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July 1, 1999

FILED
JUL 1 1999
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: In the matter of 4 CSR 240-20.015 Proposed Rule - Electric Utilities Affiliate Transactions, Case No. EX-99-442

Dear Mr. Roberts:

Enclosed for filing in the above referenced case, please find the original and eight copies of the **Initial Comments of the Office of the Public Counsel** (NP version) and seven copies of the **HC sets**. Please "file stamp" the extra enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

John B. Coffman
Deputy Public Counsel

JBC:kh

Enclosure

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

FILED
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INITIAL COMMENTS OF THE OFFICE OF THE PUBLIC COUNSEL

Proposed Rule 4 CSR 240-20.015
Electric Utilities Affiliate Transactions
Case No. EX-99-442

July 1, 1999

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OFFICE OF THE PUBLIC COUNSEL INITIAL COMMENTS
AFFILIATE TRANSACTION RULEMAKING FOR ELECTRICAL UTILITIES
CASE NO. EX-99-442

I. INTRODUCTION

The Missouri Office of the Public Counsel ("OPC" or "Public Counsel") is pleased to have the opportunity to comment upon proposed rules as well as to submit suggested modifications to the proposed rules relating to transactions between Missouri electric utilities and their various affiliates. In recent years there has been a national as well as local Missouri trend for electric utilities to become more diversified. In some instances, the diversification has been into "energy-related" product lines and services – such as energy conservation products and appliance sales and service. In other instances, the diversification has been to unrelated – or only distantly related – goods and services such as home security or facilities-based telephony services.

Diversification strategies have likely been driven by a number of factors – including linkage to "natural fits," the desire to employ or invest excess cash flow generated from declining utility rate bases, and simply "keeping up with the Jones." However, in OPC's view, the primary driver behind the recent rush to diversify has been the actual or anticipated deregulation of different energy services that have been, or that still are currently, considered regulated and tariffed utility service. Recognizing that a part of the service now provided may soon be deregulated and subjected to competition, many utilities are forging ahead – trying to achieve customer loyalty, name recognition, continued market saturation and product "partners" that would enable them to "package" their previously regulated and competition-protected service with other competitive products that will permit them to retain market share and achieve product/price differentiation.

In establishing the current rulemaking docket, the Missouri Public Service Commission and its Staff appear to have appropriately recognized the problems and pitfalls that can accompany utility diversification efforts. Left unattended, utilities could end up significantly subsidizing non-utility/non-regulated products, services and business lines. Such subsidization could occur in a number of different ways – including unfair transfer pricing for goods and services exchanged, inequitable cost allocation methods and schemes, joint marketing of unregulated products with regulated services, "packaging" of regulated and unregulated products as well as unfettered "branding" of non-regulated products with regulated services. The Commission and its Staff are to be applauded for recognizing the potential subsidization problems at hand by undertaking the effort to establish equitable affiliate transaction rules.

There are two ways to control the ability of a vertically and horizontally integrated entity in order to address cross subsidization and market power problems. The cleanest and most certain solution to these problems is to require structural separation of the competitive affiliates from the regulated monopolist. The second best solution is to promulgate record keeping requirements and behavioral rules like those that are contained in the Commission's proposed affiliate rules. The disadvantages of utilizing the record keeping requirements and behavioral rules approach is that sufficient resources must be devoted to monitoring and enforcement activities and that the rules must have sufficient detail and clarity regarding the behavioral guidelines to which the utilities and their affiliates are expected to adhere.

For the most part, the OPC embraces the concepts embodied within the currently Proposed Rules. In particular, the OPC applauds and supports the asymmetrical pricing standards contained within the currently Proposed Rules as well as the requirements that utilities not provide "preferential service, information or treatment to an affiliated entity over another party at any time." As noted within the ensuing comments, the OPC does not oppose the rules that have been proposed (with a few exceptions). Rather, the OPC believes that the concepts that are now embodied within the Proposed Rules need to be expanded upon and more clearly delineated so as to avoid confusion and controversy in their interpretation. Most of OPC's proposals simply involve "additions" or "expansions" to the Proposed Rules – there is very little "deletion" to what has been proposed.

With this brief introduction, we would emphasize to the Commission the tremendous market advantage that electric utilities enjoy by virtue of their government-endorsed status as monopoly utility service providers. As stated often in the ensuing comments, such utilities enjoy virtually 100% market penetration by virtue of their claim to a certificated service territory. Free from competition within their certificated service territory, and being in the business of providing an extremely "essential" service, utilities enjoy name recognition and market clout that is unmatched by any company or product/service line. The major weakness identified in the Proposed Rules would be the apparent lack of concern the Proposed Rules have regarding the market power the utilities currently possess and how, left unattended, the utilities will likely leverage such market power to stifle or disadvantage competitors in markets that are either currently unregulated (e.g. gas sales to large customers and energy conservation services) or likely to be deregulated (e.g. gas sales to small customers and retail electric generation service). Accordingly, many of OPC's proposed changes and attendant comments deal with needed enhancements to the Proposed Rules which would further "separate" the utility and its affiliates.

The remaining comments are organized in the following manner. For the most part, Public Counsel will comment on subjects in the same order that the subjects arise in the Commission's proposed rule, as modified by OPC's recommendations. The last section of Public Counsel's comments contains information that has been classified as highly confidential by the utilities that have provided this information to OPC. This last section has been included to advise the Commission of some examples of questionable utility practices that OPC believes the Commission should take into account when deciding whether to retain certain sections of the proposed rules or supplement provisions to the proposed rules as is being recommended by Public Counsel. The highly confidential section also contains other information such as discussions of utility strategic planning documents that OPC believes the Commission should consider when deciding on the final rule that it will promulgate as a result of this rulemaking.

Finally, several attachments have been included with these comments. The first attachment contains a complete copy of the rule that Public Counsel is recommending to the Commission. This rule is presented in redline/strikeout format to clarify which sections OPC has recommended be added to and deleted from the Commission's proposed rule. Public Counsel hopes that presenting our suggested alterations to the Commission's proposed rule in this format will make it easier for other parties to this case to respond to OPC's specific recommendations in their reply comments. The remaining attachments have all been classified as confidential and have been included to better inform the Commission about utility trends, strategies, and practices that illustrate the need for a strong and unambiguous affiliate transaction rule.

One final introductory comment that will help the Commission and other parties comprehend Public Counsel's proposals and supporting comments is in order. Please note that the electric and gas affiliate transaction rules that have been proposed by OPC in Case Nos. EX-99-442 and GX-99-444 are nearly identical, as are the Comments that have been submitted by Public Counsel in these two dockets.

II. COMMENTS ON SPECIFIC PROVISIONS IN OPC'S RECOMMEDED RULE

A. Section (1) - Definitions

(D) 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 non-marketing research and development activities.

(E) Customer Information means non-public information and data specific to a utility customer, which the regulated electric corporation acquired or developed in the course of its provision of regulated utility services.

The changes that Public Counsel recommended for this section are limited to the addition of two definitions for the terms "corporate support" and "customer information." The definition for "corporate support" has been added to help clarify the meaning of two new subsections that have been added by OPC in other areas of the Proposed Rules. These new subsections are subsection (2)(G) – Independent Functioning and subsection (2)(H) - Corporate Support. The "corporate support" definition also helps clarify the meaning of the modifications to subsection (3)(B) and paragraphs 4, 6, and 7 of subsection (6)(A).

The definition for "customer information" has been added to help clarify the meaning of several references to this term in the rule as proposed by the Commission and several references in Public Counsel's suggested modifications.

B. Section (2) – Nondiscriminatory Standards of Conduct for Affiliated Entities

This entire section is an addition to the Commission's proposed rule. The original section (2) in the Commission's proposed rule has been renumbered as section (3) in OPC's proposed rule. For example, former subsection (2)(B) in the Commission's proposed rule has become subsection (3)(B) in OPC's proposed rule. All of the subsections of the new section (2) are intended to provide additional clarification and specificity to the standard that was presented in subsection (2)(B) of the Commission's proposed rule. Subsection (2)(B) of the Commission's proposed rule originally read as follows:

> *(B) The regulated electrical corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.*

Public Counsel's new section (2) contains subsections that address several areas in order to ensure that the preference that is prohibited by subsection (2)(B) of the Commission's proposed rule does not occur. These areas are: customer information, business development and customer relations, use of the name or logo of the regulated utility, joint advertising, joint marketing, and independent functioning of affiliates.

As stated in our introduction, OPC believes that the increasing trend towards diversification into additional areas of business is occurring as utilities prepare themselves for competition by offering non-regulated products. This diversification has led to the need for affiliate rules to set standards for pricing of affiliate transactions and conduct in competitive areas. The rule that has been proposed by the Commission sets out a straightforward and easy to apply standard in section (2)(A) that can be used to ensure that a utility cannot provide a "financial advantage" to it affiliates. Public Counsel has very serious concerns, however, that the standard in (2) of the Commission's proposed rule will not have its intended effect of preventing the provision of "preferential service, information or treatment to an affiliated entity over another party at any time" unless a detailed code of conduct is incorporated in the rule to set specific parameter for what constitutes "preference." The various subsections of Public Counsel's new section (3) that make up our proposed code of conduct are described and supported below.

1. Subsection (2)(A) – Customer Information

(A) Customer Information

1. Customer information shall be made available without preference to affiliated entities or their customers. Electric utilities shall not provide any preferences to affiliated entities in requesting authorization for the release of customer information. Customer information shall be made available only with prior affirmative customer written consent.

2. A utility shall make non-customer specific non-public information, including but not limited to information about a utility's natural gas or electricity purchases, sales, or operations or about the utility's energy-related goods or services, available to the utility's affiliated entities only if the utility makes that information contemporaneously available to all other service providers on the same terms and conditions, and keeps the information open to public inspection.

