

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

In the Matter of the Establishment of a Working Case)
for the Review and Consideration of a Rewriting and) **File No. AW-2018-0394**
Writing of Existing and New Affiliate Transaction)
Rules and HVAC Affiliate Transaction Rules)

**STAFF RESPONSE TO PUBLIC COUNSEL’S RESPONSE
TO STAFF’S SEPTEMBER 16, 2019, DRAFT AFFILIATE
TRANSACTIONS AND HVAC AFFILIATE SERVICES RULES**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through Staff Counsel’s Office, and files a response to the Office of the Public Counsel’s (“Public Counsel”) October 9, 2019, *Response to Staff’s September 16, 2019, Draft Affiliate Transactions and HVAC Affiliate Services Rules*. In response thereto, Staff states as follows:

1. Public Counsel contends, in various paragraphs, that Staff has not provided explanations for the changes to the affiliate transaction rules proposed on June 27, 2018, and September 16, 2019. However, Staff made a good faith effort to respond to the Commission’s July 17, 2019, *Order Directing Staff to File a Draft Rule* in the instant proceeding, and noted in Paragraph 5, page 3 of its September 16, 2019, filing that Staff revised the original draft affiliate transaction rules it filed on June 27, 2019, based on the comments and proposed language filed on August 10, 2019, and discussions that occurred at the October 9, 2018, workshop. That being said, it is accurate that Staff did not provide specific explanations for each and every proposed amendment; in order to provide this level of detailed explanation, Staff has attached hereto a document providing

further details on the differences between the June 27, 2018, and September 16, 2019, drafts.¹

2. Of note Public Counsel's *Response*, at Paragraph 4, Public Counsel charges that:

Of marked significance, without explanation, the Staff's latest draft rules eliminate from the purpose of the affiliate transactions rule the following language found in the current rules: "*The rule and its effective enforcement will provide the public assurance that their rates are not adversely impacted by the utilities' nonregulated activities.*"

Staff would note that Public Counsel's statement above is not correct. This sentence was removed for the first time by Staff in its draft of the affiliate transaction rules filed on June 27, 2018, in the Staff Motion To Establish Working Docket. That being said, as with all of its proposed amendments, Staff welcomes further input from interested parties.

3. In addition to Public Counsel's comments, it also suggested a procedural process in its October 9, 2019, filing, extending into February of 2020 which includes holding another workshop for further discussion. However, Staff does not share Public Counsel's belief that another workshop is necessary at this time. Staff suggests the Commission direct interested parties to file comments within 30 days stating their proposed changes and/or response to Staff's proposed changes. After a further round of comments have been filed, Staff and the Commission will be better able to determine what next step is most appropriate.

5. Staff also requests that stakeholders begin considering, if they have not done so already, an estimate of the costs of compliance with the discrete sections of the proposed ATRs. Staff is not requesting that stakeholders perform specific calculations at this time, however, as Staff recognizes that its September 16, 2019, draft rules will likely

¹ See Appendix A.

not be the final version submitted to the Commission. Should you have any questions, do not hesitate to contact:

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WHEREFORE Staff files its response to Public Counsel's October 9, 2019, Response to Staff's September 16, 2019, Draft Affiliate Transactions and HVAC Affiliate Services Rules and requests that the Commission adopt the procedural schedule proposed by Staff set out above.

Respectfully submitted,

/s/ Mark Johnson

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all counsel of record this 6th day of November 2019.

/s/ Mark Johnson

204 CSR 4240-10.XXX Affiliate Transactions Respecting Electrical Corporations, Gas Corporations, Heating Companies, Certain Water Corporations and Certain Sewer Corporations

Commented [Staff 1]: Change to reflect the transfer of the Commission's rules from Title 4 Division 240, to Title 20 Division 4240, effective August 28, 2019.

PURPOSE: This rule is intended to prevent a Missouri Public Service Commission (commission) regulated electrical corporation, gas corporation, heating company, water corporation (with more than eight thousand (8,000) customers), or sewer corporation (with more than eight thousand (8,000) customers) from subsidizing ~~an affiliate's operations (regulated and nonregulated) its nonregulated operations, or those of its affiliates).~~ In order to accomplish this objective, the rule sets forth standards of conduct, financial standards, evidentiary standards, access requirements, training requirements, and record-keeping requirements applicable to any of these commission regulated utilities whenever any such entity participates in a transaction with an ~~affiliated entity/affiliate~~ (except with regard to HVAC services as defined in section 386.754, RSMo., 2016, by the General Assembly of Missouri).

Commented [Staff 2]: In its last proposed draft, Staff expanded the purpose of the rule to include transactions between regulated utilities. However, after reviewing the comments filed in the working docket, specifically those of Spire, KCPL & GMO objecting to the extension of the purpose statement to cover transactions between regulated affiliates, and after further discussions internally, Staff agrees that the extension of the rule to apply to transactions between regulated affiliates is not necessary. In particular, the provisions concerning asymmetric pricing in the rule, which are key to protecting customer interests in the context of regulated-nonregulated affiliate transactions, do not seem to be generally applicable or workable for transactions between two regulated utilities. The inherent powers of regulated utility commissions to examine the prudence of transactions between rate-regulated affiliates seems to be sufficient to protect customer interests in this regard.

Commented [Staff 3]: Clean up change

(1) Definitions.

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

Commented [Staff 4]: Clean up change

(B) Affiliate transaction means any transaction ~~for the provision, receipt, purchase or sale of any information, asset, good or service, or portion of any good or service,~~ between a covered utility and an ~~affiliated entity~~**affiliate**. Affiliate transactions as defined by this rule shall also

Commented [Staff 5]: Clean up changes

include all transactions carried out between any nonregulated business operation of a covered utility and the regulated business operations of a covered utility. An affiliate transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754 by the General Assembly of Missouri.

(C) Affiliate Transactions Report means the filing that each covered utility is required to make with the secretary of the commission no later than each May 15, providing the information identified below in section (6) of this rule, Record Keeping Requirements.

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

(E) Corporate support means ~~those functions dedicated to supporting the operations of a covered utility or its affiliates, including, but not limited to,~~ joint corporate oversight, governance, support systems and personnel, ~~involving~~ payroll, shareholder services, financial ~~reporting~~services, financial planning and management support, human resources, employee records, pension management, legal services, ~~and~~ research and development ~~activities~~.

Commented [Staff 6]: Clean up change

Commented [Staff 7]: Staff incorporated language from Public Counsel's comments filed in the 1999 Affiliate Transactions rulemaking dockets.

Commented [Staff 8]: This change was proposed by Missouri American Water Company. Staff agrees with the addition of this language as to not limit "corporate support" functions to those only listed in the rule.

Commented [Staff 9]: Clean up change

information technology, accounting services, environmental services, internal audit, and community relations.

Commented [Staff 10]: Staff added to the list of examples of corporate support functions after internal discussion and review of other states' Affiliate Transactions Rules. Those states included Arkansas, Texas, Connecticut, Illinois, New Hampshire, Oklahoma, and others.

(F) Cost allocation manual (CAM) means the document which specifies the criteria, guidelines and procedures that the covered utility will follow to be in compliance with the commission's Affiliate Transactions Rule. The CAM sets forth the covered utility's cost allocation, market valuation, and internal cost methods. ~~The frequency of the filing of the covered utility's CAM is addressed in section (5) of this rule.~~

Commented [Staff 11]: Deleted due to changes to the filing and timing procedures proposed in Section (5).

(G) Covered utility means, for purposes of this rule, an electrical corporation, gas corporation, or heating company as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapters 386 and 393, RSMo, or a water corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with more than eight thousand (8,000) customers or a sewer corporation as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapters 386 and 393, RSMo, with more than eight thousand (8,000) customers.

(H) Derivatives means a financial instrument ~~with a value that, traded on or off an exchange, the price of which~~ is directly dependent upon ~~(i.e., " or derived from") an the value of one or more~~ underlying factor. This underlying factor can be financial assets, real assets, indices, 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) ~~or the composition of these factors~~. Derivatives involve the trading of rights or obligations based on the underlying good, but ~~de-may~~ not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for a fixed rate of return.

Commented [Staff12]: Staff's Financial Analysis Department reviewed the prior definition of derivatives and made changes to clarify and clean up the definition.

~~(I) Electrical corporation, gas corporation, heating company, water corporation, or sewer corporation is as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., i.e., a covered utility by the Affiliate Transactions Rules.~~

Commented [Staff 13]: Staff deleted this definition because it is already addressed in section (1)(G) of the rule.

(J) Financial advantage means an advantage ~~is~~ provided by a covered utility to an ~~regulated or nonregulated entity~~ affiliate ~~if when~~ the covered utility:

Commented [Staff 14]: This change was made to be consistent with the change to the purpose statement of the rule.

1. Compensates an ~~regulated or nonregulated entity~~ affiliate for assets, goods, information or services of any kind above the lesser of –

Commented [Staff 15]: Staff amended this section to incorporate wording suggestions proposed by Public Counsel in its comments filed in this working docket.

Commented [Staff 16]: Clean up change

A. The fair market price (FMP); or

B. The fully distributed cost (FDC) to the covered utility to provide the assets, goods, information or services for itself; or

2. Transfers assets, goods, information, or services of any kind to an ~~regulated or nonregulated entity~~ affiliate below the greater of –

Commented [Staff 17]: Clean up change

A. The FMP; or

B. The FDC to the covered utility.

(K) Fair Market Price (FMP) means a price determined by a covered utility as the amount it would pay or receive for receiving or providing a good or service in an affiliate transaction based on comparisons of similar transactions with, or the price of similar goods and services available from, unrelated third parties. A covered utility may make such determination based on surveys, third party studies, specific price inquiries, benchmarking, competitive bids or any other reasonable method. For goods or services for which there is no readily available comparative market price, the price shall be the fully distributed cost of the entity supplying the goods or services. The covered utility shall have the burden of demonstrating its method

~~of determining FMP is reasonable, and/or that there is no readily available comparative market price for a given good or service.~~

Commented [Staff18]: Staff added a definition of Fair Market Price to the rule, as the prior iterations of the rule did not contain one. Further, Staff does not believe the manner in which covered utilities determine a fair market price should be limited to competitive bidding. Allowing for the use of other reasonable methodologies should provide more flexibility for utilities to determine market prices for affiliate transactions when the use of competitive bids may not be appropriate or reasonable, without potentially requiring a request for a variance from the rule. The definition also provides for a clear costing methodology for transactions in which there is no reasonably determinable fair market price. Note that the covered utility has the burden of demonstrating its chosen method is reasonable, and/or that there is no readily available fair market price.

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

Commented [Staff19]: Staff added this language based upon the comments of Public Counsel filed in this working docket.

(~~L~~M) Information means any data ~~with competitive value~~ obtained by a covered utility that is not obtainable by non~~affiliated entities~~ affiliates or can only be obtained at a competitively prohibitive cost in either time or resources.

Commented [Staff20]: In its comments filed in this working docket, Ameren Missouri recommended similar language, but with the addition of requiring a minimum value of \$1 million. Staff agrees that there should not be a prohibition on sharing data, unless that data has some value. However, Staff does not agree with Ameren Missouri's proposed threshold, as \$1 million may not be an appropriate limit for all utilities regulated by this Commission. However, that is not to say that Staff is opposed to a threshold of any amount. As with all of its proposed amendments, Staff welcomes further input from interested parties.

(~~M~~N) Long-term means a transaction in excess of thirty-one (31) days.

Commented [Staff21]: Clean up change

(~~N~~O) Marketing affiliate means an ~~affiliated entity~~ affiliate which engages in or arranges a commission-related sale of any natural gas service or portion of ~~natural gas~~ service to a shipper.

Commented [Staff22]: Clean up change

(~~O~~P) Nonregulated operations mean~~s~~ assets, goods, information, or services of an affiliate ~~of~~ ~~or~~ a covered utility, not subject to the jurisdiction of the commission under Chapters 386 and 393, RSMo.

Commented [Staff23]: Staff made this change based upon Public Counsel's comments filed in this working docket.

(P) Opportunity sales means sales of unused contract entitlements necessarily held by a gas corporation to meet the daily and seasonal swings of its system customers and are intended to maximize utilization of assets that remain under regulation.

Commented [Staff24]: Clean up change

(Q) Preferential position means treatment provided by ~~the a~~ covered utility which offers an affiliate an advantage that cannot be obtained by nonaffiliates, or can only be obtained at a competitively prohibitive cost in either time or resources ~~places the affiliated entity at an unfair advantage over its nonaffiliated competitors.~~

Commented [Staff25]: Clean up change

Commented [Staff26]: Staff amended the definition of "Preferential position" to replace the term "unfair advantage" with the definition of that term currently included in the various affiliate transaction rules. This change removes the need for a separate definition of "unfair advantage."

~~(R) Sewer corporation means a sewer corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with more than eight thousand (8,000) customers, and is covered by this rule, but is not covered by 4 CSR 240-10.XXX.~~

Commented [Staff27]: Staff deleted this definition because it is already addressed in section (1)(G) of the new rule.

(S) Shippers means all current and potential transportation customers on a regulated gas corporation's natural gas distribution system.

(T) Short-term means a transaction of thirty-one (31) days or less.

(U) Transportation means the receipt of natural gas at one point on a gas corporation's system and the redelivery of an equivalent volume of natural gas to the retail customer of the gas at another point on the gas corporation's system including, without limitation, scheduling, balancing, peaking, storage, and exchange to the extent such services are provided pursuant to the regulated gas corporation's commission tariff, and includes opportunity sales.

Commented [Staff28]: Staff made this change based upon Public Counsel's comments filed in this working docket.

Commented [Staff29]: Staff made this change based upon Public Counsel's comments filed in this working docket.

~~(V) Unfair advantage means an advantage that cannot be obtained by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.~~

Commented [Staff30]: The inclusion of this language in the definition of "Preferential position" eliminated the need for this definition.

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

~~(X) Water corporation means a water corporation as defined in section 386.020, RSMo., subject to commission regulation pursuant to Chapters 386 and 393, RSMo., with more than~~

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

Commented [Staff31]: Staff deleted this definition because it is already addressed in section (1)(G) of the new rule.

(2) Standards.

(A) A covered utility shall not provide a financial advantage to an ~~affiliated entity~~ affiliate.

Commented [Staff32]: Clean up change

(B) ~~Except as necessary to provide corporate support functions, a~~ covered utility shall conduct its business in such a way as ~~not to~~ not provide any ~~financial advantage or preferential position to an~~ ~~affiliated entity~~ affiliate over another entity at any time.

Commented [Staff33]: Staff made this to be consistent with the inclusion of an exception for corporate support functions included later in the rule.

(C) A covered utility shall not participate in any ~~affiliated~~ transactions which are not in compliance with this rule, except as otherwise provided in the variance section (11) of this rule.

Commented [Staff34]: Clean up change

(D) If a customer requests information from the covered utility about goods or services provided by an ~~affiliated entity~~ affiliate, the covered utility may provide information about the affiliate but must inform the customer that regulated services are not tied to the use of an affiliate provider and that other service providers may be available. The covered utility may provide reference to other service providers or to commercial listings, but is not required to do so.

Commented [Staff35]: Clean up change

~~(E) The covered utility shall include as part of its triennial CAM filing, the criteria, guidelines and procedures it will follow to be in compliance with this rule, including authorized and interim variances. Changes to the criteria, guidelines and procedures must be filed as part of the CAM no later than May 15 of the succeeding year in which the changes occur.~~

Commented [Staff36]: Staff removed this language based upon a change to the CAM filing procedures addressed later in the rule.

(E) Marketing materials, information, or advertisements distributed to Missouri residents by an affiliate entity that shares an exact or similar name, logo or trademark of the covered utility shall clearly display in a font size no smaller than the smallest font size on the page or announce that the affiliate entity is not regulated by the “Missouri Public Service Commission.”

Commented [Staff37]: In their comments filed in this working docket, both Missouri American Water Company and Ameren Missouri recommended language making this section only applicable to materials targeted to Missouri residents. Staff believes this change is appropriate.

(F) This section shall not apply to or prohibit any of the following unless found by the commission, after notice and hearing, that such practice is contrary to the purposes and intent of the Affiliate Transactions Rule:

1. The provision of corporate support services, at FDC, between or among a covered utility and any affiliate, including a service company.

2. The provision, at FDC, of goods, information, or services of any kind between or among a covered utility and a rate-regulated affiliate.

Commented [Staff38]: Missouri American Water Company and Ameren Missouri proposed removing corporate support services from the asymmetrical pricing requirements in their comments filed in this working docket. Staff agrees with this suggestion in that it will allow utilities in Missouri, especially those that employ the use of a “services company,” to better realize cost savings through economies of scale, and pass those savings on to their rate payers. Staff believes the exception provided for corporate support functions in this section, combined with the protections afforded to ratepayers through the ratemaking process in this state, will aid in accomplishing that feat.

(3) Nondiscrimination Standards Respecting Gas Marketing.

(A) Nondiscrimination standards under this section apply in conjunction with all the standards under this rule and control when a similar standard overlaps.

(B) A regulated gas corporation shall apply all tariff provisions relating to transportation in the same manner to customers similarly situated whether they use affiliated or nonaffiliated marketers or brokers.

(C) A regulated gas corporation shall uniformly enforce its tariff provisions for all shippers.

(D) A regulated gas corporation shall not, through a tariff provision or otherwise, give its marketing affiliate and/or its customers any preference over a customer using a nonaffiliated marketer in matters relating to transportation or curtailment priority.

Commented [Staff39]: As earlier stated in Comment 2 regarding applicability of the rules to transactions between regulated affiliates, it is not reasonable to apply a comparison of FMP and FDC values to transactions of this nature. Transfer of goods and services between regulated affiliates at FDC would appear to generally protect customer interests fairly and equitably for both affiliates.

(E) A regulated gas corporation shall not give any customer using its marketing affiliate a preference, in the processing of a request for transportation services, over a customer using a nonaffiliated marketer, specifically including the manner and timing of such processing of a request for transportation services.

(F) A regulated gas corporation shall not disclose or cause to be disclosed to its marketing affiliate or any nonaffiliated marketer any information that it receives through its processing of requests for or provision of transportation.

(G) If a regulated gas corporation provides information related to transportation which is not readily available or generally known to other marketers to a customer using a marketing affiliate, it shall provide that information (electronic format, phone call, facsimile, etc.) contemporaneously to all nonaffiliated marketers transporting on its distribution system.

(H) A regulated gas corporation shall not condition or tie an offer or agreement to provide a transportation discount to a shipper to any service in which the marketing affiliate is involved. If the regulated gas corporation seeks to provide a discount for transportation to any shipper using a marketing affiliate, the regulated gas corporation shall, subject to an appropriate protective order--

1. File for approval of the transaction with the secretary of the commission and provide a copy to the commission staff counsel and the Office of the Public Counsel;
2. Disclose whether the marketing affiliate of the regulated gas corporation is the gas supplier or broker serving the shipper;
3. File quarterly public reports with the secretary of the commission which provide the aggregate periodic and cumulative number of transportation discounts provided by the regulated gas corporation; and

4. Provide the aggregate number of such agreements which involve shippers for whom the regulated gas corporation's marketing affiliate is or was at the time of the granting of the discount the gas supplier or broker.

