Missouri Public Service Commission

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FILED

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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 **REPLY COMMENTS OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

Thank you for your attention to this matter.

Sincerely yours,

Lera L. Shemwell
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LLS/wf
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
AUG 2 1999
Missouri Public
Service Commission

In the Matter of 4 CSR 240-80.015 Proposed Rule - Steam Heating Utilities Affiliate Transactions	**)))**	**Case No. HX-99-443**

REPLY COMMENTS OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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Dated: August 2, 1999

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REPLY COMMENTS OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION CONCERNING AFFILIATE TRANSACTIONS RULES FOR HEATING UTILITIES

COMES NOW the Staff of the Missouri Public Service Commission and hereby submits its Reply Comments regarding the Missouri Public Service Commission's (Commission) proposed rules for affiliate transactions.

I. INTRODUCTION

Several commenters have challenged the need for affiliate transaction rules and others, who have not challenged the need directly, urge a moderate or "lighthanded" approach. Staff consulted with many of the entities that could be affected by affiliate transaction rules before finalizing the rules that have been proposed.

Changes in the structure of utility companies through mergers, expansions, and acquisition or development of nonregulated affiliates has changed the way monopoly utilities do business. The move of regulated utilities into nonregulated businesses increases the probability that the costs of the affiliate may be allocated to the regulated entity resulting in cross subsidization. The goal of the proposed rules is to protect utility ratepayers from paying excessive rates through misallocation of costs related to complex, ongoing affiliate transactions.

The fact that Missouri utilities are still monopolies and not operating in a competitive environment merely increases the incentive to shift costs from a non-regulated affiliate to the captive ratepayer where cost recovery is much more certain.

The proposed rule is a moderate, middle-of-the-road, measured approach designed to deal with the problems of cross-subsidization of affiliates by a regulated monopoly while not discouraging appropriate economic transactions. The objective is to

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reduce the occurrence of self-dealing and cross subsidization of affiliates by utilities, in order to protect monopoly ratepayers, while permitting competition in non-regulated areas. Preventing cross subsidization should encourage competition by allowing competing companies that cannot transfer costs to compete effectively and fairly.

In the recently issued Guidelines for Cost Allocations and Affiliate transactions, the National Association of Regulatory Utility Commissions (NARUC) based its pricing guides on just two concerns that give rise to the need for these proposed rules. The first concern is related to utility self-dealing where market forces do not necessarily drive prices. Second is the concern that utilities have a natural incentive to shift costs from non-regulated competitive operations to regulated monopoly operations. There are two factors that fuel this risk. First, recovery is certain with captive ratepayers unless the Commission and other parties have the information to prevent this occurrence. Second, utilities are motivated by profit growth which will result from a utility shifting its non-regulated costs to its regulated operations.

The shifting of costs can include expenses for office space, computer time and data base development, advertising, employee hiring and training, vehicles, and purchasing and warehousing. It is the utility's ability to shift costs to its ratepayers for recovery that is the central issue in the development of the Commission's proposed rules. Many of the utilities that commented on the proposed rules are fighting to control provision of information and for a costing method other than fully distributed or fully allocated cost. It is also the reason that commenters interested in consumer protection urging the information flows and safeguards related the fully distributed cost method.

It is interesting that the commenter whose role is to represent the interests of the public, Office of the Public Counsel, is not only highly supportive of adoption of the proposed rule, but proposes that the rules be even more stringent in some areas. Concerning the need for these rules, the Office of the Public Counsel notes that the utilities' "diversification efforts" may result in unfair transfer pricing for goods and services, inequitable cost allocations, packaging or tying of utility product with essential service, an inappropriate joint advertising.

As early as 1988, the FCC promulgated affiliate transactions rules. These rules were upheld in the D.C. Court of Appeals. Southwestern Bell Corporation v. FCC 896 F2d 1378, 1378 (D.D.C. 1990). In doing so, the Court said "[d]iversified [utility] companies possess a natural incentive to shift costs to their regulated . . . service, and thereby guarantee the recovery of those costs from ratepayers. The [Commission's] responsibility . . . is to prevent prices for regulated telephone services from incorporating the costs of nonregulated activities and thus to ensure that telephone rates are 'just and reasonable.'" 47 U.S.C. § 201(b).

The court continued:

> In recent years, [utility] companies have significantly diversified their businesses to envelop nonregulated activities. Since the companies' permitted rate of return on telephone service depends upon the relevant cost of providing those regulated services, the FCC must properly allocate costs between the regulated and nonregulated businesses. Diversified [utility] companies possess a natural incentive to shift costs to their regulated telephone service, and thereby guarantee the recovery of those costs from ratepayers. The FCC's responsibility under the Communications Act is to prevent prices for regulated . . .services from incorporating the costs of nonregulated activities and thus to ensure that . . . rates are "just and reasonable." 47 U.S.C. § 201(b).

Id. at 1380.

> In this case the utilities admitted that heightened regulatory scrutiny was necessary but they argued for "finely tailored" or light handed means. To quote the court: hile petitioners admit that affiliate transactions call for "heightened regulatory scrutiny," they insist that other more finely tailored means of regulatory oversight would sufficiently protect against possible cost misallocation. Even a cursory glance of the regulatory history of telephone companies, however, exposes the fallacy of this premise. Before its breakup, AT & T wholly owned the Bell Operating Companies ("BOCs"). The BOCs, in turn, purchased most of their telecommunications equipment from Western Electric Company, an affiliate of AT & T. The FCC discovered that the intracompany nature of the purchase and sale of equipment created a built-in

> bias in favor of dealing with affiliates. See AT & T Co., 64 FCC 2d 1, 41 (1977). And in its antitrust case against AT & T, the government alleged that the BOCs had purchased equipment at inflated prices from Western Electric to shift costs to the telephone services. In response, the settlement decree required a structural separation of the BOCs from Western Electric, along with a prohibition against the BOCs entering certain markets like telephone equipment manufacturing.

896 F2d 1378 at 1381 (*citing* United States v. AT & T, 552 F.Supp. 131, 190-91 (D.D.C.1982),

The Federal Energy Regulation Commission has noted some of the reasons that affiliate transactions rules are needed. The FERC in *Portland General Exchange* found that that affiliates have an incentive to engage in preferential sales by having the public utility charge the affiliate a lower price, with the affiliate charging a third party higher rates, thereby allowing the affiliate, not the public utility, to receive the majority of the profits. 51 FERC ¶ 61,108 (1990)

Such an example can be found in *Terra Comfort Corp.*in which the FERC found that Iowa Southern, a regulated utility would have been providing transmission service to its affiliate for $7,600 in circumstances where a nonaffiliate would be assessed about $2 million annually. 52 FERC ¶ 61,241 (1990)

The FERC promulgated its own rule, in Order No. 497 issued in June 1988. 53 FERC 22139 (June 14, 1998), 18 CFR Parts 161, 250 and 284, The FERC noted that it was issuing its final rule to address possible abuses in the relationship between gas pipelines and their marketing affiliates. The need for such rules were challenged by the pipelines. The pipelines, like some of the Commenters (Missouri Utilities, Trigen and Ameren, among others) argued that there were few cases of anti-competitive behavior and that the "anecdotal" problems were transitory. The utilities argued that abuses were not widespread and were declining. Independent marketers wanted much more stringent rules, and argued for full structural separation or at least "divorcement." Divorcement would mean that the utility could not do business with its marketing affiliate.

The FERC responded to this assertion that after careful consideration, they remained convinced of the need for a rule to establish standards of conduct to prevent anticompetitive abuses between the utilities and their affiliates. The FERC noted that "even some of the pipelines concede the value of having a clearly established code of conduct to rude behavior rather than operating without established standards and running the risk that pipelines practices would later be found to be unlawfully discriminatory." 53 FERC ¶ 30,820.

Both of these regulatory agencies found the need to issue affiliate transactions rules because of the motivation of regulated entities to improperly shift costs from their nonregualted affiliates to the ratepayer, NARUC has recently issued guidelines that recommend controls that are similar to those in the Commission's proposed rule.

II. SUMMARY OF PARTIES POSITIONS

Several Commenters filed Initial Comments on the Commission's proposed rule. Two of the parties, Mountain Energy and Enron are energy service companies. Ameren Corporation and Union Electric Company filed joint comments. In the rest of this document, Ameren and Union Electric Company will be referred to as Ameren. UtiliCorp United, Inc. d/b/a Missouri Public Service and St. Joseph Light and Power Company filed comments with Associated Natural Gas Company and Laclede Gas Company. They are collectively referred to in the rest of this document as Missouri Utilities. Empire District Electric Company (EDE) and Kansas City Power and Light Company (KCPL) filed their own comments. In addition, the Missouri Industrial Energy Consumers (MIEC) and Office of the Public Counsel (OPC) filed comments.

All of the parties are concerned with how this rule will impact competition and consumer welfare. However, the parties disagree with what kind of impact the rule will have and whether or not it will meet its intended purpose.

Ameren believes that there are already numerous mechanisms in place for Ameren that will prevent subsidization. In its comments, Ameren proposed its own version of an affiliated transaction rule. Its rule incorporates what it believes are these existing legal protections. The other major difference between Ameren's proposed rule and the Commission's proposed rule is that Ameren's rule only applies to what it considers "essential services." Dr. Michael Proctor reviewed the comments of Ameren's consultant Dr. John H. Landon. Dr. Proctor's comments can be found in Attachment A.

Missouri Utilities do not believe that affiliate transaction rules are necessary. They did, however, propose a modified rule. It does not prohibit all subsidization. It prohibits only that subsidization that causes rates to increase. It also limits the applicability of the rule to energy related services. Missouri Utilities' proposed rule does not apply if the utility has identified and allocated to the affiliate the cost of any utility assets used by or transferred to the affiliate. This means that the rule would be applicable to very few, if any, transactions.