OPC-proposed Part (A) of OPC's proposed Section 2, "Nondiscriminatory Standards of Conduct for Affiliated Entities" mandates that utility customer-specific information be made available to affiliates and non-affiliates alike on a non-preferential or non-discriminatory basis. Furthermore, under OPC-proposed Part (A)1., any customer information sought by any outside entity shall only be made available to affiliates and non-affiliates upon receipt of written affirmative customer consent.

The merits of OPC-proposed Part (A)1. should be obvious. The utility's customer data base consisting of detailed information for virtually every resident and business within the utility's service territory – including name, address, work place, consumption pattern, and of course, payment history – would prove to be a highly valuable data base for any number of vendors. Utility databases for large customers typically contain even more detailed information such as customer expansion plans, conservation and load management measures installed, contact names, and information on loads and locations outside of the utility's service territory. To allow these data to flow selectively to the utility's affiliate would provide an incredible advantage to the affiliate and a tremendous disadvantage to all non-affiliate competitors.

Once again, broadly worded and briefly stated part (B) of the Commission proposed "Standards" merely requires that "[t]he regulated gas corporation.... not.... provide any preferential service, *information* or treatment to an affiliated entity over another party at any time." Such existing language is indeed consistent with the OPC-proposed rule regarding the dissemination of customer information. And while it may be argued that the existing language contained within the Commission proposed "Standard" (B) quoted above covers the OPC's concern embodied within its proposed Part (A)1. to the "Customer Information" section, the OPC respectfully submits that the concern regarding customer information is of such importance that it is deserving of a separate "Part" that should leave nothing to chance or interpretation with regard to the Commission's intent on this subject.

Finally, the necessity that customer-specific information be disseminated *only upon receiving written consent* from the individual customer should be obvious. Information concerning the utility customer's address, consumption and payment history are very confidential matters. To allow a utility to disseminate information it has compiled solely as a result of its government-authorized status to provide an essential utility service without the utility customer's consent, would be an breach of privacy.

The need for OPC's proposed Part (A)2. of the "Customer Information" section should also be obvious. Carrying out its significant government-authorized business, utilities acquire tremendous amounts of non-customer-specific information that could also be of value to the utility's affiliates and their competitors. Data concerning vendor lists, purchasing discounts, local franchise requirements, new development areas, aggregate consumption information by locale – just to name a few – could be of great value to companies desiring to, or already providing, goods and services in a utility's certificated service territory. Once again, it would be unfair to provide information obtained primarily as a result of the utility's government-authorized monopoly service provider status only to its affiliate and not to the remainder of the affiliate's competitors.

2. Subsection (2)(B) – Business Development and Customer Relations

(B) Business Development and Customer Relations.

1. Except as otherwise provided by these Rules, a utility shall not:
A. provide leads to its affiliated entities;
B. solicit business on behalf of its affiliated entities;
C. acquire information on behalf of or to provide to its affiliated entities;
D. share market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports, with its affiliated entities;
E. request authorization from its customers to pass on customer information exclusively to its affiliated entities;
F. give the appearance that the utility speaks on behalf of its affiliated entities or that the customer will receive preferential treatment as a consequence of conducting business with the affiliated entities; or
G. give any appearance that the affiliated entity speaks on behalf of the utility.
2. A utility shall not provide its customers with any verbal or written list of service providers, which includes or identifies the utility's affiliates, regardless of whether such list also includes or identifies the names of unaffiliated entities. If a customer inquires about a good or services provided by an affiliate, the utility shall direct the customer to a generally available listing of service providers (e.g., the Yellow Pages).

All of the provisions in paragraph 1 of subsection (2)(B) are intended to provide specific guidance to the regulated utility about what constitutes preference under the standard set forth in subsection (2)(B) of the Commission's proposed rule. This subsection of the Commission's proposed rule becomes subsection (3)(B) in OPC's proposed rule because the new section (2) that contains a code of conduct is intended to give additional guidance to regulated utilities about which specific types of behavior would constitute granting "preference" to their affiliates. Items A through F in paragraph 1 of OPC's subsection (2)(B) are potential utility behaviors that, if allowed, would lead the utility's affiliate to gain a unique advantage over its competitors. This advantage would be solely due to the ability of the regulated utility to use its government authorized monopoly status to grant preferences to its affiliates. It should not be allowed because it is not an advantage that has been "earned" through excelling in a competitive marketplace with a level playing field.

Utilities will likely argue that it is anti-consumer for them to be prevented from fully exploiting all of the economies of scale and scope that are available to them. They may claim that consumers will be forced to pay extra for competitively provided goods because of these types of restrictions. This argument is based on at least two false premises. The first false premise is that utility affiliates will necessarily pass on any cost savings resulting from so called "scale and scope" economies to consumers. Prices are only pushed fully towards the cost of providing service in markets where effective and sustained competition can exist. Allowing utility affiliates to exploit the incumbent advantages arising from their ability to exploit Items A through F in paragraph 1 of OPC's subsection (2)(B) would erect entry barriers that would impair the development of effective and sustained competition. Accordingly, one should not conclude that cost savings will be passed on to consumers in this type of market.

The second false premise upon which the "don't interfere with our ability to fully exploit economies of scale and scope" argument is based on the assumption that competitive markets will somehow function better when the affiliates of regulated utilities are given exclusive access to the essential facilities and other unique business advantages that are possessed by the monopolist who has been given an exclusive franchise that was insulated from any serious competitive pressures.

We now turn to a discussion of paragraph 2 of subsection (2)(B) in OPC's proposed rule. The OPC has consistently maintained in these comments that the affiliate's marketing efforts should be separate and distinct in every way and fashion from those of the utility's so that the affiliate's ownership connection with the regulated utility will not result in an unfair competitive advantage. Consistent with this theme, the OPC urges Commission adoption of the above rule, effectively prohibiting the promotion of an affiliate that might occur when the utility's customers contact the utility regarding a competitive service. The Commission should recognize in its rules the tremendous market advantage, customer contact handicap and name recognition that the utility enjoys by virtue of government intervention in the market place. Absent the above-proposed standard, the utilities will be able to leverage the customer contact advantage that they have in their certificated service territory to promote the name or goods and services of the competitive affiliate.

Some may argue that it is the customer that is injured if the utility is not permitted to disseminate information regarding the reliable goods and services being offered by its affiliate. The OPC does not share this concern, and would argue that any possible negatives on this front are necessary to promote a "level playing field." The ability of the utility to exploit the customer contact that it enjoys by virtue of its status as a monopoly provider of an essential utility service is just too great to be left unattended.

While the OPC endorses the "just say no" position regarding the dissemination of information surrounding its affiliate or any good or service provided by its affiliate, the OPC anticipates that there may be significant utility opposition to such blanket prohibition. If the Commission should be persuaded to permit the utility to disseminate information regarding its affiliates, it should do so only with significant conditions attached.

The California Public Utilities Commission wrestled with this issue two years ago. While ultimately allowing the utility to disseminate information regarding its affiliate, the California PUC attached many conditions. If this Commission were to also allow the utility to disseminate information regarding its affiliate, we would propose it do so only with the following conditions – which have been predominantly cloned from the California PUC approved rules:

Alternative 2. Responses to Customer Requests for Information Regarding Products and Services Provided by Affiliated Entities

A. Except upon request by a customer or as otherwise authorized by the Commission, a utility shall not provide its customers with any list of service providers, which includes or identifies the utility's affiliates, regardless of whether such list also includes or identifies the names of unaffiliated entities.

B. If a customer requests information about any affiliated service provider, the utility shall provide a list of all providers in its service territory, including its affiliates. The Commission shall authorize, by a filing, and either the utility, the Commission, or a Commission-authorized third party provider shall maintain on file with the Commission a copy of the most updated lists of service providers which have been created to disseminate to a customer upon a customer's request. Any service provider may request that it be included on such list, and, barring Commission direction, the utility shall honor such request. Where maintenance of such list would be unduly burdensome due to the number of service providers, subject to Commission approval by advice letter filing, the utility shall direct the customer to a generally available listing of service providers (e.g., the Yellow Pages). In such cases, no list shall be provided. The list of service providers should make clear that the Commission does not guarantee the financial stability or service quality of the service providers listed by the act of approving this list.

3. Subsection (2)(C) – Use of the Name or Logo of the Regulated Electrical Corporation

(C) Use of the Name or Logo of the Regulated Electrical Corporation

1. An affiliate of a regulated electric utility shall not assume or share the same name, trademark or logo of the regulated electric utility.

2. An affiliate of a regulated electric utility shall not assume or share a name, trademark or logo that is similar to, or that could be reasonably associated with, the regulated electric company.

To appreciate the necessity of the two above-proposed rules, one must consider the regulated electric utilities' unique market advantage. The regulated electric utility desiring to enter into a competitive business already enjoys a virtually 100% market penetration for its regulated product. It has instant name recognition by essentially 100% of the adult population living within its service territory by virtue of monthly utility billings as well as occasional customer contact inquiring about service. The utility's presence is further nurtured by uniformed employees driving uniformly painted and labeled service vehicles. Its product is an "essential" service to which anyone moving into its service territory is immediately exposed. Thus, the corporate name and reputation of the regulated electric company can have considerable value in any competitive market place.

Branding is currently a key element of marketing to consumers. McDonalds, Texaco, Disney and Midas -- all operating in highly competitive arenas -- can legitimately claim pride in ownership of extensive name recognition created through a carefully cultivated program of offering good/superior products and service at competitive prices. The combination of good price and product offered by these non-regulated entities, enveloped by extensive marketing and advertising programs, has created a valuable brand asset in "a name you can trust." Notably, to use the brand and reputation, franchisees or licensors of these competitive businesses pay significant royalties to "use" the brand.

