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October 4, 2001

FILED
OCT 04 2001
Missouri Public Service Commission

Mr. Dale Hardy Roberts
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. AX-2001-634

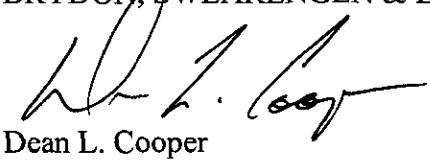
Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of Comments and Motion to Schedule Hearing of the Missouri Utilities. Please stamp the enclosed extra copy "filed" and return same to me.

If you have any questions concerning this matter, then please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 

Dean L. Cooper

DLC/rhg
Enclosures
cc: Office of the Public Counsel
Office of the General Counsel
Mr. Mike Pendergast
Mr. John McKinney
Mr. David Abernathy

FILED[2]

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

OCT 0 4 2001

Missouri Public Service Commission

In the Matter of a Proposed Rescission of Commission Rule 4 CSR 240-10.020 Income Depreciation Fund Investments.	)))	**Case No. AX-2001-634**

COMMENTS AND MOTION TO SCHEDULE HEARING OF THE MISSOURI UTILITIES

On September 4, 2001, the Missouri Public Service Commission (Commission") caused to be published in the Missouri Register, a notice of a proposed rescission of Commission Rule 4 CSR 240-10.020 relating to Income on Depreciation Fund Investments. (*See Mo. Reg.*, Vol. 26 No. 17, p. 1659) (hereinafter the "Proposed Rescission"). In its notice, the Commission indicated that interested parties could submit a statement regarding the Proposed Rescission within 30 days of its publication in the Missouri Register. In response, Laclede Gas Company, Missouri-American Water Company, St. Louis County Water Company d/b/a Missouri American Water Company, Jefferson City Water Works Company d/b/a Missouri American Water Company, UtiliCorp United Inc. d/b/a Missouri Public Service and St. Joseph Light and Power and (hereinafter the "Missouri Utilities") submit the following Comments and Motion to Schedule Hearing, as mandated by Section 393.240 RSMo. 2000 and other provisions of Missouri law.[1]

[1] Each of the Missouri Utilities is subject to Rule 4 CSR 240-10.020 by virtue of the fact that they are either a gas, electric, heating or water corporation providing public utility service in Missouri subject to the jurisdiction of this Commission.

I. The Rule

As stated in the Notice announcing the Proposed Rescission, Commission Rule 4 CSR 240-10.020 (hereinafter the "Rule") was promulgated by the Commission pursuant to §§392.280 and 393.240 RSMo. (2000).[2] Both of these companion statutes address the Commission's authority to address depreciation-related matters, with the first being applicable to the Commission's regulation of telecommunications companies and the second applying to electric, gas, heating and water utilities such as the Missouri Utilities. For its part, §393.240 states as follows:

> 1. The commission shall have power, after hearing, to require any or all gas corporations, electrical corporations, water corporations and sewer corporations to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the commission may prescribe.
>
> 2. The commission may, from time to time, ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of such corporation, person or public utility. Each gas corporation, electrical corporation, water corporation and sewer corporation shall conform its depreciation accounts to the rates so ascertained, determined and fixed, and shall set aside the moneys so provided for out of earnings and carry the same in a depreciation fund and expend such fund only for such purposes and under such rules and regulations, both as to original expenditure and subsequent replacement, as the commission may prescribe. The income from investments of moneys in such fund shall likewise be carried in such fund.

Pursuant to these statutory provisions, the Rule prescribes the ratemaking treatment to be afforded to certain depreciation funds carried by public utilities subject to the Commission's ratemaking authority. *See* Subsection 1 of the Rule. Specifically, the

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[2] Unless otherwise noted, all subsequent references to statutory provisions shall be to the 2000 edition of the Revised Statutes of Missouri.

Rule prescribes the ratemaking treatment to be applied to the depreciation reserve accounts maintained by such utilities.