III. SUMMARY OF PARTIES COMMENTS

1. Purpose

Ameren argues that they and their affiliates already have numerous mechanisms in place to prevent cross-subsidization.

Ameren's proposed rule may recognize the existing legal protections that apply to Ameren, but the Commission's proposed rule is not designed, nor would it be permissible to promulgate a rule, that applied only to single utility. This is rulemaking, the legislative process, not the adjudicatory process and the rules apply to all current and future electric service providers. However, Ameren's claim that the goals of the proposed rulemaking are to some degree met by its existing PUHCA/SEC accounting requirements may have some merit. Under the rules, they are free to seek variances as appropriate. However, any major variances sought should be premised upon a demonstration that the SEC accounting requirements do in fact constitute an fully distributed cost (FDC) methodology which is implied but not stated directly in Ameren's comments.

The Commission should not rely on the Statement of William T. Baker, Jr. on behalf of Union Electric Company (UE) regarding the operation of the Public Utility Holding Company Act of 1935 (PUHCA) and the Commission's maintenance of its regulatory authority or jurisdiction. The Staff and Public Counsel negotiated with UE in Case No. EM-96-149 a settlement of UE's Application to merge with CIPSCO, Inc. which, as best as possible, maintains the Commission's ability to regulate the affiliated transactions of UE. Those provisions are set out in Attachment 1, pages 22 to 29 and Attachment D, to the Commission's February 1, 1997 Report And Order in Case No. EM-96-149. Also, with all do respect to the Illinois Commerce Commission, this Commission should not rely on Illinois statute, rule or procedure to regulate the Missouri operations of UE as suggested by Ameren and UE.

The language recommended by Ameren and UE in their proposed affiliate transactions rule as it relates to reliance on the United States Securities and Exchange Commission (SEC) and the United States Congress (Congress), 4 CSR 240-20.015(2)(G) and (4)(C), would constitute an unlawful delegation of State authority to the SEC and the Congress, were the Commission to adopt this language as proposed by Ameren and UE.

2. Consumer welfare

Some commenters argue that consumer welfare is maximized by Commission regulations that lead to low prices, high quality and a diversity of service offerings. The Commission's proposed rules are designed to accomplish that but not at captive ratepayer expense. Please see Attachment B for Staff's Response to Ameren's economic arguments.

Utility-affiliate transactions that are anti-consumer when the transactions result in anti-consumer cross-subsidization of competitive affiliates. These utility-affiliate transactions reduce alternatives available to consumers, reduce allocative efficiency and retard the development of new products and services. These utility-affiliate transactions are detrimental to the public interest.

3. Moderate approach

Ameren and the Missouri Utilities argue that a light-handed, narrowly tailored approach would effectively prohibit all anti-consumer-welfare aspects of interaffiliate transaction but would allow and encourage the pro-consumer aspects of interafffiliate transactions. To this end, both Ameren and Missouri Utilities have proposed rules. However, close examination of Missouri utilities rule reveals that the rule would only apply to few, if any, transactions. Ameren's proposed rule limits the application of its rule to essential "services," thereby severely limiting the applicability of the rule.

The current Commission's propose approach is a light-handed, no specific rule, approach. This has resulted in a lack of information to the Commission to detect where inappropriate subsidization has occurred. Staff has not had the tools that it needs to get adequate information and present evidence to the Commission so that the Commission is able to make a decision based on substantial evidence. The Commission cannot prevent inappropriate utility actions without information.

Ameren further argues that light-handed regulation is consistent with the current trend toward deregulation. However, the most restrictive affiliate transaction rules exist in states were restructuring has already begun. The reason for this fact is simple. The utility incentive for abuse is increased when presented the additional opportunities under deregulation.

Enron states that affiliate rules are essential in preventing anti-competitive behavior, and that the Commission should seek to protect competition, not competitors. Enron adds that incumbent monopoly utilities can deny new or potential entrants access to essential facilities including information and access to markets by locking up the markets. Names and logos can be leveraged on and affiliates can be subsidized. Enron adds that the most significant threat to the effective development of competition is residual market power.

Missouri Utilities assert that there is no need for the rule. The purpose of the Commission's proposed rule is "to prevent regulated utilities from subsidizing their non-regulated affiliates with ratepayer monies. Some commenters suggest that there is no need for this rule and that Staff should wait until problems occur, and perhaps numerous problems, before proposing this rule for Commission action. This would put Staff in an impossible position of having to catch up with violators without having the information to detect the activity. This rulemaking effort started from the problems found in the Southwestern Bell complaint case.

The utilities' position on this point ignores the fact that utilities offering both regulated and nonregulated services have a natural and inherent incentive to use captive ratepayers to subsidize competitive nonregulated services. Such actions improve the bottom line for competitive services, while the regulated offerings are made whole through the contributions of captive customers in rates. With the incentive to cross-subsidize, an unpoliced environment will promote further violations to occurr. The proposed rules are intended to provide the groundwork for effective monitoring of affiliate transactions in the future.

Additionally, the problem with the approach of waiting until additional problems occur is that without access to the records, Staff will never be able to adequately determine for the Commission the full extent of current problems and, thus, never be unable to prevent cross-subsidization of non-regulated affiliates at ratepayer expense. This rule would allow the Staff to review the electric utilities' records (such as during a rate/overearnings investigation proceeding) in order to determine if subsidization is occurring and be able to make appropriate and adequate proof to the Commission. Without adequate information the Commission is prevented from making a reasoned decision based on substantial evidence. The utility opposition to providing information is motivated to protect and promote the companies' opportunities to subsidize their unregulated ventures. Perhaps that is one of the motivations of those most vocally opposed to this rule.

Assuming for the sake of argument that there have been no problems, that is no guarantee that there will not be problems in the future. The regulated utilities are merging and forming relationships with nonregulated entities at an unprecedented pace. These are exactly the types of situations that lead to cross-subsidization. Without the audit process in this rule, Staff is unable to make a determination of whether subsidization has taken place, and is unable to provide that information to the Commission. The Staff is aware of past cases in the telephone and gas industries where questions of affiliated transaction subsidization were raised but not verified due to the inability of the Staff to review the proper books and records to get evidence as to whether or not undue discrimination or preferential treatment was given.

The Staff's intention of this rule is to allow it access to the required books and records to make the determination of whether or not subsidization had occurred. This allows the Commission to make an informed decision to ensure that ratepayers are paying just and reasonable rates.

Missouri Utilities further argue that the rule imposes numerous accounting and record keeping requirements that are unnecessary to protect consumers and will drive up the cost of service. There are numerous accounting and record keeping requirements that might drive up the cost of service, but the benefits significantly outweigh the cost because these requirements were developed to prevent the cost of service to regulated ratepayers from increasing due to subsidization of affiliated entities. Without these rules cross subsidization will continue, and will be impossible to detect.

Missouri Utilities agree that Commission has the right to obtain information and the unregulated activities should not adversely affect rates. However they do not agree that the unregulated should not be subsidized by the regulated. Please see Attachment A for response.

4. Jurisdiction

Ameren argues that in light of the complexity and importance of the issues, the current procedures do not appear to be the most effective or desirable manner of proceeding. The Commission should move forward with a "contested case" proceeding. They further state that “contested case" proceedings are probably required under Missouri law, and refer the Commission to RSMo 386.250; 393.140, and 536.010.

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). 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.

Not only are contested case proceedings not required by statute, the Commission has, and is, following all of the procedure required by Missouri statute to promulgate this rule. Staff responded to this argument in the Motions to Adopt Contested Case procedures and will not repeat the entire argument here, but this is not a contested case and contested case procedures are not only not required, but adoption of such procedures could delay, perhaps indefinitely, implementation of these rules.

Ameren further argues that the statutes require that the Commission conduct a hearing, therefore this is a contested case and requires the right to call witnesses, introduce exhibits, cross-examine witnesses, rebut opposing evidence, present oral arguments, and written briefs.

While it is true that ∍ 386.250 RSMo (Supp.1998), requires the Commission to promulgate rules only after a hearing in which the Commission is to take evidence of the reasonableness of its proposed rule. As Professor Neely points out in *Missouri Practice and Procedure,* § 6.39 (1995) many statutes require that a hearing be held before a state agency may engage in rulemaking.

Ameren's argument is that, because a hearing is required by statute before the commission may exercise its authority to promulgate rules, this is a contested case. Professor Neely disagrees, saying

> [t]hat such statutes require a Ahearing≅ 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. [The 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.

Ameren further argues that Sections (5) and (6) of proposed rule conflict with §393.140(12) RSMo (Supp. 1998) which precludes Commission jurisdiction over unregulated business activity engaged in by a utility. For Staff's response to this erroneous comment see Staff's Initial Comments regarding Commission jurisdiction.

5. Rate Increases

One commenter suggested that the rule will actually lead to rate increases. As with most regulation the customers/ratepayers are paying for the resources for Staff to ensure that the utilities are in compliance with the State laws and Commission rules, as well as having fair and equitable rates. The customers/ratepayers do not pay on an incremental cost basis for the Staff to check an individual rule, or to check for a specific violation. It is important for Staff to have the resources to audit a regulated utilities books and records to ensure the customers/ratepayers are not harmed by subsidication of nonregulated affiliates.

The costs incurred by the utility to comply with the rules and regulations are part of the cost of ensuring that the customers/ratepayers are not harmed by such subsidization. Without proper review of books and records, the Staff cannot determine if subsidization is occurring and what the costs the customers/ratepayers are paying. It is the Staff's belief that subsidization costs to the customers/ratepayers are likely to be greater than the costs incurred by the utility to comply with this rule.

6. 4 CSR 240-20.015(1)(A)240-80.015(1)(A) This definition clarifies what constitutes an affiliated entity.

Trigen-Kansas City Energy Corporation argues that Subparagraph (1)(A) of the proposed rule includes political subdivisions, which violates the Hancock amendment Article X section 21 of the Missouri Constitution.