However, utilities typically have not "earned" customer loyalty by extensive marketing in conjunction with offering reasonable/superior service at fair/competitive prices. Indeed, prior to the actual advent or mere expectation of deregulation in recent years, utilities typically engaged in little "goodwill" or "name enhancing" advertising. Furthermore, minimum "service" and "safety" standards" have been mandated by government regulators – all with the assurance that reasonable costs incurred in meeting such standards would be collected from captive customers. Thus, much of the value of the utility's name or brand is inherited from the franchised operation over many years at no cost to shareholders. Furthermore, the utilities' overwhelming market penetration is not a product of extensive, expensive, risky or shareholder-financed marketing efforts. Rather, this market penetration is a product of government intervention in the market place – wherein the government has effectively prohibited competition in the local utility's service territory.

The OPC respectfully submits that non-regulated affiliates of the regulated utility should receive no benefit of name recognition currently enjoyed by the incumbent utility. To bestow the benefit of essentially "unearned" name recognition upon affiliates of regulated utilities would create an unfair advantage for the affiliates. In some instances, extensive name recognition with the incumbent utility (who again, enjoys virtually 100% market penetration) may discourage market entry and quash or stifle the existing businesses who are already offering a competitive service that the utility affiliate desires to introduce. Accordingly, OPC submits that adoption of the above noted rules will tend to promote competition and is in the public interest.

Notwithstanding the OPC's "just say no" position on name sharing espoused above, the OPC is very cognizant of the countervailing arguments against the prohibition of name apportioning. Specifically, OPC anticipates that utilities intervening in this cause may claim that the prohibition against the use or sharing of a corporate name or logo is inappropriate because:

1) such prohibition violates the utilities' first amendment right to free speech,
2) other competitors and entrants are, and will be, building upon the good name and reputation of parent and affiliate organizations. To not allow the utility affiliate this same advantage would be unfair, and/or
3) to impair the utility affiliates' growth into competitive businesses vis-a-vis name/logo prohibition is, in and of itself, anti-competitive. Further, to stifle economic expansion through prohibited name sharing deprives utility ratepayers of the added economies of scale and scope that will inure as the non-regulated business grows.

The OPC believes such arguments are without merit and/or are less meritorious than the arguments propounded in support of OPC's "just say no" to name/logo sharing noted above. Nonetheless, *should this Commission reject the proposed prohibition of name sharing*, the OPC would, *in the alternative*, propose the following two rules:

(Alternative C) Use of the Name or Logo of the Regulated Electrical Corporation

1. If an affiliate assumes or shares an exact or similar name, logo or trademark of the regulated utility, the affiliate shall prominently display and announce in every product advertisement and offering that:

A. The affiliate does not receive preferential treatment from the regulated utility relative to the treatment of the affiliate's competitors

B. The utility and affiliate are separate entities.

C. The affiliate is not regulated by the Missouri Public Service Commission

2. If an affiliate elects to assume or share an exact or similar name, logo or trademark of the regulated utility, the affiliate shall pay the regulated utility a recurring royalty equivalent to three percent (3.0%) of gross revenues received. The royalties received by the regulated utility will be deferred on the regulated utility's books and records for crediting to ratepayers in future rate proceedings. The reasonableness of the application of the three percent (3.0%) royalty fee will be a rebuttable presumption, with the burden of proof for any deviation from such three percent (3.0%) royalty fee being placed upon the party proposing the deviation.

With respect to the first alternative rule being suggested, we anticipate that there should be little opposition to such proposal. Indeed, such disclosures are neither burdensome nor negative. If opposition to such disclosures arises, one must necessarily conclude that the utility or its affiliate would *like* to convey or infer that 1) there is some real or intangible benefit to be achieved by purchasing from the affiliate of the utility, 2) the utility and its affiliates are not really separate, or 3) there is some government protection, assurance or endorsement implicit in buying from the utility affiliate. Adoption of this rule is the bare minimum to be imposed upon utility affiliates -- assuming this Commission should elect to allow utility affiliates to share in and build upon the utilities' name recognition.

Regarding the merits of our second alternative rule (i.e., imposition of a royalty), we remind the Commission that our foremost proposal is to "just say no" to the sharing of the utility's name, logo or trademark. If there is strong utility opposition to such prohibition, one must logically conclude that the utilities themselves perceive great value in the names, logos and trademarks that they presently own and maintain. If there is significant value in being associated with such established utility company, it logically and equitably follows that the utility company, and ultimately its ratepayers, should be compensated or credited when such value is transferred to an unregulated affiliate providing a competitive service.

Name recognition and customer base, which the utility enjoys, is primarily as a result of the monopoly status granted the utility by the government. To allow this asset, largely created by government intervention, to be transferred free of charge to an unregulated affiliate is tantamount to suggesting that the utility no longer has an obligation to minimize its cost of service. Just as, for instance, a utility has an obligation to maximize off-system opportunity energy sales, so should the utility have the obligation to maximize revenues from any transferred intangible assets – including the asset embodied within its brand and business reputation.

OPC also notes that imposition of a royalty cost to the utility affiliate should have the effect of "leveling the playing field" so that other companies – who may not have instant name recognition by virtue of government intervention – can more readily compete with the utility affiliates who elect to obtain leverage through association with the utility's name. Specifically, non-affiliates can be expected to expend monies to market their various products. In other words, non-affiliates can be expected to expend additional monies – above and beyond what the utility affiliate expends – just to achieve the same name recognition that the affiliate enjoys instantly by virtue of its association with the regulated utility. Also, where affiliates are already offering non-regulated products, new entrants must over come both brand loyalty and customer inertia to get patrons to switch.

With regard to OPC's royalty proposal, it should be recognized that such fee will only be imposed if the affiliate elects to transfer and use the utility's name and reputation. The affiliate's choice as to whether it elects to use the utility's name, logo or trademark and incur the royalty fee. If the affiliate perceives little or no value in such name recognition, it will be free to chose a different name – and thus avoid the three- percent (3.0%) royalty fee. Presumably the affiliate will only elect to adopt the utility's name, trademark and logo if it perceives value in such association.

Finally, we emphasize that the three percent (3.0%) royalty fee can be subjected to challenge. However, as noted in the proposed rule, the burden to increase, decrease or eliminate the three percent (3.0%) royalty fee embodied within the rule will be placed upon the party electing to challenge the reasonableness of the fee.

4. Subsection (2)(D) – Joint Advertising

(D) Joint Advertising

1. A utility shall not trade upon, promote, or advertise its affiliated entity's affiliation with the utility, nor allow the utility name or logo to be used by the affiliated entity or in any material circulated by the affiliated entity, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

A. the affiliated entity "is not the same company as the utility [i.e. AmerenUE, KCPL, the Electric Company, etc.],";

B. the affiliated entity is not regulated by the Missouri Public Service Commission; and

C. "you do not have to buy [the affiliated entity's] products in order to continue to receive quality regulated services from the utility."

The application of the name/logo disclaimer is limited to the use of the name or logo in Missouri.

As a preface to OPC's comments regarding subsection (2)(D), please note that the above provisions which require that certain disclaimers be made when joint advertising occurs would only be necessary if the Commission rejects OPC's proposal for subsection (2)(C). If the Commission accepts OPC's proposed **alternate** subsection (2)(C) or rejects both OPC's proposed subsection (2)(C) and OPC's proposed **alternate** subsection (2)(C), then OPC recommends that the Commission incorporate OPC's proposed subsection (2)(D) in its final rule.

The regulated utility's significant market advantage created by government intervention in granting exclusive rights to provide essential utility service in a given geographical area. To avoid exploitation of such unique market advantage to the detriment of competitors would be most inequitable. OPC has argues in the preceding segment of these comments that good reasons exist to support the prohibition of the use of the utilities name and logo by the affiliate. Based on this reasoning, Public Counsel has recommended that absolutely *no* joint advertising should be allowed in any form or with a number of restrictions given the overwhelming market advantage that the regulated utility enjoys. If the Commission decides, however, to stop short of mandating such a prohibition, then OPC submits that if any joint advertising it to be permitted, it is critical that Subsection (D), which restricts joint advertising, be incorporated within any affiliated transaction rules being established by this commission. Adoption of Subsection (D) would ensure that if joint advertising is undertaken in any form, that the utility could not fully exploit its name recognition and market power advantage gained primarily as a result of government intervention in the market place.

5. Subsection (2)(E) – Joint Marketing

(E) Joint Marketing

1. Except as provided in subsection (2)(E)2 of this rule, joint marketing of services and/or facilities with an affiliated entity is prohibited.

2. A utility shall not offer or provide to its affiliated entities advertising space in utility billing envelopes or any other form of utility customer written communication unless it provides access to all other unaffiliated service providers on the same terms and conditions.

Paragraph 1 of subsection (2)(E) prohibits all joint marketing activities except for those that would be permissible under paragraph 2 of this same subsection. Public Counsel believes that this prohibition is appropriate for all of the same reasons cited in support of Items A through F in paragraph 1 of OPC's subsection (2)(B).

With respect to OPC's proposed language in Paragraph 1 of subsection (2)(E), we emphasize the importance of prohibiting the utility from selectively allowing its affiliate to advertising in the utility's billing envelopes. The exposure the utility automatically enjoys by virtue of its government-authorized monopoly status as a provider of an essential service through monthly customer billings cannot be overstated. As the Commission is well aware, ratepayers are paying through rates the cost that the utility incurs in order to bill customers on a monthly basis. The incremental cost to allow others to advertise with flyers in the monthly utility bill can be expected to be fairly modest. It is simply essential that affiliates and non-affiliates alike have equal access, on equal terms, to the utility's customer billing envelopes that provides incredible coverage to the entire adult population in a given geographic area. The OPC views all conditions and requirements set forth within Subpart (1) to be of importance. However, the OPC places as its highest priority this subpart requiring equal access by affiliates and non-affiliates to the utility's billing envelopes.

Furthermore, the proposed requirement that the utility offer other service providers equal access to joint marketing opportunities should – at least partially – quell the concerns of current competitors and potential future competitors who no doubt also fear the extreme market advantage that utilities automatically enjoy by virtue of their monopoly status in a given geographical area.