To that end, Subsection 1 of the Rule states that in determining the reasonableness of rates for service, the Commission shall calculate income on the depreciation funds of the utility and then apply such income to reduce the utility's annual operating charges. Subsection 2 of the Rule provides that such income shall be computed at a rate of three percent (3%) per annum of the moneys in the depreciation funds. The utility's "depreciation funds" are, in turn, deemed by Subsection 3 to be the amount which is equivalent to the utility's "depreciation reserve account ... regardless of whether or not such any such depreciation reserve account may be represented by a segregated fund ear-marked for that purpose." Finally, Subsection 4 of the Rule provides that the 3% rate is to be applied in the case of each gas, electric, and water utility unless the rate has been modified upon the Commission's own motion or upon showing by a utility that the rate is not reasonably and equitably applicable to it.

In short, the Rule prescribes a very specific method for determining how a utility's depreciation reserve account is to be treated for purposes of establishing rates -- a method which requires that operating income be reduced by an amount no greater and no less than 3% of the amount recorded in the utility's depreciation reserve account. As discussed below, however, it is clear from its Notice of Proposed Rescission, that the Commission has not been complying with this prescribed ratemaking method for some time now. Instead, the Commission has used an entirely different ratemaking method for purposes of determining how the depreciation reserves of the Missouri Utilities will be accounted for in setting rates. It is equally clear that the Commission's current use of this

method, which is wholly inconsistent with, and unauthorized by, the method prescribed by the Commission's Rule, has served to unlawfully deprive the Missouri Utilities of tens of millions in mandated rate relief. It is against this backdrop, that the lawfulness of the Proposed Rescission must be evaluated.

II. The Proposed Rescission

In the Notice announcing the Proposed Rescission, the Commission makes a number of statements regarding the rationale for, and effect of, its proposed elimination of the Rule. Most of these statements are simply inaccurate. And none of them provide a justification for rescinding the Rule.

For example, the Notice states that the Rule is being rescinded, in part, because it is "obsolete" for rate base regulated companies. It is completely unclear, however, in what manner the Rule could be deemed obsolete, particularly in the case of rate base regulated companies. The Missouri Utilities are aware, of course, that by virtue of changes in the statutory scheme governing their regulation by the Commission, certain telecommunications companies are no longer subject to full rate base regulation. The Missouri Utilities also know that pursuant to these same statutory changes, a number of these telecommunications companies have received explicit waivers exempting them from both the Rule and the statutory provisions under which it was promulgated.[3] In view of these developments, the Missouri Utilities could understand how the Rule might

[3] Section 392.361.5 specifically permits the Commission to suspend or modify the application of its rules or certain statutory provisions for telecommunications companies or services that are determined to be competitive or transitionally competitive. Pursuant to that statutory provision, the Commission has explicitly waived the applicability of §392.280 and Rule 240-10.020 for a number of telecommunications companies. *See e.g.* ***Re Norstar Communications Inc. dba Business Savings Plan Inc.,*** Case No. TA-2001-377, Report and Order (February 2, 2001); ***Re: Dail U.S.,*** Case No. TA-96-347, Report and Order (December 20, 1996).

be viewed as "obsolete" for these companies.

None of these considerations apply, however, to the Missouri Utilities and other utilities subject to rate base regulation in the state of Missouri. In contrast to how certain telecommunications companies may be treated under Chapters 386 and 392, the Missouri Utilities continue to be subject to rate base regulation. And, unlike the laws applicable to telephone utilities, there is nothing in the statutes governing the Commission's regulation of the Missouri Utilities that would permit the Commission to waive the applicability of statutory provisions such as the one under which the Rule was promulgated. Nor has the Commission ever, to the Missouri Utilities knowledge, attempted to authorize or implement such a waiver for either §393.240 or Commission Rule 4 CSR 240-10.010.

Moreover, as a number of recent Commission cases indicate, the proper treatment of depreciation remains an integral component of regulation in general, and ratemaking in particular, for rate base companies such as the Missouri Utilities. Indeed, over the course of the past two years, the issue of how depreciation should be calculated and reflected in the cost of service for Missouri gas, electric and/or water utilities has been litigated in at least three separate Commission cases and is currently the subject of at least two judicial review proceedings. See ***Re: Laclede Gas Company,*** Case No. GR-99-315; ***Re: St. Louis County Water Company,*** Case No. GR-2000-844; ***Re: Empire District Electric Company,*** Case No. ER-2001-299; ***State ex rel. Laclede Gas Company v. Public Service Commission,*** Case No. CV 00CV323839; ***State ex rel St. Louis County Water Company,*** Case No. 01CV324557. In none of these cases, has the Commission, or any other party for that matter, suggested that existing statutory requirements or Commission

rules governing the proper treatment of depreciation are inapplicable or obsolete. Moreover, even if they believed such requirements were obsolete, neither the Commission nor the parties would have the power to ignore their applicability until and unless such time as they were lawfully modified by the Missouri General Assembly and the Commission – a development that has not yet occurred. Under such circumstances, there is simply no basis for the Commission's claim that the Rule is "obsolete" as it applies to rate base regulated companies such as the Missouri Utilities.

In fact, it is clear from the Commission's subsequent statements in its Notice that rather than being obsolete, the Rule has simply been ignored by the Commission. As the Commission acknowledges in its Notice, its practice over the past several decades has been to use a ratemaking method for addressing the depreciation reserve accounts of Missouri utilities that varies markedly from the method prescribed by the Rule. Specifically, instead of reducing operating income by 3% of the value of the depreciation reserve as prescribed by the Rule, the Commission states that it has simply deducted the depreciation reserve from the utility's rate base when setting rates.

The mere fact that the Commission has chosen, in practice, to use a method different from the one prescribed by the Rule when determining how depreciation reserves will be reflected in the ratemaking process says nothing, of course, about whether the current Rule, and the method prescribed therein, is inappropriate and should therefore be eliminated. Nor does the Commission attempt to provide any insight into this controlling policy question in its Notice. To the contrary, all the Commission does in its Notice is to simply assume, without any discussion or analysis of any kind regarding the relative merits of various approaches, that the currently effective Rule should be

eliminated because its method does not comport with the Commission's practice. Such unadorned and unsupported assumptions do not provide a sufficient legal or policy basis for eliminating a long-standing rule such as 4 CSR 240-10.020.

This absence of any analysis regarding the relative merits of the Rule, or the considerations bearing on whether it should be maintained, is particularly significant in light of the radical changes that the Commission has recently made in its depreciation policies for rate base regulated companies. As previously noted, in each of the cases identified above, the issue of how depreciation should be calculated and accounted for has been a hotly contested issue before the Commission. In the two of those cases (i.e. ***Re: Laclede Gas Company, supra,*** and ***Empire District Electric Company, supra,***) the Commission decided to adopt an entirely new method for determining the net salvage component of the utilities' depreciation rates – a method that departs not only from the depreciation methods traditionally followed by this Commission but also from those observed by virtually every other regulatory body in the country.[4] This new method, which effectively eliminates any allowance for the net salvage costs which historical data has demonstrated will be incurred in connection with removing plant that is currently being used to provide utility service, has the effect of substantially reducing the cash flows available to the affected utilities for replacing and constructing such plant.

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[4] Prior to this sea change in its depreciation policies, the Commission had consistently recognized that: "It is ...customary to recover through the depreciation rates the estimated cost of ultimately removing the asset offset by the projected amount to be realized from its salvage price." ***Re: Missouri Public Service***, 30 Mo.P.S.C. (N.S.) 320, 344 (1990). (*emphasis supplied*). By excluding any allowance for future net salvage costs from the calculation of depreciation rates, the Commission not only departed from its own policies, but also adopted a method that is inconsistent with Generally Accepted Accounting Principles (GAAP) in general and widely-adopted depreciation accounting practices in particular, including those depreciation practices followed by NARUC and nearly all recognized authorities on the subject. See NARUC publication entitled Public Utility Depreciation Practice, and Depreciation Systems by Wolf and Fitch as examples of authoritative texts.

Moreover, even in those instances where the Commission has decided not to adopt this radical new approach to depreciation accounting (i.e., in the ***St. Louis County Water Company*** case, *supra*) it has imposed additional restrictions on how the revenues generated from such depreciation rates may be used. In fact, in the ***St. Louis County Water Company*** case, these restrictions were imposed by the Commission pursuant to the very statutory provisions – §393.240 – that the Rule under review in this proceeding was designed to implement.

In view of these considerations, the Missouri utilities would submit that the need for the current Rule, and the need for the Commission to adhere to it as the method for determining how depreciation reserve accounts will be treated for ratemaking purposes, has never been greater or more compelling. Indeed, the method prescribed by the Rule, with its more favorable cash flow implications, provides at least some opportunity to offset the detrimental impact which the Commission's recent policy shift on depreciation matters has had or will have on the capital resources available to utilities to perform their public utility functions. In any event, the Commission's failure to even consider, let alone address, the impact of these recent policy changes on the continuing need for the Rule is yet another illustration of the complete lack of any reasoned support for the Proposed Rescission.

What is perhaps most troubling about the Proposed Rescission, however, is the Commission's candid, but completely unexplained, acknowledgement in the Notice accompanying the Rule that the Commission has been setting rates for many years based on a method for addressing depreciation reserves that is inconsistent with the method prescribed by the Rule. Like any other administrative agency, the Commission has a

fundamental obligation to comport its administrative actions, including its ratemaking decisions, with the express requirements of its own rules. In fact, as the Commission itself recently recognized "Missouri courts have held that duly promulgated rules of a state administrative agency have the force and effect of law." *See* ***In the Matter of the Application of UtiliCorp United Inc. under §32(k) of the Public Utilities Holding Company Act of 1935,*** Case No. EO-2001-477 (June 7, 2001).[5] By its own acknowledgement, however, the Commission has failed to comply with its Rule in this instance.

Moreover, the Commission has failed to satisfy this fundamental obligation without any legal justification that would sanction its actions. As previously discussed, in contrast to the statutes governing the Commission's regulations of telecommunications companies, there is no statutory provision applicable to the Missouri Utilities that would permit the Commission to waive the requirements of §393.240, as that statute has been interpreted and applied through the Commission Rule under review in this proceeding. Nor has the Commission in any event attempted to grant such waivers or otherwise modify the Rule in order to accommodate its different and inconsistent approach over the years to the ratemaking treatment of depreciation reserve accounts.

There is also nothing in the Commission's Rules which support the Commission's approach of deducting the depreciation reserve from rate base rather than deducting 3% of the value of depreciation reserve from operating income. One might argue that the Commission's approach, at least for book accounting purposes, is

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[5] Federal courts have also recognized that when an agency, such as the Commission, promulgates a rule it is as bound by the terms of that rule as the general public or the entities it seeks to regulate. ***Mississippi***

is consistent with the reporting requirements set forth in the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission that Missouri utilities are generally required to use. *See e.g.* 18 CFR part 201; 4 CSR 240-30.030(1); 4 CSR 240-40.040(1). However, that same Uniform System of Accounts also explicitly endorses, consistent with the Commission's traditional depreciation policies, the concept that an allowance for future net salvage costs must be recognized in the calculation of depreciation rates. *See* 18 CFR part 201 §108 for definitions of "depreciation" (Subsection 12B), "net salvage value" (Subsection 23), "salvage value" (Subsection 35), and "service value" (Subsection 37). Given the fact that the Commission has repeatedly ignored these provisions of the Uniform System of Accounts in its recent decisions regarding the treatment of net salvage, it appears that the Commission itself does not view the rules requiring the use of that System as having any relevance (and certainly no binding effect) as to how issues are resolved in the ratemaking process.

