

**IN THE SUPREME COURT OF MISSOURI**

**EN BANC**

**STATE OF MISSOURI EX REL. ENERGY )  
ENERGY CORPORATION, et al., )  
Appellants, )**

**vs. )**

**THE PUBLIC SERVICE COMMISSION OF )  
THE STATE OF MISSOURI, et al. )  
Respondents )**

**and )**

**Case No. SC84344**

**AMEREN CORPORATION and UNION )  
ELECTRIC COMPANY, d/b/a )  
AmerenUE, )  
Appellants, )**

**vs. )**

**PUBLIC SERVICE COMMISSION OF THE )  
STATE OF MISSOURI, et. al., )  
Respondents. )**

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Appeal from the Circuit Court of Cole County  
Hon. Thomas J. Brown, III, Circuit Judge  
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**BRIEF OF INTERVENOR-RESPONDENT  
OFFICE OF THE PUBLIC COUNSEL**  
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## **JURISDICTIONAL STATEMENT**

Intervenor-Respondent, Office of the Public Counsel, concurs in Appellants' statement of jurisdiction.

## **STATEMENT OF FACTS**

Intervenor-Respondent Office of the Public Counsel hereby adopts the facts pertinent to this cause as recited by Appellants Atmos Energy Corp., Missouri Gas Energy, Laclede Gas Co. and Trigen-Kansas City Energy Corp. (hereinafter “Appellants”).

## POINTS RELIED ON

### ARGUMENT

#### I.

**THE PUBLIC SERVICE COMMISSION DID NOT ERR IN ITS ORDERS OF RULEMAKING BECAUSE THE RULEMAKINGS AT ISSUE WERE NOT PROMULGATED PURSUANT TO SECTION 386.250(6) NOR WERE THE RULES REQUIRED TO BE PROMULGATED PURSUANT TO SECTION 386.250(6) OR SECTION 393.140(5) AND (8) IN THAT THE RULES AT ISSUE DO NOT PRESCRIBE CONDITIONS FOR RENDERING PUBLIC UTILITY SERVICE TO END USE CUSTOMERS AND THE RULEMAKING WAS AUTHORIZED BY SECTION 386.250(7) AND SECTION 393.140(1), (4) AND (11). (Appellants' Point Relied on I and Ameren's Point Relied On III).**

#### CASES

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**II.**

**THE PUBLIC SERVICE COMMISSION DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF SECTION 536.021.2 AND SECTION 536.021.6(4) RSMo. 2000 IN THAT THE COMMISSION PROVIDED THE REASONS FOR ALL FOUR OF THE RULES AT ISSUE IN THIS PROCEEDING AS REQUIRED BY SECTION 536.021.2 AND THE**

**COMMISSION PROVIDED CONCISE SUMMARIES OF THE COMMENTS RECEIVED AS WELL AS THE COMMISSION'S EXPLANATION OF ITS FINDINGS AS TO WHY IT MADE OR DID NOT MAKE PROPOSED CHANGES TO THE RULES AT ISSUE AS REQUIRED BY 536.021.6(4).**

### **CASES**

State ex rel. City of Springfield v. Public Service Commission, 812 S.W.2d 827, 833-34 (Mo.App. 1991) overruled on other grounds by Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. banc 1996)

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## **III.**

**THE PUBLIC SERVICE COMMISSION DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF SECTION 536.016 RSMo. 1999 IN THAT THE COMMISSION PROPOSED THE RULES AT ISSUE A FULL FOUR MONTHS BEFORE THE EFFECTIVE DATE OF SECTION**

**536.016 AND THERE IS NO INDICATION THE GENERAL ASSEMBLY HAD ANY INTENT TO APPLY THIS STATUTE TO ANY PORTION OF ANY RULEMAKING PROCEEDING PRIOR TO THE EFFECTIVE DATE OF THE STATUTE.**

**CASES**

Clark v. Kansas City, St. L. & C.R. Co., 219 Mo. 524, 118 S.W. 40, 43 (1909)

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THE PUBLIC SERVICE COMMISSION DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF 393.140(5) RSMo. 2000 IN THAT IN PROMULGATING THE RULES AT ISSUE THE COMMISSION WAS NOT REQUIRED TO MAKE A DETERMINATION, AFTER HEARING, THAT APPELLANTS’ EXISTING METHODS OR PRACTICES ARE “UNJUSTLY DISCRIMINATORY OR UNDULY PREFERENTIAL” BECAUSE SUCH A DETERMINATION IS ONLY REQUIRED IN A CONTESTED CASE PROCEEDING AND THESE RULEMAKINGS WERE NOT A CONTESTED CASE PROCEEDING.