Missouri Utilities suggest that Subsections 1(A) and 1(B). Imposes a host of burdensome and one-sided provisions that would extend the rule's reach to virtually any "unregulated" activity, regardless of whether the activity was performed by the utility itself or by a separate affiliate, and regardless of whether such activities are already subject to full review and appointment by the Commission as part of the normal rate-making process.

Staff has no information to indicate what the burdensome impact is of this Commission proposed rule to the Missouri utilities. Staff believes the rules only apply to transactions between a regulated heating company and its affiliated entity.

As utilities engage in more and more non regulated operations, it is increasingly important for the Commission to have adequate access to information to determine when an affiliate is operated in such a manner that it is not regulated. Adoption of this rule will give the Commission the information that it needs to make an informed decision.

As OPC points out, there is significant motivation for a regulated entity to subsidize its non-regulated affiliates.

7. **4 CSR 240-20.015(1)(B)240-80.015(1)(B)** This definition clarifies what constitutes a transaction between a regulated electrical corporationheating company and its affiliated entity.

Missouri Utilities argue that subsections 1(A) and 1(B) impose a host of burdensome and one-sided provisions that would extend the rule's reach to virtually any "unregulated" activity, regardless of whether the activity was performed by the utility itself or by a separate affiliate, and regardless of whether such activities are already subject to full review and appointment by the Commission as part of the normal rate-making process.

The definition and language is very straightforward in that any unregulated business operation not under Missouri Commission regulation falls within this definition (i.e., nontariffed services). If the transaction affects the regulated entity in any way, it would be subject to the proposed rules. Any affiliate transaction will have an impact on regulated rates as pointed out by the examples offered by the Missouri Utilities. The Commission is charged with a statutory duty to ensure just and reasonable rates.

Staff has no information to indicate what the burdensome impact is of this Commission proposed rule to the Missouri utilities. Staff believes the rules only apply to transactions between a regulated heating company and its affiliate entity.

8. 4 CSR 240-20.015240-80.015 (1)(F) "preferential service."

Trigen argues that subparagraphs (1)(F) and (2)(B) attempt to prevent the regulating heating companies from providing any "preferential service" to an affiliated entity. However if it does not harm the customers it is difficult to see why the Commission should care about it. Subparagraph (2)(D) would require the regulated heating company to provide information to customers regarding the availability of nonaffiliated entities even when customers did not request such information. If not providing this information does not harm the customers it is difficult to see why the Commission should care about it.

Trigen further argues that by requiring these requirements which do not harm the customers, the proposed rule limits the ability of the regulated heating company to manage its assets in the most efficient manner possible, and therefore will result in even higher costs to the customer.

Staff believes that "preferential service" is a service which is provided to an affiliated entity by subsidization. An example might be a customer list created by the parent company in the regulated heating business. No other entity would have a list customer information, because the list was compiled by the regulated heating company doing business with its customers. The customers of the regulated heating company would have paid for that list to be compiled as part of their rates. The "harm" to the customers would be if the affiliated entity got the list without paying market value for the list. There is a concern that assets of the regulated heating company may be used by the affiliate and the regulated heating company not be reimbursed properly, thereby "harming" the customers/ratepayers.

9. 4 CSR 240-20.015(2)(A) 240-80.015(2)(A) financial standards for compensation of an affiliated .

Ameren Corporation and Union Electric Company argue that Section 2 is inconsistent with the philosophy of PUCHA and that Section 2(A) definition of "financial advantage" is too broad.

Staff believes that any financial advantage given to the affiliated entity by the regulated heating company might not be in the best interest of the customers/ratepayers. Any financial advantage given to the affiliated entity would be subsidized by the customer/ratepayer.

Ameren further asserts that this section prohibits the realization of any efficiencies and benefits from interaffiliate transactions.

Many of the possible efficiencies and benefits from interaffiliate transactions may come at the expense of the customer/ratepayers due to subsidization of the affiliate by the regulated entity. The argument that eliminating the cost savings from these economies will make the utility and its affiliates less efficient and will reduce consumer welfare through increased prices is one with which Staff disagrees. An unconditional statement that consumer welfare will be harmed if a utility is prevented from realizing (exploiting) economies of scale and other efficiencies must be challenged as erroneous.

To "exploit" means to take advantage of a situation for one's own advantage. One way in which economies are exploited is to increase profits by lowering costs. A second way economies are exploited or realized is to lower price as a barrier to entry to competitors. Neither of these economies of scale benefit consumers in the long-run. Even with lower prices in the short term, when the lower price effectively keeps competitors out of the market, consumers ultimately are not benefited, and in fact are harmed. When, in the long run, lower costs through economies of scale and scope can only be obtained for a single producer of goods and services, this is the case of a natural monopoly whose price should be regulated.

This comment also ignores the possibility that the utility gained its competitive advantage (economies of scale and scope) because of its unique status as a monoply. If the utility's competitive advantage either cannot be obtained by a non-utility competitor or can only be obtained at great cost of either time or resources, then the utility has an ***unfair competitive advantage***. Such an advantage does not benefit consumers.

Staff has proposed this rule to benefit consumers by, among other things, reducing the unfair competitive advantage of the monopoly and thus benefiting consumers.

Staff also has proposed this rule to try to eliminate cross-subsidization which can result in illegitimate advantage for the monopoly. Cross-subsidies occur when utilities sell goods and services or share facilities with an affiliate at "below cost," or where the utility buys goods and services from an affiliate at "above-market prices." The ratepayer suffers when this occurs.

The proposed Missouri rule on affiliate transactions anticipates that when the utility is considering purchasing goods or services from an affiliate (e.g., accounting or financial services), if the utility can purchase those same services from the market at a lower cost, then it should do so. Indeed, if economies exist in the provision of affiliate services, then the affiliate's fully allocated cost for those services should be less than the market cost, and the utility can fully exploit the savings by buying from the affiliate which also benefits the ratepayer.

Ameren also suggests that section 2(A) provides no recognizable benefit to Ameren and it still imposes significant regulatory costs and burdens. It will be difficult or impossible to determine a fair market price for many goods and services.

This Commission proposed rule was not written to provide a recognizable benefit to Ameren, but to prevent harm to the customers/ratepayers of Ameren. The Staff has no information of the significant costs or burdens that Ameren will incur to meet this rule, however if Ameren is not determining a fair market price, how do they know that they are not overpaying for many services. The rules give the option of fair market price OR fully distributed cost of the regulated heating company.

UtiliCorp asserts that subsection 2(A) imposes a host of burdensome and one-sided provisions that would impose an asymmetrical pricing standard under which assets or services would have to be transferred between a utility and its affiliate at either market value or fully distributed cost, depending on which approach was least favorable to the utility. Staff believes what is important is not what is 'least favorable' to the utility, but what is fair to the customers/ratepayers of the utility.

The D. C. Court of Appeals addressed this issue in Southwestern Bell Corp. v. Federal Communications Commission, 896 F.2d 1378 (U.S. App. D.C. 1990). The court said:

> If the company buys an asset from a nonregulated affiliate, the carrier must record its purchase on its books as the lesser of the asset's fair market value or net book cost. 47 C.F.R. § 32.27(b). On the other hand, if the company sells an asset, it must record the sale on its books as the greater of fair market value or net book cost. See 47 C.F.R. § 32.27(c). These accounting rules are intended to discourage inflation of the regulated company's ratebase by less than arms- length transactions. In unusual circumstances, the carrier may seek a waiver of these rules from the FCC. See Joint Cost Order, 2 FCC Rcd at 1336.

In this case the Petitioners, Southwestern Bell, asserted "that the only rational accounting rule would require the recording at market price of both transfers into and out from regulation. The Joint Cost Order, they contend, imposes an arbitrary and capricious discrimination against a regulated carrier's investors by treating sales and purchases differently and will eventually harm rather than protect ratepayers." *Id.* The court rejected this contention saying:

> As we noted, the FCC regulations permit sales and purchases by regulated carriers to be recorded at market price when the company deals with unaffiliated third parties or if a prevailing price exists for the asset when it deals with an affiliate. Thus, Southwestern and GTE's complaint actually focuses on the "residual" situation in which the carrier sells or purchases from its affiliate an asset for which no discernable market price exists. <u>That narrow circumstance is precisely when the risk of abusive cost misallocation is greatest.</u> Courts have long recognized that intracompany buyers and sellers may not deal with each other at arms-length, see, e.g., AT&T v. United States, 299 U.S. 232, 239, 57 S.Ct. 170, 173, 81 L.Ed.142 (1936), and that strong incentives exist for carriers to channel their nonregulated costs into regulated telephone services, see, e.g., United States v. Western Elec. Co., 673 F.Supp. *525, 553-54* & n. 124 (D.D.C.1987).

Id. at 1381. (emphasis added).

The court makes a strong case for the need for this type of standard when it continues saying:

> While petitioners admit that affiliate transactions call for "heightened regulatory scrutiny," they insist that other more finely tailored means of regulatory oversight would sufficiently protect against possible cost misallocation. Even a cursory glance of the regulatory history of telephone companies, however, exposes the fallacy of this premise. Before its breakup, AT & T wholly owned the Bell Operating Companies ("BOCs"). The BOCs, in turn, purchased most of their telecommunications equipment from Western Electric Company, an affiliate of AT & T. The FCC discovered that the intracompany nature of the purchase and sale of equipment created a built-in bias in favor of dealing with affiliates. See AT & T Co., 64 FCC 2d 1, 41 (1977). And in its antitrust case against AT & T, the government alleged that the BOCs had purchased equipment at inflated prices from Western Electric to shift costs to the telephone services. In response, the settlement decree required a structural separation of the BOCs from Western Electric, along with a prohibition against the BOCs entering certain markets like telephone equipment manufacturing. See United States v. AT & T, 552 F.Supp. 131, 190-

91 (D.D.C.1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

In footnote 3, the court noted "in passing that the affiliate transaction rule obtained the support of state regulatory agencies.