Proposed paragraph 1 of subsection (2)(E) regarding the requirement that utilities provide customer billing to other service providers is a logical extension, and indeed nothing more than a definitional expansion, of the Commission's proposed subsection (2)(B) that already requires that the utility *not* provide "preferential service" or "treatment" to an affiliate over any other party. Utilities may argue that it is unreasonable, and creates an unacceptable burden, to have to offer to provide customer billing to non-affiliates. The answer to such criticism is, of course, for the utility to simply not offer to provide customer billing service to its affiliates. In fact, some competitors may argue (again, with considerable merit) that offering customer billing service to affiliates should be prohibited *under any circumstance.* OPC's proposed Paragraph 1 of subsection (2)(E) does not go to such an extreme, but instead, effectively lets the utility off the hook from offering such service to the affiliate's competitors by merely prohibiting the utility from providing the service to its affiliate when it observes that it would be burdensome or impossible to offer customer billing to non-affiliates. And finally, as with the other Proposed Rules, if there are unique circumstances that warrant special consideration on this topic, the utility is always permitted to file for a variance that might allow it to provide customer billing services to its affiliate or perhaps a more select group of non-affiliates.

6. Subsection (2)(F) – Tying

(F) Tying: electric utilities shall not tie or otherwise condition the provision of any services, discounts, rebates, fee waivers, or waivers of the electric utilities' ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and services from the electric utility's affiliated entity.

At the risk of stating the blatantly obvious, OPC notes how egregious it would be if the utility were to allow preferential treatment/pricing in the delivery of a government-authorized monopoly service to captive utility customers conditioned upon the captive customers purchasing a competitive product from a non-regulated affiliate. A "double" injustice would likely occur under such a scenario. First, competitors of the utility affiliate simply could not compete with such clout. Even if the competitive product being peddled by the affiliate was of inferior quality or has a price well above market, the customer may be enticed to buy from the affiliate just to get "the deal" on the essential utility service. Under such a scenario, competition would be squelched – not enhanced, as this Commission should be striving to encourage.

Second, the utility may attempt to recover from other captive utility customers the "discount" on the monopolistic utility service being "packaged" with the affiliate's competitive product. While it is nearly unfathomable that the utility would be able to recover from other captive customers the "discounts" given to utility customers in order to induce them to purchase competitive products from utility affiliates, utility conduct that could lead to attempts for such recovery would effectively be promoted if the OPC's "tying" standard is not adopted.

"Tying" utility price discounts or the provision of uncompensated premium utility service to the purchase of competitive goods and service from the affiliates would be the consummate "preferential... treatment to an affiliated entity over another party." As such, one might argue that a specific rule or standard addressing the "tying" concern may be redundant to the language presently included as Standard 2 (B). However, if redundancy is the only objection to the OPC's proposed "tying" standard, OPC would argue the need for utmost clarity on this most important topic far out shadows any claim of "redundancy."

See Sections III and IV of these Initial Comments for examples of recent utility actions of which the OPC is aware that would be addressed by this proposal.

7. Subsections (2)(G) and (2)(H) - Independent Functioning and Corporate Support

(G) Independent Functioning: Except in relation to corporate support, an electric utility and its affiliated entities shall function independently of each other and shall not share services, employees or facilities.

1. A utility and its affiliated entities shall be separate corporate entities.

2. All new non-tariffed products and services shall be offered by an affiliate of the regulated electric corporation except where the non-tariffed product or service utilizes a portion of a utility asset or capacity where such asset or capacity has been acquired for the purpose of, and is necessary and useful in providing tariffed utility service.

3. Sharing of Plant, Facilities, Equipment or Costs. A utility shall not share office space, office equipment, services, and systems with its affiliated entities, nor shall a utility access the computer or information systems of its affiliated entities or allow its affiliated entities to access its computer or information systems, except to the extent appropriate to perform shared corporate support functions permitted under Section (H) of these Rules. Physical separation required by this rule shall be accomplished preferably by having office space in a separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. This provision does not preclude a utility from offering a joint service provided this service is authorized by the Commission and is available to all non-affiliated service providers on the same terms and conditions (e.g., joint billing services).

4. Except in relation to corporate support, an electric utility and its affiliated entities shall not jointly employ or otherwise share the same employees.

(H) Corporate Support:

1. As a general principle, a utility, its parent holding company, or a separate affiliate created solely to perform corporate support services may share with its affiliated entities joint corporate oversight, governance, support systems and personnel. Any shared support shall be priced, reported and conducted in accordance with the Standards set forth in this rule.

2. As a general principle, such joint utilization shall not allow or provide a means for the transfer of confidential information from the utility to the affiliated entity, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliated entities. In the annual CAM filing, a corporate officer from the utility and holding company shall verify the adequacy of the specific mechanisms and procedures in place to ensure the utility follows the mandates of this paragraph, and to ensure the utility is not utilizing joint corporate support services as a conduit to circumvent these Rules.

3. Services that may be shared include: payroll, taxes, shareholder services, insurance, financial reporting, financial planning and analysis, corporate accounting, corporate security, human resources (compensation, benefits, employment policies), employee records, legal, and pension management.

4. Services that may not be shared include: employee recruiting, engineering, hedging and financial derivatives and arbitrage services, electric and electric purchasing for resale, purchasing of electric transmission, system operations, regulatory affairs, lobbying, and marketing.

A common and recurring theme throughout the OPC's comments is that the regulated utility and their affiliates should not be able to exploit, to the disadvantage of competitors, the utility's name recognition and market advantage achieved primarily as a result of the utility's government-authorized ability to provide an essential utility service free from competition. Thus, many of the positions being proposed by OPC essentially require the utility and its affiliates to completely separate so as to facilitate the tracking of affiliate transactions and to prohibit the affiliate from achieving an "unearned" competitive edge merely as a result of being associated with the established utility company.

While OPC's general position is to completely separate the utility from the affiliate, OPC's proposed Parts (G) and (H) to the proposed "Standards" section carve out an exception to this general theme. Specifically, Parts (G) and (H) provide for the sharing of a number of "support" functions or activities. The functions that would be allowed to be shared under the rule – which are set out in a fair degree of detail – are thought to be "ownership" functions or functions exclusively dedicated to merely "supporting" the actual operations of the utility and its affiliates. The actual production, servicing and marketing by the utility and its affiliate of various products and services should remain physically, and in all other respects, separate. However, OPC supports, or certainly does not oppose, the sharing of activities that generally fall into the categories of ownership, corporate oversight, governance, support systems and personnel.

Some may argue, with some merit, that there should be absolutely no sharing of support functions between the utility and affiliates. Proponents of complete separation might argue that the sharing of *any* functions invites problems such as the inappropriate exchange of information or the unfair pricing for services exchanged. Furthermore, proponents of complete separation may argue that the utility, by virtue of its protected monopoly status, business longevity, immense size and purchasing clout, will automatically have an unfair advantage over competitors that should not be allowed to be exploited.

The OPC shares some of the concerns set forth above that would lead one to a conclusion that virtually no functions should be shared. However, the OPC has ultimately arrived at the conclusion that any advantages the utility and its affiliate may achieve that are unrelated to its protected monopoly status and control of essential facilities but are instead merely because of the utility's size, should not be considered discriminatory. Indeed, it is often the advantage gained with economies of scale that has led to lower prices for consumers. Furthermore, while it could be argued that a small, start up operation may not be able to effectively compete with an affiliate of a utility that is able to take advantage of the utility's size, it can also be stated that it is the utility affiliate that may be facing discrimination if it is not able to, within limits, take advantage of the utility's size and business sophistication. Specifically, it is reasonable to assume that any conglomerate, such as a Wal-Mart, can be expected exploit to the fullest extent possible, all advantages it can achieve by virtue of its size. If new affiliates of the Wal-Marts of the world are able to take advantage of the business sophistication and "back office" support that Wal-Mart can provide, it may be the affiliates of the utility who are disadvantaged if they are not able to similarly take advantage of the size and business sophistication of the utility.

We repeat and emphasize that the functions and activities that are essential and specific to operating, marketing or "running" the utility or the affiliate need to be physically, and in all other respects, separate. Such separation is necessary to ensure that the affiliate gains no advantage solely because of its association with the utility that has achieved overwhelming name recognition and market share of an essential product merely by virtue of government intervention in the market place. However, the OPC does not oppose restricted sharing of certain "governance" or "support" functions or activities that will enable the affiliate to enjoy certain economies of scale and "back office" support as a result of the utility's size and established business practices.

C. Section (3) – Standards

1. OPC Recommended Modifications to Section (3)

OPC recommends that four modifications be made to this section. First, we have modified subsection (3)(B) (please note for comparison purposes, that this is subsection (2)(B) in the Commission's proposed rule) so that is begins with the phrase "except as necessary to provide corporate support functions." This modification was necessary to make this subsection consistent with the general requirement for the independent functioning of utilities and their affiliates that is contained in subsections (2)(G) and (2)(H) of OPC's proposed rule. Subsection (3)(B) of OPC's proposed rule reads as follows:

(B) Except as necessary to provide corporate support functions, the regulated electrical corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.

The next OPC proposed modification to this section is the deletion of subsection (3)(D), which was section (2)(D) of the Commission's proposed rule. This section was deleted because Public Counsel believes that specific guidance for non-preferential treatment in utility dissemination of information about the products and services of utility affiliates and their competitors fits better in the code of conduct section of the rule. For this reason, this subject has been addressed in subsection (2)(B), which is the Business Development and Customer Relations subsection in the code of conduct section of OPC's proposed rule.

OPC has added two new subsections to the Standards section of its proposed rule. These sections, dealing with the transfer of employees between the regulated utility and its affiliates, are reproduced below.

