

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
August 10, 1999**

CASE NO: EX-99-442

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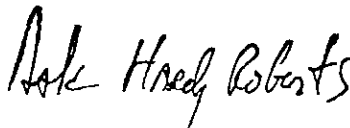
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

William J. Niehoff

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Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

Uncertified Copy:

Gerald A. Reynolds

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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 240-20.015 Proposed Rule) Case No. EX-99-442
- Electric Utilities Affiliate Transactions.)

ORDER DENYING CONTESTED CASE PROCEDURES

On April 26, 1999, the Missouri Public Service Commission (Commission) filed proposed rule 4 CSR 240-20.015 *Affiliate Transactions* with the Secretary of State. This rulemaking proceeding has been assigned case number EX-99-442. 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 14, 1999.

On July 2, 1999, UtiliCorp United Inc., d/b/a Missouri Public Service, The Empire District Electric Company and St. Joseph Light & Power Company ("Movants") filed their *Joint Motion for Implementation of Contested Case Procedures*. The Movants are public utilities as defined in Section 386.020, RSMo 1994, and 4 CSR 240-2.010(15).

The Movants request the use of contested case procedures in this rulemaking. 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. Contested case

procedures are generally described at 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 Public Counsel (OPC) filed separate responses in opposition to the motions requesting contested case procedures.

Proposed Rule 4 CSR 240-20.015: 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 electrical corporations participating in 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 electrical 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 electrical

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 rulemaking proceedings as well as contested case proceedings.

Arguments

The Movants cite 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.

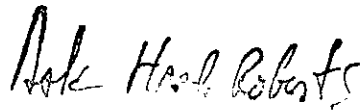
IT IS THEREFORE ORDERED:

1. 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.

2. 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

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

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson
City,

Missouri, this 10TH day of AUGUST, 1999.



Dale Hardy Roberts

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**