The court upheld this accounting principal saying that:

> the FCC accounting regulation, in contrast, represents a prophylactic rule designed to curb abuses in ongoing affiliate transactions. The Commission rule is a response to systematic incentives to shift costs through less than arms-length deals. Going forward, then, the FCC may seek to avoid the threat of cost misallocation with disincentives built into the accounting rules. We conclude that the FCC's accounting rules for affiliate transactions are reasonable and consistent with our prior decisions.

One commenter suggests that subsection 2 imposes a host of burdensome and one-sided provisions that would require the utility to provide customers with information regarding the availability of competing, non-affiliated firms, whenever the customer requests information regarding the goods and services offered by an affiliate of the utility -- in other words do marketing function for such firms.

Staff has no information to indicate what the burdensome impact is of this rule to the Missouri Utilities. Staff does not believe that making a list of names of other companies furnishing the same services available to the prospective customers is marketing. The regulated heating company is not required to give detail information about the competitors, only the identity of them. Staff believes this requirement is needed to prevent the customers from believing that the regulated heating company can only supply a particular service, and the implication that since it is an affiliated entity of the regulated heating company that the Commission has authority to assure reasonable service at a reasonable rate.

Finally, the utilities claim that these rule place requirements on them that other multi-product firms do not have to meet. Again Staff does not disagree. But utilities are not like other multi-product firms. Utilities are not in a competitive environment. They are monopolies that have a different set of requirements. The risks of doing business are considerably less for utilities. In determining to fair and reasonable rates, the Commission allows the utility to recover from its captive ratepayers prudently incurred costs. Other multi-product firms are not guaranteed the recovery of their costs. When they choose to subsidize products, they evaluate the risks to determine how it will impact the other products. Another difference is that other multi-product firms have no captive customers. Their customers can easily move to another producer. Therefore each decision is made with the purpose of keeping and expanding their customer base. They will not subsidize a product when it is a long-term detriment to another profitable product of their firm.

In addition, affiliate transaction rules are not unique to the state of Missouri. In most of the states where the electric industry is being restructured, affiliate transaction rules have been adopted. NARUC has adopted guidelines for affiliate transaction rules. FERC has realized the need for such rules. So while other competitive multi-product firms do not have these requirements, other utilities across the nation do.

10. 4 CSR 240-20.015(2)(B)240-80.015(2)(B) transactions in an arms-length manner

Ameren Corporation and Union Electric Company argue that Section 2(B) is too vague. The term "unfair advantage" is undefined. Staff believes section 2(B) is clear as stated; to prevent subsidization from occurring no preferential service will be provided by the regulated heating company. The utilities purport that this standard is anti-competitive. OPC, Mountain Energy, Missouri Industrial Energy Consumers (MIEC) and Enron believe that this standard is necessary but more specific standards are necessary to clarify preferential treatment and to ensure that preferential treatment does not occur.

Ameren pointed out in its comments that this section of the rule is inconsistent with the definition of preferential service. Upon review, Staff agrees with Ameren. Preferential service definition follows:

> Preferential service means information or treatment or actions by the regulated electrical corporation which places the affiliated entity at an unfair advantage over its competitors.

This section prohibits "preferential service, information, or treatment." Since information and treatment is included in the definition of preferential service, repeating information and treatment in this section could imply that all provision of information and treatment is prohibited. That is not the intent of this section. To remove this redundancy and to clarify what is prohibited, Staff recommends that the Commission adopt the following language for this standard.

> 4 CSR 240-20.015(2)(B) The regulated electrical corporation shall conduct its business in such a way as not to provide any preferential service to an affiliated entity over another part at any time.

Trigen-Kansas City Energy Corporation asserts that subparagraphs (1)(F) and (2)(B) attempt to prevent the regulating heating companies from providing any "preferential service" to an affiliated entity and if it does not harm the customers it is difficult to see why the Commission should care about it.

Staff believes that "preferential service" is a service which is provided to an affiliated entity by subsidization. An example might be a customer list created by the parent company in the regulated heating business. No other entity would have a list customer information, because the list was compiled by the regulated heating company doing business with its customers. The customers of the regulated heating company would have paid for that list to be compiled as part of their rates. The "harm" to the customers would be if the affiliated entity got the list without paying market value for the list. There is a concern that assets of the regulated heating company may be used by the affiliate and the regulated heating company not be reimbursed properly, thereby "harming" the customers/ratepayers.

11. 4 CSR 240-20.015(2)(D) 240-80.015(2)(D) preferential treatment

Trigen suggested that subparagraph (2)(D) would require the regulated heating company to provide information to customers regarding the availability of nonaffiliated entities even when customers did not request such information. If not providing this information does not harm the customers it is difficult to see why the Commission should care about it. By requiring these requirements which do not harm the customers, the proposed rule limits the ability of the regulated heating company to manage its assets in the most efficient manner possible, and therefore will result in even higher costs to the customer.

Ameren Corporation and Union Electric Company asserts that section 2(D) serves to harm consumer welfare by providing an artificial competitive advantage to any non affiliated competitor, regardless whether that non-affiliated competitor may be less efficient than the utility affiliated competitor. Also harms consumer welfare by discouraging any affiliation between non-regulated companies and regulated utilities.

This section however, has nothing to do with the utilities' competitors because as a regulated monopoly the utility has no competitors. What this section does is require the utility to supply information to customers that call the utility for information on goods or services that its affiliate supplies to make sure that the customer knows that the good or service is available to from other sources. It does not require a comprehensive, exhaustive list of other suppliers. A reference to the yellow pages or a trade organization would meet the requirements of this section. This section does not require the utility to do the marketing function for their competitors of the affiliate. If the customer called the utility trying to contact its affiliate, a reference to the Yellow

Pages or trade organizations will not be likely to sway the customer from using its affiliate. But on the other hand, if the customer is not aware that others offer the service, not disclosing the existence of other suppliers is taking an advantage of the market power of the utility. Making the customer aware of other suppliers does not imply a warrantee as Ameren claims or cause the utility to associate with competitors. Again, the utility is a regulated monopoly and this would not cause it to associate with competitors.

Staff suggests that the Commission clarify this section in the following manner.

> 4 CSR 240-20.015(2)(D) If a customer requests information from the regulated electrical corporation about goods or services provided by an affiliated entity, the regulated electrical corporation shall in addition to giving information about its affiliate, inform the customer that other service providers are available(e.g. the Yellow Pages).

The section was written to prevent artificial competition advantage to the affiliated entity of the regulated heating company. By telling customers there are others whom are in the same business doesn't interfere with competition. The rule doesn't require the regulated heating company to indicate that the others are better, only that the customer has an option. It is to assure that the regulated heating company does not gain business by using the regulated heating company's name or reputation, or by the implication that the affiliated entity is regulated by the state to insure reasonable service.

Ameren suggests that Section 2(D) is unconstitutional, it violates the First Amendment of the United States Constitution, and the Missouri Constitution. This section would compel the utility to send a message with which it may not agree and to associate with entities to whom it certainly is adverse.

Trigen complains that Subparagraphs (2)(D) and (3)(D) refer to a CAM but there is no indication as to how this is to be filed for Commission approval.

Several commenters to the proposed rules have said that they do not understand how an annual CAM filing would work, or do not not fully understand its purpose. A CAM is simply a compilation of cost allocation procedures governing assignment of costs between all of the regulated and nonregulated operations of a utility, using fully distributed costing methods. Each utility would make an initial filing, with the Staff, OPC and other interested parties having some time to review it and make suggestions, and to bring concerns to the Commission. The Commission would then approve the CAM, with or without modifications as appropriate. Each year each utility would either file a new CAM, based on new service offerings or scopes or other changes, or indicate that the existing CAM is still appropriate for use. Interested parties would again have a period of time to review the annual filings, and bring any concerns to the Commission.

UtiliCorp United Inc. and St. Joseph Light & Power assert that Subsections 2(B) and 2(D) imposes a host of burdensome and one-sided provisions that would impose a requirement prohibiting a utility from providing any "preferential" service, information or treatment, to an affiliate.

Staff has no information to indicate what the burdensome impact is of this rule to the Missouri utilities. Staff believes that the intent of the rule is indeed to prohibit a utility from providing "preferential" treatment to an affiliate, in order to prevent subsidization.

12. 4 CSR 240-20.015(3)(A) competitive bids

Ameren Corporation and Union Electric Company comment that section 3 imposes significant substantive burdens upon the utilities and directly contradicts provisions of PUHCA. The requirements of section 3(A) are inconsistent with PUHCA. Section 3(A) would require competitive bidding process every time UE purchased goods or services from Ameren Services.

This would defeat the whole purpose of a service company, which is to ensure realization of efficiencies. Section 3(A) bidding process, would inevitably cause an increase in the rates paid by consumers. Bidding requirements are already addressed by PUHCA. SEC regulation and monitoring assures prices are competitive.

The Staff is unaware of any information indicating the magnitude of any significant or unreasonable burdens upon the utilities by this rule. The Commission proposed rule states that competitive bids are required unless it can be demonstrated that competitive bids were neither necessary nor appropriate. Bidding would be required only if it can't be demonstrated that competitive bids were neither necessary nor appropriate.

The Staff is unaware of any information indicating the magnitude of any significant burdens upon the utilities by this rule. The benefit to this rule would be assurance that no consumer/ratepayer is paying for the subsidization of the regulated heating companies affiliated entity.

Missouri Utilities comment that sections (3), (4), and (5) impose a host of burdensome and one-sided provisions that would impose other extensive record keeping and evidentiary requirements, including the obligation to develop and keep a Cost Allocation Manual, the requirement to maintain data on each affiliate transaction, and the obligation to continually track how affiliate transactions may be affecting the cost and quality of utility service.

The rule requires a CAM only to allow the regulated heating companies to have an approved method for cost allocations. This would simplify the methodology for the regulated heating company by not having to get regulatory approval of costing methodology for every different transaction as they occur.

