

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

In the Matter of the Establishment of a )  
Working Case for the Review and Consideration )  
Of a Rewriting and Writing of Existing and New ) Case No. AW-2018-0394  
Affiliate Transaction Rules and HVAC Affiliate )  
Transaction Rules )

**THE OFFICE OF THE PUBLIC COUNSEL’S COMMENTS**

**COMES NOW** the Office of the Public Counsel (OPC), by and through counsel, and for its Comments states as follows:

**BACKGROUND**

On July 11, 2018, the Public Service Commission (Commission) established Case No. AW-2018-0394 in response to the Commission Staff’s (Staff) Motion to Open Rulemaking Workshop. The Commission Staff acted pursuant to Executive Order 17-03 to consolidate existing rules, and accordingly proposed new rules regarding the sharing of customer information by Commission regulated utilities.

The Commission requested comments regarding the Staff’s drafted rules to be submitted by no later than August 10, 2018. As the OPC is charged to “represent and protect the interests of the public”, the OPC offers comments as follows.<sup>1</sup>

**POSITION ON AFFILIATE TRANSACTIONS GENERALLY**

The Commission should adopt robust affiliate transaction rules; maintaining current protections, extend those rules to water corporations, and even consider extending existing oversight mechanisms. When regulated monopolies engages in affiliated transactions there is an inherent danger of distorting the market and incentivizing their own enrichment to the detriment of consumer choice. Public utilities have the potential to disrupt competition and further constrict

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<sup>1</sup> Section 386.710, RSMo (1977).

consumer choices simply by favoring themselves and their affiliates over independent vendors. The Missouri General Assembly recognized this danger when it created a statutory separation between HVAC and utility services.<sup>2</sup> When consolidating and updating existing affiliate transaction rules this explicit policy of not engaging in self-dealing with affiliates from the Legislature should be forefront in one’s mind.

Consideration must also be afforded to public utilities having an inherent advantage when competing with independent vendors because only the utility has direct and immediate access to customer energy usage and other sensitive data. An independent vendor can only get this information through the utility or customer, but utility affiliates may potentially access this information straight from the utility. A utility and its affiliates can then exploit this informational asymmetry to obtain an undue competitive advantage for both their nonregulated activities and for their affiliates. Because both a utility’s affiliates and its own internal activities not regulated by the Commission can be unduly advantaged, the OPC further recommends that any affiliate transaction rule apply to at utility’s nonregulated activities as well.

The OPC is pleased that Staff is presumably cognizant of these issues given that most of the text of the proposed rules has come from existing regulatory language. The OPC has incorporated its position into its attached version of a consolidated affiliated transaction rule, and also wishes to point out potential issues in Staff’s draft.

POSITION ON THE EVIDENTIARY STANDARDS SECTION OF THE PROPOSED  
AFFILIATE TRANSACTION RULE

Staff’s proposed subsection (4) entitled “Evidentiary Standards for Affiliate Transactions”, includes subdivision (E) requiring notice to the Commission when a covered utility transfers ten

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<sup>2</sup> See Section 386.756, RSMo (2003) (prohibiting a utility “engag[ing] or assist[ing] any affiliate or utility contractor in engaging HVAC services in a manner which subsidizes the activities of such utility, affiliate or utility contractor”).

percent or more of its employees to an affiliated regulated or nonregulated entity. The OPC seeks clarification as to why this was included, and otherwise sees this provision as easily subverted. If a covered utility transferred its employees in increments of nine percent or lower then the notice requirement would presumably not apply. The OPC also fails to understand why the demarcation between nine or ten is significant if Staff is concerned about the transferring of utility employees. The OPC is concerned less with the employment decisions of a covered utility, and more with how those decisions may affect affiliate transaction abuse or ratepayers.

