's Proposed Rules on Electric Utility Resource Planning, 4 C.S.R. Chapter 22 ("the Proposed Rules"):

In considering the written comments of interested parties, the purpose of this rulemaking must be borne in mind. The proper purpose of these rules is "to set minimum standards to govern the scope and objectives of the resource planning process." Proposed Rules at 4 CSR 240-22.010 (1). Good planning is the goal of the rule; good decisions cannot be the goal. Only utility management can make planning *decisions* as to how to run the utility. Fundamental

changes in Missouri law relating to prudence of utility decisions and cost recovery mechanisms for utilities are beyond the scope of a rulemaking designed to ensure good planning.

Plan Approval

Several utilities argue that the proposed rule should provide for approval of the utility resource plan. They assert that a process by which the Commission approves a plan, and allows a presumption of the prudence of utility actions taken pursuant to that plan for purposes of cost recovery in future rate cases, would improve regulation by allowing the Commission to rule on planning decisions *before* investments are made, rather than in hindsight. In particular, Union Electric argues for a presumption of prudence that would shift the burden of proof to ratepayers or others challenging at the time of cost recovery utility resource decisions:

> "the Company is proposing only that a *presumption* of prudence attach to an approved strategy. A party would therefore have the opportunity to rebut this presumption of prudence in a later proceeding...However, *the initial burden of proof as to reasonableness should rest on the challenging party and not on the utility.*"

Initial Comments of Union Electric Company at p. 10 (emphasis added.)

The Commission does not have the authority to allow the "presumption of prudence" desired by the utilities. Missouri Statutes governing the Commission and regulated utilities place the burden of proof in a rate case squarely on the *utility*: "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...electrical corporation." Section 393.160 RSMo (1986 & Supp. 1991). "Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by...statutes." *State ex rel. Util. Consumers Council, etc. v. PSC*, 585 S.W.2d 41 (Mo. 1979)(en banc). The utility version of the proposed rule would

fundamentally change the Missouri regulatory framework, and it is clear that only the Missouri legislature can shift the burden of proof in order to eliminate regulatory and business risks that the utilities complain of.

Not only does Section 393.160 prevent the Commission from giving utilities a presumption of prudence at the time of cost recovery, Missouri's "used and useful" law also prevents prudence determinations for purposes of cost recovery made in advance of the utility's rate case. Missouri Revised Statutes Section 393.135 ("the used and useful law") provides as follows:

> Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on...cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

Section 393.135 RSMo (1986 & Supp. 1991). An advance determination of the prudence of utility decisions would undermine this standard by presuming decisional prudence and therefore cost recovery for investments not yet fully operational and used for service, i.e. planned investments, whether that investment be a generating plant or a DSM measure. Although the proposed "approval" of utility resource plans and accompanying presumption of prudence do not themselves constitute a direct charge or demand for charge for a utility service, the effect of such a scheme would be to increase rates in a manner not provided by Missouri law.

The Missouri Supreme Court's reasoning in the *UCCM* case strongly supports this conclusion. There, the Court considered the validity of fuel adjustment clauses ("FACs") that would allow an automatic fuel cost recovery. 585 S.W.2d at 46. It determined that "to

permit...such costs to be automatically adjusted would create a third method of approval of rates not within the contemplation of the authorizing statutes":

> [A]lthough the FAC may not *itself* be a rate, by approval of an FAC in a utility's rate schedule, the commission in advance approves any increase (or decrease) in rates which will automatically result through application of the FAC if the price of fuel to the utility increases or decrease. *It would exalt form over substance to say that approval of an FAC is proper because the FAC is merely a "rule relating to a rate" and not a rate itself, where the effect of such approval is to permit increases in rates in a manner not provided by statutes.* It would also come at least dangerously close to abdication by the commission of its power to set just and reasonable rates, for the commission has determined in advance that any fuel charge made in accordance with the prescribed formula will be proper without regard to whether, in light of other cost factors, the charge is reasonable.

UCCM, 535 S.W.2d at 57 (emphasis added).

Similarly, plan approval and an accompanying prudence presumption through this rulemaking would create a method of approval of rates not within the contemplation of Missouri law governing the Commission. It is no answer for utilities to contend that plan approval would not *guarantee* cost recovery in that the presumption could be rebutted. A provision in utility resource plans allowing an advance prudence determination would be a rule relating to a rate, which, for purposes of Missouri statutes, would permit increases to rates in the absence of ratepayers undertaking the burden to challenge those increases, and therefore is tantamount to a rate or charge for services not used or useful to the public. *See id.*

Not only would plan approval violate Missouri statutes governing the commission, it would be bad regulatory policy. Utilities complain of the "significant financial risk" to them caused by the uncertainties in resource planning, and state that these risks would be reduced if

the Commission gave direction to them through plan approval. For instance, Kansas City Power and Light ("KCPL") states:

> Without Commission approval, the Company will be in the precarious position of selecting resource acquisition strategies and investment decisions without all the pertinent information, i.e., while being subject to future financial risk, brought about solely by the lack of Commission guidance and direction. Management must know the rules of the game, since *shareholder* money will be put at risk.

