ARMSTRONG, TEASDALE, KRAMER, VAUGHAN & SCHLAFLY
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

ATTORNEYS AND COUNSELORS
611 OLIVE STREET SUITE 1900
ST. LOUIS, MO. 63101-1782
(314) 621-5070

NITE TELECOPIER (314) 621-5065
TWX 910 761-2246
CABLE ATEV-LAW

March 2, 1987

Mr. Harvey Hubbs
Secretary
Missouri Public Service Commission
P.O. Box 360
St. Louis, MO 65102

Dear Mr. Hubbs:

Re: Tax Reform Act AO-87-48

We enclose an original and fourteen copies of Comments of Missouri Cities Water Company with respect to the Staff's Interim Tariff Proposal.

Please return a stamped copy of comments addressed to Mr. Francis X. Duda of this office for our files.

Sincerely,

Francis X Duda

Francis X. Duda

Enclosures

cc: Mr. Lynn Bultman
Mr. August L. Griesedieck

n

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the investigation of the revenue effects upon Missouri utilities of the Tax Reform Act of 1986	))))	Case No. AO-87-48

COMMENTS OF MISSOURI CITIES WATER COMPANY
WITH RESPECT TO STAFF'S INTERIM TARIFF PROPOSAL

In the Order of the Commission dated January 30, 1987, the utilities have been requested to file responses to Staff's interim tariff proposal contained in its Comments of January 9, 1987. In its Comments, Staff concluded that the only appropriate method to address the effects of the Tax Reform Act of 1986 was to file complaints against individual companies. The Staff stated that one extreme disadvantage of the complaint process is that all potentially justifiable rate decreases could not be implemented concurrent with the reduction in revenue requirement resulting from the Tax Reform Act. However, the Staff felt that the inequity of that situation could be rectified by an order of the Commission requiring all companies to file new superseding tariffs which would be designated interim and subject to refund.

Missouri Cities Water Company (hereinafter "Missouri") agrees with Staff that there are no procedural alternatives other than individual rate-making proceedings to resolve the issue of the impact of the Tax Reform Act of 1986 upon the earnings of each individual company. Two methods of initiating rate proceedings have been recognized in Missouri. The traditional "file and suspend" method of rate-making is

authorized by Sections 393.140 and 393.150 RSMo 1978. State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. en banc 1975), cert. denied 97 S.Ct. 73, 429 U.S. 822, 50 L.Ed. 2d 84. The other method is the complaint procedure authorized by Sections 386.390, 393.260 and 393.270 RSMo 1978. These latter sections authorize the Commission, on its own motion, or other persons or entities under certain circumstances, to file complaints with respect to the reasonableness of rates or charges.

Obviously, any of the companies under the jurisdiction of the Commission could, at any time, file new tariff schedules with the Commission reflecting new rates and charges and the Commission could then proceed under the "file and suspend" method. Assuming for the moment that such tariff schedules are not filed, the "complaint" method is the only procedure by which the Commission could implement any new rates and charges for a particular utility.

In the event that a complaint is filed with respect to the rates and charges of a particular company, the Commission is mandated to consider all relevant factors bearing upon the rates to be charged by the utility. Section 393.270(4) RSMo 1978. State ex rel. Missouri Water Company v. Public Service Commission, 308 S.W. 2d 704 (Mo. 1957); State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41 (Mo. en banc 1979). Thus, in any rate proceeding, the Commission may not isolate the impact of the Tax Reform Act, but must give consideration to all other expenses of the

Company with due regard to the rate of return which should be allowed to the Company.

While Missouri agrees with the Staff that such "full-blown" rate cases will be time-consuming and will place a strain on the Staff's resources, these factors do not support an order requiring all companies to file interim rates subject to refund. Missouri strongly believes that such a requirement is not authorized by law and, assuming such authority exists, would be unwarranted without a showing of some emergency situation.