#### POSITION ON COST ALLOCATION MANUALS

The OPC offers that existing cost allocation manual (CAM) filing deadlines be upheld in any new affiliate transaction rule. Commission Staff has authored a new subsection (5) entitled “Cost Allocation Manuals (CAM)” addressing existing CAM filing procedures. The Current affiliate transaction rules for gas and electric utilities provide that such regulated entities shall annually file information on their affiliate transactions by March 15<sup>th</sup>.<sup>3</sup> Commission Staff’s new subsection (5) instead requires a filing of such information every three years by May 15<sup>th</sup>. The affiliate transaction data included in a CAM are vital for annual financial filings before both the Commission and the Securities and Exchange Commission. The OPC does not believe that a filing deadline extension is warranted or even necessary as the CAM’s components should readily be at a utility’s disposal, and thus suggests that existing deadlines be maintained.

#### POSITION ON THE LACK OF AN EXPLICIT PROVISION REGARDING THE SHIFTING OF ANY BURDEN OF PROOF AND AN ENFORCEMENT SECTION

The OPC notices that the explicit language stating that the affiliate transaction rules do not modify existing burden of proof responsibilities enforcement subsection that is currently included

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<sup>3</sup> 4 CSR 240-20.015(4); 4 CSR 240-40.015(4).

in the affiliate transaction rule for electric and gas utilities has been removed in the proposed consolidated rule. Although the OPC does not believe that either language is necessary to understand who has the burden of proof, or to impose penalties, the OPC is nonetheless concerned that another reader may infer that the loss of either language as curtailing the Commission's authority to oversee affiliate transactions. The OPC recommends reinserting both provisions to avoid differing legal interpretations.

POSITION ON THE WAIVER PROVISION OF THE PROPOSED HVAC SERVICES

AFFILIATE TRANSACTIONS RULE

The OPC believes that the existing absence of a waiver provision within the affiliate transactions rule regarding heating, ventilation, and air conditioning services (HVAC) should be maintained contrary to the newly included waiver in Staff's proposed rule. Staff's proposed rule regarding HVAC services affiliate transactions closely follows existing statutory and regulatory guidelines, except that a waiver provision has been included. However, Missouri law expressly bar the Commission from creating rules "inconsistent or in addition" to statutory HVAC services affiliate transaction prohibitions.<sup>4</sup> Such prohibitions include not permitting utilities to allow the use of their names by contractors or affiliates that provides HVAC services without a proper disclosure, and preventing the subsidization of a utility through HVAC service offerings.<sup>5</sup> Both of those prohibitions were included in Staff's proposed rule, but are then subject to Staff's additional waiver provision. Therefore, the waiver provision of the proposed HVAC services affiliate transaction rule is inconsistent and additional to Missouri statutes, and the OPC recommends removing the provision.

**WHEREFORE**, the OPC respectfully submits its Comments.

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<sup>4</sup> Section 386.760, RSMo (1988).

<sup>5</sup> Section 386.756, RSMo (2003).

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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**CERTIFICATE OF SERVICE**

We hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 10<sup>th</sup> day of August, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall  
/s/ Lera Shemwell

#### **4 CSR 240-10.XXX Affiliate Transactions Respecting Electrical Corporations, Gas Corporations, Heating Companies, Certain Water Corporations and Certain Sewer Corporations**

PURPOSE: This rule is intended to prevent a Missouri Public Service Commission (commission) regulated electrical corporation, gas corporation, heating company, water corporation (with more than eight thousand (8,000) customers), or sewer corporation (with more than eight thousand (8,000) customers) from subsidizing an affiliate's operations (regulated and nonregulated). In order to accomplish this objective, the rule sets forth standards of conduct, financial standards, evidentiary standards, access requirements, training requirements, and record-keeping requirements applicable to any of these commission regulated utilities whenever any such entity participates in a transaction with an affiliated entity (except with regard to HVAC services as defined in section 386.754, RSMo., 2016, by the General Assembly of Missouri). The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.

(1) Definitions.

