



**Department of Energy**

Washington, DC 20585

February 27, 1987

Harvey G. Hubbs, Secretary  
Missouri Public Service Commission  
P.O. Box 360  
305 W. High Street, 5th Floor, A-Wing  
Jefferson City, MO 65102

Re: AO-87-48; Comments

Dear Mr. Hubbs:

Enclosed for filing in the above-referenced cause please find the original and fifteen copies of the Comments of Intervenor Department of Energy. Please return one copy stamped "filed."

Yours truly,

A handwritten signature in dark ink, appearing to read "Paul W. Phillips", is written over the typed name.

Paul W. Phillips  
Office of General Counsel

cc: All Parties of Record

**FILED**  
MAR 2 1987  
PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the matter of the investigation )  
of the revenue effects upon )  
Missouri utilities of the Tax )  
Reform Act of 1986 )

Case No. AO-87-48

**FILED**

MAR 2 1987

COMMENTS OF INTERVENOR  
DEPARTMENT OF ENERGY

PUBLIC SERVICE COMMISSION

On November 03, 1986 the Missouri Public Service Commission ("Commission") issued its Order initiating an investigation into the effects of the Federal Tax Reform Act of 1986 ("TRA") on the revenue requirements of Missouri public utilities. Among the issues to be addressed as a result of the Commission's Order is the question of an appropriate procedural mechanism for implementing rate reductions to reflect the tax decrease resulting from TRA.

In response to the Commission's Order, both the Commission's Staff ("Staff") and the Office of Public Counsel ("OPC") filed Comments on the appropriate procedural mechanism to implement the rate reduction. Essentially, both of these Commenters concluded that, unless utilities voluntarily file new tariffs, rate reductions cannot be unilaterally implemented by the Commission. As a result the only way to effect a rate reduction would be for an interested party to file a Complaint after which the Commission would be required to hold a lengthy rate proceeding. 1/

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1/ As we discuss infra the Commission on its own motion may initiate a proceeding.

(This proceeding is hereinafter referred to as the "Complaint Proceeding".) Consequently, according to this interpretation of Missouri law, rate reductions could not be implemented until some time after the Tax Reform Act took effect.

In order to avoid the delay caused by the Complaint Proceeding, the Staff has suggested that informal meetings be held with utilities to negotiate voluntary rate reductions. The Commission has authorized the Staff to commence this procedure in its Order Addressing Comments, Granting Interventions and Extending Filing Dates issued on January 30, 1987.

If the Missouri utilities refuse to voluntarily reduce their rates, they may realize significant overearnings due to the time required to conduct the Complaint Proceedings. Consequently, the Staff has also proposed that the Commission require all utilities to file new rate schedules indicating that, as of July 1, 1987, all rates and charges are interim and subject to refund. This refund would consist of all charges subsequently found to be unreasonable during the pendency of the Complaint Proceeding.

The Staff's proposed procedure would permit the Commission to undertake the extensive review of utility rates required by Missouri law, yet would prevent utilities from realizing significant overearnings by virtue of the time consuming review. Comments in response to the Staff's proposal are due to be filed by March 2, 1987 as fixed in the Commission's Order of January 30, 1987. On January 24, 1987, we filed a timely application to formally intervene in this docket and wish now to make the following comments.

Based on a review of Missouri statutes and the relevant case law, it is apparent that the Staff and the Public Counsel are correct in their conclusion that the Commission cannot order permanent rate reductions without a review of all factors relevant to determining rates. The law is not as explicit with regard to the Commission's authority to order utilities to implement the Staff's proposal for interim rates. The authority and procedural mechanism for implementing interim rates subject to refund is outlined below.

#### Procedures for Implementing Rate Changes

It is well settled that the Missouri Public Service Commission Law provides two procedures through which the Commission may change rates filed by utilities. First under the "file and suspend" procedures, the Commission may suspend newly filed rate schedules and "may, after a full hearing ... make such order in reference to such rate as would be proper ..." Section 393.150 (1) RS Mo. 1978 (emphasis added). Alternatively,

Whenever the Commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges ... are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished ...

Section 393.140 (5) RS MO. 1978 (emphasis added). 2/ Whichever procedural method is utilized, the Commission must consider "all

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2/While the quoted provisions apply specifically to gas,  
(Footnote Continued)

factors relevant to the proper maximum price to be charged."

State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585. S.W. 2d 41, 56 (Mo. 1979). See also, Section 393.270 (4) RS MO. 1978 ("In determining the price to be charged for gas, electricity, or water, the Commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein ..."); State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W. 2d 704 (Mo. 1957) (Commission must consider evidence of fair value in determining rate of return.)

