LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P. O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847
E-MAIL: DUFFY@BRYDONLAW.COM

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
BRIAN K. BOGARD
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

May 31, 2002

Executive Secretary
Public Service Commission
Governor Office Building
Jefferson City, MO

HAND DELIVERY

RE: Case No. AX-2002-157

Good afternoon:

Enclosed for filing in the above-referenced proceeding please find an original and six copies of the Comments of Missouri Gas Energy, The Empire District Electric Company, and Laclede Gas Company.

If you have any questions, please give me a call.

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl:
Office of Public Counsel
Office of the General Counsel
Mike Pendergast
Dave Gibson
Rob Hack

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of proposed rulemaking 4 CSR 240-2.075 Intervention.	))	Case No. AX-2002-157

COMMENTS OF MISSOURI GAS ENERGY,
THE EMPIRE DISTRICT ELECTRIC COMPANY, AND
LACLEDE GAS COMPANY

COME NOW Missouri Gas Energy, a division of Southern Union Company; The Empire District Electric Company; and Laclede Gas Company (hereinafter, "the Companies") and present the following comments on the Commission's proposed amendments to 4 CSR 240-2.075 Intervention which appeared in the May 1, 2002, edition of the Missouri Register. The Companies are all subject to the rules of the Commission and thus are directly affected by this proceeding.

1. While it is always beneficial for all parties to a Commission case to be fully aware of and informed as to the position of other parties, the Companies have concerns regarding the wording of proposed section (7). Apparently, the intention of this proposal is that the Commission wants someone granted intervention in a case to file a pleading stating their position with great particularity. The Companies infer this from the phrase "file a responsive pleading to the application, complaint or tariff that is the subject of the contested case, specifically admitting or denying each fact asserted therein." The Companies note that the PURPOSE section published with the Proposed Amendment does not provide an explanation of this particular proposal or the reasons therefor, as required by § 536.021.2 RSMo 2000. As a result, the Companies are left to

speculate as to what this is supposed to accomplish, or why the Commission believes this change in procedure is necessary, expedient, beneficial, or furthers the interests of justice.

2. The proposal appears problematic and unfair in that it does not seem to make sense in some situations to which it is proposed to apply and it fails to impose a similar burden upon entities that are automatically a party to a case without seeking intervention.

3. Problematic Aspects. The proposal is problematic in that it requires an intervenor to file a pleading within 30 days "specifically admitting or denying each fact" contained in something filed by some other party. To explain some of the potential problems anticipated by the Companies in attempting to comply, let's begin with a dictionary definition of "fact." A common definition is "a thing that has actually happened or is true." A threshold question then, is whether there are "facts" in **applications, complaints or tariffs** which are suitable to being "admitted or denied" by an intervenor.

4. Applications. Applications take several forms at the Commission, depending upon the relief sought. A common example is an application for a certificate of public convenience and necessity. Such an application has numerous requirements which are found in 4 CSR 240-2.060. Some call for the assertion of "facts" and some call for other things which may not be "facts." For example, the application is required to contain a list of at least ten people who reside within the proposed area. That presumably is a "fact" which can be admitted or denied by an intervenor if it has knowledge of the area. But the application is also is required to contain a "feasibility

study." See 4 CSR 240-2.060(4)(A)5. A feasibility study necessarily contains projections which are not, by definition, "facts." They are estimates. Application may also require the applicant to state the legal authority under which the applicant exists. See, 4 CSR 240-2.060(1)(E). The proposed amendment is silent with regard to what is required of an intervenor confronted with assertions which are not "facts." Is the intervenor required nonetheless to "specifically admit or deny" an estimate by another party. Is the intervenor required to "specifically admit or deny" something which is not a fact or for which the intervenor has no knowledge? The proposed amendment does not provide an answer to these practical questions.

5. Tariffs. Some of the problems noted above also apply in a tariff filing. Tariff filings generally consist of either a proposed change to a set of numbers in an existing tariff (i.e. a rate increase or decrease), proposed new text, or changed text in conditions or descriptions of service. Where a utility proposes a rate increase or decrease by submitting a set of proposed rate schedules with changed numbers, what are the "facts" in that situation to which an intervenor is required to respond with an admission or denial? Similarly, where a change in the text of a tariff governing conditions of service is proposed, the text is not likely to set forth "facts" but rather requirements much in the fashion of a statute. There are no "facts" in such a situation. The proposed amendment is silent as to what requirements, if any, the intervenor has when confronted with a requirement to "specifically admit or deny each fact" in a situation where there are no "facts."

6. Complaints. Unlike the situation with applications and tariffs, the proposed amendment may make some sense in a complaint case. There, the

Commission's rules already require a writing asserting acts or things done or omitted to be done. See 4 CSR 240-2.070(3). The Commission's rules already require the respondent to file an "answer" setting forth all grounds of defense, both of law and of fact, in response to the complaint. See 4 CSR 240-2.070(8). In practice, answers to complaints are generally formal legal documents prepared in a style which specifically admits or denies factual allegations contained in the complaint. The Commission's existing rule on complaints also allows a respondent who has no or insufficient information about a particular assertion, to so state and assert a denial upon that ground. See 4 CSR 240-2.070(8). Therefore, it would appear appropriate to require an intervenor to file the same sort of pleading as the respondent in order to make other parties aware of the intervenor's exact position on the complaint. But it only makes sense because the original pleading in a complaint case is required to contain facts or allegations which can then be responded to in the fashion desired by the Commission. That is not the case with much of the material in applications and tariffs.