(I) A regulated gas corporation shall not make opportunity sales directly to a customer of its marketing affiliate or to its marketing affiliate unless such supplies and/or capacity are made available to other similarly situated customers using nonaffiliated marketers on an identical basis given the nature of the transactions.

(J) A regulated gas corporation shall not condition or tie agreements (including prearranged capacity release) for the release of interstate or intrastate pipeline capacity to any service in which the marketing affiliate is involved under terms not offered to nonaffiliated companies and their customers.

(K) A regulated gas corporation shall maintain its books of account and records completely separate and apart from those of the marketing affiliate.

(L) A regulated gas corporation is prohibited from giving any customer using its marketing affiliate preference with respect to any tariff provisions that provide discretionary waivers or variances.

(M) A regulated gas corporation shall maintain records when it is made aware of any marketing complaint against an ~~affiliated entity~~ affiliate--

Commented [Staff40]: Clean up change

1. The records should contain a log detailing the date the complaint was received by the regulated gas corporation, the name of the complainant, a brief description of the complaint and, as applicable, how it has been resolved. If the complaint has not been recorded by the regulated gas corporation within thirty (30) days, an explanation for the delay must be recorded.

(N) A regulated gas corporation will not communicate to any customer, supplier or third parties that any advantage may accrue to such customer, supplier or third party in the use of the regulated gas corporation's services as a result of that customer, supplier or third party dealing with its marketing affiliate and shall refrain from giving any appearance that it speaks on behalf of its ~~affiliated entity~~ affiliate.

Commented [Staff41]: Clean up change

(O) If a customer requests information about a marketing affiliate, the regulated gas corporation may provide the requested information but shall also provide a list of all marketers operating on its system.

(4) Evidentiary Standards for Affiliate Transactions.

(A) When a covered utility purchases information, assets, goods or services from an ~~affiliated entity~~ affiliate, other than those listed in Section (2)(F) of this Rule, the covered utility shall either ~~obtain competitive bids~~ determine a FMP for such information, assets, goods or services or demonstrate why ~~no reasonable readily available comparative FMP can be determined~~ competitive bids were neither necessary nor appropriate.

Commented [Staff42]: Staff's changes to this section recognize and incorporate both the added definition of Fair Market Price, and the exceptions outlined above in Section (2)(F).

(B) In transactions that involve either the purchase or receipt of information, assets, goods or services by a covered utility from an ~~affiliated entity~~ affiliate, other than those listed in Section (2)(F) of this Rule, the covered utility shall document both the FMP of such information, assets, goods and services and the FDC to the covered utility to produce the information, assets, goods or services for itself.

Commented [Staff43]: Staff's changes to this section include clean up, and recognition and incorporation of the exceptions outlined above in Section (2)(F).

(C) In transactions that involve the sale or provision of information, assets, goods or services to ~~affiliated entities~~affiliates, other than those listed in Section (2)(F) of this Rule, the covered utility must demonstrate that it--

Commented [Staff44]: Staff's changes to this section include clean up, and recognition and incorporation of the exceptions outlined above in Section (2)(F).

1. Considered all costs incurred to complete the transaction;
2. Calculated the costs at times relevant to the transaction;
3. ~~Allocated~~Charged, assigned, or allocated all joint and common costs appropriately; and
4. Adequately determined the FMP of the information, assets, goods or services.

Commented [Staff45]: Staff made this change based upon Public Counsel's comments filed in this working docket.

(D) In transactions involving the receipt or purchase of information, assets, goods or services by the covered utility from an ~~affiliated entity~~affiliate, the covered utility will use a commission-approved CAM. ~~This CAM can use benchmarking practices that can constitute compliance with the market value requirements of this section if approved by the commission.~~

Commented [Staff46]: Clean up change

~~(E) If covered utility plans to transfer ten percent (10%) or more of its employees to an affiliated regulated or nonregulated entity, it must provide notice to the secretary of the commission by registered mail or electronic filing in EPIS ninety (90) days in advance of doing so, providing the names and job descriptions of officers and managers and the job descriptions of such other employees who are planned to be transferred and the locations to which they are to be sent if they are being re-located.~~

Commented [Staff47]: Staff removed this language because the use of benchmarking is included in the definition of Fair Market Price above.

(5) Cost Allocation Manuals (CAM)

(A) ~~Each covered utility shall maintain a CAM which sets forth cost allocation, market valuation, and internal cost methods and specifies the criteria, guidelines and procedures that the covered utility will follow to be in compliance with the commission's Affiliate Transactions Rule.~~

Commented [Staff48]: This section of the rule was removed based on the comments of several participants in the working docket questioning its inclusion. After reviewing those comments, Staff agrees with its removal. The intent of the rule can be accomplished without the inclusion of this section.

