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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 10th
day of August, 1999.

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

ORDER DENYING CONTESTED CASE PROCEDURES

On April 26, 1999, the Missouri Public Service Commission (Commission) filed proposed rule 4 CSR 240-40.016 *Marketing Affiliate Transactions* with the Secretary of State. This rulemaking proceeding has been assigned case number GX-99-445. The Proposed Rule was published in the *Missouri Register* on June 1, 1999, and provided a comment period through July 1, 1999, a reply comment period through August 1, 1999 (comments due Monday, August 2), and, scheduled a public hearing for September 15, 1999.

On July 1, 1999, Associated Natural Gas Company, Laclede Gas Company, Missouri Gas Energy and Trigen-Kansas City Energy Corporation jointly filed their *Motion to Adopt Contested Case Procedures* (Group A Movants). On July 2, 1999, UtiliCorp United Inc., d/b/a Missouri Public Service, The Empire District Electric Company and St. Joseph Light & Power Company filed their *Joint Motion for Implementation of Contested Case Procedures* (Group B Movants) ("Movants" collectively for both groups). These motions are similar and request contested case procedural due process rights in this rulemaking proceeding. The Movants are all

public utilities as defined in Section 386.020, RSMo 1994, and 4 CSR 240-2.010(15).

Most significantly, the Movants desire to test the evidence presented at the public hearing for this rulemaking by being allowed cross-examination and additional days for the hearing. Group B Movants also requested the "full range of procedural rights and requirements" for "contested cases" describing the requirements and citing Sections 536.067; 536.073; 536.070; 536.077; 536.080 and 536.090, RSMo, as amended.

On July 12, 1999, the Staff of the Missouri Public Service Commission and the Office of the Public Counsel (OPC) filed separate responses in opposition to the motions requesting contested case procedures.

Proposed Rule 4 CSR 240-40.016: Purpose and Authority

The purpose of the proposed rule being considered in this proceeding is to set standards of conduct, financial standards and record-keeping requirements applicable to regulated gas corporations engaging in marketing affiliate transactions.

An affiliate entity under the proposed rule is an entity that directly or indirectly controls or is controlled by or is under common control with the regulated gas corporation. Transactions between the affiliate and the regulated company may occur on less than an arms-length basis and affect the regulated company. The Commission must consider how these transactions affect regulated activities. The proposed rule will

assure that "affiliate" or "other" businesses are "substantially kept separate and apart" from the regulated activity and to the extent this does not occur assures that the Commission has the information necessary to carry out its duties.

The Commission's authority to promulgate the proposed rule is based on the Commission's general authority at Section 386.250, RSMo Supp. 1998, and the Commission's express authority concerning gas utilities at Section 393.140, RSMo 1994. The Commission is a state agency under the general provisions of the Missouri Administrative Procedure Act (APA) at Chapter 536 of the Revised Statutes of Missouri. The APA provides authority applicable to administrative rules and rule-making proceedings as well as contested case proceedings.

Arguments

The Movants state that Section 386.250(6), RSMo Supp. 1998, as requiring that "a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule." The Movants assert that if the Commission is required to hold a hearing and take "evidence" that a rulemaking proceeding must be considered a "contested case".

Even if a hearing is required or is held, a rulemaking proceeding does not become a contested case. The APA, at Section 536.021, RSMo Supp. 1998, expressly allows for an optional or required hearing for a proposed rulemaking (Section 536.021.3) and provides that the agency

shall summarize and state its findings as to the merits of testimony presented at the hearing (Section 536.021.5(4)).

The APA defines and distinguishes the words "rule" and "contested case" and prescribes separate and distinct due process procedures for rulemaking and for contested cases. A "contested case" is defined as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." § 536.010(2), RSMo 1994 (emphasis supplied). A "rule" is defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy . . . but does not include: . . . d) A determination, decision, or order in a contested case." § 536.010(4), RSMo 1994.

The Missouri Supreme Court has followed the statutory definitions and voided agency actions to set or change a statewide policy where the agency failed to comply with statutory rulemaking procedures. *NME Hospitals, Inc. v. Dept. of Soc. Services*, 850 S.W.2d 71 (Mo. banc 1993). "An agency standard is a "rule" if it announces "[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified facts" *Id.* at 74, citing *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. 1979).

The proposed rulemaking in this proceeding is not to determine the legal rights, duties or privileges of specific parties. The culmination of this process will not result in a decision made in a contested case. The proposed rule does provide a statement of general

applicability that implements, interprets and prescribes law and policy that will apply in the future on a statewide basis to all public utilities. A requirement for a hearing, if any, is consistent with a rulemaking proceeding and does not convert that proceeding into a contested case.

The Group A Movants also assert that "hearing" requirements found in subsections (5) and (8) of Section 393.140, RSMo 1994, require the implementation of contested case procedures. Even if this were so, these subsections are addressed to examinations of particular persons or corporations as opposed to a proceeding to formulate general policy. In addition, nothing in Section 393.140 nullifies other subsections or statutes granting authority to the Commission or restricting the Commission to acting only under certain subsections.

Finally, the Group A Movants assert that the proposed rules and the public policy they present are "too important" to utilities and to consumers to be resolved without the use of contested case procedures. This assertion is beyond reason. Nothing in state law restricts rule-making powers to unimportant or less important matters. "Implicit in the concept of the word "rule" is that the agency declaration has a potential . . . of impacting the substantive or procedural rights of some member of the public." *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994). If administrative rules only dealt with matters not presenting any great consequence, formal rulemaking and the significant notice, comment and procedural requirements imposed on the process would not be warranted.

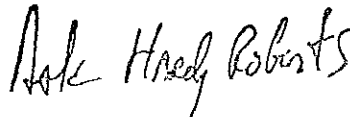
IT IS THEREFORE ORDERED:

1. That the *Motion to Adopt Contested Case Procedures* filed by Associated Natural Gas Company, Laclede Gas Company, Missouri Gas Energy and Trigen-Kansas City Energy Corporation is denied.

2. That the *Joint Motion for Implementation of Contested Case Procedures* filed by UtiliCorp United Inc., d/b/a Missouri Public Service, The Empire District Electric Company and St. Joseph Light & Power Company is denied.

3. That this order shall become effective on August 20, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Drainer and Schemenauer,
CC., concur.
Crompton and Murray, CC., concur.

Thornburg, Regulatory Law Judge

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

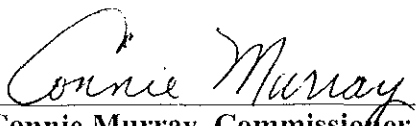
DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully dissent from the decision of the majority to issue the Order of Rulemaking. Although the final rule is more closely tailored to accomplish its stated purpose than was the originally proposed rule, it remains more restrictive than necessary and may result in increased costs to utilities and reduced benefits to consumers.

The requirements of asymmetrical pricing and the use of fully distributed cost methodology exceed what is needed to prevent cross-subsidization. These requirements provide an advantage to competitors and a disadvantage to regulated utilities and their affiliates. When the competitive scale is tilted in either direction, the consumer loses.

Therefore, I must vote against this final order of rulemaking.

Respectfully submitted,


Connie Murray, Commissioner

Dated at Jefferson City, Missouri,
on this 14 day of November, 1999.

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION