



Commissioners

SHEILA LUMPE  
Chair

HAROLD CRUMPTON

CONNIE MURRAY

ROBERT G. SCHEMENAUER

M. DIANNE DRAINER  
Vice Chair

## Missouri Public Service Commission

POST OFFICE BOX 360  
JEFFERSON CITY, MISSOURI 65102  
573-751-3234  
573-751-1847 (Fax Number)  
<http://www.ecodev.state.mo.us/psc/>

April 13, 2000

BRIAN D. KINKADE  
Executive Director

GORDON L. PERSINGER  
Director, Research and Public Affairs

WESS A. HENDERSON  
Director, Utility Operations

ROBERT SCHALLENBERG  
Director, Utility Services

DONNA M. KOLILIS  
Director, Administration

DALE HARDY ROBERTS  
Secretary/Chief Regulatory Law Judge

DANA K. JOYCE  
General Counsel

**FILED**<sup>3</sup>

APR 13 2000

Missouri Public  
Service Commission

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

**RE: Case No. EE-2000-592 – In the Matter of the Joint Application UtiliCorp United, Inc., d/b/a Missouri Public Service, The Empire District Electric Company and St. Joseph Light & Power Company for waivers of Commission Rules 4 CSR 240-20.015, 4 CSR 240-40.015, 4 CSR 240-40.016 and 4 CSR 240-80.015**

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **STAFF RESPONSE IN OPPOSITION TO JOINT APPLICATION FOR WAIVERS.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Steven Dottheim  
Chief Deputy General Counsel  
(573) 751-7489  
(573) 751-9285 (Fax)

Enclosure

cc: Counsel of Record

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

**FILED<sup>3</sup>**

APR 13 2000

Missouri Public  
Service Commission

In the Matter of the Joint Application of )  
UtiliCorp United, Inc., d/b/a Missouri )  
Public Service, The Empire District )  
Electric Company and St. Joseph Light & )  
Power Company for waivers of )  
Commission Rules 4 CSR 240-20.015, 4 )  
CSR 240-40.015, 4 CSR 240-40.016 and 4 )  
CSR 240-80.015. )

Case No. EE-2000-592

**STAFF RESPONSE IN OPPOSITION TO JOINT APPLICATION FOR WAIVERS**

Comes now the Missouri Public Service Commission Staff (Staff) and files the instant response in opposition to the Joint Application For Waivers of UtiliCorp United, Inc. (UtiliCorp), d/b/a Missouri Public Service (MPS), The Empire District Electric Company (EDE) and St. Joseph Light & Power Company (SJLP) respecting Commission Rules 4 CSR 240-20.015, 4 CSR 240-40.015, 4 CSR 240-40.016 and 4 CSR 240-80.015 concerning affiliated transactions, and in general concurrence with Public Counsel's Suggestions In Opposition To Application For Waivers filed in the instant case. In opposition to the Joint Application For Waivers, the Staff states as follows:

1. UtiliCorp, EDE and SJLP (Joint Applicants) note that Atmos Energy Corporation, Arkansas Western Gas Company, d/b/a Associated Natural Gas, Missouri Gas Energy (a division of Southern Union Company), Laclede Gas Company, Trigen-Kansas City Energy Corporation and Union Electric Company, d/b/a AmerenUE (Relators) filed, in Cole County Circuit Court, Petitions For Writs Of Review and Motions For Stay and that the Court issued an Order Granting Stay in consolidated Case Nos. 00CV323156 and 00CV323164. The Joint Applicants assert at page 4, paragraphs 9 and 10 of their Joint Application For Waivers that due to the Order

4

Granting Stay suspending the affiliated transaction rules only as to Relators, the Order Granting Stay "has resulted in a possible uneven application of the rules" and thereby the rules cannot accomplish its goal "to address transactions with corporate affiliates and unregulated business operations in such a way as to have a positive impact on the competitive markets." The Staff maintains that the purposes of the affiliated transaction rules can be better, and at least partially, accomplished by the Commission denying the Joint Application For Waivers than by the Commission granting the relief sought by the Joint Applicants. The purposes of the affiliated transaction rules can be accomplished to a certain extent by the rules applying to some utilities, but the purposes of the affiliated transaction rules cannot be accomplished at all if the Commission grants the requested variance.

