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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 3rd
day of August, 1999.

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

**ORDER GRANTING PUBLIC COUNSEL'S MOTION TO COMPEL ANSWERS
TO DATA REQUESTS PRESENTED TO AMERENUE AND TO MISSOURI GAS
ENERGY AND SUSTAINING CERTAIN OBJECTIONS**

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 formal 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 June 7, 1999, the Office of the Public Counsel (OPC) served data requests on several large regulated gas utilities in Missouri in order to obtain information the OPC believed would support its initial and reply comments concerning the proposed rule. On June 14, 1999, UtiliCorp United, Inc., d/b/a Missouri Public Service (MPS), filed its motion asking the Commission to issue its standard protective order in this proceeding stating that the OPC's data requests sought information

that MPS considered to be highly confidential business information. On June 23, 1999, the OPC requested a blanket standard protective order for this rulemaking proceeding. On June 26, 1999, the Commission adopted and issued its standard protective order for this rulemaking proceeding effective July 6, 1999. The effective date of the order was later changed to June 30, 1999, so that if any comments referenced highly confidential information those comments containing highly confidential information could be timely filed under seal on July 1, 1999.

In addition to issues concerning protection of confidential and sensitive information, certain utilities have presented the OPC with additional objections, in writing, pursuant to 4 CSR 240-2.090, concerning the data requests. The participants have not been able to resolve all the issues presented. On July 9, 1999, the OPC filed its *Motion to Compel Data Requests Submitted to AmerenUE* in this proceeding and filed a similar motion for data requests submitted to Missouri Gas Energy. Pursuant to 4 CSR 240-2.080(12) and the Commission's *Order and Notice Regarding Motions to Compel Data Requests* responses to OPC's motion were due by July 19, 1999. On July 19, 1999, AmerenUE and Missouri Gas Energy (MGE) each filed responses.¹

¹ On August 2, 1999, AmerenUE filed its *Satisfaction of Outstanding Data Requests*. AmerenUE stated that it had determined to respond "without requiring the Commission to address the issues" presented and "without waiving the positions taken" by AmerenUE. With respect to specific data requests that were still pending AmerenUE prefaced its responses by noting it was one of 32 subsidiaries of Ameren Corporation, that AmerenUE was the only subsidiary that was a Missouri public utility subject to the Commission's jurisdiction, and, that AmerenUE did not have the information requested in the data requests.

The responses raise three challenges to the data requests submitted by the OPC: 1) that this discovery procedure (data request) is available only in a "contested case" and is not available in a rulemaking proceeding; 2) that the data requests seek information that is outside the jurisdiction of the Commission and from persons outside the jurisdiction of the Commission; and, 3) that the data requests do not seek information that is relevant to this proceeding.

Availability of Data Requests in a Formal Rulemaking Proceeding

Section 386.450, RSMo 1994², provides statutory authority for the OPC to issue data requests and provides for the Commission to compel production for good cause shown. This statute states no condition that there be a contested case. In fact, this statute does not require any type of proceeding to be pending before the Commission.

Even if a pending proceeding is required, pursuant to Section 386.710(2), RSMo, the public counsel may represent and protect the interests of the public in "any proceeding" before the Commission. And, under Section 386.710(4), RSMo, the public counsel has "all powers necessary or proper to carry out" her duties. The proposed rulemaking in this case is a "proceeding before the Commission." Public interests are at issue.

The public counsel's access to information is co-extensive with that of the Commission as provided in Section 386.450, RSMo. The Commission's authority to obtain information from a corporation, person

or public utility is not limited to contested case proceedings. The Commission's rule regarding data requests, 4 CSR 240-2.090, is applicable in "proceedings before the commission" without restriction to contested case proceedings.

Because the OPC's authority to make data requests is not conditioned upon a contested case proceeding, the assertions to deny the *Motion to Compel* on this basis are without merit.

Jurisdiction Over Persons and Subject Matter

The jurisdictional arguments are premised on a presumption that the data requests cannot be enforced if the persons or subject matter to which the requests are directed are outside the jurisdiction of the Commission.

MGE asserted that data requests could not extend to entities over which the Commission has no jurisdiction. This argument presents no genuine issue. The data requests are addressed to regulated public utility companies and seek information from these companies. The data requests were not served on unregulated companies and do not require such companies to produce any information.