Initial Comments of KCPL at p. 6. Similarly, Union Electric states that the Commission should resolve utility planning strategy balances and tradeoffs in advance of expenditures in order to eliminate uncertainties-- uncertainties as to reasonableness and prudence of utility decisions, and therefore uncertainties as to cost recovery. Comments of Union Electric Company at pp. 12-13. This reduction of uncertainty would do little or nothing to lower rates. Instead, uncertainty and risk for which the utility is already compensated in its rate of return would be reduced. Plan approval would not eliminate uncertainty about the financial impacts and consequences of decisions; rather, plan approval would merely inappropriately shift the financial burden of this uncertainty entirely to the shoulders of ratepayers. As the Commission noted in *Union Electric*:

> The utility seeks investment based upon analysis of the profit and risk involved in the project. The reasonable investor examines the potential profit and risk and acts accordingly...
>
> Part of the potential risk is that a portion of the investment may not be recovered through rates...If this were not true and a stockholder could be assured a return of his investment whether the plant was cancelled or not, it would make the investment practically risk-free...Stockholders and investors have received some compensation for risk through the rate of return allowed by the Commission.

In the matter of Union Electric Company of St. Louis, Missouri for authority to file tariffs increasing rates for electricity service provided to customers in the Missouri service area of the Company, 28 Mo. P.S.C. 189, 200-201. What utilities would like to accomplish through this rulemaking is elimination of decision-making risks to them. *See* Comments of Union Electric Company at p. 10. It is true that all utilities face significant uncertainties and risks. However, it is not for the Commission to make decisions for the utilities. Consistent with the principle that regulation serves as a surrogate for competition, the Commission should to the broadest extent possible allow utilities broad discretion to manage their business affairs. *In the matter of the investigation of developments in the transportation of natural gas and their relevance to the regulation of natural gas corporations in Missouri*, 29 Mo. P.S.C. (N.S.) at 137, 143, Case No. GO-85-264 (March 20, 1987). *See also Laclede Gas Company*, 600 S.W.2d at 228 ("It is obvious that the PSC has no authority to take over the general management of any utility.")

KCPL asserts that resource planning rules "would provide the Commission with all relevant information required to allow contemporaneous approval to occur. It simply comes down to an issue of the Commission deciding to allocate the necessary resources to the process." Initial Comments of KCPL at p. 4. To the contrary, the rules presently do not require information adequate for plan approval. As the Commission Staff notes in its initial comments that if plan approval is adopted (a proposal that Staff opposes), then "the rules promulgated by the Commission *should be much more prescriptive than the rules that appear in the July 1, 1992 Notice of Proposed Rulemaking*." Initial Comments of the Staff of the Missouri Public Service Commission at p. 2. The proposed rules submitted by the utilities have not provided any such

prescriptive regulations. Thus, utilities would provide minimal information, obtain approvals, and proceed at the peril not of stockholders but of ratepayers.

The MIEC submits that tremendous allocation of Staff resources at great expense would be necessary to administer a plan approval process. Under a plan approval scenario, the Staff would be deluged with data and entangled in a process requiring enough technical information for all parties, and ultimately the Commission, to evaluate all utility strategies and alternatives-- indeed, enough information for the Commission to manage the utility itself. As KCPL notes, "utility resource planning is quite complex and involves numerous assumptions and evaluations of uncertainties that allows for an infinite combination of possibilities." Initial Comments of KCPL at p. 5. Are the Commission and its Staff prepared to confront that infinite combination of uncertainties, and should they be? The MIEC submits that the answer is no. Again, it is apparent that utilities want the Commission to either make decisions for them, or to assume the responsibility for decisions so that ratepayers will bear risks that should be borne by shareholders. There is no authority provided by Missouri law for state-run utilities, and the Commission must be wary of proposals that would do so on a defacto basis with respect to utility resources. Review of the prudence of utility management decisions must be reserved for the time of cost recovery-- in the utility's rate case. *Natural Gas Transportation Order*, 29 Mo. P.S.C. at 137.