Commented [Staff49]: Staff's initial proposed rule included a triennial filing of a CAM for all covered utilities. The majority of the commenters in this working docket, including OPC, Spire, Ameren Missouri, KCPL, and KCP&L GMO, opposed the triennial filing of CAMs, and generally stated that they favored the current process. Staff made various changes to this section in an attempt to keep the current processes in place, while clarifying the CAM filing requirements and review processes.

Commented [Staff50]: This section outlines the required contents of a covered utilities CAM, using the same descriptions that are in the current rule.

~~(B) No later than 250 days after the effective date of this rule, each covered utility shall file an application with the commission for approval for an initial CAM. Each covered utility shall conduct periodic reviews of its cost allocation, market valuation, and internal cost methods, and shall update its CAM accordingly. Each covered utility shall file its CAM with the commission on or before May 15 each year as part of the covered utility's Affiliate Transaction Report. The commission may, at any time, on its own motion or at the request of an interested party, direct its staff to conduct an audit or review of a covered utility's CAM.~~

~~Covered utilities shall file with the commission for its approval a CAM every three (3) years on or before May 15. The commission may accept, reject, or direct a covered utility to modify its CAM.~~

~~(B) All affected sections and pages of a covered utility's CAM shall be updated and filed with the commission for its approval within sixty (60) days of any of the following conditions:~~

- ~~1. A new nonregulated operation is commenced or acquired, or an existing nonutility operation is eliminated or divested, by the covered utility;~~
- ~~2. A change in the covered utility's allocation methodology;~~
- ~~3. An affiliate relationship of the covered utility changes; or~~
- ~~4. Operations affecting nonregulated operations change sufficiently to warrant new allocation methodology.~~

(6) Record Keeping Requirements.

(A) A covered utility shall maintain books, accounts and records separate from those of its affiliates.

Commented [Staff51]: This change is meant to require initial approval of a covered utility's CAM by the Commission, and to require covered utilities to annually review and update their cost allocation, market valuation, and internal cost methods. These annual reviews should be used to update the covered utilities' CAMs as necessary. Staff contemplates that after initial approval of a CAM is given by the Commission, a covered utility shall file its CAM with the Commission as a non-case filing as part of its Affiliate Transaction Report. Any changes made to a covered utility's CAM after initial Commission approval would not require subsequent approval, however, Staff has attempted to include a process to allow for interested parties, or the Commission on its own motion, to challenge the sufficiency of a covered utility's CAM at a later date.

Staff also made an effort to include a deadline by which each covered utility will be required to file an initial CAM that would provide for an opportunity to review the new rule requirements, and develop its CAM.

(B) Each covered utility shall maintain the following information in a mutually agreed-to electronic format (i.e., agreement between the commission staff, Public Counsel and the covered utility) regarding affiliate transactions with ~~affiliated entities~~affiliates on a calendar year basis and shall file such information in the form of an Affiliate Transactions Report with the secretary of the commission in EFIS and serve a copy on commission staff counsel and the Public Counsel by no later than May 15 of the succeeding year:

Commented [Staff52]: Clean up change

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

Commented [Staff53]: Clean up change

2. A full and complete list of all assets, goods, information and services sold or provided to, or purchased or received from, ~~affiliated entities~~affiliates;

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

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

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

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6. The basis used (e.g., FMP, FDC, etc.) to record each type of affiliate transaction, ~~and a description of the method used by the covered utility to determine FMP.~~

~~7. A list of all affiliate transactions for which the covered utility could not determine a reasonable FMP, with explanations as to why a reasonable FMP was unobtainable; and~~

Commented [Staff58]: These changes were made to recognize and incorporate a covered utility's ability to use a reasonable method of determining Fair Market Price into the materials required in the annual Affiliate Transactions Reports.

~~8. A full and complete listing of all affiliate transactions made pursuant to Section (11)(A)2.B. of this Rule.~~

Commented [Staff59]: This requirement is currently found in the Variance section of the rules. Staff moved it to the Record Keeping Requirements section for clarity and consistency.

(C) In addition, each covered utility shall maintain the following information regarding affiliate transactions on a calendar year basis:

1. Records identifying the basis used (e.g., FMP, FDC, etc.) to record all affiliate transactions; and
2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.

(7) Records of ~~Affiliated Entities~~Affiliates.