~~(A) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the covered utility. This term shall also include the nonregulated business operations of a covered utility.~~

~~(B) Affiliate transaction means any transaction for the provision, receipt, purchase or sale of any information, asset, good or service, or portion of any good or service, between a covered utility~~

and an affiliated entity. Affiliate transactions as defined by this rule shall also include all transactions carried out between any nonregulated business operation of a covered utility and the regulated business operations of a covered utility. An affiliate transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754 by the General Assembly of Missouri.

~~(B)~~ Affiliate Transactions Report means the filing that each covered utility is required to make with the secretary of the commission no later than each May 15, providing the information identified below in section (6) of this rule, Record Keeping Requirements.

(C) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the covered utility. This term shall also include the nonregulated business operations of a covered utility.

~~(B)~~

(D) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through one (1) or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of ten percent (10%) or more of voting securities or partnership

interest of an entity constitutes control for purposes of this rule. This provision, however, shall not be construed to prohibit a covered utility from rebutting the presumption that its ownership interest in an entity confers control or another party from asserting that control exists without the ten percent (10%) ownership guideline.-

(E) Corporate support means joint corporate oversight, governance, support systems and personnel, involving payroll, shareholder services, financial reporting, human resources, employee records, pension management, legal services, and research and development activities.

(F) Cost allocation manual (CAM) means the document which specifies the criteria, guidelines and procedures that the covered utility will follow to be in compliance with the commission's Affiliate Transactions Rule. The CAM sets forth the covered utility's cost allocation, market valuation, and internal cost methods. The frequency of the filing of the covered utility's CAM is addressed in section (5) of this rule.

(G) Covered utility means, for purposes of this rule, an electrical corporation, gas corporation, or heating company as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapters 386 and 393, RSMo, or a water corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with more than eight thousand (8,000) customers or a sewer corporation as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapters 386 and 393, RSMo, with more than eight thousand (8,000) customers.

(H) Derivatives means a financial instrument, traded on or off an exchange, the price of which is directly dependent upon (i.e., "derived from") the value of one or more underlying securities, equity indices, debt instruments, commodities, other derivative instruments, or any agreed-upon pricing index or arrangement (e.g., the movement over time of the Consumer Price Index or



freight rates). Derivatives involve the trading of rights or obligations based on the underlying good, but do not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for a fixed rate of return.

(I) Electrical corporation, gas corporation, heating company, water corporation, or sewer corporation is as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., i.e., a covered utility by the Affiliate Transactions Rules.

(J) Financial ~~advantage~~ advantage means an advantage is provided by a covered utility to an affiliated regulated or nonregulated entity or its nonregulated activities ~~if~~ when the covered utility:

(1.) Compensates an affiliated entity for assets, goods, information or services of any kind above the lesser of –

A. The fair market price (FMP); or

B. The fully distributed cost (FDC) to the covered utility to provide the assets, goods, information or services for itself; or

2. Transfers assets, goods, information, or services of any kind to an affiliated entity below the greater of –

A. The FMP; or

B. The FDC to the covered utility.

(K) Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct, indirect cost causative or allocated approach. Costs that cannot be directly or

~~indirectly charged~~ or ~~indirectly assigned~~ ~~located~~ (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

(L) Information means any data obtained by a covered utility that is not obtainable by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

(M) Long-term means a transaction in excess of thirty-one (31) days.

(N) Marketing affiliate means an affiliated entity which engages in or arranges a commission-related sale of any natural gas service or portion of gas service to a shipper.

(O) Nonregulated operations means assets, goods, information, or services of an affiliate of a covered utility or services of the covered utility, not subject to the jurisdiction of the commission under Chapters 386 and 393, RSMo.

(P) Opportunity sales means sales of unused contract entitlements necessarily held by a gas corporation to meet the daily and seasonal swings of its system customers and are intended to maximize utilization of assets that remain under regulation.

(Q) Preferential position means treatment provided by the covered utility which places the affiliated entity or its nonregulated activities at an unfair advantage over its nonaffiliated competitors.

(R) Sewer corporation means a sewer corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with more than eight thousand (8,000) customers, and is covered by this rule, but is not covered by 4 CSR 240-10.XXX.