(D) When an employee of a utility is transferred, assigned, or otherwise employed by the affiliate, the affiliate shall make a one-time payment to the utility in an amount equivalent to 25% of the employee's base annual compensation, unless the utility can demonstrate that some lesser percentage (equal to at least 15%) is appropriate for the class of employee included. All such fees paid to the utility shall be accounted for in a separate memorandum account to track them for future ratemaking treatment (i.e., credited to cost of service in future rate proceedings).

(E) Once an employee of a utility becomes an employee of an affiliate, the employee may not return to the utility for a period of two years. In the event that such an employee returns to

the utility after the two year period has ended, such employee cannot be re-transferred, reassigned, or otherwise employed by the affiliate for a period of two years. Employees transferring from the utility to the affiliate are expressly prohibited from using information gained from the utility in a discriminatory or exclusive fashion, to the benefit of the affiliate or to the detriment of the other unaffiliated service providers. Transferred employees shall sign an affidavit attesting to the fact that they will not release to the affiliate privileged information gained while in the employment of the regulated utility.

The "Standards" section of the Commission's Proposed Rules now provide that:

A regulated gas/electric corporation shall not....transfer information, assets, goods or services of any kind (including, but not limited to, land, patents, ***trained employees****, research, employee training, etc.) to an affiliated entity below the greater of...[t]he fair market value; or [t]he fully distributed cost to the regulated gas/electric corporation."* ***(Emphasis added)***

The OPC embraces the concept that "trained employees" shall not be transferred to affiliates without just compensation. However, the OPC submits that the Commission's Proposed Rule as written is somewhat confusing and could be strengthened by assessing a clearly stated fee rather than simply adopting the broad transfer pricing language applicable to the balance of other goods and services exchanged between the utility and the affiliate. Specifically, if an employee transfers from the regulated utility to the affiliate, it is probable that the "fair market value" or "cost" of the transfer to the utility may be obscure and subject to much interpretation and controversy. Accordingly, the OPC is proposing the assessment of a one-time fee, equivalent to 25% of the transferred employee's base compensation, to be paid by the affiliate to the utility.

Such assessment is reasonable and equitable for three reasons. First, it is logical to assume that the affiliate would incur considerable expense, either in-house or with outside recruiting firms, when hiring new employees. If such costs are avoided by the affiliate, it logically and equitably follows that the affiliate should pay the regulated utility for costs it was able to avoid in the recruiting process. Second, if an affiliate entices an employee of the utility to transfer, thus leaving a vacancy at the utility, the utility must turn right around and begin the recruitment process for the vacancy created. Thus, the affiliate's "savings" can quickly become the utility's "cost." Finally, in addition to up front out-of-pocket costs incurred in the recruitment process, there is also the very real cost created by the need for the utility to train a new hire. In light of all of the above, the OPC urges adoption of subsection (3)(D) set forth above.

Such a rule is reasonable and abundantly more clear than the present Proposed Rule that simply states that the regulated utility is not to transfer trained employee below the "fair market price" or the "fully distributed cost" to the regulated company. The OPC can envision that with the present language the utilities will argue that there is no "cost" to the utility or that there is no "fair market value" for transference of an employee. In actuality, there is a very real and significant cost every time a company loses a valued employee. First, there is often the significant and "hard" cost of placement fees. Fees charged by employee recruiting firms can range from 15% to 40% of the employee's annual compensation -- depending upon the requirements of the position. Even if the utility's in-house human resources department undertakes the recruitment process utilizing utility employees, the utility nonetheless incurs the cost of paying such employees as well as advertising, and potentially, relocation charges.

Second, and just as importantly, there is the cost of retraining and/or simply acclimating a new hire to the utility company's methods and procedures for carrying out company business. The retraining/acclimating costs can be fairly modest to very significant – again, depending upon the position.

In light of all of the foregoing, the OPC urges adoption of the above-noted rule that would impose a clearly stated one-time fee equivalent to 25% of an employee's base compensation whenever an employee transfers from the utility to an affiliate.

OPC's Proposed subsection (D) of the "Standards" section of the rules, regarding the one-time fee to be assessed when an employee transfers from the utility to the affiliate, addresses the more obvious subsidization which can occur when an affiliate avoids "hard" costs only at the expense of the utility incurring incremental or otherwise avoidable "hard" costs. However, another form of subsidization can occur when an employee crosses the employment line from the regulated utility to the unregulated, competitive affiliate. Specifically, utility employees can walk out the utility's doors with either written confidential information, or just as valuable, a good memory of information that would not otherwise be available to the affiliate or its competitors. For example, an employee that worked to provide regulated service to a utility's "key account" customers would leave the regulated utility with knowledge of important information (future plans for expansion of the customer's facilities, current and likely future load characteristics, credit history, etc.) as well as established relationships with customer contacts. OPC's proposed subsection (3)(E) to the "Standards" is designed to prohibit the indirect subsidization that can occur when employees who had access to confidential information of the utility leave to go to work for the affiliate operating in a competitive arena.

Subpart (B) of the proposed "Standards" currently states that "[t]he regulated electric corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time." The OPC fully support the broad concept incorporated within the briefly worded subpart (B) of the proposed "Standards." Arguably, adoption of this one, broadly worded rule addressing a regulated utility's conduct would obviate the need for any other code of conduct rules. However, the information leakage and attendant subsidization that can occur when an employee transfers from the utility to the affiliate has the potential to be significant -- and yet subtle to detection. Because of these unique characteristics, OPC urges adoption of proposed subsection (E) to the "Standards."

The first component of OPC proposed subsection (E) of the Standards addresses the potential "revolving door" scenario wherein an information pipeline between the utility and the affiliate could be created by merely strategically moving key employees between entities on a regular and/or frequent basis. One can establish rules prohibiting, and attempt to screen for, *written* information passing from utility to affiliate. However, there are far fewer controls and methods of detecting privileged or confidential information passing from utility to affiliate vis-a-vis a former utility employee simply "remembering" tidbits of intelligence gathered while in the employ of the utility. The two-year employment moratorium embodied within proposed subsection (E) will partially alleviate the concern regarding information flowing to the utility via frequent employee transfers.

Even with infrequent transference of employees from utility to affiliate, privileged knowledge and information can occasionally escape to the benefit of the affiliate. Again, if subpart (B) of the proposed Standards is adopted and adhered to as written, arguably one would not have to expand upon the broadly-worded language that simply states that the regulated utility will "not provide any preferential service, *information* or treatment" to an affiliate. However, lest there be any confusion or difficulty with interpretation of what is meant, intended or covered by existing subsection (B), OPC strongly encourages adoption of the second component of its proposed subsection (E) to the "Standards." Specifically, OPC urges adoption of the language that unambiguously states that "[e]mployees transferring from the utility to the affiliate are expressly prohibited from using information gained from the utility in a discriminatory or exclusive fashion, to the benefit of the affiliate or to the detriment of the other unaffiliated service providers."

Finally, while auditors can observe events and search for documentation that may lead to a conclusion that a rule concerning the prohibition of information passing from utility to affiliate has been violated, to a large extent, adherence to such rule will be dependant upon the "honor system." Utilities may publish manuals and post rules that state that critical and sensitive information obtained while an employee was working for the utility may not be used by, or disseminated to, the affiliate. However, OPC submits that such rule will have more meaning or "teeth" if transferred employees are required to actually sign affidavits attesting to the fact that they will not provide sensitive information to the affiliate. Accordingly, OPC urges adoption of the third component of proposed Subsection (E) to the "Standards" that states "[t]ransferred employees shall sign an affidavit attesting to the fact they will not release to the affiliate privileged information gained while in the employment of the regulated utility."

2. Subsection (A) of the Standards Section

This subsection of the Commission proposed Standards section provides that:

(A) A regulated electrical corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation shall be deemed to provide a financial advantage to an affiliated entity if:

1. It compensates an affiliated entity for goods or services above the lesser of:

A. The fair market price; or

B. The fully distributed cost to the regulated electrical corporation to provide the goods or services for itself.

2. It transfers information, assets, goods or services of any kind (including, but not limited to, land, patents, trained employees, research, employee training, etc.) to an affiliated entity below the greater of:

A. The fair market price; or

B. The fully distributed cost to the regulated electrical corporation.

Both the electric and gas utilities' Proposed Rules contain asymmetrical transfer pricing guidelines for use when goods and services are exchanged between the regulated utility and its affiliate. Under such guidelines, goods and services sold by the regulated utility to the affiliate are to be priced at the *higher of* fully distributed cost ("FDC") *or* fair market value. Conversely, goods and services sold by the affiliate to the regulated utility are to be priced at the *lower of* fully distributed cost *or* fair market value. Public Counsel fully supports and embraces these asymmetrical transfer pricing concepts and recommends their adoption by this Commission.

The OPC anticipates that the proposed asymmetric pricing standards will not be popular with Missouri regulated utilities. Indeed, upon first impression, the rule may appear unfair to utilities. However, OPC submits that the proposed standards are indeed fair, and in fact, consistent with sound and equitable ratemaking principles.

First, regarding the pricing of goods and service sold by the affiliate to the utility, why should such sales be at the lower of fully distributed cost or market? Very simply, because the regulated utility, providing monopolistic services, still has an obligation to provide such service at the lowest cost achievable – consistent, of course, with reasonable safety and service standards. If the affiliate's fully distributed cost to provide the good or service is higher than market, the utility should "shop the market" and incur the lower market price. This is the exact same procedure that utilities follow, or certainly should follow, regarding the purchase of any good or service from non-affiliated vendors. Indeed, if during the course of a rate case the Commission determined that a utility was not going out for competitive bid on major purchases of products and services, and not buying from the lowest qualified vendor, it no doubt would impose a "prudence" disallowance after it concluded that the utility was not acting reasonably to lower the cost of service for its captive ratepayers.