While the Commission has, in the past, attempted to avoid a lengthy rate proceeding and to expedite cost recovery through automatic adjustment mechanisms, these mechanisms have been approved by the Missouri Supreme Court in only a limited and narrow set of circumstances. In State ex. rel. Hotel Continental v. Burton, 324 S.W. 2d 75 (Mo. 1960), the Commission authorized a tax adjustment clause which permitted the utility to directly recover from ratepayers gross receipts and related taxes imposed by municipalities. The Court upheld the Commission's authorization of this surcharge based on the Commission's authority to adopt rules or practices related to rates under §393.150 of the Missouri Statutes. In addition, the Court noted

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(Footnote Continued)

electric, water and sewer corporations similar "file and suspend" and complaint procedures apply to telephone and telegraph companies and are set forth at §392.230 (3) and 392.240 (1) (RS MO. 1978) respectively.

that the Commission's general ratemaking powers enable it "to authorize a utility, as an integral part of its operating schedule, to deal with an item of operating expense in a different manner than other such items." Id. at 79.

The rule established in Burton was severely circumscribed in State ex. rel. Utility Consumers Council of Missouri Inc. v. Public Service Commission, 565 S.W. 2d 41 (Mo. 1979) (hereinafter UCCM). There, in partial reliance on Burton, the Commission attempted to authorize an automatic fuel adjustment clause. 3/

However, the Missouri Supreme Court, in UCCM held that Burton was distinguishable. The Court found that unlike the fuel adjustment clause, the tax adjustment clause authorized in Burton was a direct charge, assignable to a particular customer. Additionally, the Court noted that fuel costs, unlike gross receipts taxes, can be effected by the utility's management. Finally, according to the Court, the tax adjustment could not affect the rate of return, while collections of fuel costs could. UCCM at 53-54. 4/

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3/The Commission also relied on §393.130 (4) which provides that nothing in this section shall be taken to prohibit a gas corporation, electrical corporation, water corporation or sewer corporation from establishing a sliding scale for a fixed period for the automatic adjustment of charges for gas, electricity, water, sewer or any service rendered or to be rendered and the dividends to be paid stockholders of such corporation.

However, the Court held that this provision related only to sliding scale rates associated with dividends. UCCM at 54-55.

4/As the Office of Public Counsel ("OPC") notes in its comments  
(Footnote Continued)

More importantly, the UCCM Court explicitly refused to permit the Commission to use its general ratemaking authority or miscellaneous statutory provisions to circumvent the statutorily mandated procedures for determining rates. First, it noted that the Commission's responsibility was to fix maximum rates based on all relevant factors. Id. at 56. Implementation of a fuel adjustment clause violated these principles both because it resulted in variable rates and because the rate changes resulted from the effects of only one isolated factor, fuel costs.

In addition, the Court refused to base Commission authority on either its general ratemaking power or on the statutory provision which allows the Commission to formulate rules relating to rates. The Court found that if it did so it would establish a precedent for adjusting all operating expenses automatically. Thus a third, unauthorized method for establishing rates would be created. For this reason, the Court refused to "travel further down the 'slippery slope'" initially established by Burton "and risk a dismantling of the carefully balanced fixed rate system established by the legislature." Id. at 57.

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(Footnote Continued)

to the Commission in the current matter, implementation of an automatic adjustment to recover excess revenue resulting from federal tax changes would be objectionable for the same reasons that the UCCM Court found the fuel adjustment clause objectionable. First, according to OPC, a federal tax clause would not be a direct charge to a customer. Instead, it would be dependent upon the numerous other factors used to determine rates. Additionally, as pointed out by OPC, changes in revenue requirements due to federal tax changes could effect the utility's rate of return.

Thus it is clear that reducing rates solely to account for federal tax changes would result in precisely the same circumstances that the UCCM Court found objectionable. Specifically, the Commission would be using one factor, to the exclusion of all others, to determine the appropriate rate levels. Therefore we agree with the conclusion of the Staff and OPC that the Commission may not make a rate change to reflect the Tax Reform Act without investigating each utility's entire cost of service within the context of a Complaint Proceeding. We also note that the Commission itself is empowered "on its own motion" to enter into a hearing concerning the propriety of a utility's rates. See §393.150 (1).

#### Interim Rate Subject to Refund

Because a Complaint Proceeding would delay implementation of rate reductions, the Staff has proposed that the Commission order utilities to file new tariffs indicating that all rates in effect as of July 1, 1987 are interim and subject to refund. The amount of the refund could include all charges subsequently found to be excessive or could be limited to excess revenues associated with the Tax Reform Act.