(S) Shippers means all current and potential transportation customers on a regulated gas corporation's natural gas distribution system.

(T) Short-term means a transaction of thirty-one (31) days or less.

(U) Transportation means the receipt of natural gas at one point on a gas corporation's system and the redelivery of an equivalent volume of natural gas to the retail customer of the natural gas at another point on the gas corporation's system including, without limitation, scheduling, balancing, peaking, storage, and exchange to the extent such services are provided pursuant to the regulated gas corporation's commission approved tariff, and includes opportunity sales.

(V) Unfair advantage means an advantage to the covered utility that cannot be obtained by nonaffiliated entities or can only be obtained by competitors at a ~~competitively~~ prohibitive cost in either time or resources.

(W) Variance means an exemption granted by the commission from any applicable standard required pursuant to this rule.

(X) Water corporation means a water corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with more than eight thousand (8,000) customers and is covered by this rule, but is not covered by 4 CSR 240-10.XXX.

(2) Standards.

(A) A covered utility shall not provide a financial advantage to an affiliated entity or that covered utility's own ~~nonregulated activity~~.

(B) ~~Except as necessary to provide corporate support functions, a~~ covered utility shall conduct its business in such a way as not to provide any financial advantage or preferential position to an affiliated entity or nonregulated activity over another entity at any time.

(C) A covered utility shall not participate in any affiliated transactions which are not in compliance with this rule, except as otherwise provided in the variance section (12~~+~~) of this rule.

(D) If a customer requests information from the covered utility about goods or services provided by an affiliated entity, the covered utility may provide information about the affiliate but must inform the customer that regulated services are not tied to the use of an affiliate provider and that other service providers may be available. The covered utility may provide reference to other service providers or to commercial listings as a customer service, but is not required to do so.

(E) The covered utility shall include as part of its ~~annual~~triennial CAM filing, the criteria, guidelines and procedures it will follow to be in compliance with this rule, including authorized and interim variances. ~~Changes to the criteria, guidelines and procedures must be filed as part of the CAM no later than May 15 of the succeeding year in which the changes occur.~~

(F) Marketing materials, information or advertisements by an affiliate entity that shares an exact or similar name, logo or trademark of the covered utility shall clearly display in a font size no smaller than the smallest font size on the page or announce that the affiliate entity is not regulated by the “Missouri Public Service Commission.”

### (3) Nondiscrimination Standards Respecting Gas Marketing.

(A) Nondiscrimination standards under this section apply in conjunction with all the standards under this rule and control when a similar standard overlaps.

(B) A regulated gas corporation shall apply all tariff provisions relating to transportation in the same manner to customers similarly situated whether they use affiliated or nonaffiliated marketers or brokers.

(C) A regulated gas corporation shall uniformly enforce its tariff provisions ~~for~~on all shippers.

(D) A regulated gas corporation shall not, through a tariff provision or otherwise, give its marketing affiliate and/or its customers any preference over [a-any](#) customer using a nonaffiliated marketer in matters relating to transportation or curtailment priority.

(E) A regulated gas corporation shall not give any customer using its marketing affiliate a preference, in the processing of a request for transportation services, over [a-any](#) customer using a nonaffiliated marketer, specifically including the manner and timing of such processing of a request for transportation services.

(F) A regulated gas corporation shall not disclose or cause to be disclosed to its marketing affiliate or any nonaffiliated marketer any information that it receives through its processing of requests for, or provision of transportation.

(G) If a regulated gas corporation provides information related to transportation, which is not readily available or generally known to other marketers to a customer using a marketing affiliate, it shall provide that information (electronic format, phone call, facsimile, etc.) contemporaneously to all nonaffiliated marketers transporting on its distribution system.