13. 4 CSR 240-20.015(3)(B) documentation of the information and 4 CSR 240-80.015(3)(C) all costs were considered when supplying information, assets, goods and services to an affiliated entity.

Ameren Corporation and Union Electric Company assert that these sections impose considerable costs without any benefit.

The Staff is unaware of any information indicating the magnitude of any significant burdens upon the utilities by this rule. The benefit to this rule would be assurance that no consumer/ratepayer is paying for the subsidization of the regulated heating companies affiliated entity.

14. 4 CSR 240-20.015(3)(D)240-80.015(3)(D) The CAM

Ameren Corporation and Union Electric Company claim that sections 3(B), 3(C), and 3(D) threaten to impose onerous burdens without any real benefit and that these sections impose considerable costs without any benefit.

The benefit to this rule would be assurance that no consumer/ratepayer is paying for the subsidization of the regulated heating companies affiliated entity.

Trigen-Kansas City Energy Corporation suggests that subparagraphs (2)(D) and (3)(D) refer to a CAM but there is no indication as to how this is to be filed for Commission approval.

Several parties have commented that they do not understand how an annual CAM filing would work, or do not fully understand its purpose. A CAM is simply a compilation of cost allocation procedures governing assignment of costs between all of the regulated and non-regulated operations of a utility, using fully distributed costing methods. Each utility would make an initial filing, with the Staff, OPC and other interested parties having some time to review it and make suggestions, and to bring concerns to the Commission. The Commission would then approve the CAM, with or without modifications as appropriate. Each year each utility would either file a new CAM, based on new service offerings or scopes or other changes, or indicate that the existing CAM is still appropriate for use. Interested parties would again have a period of time to review the annual filings, and bring any concerns to the Commission.

15. 4 CSR 240-20.015240-80.015(4) the record keeping requirements

Trigen comments that these sections greatly increase the record keeping requirements upon Trigen thereby consuming a great deal of time. Since Trigen is a small company this would place a burden upon Trigen it does not have the personnel or financial resources to handle. Since there has been no indication of abuses of subsidization, this increase in cost is unjustified and ultimately harmful to the customers.

Missouri Utilities join in this complaint saying sections (3), (4), and (5). impose a host of burdensome and one-sided provisions that would impose other extensive record keeping and evidentiary requirements, including the obligation to develop and keep a Cost Allocation Manual, the requirement to maintain data on each affiliate transaction, and the obligation to continually track how affiliate transactions may be affecting the cost and quality of utility service.

It is the Staff's belief that additional resources may be needed to comply with this rule, however it should be minimal. Trigen's estimate for the fiscal note does not indicate what exactly will be the responsibility of each of their personnel listed. The Staff could not determine the reasonableness of Trigen's estimate. The Staff does not believe the additional record keeping will require a great of time.

As with most regulation the customers/ratepayers are paying for the resources for the Staff to ensure that the utilities are in compliance with the State laws and Commission rules, as well as having fair and equitable rates. The customers/ratepayers do not pay on an incremental cost basis for the Staff to check an individual rule, or to check for a specific violation. The customers/ratepayers pay for the Staff to have the resources to check on what it thinks is important to ensure the customers/ratepayers are not harmed.

The costs incurred by the utility to comply with the rules and regulations are part of the cost of ensuring that the customers/ratepayers are not harmed by subsidization. Without proper review of books and records, the Staff cannot determine if subsidization is occurring and what the costs the customers/ratepayers are paying. It is the Staff's belief that the possible subsidization costs to the customers/ratepayers may be greater than the costs incurred by the utility to comply with this rule.

The rule requires a CAM only to allow the regulated heating companies to have an approved method for cost allocations. This would simplify the methodology for the regulated heating company by not having to get regulatory approval of costing methodology for every different transaction as they occur.

16. 4 CSR 240-20.015(5)(A)240-80.015(5)(A)

Trigen-Kansas City Energy Corporation asserts that Trigen's parent company Trigen Energy Corporation has 19 operating companies in the US, Canada, and Mexico, and asks How Trigen can "ensure" that all of these entities maintain their books and records as required by Section (5).

The Staff believes if the regulated heating companies are conducting business with their affiliates, the records of those transactions would be recorded as part of ordinary business practices. The rule would require any transaction with the regulated heating company to include specific information by both the affiliate and the parent company. The regulated heating company would "ensure" this by having the requirement that any transaction done with the regulated heating company would include the recording of the require information. The Staff believes this is necessary in order to ensure customers/ratepayers are not harmed.

17. 4 CSR 240-20.015(6)(A)240-80.015(6)(A) access to the records of the affiliated entities

Trigen again asks how Trigen can "make available" such books and records as required by section (6)(A)?

Trigen would "make available" books and records as they would with any other Commission required records. The Staff believes that if a multi-national company like Trigen could not produce the required records for the Staff to review in Missouri, then they would incur the cost of transporting the Staff to the locations of the required records as per existing Commission requirements. Therefore, there would be no additional cost to the Staff's fiscal note.

18. 4 CSR 240-20.015(9)(A) Variance

Trigen-Kansas City Energy Corporation comments that subparagraph (9)(A)2.B refers to an annual filing of a CAM but offers no guidance as to when or how this filling is to be made, or what exactly it should contain.

Several parties have commented that they do not understand how an annual CAM filing would work, or do not fully understand its purpose. A CAM is simply a compilation of cost allocation procedures governing assignment of costs between all of the regulated and non-regulated operations of a utility, using fully distributed costing methods. Each utility would make an initial filing, with the Staff, OPC and other interested parties having some time to review it and make suggestions, and to bring concerns to the Commission. The Commission would then approve the CAM, with or without modifications as appropriate. Each year each utility would either file a new CAM, based on new service offerings or scopes or other changes, or indicate that the existing CAM is still appropriate for use. Interested parties would again have a period of time to review the annual filings, and bring any concerns to the Commission.

19. Fiscal notes

Trigen-Kansas City Energy Corporation says that fiscal note estimate for private entity is grossly understated. Trigen's higher estimates make the rule unjustified and ultimately harmful to the customers which the rule purports to protect.

Staff requested assistance from all the regulated heating companies in order to complete the private fiscal note for this rule. Trigen did respond with an estimate, however their estimate did not include any details of how the total costs were calculated. The Staff was unable to determine if the estimate was reasonable, and therefore the Staff estimated the possible costs that the utilities might incur to comply with this rule. Trigen offers no support that all three regulated heating companies would incur the same costs as themselves, instead Trigen offers the fact that since they are a small company that their costs would be greater than the other utilities. Yet in support of their contention of the burdensome costs to the customer/ratepayer, Trigen assumes the costs of all regulated heating companies have equal costs.

Trigen further suggests if the Staff plans to audit these books and records outside the US then the fiscal estimate for the Staff is understated.

Trigen would "make available" books and records as they would with any other Commission required records. The Staff believes that if a multi-national company like Trigen could not produce the required records for the Staff to review in Missouri, then they would incur the cost of transporting the Staff to the locations of the required records as per existing Commission requirements. Therefore there would be no additional cost to the Staff's fiscal note.

20. Miscellaneous

Some commenters suggest the Commission Should Seek to Improve Consumer Welfare Through Light-handed And Flexible Regulation.

The goal of this rule was to provide Staff the resources needed to investigate any possible subsidization of non-regulated affiliated entities by the regulated heating companies. Staff's belief is that subsidization of a non-regulated entity by the regulated heating company is harmful to the consumer/ratepayers.

In the context of a regulated industry, consumer welfare is maximized by regulations that lead to low prices, high quality, and a diversity of service offerings.

Staff believes that it is reasonable prices, reasonable quality service, and value service offerings that is the best for consumer welfare. If low prices were the main criteria used by the Staff then low prices could be achieved easily by denying the utilities any rate increases and requiring rate decreases. If high quality was the criteria, then the Staff would allow the utilities to spend unlimited money on assuring that all equipment, workmen-ship, and operations would be of the highest quality. It is obvious that these two criteria must be in balance, hence the reasonable prices and reasonable quality service. Staff believes that customers/ratepayers should expect services that are a value to them. Unlimited or a multitude of service offerings does not mean value services, and may be costing the customers/ratepayers more. So the Staff believes in reasonable service offerings which give the customer/ratepayer good value.

IV. CONCLUSION

Adoption of this rule will enable Staff and OPC to gather the necessary information to provide the Commission with more complete documentation, so that the Commission can make an informed decision. In order to make an informed decision when reviewing affiliate transactions, the Commission needs the most complete information possible. Adoption of this rule will mean that the Commission is more likely to get the information that it needs to make such a decision.

Respectfully submitted,

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ATTACHMENT A

ALTERNATIVE PROPOSED RULES

Ameren Corporation and Union Electric Company

Staff believes that the AmerenUE proposed rules incorporate their beliefs in what should be corrected with the Staff's proposed rule, based on their individual section comments above.

Purpose:

Identical to Staff's rule.

4 CSR 240-80.015 (1)(A):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (1)(B):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'
Uses 'steam heating corporation' instead of 'heating company'
Spells out HVAC

4 CSR 240-80.015 (1)(C):

Uses 'one (1)' instead of 'one'

4 CSR 240-80.015 (1)(D):

Uses 'one (1)' instead of 'one'
Uses 'producer' instead of 'product'
Uses 'hedge' instead of 'hedge risk'

4 CSR 240-80.015 (1)(E):

Added ' For purposes of this rule, compliance with 17 C.F.R. 250.91 establishes FDC.'

4 CSR 240-80.015 (1)(F):

Removed entire subsection.

4 CSR 240-80.015 (1)(G):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (1)(H):

Identical to Staff's rule.

4 CSR 240-80.015 (2)(A):

Uses 'preferential treatment or advantages' instead of 'financial advantage'
Eliminates the definition of what constitutes 'financial advantage'.

Adds 'in connection with services provided under tariffs on file with the Missouri Public Service Commission'.