In contrast, by its very terms, the Rule under consideration in this proceeding actually purports to determine how depreciation reserve accounts will, in fact, be treated for ratemaking purposes. That means, by necessity, that for many years now the Commission has been calculating rates based on an unauthorized method that is wholly inconsistent with the method that has been legally prescribed by the Commission. It also means that by employing such a method, the Commission has deprived the Missouri Utilities of tens of millions, if not hundred of millions of dollars, in capital recovery which they would have otherwise received had the Commission followed the method

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Valley Barge Line Company v. Interstate Commerce Commission, 252 F.Supp. 162, 166 (1966) *citing* ***Columbia Broadcasting System v. United States,*** 316 U.S. 422, 62 S.Ct. 1194.

prescribed by its own Rules.[6] In other words, by deducting the depreciation reserve from a rate base upon which the Missouri Utilities would have otherwise earned an overall return of 9%, 10% or more, instead of deducting from operating income an amount equal to 3% of the value of that depreciation reserve, the Commission has significantly reduced the amounts received by Missouri utilities for their capital investments compared to what they would have received its own Rule.[7]

At a minimum, any further action to rescind the Rule should be deferred until a full accounting can be made of any amounts that may be owed to the Missouri Utilities and other companies regulated by the Commission as a result of the Commission's failure to comply with its rules. Since, as discussed below, the Commission must in any event hold an evidentiary hearing before it may lawfully take any action to rescind the Rule, the Missouri Utilities believe that such a hearing could be one of the vehicles for making such an accounting and adopting measures for returning these unlawfully withheld monies to those utilities that are entitled to receive them. Such a hearing would be particularly appropriate for those utilities who currently do not have a general rate case or other proceeding on file with the Commission through which a method for recouping these unlawfully withheld monies can be implemented.

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[6] This unauthorized deprivation of monies that the Missouri Utilities were entitled to, but did not, collect under the Commission's Rule constitutes a taking of their property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 26 of the Missouri Constitution., S*ee e. g.*, ***Duquesne Light Co. v. Barasch***, 488 U.S. 299 (1989); ***Federal Power Comm'n v. Hope Natural Gas Co.***, 320 U.S. 591 (1944); ***Bluefield Waterworks v. Public Service Comm'n***, 262 U.S. 679 (1923). Moreover, because the Missouri Utilities had, at all times, a lawful right to such monies, it is a taking that can be remedied by returning the moneys to the Missouri Utilities which were collectable under the Commission's Rule. *See* ***State ex. rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,*** 585 SW2d. 41, 59-60. (Mo. 1979).

[7] In view of this continuing financial impact the Commission's statement in its Notice that rescission of the Rule will have a private cost of less than $500 in the aggregate is obviously inaccurate and understated. This deficiency alone would invalidate any Rescission of the Rule. *See* ***Missouri Hospital Association v. Air Conservation Commission,*** 874 SW2d 380 (Mo.App. 1994).

III. Motion for Hearing

In its Notice, the Commission indicates that no evidentiary hearing, or even a public hearing similar to those conducted in other rulemaking proceedings, will be held in connection with the Proposed Rescission. Instead, the Commission has indicated that the participation by interested parties in this proceeding will be limited to the filing of a statement in opposition to or support of the Proposed Rescission.

Such procedures are plainly inadequate under Missouri law and cannot serve as a valid basis for the Proposed Rescission. As previously noted, the Commission itself indicated in its Notice of the Proposed Rescission that the Rule had been promulgated pursuant to §§392.280 and 393.240. Both of these statutory sections specifically provide that the Commission must hold a "hearing" before it may take any rulemaking action under the statute.[8] Specifically, Subsection 1 of 393.240 states as follows:

> 1. The commission shall have power, ***after hearing***, to require any or all gas corporations, electrical corporations, water corporations and sewer corporations to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the commission may prescribe. (*emphasis supplied*).