The Joint Applicants had available to them the option of filing Petitions For Writs Of Review and Motions For Stay in the Circuit Court of Cole County as did the Relators, and for whatever reason(s), the Joint Applicants chose not to take such actions. The Staff also would note that Kansas City Power & Light Company (KCPL) neither has filed in the Circuit Court of Cole County a Petition For Writ Of Review and Motion For Stay, nor has KCPL filed an Application For Variance with this Commission respecting the applicable affiliate transaction rules. Even if KCPL does file an Application For Variance, the arguments of the Staff against the granting of variances from the affiliated transaction rules to the Joint Applicants remain valid.

2. At page 5, paragraph 11 of their Joint Application For Waivers, the Joint Applicants assert that the "uncertainty [of the future of the rules] also creates a financial predicament for UtiliCorp, Empire and SJLP" and compliance with the affiliated transaction rules "requires a significant investment on the part of UtiliCorp, Empire and SJLP." First, the

Staff believes that the arguments that the Commission made to the Circuit Court of Cole County in opposition to the Motions For Stays of the Relators in general, and in particular respecting the matter of "great or irreparable damage," are no less valid now because the Circuit Court issued its Order Granting Stay. See attached Respondent Missouri Public Service Commission's Suggestions in Opposition To Motion For Stay in consolidated Case Nos. 00CV323156 and 00CV323164; See also paragraph 7 of the Public Counsel's Suggestions In Opposition To Application For Waivers.

Second, the Staff would note that the contention that compliance with the affiliated transaction rules "requires a significant investment on the part of UtiliCorp, Empire and SJLP" is not borne out by the information supplied by SJLP respecting the proposed rules. As noted in the Public Counsel's Suggestions In Opposition To Application For Waivers (at footnote 2 on page 4 and in Attachment A), SJLP estimated that (a) to comply with proposed rules 4 CSR 240-20.015, it would cost SJLP between \$3,000 and \$5,000 annually, and at least \$1,000, but less than \$10,000 in the initial 12 months, (b) to comply with proposed rules 4 CSR 240-80.015, it would cost SJLP between \$3,000 and \$5,000 annually, and at least \$1,000, but less than \$10,000, in the initial 12 months and (c) to comply with proposed rules 4 CSR 240-40.015 and 4 CSR 240-40.016, it would cost SJLP between \$3,000 and \$5,000 annually, and at least \$1,000, but less than \$10,000 in the initial 12 months.

4. In the course of the affiliated transactions rulemaking cases the Staff argued, among other things, that utilities within the Commission's jurisdiction already should be maintaining their books and records in manner that keep their regulated and unregulated operations substantially separate, and if a utility has appropriate recordkeeping in place, then any additional recordkeeping expenses required by the rules should not be significant.

5. The Staff always has believed that the concerns raised by the utilities regarding additional costs and additional staffing required for them to be in compliance with the affiliated transactions rules have been, for whatever reason, overstated. One company has recently met with the Staff to obtain a better understanding as to what the Staff believes the Commission's affiliated transactions rules require. The Staff is willing to meet with all companies to discuss this matter.

6. The rationales provided by the Joint Applicants do not warrant the granting of variances from the affiliate transaction rules, pursuant to 4 CSR 240-20.015(10), 4 CSR 240-40.015(10), 4 CSR 240-40.016(11) or 4 CSR 240-80.015(10).

Wherefore, for the above stated reasons, the Staff requests that the Commission deny the Joint Application For Waivers filed by UtiliCorp United, Inc. (UtiliCorp), d/b/a Missouri Public Service (MPS), The Empire District Electric Company (EDE) and St. Joseph Light & Power Company (SJLP) respecting Commission Rules 4 CSR 240-20.015, 4 CSR 240-40.015, 4 CSR 240-40.016 and 4 CSR 240-80.015.

Respectfully submitted,

DANA K. JOYCE  
General Counsel



Steven Dottheim  
Chief Deputy General Counsel  
Missouri Bar No. 29149

Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-7489 (Telephone)  
(573) 751-9285 (Fax)

**Certificate of Service**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 13th day of April 2000.

  
\_\_\_\_\_

Service List for  
Case No. EE-2000-592  
April 13, 2000

Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

Dean L. Cooper  
Attorney At Law  
312 E. Capitol Ave., P.O. Box 456  
Jefferson City, MO 65102

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

State of Missouri ex rel. Atmos Energy )  
Corporation, Arkansas Western Gas )  
Company d/b/a Associated Natural Gas )  
Company, Missouri Gas Energy, a )  
division of Southern Union and, Trigen )  
Kansas City Energy Corporation, )

