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May 31, 2002

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

HAND DELIVERY

RE: Case No. AX-2002-158

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 240-2.115 Stipulations and Agreements	)))	Case No. AX-2002-158

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 240-2.115 Nonunanimous Stipulations and Agreements** 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. The Companies have three general comments to make with respect to the Commission's proposed amendment to this rule.

2. **Use of Term "Contested Case."** The Commission uses the phrase "contested case" in subsection (1)(A). 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. Some Commission proceedings are required by law to

involve a hearing. 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 stipulations and agreements. 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 that this potential confusion and controversy can be avoided simply by substituting a more general term such as "proceeding" or "case."

3. **Requirement for Stipulated Facts.** The Companies are opposed to the second sentence to proposed subsection (1)(A) which states that "any such stipulation and agreement must contain stipulated facts sufficient to support the resolution proposed by the parties." The Companies have serious concerns that the language proposed by the Commission will have the inadvertent effect of discouraging the settlement of cases, particularly rate cases.

4. Many stipulations and agreements at the Commission settle a case on a compromise dollar amount or result. They usually are silent as to why certain facts compel a particular outcome. For example, stipulations as to a utility's revenue requirement have rarely addressed the underlying elements which may have generated a particular dollar recommendation. The reason for this is simple. There rarely is agreement on all of the factors which generate a particular revenue requirement. Instead, the parties typically agree to an outcome based on information generated by their respective accounting "runs," as well as such things as the inherent uncertainty of litigation. In other words, each party likely has different reasons for reaching the same

result. It is important for the Commission to understand that parties may be able to agree to a particular ultimate outcome, but also disagree as to the merits of particular issues. The method presently employed allows the parties to resolve a case without concern about establishing precedent with respect to any particular component.

5. As a legal and practical matter, the Commission need only require that the ultimate recommendation is within the upper and lower ranges produced by the record evidence on the whole. The present structure creates strong advocates for many different issues. Given that structure, the Companies believe that a stipulation as to basic facts will rarely be reached. If the Commission's proposed rule is intended to require the parties to submit a stipulation of basic facts which address every cost, revenue, and service element in a particular revenue requirement recommendation, the Companies believe very few rate case settlements will be attainable. This will have the adverse effect of unnecessarily forcing more cases to a full-blown evidentiary hearing. It is in the public interest for litigants to reach stipulated resolutions of contested issues if possible. Society generally favors compromised resolutions. The legal system does not impose these same type of requirements on commercial or civil litigants. With the strong advocates for competing positions in the present structure, any settlement within the parameters demonstrated by the record evidence has to carry a strong presumption of being in the public interest.

6. The Companies do not mean to suggest the Commission has no legitimate role in exploring the reasonableness of a proposed settlement. To the contrary, stipulations typically contain language permitting the Commission's Staff to present to the Commission its rationale for the proposed settlement. The Commission

is also free to inquire as to the positions of other proper parties to the case as well. It should not, however, be surprised or alarmed to discover that each party may have a different rationale with respect to the merits of the underlying issues. Ultimately, though, the Commission has no legal obligation to make detailed findings of fact in a settled case.

7. Proposal Discourages Settlements. The Companies believe the Commission should not enact a rule which, as this proposal is likely to do, discourages settlements and forces parties to an adversarial hearing where otherwise one need not take place. In the view of the Companies, this is not the best use of the scarce resources of the Commission, its Staff, the regulated industries, consumers, and other interested parties.

8. Non-Signatory Parties. The Companies also have a comment on subsections (2)(6) and (2)(C). However, some background is appropriate. The Commission's current rule regarding non-unanimous stipulations and agreements was enacted several years after the Western District of the Missouri Court of Appeals issued its decision in **State ex rel.** Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo. App. 1982). In that case, the Court determined that the Commission failed to satisfy certain requirements of due process by restricting an objecting party to a limited hearing procedure. The Court concluded that a limited hearing afforded to the objecting party 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." Subsequently, the Commission enacted its rule requiring an objecting party to file a written objection and to request a hearing within seven (7) days of the date the

document is filed. If the objecting party did not do so, it was deemed to have waived its right to a hearing, paving the way for the Commission to consider and, perhaps, adopt the proposed settlement and dispose of the case. The Companies believe a rule of this nature is still a valuable docket control tool for the Commission. The proposed amendment, however, contains some language which is problematic and unnecessary.

9. Subsection (2)(B) contains language addressing a so-called "conditional assent." In essence, the Commission is proposing to deem a conditional assent as non-conditional and not as an objection. This language is troubling to the extent it suggests that a non-signatory will be deemed by the Commission to have assented to or joined in and to be bound by the specific terms of a particular settlement agreement. This problem is aggravated by subsection (2)(C) which provides that the Commission may treat a non-unanimous stipulation and agreement as unanimous if no objection is filed.

10. The underlying problem is that a **non-signatory party** should not be *deemed* to take a particular position on the merits of a settlement to which it is not a signatory. There is no compelling reason for this requirement. To the contrary, such a party should be allowed to simply stand on the sidelines if it chooses and allow a stipulation to take place. In this manner, it does not impede a settlement and it is not deemed to have joined in the terms of a document to which it is not a signatory. The Commission should not preclude a non-signatory from reserving its rights to the extent it deems necessary. All the *Fischer* decision requires is that the Commission extend the due process requirement of an **opportunity** for a hearing on the merits to those parties expressly objecting to a settlement agreement. The *Fischer* decision says

nothing about treating a non-signatory as a supporter or opponent of the underlying agreement in the event no objection is filed. On the other hand, a non-objecting, non-signatory should not be allowed to hide in the shadows and then later pursue an appeal if the Commission adopts the stipulation presented by the signatory parties. A waiver of the right to a hearing on the specific matter should be binding throughout the process.

11. Consequently, the Companies suggest the last sentence in subsection (2)(B) be stricken from the proposed amendment. The second sentence in subsection (2)(B) should be rewritten as follows: "Failure to file a timely objection shall constitute a full waiver of that party's right to a hearing and that party's right to file an application for rehearing and pursue judicial review on the subject of the stipulation and agreement if it is approved by the Commission." Subsection (2)(C) should also be modified as follows: "If no party timely objects to a non-unanimous stipulation and agreement, the Commission may rule summarily on the merits of the non-unanimous stipulation and agreement without holding a hearing." In this manner, a non-objecting, non-signatory party will not be deemed to have concurred in or be bound by the underlying settlement agreement, but its waiver of a right to a hearing on the topic will be final and binding upon it and bar it from pursuing judicial review of that to which it did not object. This approach will conform in all respects with the principles set forth in the *Fischer* decision.

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

Respectfully submitted,

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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-2002-158comments/gdmydocs/wp8