



John B. Coffman  
Acting Public Counsel

State of Missouri

Bob Holden  
Governor

Office of the Public Counsel  
Governor Office Bldg. Suite 650  
P. O. Box 7800  
Jefferson City, Missouri 65102

Telephone: 573-751-4857  
Facsimile: 573-751-5562  
Relay Missouri  
1-800-735-2966 TDD  
1-800-735-2466 Voice

May 31, 2002

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

Re: Case No. AX-2002-158

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case, please find the original and 8 copies of the Office of the Public Counsel's Comments. I have on this date mailed, faxed, and/or hand-delivered the appropriate number of copies to parties of record. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael F. Dandino".

Michael F. Dandino  
Senior Public Counsel

MFD:kh

cc: Counsel of Record

Enclosure

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the matter of proposed rulemaking            )  
4 CSR 240-2.115, Stipulations and            )        Case No. AX-2002-158  
Agreements    )

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

COMES NOW the Office of the Public Counsel and respectfully submits the following as its comments on the proposed rule regarding Stipulations and Agreements.

1. Public Counsel opposes this proposed rule and urges the Commission to continue the existing rule 2.115, Unanimous Stipulations and Agreements, and each of the sections (1), (2), and (3) without amendment or modification.
  
2. Public Counsel states that this proposed rule violates the ruling in *State ex rel Fischer v. PSC* 645 S.W.2d 39 (Mo. App. 1982) that sets out the rights and duties of the Office of the Public Counsel and other parties regarding nonunanimous stipulations presented by some, but not all of the parties. That case held that Section 386.420, RSMo. guarantees the Public Counsel and all other parties to a Commission proceeding the right to be heard and to introduce evidence. 645 SW2d at 42-43. The Court of Appeals criticized the process whereby the a nonunanimous stipulation and agreement foreclosed Public Counsel from full and fair hearing on the issues notwithstanding the negotiated settlement of other parties:

The hearing procedure followed in this case failed to satisfy the due process requirement. Although Public Counsel was allowed to present his rate design proposal and to cross-examine the opposing witnesses, the Commission had previously decided that the only issue it would [\*\* 12] consider was whether or not to approve the stipulation and agreement. In light of this decision, the hearing

afforded Public Counsel was not meaningful, in that the Commission was precluded from approving anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal. Thus, the hearing procedure adopted in this case was a violation of the due process which should be accorded to Public Counsel in his capacity as the representative of the public.

3. This proposed rule improperly deletes the hearing requirement guaranteed by the *Fischer* case and by due process of law under Missouri Constitution, Art. 1, sec. 10 and the Fourteenth Amendment to the United States Constitution. As proposed, Public Counsel and any party is deprived of the opportunity to be heard at a meaningful time and in a meaningful way. The proposed rule makes fundamental changes in the rights of the parties without statutory or legal authority. It removes a party's absolute right and ability to require a hearing on an issue or case if it does not concur with the agreements made by the other parties. The request for a hearing that must be honored by the Commission is watered down to the making of a mere "objection" Section(2) (B). The objection does not result in a hearing; Section (2) (C) speaks only to the effect of the objection on the nonunanimous stipulation and agreement as a statement of the position of the signatory parties. The proposed rule leaves silent the next step in the process and does not explain the meaning and effect of an objection. This revision to the current rule could only increase procedural uncertainty and needlessly confuse and complicate the process.
4. Without the ability of Public Counsel or any party to request a hearing and have its right to a hearing, the right of a party to cross-examination would be denied. This right is guaranteed by Section 536.070, RSMo. 2000:

In any contested case:

(2) Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

5. A "conditional assent" is not defined in the proposed rule which creates ambiguity and sets the table for confusion and uncertainty in the process. Without an adequate definition, a party could be put at risk of waiving all hearing rights in an attempt to try to negotiate a good faith settlement. Although a party has not entered into the stipulation and agreement unconditionally and, therefore, does not specifically assent to the settlement unless it is accepted by all parties and accepted by the PSC, the rule defeats the intent of the party and transforms the party's reasonable condition into agreement. Under the proposed rule, a conditional assent has no effect since it will not be considered an objection and will instead serve as a conclusive waiver of a party's right to object to the nonunanimous stipulation or any part of it.
6. Public Counsel also opposes the provisions of Section (1) (A) of the proposed rule that requires the stipulated set of facts sufficient to support the resolution proposed by the parties. Public Counsel sees this proposed rule as discouraging settlement. A settlement is by its nature results oriented rather than specific facts oriented. By agreeing to an overall rate design or rate structure or total revenue requirement, the parties can avoid contesting each and every issue and fact that factor into a final decision. The purpose of the settlement of an issue is for each party to make concessions on an issue without locking themselves into any position or fact or number that will seem a "precedent." Individual issues may be

