

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

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 its nonregulated operations, or 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 affiliate (except with regard to HVAC services as defined in section 386.754, RSMo., 2016, by the General Assembly of Missouri).

(1) Definitions.

(A) 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.

(B) Affiliate transaction means any transaction between a covered utility and an affiliate. Affiliate transactions as defined by this rule shall also 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, 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, payroll, shareholder services, financial services, financial planning and management support, human resources, employee records, pension management, legal services, research and development, information technology, accounting services, environmental services, internal audit, supply chain, regulatory affairs, facilities management, security, and community relations.

(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.

(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 is directly dependent upon or derived from an underlying factor. This underlying factor can be financial assets, real assets, indices, securities, debt instruments, commodities, other derivative instruments, 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 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.

(I) Financial advantage means an advantage provided by a covered utility to an affiliate when the covered utility:

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

- A. The fair market price (FMP); or

- B. The fully distributed cost (FDC) to the 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 affiliate below the greater of –
 - A. The FMP; or
 - B. The FDC to the covered utility.

(J) 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.

(K) 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 or indirectly charged or assigned (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

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

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

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

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

(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.

(Q) Preferential position means treatment provided by 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.

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

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

(T) 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.

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

(2) Standards.

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

(B) A covered utility shall conduct its business in such a way as to not provide any preferential position to an affiliate over another entity at any time.

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

(D) If a customer requests information from the covered utility about goods or services provided by an 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.

(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.”

(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 an affiliate regulated by a state utility commission.

(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.

(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 affiliate--

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 affiliate.

(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 affiliate, other than those listed in Section (2)(F) of this Rule, the covered utility shall either determine a FMP for such information, assets, goods or services or demonstrate why no reasonable FMP can be determined.

(B) In transactions that involve either the purchase or receipt of information, assets, goods or services by a covered utility from an 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.

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

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

(D) In transactions involving the receipt or purchase of information, assets, goods or services by the covered utility from an affiliate, the covered utility will use a commission-approved CAM.

(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.

(B) Each covered utility shall file a CAM for approval by the commission as part of its first general rate case after the effective date of this rule, or in a separate filing no later than two (2) years after the effective date of this rule. 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, direct its staff to conduct an audit or review of a covered utility's CAM.

(6) Record Keeping Requirements.

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

(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 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:

1. A full and complete list of all affiliates as defined by this rule;
2. A full and complete list of all assets, goods, information and services sold or provided to, or purchased or received from, affiliates;
3. A full and complete list of all contracts entered with affiliates;
4. A full and complete list of all affiliate transactions undertaken with affiliates without a written contract together with a brief explanation of why there was no contract;
5. The amount of all affiliate transactions by affiliate and account charged;
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
8. A full and complete listing of all affiliate transactions made pursuant to Section (11)(A)2.B. of this Rule.

(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 Affiliates.

(A) Each covered utility shall ensure that its parent and any other affiliates 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 affiliate and charged to the covered utility;
2. Documentation of the methods used to allocate and/or share costs between 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 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 affiliate;
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 affiliates;
7. Policies regarding the access to services available to nonregulated affiliates desiring use of the covered utility's contracts and facilities; and
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 affiliate.

(8) Access to Records of Affiliates.

(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 affiliates 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 covered utility or affiliate for the sole purpose of ensuring compliance with this rule and making findings available to the commission; and
2. Investigate the operations of a covered utility or affiliate and their relationship to each other for the sole purpose of ensuring compliance with this rule.

(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.

1. A covered utility may request a variance upon written application in accordance with commission procedures set out in 20 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 until the commission grants the variance for good cause shown; or

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 following procedures:

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, the Public Counsel, and any person or entity granted intervention in the covered utility's most recent general rate proceeding, 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. Upon the filing of a covered utility's notice of the noncomplying affiliate transaction, the commission shall prescribe an intervention period, and order any interested party to file a request for a hearing regarding the noncomplying affiliate transaction within forty-five (45) days of the notice of the noncomplying affiliate transaction. Any affiliate transaction for which a variance is requested 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.

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.

20 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.

(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. 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 charged or assigned (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

(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) 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 FDC to the covered utility.

(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.

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.*