Consistent with its objections to plan approval, the MIEC also objects to the Office of Public Counsel's suggestion that the Filing Requirements portion of the rule, 4 CSR 240-22.080, be revised in order for the Commission to determine whether utility plans accomplish the fundamental policy objectives of the resource planning rules. These objectives include the

provision to the public of "energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that adequately serves the public interest." Proposed Rule at 4 CSR 240-22.010 (2). Contrary to OPC's assertion, the major purpose of the Filing Requirements portion of the rule *is not* to ensure that the Commission has as much information as necessary to make a reasoned decision about a utility's plan, based on how well the plan meets policy objectives. Rather, so long as plan approval is not adopted, the Commission would not make any decision about the utility's plan except that it complies with the planning procedure laid out in the rules.

The MIEC objects to OPC's suggestion that policy objectives section of the rule be revised so that the fundamental objective of the planning process be, *inter alia*, provision of energy services in a manner that "serves the public interest" rather than simply, in a manner that "*adequately* serves the public interest." Comments of the Office of Public Counsel at p. 3. *See* Proposed Rule at 4 CSR 240-22.010 (2). OPC complains that the inclusion of the word "adequately" would allow the utility to choose a plan that does not *best* serve the public interest. This proposal reflects a misunderstanding of the purpose of utility regulation. The Commission does not have the authority to require utilities to make planning decisions that "best" serve the public interest. Rather, its statutory authority is simply to have general supervision of electric utilities with respect to the *adequacy* of service, *see* section 386.320, RSMo. The statutory *duty* of the utility is to furnish "safe and *adequate*", as well as just and reasonable, service. *See* section 393.130 RSMo. Once again, it must be emphasized that the Commission must not take over management of utilities, and must leave utilities great discretion to select among their many options. *See Laclede Gas Company*, 600 S.W.2d at 182.

Non-Traditional Ratemaking Treatment for DSM

A topic closely related to plan approval is that of special cost recovery or ratemaking treatment for DSM measures. Utilities have proposed that to ensure equal consideration by them of demand-side and supply-side measures, they should receive special cost recovery for DSM. *See, e.g.*, Initial Comments of KCPL at p. 8; Initial Comments of Union Electric at p. 22. Missouri Public Service argues that incentives and guaranteed cost recovery should be allowed because DSM programs are risky and uncertain. Initial Comments of Utilicorp United, Inc., Missouri Public Service Division at pp. 8-10. KCPL similarly wants special cost recovery to include decoupling and incentives for DSM measures due to risks. Initial Comments of KCPL at p. 8. Utilities assert particularly with respect to DSM programs that the Commission should allow recovery of those costs through rates if prudently incurred. Initial Comments of KCPL at p. 9, Initial Comments of Union Electric at p. 25-26.

Just as the presumption of prudence desired by the utilities, the form of cost recovery requested by the utilities for DSM measures would be contrary to Missouri law. Guaranteed cost recovery for all prudently incurred DSM would violate the used and useful law because it would provide advance approval for programs and investments that are not yet in service and used and useful to the public. *See* Section 393.135 RSMo. *See also State ex. rel. Consumers Council etc. v. PSC*, 585 S.W.2d 41 (Mo. 1979)(en banc).

Additionally, a guarantee of DSM cost recovery, advance approval for prudently incurred DSM investments, or separate rate treatment for DSM would violate Missouri's prohibition against single issue ratemaking. In the *UCCM* case, the Missouri Supreme Court held that fuel

adjustment clauses violate the requirement that the Commission consider all relevant factors, including all operating expenses and rate of return, in determining rates:

> By permitting an electric utility to utilize a fuel adjustment clause, the commission permits one factor to be considered to the exclusion of all others in determining whether or not a rate is to be increased...it would..come at least dangerously close to abdication by the commission of its power to set just and reasonable rates, for the commission has determined in advance that any fuel charge made in accordance with the prescribed formula will be proper without regard to whether, in light of other cost factors, the overall charge is reasonable.

Id. at p. 57. Like a fuel adjustment clause, guaranteed recovery for prudently incurred DSM programs would permit one factor --the prudence of DSM expenditures-- to be considered to the exclusion of all others in determining whether a rate would be increased, "without a framework in which to determine if overall rates are reasonable." *Id.*

The utilities' proposals on DSM cost recovery are based on their assertions that DSM investments are risky and their success uncertain, and that there is an inherent utility bias against DSM expenditures. Initial Comments of KCPL at pp. 7-8; Initial Comments of Missouri Public Service pp. 8-10; Initial Comments of Union Electric, p. 25. The MIEC agrees that there is a good deal of uncertainty associated with DSM measures, and noted in its initial comments that the actual performance of DSM programs is highly variable and uncertain. It is precisely this uncertainty, which the utilities believe should serve as a basis for special cost recovery, that should set off warning bells and serve as a strong reason why ratepayers should not be burdened with the risks of their implementation. The usefulness of any DSM measure cannot be assessed until the company's rate case, after implementation, and at the time of cost recovery.