Commented [Staff60]: Clean up change

(A) Each covered utility shall ensure that its parent and any other ~~affiliated entities~~affiliates maintain books and records that include, at a minimum, the following information regarding affiliate transactions:

Commented [Staff61]: Clean up change

1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or ~~affiliated entity~~affiliate and charged to the covered utility;
2. Documentation of the methods used to allocate and/or share costs between ~~affiliated entities~~affiliates including other jurisdictions and/or corporate divisions;
3. Description of costs that are not subject to allocation to affiliate transactions and documentation supporting the nonassignment of these costs to affiliate transactions;
4. Descriptions of the types of services that corporate divisions and/or other centralized functions provided to any ~~affiliated entity~~affiliate or division accessing the covered utility's contracted services or facilities;
5. Names and job descriptions of the officers and managers, and only the job descriptions of such other employees that transferred or were transferred from the covered utility to an ~~affiliated entity~~affiliate;

Commented [Staff62]: Clean up change

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6. Evaluations of the effect on the reliability of services provided by the covered utility resulting from the access to regulated contracts and/or facilities by ~~affiliated entities~~affiliates;

Commented [Staff66]: Clean up change

7. Policies regarding the access to services available to nonregulated ~~affiliated entities~~affiliates desiring use of the covered utility's contracts and facilities; and

Commented [Staff67]: Clean up change

8. Descriptions of and supporting documentation related to any use of derivatives that may be related to the covered utility's operation even though obtained by the parent or ~~affiliated entity~~affiliate.

Commented [Staff68]: Clean up change

(8) Access to Records of ~~Affiliated Entities~~Affiliates.

Commented [Staff69]: Clean up change

(A) To the extent permitted by applicable law and pursuant to established commission discovery procedures, a covered utility shall make available the books and records of its parent and any other ~~affiliated entities~~affiliates when required in the application of this rule.

Commented [Staff70]: Clean up change

(B) The commission shall have the authority to--

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

Commented [Staff71]: Clean up change

2. Investigate the operations of a covered utility or ~~affiliated entity~~affiliate and their relationship to each other for the sole purpose of ensuring compliance with this rule.

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(9) Record Retention.

(A) Records required under this rule shall be maintained by each covered utility for a period of not less than six (6) years.

(10) Training

(A) The covered utility shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

(11) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraphs (11)(A)1. or (11)(A)2. The granting of a variance to one covered utility does not constitute a ~~waiver respecting or otherwise affect the required compliance of variance for any other covered utility to comply with the standards.~~ The scope of a variance will be determined based on the facts and circumstances found in support of the application.

Commented [Staff73]: Staff made this change based upon Public Counsel's comments filed in this working docket.

1. A covered utility may request a variance upon written application in accordance with commission procedures set out in 204 CSR 4240-2.060(4) but, ~~except as provided for in subsection 2 of this section,~~ it may not engage in such an affiliate transaction ~~not in compliance with the standards set out in subsection (2)(A) of this rule unless it is first granted until the commission grants the variance by the commission~~ for good cause shown; or

Commented [Staff74]: Staff made this change based upon Ameren Missouri's comments filed in this working docket.

2. A covered utility may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, on an interim basis, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (11)(A)2.A. and (11)(A)2.B. of this rule--

Commented [Staff75]: Staff made this change based upon Public Counsel's comments filed in this working docket.

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

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and a copy served upon the commission staff counsel and the Public Counsel within ten (10) days of the occurrence of the non-complying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate transaction was in the best interests of the regulated customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any person, entity, or association shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a person's, entity's, or association's ability to challenge the affiliate transaction at the time of the filing of the annual Affiliate Transactions Report. Requesting a hearing regarding the noncomplying affiliate transaction within thirty (30) days of the covered utility's initial notice of the noncomplying affiliate transaction, is not a prerequisite for a person, entity, or association challenging the affiliate transaction within thirty (30) days of the filing of the annual Affiliate Transactions Report. ~~(Section 386.550 RSMo., applies to the commission's determinations after granting a request for a hearing filed within thirty (30) days of the initial notice of the noncomplying affiliate transaction.) At the time of the filing of the covered utility's annual Affiliate Transactions Report filing, the covered utility shall file with the secretary of the commission, a listing of all non-~~

Commented [Staff76]: Staff determined this language to be unnecessary; the statute speaks for itself.

~~complying affiliate transactions which occurred between the period of the last filing and the current filing.~~ Any affiliate transaction submitted pursuant to this section shall remain interim, subject to disallowance, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the regulated customers; ~~if the commission did not grant a request for a hearing if notice of the occurrence of the non-complying affiliate transaction had been provided within ten (10) days of the occurrence.~~

Commented [Staff77]: This requirement was moved to the Record Keeping Requirements section.

Commented [Staff78]: Staff determined this language to be unnecessary.

AUTHORITY: sections 386.250, RSMo., Supp. 1998, and 393.140, RSMo., 1994.* Original rule filed April 26, 1999, effective Feb. 29, 2000; *State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n*, 103 S.W.3d 753 (Mo.banc 2003); *Office of the Public Counsel v. Public Serv. Comm'n*, 409 S.W.3d 371 (Mo.banc 2013).