Relators, )

v. )

Case No. 00CV323156

Public Service Commission of the State of )  
Missouri, )

Respondent. )

and )

Ameren Corporation and Union Electric )  
Company d/b/a Ameren UE, )

Relators, )

v. )

Case No. 00CV323164

Public Service Commission of the State of )  
Missouri, )

Respondent. )

**RESPONDENT MISSOURI PUBLIC SERVICE COMMISSION'S**

**SUGGESTIONS IN OPPOSITION TO MOTION FOR STAY**

COMES NOW Respondent, the Public Service Commission of the State of Missouri, (hereinafter "Commission") and urges this court to deny Atmos Energy Corporation, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri Gas Energy, a division



of Southern Union, Trigen-Kansas City Energy Corporation, Laclede Gas Company and Ameren UE's (hereinafter "Relators") Motion for Stay of the Commission's Orders of Rulemaking.

### INTRODUCTION

In reviewing comments to the proposed rules, the Commission observed that a purpose of the rules is to prevent regulated utilities from subsidizing their unregulated operations, noting that this would occur where costs of unregulated operations are shifted to ratepayers for regulated operations, or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. 25 Mo. Reg. 55, 59, 64, 69 (2000).

As the traditional monopoly utility structure changes and regulated utilities expand into non-regulated areas, federal agencies, state legislatures and state utility commissions are adopting rules to protect consumers against cross-subsidization.<sup>1</sup> There is incentive for a utility to shift costs to the regulated operations because recovery of those costs from captive ratepayers is more certain in the regulated environment.<sup>2</sup> In addition, shifting of costs means that the profits of the non-regulated entity are enhanced.

Relators are asking this court to stay the Affiliate Transactions rules applicable to electrical companies (EX 99-442), gas companies (GX 99-444) and steam heating companies (HX 99-443) and their affiliates. Relators are also requesting that this court stay the Affiliate Transaction rule applicable to gas utility marketing affiliates (GX 99-445).

---

<sup>1</sup> See Calif. Comm'n Rules, Decision 9-12-088, 183 PUR 4<sup>th</sup> 583 (Dec. 16, 1997); ME. REV. STAT. T 35-A§ 707; ICA § 476.1 *et seq.* 476.78; WIS. STAT. § 196.52; N. H. STATS. § 366 Affiliates of Public Utilities; II. St. Ch 220 Sec. 5/7-101; IOWA CODE §§ 476.71 through 476.83 (Public Utility Affiliates); See *e.g.*, Re Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, 43 FERC ¶ 61,420, 93 PUR4th 493, Order No. 497, FERC Stats. & Regs. ¶ 30,820 (1988) for a discussion of the Federal Energy Regulatory Commission's concern about possible abuses in the relationship between pipelines and their marketing affiliates.

<sup>2</sup> Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.D.C. 1990).

Relators rely on Section 386.520 RSMo 1994, as the basis for their Motion for Stay. Under Section 386.520 RSMo 1994, Relators must demonstrate, among other things, that they will suffer great or irreparable harm.

## **I. THE STAY SHOULD NOT BE GRANTED**

The Missouri Supreme Court, in State ex rel. Director of Revenue v. Gabbert, 925 S.W.2d 838 (Mo. 1996), in analyzing the requirements for granting a stay of an administrative order said: “[w]hen considering a motion for preliminary injunction, a court should weigh ‘the movants probability of success on the merits, the threat of irreparable harm to the movant, absent the injunction, the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties, and the public interest.’” (citations omitted).

The court further noted:

The factors and analysis for granting a stay of an administrative order are substantially the same as those for issuing a preliminary injunction. It is the movant’s obligation to justify the court’s exercise of such an extraordinary remedy. An administrative order or decision will not be stayed pending appeal where the applicant has not sustained his or her burden of proof or other wise has not made the required showings. (citations omitted).

The court continued noting that:

This issue was directly addressed in Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n, here it was stated:

As with a stay of a district court order in a civil proceeding pending appeal, the determination of whether a stay of an agency’s order is warranted must be based on a balancing of four factors. These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay (citations omitted) These factors are the same ones considered in evaluating the granting of a preliminary injunction. (citations omitted)(emphasis added).

In order for the reviewing court to adequately balance these factors, the party seeking a stay must provide the court with evidence supporting each of these

assertions. Celebrezze. The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued. *Id.* . . . The equitable nature of the proceeding mandates that the courts approach be flexible enough to encompass the particular circumstances of each case.