As the MIEC asserted in its initial comments, all utility expenditures, including those associated with DSM measures, should be subject to prudence and used and useful review in the utility's rate case. The utility's expertise places it in a far better position than the Commission to assess the potential of DSM measures, and the utility should therefore account for these risks in the resource planning process, and bear the risk of the success or failure of those programs at the time of rate recovery. Such risks are properly borne by utility shareholders. *See Union Electric*, 28 Mo.PSC at 196. The utilities' proposals demonstrate that they misunderstand the purpose for this strategic resource planning rulemaking. Only good planning can mitigate risk. Proposals that merely pass that risk off to the ratepayers would hinder this process. Once the utilities' financial stake in decision-making is removed, how can utilities ever be expected to exhibit the same care and caution as when the money of the stockholders was at risk? The utilities' goal would no longer be good planning.

Nor should utilities be provided incentives for implementing DSM programs. We believe that utilities have an obligation to provide efficient service, and a fair rate of return is their incentive to do so. If DSM is truly efficient and least-cost, utilities have an incentive to provide DSM programs when the time is right. Decoupling or bonuses to utilities for DSM, suggested by several utilities as options in order to "level the playing field", actually pays utilities for sales not made and provides revenues to utilities for costs not incurred. The result of such incentives can only be an abrogation of the rate process mandated by Missouri law-- one that has served well and withstood the test of time.

Contrary to the comments of several utilities, it is simply not true that traditional cost-of-service regulation is inconsistent with DSM programs. *See e.g.* Initial Comments of KCPL at

p. 8. Any bias of utilities against DSM is unfounded and contrary to their obligation to provide efficient service. It is insufficient for utilities to respond that utilities are being asked to sell electricity or reduce profits by being required to implement DSM; more efficient use of electricity by customers could increase utility profits by making electricity a more attractive energy option and actually increasing load. The MIEC is strongly opposed to the award of any incentives to utilities for implementing DSM programs, or meeting any other legal requirements.

Load Building

The MIEC disagrees with the comment of Laclede Gas Company that the offering of demand-side programs is designed to *reduce the use of an energy source* through the more efficient use of that energy source. Initial Comments of Laclede Gas Company, at p. 4. A successful demand-side program increases the efficiency use of utility resources, and may contribute to greater use of the energy source by making it more economical to consumers. This is one reason that the MIEC has objected to requiring minimization of present value of revenue requirement (utility cost) as a *primary* planning objective in 4 CSR 240-22.010-(B) and (C). *See* Initial Comments of the MIEC at p. 10. If reducing utility costs is the primary goal, an incentive to simply reduce load exists. Simply reducing load hinders economic development and potentially raises rates for all, because it disregards the efficiency with which the energy resource is delivered. *See id.* In order to recognize the importance of efficiency, minimizing rates should be stated in the rule to be of equal importance to minimizing utility costs.

The MIEC also objects to OPC's proposal to include under the definition of load building activities, 4 CSR 240-22.020 (29), efforts by utilities to expand their service territories or attract new customers. Initial Comments of the Office of Public Counsel at p. 5. Such activities are

inherently beneficial to economic development in Missouri and should be encouraged by the Commission. It would be absurd to consider economic development efforts to be load building programs and require a showing that such programs are beneficial.

Environmental Laws and Regulations

The MIEC is in agreement with the comments of Union Electric and several other parties that the definition of "probable environmental cost" in 4 CSR 240-22.020 (45) as the expected cost of complying with new environmental regulations that the utility believes will have a "nonzero probability" of being imposed during the twenty year planning horizon, should be revised, so that in the screening of supply side resources pursuant to 4 CSR 240-2.040 (2), very small or remote likelihoods will not need to be considered. As noted by Union Electric, the requirement that utilities consider regulations that have a "non-zero" probability of being imposed could make utility analysis unmanageable. The word "significant" should be substituted for "non-zero". *See* Initial Comments of Union Electric at pp. 44-45.

Respectfully submitted,

PEPER, MARTIN, JENSEN, MAICHEL
and HETLAGE

By Diana Schmidt

Robert C. Johnson #15755
Diana M. Schmidt #42419
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850 (Telephone)
(314) 621-4834 (Facsimile)

Attorneys for the Missouri
Industrial Energy Consumers