

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Application of)
Tri-State Utility, Inc., for Authority)
to Borrow an Amount Not to Exceed)
\$1,300,000 from Great Southern Bank)
and in Connection Therewith to Execute)
a Loan Agreement, Promissory Note,)
Deed of Trust, Security Agreement and)
Financing Statement.)

Case No. WF-97-349

**DISSENT AND CONSTITUTIONAL PROTEST
OF COMMISSIONER KENNETH MCCLURE**

I respectfully dissent and raise this constitutional protest. Although I was not present when the vote was taken and do not dissent in the substance of the April 11 order which indicates on its face a 2-1 vote of the Commission, I raise a constitutional protest to the very possibility that a 2-1 vote is a valid order of the Commission.

In *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696 (Mo.banc 1977), the Court held that a final act must be that of the Commission as a body attended by a quorum. Additionally, the *Philipp* court held that for a Commission action to be a valid order, it was necessary that it should appear that it had been adopted by the Commission, acting at least by a majority.

Pursuant to Section 396.130 RSMo 1994, the MoPSC must have a quorum to transact its business, and a majority of the Commissioners constitutes that quorum. Thus, when there are four (4) Commissioners sitting, as there were at the time of this order, a majority must be three (3) Commissioners. The *Philipp* court indicated that for such an order to be valid, it was necessary that it should be acted upon by at least a majority. Thus, a 2-1 vote is not valid, and the Tri-State Utility, Inc. Order Approving

Financing is null and void and does not constitute a valid order of the Commission.

The apparent conclusion reached by my colleagues, that only a majority of the quorum is necessary for any action of the Commission, is not sound policy. A very dangerous precedent has been set which, if allowed to stand, would permit only two individuals to determine utility rates and ratemaking policy for all consumers in Missouri. I do not believe this was the intent of the Missouri General Assembly in enacting statutes relating to the Public Service Commission, and it definitely is not in the public interest.

The Commission is an institution created by the General Assembly and, as such, should have no greater powers than the General Assembly could have if it were conducting the business of the Commission on its own. Article 3, Section 27 of the Missouri Constitution states:

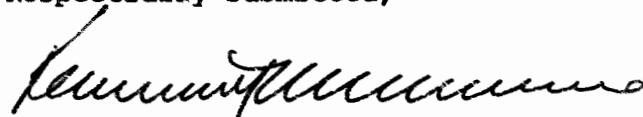
No amendments to bills by one house shall be concurred in by the other, nor shall reports of the committees of conference be adopted in either house, nor shall a bill be finally passed, unless a vote by yeas and nays be taken and a majority of the members elected to each house be recorded as voting favorably.

The Commission was created by the General Assembly under Section 386.010 RSMo 1994 to carry out a legislative function. The Commission can have no greater powers than the legislature could have in carrying out the statutory obligations of the Commission. Thus, the Commission cannot act on less than the requirements set forth in Article 3, Section 27 of the Missouri Constitution. Without a majority of the Commissioners approving an application, in this instance three Commissioners, there can be no action taken.

The precedent has now been established. Taken further, this would allow the possibility of two Commissioners, by controlling when a vote is taken on important matters, to thwart statutory safeguards and negate the

wishes of three of the five Commission members. I cannot believe that this was the intent of the General Assembly. To permit such a construction of a simple concept of a majority is a dangerous public policy and must be challenged.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kenneth McClure".

Kenneth McClure
Commissioner

Dated on this 28th day of
April, 1997.