If, on the other hand, the affiliate's fully distributed cost to provide or produce the good or service is less than the market price for the good/service, the utility, again in an effort to minimize its cost of service, has an obligation to internalize this product/service. It would be unfair and inequitable to allow an affiliate to "internalize" a process that the regulated utility could just as easily internalize by producing the product or service "in house," and then turn around and mark the price up to "market" for payment to an affiliate.

In short and in sum, regarding the flow of goods and services *from* the affiliate *to* the regulated utility, if the regulated utility can produce or provide the good/service at a cost that is less than "market" price for the good/service, it should internalize the process. If the affiliate can produce the good or service at less than the market price, then it is likely that the utility could do the same. The utility should not allow an affiliate to do what it can do itself – only to have the affiliate "mark up" the price to a higher market price. Conversely, if a utility can purchase a good or service at a market price that is less than its own cost to produce/provide, it should simply buy the good/service on the market rather than provide/produce the good or service itself or buy the product from an affiliate at a price above market.

Regarding the flow of goods and services from the utility to the affiliate, we note that "maximizing revenues" is tantamount to "minimizing costs." Or in other words, a utility can lower its cost of service by "minimizing costs" or by "maximizing revenues" from non-jurisdictional opportunity sales. Indeed, Missouri electric companies have historically made off-system capacity and energy "opportunity sales" whenever such sales could be made without adversely impacting the service to it jurisdictional customers. The profits made from such opportunity sales have historically been "credited" to ratepayers in the cost of service. Such rate treatment is fair and equitable inasmuch as utilities have an obligation to lower the cost of service to their customers. Furthermore, utility ratepayers are supporting in rates the corporate infrastructure as well as the cost of the assets that allow such opportunity sales to be undertaken. Accordingly, ratepayers should be fully credited for profits from off-system sales that are only possible as a result of such rate support.

Just as a utility has an obligation to lower its cost of service to captive ratepayers by engaging in capacity and energy opportunity sales at "market prices," so to, it should undertake any sale of a good or service to an affiliate at a prevailing market price. The affiliate is not being treated unfairly as it is simply paying the same price that it would if it had gone out and "shopped the market." If for any unique reasons the fully distributed cost for the utility to produce/provide a good or service is above prevailing market prices, the utility should also charge the affiliate the higher fully distributed cost. Such treatment would be appropriate inasmuch as it would be unfair to charge its affiliate a cost that is less than what it is effectively charging its captive customers for an identical good or service. (In actuality, except perhaps for a temporary phenomena, the utility's fully distributed cost should not exceed the fair market price for the good or service. If the utility's cost to produce or provide the good or service was higher than the market price, the utility itself should discontinue producing/providing the good/service and opt instead to begin purchasing such item.)

Some might argue that, on its face, asymmetrical transfer pricing is unfair. However, as demonstrated above, there exists sound reasoning for adoption of the rules as now proposed. Additionally, utilities may argue that asymmetrical pricing could, under unique circumstances, discourage efficient operations and the taking advantage of economies of scale that could be achieved vis-a-vis growth through affiliates. However, if a unique situation should arise that might warrant a deviation from the transfer pricing procedures set forth in the Commission Proposed Rule, the solution is for the utility to simply file for a variance -- as is also provided for within the Proposed Rule. Specifically, under the Commission Proposed Rules utilities are free to file for a variance any time non-compliance with the standards "would not be in the best interest of its regulated customers."

In summary, the OPC believes the basic transfer pricing concepts embodied within the Commission Proposed Rules are reasonable and equitable, and accordingly, should be adopted by this Commission.

D. Section (5) – Record Keeping Requirements

The only modification that OPC is proposing to the Record Keeping Requirements section of the rule is the new subsection that follows:

> *7. A full and complete list of all employee movement between the utility and affiliates, including names and positions transferred to and from.*

Regarding the transfer of employees between a utility and its affiliate, OPC is proposing a small additional Record Keeping Requirement that would have utilities report annually the names and positions of employees moving between the utility and its affiliate. The purpose of the requirement should be obvious. Implementation should not be burdensome. Accordingly, the OPC urges adoption of Subsection (7) to the proposed Record Keeping Requirements that will allow the Commission, the Staff and the OPC to monitor the movement of employees between utility and affiliate – to ensure compliance with the employee turnover limitation embodied within OPC's proposed "Standard" as well as to simply observe the volume of employees moving in and among the utility and the affiliate.

E. Section (6) – Records of Affiliated Entities

Public Counsel is proposing the following modifications to three of the paragraphs in this section to make these paragraphs consistent with the general requirement for the independent functioning of utilities and their affiliates that is contained in subsections (2)(G) and (2)(H) of OPC's proposed rule.

> *4. Descriptions of the types of corporate <u>support services</u> that corporate divisions and/or other centralized functions provided to any affiliated entity or division accessing the regulated electrical corporation's contracted services or facilities;*
>
> *6. Evaluations of the effect on the reliability of services provided by the regulated electrical corporation resulting from the access to regulated contracts and/or facilities by affiliated entities <u>for corporate support purposes</u>;*

7. Policies regarding the availability of customer information and the access to services available to non-regulated affiliated entities desiring use of the regulated electrical corporation's contracts and facilities for corporate support purposes; and

The modified portions of the three above paragraphs have been underlined to highlight OPC's recommended changes.

F. Section (7) – Access to Records of Affiliated Entities

Public Counsel does not recommend that any changes be made to the Access to Records of Affiliated Entities section of the Commission's proposed rule other than re-numbering this section as section (7) instead of its original numbering as section (6). As proposed by the Commission, this section contains the following language:

(7) Access to Records of Affiliated Entities.

(A) To the extent permitted by applicable law and pursuant to established Commission discovery procedures, a regulated electrical 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 shall have the authority to:

1. Review, inspect and audit books, accounts and other records kept by a regulated electrical 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 regulated electrical 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.

The OPC cannot overemphasize the importance of this section of the Proposed Rule that will effectively give the auditors complete access to the affiliates' books and records. Enforcement of the other worthy portions of the rule under consideration is, to a large extent, impaired without this audit right. Without unfettered access to the affiliates' books and records, the auditor will be essentially asked to perform her task with one hand tied behind her back.

Missouri utilities will no doubt vigorously argue that the Commission, the Commission Staff, the OPC and other intervenors have no legitimate right of access to the affiliates' books and records. However, to understand the complete picture, the auditor must, in fact, be able to access the books and records of the utility, the holding company (when applicable), any service company, support division or subsidiary (when applicable) as well as the affiliate with which the utility transacts business and/or shares support services. Furthermore, the auditor must have a complete understanding of how the affiliate operates its business – including how corporate governance and administrative and general functions are carried out.

Ability to review only the utility's books and records, and perhaps the holding company's or service company's books and records, is simply not adequate. The auditor must be able to understand what functions are being undertaken, by which entities, as well as for which entities. Furthermore, the auditor must be able to assess the reasonableness of allocation procedures being utilized or proposed for assigning joint or shared costs between the regulated utility and all other affiliates. In order to make such assessment and understand the reasonableness of allocation procedures being utilized, the auditor must understand the utility's as well as the affiliate's business operations and methods of performing essential support functions. To be able to review the utility's books and records and perhaps the holding company's or service company's books and records -- *but not the affiliates* -- when analyzing allocation procedures, is simply not adequate.

A number of examples may drive home the problems that may be encountered if the auditor can only observe "half of the picture." Assume that a service company or subsidiary is established to provide certain administrative functions – such as information technology, telecommunication, risk management and human resources services -- for the utility as well as a number of affiliates. The auditor will undoubtedly have unfettered access to the utility's books and records, and it is likely that he will be able to view, without objection, the service company's books and records. With such access he can observe the service organization's "total company" charges, say, for all risk management services. He can also observe the allocation factors, and probably even the underlying statistics for each entity for which cost causative statistics are used in the allocation development process. Finally, he will also be allowed to observe amounts being allocated to the utility.

Assume further in this hypothetical organization that, in addition to the utility and the service company organization, there are two non-regulated affiliates. In discussions with utility management it is represented to the auditor that one of the two non-regulated affiliates, for whatever reasons, performs all or most of its risk management function "in house" and does not, for the most part, utilize the risk management services offered by the service organization. Accordingly, the utility proposes to *not* allocate any of the service organization's risk management department expenses to one of the non-regulated affiliates. Without access to the affiliates books and records, and without a good understanding of the affiliates operations, it will be virtually impossible for the auditor to test the reasonableness of the utility's position of *not* allocating risk management costs to all affiliates. Without access to all affiliates' books and records, the auditor as well as this commission will be required to blindly accept many representations made by the utility about the affiliates business that could impact allocation methods and procedures.

It will also be necessary for the auditor to understand the affiliates' business operations in order to make an assessment as to when the affiliate should reasonably be expected to obtain a "fair market price" for a service being received from the utility. The OPC can envision situations where the affiliate is receiving a valuable service and simply being charged the fully distributed cost of the utility or service organization providing the service. The utility and affiliates may argue that because of some unique situation or circumstance that there really is no "market" capable or providing the services required, and therefore, FDC is the only appropriate pricing mechanism for the service being provided. Once again, to assess the reasonableness of this assertion, the auditor needs to understand the affiliate's business. In order to fully understand the affiliate's business, the auditor must have access to the affiliate's books and records.

Utilities may argue that if the affiliate inspection rules are adopted then affiliates, operating in a competitive environment, will be exposed to leakage of confidential information to competitors. Leakage of competitively sensitive material is a legitimate concern. However, the solution to this potential problem is implementation of confidentiality agreements limiting the use and reproduction of records inspected. This commission has an abundance of experience with many different types of confidentiality agreements. To the best of the OPC's knowledge and recollection, there has never been a serious breach of any confidentiality agreement, nor has any utility or its affiliates ever claimed any damages resulting from a real or alleged breach of such agreement.