In the Utility Consumers Council case, the Supreme Court was faced with substantially the same issue which the Commission is now facing with respect to the TRA. In its analysis of the of the fuel adjustment clause involved in that case, the Supreme Court reviewed the rate-making procedures discussed above and stated that such a system of regulation is necessary "despite the expense and time required to investigate utility costs, hold hearings and fix rates." 585 S.W.2d at 48. The Supreme Court cited the long-held rule that the Public Service Commission's powers are limited to those conferred by its statutes, either expressly or by clear implication as necessary to carry out the powers specifically granted. 585 S.W.2d at 49, citing State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925 (Mo. en banc 1958). After reviewing the statutory authority, the Supreme Court reversed the order of the Commission allowing fuel adjustment clauses.

In the same proceeding, the Public Council argued that the case should be remanded to the Commission for a determination of the excessive charges recovered by the fuel adjustment clause and that such charges, after being determined, should be ordered to be refunded to the customers. In refusing to so remand the case, the Supreme Court held that such a determination would amount to retroactive rate-making and that the Commission has only the authority to determine the rate "to be charged" under Section 393.270. 585 S.W.2d at 58. The Court went on to state:

> It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process. 585 S.W.2d at 58.

The Commission should note that there is no specific statutory authority for the allowance of interim rates. However, the Courts of this state have inferred the power to impose interim rate increases from the inherent statutory authority given to the Commission under the "file and suspend" method. State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976); State ex rel. Fischer v. Public Service Commission, 670 S.W.2d 24 (Mo. App. 1984). There are no cases dealing with the issue which the Staff has raised concerning the authority to require companies to file new interim rates superseding all other filed tariffs and schedules and designating such rates subject to refund. The UCCM case cited above indicates that such a requirement would amount to retroactive rate-making. Moreover, the Laclede

Gas case indicates that the interim rate increase authority is only derived from the "file and suspend" procedure. In so holding, the Court stated:

> The Commission and the trial court treated this case on the assumption that Laclede was proceeding within the general scope of the file and suspend procedures provided by §§393.140 and 393.150. This treatment was favorable to Laclede, since otherwise its entire proceeding for interim rate increase in this case would have been of very doubtful effectiveness. 535 S.W.3d at 568 (emphasis supplied).

Furthermore, the rationale behind the authority to issue interim rates is that such interim rate requests are merely ancillary to a permanent rate request. State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 at 565; State ex rel. Fischer v. Public Service Commission, 670 S.W.2d 24 at 26-27.

Assuming for the moment that the Laclede Gas and Fischer cases provide support for the procedure proposed by Staff, interim rate requests have only been allowed where an emergency need exists. State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561, 568; State ex rel. Utility Consumers Council v. Public Service Commission, 585 S.W.2d 41, 48. The test, as quoted in the Laclede Gas opinion, is whether the rate of return being earned is so unreasonably low as to show a deteriorating financial condition impairing the utility's ability to render adequate service or maintain its financial integrity. 535 S.W.2d at 568-569. This test was upheld by the Western District Court of Appeals in Laclede Gas despite Laclede's argument that such a requirement was too burdensome.

In the instant proceedings, there has been no showing of any emergency situation which has been brought about by the enactment of the TRA. On the contrary, it is apparently Staff's position that such enactment has enhanced rather than impaired, the utility's ability to render adequate service and to maintain its financial integrity. Staff has made no attempt to present even bare allegations which would support the Commission's approval of such a novel approach. Moreover, and most importantly, the procedure proposed would effectively allow the Commission to engage in retroactive rate-making, an activity to which the Commission has been prohibited from engaging on numerous occasions.

For the foregoing reasons, Missouri respectfully requests the Commission to deny the Staff's proposal to require all utilities to file interim rates subject to refund and that all further proceedings in this matter be held in abeyance until the Staff has conducted all informal meetings with the utilities under this Commission's jurisdiction.

Respectfully submitted,

ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY

By Francis X Duda

August L. Griesedieck #11598
Francis X. Duda #20110
Byron E. Francis #23982
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Attorneys for Missouri Cities
Water Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed to all parties of record this 2nd day of March, 1987.

Francis X Dudek