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**THE ORDERS OF RULEMAKING MADE BY THE PUBLIC SERVICE COMMISSION THAT ARE THE SUBJECT OF THIS PROCEEDING WERE NOT BEYOND THE COMMISSION'S SUBJECT MATTER JURISDICTION AND DO NOT CONFLICT WITH SECTION 386.030 RSMo. 2000 AND SECTION 393.140(12) RSMo. 2000 IN THAT THEY ONLY REGULATE DOCUMENTATION OF COSTS ASSOCIATED WITH AFFILIATE TRANSACTIONS THAT ARE INCURRED BY THE PARENT OR AFFILIATE ENTITY AND CHARGED TO THE REGULATED ELECTRIC OR GAS CORPORATION NOWHERE DO THE RULES PURPORT TO GOVERN THE ACTIVITIES OF AFFILIATES.**

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**VI.**

**THE PUBLIC SERVICE COMMISSION ORDERS OF RULEMAKING DO NOT CONTAIN IMPERMISSIBLY VAGUE, AMBIGUOUS AND INCONSISTENT PROVISIONS VIOLATING APPELLANTS' DUE PROCESS, AS GUARANTEED BY ARTICLE I §10 OF THE MISSOURI CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE STANDING TO ATTACK THE RULES AT ISSUE ON CONSTITUTIONAL GROUNDS AND THERE IS NOT A CONTROVERSY RIPE FOR THIS COURT'S DETERMINATION BECAUSE THE COMMISSION IS NOT SEEKING TO ENFORCE ANY PROVISION OF THE RULES AGAINST ANY SPECIFIC ACT OR OMISSION COMMITTED BY ANY OF THE APPELLANTS IN THE PROCEEDING NOW BEFORE THE COURT AND APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THE COMMISSION'S RULES ARE IMPERMISSIBLY VAGUE BECAUSE THE RULES PROVIDE FAIR NOTICE TO APPELLANTS OF THE RULES' REQUIREMENTS.**

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## STATUTES

§ 393.140 RSMo.

## **VII.**

**THE COMMISSION'S ORDER OF RULEMAKING REGARDING 4 CSR 240-86.015 (STEAM) IS NOT VOID PURSUANT TO SECTION 536.021.7 RSMo. 2000 IN THAT SECTION 393.290 RSMo. 2000 MAKES SECTION 393.140 AND SECTION 386.250 APPLICABLE TO HEATING COMPANIES, JUST LIKE THE TERM HEATING COMPANY WERE INCLUDED IN THOSE STATUTORY SECTIONS.**

### **STATUTES**

§ 386.250 RSMo.

§ 393.140 RSMo.

§ 393.290 RSMo.

§ 536.021 RSMo.

## VIII.

**THE COMMISSION’S DECISION TO UTILIZE “ASYMMETRICAL PRICING” STANDARDS IN 4 CSR 240-20.015 (ELECTRIC UTILITIES): 4 CSR 240-40.015 (GAS UTILITIES) AND; 4 CSR 240-80.015 (STEAM) IS NOT BEYOND THE COMMISSION’S LEGISLATIVE AUTHORITY IN THAT THE COMMISSION’S “ASYMMETRICAL PRICING” STANDARDS DO NOT ADJUDGE ACTS OF A PUBLIC UTILITY TO BE UNREASONABLE, UNJUST, UNJUSTLY DISCRIMINATORY OR UNDULY PREFERENTIAL WITHOUT ADJUDICATION AS REQUIRED BY SECTION 393.140(5) RSMo. 2000. (AMEREN’S POINT RELIED ON I.)**

### **STATUTES**

§ 393.140 RSMo.

§ 393.150.2 RSMo.

### **OTHER AUTHORITIES**

4 CSR 240-13.055

In re Laclede Gas Company, GR-99-315 Report and Order December 24, 1999.