In short and in sum, the auditor must have open access to the affiliates books and records in order to assess the utilities' compliance with the Affiliate Transaction Rules. Potential problems regarding release of commercially sensitive materials can be dealt with by implementation of confidentiality agreements – agreements that have been used with great success in numerous regulatory proceedings before this commission.

G. Section (11) – Filing Requirements

As proposed, the Commission's rule does not contain a Filing Requirements section. The proposed rule does, however contain a requirement for an annual CAM filing. OPC's proposed rule has included this requirement in a Filing Requirements section so that this requirement that is referenced in (2)(D) and (9)(A)2.B. of the Commission's proposed rule can be located more readily for easy reference.

(11) Filing Requirements

(A) The regulated electric utility shall file its CAM with the Commission within 60 days of the effective date of this rule and on, or before March 15 of each succeeding year.

III. EXAMPLES OF UTILITY BEHAVIOR OBSERVED IN MISSOURI THAT ILLUSTRATES THE NEED FOR OPC'S PROPOSED RULE

While it may have been beneficial to perform a detailed audit of affiliate transaction practices at all of Missouri's electric and gas utilities in order to help determine the need for the affiliate rules proposed by the Commission and by Public Counsel, OPC has not had the time or resources to perform such an audit. Public Counsel does not, however, believe that the additional information that would be provided by such an audit is necessary for the Commission to determine whether the Commission's proposed rules, as modified by OPC, are in the public interest. Certain facts and theories regarding the (1) motivations of profit-incented entities and (2) the inherent competitive advantages that result from being affiliated with a regulated utility that receives unique benefits from its protected monopoly status and control of essential facilities are sufficient for the Commission to make its decision in the currently pending affiliate transaction cases.

Public Counsel has come across certain utility behavior that the Commission should take into account when determining the need for the rules as proposed by the Commission and as modified by OPC. The details regarding these utility practices must be reserved for the confidential portion of this filing since much of the relevant information has been classified as confidential by the utility that provided the information to OPC.

Public Counsel has reviewed documentation of certain transactions between a regulated Missouri utility and its affiliates that lead us to believe that the regulated utility may have engaged in transactions with its affiliate that illustrate the need for the financial advantage standard contained in the Commission's proposed rule. Although the Commission's proposed rule requires that transfers from a utility to its affiliate must be priced at the greater of the fair market price or the fully distributed cost, the example described more fully in Section IV below appears to have been made for no compensation whatsoever!

Public Counsel has reviewed documentation of certain coordinated actions between a regulated Missouri utility and its affiliated entities that leads OPC to believe that this company may have tied the granting of special favors related to its regulated business to the procurement of new or additional business for its unregulated affiliates. Additional information regarding this tying allegation is contained in Section IV.

SECTION IV IS
"HIGHLY CONFIDENTIAL"
IN ITS ENTIRETY AND IS
INTENTIONALLY MISSING
FROM THIS NP VERSION OF
THE COMMENTS.

Respectfully submitted,

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Public Counsel's Recommended Modifications to the Commission's Proposed Rule

Title 4–DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240- -Public Service Commission
Chapter 20- -Electrical Utilities

PROPOSED RULE

4 CSR 240-20.015 Affiliate Transactions

PURPOSE: This rule sets forth financial standards, evidentiary standards and record keeping requirements applicable to any Missouri Public Service Commission (Commission) regulated electrical corporation when such electrical corporation participates in affiliate transactions with any affiliated entity except with regard to HVAC services as defined in Section 386.754 by the General Assembly of Missouri.

(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 or more intermediaries, controls, is controlled by, or is under common control with the regulated electrical corporation.

(B) Affiliate transaction means any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of any product or service, between a regulated electrical corporation and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated electrical corporation and the regulated business operations of an electrical corporation. An affiliate transaction for the purposes of this rule excludes HVAC services as defined in Section 386.754 by the General Assembly of Missouri.

(C) 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 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. Under all circumstances, beneficial ownership of more than ten percent (10%) of voting securities or partnership interest of an entity shall be deemed to confer control for purposes of this rule.

(D) 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 non-marketing research and development activities.

(E) Customer Information means non-public information and data specific to a utility customer, which the regulated electric corporation acquired or developed in the course of its provision of regulated utility services.

(F)~~(D)~~ 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 product, 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)~~(E)~~ 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

Attachment 1
pages 1 - 8

incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g. General and Administrative) must also be included in the FDC calculation through a general allocation.

(H)~~(F)~~ Preferential Service means information or treatment or actions by the regulated electrical corporation which places the affiliated entity at an unfair advantage over its competitors.

(I)~~(G)~~ Regulated electrical corporation means every electrical corporation as defined in Section 386.020 RSMo, subject to Commission regulation pursuant to Chapter 393 RSMo.

(J)~~(H)~~ Variance means an exemption granted by the Commission from any applicable standard required pursuant to this rule.

(2) Nondiscrimination Standards of Conduct for Affiliated Entities

(A) Customer Information

1. Customer information shall be made available without preference to affiliated entities or their customers. Electric utilities shall not provide any preferences to affiliated entities in requesting authorization for the release of customer information. Customer information shall be made available only with prior affirmative customer written consent.

2. A utility shall make non-customer specific non-public information, including but not limited to information about a utility's natural gas or electricity purchases, sales, or operations or about the utility's energy-related goods or services, available to the utility's affiliated entities only if the utility makes that information contemporaneously available to all other service providers on the same terms and conditions, and keeps the information open to public inspection.

(B) Business Development and Customer Relations.

1. Except as otherwise provided by these Rules, a utility shall not:

A. provide leads to its affiliated entities;

B. solicit business on behalf of its affiliated entities;

C. acquire information on behalf of or to provide to its affiliated entities;

D. share market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports, with its affiliated entities;

E. request authorization from its customers to pass on customer information exclusively to its affiliated entities;

F. give the appearance that the utility speaks on behalf of its affiliated entities or that the customer will receive preferential treatment as a consequence of conducting business with the affiliated entities; or

G. give any appearance that the affiliated entity speaks on behalf of the utility.

2. A utility shall not provide its customers with any verbal or written list of service providers, which includes or identifies the utility's affiliates, regardless of whether such list also includes or identifies the names of unaffiliated entities. If a customer inquires about a good or services provided by an affiliate, the utility shall direct the customer to a generally available listing of service providers (e.g., the Yellow Pages).

Alternative 2. Responses to Customer Requests for Information Regarding Products and Services Provided by Affiliated Entities

A. Except upon request by a customer or as otherwise authorized by the Commission, a utility shall not provide its customers with any list of service providers, which includes or identifies the utility's affiliates, regardless of whether such list also includes or identifies the names of unaffiliated entities.

B. If a customer requests information about any affiliated service provider, the utility shall provide a list of all providers in its service territory, including its affiliates. The Commission shall authorize, by a filing, and either the utility, the Commission, or a Commission-authorized third party provider shall maintain on file with the Commission a copy of the most updated lists of service

providers which have been created to disseminate to a customer upon a customer's request. Any service provider may request that it be included on such list, and, barring Commission direction, the utility shall honor such request. Where maintenance of such list would be unduly burdensome due to the number of service providers, subject to Commission approval by advice letter filing, the utility shall direct the customer to a generally available listing of service providers (e.g., the Yellow Pages). In such cases, no list shall be provided. The list of service providers should make clear that the Commission does not guarantee the financial stability or service quality of the service providers listed by the act of approving this list.

(C) Use of the Name or Logo of the Regulated Electrical Corporation

1. An affiliate of a regulated electric utility shall not assume or share the same name, trademark or logo of the regulated electric utility.

2. An affiliate of a regulated electric utility shall not assume or share a name, trademark or logo that is similar to, or that could be reasonably associated with, the regulated electric company.

(Alternative C) Use of the Name or Logo of the Regulated Electrical Corporation

1. If an affiliate assumes or shares an exact or similar name, logo or trademark of the regulated utility, the affiliate shall prominently display and announce in every product advertisement and offering that:

A. The affiliate does not receive preferential treatment from the regulated utility relative to the treatment of the affiliate's competitors

B. The utility and affiliate are separate entities.

C. The affiliate is not regulated by the Missouri Public Service Commission

2. If an affiliate elects to assume or share an exact or similar name, logo or trademark of the regulated utility, the affiliate shall pay the regulated utility a recurring royalty equivalent to three percent (3.0%) of gross revenues received. The royalties received by the regulated utility will be deferred on the regulated utility's books and records for crediting to ratepayers in future rate proceedings. The reasonableness of the application of the three percent (3.0%) royalty fee will be a rebuttable presumption, with the burden of proof for any deviation from such three percent (3.0%) royalty fee being placed upon the party proposing the deviation.

[Note – the following provisions in section (2)(D) which requires that certain disclaimers be made when joint advertising occurs would only be necessary if the Commission rejects OPC's proposal for section (2)(C) since OPC's proposed section (2)(C) would prohibit joint advertising in any form. If the Commission accepts OPC's proposed **alternate** section (2)(C) or rejects both OPC's proposed section (2)(C)and OPC's proposed **alternate** section (2)(C), then OPC recommends that the Commission incorporate OPC's proposed section (2)(D) in its final rule.]

(D) Joint Advertising

1. A utility shall not trade upon, promote, or advertise its affiliated entity's affiliation with the utility, nor allow the utility name or logo to be used by the affiliated entity or in any material circulated by the affiliated entity, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

A. the affiliated entity "is not the same company as the utility [i.e. AmerenUE, KCPL, the Electric Company, etc.],";

B. the affiliated entity is not regulated by the Missouri Public Service Commission; and

C. "you do not have to buy [the affiliated entity's] products in order to continue to receive quality regulated services from the utility."

The application of the name/logo disclaimer is limited to the use of the name or logo in Missouri.

(E) Joint Marketing

1. Except as provided in subsection (2)(E)2 of this rule, joint marketing of services and/or facilities with an affiliated entity is prohibited.