A more complex issue is presented with respect to whether the information sought is subject matter that is within the Commission's jurisdiction.

² Statutory references are to the Revised Statutes 1994, unless indicated otherwise.

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.

MGE has cited and relied on Section 393.140(12), RSMo, as a basis to argue against subject matter jurisdiction. Under Section 393.140(12), RSMo, a regulated gas utility is not required to obtain the Commission's consent to carry on "other business" outside the Commission's jurisdiction and "such other business shall not be subject" to any of the provisions of Chapter 393 (Regulation of Certain Utilities) - so long as - the operations of the "other business" are "substantially kept separate and apart" from the regulated activity. The statute expressly provides that it does not limit or restrict the Commission with regard to its powers in respect to the regulated activity and states that "said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by" the public utility operations and business "as distinguished from such other business."

To raise subject matter jurisdiction MGE has miscast the statute, the proposed rule, and OPC's data requests. The proposed rule will simply 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 proposed rule addresses matters within the Commission's jurisdiction and actually will enable greater compliance with Section 393.140(12), RSMo.

OPC's data requests concern matters that are the subject of the proposed rule and therefore are within the subject matter jurisdiction of the Commission.

Relevance

MGE raised and mixed relevancy objections with jurisdictional issues in its responses. Jurisdiction has been addressed. Relevancy objections must be considered in the context of each data request where an objection was specifically presented to the Commission.

AmerenUE raised relevancy objections to data requests 507, 508 and 509³. Data requests 507, 508 and 509 were as follows:

(507) Please provide a copy of the Company's two most recent strategic plans (business plans) for its (1) overall regulated and (2) overall non-regulated electric [sic] operations.

(508) Please provide a copy of the two most recent strategic plans (business plans) for the Company's gas marketing affiliate.

³ AmerenUE subsequently responded to the data requests as noted previously.

(509) Please provide a copy of the two most recent strategic plans (business plans) for the Company's gas marketing affiliate.

The OPC stated that "the data requests were to provide Public Counsel with enough information so that its initial and reply comments might include specific examples of current activity that should be covered by an affiliated transaction rule." The proposed rule is not concerned with strategic plans. In fact, the purpose is not to restrict regulated or nonregulated activities, but to ensure that such activities are substantially kept separate and apart, and, to the extent that they are not, that the Commission has sufficient information to determine the effect on the regulated activity. Strategic plans might or might not reflect "current activity." The Public Counsel can obtain information about current activities without viewing strategic plans simply by asking about current activities. These data requests are not relevant to the matters presented by the proposed rule.

MGE made a blanket assertion that the OPC's data requests were not relevant. Further, MGE argued that OPC's intent to "illustrate" an alleged "current trend toward diversification" did not support the relevance of its data requests.

The proposed rule would be unnecessary if regulated utilities were not diversifying their business activities. Information showing diversification supports the proposed rule. OPC's data requests seek information to support the proposed rule and therefore the data requests are generally relevant to the proposed rule. The Commission cannot and need not speculate or guess what other issues concerning relevance MGE

had with the data requests. However, the Commission has determined that data requests numbered 507, 508 and 509 are not relevant. MGE will not be compelled to respond to data requests that have been found not to be relevant.

The Commission's *Order and Notice Regarding Motions to Compel Data Requests* indicated that OPC would be permitted to supplement its comments and reply comments if its *Motion to Compel* were granted in whole or in part. OPC will be permitted additional time accordingly.

IT IS THEREFORE ORDERED:

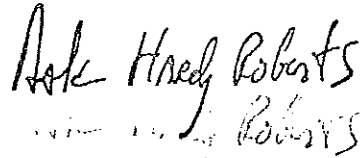
1. That relevancy objections to data requests 507, 508 and 509 are sustained.

2. That Missouri Gas Energy is ordered to respond to all other data requests as previously submitted by August 19, 1999.

3. That the Office of the Public Counsel shall adhere to the comment and reply comment deadlines for this rulemaking, but may supplement these comments by filing supplemental comments and reply comments on or before August 27, 1999; however, any supplemental filing shall be limited to only the information resulting from the late-filed responses to the subject data requests.

4. That this Order shall be effective on August 3, 1999.

BY THE COMMISSION

A handwritten signature in dark ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, somewhat stylized script.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Drainer,
and Schemenauer, CC., concur.
Murray, C., dissents.

Thornburg, Regulatory Law Judge

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION