

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

In the Matter of the Establishment of a)
Working Case for the Consideration of Writing a)
New Affiliate Transaction Rule for Water) Case No. WW-2018-0392
Corporations with 8,000 Customers or Less and/or)
Sewer Corporations with 8,000 Customers or Less)

THE OFFICE OF THE PUBLIC COUNSEL'S COMMENTS

COMES NOW the Office of the Public Counsel (OPC), by and through counsel, and for its Comments states as follows:

BACKGROUND

On July 11, 2018, the Public Service Commission (Commission) established Case No. WW-2018-0392 in response to the Commission Staff's (Staff) Motion to Open Rulemaking Workshop. The Commission Staff acted pursuant to Executive Order 17-03 to consolidate existing rules, and accordingly proposed new rules regarding the sharing of customer information by Commission regulated utilities.

The Commission requested comments regarding the Staff’s drafted rules to be submitted by no later than August 10, 2018. As the OPC is charged to “represent and protect the interests of the public”, the OPC offers comments as follows.¹

POSITION ON AFFILIATE TRANSACTIONS GENERALLY

The Commission should adopt robust affiliate transaction rules; maintaining current protections, extend those rules to small water and sewer corporations, and even consider extending existing oversight mechanisms. When regulated monopolies engage in affiliated transactions there is an inherent danger of distorting the market and incentivizing their own enrichment to the detriment of consumer choice. Public utilities have the potential to disrupt competition and further

¹ Section 386.710, RSMo (1977).

constrict consumer choices simply by favoring themselves and their affiliates over independent vendors. The Missouri General Assembly recognized this danger when it created a statutory separation between HVAC and utility services.² When consolidating and updating existing affiliate transaction rules this explicit policy of not engaging in self-dealing with affiliates from the Legislature should be forefront in one's mind.

Consideration must also be afforded to public utilities having an inherent advantage when competing with independent vendors because only the utility has direct and immediate access to customer energy usage and other sensitive data. An independent vendor can only get this information through the utility or customer, but utility affiliates may potentially access this information straight from the utility. A utility and its affiliates can then exploit this informational asymmetry to obtain an undue competitive advantage for both their nonregulated activities and their affiliates. Because both a utility's affiliates and its own internal activities not regulated by the Commission can be unduly advantaged, the OPC further recommends that any small water corporation and small sewer corporation affiliate transaction rule apply to the utility's nonregulated activities as well.

The OPC has incorporated its position into its attached version of a consolidated affiliated transaction rule, and also wishes to point out potential issues in Staff's draft.

POSITION ON COST ALLOCATION MANUALS

The OPC offers that existing cost allocation manual (CAM) filing deadlines be upheld in any new affiliate transaction rule. Commission Staff has authored a new subsection (3) entitled "Cost Allocation Manuals (CAM)" addressing existing CAM filing procedures. The Current affiliate transaction rules for gas and electric utilities provide that such regulated entities shall

² See Section 386.756, RSMo (2003) (prohibiting a utility "engag[ing] or assist[ing] any affiliate or utility contractor in engaging HVAC services in a manner which subsidizes the activities of such utility, affiliate or utility contractor").

annually file information on their affiliate transactions by March 15th.³ Commission Staff's new subsection (3) instead requires a filing of such information every three years by May 15th. The affiliate transaction data included in a CAM are vital for annual financial filings before both the Commission and the Securities and Exchange Commission. The OPC does not believe that a filing deadline extension is warranted or even necessary as the CAM's components should readily be at a utility's disposal, and thus suggests that existing deadlines be maintained.

POSITION ON THE LACK OF AN EXPLICIT PROVISION REGARDING THE SHIFTING
OF ANY BURDEN OF PROOF AND AN ENFORCEMENT SECTION

The OPC notices that the explicit language stating that the affiliate transaction rules do not modify existing burden of proof responsibilities enforcement subsection that is currently included in the affiliate transaction rule for electric and gas utilities has been removed in the proposed rule for small water and sewer corporations. Although the OPC does not believe that whether language is necessary to understand who has the burden of proof, or to impose penalties, the OPC is nonetheless concerned that another reader may infer that the loss of either language as curtailing the Commission's authority to oversee affiliate transactions. The OPC recommends reinserting both provisions to avoid differing legal interpretations.

