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May 29, 2002

Secretary of the Public Service Commission  
Governor Office Building  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: **Proposed Amendments to 4 CSR 240-2.070 Intervention and 4 CSR 240-2.115 Stipulations and Agreements and 4 CSR 240-2.117 Summary Disposition of Cases Case No. AX-2002-157**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter please find an original and eight (8) copies of Comments Concerning Proposed Rules and Amendments to be filed on behalf of the companies listed on the appendix thereto. I have also provided a copy to the Office of the Public Counsel. Please file stamp the "receipt" copy and return to the messenger delivering this filing.

Thank you for your assistance.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:

  
Paul A. Boudreau

PAB/aw

Enclosures

cc: PSC General Counsel's Office  
OPC

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of the Proposed Amendments to  
4 CSR 240-2.070 Intervention and 4 CSR  
240-2.115 Stipulations and Agreements and  
Proposed Rule 4 CSR 240-2.117 Summary  
Disposition of Contested Cases.

Case No. AX-2002-157

COMMENTS CONCERNING PROPOSED RULES AND AMENDMENTS

COME NOW the companies listed on the attached appendix (hereinafter, "Companies") and offer the following comments with regard to the Commission's proposed amendments to its rules 4 CSR 240-2.075 (Intervention) and 4 CSR 240-2.115 (Stipulations and Agreements) and proposed rule 4 CSR 240-2.117 (Summary Disposition of Contested Cases):

1. In the May 1, 2002, edition of the Missouri Register, the Commission caused to be published two proposed amendments and one proposed rule to be included in Chapter 2 under its "Rules Governing Practice and Procedure". The Companies offer the following comments with respect to those proposed rules and rule changes.

Proposed Amendment to 4 CSR 240-2.075 (**Intervention**)

2. The Companies generally support a practice that requires a greater degree of specificity in the positions taken by intervening parties. However, Subsection (7) regarding the requirement that an intervenor file a "responsive pleading" may be problematic in practice. Although it makes some sense in the context of a complaint, it is likely to cause confusion and difficulty in the context of a tariff filing which typically does not contain allegations of facts or law that are conducive to a response. Also, to the extent a responsive pleading is required, the rule should include language to the effect that a party may deny an allegation in those circumstances in which it does not have a

basis from which to conclude that it is true or false. This would be consistent with practice before Missouri courts. *See, Civil Rule 55.07 cl. 2.* It would also conform to current Commission practice regarding answers to complaints. *See, 4 CSR 240-2.070(8).*

Proposed Amendment to 4 CSR 240-2.115 (Stipulations and Agreements)

3. The Companies have two general comments to make with respect to the Commission's proposed amendment to this rule. First, the Companies are opposed to the second sentence to proposed subsection (1)(A) that states that "any such stipulation and agreement must contain stipulated facts sufficient to support the resolution proposed by the parties." The Companies have serious concerns that the language proposed by the Commission will have the unintended effect of discouraging the settlement of cases, particularly of rate cases.

4. Frequently, stipulations and agreements filed with the Commission to settle rate cases propose a total dollar settlement. Consequently, these stipulations usually remain silent as to the underlying basic facts that would result in a particular outcome. For example, stipulations and agreements as to a utility's revenue requirement have rarely addressed the underlying elements which may have generated a particular dollar recommendation. The reason for this is simple; that is, there is rarely an agreement between the parties as to the underlying inputs which generate a particular revenue requirement. Rather, the parties typically agree to an outcome based on certain raw information generated by their accounting "runs", as well as factoring in more abstract considerations such as litigation uncertainty; that is, the judgment that each party makes as to the likelihood of success on the merits of a particular issue if the matter were to go to hearing. Consequently, the end result is as much a product of art as science. It is

important for the Commission to understand that parties may be able to agree that a particular ultimate outcome is reasonable and just and in the public interest, but also to agree to disagree as to the merits of particular underlying revenue or cost of service issues.