beyond settlement, but an overall solution may be attainable so long as no party is seen to concede or win on any particular issue. The proposed rule would discourage settlement and increase administrative expense since it would force more issues and cases to proceed to hearing rather than be resolved through settlement. This proposed rule that inhibits a results oriented settlement and closes the door to an efficient means to resolve disputed and contested cases is detrimental to the public interest. As in criminal and civil law, the efficient and effective operation of the judicial system depends on the ability of the parties to settle and resolve cases short of trial.

7. In a unanimous stipulation of an issue or a case, the parties are stating to the Commission that they have resolved the matter through negotiation and compromise. It would be counter productive to disclose or attempt to quantify exactly how the issue or outcome was fixed. The decision for the Commission is to review the unanimous stipulation and agreement and make a finding whether or not it is a reasonable resolution of the controversy. The Commission does not promote settlement of issues and cases if it takes a final outcome agreed upon by the parties and attempts to reconstruct and identify the elements that lead to the outcome settlement. The PSC's role is to review the stipulation and agreement and decide whether it serves the public interest, is it detrimental to the public interest, does it seem unreasonable and inconsistent with the possible outcomes, or is contrary to the Commission's sense of proper public policy. The Commission has considerable discretion to accept or reject stipulations. This

process should be to accept or reject the facts, issues, or outcomes agreed and stipulated by the parties.

8. Ensuring that competent and substantial evidence supports the stipulation and agreement is not the same issue as stipulating facts on the issues. The parties may not be able to reach agreement on the ultimate facts, but are able to reach a compromise of their respective positions without admitting or denying that any particular fact is true and correct. In the same manner as a reviewing court determines whether or not the effect of an order is reasonable and lawful, the Commission should look at the outcome of the final resolution of an issue or case and determine whether the impact and effect of the resultant order is reasonable and lawful. *See, FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 599-600 (1944). Also, "It is not theory but the impact of the rate order which counts." *Dusquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989)
9. The Staff of the Commission routinely provides a status memorandum with the suggestions in support of any stipulation and agreement it enters. Any other party may file its own supporting statement. These statements can provide the rationale for the settlement without identifying the specific factors each party took into consideration in reaching the final outcome.
10. Section (E) deprives a party of the right to develop evidence on cross-examination or at hearing. Section 386.420. 1, RSMo. provides: "At the time fixed for any hearing before the commission or a commissioner, or the time to which the same may have been continued, the complainant, the public counsel and the corporation, person or public utility complained of, and such corporations and

persons as the commission may allow to intervene, shall be entitled to be heard and to introduce evidence." There is no rule or requirement for a party to prefile prepared testimony as a condition for the participation in the hearing or for the ability to brief or otherwise take a position in the case. There is no PSC procedural rule that a party must file a "position statement" or similar pleading in which it must take a firm position on each and every issue before all the evidence is adduced at hearing. A party has a right to file a brief on any or all of the issues contested in the case. See, Section 536.080.1, RSMo. "In contested cases each party shall be entitled to present oral arguments or written briefs at or after the hearing which shall be heard or read by each official of the agency who renders or joins in rendering the final decision."

11. Section (E) deprives a party of the right to a hearing and nullifies its timely objection. By nullifying the objection, the party then is deemed to consent to a unanimous stipulation by operation of the rule, despite its on the record opposition and objection. The party is deprived of its right to object and seek a hearing. *Fischer, supra*, and the due process clause, Missouri Constitution, Art. I, sec. 10 and the Fourteenth Amendment to the United States Constitution.
12. Section (D) also deprives the parties the right to set the terms of their agreement. Under this section, the nonunanimous stipulation seems to be converted into a binding agreement and a *de facto* statement of position even if it is objected to and perhaps even if the issue or case goes to hearing. The parties should have the right to negotiate and agree what the effect of an objection or hearing has on their continued stipulation. If a total settlement is not possible and a hearing is

required, a party may take a very different position than was set forth in the nonunanimous stipulation and agreement. Typically, stipulations and agreements on certain positions are contingent on the approval of the entire stipulation and agreement by the PSC. That is the intent and purpose of the standard non-severability clause that has been used over the years in practice before the Commission. All the terms and conditions of the stipulation and agreement are contingent on the acceptance of the entire document. A party does not waive its right to present another position in this case by its stipulation in this case if the settlement is not accepted by the PSC or if it is not agreed to by all parties and proceeds to hearing. The PSC cannot prevent a party from changing its position if the reason for the party to take that position has been removed or rejected. Because this section of the proposed rule discourages or even nullifies non-severability clauses, it in turn discourages settlement and, therefore, is detrimental to the public interest.