(H) A regulated gas corporation shall not condition or tie an offer or agreement to provide a transportation discount to a shipper to any service in which the marketing affiliate is involved. If the regulated gas corporation seeks to provide a discount for transportation to any shipper using a marketing affiliate, the regulated gas corporation shall, subject to an appropriate protective order-

1. File for approval of the transaction with the secretary of the commission and provide a copy to the commission staff counsel and the Office of the Public Counsel;
2. Disclose whether the marketing affiliate of the regulated gas corporation is the gas supplier or broker serving the shipper; [and](#)

3. File quarterly public reports with the secretary of the commission which:

a. Provide the aggregate periodic and cumulative number of transportation discounts provided by the regulated gas corporation; and

b. Provide the aggregate number of such agreements which involve shippers for whom the regulated gas corporation's marketing affiliate is or was at the time of the granting of the discount the gas supplier or broker.

(I) A regulated gas corporation shall not make opportunity sales directly to a customer of its marketing affiliate or to its marketing affiliate unless such supplies and/or capacity are made available to other similarly situated customers using nonaffiliated marketers on an identical basis given the nature of the transactions.

(J) A regulated gas corporation shall not condition or tie agreements (including prearranged capacity release) for the release of interstate or intrastate pipeline capacity to any service in which the marketing affiliate is involved under terms not offered to nonaffiliated companies and their customers.

(K) A regulated gas corporation shall maintain its books of account and records completely separate and apart from those of the marketing affiliate.

(L) A regulated gas corporation is prohibited from giving preference to any customer using its marketing affiliate preference with respect to any tariff provisions that provide discretionary waivers or variances.

(M) A regulated gas corporation shall maintain records when it is made aware of any marketing complaint against an affiliated entity--

1. The records should shall contain a log detailing the date the complaint was received by the regulated gas corporation, the name of the complainant, a brief description of the complaint and,

as applicable, how it has been resolved. If the complaint has not been recorded by the regulated gas corporation within thirty (30) days, an explanation for the delay must be recorded.

(N) A regulated gas corporation ~~will~~shall not communicate to any customer, supplier or third parties that any advantage may accrue to such customer, supplier or third party in the use of the regulated gas corporation's services as a result of that customer, supplier or third party dealing with its marketing affiliate and shall refrain from giving any appearance that it speaks on behalf of its affiliated entity.

(O) If a customer requests information about a marketing affiliate, the regulated gas corporation may provide the requested information but shall also provide a list of all marketers operating on its system.

(4) Evidentiary Standards for Affiliate Transactions.

(A) When a covered utility purchases information, assets, goods or services from an affiliated entity, the covered utility shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate.

(B) In transactions that involve either the purchase or receipt of information, assets, goods or services by a covered utility from an affiliated entity, the covered utility shall document both the FMP of such information, assets, goods and services and the FDC to the covered utility to produce the information, assets, goods or services for itself consistent with its CAM.

(C) The covered utility shall not participate in any affiliated transactions or provide any nonregulated services which are not in compliance with this rule, except as otherwise provided in section (12) of this rule.-

~~(D)~~ In transactions that involve the sale or provision of information, assets, goods or services to affiliated entities, the covered utility must demonstrate that it--

1. Considered all costs incurred to complete the transaction;
2. Calculated the costs at times relevant to the transaction;
3. Allocated all joint and common costs appropriately; and
4. Adequately determined the FMP of the information, assets, goods or services.

(D) In transactions involving the receipt or purchase of information, assets, goods or services by the covered utility from an affiliated entity, the covered utility will use a commission-approved CAM. This CAM can use benchmarking practices that can constitute compliance with the market value requirements of this section if approved by the commission.

~~(E) If covered utility plans to transfer ten percent (10%) or more of its employees to an affiliated regulated or nonregulated entity, it must provide notice to the secretary of the commission by registered mail or electronic filing in EFIS ninety (90) days in advance of doing so, providing the names and job descriptions of officers and managers and the job descriptions of such other employees who are planned to be transferred and the locations to which they are to be sent if they are being re-located.~~

(5) Cost Allocation Manuals (CAM)

(A) Covered utilities shall file with the commission for its approval a CAM every ~~year~~three (3) ~~years on year on~~ or before ~~March~~March 15. The commission may accept, reject, or direct a covered utility to modify its CAM.