The primary difficulty with the Staff's suggestion is that no statutory provisions explicitly authorize this type of procedure. While Missouri courts have long held that the Commission may adopt interim rates, this authority is based on the "file and suspend" procedure which permit the Commission to adopt rates by not suspending them for the entire suspension period. State ex rel. Laclede Gas Co. v. Public Service



Commission, 535 S.W. 2d 561 (Mo. Ct. App. 1976). Since the Staff's proposed procedure assumes that Complaints will have to be filed to implement rate reductions, the "file and suspend" provisions would not be directly applicable.

However, because the "file and suspend" procedures and the Complaint procedures complement each other, the Commission can adopt a form of interim rates upon the filing of a Complaint where there is a prima facie showing that current rates are excessive, as in the case of rate fixed under the old tax act where the tax rate has been much higher than under the new TRA. The only difference between the existing "file and suspend" and the Complaint procedures relates to the instigating party. In other words under the existing "file and suspend" procedures, a utility's rate proposal may go into effect on an interim basis pursuant to the Commission's non-action or where one Commission vacates a suspension. This passivity which formed the basis for the Laclede Court's conclusion that the Commission had authority to adopt interim rates, makes sense because a utility may immediately provide sufficient information to provide a prima facie justification for its rate request. As a condition imposed by the Commission in not suspending a rate or in vacating a suspension the Commission is clearly empowered to require that the rates be collected on an interim basis subject to refund. In contrast, in a normal Complaint proceeding, since all relevant information is not immediately available, the Commission may have to conduct some investigation prior to reaching any conclusion regarding the merits. If a prima facie case is made by

Complainant then the Commission has enough information to fix interim rates subject to refund. In addition as noted above, the Commission is empowered to enter upon a hearing "on its own motion." Such a proceeding could be instituted in lieu of a complaint where the Commission on its own motion has reason to believe that rates it has fixed may no longer be just and reasonable where a significant factor has changed, to wit, the tax change under TRA.

As noted by the Laclede Court, interim procedures are a necessity because of the problems of regulatory lag. Yet regulatory lag poses problems, not only for utilities, but also for ratepayers, who must pay prima facie unreasonable rates until completion of a lengthy Complaint Proceeding. Thus, ratepayers need to be accorded the same flexibility in procedures as utilities, at least in those situations where the Commission has sufficient information at the outset (e.g., a verified complaint, a requirement that the utility's rates were fixed under the old tax law and a recitation of the new TRA tax rates) to draw a conclusion regarding the reasonableness of the interim rates and the likely extent of any refund.

Adoption of the Staff's proposal would not violate any of the prohibitions set forth in UCCM. Ultimately all factors relevant to rates would be considered. Additionally, the Staff's proposal would not result in the automatic changes which the UCCM Court found objectionable. Instead, the Commission would simply be equitably balancing the needs of the shareholders and ratepayers through flexible procedures.

In fact, the Commission has, in the past, authorized interim rates to balance shareholder and ratepayer interests. In Re: Kansas City Power & Light Co., 55 PUR 4th (1983) the Staff and the utility could not agree on appropriate test-year adjustments. However, the Staff did not recommend a true-up procedure because it did not have the resources at the time.

The Commission concluded that it was faced with two choices. It could either utilize a purely historical test year, which would result in under-compensation for shareholders or it could authorize interim rates subject to refund after test year issues were resolved. In order to balance shareholders and ratepayer interests the Commission authorized interim rates subject to refund based on the subsequent true-up.

As in Re: Kansas City Power & Light, interim rates subject to refund in this case would provide a mechanism for balancing shareholder and ratepayer interests. Utilities could continue to collect currently authorized rates (albeit subject to refund at such time a prima facie case is made by Staff or OPC or the Commission on its own motion) while rates established in the Complaint Proceeding would be based on consideration of all relevant factors. However, ratepayers would not be detrimentally affected by the time lag associated with this lengthy review because excess revenues would be refunded after the review process.

Alternative statutory bases for the Staff's proposal lies in the Commission's authority to order utilities to file new rate schedules. In such an order the Commission could indicate that

all rates contained in such schedules are interim. When new schedules are filed the Commission would then implement the Staff's proposed interim procedures pursuant to the traditional Missouri "file and suspend" provisions.


The basis for the Commission's authority to order new rate schedules is set forth at Section 393.140 (1). That section grants the Commission authority over schedules filed by gas, electric, sewer, and water corporations. It further provides that "unless the Commission otherwise orders, no changes shall be made" to the filed rates, thus implying that the Commission may authorize changes. While changes to the rate itself on a permanent basis could not be made without considering all relevant factors, an order making the existing rates interim would not be subject to the same prohibitions since the rate itself would not be immediately affected nor modified.