13. Public Counsel recommends Kreiger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 Yale J. on Reg. 257 (Summer, 1995) for a discussion of the various legal and public policy issues related to such settlements. The article points out that while a "nonunanimous settlement process is more efficient than traditional adjudication, the process has the potential for accentuating the power imbalances in negotiations and creates a perception of unfairness in the decision-making." At 33. This rule compounds this power imbalance for captive ratepayers.

14. Public Counsel does not believe the proposed rule is needed. It is not an improvement in the present process and instead serves to complicate the procedures. This is inconsistent with the intent and purpose of the law that administrative bodies conduct their proceedings in a more informal manner with less reliance on the technical rules of evidence. The proposed rules also tend to reinstate strict pleading requirements and obstacles that have long vanished from the procedural rules and practices in both the state and federal courts in an effort to concentrate on substance rather than form and formalities.
15. In summary, the present rule complies with the *Fischer* case and has served the public, the parties, and the Commission well has since its adoption. The proposed rule is unreasonable and unnecessary.

WHEREFORE, Public Counsel asks the Commission to consider its suggestions and comments on this proposed rule.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 

Michael F. Dandino (24590)  
Senior Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102  
(573) 751-4857  
(573) 751-5559  
Fax (573) 751-5562  
email: [mdandino@ded.state.mo.us](mailto:mdandino@ded.state.mo.us)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed via U. S. Mail postage prepaid or hand delivered on this 31st day of May, 2002 to the counsel of record on the attached service list.

A handwritten signature in black ink, appearing to be "M. J. [unclear]", is written over a horizontal line.

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

Andereck, Evans, Milne, Peace & Johnson  
301 E. McCarty  
P. O. Box 1438  
Jefferson City, MO 65102

Kevin K. Zarling  
AT&T Communications  
919 Congress, Suite 900  
Austin, TX 78701

Mary Ann Young  
William D. Steinmeier, P.C  
2031 Tower Drive  
P. O. Box 104595  
Jefferson City MO 65110-4595

Lisa Creighton Hendricks  
Sprint Communications Company, L.P.  
6450 Sprint Parkway, Bldg. 14  
MAILSTOP: KSOPHN0212-2A253  
Overland Park, KS 66251

Brydon, Swearingen & England  
P. O. Box 456  
Jefferson City, MO 65102

Diana Vuylsteke  
Bryan Cave LLP  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102-2750

Newman, Comley & Ruth  
601 Monroe Street  
Jefferson City, MO 65101

Michael C. Pendergast  
Laclede Gas Company  
720 Olive Street, Room 1520  
St. Louis, MO 63 101

Thomas R. Parker  
Verizon  
601 Monroe Street, Suite 304  
Jefferson City MO 65101

Paul G. Lane  
Southwestern Bell Telephone Company  
One Bell Center, Room 3520  
St. Louis, MO 63101-1976

Leland Curtis/Carl J. Lumley  
Curtis, Oetting, Heinz, Garrett & Soule  
130 S. Bemiston, Suite 200  
Clayton, MO 63105

Stephen F. Morns  
MCI WorldCom Communications, Inc.  
701 Brazos, Suite 600  
Cedar Rapids, IA 52406-3177

Paul H. Gardner  
Goller, Gardner & Feather  
131 East High Street  
Jefferson City MO 65101

Fischer and Dority  
101 Madison, Ste. 400  
Jefferson City, MO 65 101

Stuart W. Conrad  
Finnegan, Conrad & Peterson  
1209 Penntower Office Center  
3 100 Broadway  
Kansas City, MO 64111

Robert C. Johnson  
720 Olive Street, Suite 2400  
St. Louis, MO 63 101

Robert J. Hack  
Missouri Gas Energy  
3420 Broadway  
Kansas City, MO 64111

James J. Cook  
Union Electric Company  
One Ameren Plaza  
1901 Chouteau Avenue, Box 66149  
St. Louis, MO 63166-6149

Ron Molteni  
Attorney General Office  
P. O. Box 889  
Jefferson City, MO 65102

Stewart & Keevil, LLC  
1001 Cherry Street, Suite 302  
Columbia, MO 65201-7931