Given this statutory requirement for a hearing, it is clear that the Commission has no authority, absent such a hearing, to modify the requirements and rules governing how utilities must carry and maintain their depreciation accounts. Yet that is precisely what the Commission has proposed to do in this instance. Just as significantly, the Commission has proposed to take such action on a Rule that not only governs the manner in which utilities must carry their depreciation accounts but also purports to determine how those depreciation accounts will be treated for ratemaking purposes. Pursuant to

§393.140(5), it is clear that such ratemaking determinations may only be made by the Commission "after a hearing." Finally, by proposing to eliminate the method prescribed in the Rule in favor of any existing "practice" that effectively determines (in a much different way) the amount of the utility's rate base that will be recognized for ratemaking purposes, the Commission is taking an action "concerning the value of the property" of the utility. Under such circumstances, §393.230.1 and 2 affirmatively requires that the Commission first hold a hearing and permit the utility "to be heard and introduce evidence" before it may act.

In view of these statutory provisions, it is clear that the Commission must hold an evidentiary hearing before it acts on the Proposed Rescission. The Missouri Utilities accordingly request that before it takes any action on the Proposed Rescission, that the Commission schedule an evidentiary hearing pursuant to a time frame that will permit the Missouri Utilities and all other interested parties to exercise their due process and other procedural rights, as provided by law. As codified by the General Assembly, these include: (1) the right to receive notice (§ 536.067); (2) the right to conduct discovery through the use of various discovery mechanisms (§536.073 and § 536.077); (3) the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses and to rebut opposing evidence (§ 536.070(2)); (4) the right to have all oral evidence received only on oath or affirmation (§ 536.070(1)); (5) the right to have a printed transcript of all proceedings (§ 536.070(4)); (6) the right to present oral arguments or written briefs at or after the hearing (§ 536.080.1); (7) the right to have all portions of the

[8] For purposes of complying with the legal requirements governing the exercise of the Commission's rulemaking powers, Missouri law recognizes no distinction between an action to promulgate a rule and an action to rescind a rule. *See* §536.021

record which are cited by the parties in the oral argument or briefs reviewed and considered by each official of the agency who renders or joins in rendering a final decision (§ 536.080.2); and (8) the right to a final written decision accompanied by findings of fact and conclusions of law (§ 536.090).

By affording these procedural rights, the Commission will be able to harmonize its rulemaking efforts in this proceeding with its separate and explicit statutory obligations to afford an evidentiary hearing under the statutory sections discussed above. The need for an administrative agency to harmonize general rulemaking procedures with the specific statutory procedures that have been established to govern its particular exercise of regulatory power is not an unusual occurrence under Missouri law. As summarized in 20 ***Missouri Administrative Practice and Procedure,*** §6.39, the Missouri statutes are full of examples of where the General Assembly has specifically altered, supplemented or otherwise refined the notice, hearing or other procedures it wishes a particular agency to follow when promulgating rules. ***Id.*** at 151-154. It has done so in this case by mandating that hearings be held before the Commission may act on the Proposed Rescission.

To facilitate the full, efficient, and fair implementation of these procedural requirements, the Missouri Utilities further request that the Commission schedule an early prehearing conference in this proceeding so that interested parties will have an opportunity to meet and develop a proposed procedural schedule that accomplishes that goal. Such a proceeding would also enable the parties to discuss potential ways of resolving or at least limiting the issues raised in this case.

IV. Conclusion

For all of the foregoing reasons, the Missouri Utilities respectfully request that the Commission withdraw, or defer any further action on, the Proposed Rescission pending the completion of an evidentiary hearing in this matter and that the Commission schedule an early prehearing conference for the purposes specified herein.

Respectfully submitted,

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ATTORNEYS FOR

Missouri-American Water Company

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Jefferson City Water Works Company d/b/a Missouri American Water Company

UtiliCorp United Inc. d/b/a Missouri Public Service and St. Joseph Light and Power