WHEREFORE, the OPC respectfully submits its Comments.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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³ 4 CSR 240-20.015(4); 4 CSR 240-40.015(4).

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 10th day of August, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall

/s/ Lera Shemwell

4 CSR 240-10.XXX Affiliate Transactions Respecting Small Water Corporations and Small Sewer Corporations

PURPOSE: This rule is intended to prevent Missouri Public Service Commission (commission) small water and small sewer utilities from subsidizing an affiliate's operations (regulated and nonregulated). In order to accomplish this objective, the rule sets forth standards of conduct, financial standards, evidentiary standards, access requirements, training requirements and record-keeping requirements applicable to any commission small water corporation or small sewer corporation whenever any such entity participates in a transaction with an affiliated entity (except with regard to HVAC services as defined in section 386.754, RSMo., 2016, by the General Assembly of Missouri). [The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.](#)

(1) Definitions.

~~(A) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the small water corporation or small sewer corporation. This term shall also include the nonregulated business operations of a small water corporation or small sewer corporation.~~

~~(B)~~[\(A\)](#) Affiliate transaction means any transaction for the provision, receipt, purchase or sale of any information, asset, good or service, or portion of any good or service, between a small water corporation or small sewer corporation and an affiliated entity. Affiliate transactions as defined by this rule shall also include all transactions carried out between any nonregulated business operation of a small water corporation or small sewer corporation and the regulated

business operations of a small water corporation or small sewer corporation. An affiliate transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754 by the General Assembly of Missouri.

(B) Affiliate Transactions Report means the filing that each small water corporation or small sewer corporation is required to make with the secretary of the commission no later than each May 15.

(C) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the small water corporation or small sewer corporation. This term shall also include the nonregulated business operations of a small water corporation or small sewer corporation.

(D) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through one (1) or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of ten percent (10%) or more of voting securities or partnership interest of an entity constitutes control for purposes of this rule. This provision, however, shall not be construed to prohibit a small water corporation or small sewer corporation

from rebutting the presumption that its ownership interest in an entity confers control or another party from asserting that control exists without the ten percent (10%) ownership guideline.

~~(D)~~(E) _____ Corporate support means joint corporate oversight, governance, support systems and personnel, involving payroll, shareholder services, financial reporting, human resources, employee records, pension management, legal services, and research and development activities.

~~(E)~~(F) Cost allocation manual (CAM) means the document which specifies the criteria, guidelines and procedures that the small water corporation or small sewer corporation will follow to be in compliance with the commission's Affiliate Transactions Rule. The CAM sets forth the small water corporation's or small sewer corporation's cost allocation, market valuation, and internal cost methods. The frequency of the filing of the small water corporation's or small sewer corporation's CAM is addressed in section (3) of this rule.

~~(F)~~(G) _____ Derivatives means a financial instrument, traded on or off an exchange, the price of which is directly dependent upon (i.e., "derived from") the value of one or more underlying securities, equity indices, debt instruments, commodities, other derivative instruments, or any agreed-upon pricing index or arrangement (e.g., the movement over time of the Consumer Price Index or freight rates). Derivatives involve the trading of rights or obligations based on the underlying good, but do not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for a fixed rate of return.

~~(G)~~(H) _____ Financial advantage ~~is~~ means an advantage provided by a small water corporation or small sewer corporation to an affiliated regulated or nonregulated entity or its nonregulated activities when ~~if~~ the small water or small sewer corporation:

1. Compensates an affiliated entity for assets, goods, information or services of any kind above the lesser of –

A. The fair market price (FMP); or

B. The fully distributed cost (FDC) to the small water corporation or small sewer corporation to provide the assets, goods, information or services for itself; or

2. Transfers assets, goods, information, or services of any kind to an affiliated entity below the greater of –

A. The FMP; or

B. The FDC to the small water corporation or small sewer corporation.

(I) Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct, indirect cost causative, or allocated approach. Costs that cannot be directly or indirectly assigned-charged or indirectly allocated-assigned (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

(J) Information means any data obtained by a small water corporation or small sewer corporation that is not obtainable by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

(K) Nonregulated operations means assets, goods, information, or services of an affiliate of a small water corporation or small sewer corporation not subject to the jurisdiction of the commission under Chapters 386 and 393, RSMo.

(L) Preferential position means treatment provided by the small water or small sewer corporation which places the affiliated entity or its nonregulated activities at an unfair advantage over its nonaffiliated competitors.

(M) Small sewer corporation means a sewer corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with eight thousand

(8,000) customers or less, and is covered by this rule, but is not covered by 4 CSR 240-10.XXX.

(N) Small water corporation means a water corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with eight thousand (8,000) customers or less and is covered by this rule, but is not covered by 4 CSR 240-10.XXX.

(O) Unfair advantage means an advantage to the small water corporation or small sewer corporation that cannot be obtained by nonaffiliated entities or can only be obtained by competitors at a ~~competitively~~ prohibitive cost in either time or resources.

(P) Variance means an exemption granted by the commission from any applicable standard required pursuant to this rule.

(2) Standards, Evidentiary Standards, and Record Keeping Requirements for Small Water Corporations and Small Sewer Corporations

(A) A small water corporation or sewer corporation shall not provide a financial advantage to an affiliated entity or that small water corporation or sewer corporation's own nonregulated activity.

(B) A small water corporation or small sewer corporation shall maintain books, accounts and records separate from those of its affiliates.

(C) A small water corporation or small sewer corporation shall maintain records of all affiliated transactions, as described in section (4) of this rule, and make such records available in accordance with section (5) of this rule.

(D) ~~Except as necessary to provide corporate support functions, a~~ small water corporation or small sewer corporation shall conduct its business in such a way as not to provide any financial advantage or preferential position to an affiliated entity or nonregulated activity over another entity at any time.

(E) A small water corporation or small sewer corporation shall not participate in any affiliated

transactions which are not in compliance with this rule, except as otherwise provided in section (98) of this rule.

(3) Cost Allocation Manuals

(A) Each small water corporation and small sewer corporation shall file with the commission for its approval a CAM every ~~three (3) years~~year on or before ~~May~~March 15. The commission may accept, reject, or modify such CAM.

(B) All affected sections and pages of a small water corporation's and small sewer corporation's CAM shall be updated and filed with the commission for its approval within 60 days of any of the following conditions:

1. A new nonregulated operation is commenced or acquired, or an existing nonutility operation is eliminated or divested, by the small water corporation or small sewer corporation;

2. A change in the small water corporation's or small sewer corporation's allocation methodology;

3. An affiliate relationship of the small water corporation or small sewer corporation changes; ~~or~~

4. Operations affecting nonregulated operations change sufficiently to warrant a new allocation methodology; or

- 4.5. Findings of rule noncompliance.-

(4) Records of Affiliated Entities.

(A) Each small water corporation and small sewer corporation shall ensure that its parent and any other affiliated entities maintain books and records that include, at a minimum, the following information regarding affiliate transactions:

1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or affiliated entity and charged to the small water corporation and small sewer corporation;
2. Documentation of the methods used to [charge, assign](#), allocate and/or share costs between affiliated entities including other jurisdictions and/or corporate divisions;
3. Description of costs that are not subject to allocation to affiliate transactions and documentation supporting the nonassignment of these costs to affiliate transactions;
4. Descriptions of the types of services that corporate divisions and/or other centralized functions provided to any affiliated entity or division accessing the small water corporation's and small sewer corporation's contracted services or facilities; Names and job descriptions of officers and managers and the job descriptions of such other employees from the small water corporation and small sewer corporation that transferred or were to an affiliated regulated or nonregulated entity;
5. Evaluations of the effect on the reliability of services provided by the small water corporation and small sewer corporation resulting from the access to regulated contracts and/or facilities by affiliated entities;
6. Policies regarding the access to services available to nonregulated affiliated entities desiring use of the small water corporation and small sewer corporation's contracts and facilities; and
7. Descriptions of and supporting documentation related to any use of derivatives that may be related to the small water corporation and small sewer corporation's operation even though obtained by the parent or affiliated entity.

(5) Access to Records of Affiliated Entities.