5. The Commission has stated that it "has the authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060 RSMo 2000. " *In the Matter Of Tariff Revisions Of Missouri Gas Energy, Order Approving Second Revised Stipulation and Agreement*, Case No. GR-2001-292 (July 5, 2001). As a legal and practical matter, the Commission need only require that the recommendation of the parties be supported by the record evidence. The Companies are of the view that a stipulation as to basic facts will rarely be reached as to the determination of a revenue requirement number in the context of a compromise and settlement. If the Commission's new rule is intended to require the parties to submit a stipulation of basic facts as to every cost and revenue element which results in a particular revenue requirement recommendation, the Companies are of the view that very few, if any, rate case settlements will be attainable in the future. This will have the adverse effect of unnecessarily forcing more cases to a full-blown evidentiary hearing than would otherwise be the case.

6. The Companies do not mean to suggest the Commission has no legitimate role in exploring the reasonableness of a proposed settlement agreement. To the contrary, the Commission is charged with the responsibility to determine that rates are "just and reasonable" and not contrary to "the public interest." Thus, stipulations typically contain language permitting the Commission's Staff to present to the

Commission Staff's rationale for the proposed settlement. The Commission is also free to inquire as to the positions of other proper parties to the case as well. The Commission should not, however, be surprised or alarmed to discover that each party may have a different rationale or "take" with respect to the merits of the underlying issues. Ultimately, there is no requirement that *in a settled case* that the Commission make detailed findings of fact.

7. The Companies believe the Commission should not enact a rule that, in effect, discourages settlements and, rather, forces parties to an adversarial hearing where otherwise one need not take place. In the view of the Companies, this is not the best use of the resources of the Commission, its Staff, the regulated industry, its customers and other interested parties.

8. Second, the Companies also desire to comment on subsection (2)(B) of the Commission's proposed amendment. However, some background on the genesis of this rule is in order. The Commission's current rule, 4 CSR 240-2.115, as it relates to non-unanimous stipulations and agreements, was enacted several years after the Western District Court of Appeals for the State of Missouri handed down its decision in *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo. App. 1982). In that case, the Court of Appeals determined that the Commission failed to satisfy certain requirements of due process by restricting an objecting party to a limited hearing procedure with respect to a non-unanimous settlement proposal. The Court concluded that a limited hearing afforded to the objecting party was "not meaningful in that the Commission was precluded from approving anything but the stipulated rate design in the course of the hearing in question."

9. Subsequently, the Commission enacted its rule regarding non-unanimous stipulations and agreements to require that an objecting party file a written objection to a non-unanimous stipulation and agreement and to request a hearing within seven (7) days of the date the document is filed. If the objecting party did not do so, it was deemed to have waived its right to a hearing, paving the way for the Commission to consider and, perhaps, adopt the proposed settlement and, thus, dispose of the case. The Companies believe that a rule of this nature is still a valuable docket control tool for the Commission. The proposed amendment, however, contains some language which is problematic and unnecessary.

10. Subsection (2)(B) contains language addressing a so-called "conditional assent". In essence, the Commission is proposing to deem a conditional assent as non-conditional and not as an objection.

11. This language is troubling to the extent that it suggests that a non-signatory will be deemed by the Commission to have assented to or joined in the specific terms of a particular settlement agreement. This difficulty is aggravated by the following paragraph (2)(C) that provides that the Commission may treat a non-unanimous stipulation and agreement as a unanimous stipulation and agreement if no objection is filed.

12. The underlying problem is that a non-signatory party should not be deemed to take a particular position on the merits of a proposed settlement. To the contrary, it should be allowed to simply step aside so as not to impede a settlement without being deemed to have joined in the terms of a document to which it is not a signatory. This approach has been one of long-standing custom. The Commission

should not preclude a non-signatory from reserving its rights. All the *Fischer* decision requires is that the Commission extend the due process requirement of an opportunity for a hearing on the merits to those parties expressly *objecting* to a settlement agreement. The *Fischer* decision says nothing about treating a non-signatory as a supporter or opponent of the underlying agreement in the event no objection is filed.