4 CSR 240-80.015 (2)(B):

Removed entire subsection.

Substituted: - 'A regulated steam heating corporation and its affiliated interests shall not notify potential or actual customers, either directly or indirectly, that the steam heating corporation provides any advantages relating to the scheduling, transmission or distribution of steam heat to affiliated interests or their customers relative to unaffiliated entities and their customers.'

4 CSR 240-80.015 (2)(C):

Removed entire subsection.

Substituted: ' A regulated steam heating corporation shall not tie, as defined by State and federal anti-trust laws, the provision of any tariffed services to the taking of any goods and services from the steam heating utility's affiliated interests.'

4 CSR 240-80.015(2)(D):

Removed entire subsection.

Substituted: 'Specific customer information shall be made available to affiliated or unaffiliated companies only upon consent of the customer or as otherwise provided by law or Commission Rule and upon payment of reasonable charges incurred in providing such information. General or aggregated customer information may be made available to affiliated or unaffiliated companies or persons alike upon payment of reasonable charges incurred in producing such information.'

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(2)(E):

'A regulated steam heating corporation shall treat as confidential all information related to the transmission or distribution of heat received from unaffiliated energy marketers and shall not share such information with its affiliates.'

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(2)(F):

'Transactions between a steam heating corporation and its affiliated interests shall not be allowed to subsidize the affiliate interest.'

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(2)(G):

'Costs associated with the transfer of goods and services between a steam heating utility and its affiliates interest shall be priced either at cost or at fair market value, as specified in, and allocated pursuant to a Commission approved services agreement. For purposes of this section, a services agreement that has been approved by the Security and Exchange Commission under the Public Utility Holding Act of 1935, or any successor legislation or rules, will be deemed to satisfy this provision. The existence of an SEC approved or Commission approved Services Agreement under this provision shall not be a binding determination on the Commission regarding the reasonableness of charges in a subsequent Commission rate proceeding.'

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(2)(H):

'A regulated steam heating corporation shall maintain books, accounts, and records separate from those of its affiliated interest.'

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(2)(I):

'Upon request of the Commission, steam heating corporations shall make personnel available who are competent to respond to the Commission's inquiries regarding the nature of any transactions that have taken place between the steam heating utility and its affiliated interests, including but not limited to the goods and services provided, the prices, terms and conditions, and other considerations given for the goods and services provided.'

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(2)(J):

'The regulated steam heating corporation shall not participate in any affiliate transactions which are not in compliance with this rule except as otherwise provided in section (9) of this rule.'

4 CSR 240-80.015 (3)(A):

Removed entire subsection

4 CSR 240-80.015 (3)(B):

Removed entire subsection

4 CSR 240-80.015 (3)(C):

Removed entire subsection

4 CSR 240-80.015 (3)(D):

Renamed entire subsection as 4 CSR 240-80.015(3):
Uses ' ... commission approved CAM and Service Agreement as described in Section 2(G) above...' instead of ' ...commission approved CAM...'
Removes ' if approved by the commission.'

4 CSR 240-80.015 (4)(A):

Identical to Staff's rule.

4 CSR 240-80.015 (4)(B):

Identical to Staff's rule.

ADDED ADDITIONAL SECTION: 4 CSR 240-80.015(4)(C):

For purposes of this Rule, reports made on Form U-5-S and U-13-60 pursuant to the Public Utilities Holding Company Act of 1935, or any successor legislation or rules, will be deemed to satisfy this provision.

4 CSR 240-80.015 (5)(A):

Identical to Staff's rule.

4 CSR 240-80.015 (5)(A)(1):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (5)(A)(2):

Identical to Staff's rule.

4 CSR 240-80.015 (5)(A)(3):

Identical to Staff's rule.

4 CSR 240-80.015 (5)(A)(4):

Removed entire subsection.

Substituted: Policies regarding the availability of customer information and the access to services available to nonregulated affiliated entities desiring use of the regulated steam heating corporation's contracts and facilities.

4 CSR 240-80.015 (5)(A)(5):

Removed entire subsection.

4 CSR 240-80.015 (5)(A)(6):

Removed entire subsection.

4 CSR 240-80.015 (5)(A)(7):

Removed entire subsection.

4 CSR 240-80.015 (5)(A)(8):

Removed entire subsection.

4 CSR 240-80.015 (6)(A):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (6)(B)(1):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'
Uses 'for the purpose' instead of 'for the sole purpose'
Removed 'or affiliated entity'

4 CSR 240-80.015 (6)(B)(2):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'
Uses 'for the purpose' instead of 'for the sole purpose'
Removed 'or affiliated entity and their relationship to each other'

4 CSR 240-80.015 (6)(C):

Identical to Staff's rule.

4 CSR 240-80.015 (7)(A):

Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (8)(A):
Identical to Staff's rule.

4 CSR 240-80.015 (9)(A):
Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (9)(A)(1):
Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (9)(A)(2):
Uses 'regulated steam heating corporation' instead of 'regulated heating company'

4 CSR 240-80.015 (9)(A)(2)(A):
Identical to Staff's rule.

4 CSR 240-80.015 (9)(A)(2)(B):
Uses 'regulated steam heating corporation' instead of 'regulated heating company'

ATTACHMENT B

STAFF REPLY TO AMEREN WITNESS -John Landon

A. Fundamental Principle For The Commission's Affiliate Transaction Rules.

Ameren's witness John H. Landon states that the overarching goal of the Commission's rules on Affiliated Transactions should be to "improve consumer welfare." [p.2] This happens when "consumers can consume a greater quantity or higher quality of services at lower prices." [p.2] While Staff agrees with this principal, Mr. Landon's application of that principle to the affiliate transaction rules causes concern. In applying the consumer welfare maximization principle, Mr. Landon states that "all competitors should be able to exploit their legitimate competitive advantages so they can be effective in the marketplace." [p.3] According to Mr. Landon, legitimate competitive advantage comes from economies of scale and economies of scope, irrespective of how the utility or its affiliates have obtained these economies. He argues that: "[e]liminating the cost savings from these economies will make the utility and its affiliates less efficient and will reduce consumer welfare through increased prices," and "[c]onsumers will be harmed if regulators establish rules that prevent firms from exploiting economies of scale and scope." [p.4] Mr. Landon then sites three examples of how these economies would be eliminated by affiliate transaction rules: (1) "forced separation of integrated units;" (2) restricting the expansion of utilities into unregulated areas;" and (3) "prohibiting the sharing of overhead expenses such as accounting, legal and finance through service affiliates." [p. 5] It should be pointed out that none of these three measures are included in the proposed Missouri affiliate transaction rules for electric, natural gas or steam. In addition, the Staff disagrees with the unconditional statement that consumer welfare will be harmed if a utility is prevented from "exploiting economies of scale and scope." [p. 4]

To "exploit" means to take advantage of a situation for one's own advantage. One way in which economies are exploited is to increase profits by lowering costs. A second way economies are exploited is to lower price as a barrier to entry to competitors. Neither of these exploitations of economies have the long-run benefit of maximizing consumer welfare. Even with lower prices in the short run, when the lower price effectively keeps competitors out of the market, consumers are not benefited in the long run. When, in the long run, lower costs through economies of scale and scope can only be obtained for a single producer of goods and services, this is the case of a natural monopoly whose price should be regulated.

In his comments, Mr. Landon has ignored the possibility of the utility having gained its competitive advantage (economies of scale and scope) because of its unique status as a regulated monopolist. If the utility's competitive advantage either cannot be obtained by a non-utility competitor or can only be obtained at great cost in either time or resources, then the utility has an ***unfair competitive advantage***. If nothing were done to prevent this unfair competitive advantage, then regulators would not meet the criteria that Mr. Landon professes as a goal for the Commission:

> The goal of the Commission should be to ensure that the playing field is level and that all competitors have the opportunity to succeed or fail based on their own competitive merit.

The Staff agrees with the level playing field principle, and believes that the proposed rule meets this standard by not allowing a utility to have an unfair competitive advantage because of its monopoly status as a utility. Examples to illustrate this principle are presented in the following two section, where the problems of cross-subsidization and discrimination are discussed.

B. Cross-Subsidization: Potential Conflicts With Other Regulatory Bodies

Section 2A of the proposed Missouri rules on affiliate transactions deals with the issue of cross-subsidization. Mr. Landon correctly states that cross-subsidization can result in "illegitimate advantage." [p. 6] He is also correct where he states that cross-subsidies occur when utilities sell goods and services or share facilities with an affiliate at "below cost," or where the utility buys goods and services from an affiliate at "above-market prices." [p. 7] Where Mr. Landon and the Staff disagree is in the potential conflicts that might occur in the application of the rules proposed for Missouri when compared to other rules respecting cross-subsidization which apply to Ameren from the Securities and Exchange Commission (SEC).

For example, Mr. Landon states that "prices between entities in a holding company are established at fully allocated costs as approved by the SEC." [p.12] The exact language of the most relevant portion of the SEC rules is as follows:

Sec. 250.91 Determination of cost.

> (c) Any expense (including the price paid for goods) incurred in a transaction with an associate company of the performing or selling company (directly or through one or more other associate companies thereof), to the extent that it exceeds the cost of such transaction to such associate company, shall not be included in determining cost to such performing or selling company.

What this rule indicates is that when a transaction takes place between affiliates, the cost of the goods and services will be booked at fully allocated cost.[1] Mr. Landon goes on to state that the "cross-subsidy concerns are adequately addressed by the requirements of the SEC under PUHCA," and "the financial standard set under Section A is inconsistent with that embodied in SEC's regulations and inconsistent with the service company format that the SEC requires."

[1] Parts 250.91 (a) and (b) to the SEC rule specifies the details of what is meant by the word "cost" used in part (c). These specifications make it clear that "cost" should be what the proposed Missouri affiliate transactions rule define as fully allocated costs.