2. A utility shall not offer or provide to its affiliated entities advertising space in utility billing envelopes or any other form of utility customer written communication unless it provides access to all other unaffiliated service providers on the same terms and conditions.

(F) Tying: electric utilities shall not tie or otherwise condition the provision of any services, discounts, rebates, fee waivers, or waivers of the electric utilities' ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and services from the electric utility's affiliated entity.

(G) Independent Functioning: Except in relation to corporate support, an electric utility and its affiliated entities shall function independently of each other and shall not share services, employees or facilities.

1. A utility and its affiliated entities shall be separate corporate entities.

2. All new non-tariffed products and services shall be offered by an affiliate of the regulated electric corporation except where the non-tariffed product or service utilizes a portion of a utility asset or capacity where such asset or capacity has been acquired for the purpose of, and is necessary and useful in providing tariffed utility service.

3. Sharing of Plant, Facilities, Equipment or Costs. A utility shall not share office space, office equipment, services, and systems with its affiliated entities, nor shall a utility access the computer or information systems of its affiliated entities or allow its affiliated entities to access its computer or information systems, except to the extent appropriate to perform shared corporate support functions permitted under Section (H) of these Rules. Physical separation required by this rule shall be accomplished preferably by having office space in a separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. This provision does not preclude a utility from offering a joint service provided this service is authorized by the Commission and is available to all non-affiliated service providers on the same terms and conditions (e.g., joint billing services).

4. Except in relation to corporate support, an electric utility and its affiliated entities shall not jointly employ or otherwise share the same employees.

(H) Corporate Support:

1. As a general principle, a utility, its parent holding company, or a separate affiliate created solely to perform corporate support services may share with its affiliated entities joint corporate oversight, governance, support systems and personnel. Any shared support shall be priced, reported and conducted in accordance with the Standards set forth in this rule.

2. As a general principle, such joint utilization shall not allow or provide a means for the transfer of confidential information from the utility to the affiliated entity, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliated entities. In the annual CAM filing, a corporate officer from the utility and holding company shall verify the adequacy of the specific mechanisms and procedures in place to ensure the utility follows the mandates of this paragraph, and to ensure the utility is not utilizing joint corporate support services as a conduit to circumvent these Rules.

3. Services that may be shared include: payroll, taxes, shareholder services, insurance, financial reporting, financial planning and analysis, corporate accounting, corporate security, human resources (compensation, benefits, employment policies), employee records, legal, and pension management.

4. Services that may not be shared include: employee recruiting, engineering, hedging and financial derivatives and arbitrage services, electric and electric purchasing for resale, purchasing of electric transmission, system operations, regulatory affairs, lobbying, and marketing.

(3)~~(2)~~ Standards.

(A) A regulated electrical corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation shall be deemed to provide a financial advantage to an affiliated entity if:

1. It compensates an affiliated entity for goods or services above the lesser of:

A. The fair market price; or

B. The fully distributed cost to the regulated electrical corporation to provide the goods or services for itself.

2. It transfers information, assets, goods or services of any kind (including, but not limited to, land, patents, trained employees, research, employee training, etc.) to an affiliated entity below the greater of:

A. The fair market price; or

B. The fully distributed cost to the regulated electrical corporation.

(B) Except as necessary to provide corporate support functions, ~~T~~the regulated electrical corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.

(C) The regulated electrical corporation shall not participate in any affiliate transactions which are not in compliance with this rule except as otherwise provided in section (9) of this rule.

~~(D) If a customer requests information from the regulated electrical corporation about goods or services provided by an affiliated entity, the regulated electrical corporation shall provide information to the customer regarding the availability of other non-affiliated entities that provide the same goods or services. The regulated electrical corporation shall include in its annual Cost Allocation Manual (CAM), the criteria, guidelines, and procedures it will follow to be in compliance with this rule.~~

(D) When an employee of a utility is transferred, assigned, or otherwise employed by the affiliate, the affiliate shall make a one-time payment to the utility in an amount equivalent to 25% of the employee's base annual compensation, unless the utility can demonstrate that some lesser percentage (equal to at least 15%) is appropriate for the class of employee included. All such fees paid to the utility shall be accounted for in a separate memorandum account to track them for future ratemaking treatment (i.e., credited to cost of service in future rate proceedings).

(E) Once an employee of a utility becomes an employee of an affiliate, the employee may not return to the utility for a period of two years. In the event that such an employee returns to the utility after the two year period has ended, such employee cannot be re-transferred, reassigned, or otherwise employed by the affiliate for a period of two years. Employees transferring from the utility to the affiliate are expressly prohibited from using information gained from the utility in a discriminatory or exclusive fashion, to the benefit of the affiliate or to the detriment of the other unaffiliated service providers. Transferred employees shall sign an affidavit attesting to the fact that they will not release to the affiliate privileged information gained while in the employment of the regulated utility.

(4)~~(3)~~ Evidentiary Standards for Affiliate Transactions.

(A) When a regulated electrical corporation purchases information, assets, goods or services from an affiliated entity, the regulated electrical corporation shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate.

(B) In transactions that involve either the purchase or receipt of information, assets, goods or services by a regulated electrical corporation from an affiliated entity, the regulated electrical corporation shall document both the fair market price of such information, assets, goods and services and the FDC to the regulated electrical corporation to produce the information, assets, goods or services for itself.

(C) In transactions that involve the provision of information, assets, goods or services to affiliated entities, the regulated electrical corporation must demonstrate that it:

1. Considered all costs incurred to complete the transaction;
2. Calculated the costs at times relevant to the transaction;

3. Allocated all joint and common costs appropriately; and

4. Adequately determined the fair market price of the information, assets, goods or services.

(D) In transactions involving the purchase of goods or services by the regulated electrical corporation from an affiliated entity, the regulated electrical corporation will use a Commission approved CAM which sets forth cost allocation, market valuation and internal cost methods. This CAM can use benchmarking practices that can constitute compliance with the market value requirements of this section if approved by the Commission.

(5)~~(4)~~ Record Keeping Requirements

(A) Each regulated electrical corporation shall maintain the following information in a mutually agreed to electronic format (i.e., agreement between the Staff, Office of Public Counsel and the regulated electrical corporation) regarding affiliate transactions on a calendar year basis and shall provide such information to the Commission Staff and the Office of the Public Counsel on, or before, March 15th of the succeeding year:

1. A full and complete list of all affiliated entities as defined by this rule;

2. A full and complete list of all goods and services provided to or received from affiliated entities;

3. A full and complete list of all contracts entered with affiliated entities;

4. A full and complete list of all affiliate transactions undertaken with affiliated entities without a written contract together with a brief explanation of why there was no contract;

5. The amount of all affiliate transactions by affiliated entity and account charged; and

6. The basis used (e.g., fair market price, FDC, etc.) to record each type of affiliate transaction.

7. A full and complete list of all employee movement between the utility and affiliates, including names and positions transferred to and from.

(B) In addition, each regulated electrical corporation shall maintain books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule on a calendar year basis.

6)~~(5)~~ Records of Affiliated Entities.

(A) Each regulated electrical 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 regulated electrical corporation;

2. Documentation of the methods used to 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 non-assignment of these costs to affiliate transactions;

4. Descriptions of the types of corporate support services that corporate divisions and/or other centralized functions provided to any affiliated entity or division accessing the regulated electrical corporation's contracted services or facilities;

5. Names and job descriptions of the employees from the regulated electrical corporation that transferred to a non-regulated affiliated entity;

6. Evaluations of the effect on the reliability of services provided by the regulated electrical corporation resulting from the access to regulated contracts and/or facilities by affiliated entities for corporate support purposes;

7. Policies regarding the availability of customer information and the access to services available to non-regulated affiliated entities desiring use of the regulated electrical corporation's contracts and facilities for corporate support purposes; and

8. Descriptions of and supporting documentation related to any use of derivatives that may be related to the regulated electrical corporation's operation even though obtained by the parent or affiliated entity.

(7)~~(6)~~ Access to Records of Affiliated Entities.

(A) To the extent permitted by applicable law and pursuant to established Commission discovery procedures, a regulated electrical 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 shall have the authority to:

1. Review, inspect and audit books, accounts and other records kept by a regulated electrical 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 regulated electrical 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.

(8)~~(7)~~ Record Retention.

(A) Records required under this rule shall be maintained by each regulated electrical corporation for a period of not less than six years.

(9)~~(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.

(10)~~(9)~~ Variances

(A) A variance from the standards in this rule may be obtained by compliance with Sections (9)(A)1. or (9)(A)2. The granting of a variance to one regulated electrical corporation does not constitute a waiver respecting or otherwise affect the required compliance of any other regulated electrical corporation to comply with the standards.

1. The regulated electrical corporation shall request a variance upon written application in accordance with Commission procedures set out in 4 CSR 240-2.060 (11), or;

2. A regulated electrical corporation may engage in an affiliate transaction not in compliance with the standards set out in Section (2) (A) of this rule, 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 Sections (9)(A)2.A. and (9)(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 non-complying affiliate transaction shall be filed with the Secretary of the Commission and the Office of the Public Counsel within 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 Section (2) (A), and shall provide a detailed explanation of how the affiliate transaction was in the best interests of the regulated customers. Within 30 days of the notice of the non-complying affiliate transaction, any party shall have the right to request a hearing regarding the non-complying 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 party's ability to challenge the affiliate transaction at the time of the annual CAM filing. At the time of the filing of the regulated electrical corporation's annual CAM filing the regulated electrical corporation shall provide to 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 non-complying affiliate transaction resulted in the best interests of the regulated customers.

(11) Filing Requirements

(A) The regulated electric utility shall file its CAM with the Commission within 60 days of the effective date of this rule and on, or before March 15 of each succeeding year.

Authority: sections 386.250 RSMo Supp. 1998, and 393.140 RSMo 1994. Original rule filed April 26, 1999.