(B) All affected sections and pages of a covered utility's CAM shall be updated and filed with the commission for its approval within sixty (60) days of any of the following conditions:



1. A new nonregulated operation is commenced or acquired, or an existing nonutility operation is eliminated or divested, by the covered utility;
2. A change in the covered utility's allocation methodology;
3. An affiliate relationship of the covered utility changes; ~~or~~
4. Operations affecting nonregulated operations change sufficiently to warrant new allocation methodology; or

#### 5. Findings of rule noncompliance.

##### (6) Record Keeping Requirements.

(A) A covered utility shall maintain books, accounts and records separate from those of its affiliates.

(B) Each covered utility shall maintain the following information in a mutually agreed-to electronic format (i.e., agreement between the commission staff, Public Counsel and the covered utility) regarding affiliate transactions with affiliated entities on a calendar year basis and shall file such information in the form of an Affiliate Transactions Report with the secretary of the commission in EFIS and serve a copy on commission staff counsel and the Public Counsel by no later than ~~March~~ March 15 of the succeeding year:

1. A full and complete list of all affiliated entities as defined by this rule;
2. A full and complete list of all assets, goods, information and services sold or provided to, or purchased or received from, affiliated entities;
3. A full and complete list of all contracts entered with affiliated entities;
4. A full and complete list of all affiliate transactions undertaken with affiliated entities without a written contract together with a brief explanation of why there was no contract;

5. The amount of all affiliate transactions by affiliated entity and account charged; and
6. The basis used (e.g., FMP, FDC, etc.) to record each type of affiliate transaction.
7. A full and complete list of all nonregulated activities offered by the covered utility.
8. A full and complete list of all memorandums of understanding or contracts regarding the support and compensation the covered utility will receive for the goods and services provided to conduct the nonregulated activity.
8. List of all affiliated transactions undertaken or nonregulated services received without competitive bids with explanations why competitive bids were not necessary or appropriate.

(C) In addition, each covered utility shall maintain the following information regarding affiliate transactions on a calendar year basis:

1. Records identifying the basis used (e.g., FMP, FDC, etc.) to record all affiliate transactions; and
2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.
3. Names and job descriptions of the officers and managers, and only the job descriptions of such other employees that transferred or were transferred from the covered utility to an affiliated entity;
4. Evaluations of the effect on the reliability of services provided by the covered utility resulting from the access to regulated contracts and/or facilities by affiliated entities;
5. Policies regarding the access to services available to nonregulated affiliated entities desiring use of the covered utility's contracts and facilities; and
8. Descriptions of and supporting documentation related to any use of derivatives that may be related to the covered utility's operation even though obtained by the parent or affiliated entity.

(7) Records of Affiliated Entities.

(A) Each covered utility shall ensure that its parent and any other affiliated entities maintain books and records that include, at a minimum, the following information regarding affiliate transactions:

1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or affiliated entity and charged to the covered utility;
2. Documentation of the methods used to charge, assign, allocate and/or share costs between affiliated entities including other jurisdictions and/or corporate divisions;
3. Description of costs that are not subject to allocation to affiliate transactions and documentation supporting the nonassignment of these costs to affiliate transactions; and
4. Descriptions of the types of services that corporate divisions and/or other centralized functions provided to any affiliated entity or division accessing the covered utility's contracted services or facilities.;
5. ~~Names and job descriptions of the officers and managers, and only the job descriptions of such other employees that transferred or were transferred from the covered utility to an affiliated entity;~~
6. ~~Evaluations of the effect on the reliability of services provided by the covered utility resulting from the access to regulated contracts and/or facilities by affiliated entities;~~
7. ~~Policies regarding the access to services available to nonregulated affiliated entities desiring use of the covered utility's contracts and facilities; and~~

~~8. Descriptions of and supporting documentation related to any use of derivatives that may be related to the covered utility's operation even though obtained by the parent or affiliated entity.~~

(8) Access to Records of Affiliated Entities.