[pp. 14-15] Further, Mr. Landon asserts that "the provisions of Section A go well beyond those necessary to ensure that cross-subsidy is averted by setting a financial standard that serves to undermine advantages a competitive affiliate could realize in the market." [p. 15]

The Staff respectfully disagrees with Mr. Landon's conclusions. The Staff agrees that SEC rules require that transactions that have taken place between affiliates be booked at fully allocated cost. The key phrase is "transactions that have taken place." Section 2A of the proposed Missouri rules for affiliate transactions also requires that transactions that have taken place be booked at fully allocated cost, but adds a provision that if the regulated utility is the buyer it should not pay an affiliate more than market price and if the regulated utility is the seller, it should not sell to an affiliate at less than market price.

The proposed Missouri rule on affiliate transactions anticipates that when the utility is considering purchasing goods or services from an affiliate (e.g., accounting or financial services), if the utility can purchase those same services from the market at a lower cost, then it should do so. It would be incorrect to interpret the SEC rule as being contradictory to this good business practice. The SEC rule does not force the utility to purchase services from an affiliate when it can procure those services from the market at a lower cost. In addition, this does not violate Mr. Landon's concept of not allowing economies to be exploited. Indeed, if economies exist in the provision of affiliate services, then the affiliate's fully allocated cost for those services should be less than the market cost, and the utility can fully exploit the savings by buying from the affiliate.

The proposed Missouri rule anticipates that when the utility is selling goods or services to an affiliate (e.g., energy from regulated sources[2]), if these goods and services can be sold in the market at a price that is greater than fully allocated cost, then the profits from these sales would be booked to the utility, not to the affiliate. Notice that when the utility is the seller, it books its costs and the revenues that it receives from the sale. The difference is profits. If the sale to the affiliate is being considered at fully allocated cost, but a sale in the market is at a higher price, the proposed Missouri rule anticipates that the utility should sell to the market at the higher price. Again, to interpret that the SEC rule forces the utility to sell to an affiliate at a below market price is a misreading of that rule. In addition, if the regulated utility enjoys economies in the provision of these goods and services, it is more fully allowed to "exploit" those economies by selling where it can receive the highest price.

C. The Fallacy Of Limiting Discriminatory Access To "Non-Essential" Information and Facilities.

Section (2)(B) of the proposed Missouri rules for affiliate transactions deals with the issue of limiting discriminatory (preferential) access to information and facilities, as well as providing affiliates with preferential service or treatment. Mr. Landon asserts that lack of preferential access, service or treatment should be limited to "essential" information, services or facilities. Mr. Landon defines "essential" services and facilities *as "primarily ... those that cannot be practicably or efficiently duplicated by each competing firm in the market.*" [p. 7] As examples, Mr. Landon includes only the utility's transmission and distribution facilities. Mr. Landon defines "essential" information as "*exclusive information of competitive significance about a utility's regulated operations that a utility acquires by virtue of its status as a regulated*

[2] For electric, this would be electricity from plants built to provide electricity to the utility's electric customers. For steam, this would be steam from plants built to provide steam to the utility's steam customers. For natural gas, this would be gas from storage that was purchased to serve the utility's natural gas customers.

monopoly in a service area." [p. 8] As examples, Mr. Landon includes "aggregated, non-customer-specific information necessary to use essential facilities," and "regulated customer information and contacts." [p. 8] Mr. Landon goes on to state that "information that does not relate to essential facilities or services, in most cases, is information that the utility should not be compelled to share with non-affiliated suppliers." [p. 9] As examples of such services, Mr. Landon includes "corporate support, human resources, internal policies of the utility, and marketing of the utility's competitive services" ("such as new products that the utility is planning to offer or segments of the market that it plans to target"). [p. 9] Mr. Landon states that the proposed Missouri rules "appear to be broader in scope than necessary and will tend to dampen the efficiency of competitive markets that affiliate companies participate in." [p. 13] It appears that Mr. Landon's statement is based on the omission of the word "essential," as he states, "[l]egitimate preferential service concerns should be limited to those relating to access to essential facilities and information." [p. 13]

As a concrete example, consider the facilities and information related to the utility's customer information system. Because of its status as a monopoly utility, the utility has detailed information on its customers readily accessible in a highly sophisticated computer system. If the utility allowed an affiliate to use that information and system to send out advertisements or billings for non-regulated goods and services, then the affiliate would have a tremendous competitive advantage over companies attempting to sell the same goods and services. The proposed standard (2)(B) would not allow the utility to provide this service to an affiliate without making the same service available to other competitors wanting to sell similar, non-regulated goods and services. In essence, the proposed standard (2)(B) would require that <u>all</u> services, information and use of facilities that are a by-product of its regulated operations not be used to give an affiliate a competitive advantage. Mr. Landon would restrict this prohibition to what he defines as "essential" services, information and facilities.

In the above example, customer information and the facilities to access individual customers with advertising and billing appear not to fit under Mr. Landon's definition of "essential." Clearly, Mr. Landon did not include customer information facilities as an example of "essential" facilities. Also, in Ameren's proposed rule on affiliate transactions, it only includes customer information (Ameren's section 2D) and omits customer information facilities (Ameren's sections 2B and 2E). Thus, it appears that under Ameren's proposal, the customer information facilities are not included as "essential" facilities, even though those facilities are available because of the utility's need for them as a regulated monopolists and the ability and cost to duplicate these facilities would be a major barrier to entry for competitors.

This illustrates the major difference between Ameren's approach and the approach set out in the proposed Missouri rules on affiliate transactions. Ameren wants to minimize the categories of facilities and information that would be covered by the preferential treatment prohibition. In theory, Ameren would limit those to "essential" services, information and facilities, but in practice the rule would include a list of: essential services (i.e., "services provided under tariffs on file with the Missouri Public Service Commission – Ameren's proposed 2A); access to essential facilities (i.e., "scheduling, transmission or distribution of electricity" – Ameren's proposed 2B); and essential information (i.e., "customer information" – Ameren's proposed 2D). This listing approach to "essential" services, facilities and information requires that the Commission make an up-front decision about specific services, facilities and information that are deemed to be "essential." The risk in this approach is that critical items are likely to be missing from such a list. Apparently, this is consistent with what Mr. Landon calls "light-handed" regulation.

In contrast, the proposed Missouri rules on affiliate transactions prohibit any preferential service, information or treatment to an affiliated entity over another party at any time. Preferential services, information or treatment are limited to those actions by the regulated utility that would result in the affiliated entity having an unfair advantage over its competitors (Section (1)(F) of the proposed Missouri rules on affiliate transactions). Instead of listing specific services, facilities and information, the rule limits the application to what would properly be termed level playing field issues. Violations of this rule would occur on a complaint basis, where the Commission could hear specific evidence as to whether or not the service, access to facilities or information provided would result in an unfair advantage for the affiliated entity. The Staff does not consider this to be "heavy-handed" regulation. Instead, this is a very reasonable approach in which the utility must make an internal decision about whether provision of a service, access to the use of a facility or information would result in a competitive advantage for an affiliate.

Indeed, beyond the method of application, at the heart of the disagreement between Staff and Ameren is whether the standard should be a level playing field or use of essential facilities and information. In part, it appears that Mr. Landon agrees with the level playing field standard where he states: "[t]he goal of the Commission should be to ensure that the playing field is level and that all competitors have the opportunity to succeed or fail based on their own competitive merits." [p. 6] However, Mr. Landon then limits "unfair" advantage to apply only to essential facilities. The Staff believes that any competitive advantage that is gained because of the utility's status as a regulated monopoly is an unfair competitive advantage. Moreover, the types of "legitimate competitive advantages" that a holding company can gain is through shared activities among affiliates due to the presence of common buyers, channels, technologies, and other factors, rather than activities in which non-regulated affiliates are allowed to exclusively leach from the by-products of the regulated utility.

D. The Issue of Employee Transfers

Mr. Landon would restrict the affiliate transaction rules to be limited to "employees that may have competitively sensitive knowledge or information." [p. 13] He argues: (1) "[e]mployees' training and experience belongs to them, not to the regulated utility;" (2) "it is difficult to see how the Staff's requirement to consider market and fully allocated cost in setting prices would apply in the case of employees;" and (3) "this requirement places an asymmetrical burden on the utility's competitive affiliate" because "[r]egulated utility employees are free to seek employment with the affiliate's competitors without commensurate payment requirements." [p. 13] The Staff agrees with these comments. However, the Staff is still very much concerned with a situation in which the regulated utility lends or shares the services of its employees to an affiliate. In these cases, the regulated utility should be compensated fairly for those employee services. To cover this concern, the rule could be modified in section (2)(A)2 to change "trained employees" to "trained employee services."

ATTACHMENT C

A BRIEF SYNOPSIS OF WHAT OTHER STATES HAVE DONE

The Ohio, Kentucky & Indiana Commissions use these affiliate guidelines as developed from the PSI Energy & Cincinnati Gas & Electric:

1. They use the 10 % control doctrine the same as our rules.
2. They require that all affiliate contracts be filed with the Commissions as well as the SEC.
3. The Commissions have access to the affiliates of PSI and Cinergy.

The Pennsylvania Commission highlights:

1. 5% ownership of the Company is deemed as having control.
2. The LDC should apply tariffs in a nondiscriminatory manner to its affiliate its own marketing division and any non-affiliate.
3. They talk about not allowing preferential treatment.
4. The marketing codes of conduct are the same or similar to the Commission's proposed rules. Customer information is essential and the PA Commission does not allow the affiliate to have preferential treatment with this information.
5. They also have a separation of employees between a LDC and its affiliate.

The Arizona Commission highlights:

1. The definition of affiliate is similar to the Commission's proposed rule
2. The affiliate must provide access to the Commission for review.

