BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Application of Southern Union Company for Authority to Make Non-Control Investments, Either Directly or Indirectly, in Non-Jurisdictional Energy Utilities.	)))))	Case No. GF-98-425

REPORT AND ORDER

Issue Date: August 17, 1999

Effective Date: August 27, 1999

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REGULATORY LAW JUDGE: **Lewis R. Mills**

REPORT AND ORDER

Procedural History

On April 6, 1998, Southern Union Company (Southern Union) filed an application requesting that the Commission authorize it to make investments in gas and electric utilities without the necessity of prior Commission approval of each investment. Southern Union limits its request to non-control (*i.e.*, less than 10%) investments in utilities that are not regulated by the Commission. Southern Union further limits its request to investments that, in the aggregate, total less than $50,000,000, and suggests that the authority granted be limited to five years' duration.

On May 13, Atmos Energy Corporation (Atmos) filed an application to intervene, or in the alternative, to participate without intervention. On June 9, the Office of the Public Counsel (Public Counsel) filed a motion to reject the application, or in the alternative, to set this matter for hearing. On July 7, 1998, the Commission granted Atmos' application to intervene and denied Public Counsel's motion to reject Southern Union's application. The parties filed testimony pursuant to a Commission-ordered procedural schedule and a hearing was held on November 13, 1998.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has reviewed and considered all of the evidence and arguments presented by the various parties and intervenors in this case. Some evidence and positions of parties on some issues may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or a position of a party indicates that, while the evidence or position was considered, it was not found relevant or necessary to the resolution of the particular issue.

Although the parties did not clearly define the issues in the Hearing Memorandum (there was no single list of issues that all parties agreed to), the issues can be stated as follows: does the Commission have authority to grant the type of approval Southern Union seeks; and, if the Commission does have authority, will granting approval be detrimental to the public interest? The Commission finds that it does not have statutory authority to approve Southern Union's application, and further finds that, even if it did, granting the application would be detrimental to the public interest.

Authority

Both Staff and Southern Union believe that the Commission does have authority, and Public Counsel disagrees. Section 393.190.2 states in pertinent part:

> No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business . . . unless . . . authorized so to do by the commission.

The Commission is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto. State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177, 181(5) (Mo. App. 1960). The clear intent of the legislature, and the clear meaning of the statute, is that the Commission is to authorize specific acquisitions. If the Commission were to grant Southern Union's application, and allow it to enter into stock acquisitions in which the time, the target, the price, and the financing terms are all unknown, the Commission would be abdicating its responsibility to give meaningful review to the acquisition. The Commission determines that it does not have statutory authority to approve Southern Union's application.

Staff and Public Counsel, and possibly Atmos, believe that the Commission needs to address the question of whether Southern Union has demonstrated good cause for a waiver of the filing requirements set forth in 4 CSR 240-2.060(9). That rule only applies to applications for approval of the purchase of stock in Missouri utilities. Staff and Public Counsel argue that, because the Commission is required by

393.190.2 to rule on the acquisition of stock in both Missouri and non-Missouri public utilities, 4 CSR 240-2.060(9) must apply to acquisitions of stock in Missouri and non-Missouri utilities. Simply because the Commission must by statute rule on the acquisition of stock in non-Missouri utilities does not mean that it must establish filing requirements for approval of such acquisitions. Neither does it mean the filing requirements that the Commission has established for applications for approval of the stock of Missouri utilities must be applied to applications for approval of the stock of non-Missouri utilities.

Because 4 CSR 240-2.060(9) does not apply to the application herein, Southern Union is not required to establish good cause for a waiver of the rule's provisions. However, Southern Union's approach of generally following the requirements of 4 CSR 240-2.060(9), in the absence of a rule specifically setting forth the filing requirements for applications of this type, was the proper one.

Public Interest

Even though the Commission has determined that it does not have authority to approve the application herein, it will nonetheless address the question of whether approval would be detrimental to the public interest. Southern Union claims that approval of its application will allow that company to make investments in stocks that will either result in a business combination or a gain on the sale of the stock. It discounts the possibility that the investments will not lead to a business combination and that the subsequent sale of the stock will be made at a loss, calling these outcomes "remote" and "highly unlikely." The Commission finds them to be neither remote nor highly unlikely. Investors incur losses trading in stocks every day, and there was no evidence that Southern Union is immune to this risk. Furthermore, there was no evidence that any investment in a company's stock will necessarily lead to a business combination, much less that the business combination will turn out to be a good one. Simply put, because none of the details about any transaction are known, a positive outcome is no less speculative than a negative one.

Southern Union argues that, if the investments have the potential to harm ratepayers, the Commission can insulate ratepayers from harm through its review in a subsequent rate case. Public Counsel likens this after-the-fact approach to putting out a fire, and argues that reviewing the details of specific transactions before they are consummated is more like fire prevention. The Commission finds that, even with subsequent rate case review, a significant potential exists that Missouri ratepayers could be harmed. The Commission concludes that it would be detrimental to the public interest to grant the blanket approval Southern Union seeks. Southern Union's application will be denied.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

Southern Union Company, through its Missouri Gas Energy operating division, is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

Specifically, the proposed acquisition of stock is controlled by Section 393.190.2, which states in part:

> No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business . . . unless . . . authorized so to do by the commission.

The statute requires prior Commission approval of an acquisition of stock or bonds. Such approval can only be meaningful if the terms of the acquisition are known. Approval of an acquisition in general terms, when none of the specifics are known would render the provisions of the statute meaningless.

IT IS THEREFORE ORDERED:

1. That the application of Southern Union Company for authority to make non-control investments in non-jurisdictional electric and gas utilities, filed on April 6, 1998, is denied.

2. That this order shall become effective on August 27, 1999.

3. That this case may be closed on August 30, 1999.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer,
and Drainer, CC., concur
Crumpton, C., not participating

Mills, Deputy Chief Regulatory Law Judge