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

204 CSR 4240-10.XXX HVAC Services Affiliate Transactions

PURPOSE: This rule prescribes the requirements for HVAC services respecting affiliated entities and regulated electrical corporations, gas corporations, and heating companies (covered utilities) when such covered utilities participate in affiliated transactions with an HVAC affiliated entity as set forth in sections 386.754, 386.756, 386.760, 386.762 and 386.764, RSMo., by the General Assembly of the State of Missouri.

(1) Definitions.

(A) Affiliated entity means any entity not regulated by the Public Service Commission (commission) which is owned, controlled by or under common control with a utility and is engaged in HVAC services.

(B) 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 (1) one or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one (1) or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of more than ten percent (10%) of voting securities or partnership interest of an entity confers control for purposes of this rule. This provision, however, shall not be construed to prohibit a covered utility from rebutting the presumption that its ownership interest in an entity confers control.

Commented [Staff1]: Change to reflect the transfer of the Commission's rules from Title 4 Division 240, to Title 20 Division 4240, effective August 28, 2019.

(C) Covered utility means an electrical corporation, gas corporation, or heating company as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapters 386 and 393, RSMo. and covered by this rule.

(D) 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. ~~Fully distributed cost~~FDC requires recognition of all costs 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, charged or assigned~~ (e.g., general and administrative) must also be included in the ~~fully distributed cost~~FDC calculation through a general allocation.

Commented [Staff2]: Clean up change

Commented [Staff3]: Clean up change

Commented [Staff4]: Staff amended this section to incorporate wording suggestions proposed by Public Counsel in its comments filed in this working docket.

Commented [Staff5]: Clean up change

(E) HVAC services means the warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning (HVAC) equipment.

~~(F) Regulated electric corporation, gas corporation, and heating company means an entity as defined in section 386.020, RSMo., which is subject to commission regulation pursuant to Chapter 386 and 393, RSMo., and thus is covered by this rule~~

Commented [Staff6]: Staff deleted this definition because it felt it was duplicative of section 1(C).

(G) Utility contractor means a person, including an individual, corporation, firm, incorporated or unincorporated association or other business or legal entity, that contracts, whether in writing or not in writing, with a covered utility to engage in or assist any entity in engaging in HVAC services, but does not include employees of a covered utility.

(2) A covered utility may not engage in HVAC services, except by an affiliated entity, or as provided in section (8) or (9) of this rule.

(3) No affiliated entity or utility contractor may use any vehicles, service tools, instruments, employees, or any other covered utility's assets, the cost of which are recoverable in the regulated rates for a covered utility service, to engage in HVAC services unless the covered utility is compensated for the use of such assets at the ~~fully distributed cost~~FDC to the covered utility.

Commented [Staff7]: Clean up change

(A) The determination of a covered utility's cost in this section is defined in subsection (1)(D) of this rule.

(4) A covered utility may not use or allow any affiliated entity or utility contractor to use the name of such covered utility to engage in HVAC services unless the covered utility, affiliated entity or utility contractor discloses, in plain view and in bold type on the same page as the name is used on all advertisements or in plain audible language during all solicitations of such services, a disclaimer that states the services provided are not regulated by the commission.

(5) A covered utility may not engage in or assist any affiliated entity or utility contractor in engaging in HVAC services in a manner which subsidizes the activities of such covered utility, affiliated entity or utility contractor to the extent of changing the rates or charges for the covered utility's services above or below the rates or charges that would be in effect if the covered utility were not engaged in or assisting any affiliated entity or utility contractor in engaging in such activities.

(6) Any affiliated entities or utility contractors engaged in HVAC services shall maintain accounts, books and records separate and distinct from the covered utility's regulated operations.

(7) The provisions of this rule shall apply to any affiliated entity or utility contractor engaged in HVAC services that is owned, controlled or under common control with a covered utility providing regulated services in the state of Missouri or any other state.

(8) A covered utility engaging in HVAC services in the state of Missouri five (5) years prior to August 28, 1998, may continue providing, to existing as well as new customers, the same type of services as those provided by the covered utility five (5) years prior to August 28, 1998.

(A) To qualify for this exemption, the covered utility shall file a pleading before the commission for approval.

1. The commission may establish a case to determine if the covered utility qualifies for an exemption under this rule.

(9) The provisions of this section shall not be construed to prohibit a covered utility from providing emergency service, providing any service required by law or providing a program pursuant to an existing tariff, rule or order of the commission.

~~(10) Waiver~~

~~(A) Provisions of this rule may be waived by the Commission for good cause shown.~~

Commented [Staff8]: Staff amended this section to incorporate wording suggestions proposed by Public Counsel in its comments filed in this working docket.

AUTHORITY: sections 386.760.1, RSMo., Supp. 1998 and 393.140, RSMo., 1994. Original rule filed Dec. 17, 1998, effective Aug. 30, 1999.*

**Original authority: 386.760.1, RSMo., 1998 and 393.140, RSMo 1939, amended 1949, 1967.*