7. **What Are the Consequences?** Lawyers are familiar with the concept of admitting or denying allegations in a pleading such as a petition which initiates a lawsuit. Things which are admitted are no longer matters of controversy in the proceeding. Things which are denied are generally matters which are litigated and resolved by the trier of fact. Lawyers are generally careful to deny any allegation which they are not completely comfortable admitting. Lawyers are generally aware of the consequence of admitting a fact in a pleading.

8. What is not apparent from the proposed amendment is the consequence of an intervenor in a Commission case admitting or denying a fact in an application,

complaint or tariff. In civil practice, there can be dire consequences from either admitting a fact or failing to plead a defense. See Civil Rule 55.27. There does not appear to be a counterpart for Rule 55.27 in the Commission's administrative rules, except perhaps in the situation of a responsive pleading to a complaint. Thus, the proposed amendment leaves open the questions: What are the consequences if an intervenor admits a fact it later discovers it should have denied? What are the consequences if an intervenor fails to deny a "fact?" The introduction of these highly legalistic concepts into Commission practice should not be undertaken without serious thought to the ramifications.

9. Fails to Impose the Same Burden on Other Parties. The proposed amendment seeks to put a burden on one who seeks and is granted intervention to file a pleading "specifically admitting or denying each fact." Significantly, though, it imposes no such burden on "automatic" intervenors in a Commission case, such as the Office of the Public Counsel and the Staff, who are automatically parties to each Commission case. The proposed amendment contains no language which requires them to file the same type of pleading. This appears to be unfair since, in many cases, the Staff and the Public Counsel take a much more active role in a proceeding than an intervenor. Under this proposal, however, Staff and Public Counsel do not have the same obligation to notify the other parties of their position in the same fashion as an intervenor. It therefore appears to the Companies that the proposed amendment unreasonably favors the Office of the Public Counsel and the Staff by not requiring them to make a similar filing under the same circumstances. If the proposed amendment has a valid underpinning in furthering the regulatory process by making all

parties aware of the position of other parties, then it is imperative that it be applied equally to parties who are relieved of the extra step of seeking intervention.

10. Further, the proposed amendment as drafted may require an intervenor to conduct expedited discovery in order to reasonably determine the basis for "facts" or allegations in the original document or pleading in order to be able to timely comply with a filing in 30 days. The proposed amendment does not place a similar burden on either the Staff or the Office of the Public Counsel. Oftentimes, the party making the original filing does not discover the position of the Staff or the Public Counsel on a matter until several months into the process when rebuttal testimony is filed. If there is a valid reason for requiring an intervenor to state its position in a case within 30 days with great particularity, then that reason should apply equally to the Office of the Public Counsel and the Staff.

11. **Use of Term "Contested Case."** The proposed amendment contains the phrase: "that is the subject of the contested case ... ." This phrasing is confusing and could lead to controversy. "Contested case" is a term which is defined in Chapter 536 RSMo and has a definition which applies to that chapter. See 536.010 RSMo 2000. That definition involves a proceeding where there is a legal requirement for a hearing. It does not automatically apply to Chapters 386, 392 or 393 RSMo because those chapters have a special review procedure. There are also procedures at the Commission for which the law does not require a "hearing." There does not appear to be anything in the proposed amendment which specifically relates to whether a hearing is required by law with regard to intervenors filing a responsive pleading. Therefore, it is unnecessary and potentially confusing to utilize a term of law designed for application

in another chapter of the statutes, under different conditions, in this situation. The Companies suggest this potential confusion and controversy can be avoided simply by substituting a more general term such as "proceeding" or "case."

12. **Recommendation Regarding Section (7).** Because the Commission did not publish the reasons why it believes this proposal to be necessary in the PURPOSE section, the Companies are left to speculate as to why this change is perceived as needed or what it is designed to accomplish. The proposed section (7) appears to the Companies to be much more complex and legalistic than is necessary. The way it is structured, it appears to have a practical application only in the context of a formal complaint. In the situation of applications or tariff filings, if the matter goes to hearing the Commission will presumably learn of the position of the parties in prepared testimony. The intervenor should at least be allowed to deny allegations based on a lack of information, as is allowed by Civil Rule 55.07. If, however, despite all of these problems, the Commission nevertheless wants formal and legalistic "previews" of the positions of intervenors within 30 days, then that burden should apply equally to all parties to the case, not just those granted intervention. In any event, the reference to "contested case" should be removed because it is inapplicable, confusing, and unnecessary. On the whole, the Companies find the proposed amendment in section (7) to be troublesome and lacking when it comes to furthering the interests of the efficient administration of justice.

WHEREFORE, the Companies submit the foregoing comments with respect to the Commission's proposed rulemaking in the captioned case.

Respectfully submitted,

Gary W. Duffy MBE #24905
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Telephone: (573) 635-7166
Facsimile: (573) 635-3847
E-Mail: Duffy@Brydonlaw.com

Attorneys for
The Empire District Electric Company
Missouri Gas Energy
Laclede Gas Company

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was hand delivered this 31st day of May, 2002, to the Office of the Public Counsel and the Office of the General Counsel.

Gary W. Duffy

AX-2002-157comments/gdmydocs/wp8