13. Consequently, the Companies suggest the last sentence in subsection (2)(B) be stricken from the proposed amendment. Should the Commission choose to retain subsection (2)(B), then subsection (2)(C) should be deleted and rewritten as follows: "If no party timely objects to a non-unanimous stipulation and agreement, the commission may rule summarily on the merits of the non-unanimous stipulation and agreement without the necessity of holding a hearing." This approach will conform in all respects with the principles set forth in the *Fischer* decision, emphasizing that the rule is *aprocedural* remedy that permits the Commission to dispose of an uncontested matter.

Proposed Rule 4 CSR 240-2.117  
(Summary Disposition of Contested Cases)

14. The Companies generally support the Commission's proposed rule with respect to summary determinations. The Companies favor the concept that the Commission should be able to resolve cases by a summary determination in those circumstances where there are no genuine issues of material fact and there is entitlement to relief as a matter of law. Consequently, the Companies support the Commission's effort to put in place a process for the filing of motions for summary determination or motions on the pleadings where circumstances warrant.

15. The Companies only comment is with respect to subsection (1)(C) of the proposed rule. This would give a responding party only (10) days to respond to such a

motion. The Companies suggest that a modestly longer period of time in which to respond (perhaps within a 15-30 day time period) would provide the non-moving party a more reasonable opportunity to locate or generate the necessary evidentiary support to respond to a dispositive motion. A somewhat longer period of time would be in line with Missouri Civil Rule 74.04(c)(2) that provides thirty (30) days to respond unless a longer period is needed for discovery.

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

Respectfully submitted,



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BPS Telephone Company  
Cass County Telephone Company  
Citizens Telephone Company of  
Higginsville, Missouri, Inc.  
Goodman Telephone Company, Inc.  
Granby Telephone Company  
Grand River Mutual Telephone Corporation  
Green Hills Telephone Corp.  
Iamo Telephone Company  
Kingdom Telephone Company  
Lathrop Telephone Company  
Mark Twain Rural Telephone Company  
McDonald County Telephone Company  
Miller Telephone Company  
Missouri-American Water Company

New London Telephone Company  
Orchard Farm Telephone Company  
Oregon Farmers Mutual Telephone  
Company  
Ozark Telephone Company  
Peace Valley Telephone Company  
Rock Port Telephone Company  
Seneca Telephone Company  
Stoutland Telephone Company

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 29<sup>th</sup> day of May, 2002, to:

Missouri Public Service Commission  
General Counsel's Office  
Governor Office Building  
200 Madison Street, P.O. Box 360  
Jefferson City, MO 65102

Office of the Public Counsel  
Governor Office Building  
200 Madison Street, P.O. Box 7800  
Jefferson City, MO 65102

A handwritten signature in black ink, appearing to read 'P. A. Boudreau', written over a horizontal line.

Paul A. Boudreau

## APPENDIX

Aquila, Inc.  
BPS Telephone Company  
Cass County Telephone Company  
Citizens Telephone Company of Higginsville, Missouri, Inc.  
Goodman Telephone Company, Inc.  
Granby Telephone Company  
Grand River Mutual Telephone Corporation  
Green Hills Telephone Corp.  
Iamo Telephone Company  
Kingdom Telephone Company  
Lathrop Telephone Company  
Mark Twain Rural Telephone Company  
McDonald County Telephone Company  
Miller Telephone Company  
Missouri-American Water Company  
New London Telephone Company  
Orchard Farm Telephone Company  
Oregon Farmers Mutual Telephone Company  
Ozark Telephone Company  
Peace Valley Telephone Company  
Rock Port Telephone Company  
Seneca Telephone Company  
Stoutland Telephone Company