(A) To the extent permitted by applicable law and pursuant to established commission discovery procedures, a small water corporation and small sewer corporation shall make available the

books and records of its parent and any other affiliated entities when required in the application of this rule.

(B) The commission [and public counsel](#) shall have the authority to--

1. Review, inspect and audit books, accounts and other records kept by a small water corporation and small sewer corporation or affiliated entity for the sole purpose of ensuring compliance with this rule and making findings available to the commission; and

[2.](#) Investigate the operations of a small water corporation and small sewer corporation or affiliated entity and their relationship to each other for the sole purpose of ensuring compliance with this rule.

[\(C \) This rule does not modify existing legal standards regarding which party has the burden of proof in commission proceedings.](#)

(6) Record Retention.

(A) Records required under this rule shall be maintained by each small water corporation and small sewer corporation for a period of not less than six (6) years.

(7) Training

(A) The small water corporation and small sewer corporation shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

[\(8\) Enforcement](#)

[\(A\) When enforcing these standards, or any order of the commission regarding these standards, the commission may apply any remedy available to the commission.](#)

~~(8)~~[\(9\)](#) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraphs (98)(A)1. or (98)(A)2. The granting of a variance to one small water corporation or small sewer corporation does not constitute a ~~waiver variance respecting or otherwise affect the required compliance of~~ any other small water corporation ~~and or~~ small sewer corporation to comply with the standards. The scope of a variance ~~will~~ shall be determined based on the facts and circumstances found in support of the application.

1. A small water corporation and small sewer corporation may request a variance upon written application in accordance with commission procedures set out in 4 CSR 240-2.060(4) but it may not engage in such an affiliate transaction ~~not in compliance with the standards set out in subsection (2)(A) of this rule unless it is first granted~~ until the commission first grants the variance ~~or waiver by the commission~~ for good cause shown; or

2. A small water corporation and small sewer corporation may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, on an interim basis, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (98)(A)2.A. and (98)(A)2.B. of this rule--

A. All reports and record retention requirements for each affiliate transaction must be complied with; and

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and a copy served upon the commission staff counsel and the Public Counsel within ten (10) days of the occurrence of the non-complying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate

transaction was in the best interests of the small water corporation or small sewer corporation's customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any person, entity, or association shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a person's, entity's, or association's ability to challenge the affiliate transaction at the time of the filing of the annual Affiliate Transactions Report. Requesting a hearing regarding the noncomplying affiliate transaction within thirty (30) days of the small water corporation's or small sewer corporation's initial notice of the noncomplying affiliate transaction, is not a prerequisite for a person, entity, or association challenging the affiliate transaction within thirty (30) days of the filing of the annual Affiliate Transactions Report. (Section 386.550 RSMo., applies to the commission's determinations after granting a request for a hearing filed within thirty (30) days of the initial notice of the noncomplying affiliate transaction.) At the time of the filing of the small water corporation's or small sewer corporation's annual Affiliate Transactions Report filing, the small water corporation or small sewer corporation shall file with the secretary of the commission a listing of all non-complying affiliate transactions which occurred between the period of the last filing and the current filing. Any affiliate transaction submitted pursuant to this section shall remain interim, subject to disallowance, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the small water corporation or small sewer corporation's customers, ~~if the commission did not grant a request for a hearing if notice of the occurrence of the non-complying affiliate transaction had been provided within ten (10) days of the occurrence.~~ provided that an affiliate transaction need not remain interim if the commission has granted a request for a hearing under this section.

AUTHORITY: sections 386.250, RSMo., Supp. 1998, and 393.140, RSMo., 1994.* Original rule

filed April 26, 1999, effective Feb. 29, 2000; *State ex rel. Atmos Energy Corp. v. Public Serv.*

Comm'n, 103 S.W.3d 753 (Mo.banc 2003); *Office of the Public Counsel v. Public Serv.*

Comm'n, 409 S.W.3d 371 (Mo.banc 2013).

*Original authority: 386.250, RSMo., 1963, amended 1967, 1977, 1980, 1987, 1988, 1991, 1993, 1995, 1996 and 393.140, RSMo., 1939, amended 1949, 1967.