(A) To the extent permitted by applicable law and pursuant to established commission discovery procedures, a covered utility shall make available the books and records of its parent and any other affiliated entities when required in the application of this rule.

(B) The commission and public counsel shall have the authority to--

1. Review, inspect and audit books, accounts and other records kept by a covered utility or affiliated entity for the sole purpose of ensuring compliance with this rule and making findings available to the commission; and

2. Investigate the operations of a covered utility or affiliated entity and their relationship to each other for the sole purpose of ensuring compliance with this rule.

(C) This rule does not modify existing legal standards regarding which party has the burden of proof in commission proceedings.

(9) Record Retention.

(A) Records required under this rule shall be maintained by each covered utility for a period of not less than six (6) years.

(10) Enforcement

(A) When enforcing these standards, or any order of the commission regarding these standards, the commission may apply any remedy available to the commission.

(119) Training

(A) The covered utility shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

(121) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraphs (121)(A)1. or (121)(A)2. The granting of a variance to one covered utility does not constitute a ~~waiver variance respecting or otherwise affect the required compliance of~~ for any other covered utility ~~to comply with the standards~~. The scope of a variance ~~will~~ shall be determined based on the facts and circumstances found in support of the application.

1. A covered utility may request a variance upon written application in accordance with commission procedures set out in 4 CSR 240-2.060(4) but it may not engage in such an affiliate transaction ~~not in compliance with the standards set out in subsection (2)(A) of this rule unless it is first granted~~ until the commission grants the variance ~~by the commission~~ for good cause shown; or

2. A covered utility may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, on an interim basis, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (121)(A)2.A. and (121)(A)2.B. of this rule--

A. All reports and record retention requirements for each affiliate transaction must be complied with; and

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and a copy served upon the commission staff counsel and the Public Counsel within ten (10) days of the occurrence of the non-complying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate transaction was in the best interests of the regulated customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any person, entity, or association shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a person's, entity's, or association's ability to challenge the affiliate transaction at the time of the filing of the annual Affiliate Transactions Report. Requesting a hearing regarding the noncomplying affiliate transaction within thirty (30) days of the covered utility's initial notice of the noncomplying affiliate transaction, is not a prerequisite for a person, entity, or association challenging the affiliate transaction within thirty (30) days of the filing of the annual Affiliate Transactions Report. (Section 386.550 RSMo., applies to the commission's determinations after granting a request for a hearing filed within thirty (30) days of the initial notice of the noncomplying affiliate transaction.) At the time of the filing of the covered utility's annual Affiliate Transactions Report filing, the covered utility shall file with the secretary of the commission, a listing of all non-complying affiliate transactions which occurred between the period of the last filing and the current filing. Any affiliate transaction submitted pursuant to this section shall remain interim, subject to disallowance, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the regulated customers, [provided that an affiliate transaction need not remain interim if the](#)

~~commission has granted a request for a hearing under this section, if the commission did not grant a request for a hearing if notice of the occurrence of the non-complying affiliate transaction had been provided within ten (10) days of the occurrence.~~

AUTHORITY: sections 386.250, RSMo., Supp. 1998, and 393.140, RSMo., 1994.\* Original rule filed April 26, 1999, effective Feb. 29, 2000; *State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n*, 103 S.W.3d 753 (Mo.banc 2003); *Office of the Public Counsel v. Public Serv. Comm'n*, 409 S.W.3d 371 (Mo.banc 2013).

\*Original authority: 386.250, RSMo., 1963, amended 1967, 1977, 1980, 1987, 1988, 1991, 1993, 1995, 1996 and 393.140, RSMo., 1939, amended 1949, 1967.

#### 4 CSR 240-10.XXX HVAC Services Affiliate Transactions

PURPOSE: This rule prescribes ~~the~~ requirements for HVAC services ~~respecting affiliated entities and when performed by~~ regulated electrical corporations, gas corporations, ~~and~~ heating companies (covered utilities), ~~and their affiliates when such covered utilities participate in affiliated transactions with an HVAC affiliated entity~~ as set forth in sections 386.754, 386.756, 386.760, 386.762 and 386.764, RSMo., by the General Assembly of the State of Missouri. The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.