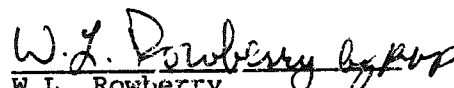
#### Conclusion

While it is clear that the Commission cannot authorize rate changes without instituting an investigation into each affected utility's cost of service on an individual basis, the Staff's proposal to make all rates interim and subject to refund would permit the ratepayers to recover some excess charges resulting from any delay in implementing permanent rate reductions. These procedures would not violate the rule established in UCCM because the Commission would eventually establish rates based on all relevant factors. This can be effectuated through a complaint filing, or through the Commission on its own motion entering into a hearing on the propriety of the affected utilities' rates or by

order of the Commission ordering the utilities to file new or changed rates.

Respectfully submitted,

  
Paul W. Phillips  
Counsel

  
W.L. Rowberry  
Counsel

Dated at Washington, D.C.  
2/27/87

CASE NO. AO-87-48

Robert C. Johnson, Attorney at Law, 720 Olive Street, 24th Floor,  
St. Louis, MO 63101  
J.B. Schnapp & Robin E. Fulton, Attorneys at Law, 135 E. Main  
Street, Fredericktown, MO 63645  
Robert Lehr, Attorney at Law, 1100 Main, Suite 1405, Kansas City,  
MO 64105  
Donald Johnstone, Drazen-Brubaker & Associates, 605 Old Ballas  
Road, Suite 100, P.O. Box 12710, St. Louis, MO 63141  
Stuart Conrad, Attorney at Law, 2600 Mutual Benefit Life Bldg.,  
2345 Grand Avenue, Kansas City, MO 64108  
Paul Agathen, Attorney at Law, Union Electric Company, P.O. Box  
149, St. Louis, MO 63166  
Francis J. Hruby, Attorney, Anheuser-Busch, Inc., One Busch  
Place, St. Louis, MO 63118  
Steven L. Kitchen, Vice President, Finance, Kansas City Power &  
Light Company, 818 Kansas Avenue, P.O. Box 889, Topeka, KS  
66601  
Joseph P. Cowin, Senior Attorney, United Telephone Company of  
Missouri, 6666 West 110th Street, Overland Park, KS 66211  
H. Edward Skinner, Ivester, Henry, Skinner & Camp, 212 Center  
Street, Suite 900, Little Rock, AR 72201  
Gary W. Duffy, Attorney at Law, P.O. Box 456, Jefferson City, MO  
65102  
J.E. Harrison, Asst. Treasurer, Missouri-American Water Co., 2707  
Pembroke Lane, St. Joseph, MO 64505  
John Eckert, Vice President, Consolidated Water Services, Inc.,  
1000 N. Madison, P.O. Box 329, Greenwood, IN 46142  
L.D. Abbott, Vice President-Revenue Requirements, General  
Telephone Company of Midwest, 11 Eleventh Avenue, Grinnell, IA  
50112  
Mark G. English, Attorney at Law, Kansas City Power & Light  
Company, 1330 Baltimore Avenue, Kansas City, MO 64141  
Michael A. Meyer, Attorney at Law, Southwestern Bell Telephone  
Company, 100 N. Tucker Blvd., St. Louis, MO 63101  
R.C. Jaudes, Executive Vice President-Finance, Lacleage Gas  
Company, 720 Olive Street, St. Louis, MO 63101  
Richard T. Ciottone, Vice President & General Counsel, St. Louis  
County Water Company, 535 N. New Ballas Road, St. Louis, MO  
63141  
W.R. England, Attorney at Law, P.O. Box 456, Jefferson City, MO  
65102  
James Swaengen, Attorney at Law, P.O. Box 456, Jefferson City,  
MO 65102  
Bob Perkins, Vice President, Tel Central of Jefferson City, 130  
E. High Street, Jefferson City, MO 65101  
Richard W. French, First Asst. Public Counsel, P.O. Box 7800,  
Jefferson City, MO 65102  
Gerald Hill, Dir. Rates, General Waterworks Management & Service  
Company, 950 Havenford Road, Bryn Mawr, PA 19010  
Gerald T. McNeive, Jr., Assoc. General Counsel, Laclede Gas  
Company, 720 Olive, St. Louis, MO 63101  
E.L. McKenzie, Secretary, Assoc. Natural Gas Company, P.O. Box  
628, Blytheville, AR 72316  
John Low, Manager, West Fork Project, ASARCO, Inc., P.O. Box 116,  
Bunker, MO 63629  
Richard Wrench, Treasurer, Great River Gas Company, P.O. Box 967,  
Kiokuk, IA 62632  
Timothy M. Rush, Manager, Rates & Market Research, St. Joseph  
Light & Power Company, 520 Francis Street, St. Joseph, MO 64502  
Jack Krokroskia, Vice President of Mining, Doe Run Company, Box  
500, Viburnum, MO 65566