The New York Commission highlights:

1. 5% ownership of the Company is deemed as having control.
2. The requirement of LDCs to account for and furnish all transactions between the LDC and its affiliates.
3. Customer information cannot be only be revealed to the affiliate.
4. The NY Staff has access to the books & records of the LDCs affiliated companies.
5. The LDCs must set up a complaint procedure and that should be responded to within 20 days written response.
6. They indorse the separation of employees between an affiliate and a LDC
7. There is to be an annual filing of annual reports to the Commission.
8. Transferred employees from the LDC to a unregulated subsidiary will be compensated in an amount equal to 25% of the employees prior years annual salary.
9. They follow fully allocated costs (FDC).
10. There shall be no preferential terms, nor such terms are available exclusively to customers who purchase goods or services from, or sell goods and services to, an affiliate of the Company.
11. Any customer information received by the LDC must be made available to its affiliate's competitors on a simultaneous and comparable basis.
12. The LDC and its unregulated affiliates will have separate operating employees.

Ohio's code of conduct for Columbia Gas of Ohio highlights:

1) Columbia must apply any tariff provision relating to transportation services in the same manner to the same or similarly situated persons if there is discretion in the application of the provision.
2) Columbia must strictly enforce a tariff provision for which there is no discretion in the application of the provision.
3) Columbia may not, through a tariff provision or otherwise, give any Marketer or any Marketer's customers preference in matters, rates, information, or charges relating to transportation service including, but not limited to, scheduling, balancing, metering, storage, standby service or curtailment policy. For purposes of Columbia's CHOICE Program, any ancillary service provided by Columbia not tariffed, will be priced uniformly for all Marketers and available to all equally.
4) Columbia must process all similar requests for transportation in the same manner and within the same approximate period of time.
5) Columbia shall not disclose any customer information to any affiliate unless such customer authorizes disclosure of such information.
6) If a customer requests information about Marketers, Columbia should provide a list of all Marketers operating on its system, but shall not endorse any Marketer nor indicate that any Marketer will receive a preference.
7) Before making customer lists available to any Marketer, Columbia will use electronic mail to provide notice to all Marketers of its intent to make such

customer list available. The notice shall describe the date the customer list will be made available to all Marketers.

8) To the maximum extent possible, Columbia's operating employees and the operating employees of its marketing affiliate must function independently of each other. Complete separation of gas procurement activities from its affiliated marketing procurement acitivities.
9) No conditioning or tying of agreements for gas supply.
10) They must maintain separate books of accounts and records.
11) No communication shall occur where the use of a marketing affiliate will procure an advantage.
12) Shall establish a complaint procedure concerning compliance of standards of conduct.
13) The marketing affiliate cannot use the LDC's logo in its promotional material, unless the promotional material discloses in plain, legible or audible language, on the the 1st page or at the 1st point where Columbia Gas of Ohio's name or logo appears, that its marketing affiliate is not the same company as Columbia Gas.

The Delaware Commission highlights:

1. Uses a CAM in place for affiliated transactions.
2. Customer information is treated the same as other states, where the customer must give written authorization for release of their information.
4. The use of bill inserts, promotions within the bill envelope shall be available to affiliates and non-affiliates alike, on the same terms and conditions.

5. There shall be a prohibition of advantages by utility affiliation.
6. Delaware has an annual requirement of filing for affiliated companies that includes,

1) All contracts entered into with affiliated companies, and all transactions undertaken with affiliates without a written contract.
2) The amount of affiliate transactions by affiliate by account charged.
3) The basis used to record affiliate transactions (i.e., book value, fmv, fdc).
4) Total costs allocated or charged back to each business unit, and the allocation of infrastructure costs to each business unit. And,
5) Updates of the allocation factors used for each infrastructure cost center.

7. Delaware also indicates that the books and records of the parent company and other affiliates when required in the application of Company's Code of Conduct and CAM should be made available.
8. The books and records should be maintained in sufficient detail to maintain verification and compliance of the rules, and continue to submit all reports currently filed with the Commission. Delaware has the use of the CAM
9. Delaware allocates costs under FDC.

The Georgia Commission highlights:

1. LDC's must be required to apply the same delivery terms and conditions in the same manner to all similarly situated shippers, whether affiliated or not.
2. Affiliates must not enjoy preferential treatment
3. Cross subsidies between the utility and its affiliate marketer must be avoided

4. All information made available to a marketing affiliate must be made available to all marketers at the same time to ensure non-discriminatory access to information, service, and unused capacity and/or supply
5. Standards for reserve margins for gas supply and capacity must be established
6. LDC's and marketing affiliates must keep separate records and files open for Commission review
7. All gas purchase activity must be conducted separately by a utility and its marketing affiliate
8. A complaint procedure must be established to address potential abuse of the affiliate relationship

The Maryland Commission highlights:

1. Costing methodology is FDC
2. They use asymmetric pricing principles which are similar to the Commission's proposed rules
3. Separation of Employees between the LDC and its affiliate
4. Physically separate locations between LDC and its affiliate
5. No preferential treatment
6. No appearance that the marketing affiliate is part of the LDC's operations Customer information, discounts, rebates, waivers, etc. shall be offered on a contemporaneously basis to affiliates and non-affiliates alike

The New Jersey Commission highlights:

1. No preferential treatment
2. Separation of Employees between the LDC and its affiliate
3. Customer information, gas supplies or capacities shall be offered on a contemporaneously basis to affiliates and non-affiliates alike
4. Costing methodology is FDC
5. Separate books and records
6. Complaint procedure

The Wisconsin Commission highlights:

1. Provide access to LDC information, services & unused capacity to all market participants
2. No preferential treatment
3. Separation of employees between the LDC and its affiliate
4. Maintain separate books and records
5. Maintain detailed records for each affiliate transaction
6. The establishment of a complaint procedure

Washington Commission Highlights:

1. RCW 81.16.010. Definition of "affiliated interest" uses five percent or more of voting securities as a determination of ownership.
2. WAC 480-146-240. Has a waiver clause.
3. WAC 480-146-320. A report on affiliated transactions for the year is due on June 1 to the commission.

4. RCW 80.16.020. Utilities must file contracts or arrangements with affiliated interests before they take affect.
5. WAC 480-146-320. Annual report to include a description of the procedure for allocating costs between the utility and its affiliates.

Connecticut Commission highlights:

1. Section 16-xxx-1. Rules are for electric distribution companies and their generation affiliates.
2. Section 16-xxx-5-(i). Shared or joint costs shall be allocated based on actual embedded costs.
3. Section 16-xxx-5-(i). Distribution company shall pay fair market value for all goods and services produced by the affiliated entities.
4. Section 16-xxx-3-(a). Prevent preference to generation affiliate over non-affiliated entities, or allow employee, officer, etc. access to information of the distribution company's customers or system that is not available on a equivalent basis to non affiliated entities.
5. Section 16-xxx-3-(e). Electric distribution companies shall not solicit business for the affiliate, acquire information on behalf of the affiliate, provide referral to the affiliate, give the appearance of speaking on the behalf of or represents the affiliate, or give the appearance that the affiliate speaks for the company.
6. Section 16-xxx-4-(b). Distribution company shall make non-customer specific non-public information available to the affiliate only if the company makes

the information available on the same terms and conditions to all other entities.

7. Section 16-xxx-5-(b). The books and records of the affiliate shall be open for examination by the DPUC with respect to transactions between the company and the affiliates.
8. Section 16-xxx-5-(d). Physical separation of company and affiliate.
9. Section 16-xxx-5-(h)-(2). No joint employees between company and affiliate. Company will track employee transfers between company and affiliates. If employee transfers to the affiliate the employee may not transfer back for a period of one year.
10. Section 16-xxx-7. Compliance plan to be filed by July 1, 1999.
11. Section 16-xxx-7-(d). DPUC will assess civil penalties.

Rhode Island Commission highlights:

1. Section II. Rules are for gas marketers.
2. Section IV(A). Use of shared employees shall be minimized. Use of a company employee by the affiliate is not allowed if employee will be exposed to market sensitive information.
3. Section IV(B). Affiliate shall have physically separated facilities.
4. Section IV(C). The utility may not disclose aggregated information or non-customer information to affiliate without making it equally accessible to other interested parties.

Illinois Commission highlights:

1. Section 450.30. Electric utilities shall not preferential treatment, any services offered to the affiliate shall be made to all non-affiliated entities.
2. Section 450.50. Employees of the electric utility affiliates shall not have preferential access to any delivery service information that is not available to nonaffiliated entities.
3. Section 450.100. Except in relation to corporate support and emergency support, electric utilities and their affiliates shall function independently of each other, and shall not share services or facilities.
4. Section 450.110. Except in relation to corporate support and emergency support, electric utilities and their affiliates shall not share employees.
5. Section 450.120. Costs associated with transfer of goods and services between an electric utility and its affiliate shall be priced as specified in, and allocated as per the Commission approved services and facilities agreement.
6. Section 450.160. Penalties can be imposed for violations of these provisions.

Iowa Commission highlights:

1. Must maintain separate records
2. LDCs and their affiliates must allow the Commission access to books, records, accounts, documents, and other data and information which the Commission finds necessary to effectively implement and effectuate the provisions of this rule.
3. An exemption or waiver is allowed

4. There is to be an annual filing relating to affiliated transactions
5. They use FDC.

California Commission highlights:

1. 5% ownership of the Company is deemed as having control.
2. They use FDC
3. They have a variance
4. No preferential treatment financial and non-financial
5. They have similar record keeping requirements
6. Separation of books and records
7. Separation of employees between LDC and its affiliates. Transferred employees from the LDC to the affiliate shall have the affiliate compensate the LDC 25% of the employee's base annual compensation, unless LDC can demonstrate a lesser percentage (equal to at least 15%) is appropriate for the class of employee included
8. They have an annual compliance filing as it relates to the affiliated transactions conducted over the course of the year.

The Nevada Commission highlights:

1. Separation of books and records between LDC and the affiliate
2. Separation of employees
3. No preferential treatment financial and non-financial
4. They use asymmetric pricing
5. They have a complaint procedure