(1) Definitions.

(A) Affiliated entity means any entity not regulated by the Public Service Commission (commission) which is owned, controlled by or under common control with a utility and is engaged in HVAC services.

(B) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through (1) one or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one (1) or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of more than ten percent (10%) of voting securities or partnership interest of an entity confers control for purposes of this rule. This provision, however, shall not be construed to prohibit a covered utility from rebutting the presumption that its ownership interest in an entity confers control.

(C) Covered utility means an electrical corporation, gas corporation, or heating company as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapters 386 and 393, RSMo. and covered by this rule.

(D) Fully distributed cost means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. Fully distributed cost requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g., general and administrative) must also be included in the fully distributed cost calculation through a general allocation.



(E) HVAC services means the warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning (HVAC) equipment.

(F) Regulated electric corporation, gas corporation, and heating company means an entity as defined in section 386.020, RSMo., which is subject to commission regulation pursuant to Chapter 386 and 393, RSMo., and thus is covered by this rule

(G) Utility contractor means a person, including an individual, corporation, firm, incorporated or unincorporated association or other business or legal entity, that contracts, whether in writing or not in writing, with a covered utility to engage in or assist any entity in engaging in HVAC services, but does not include employees of a covered utility.

(2) A covered utility may not engage in HVAC services, except by an affiliated entity, or as provided in section (8) or (9) of this rule.

(3) No affiliated entity or utility contractor may use any vehicles, service tools, instruments, employees, or any other covered utility's assets, the cost of which are recoverable in the regulated rates for a covered utility service, to engage in HVAC services unless the covered utility is compensated for the use of such assets at the fully distributed cost to the covered utility.

(A) The determination of a covered utility's cost in this section is defined in subsection (1)(D) of this rule.

(4) A covered utility may not use or allow any affiliated entity or utility contractor to use the name of such covered utility to engage in HVAC services unless the covered utility, affiliated

entity or utility contractor discloses, in plain view and in bold type on the same page as the name is used on all advertisements or in plain audible language during all solicitations of such services, a disclaimer that states the services provided are not regulated by the commission.

(5) A covered utility may not engage in or assist any affiliated entity or utility contractor in engaging in HVAC services in a manner which subsidizes the activities of such covered utility, affiliated entity or utility contractor to the extent of changing the rates or charges for the covered utility's services above or below the rates or charges that would be in effect if the covered utility were not engaged in or assisting any affiliated entity or utility contractor in engaging in such activities.

(6) Any affiliated entities or utility contractors engaged in HVAC services shall maintain accounts, books and records separate and distinct from the covered utility's regulated operations.

(7) The provisions of this rule shall apply to any affiliated entity or utility contractor engaged in HVAC services that is owned, controlled or under common control with a covered utility providing regulated services in the state of Missouri or any other state.

(8) A covered utility engaging in HVAC services in the state of Missouri five (5) years prior to August 28, 1998, may continue providing, to existing as well as new customers, the same type of services as those provided by the covered utility five (5) years prior to August 28, 1998.

(A) To qualify for this exemption, the covered utility shall file a pleading before the commission for approval.

1. The commission may establish a case to determine if the covered utility qualifies for an exemption under this rule.

(9) The provisions of this section shall not be construed to prohibit a covered utility from providing emergency service, providing any service required by law or providing a program pursuant to an existing tariff, rule or order of the commission.

~~(10) Waiver~~

~~(A) Provisions of this rule may be waived by the Commission for good cause shown.~~

AUTHORITY: sections 386.760.1, RSMo., Supp. 1998 and 393.140, RSMo., 1994.\* Original rule

filed Dec. 17, 1998, effective Aug. 30, 1999.

\*Original authority: 386.760.1, RSMo., 1998 and 393.140, RSMo 1939, amended 1949, 1967.