925 S.W.2d 838, 840 (emphasis added).

The Court was clear that when considering a request for stay, the court should use a balancing test and "The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued. Gabbert, 925 S.W.2d 838, 839 (Mo. 1996)(emphasis added). This means that the court must not just consider the potential for irreparable harm to Relators, but must also balance the public interest involved and the potential for harm to the public. The public interest will not be served by this court staying the Commission's affiliate transactions rules.

In order for Relators to be granted a stay pursuant to Section 386.520.1, they must prove that failure to enter a stay order will result in great or irreparable harm to each Relator.<sup>3</sup> Relators have asserted that they will suffer harm due to the financial cost of implementing these rules. "Generally, 'mere injuries in terms of money . . . necessarily expended in the absence of a stay [does] not form a basis for a conclusion of an irreparable injury.'" PoPeople v. Labor & Industrial Relations Commission, 830 S.W.2d 403, 409 (Mo.banc 1992)(citations omitted). In PoPeople the Court notes that

---

<sup>3</sup> Injunctive relief does not issue as a matter of right but as an exercise of judicial discretion. Injunction is a harsh remedy to be used sparingly and only in clear cases. Injunction does not lie unless the action threatened will result in irreparable injury absent the remedy. Injunctive relief does not properly issue where there is no showing that irreparable harm will result if it does not issue. An injunction will not be awarded where there is an adequate remedy at law." Eberle v. State, 779 S.W.2d 302, 304 (Mo.App. 1989)(citations omitted).

the fact that moneys expended can be recovered supports the idea that mere expenditure of money is not enough. The Court denied the stay in PoPeople.

Relators have a number of options available other than filing a Request for Stay, in order to seek recovery of any monies that may be expended to comply with the rule. These options include, but are not limited to: filing for emergency rate relief, filing for permanent rate relief, and filing for an accounting authority order.

## **II. Rulemaking is a legislative function not a rate case.**

The Court is familiar with requests for stay of rate case decisions of the Commission. This is a request for stay of a rulemaking by the Commission, which is an exercise of its legislative, not its judicial function. The Commission would suggest that it is entitled to deference in its "legislative role." In addition, as the Western District recently noted, "[u]nquestionably, the orders of the Commission are presumptively valid under the provisions of Section 386.270 prior to the ruling of the circuit court." State ex rel Midwest Gas User's Ass'n v. Public Service Comm'n, 996 S.W.2d 608, (Mo.App. 1999)(quoting State ex rel. GTE North, Inc. v. Public Serv. Comm'n, 835 S.W.2d 356, 366 (Mo.App. 1992).

Section 386.270 states in relevant part that "all regulations . . . prescribed by the Commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose." Furthermore, Section 386.610, RSMo 1994, provides that the provisions of Chapter 386, RSMo 1986, are to be liberally construed State ex rel. City of Springfield v. Public Service Comm'n of State of Mo., 812 S.W.2d 827, 834 (Mo.App.1991)(overturned on other grounds).

**CONCLUSION**

Relators must demonstrate irreparable or great harm, but under PoPeople, a showing of expenditure of money alone is insufficient. When the Court balances the public interest, the result must weigh in favor of denial of the Motion for Stay.

Respectfully submitted,

DANA K. JOYCE  
General Counsel



Lera L. Shemwell  
Assistant General Counsel  
Missouri Bar No. 43792

Attorneys for the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-7431 (Telephone)  
(573) 751-9285 (Fax)

**Certificate of Service**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 23<sup>rd</sup> day of February 2000.



**Service List for 00CV323156 & 00CV323164  
February 23, 2000**

**Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102**

**Colly J. Durley/James B. Lowery  
Smith Lewis, LLP  
901 East Broadway, Suite 100  
Columbia, MO 65201-4857**

**Dean L. Cooper/Gary W. Duffy  
Brydon, Swearngen & England P.C.  
P.O. Box 456  
Jefferson City, MO 65102-0456**

**James M. Fischer  
101 West McCarty, Suite 215  
Jefferson City, MO 65101**

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

**Michael C. Pendergast  
Laclede Gas Company  
720 Olive Street, Room 1520  
St. Louis, MO 63101**

**Jeffrey A. Keevil  
Stewart & Keevil, LLC  
1001 Cherry Street, Suite 302  
Columbia, MO 65201**