Re: Kansas City Power & Light, Case No. ER-85-185, 28 Mo.P.S.C. (N.S.) 228,

## ARGUMENT

### I.

**THE PUBLIC SERVICE COMMISSION DID NOT ERR IN ITS ORDERS OF RULEMAKING BECAUSE THE RULEMAKINGS AT ISSUE WERE NOT PROMULGATED PURSUANT TO SECTION 386.250(6) NOR WERE THE RULES REQUIRED TO BE PROMULGATED PURSUANT TO SECTION 386.250(6) OR SECTION 393.140(5) AND (8) IN THAT THE RULES AT ISSUE DO NOT PRESCRIBE CONDITIONS FOR RENDERING PUBLIC UTILITY SERVICE TO END USE CUSTOMERS AND THE RULEMAKING WAS AUTHORIZED BY SECTION 386.250(7) AND SECTION 393.140(1), (4) AND (11). (Appellants' Point Relied on I and Ameren's Point Relied On III).**

#### **A. Standard of Review**

The scope of review of a challenged agency rule is set forth in Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197-98 (Mo. banc 1972). The validity of an administrative rule or regulation is reviewed in the light of the ill sought to be cured and will be sustained unless unreasonable or plainly inconsistent with the act. Id. A rule or regulation is not unreasonable merely because it may be burdensome, but only if it bears no rational relationship to the legislative purpose. Id.

The guiding star of the Public Service Commission Law and the dominating purpose of utility regulation are the promotion and conservation of the interest and convenience of the public. State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123 (Mo. App. 1944). The dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental. DePaul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co., 539 S.W.2d 542, 548 (Mo. App. 1976)(citations omitted.). The Commission can make rules to carry out its statutory authority. State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 110 S.W.2d 364 (Mo. App. 1937).

In the context of this case, without doubt, the legislature has conferred vast power upon the Public Service Commission. Indeed, the Commission is expressly endowed with “all powers necessary or proper to enable it to carry out fully and effectively the purposes” of the Public Service Law. Section 386.040 RSMo. 2000. Moreover, the provisions of the Public Service Commission Law “shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.” Section 386.610 RSMo. 2000.

## **B. Argument**

Appellants assert that pursuant to certain provisions of Section 386.250 RSMo. 1998 Supp. and 393.140 RSMo. 1994 the Commission was required to conduct an adjudicatory hearing designed to produce evidence before it took any action with respect to the rulemaking proceedings at issue. (Appellants' Brief at p. 22). Based upon these assertions the Appellants allege the Commission was required to conduct an evidentiary hearing and provide the procedural safeguards associated with a contested case hearing. (Appellants' Brief at p. 26; Ameren Brief at p. 72). Appellants are incorrect in their assertion.

A contested case is defined in Section 536.010(2) as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” (Emphasis added). Of course, what the Appellants neglect, is the fact that the Affiliate Rules<sup>1</sup> adopted by the Commission did not determine legal rights, duties or privileges of specific parties. Rulemaking, by its nature involves an agency statement that affects the rights of individuals in the abstract. Baugus v. Director of Revenue, 878 S.W.2d 39, 42 (Mo. banc 1994) citing Bonfield, State Administrative Rulemaking, § 3.3.1 (1986). A Rule is defined

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<sup>1</sup> Affiliate Rules refer to 4 CSR 240-20.015, 4 CSR 240-080.015, 4 CSR 240-40.015 and 4 CSR 240-40.016.

as an “. . . agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of an agency.” § 536.010(4). The term “rule” as used in Chapter 536, does not include a determination, decision or order in a contested case.” § 536.010(4)(d). Rulemaking and contested case adjudication are historically and conceptually mutually exclusive categories of administrative law. Missouri Practice Vol. 20 2nd Ed. §5.21 at p. 111.

Appellants base their contested case procedure claim on certain subsections of § 386.250 and 393.140. Specifically, Appellants assert subsection (6) of § 386.250 and subsections (5) and (8) of § 393.140 are controlling. The Appellants are simply wrong in their assertion regarding the statutory sections controlling the Commission’s promulgation of the Affiliate Rules.

In fact, no hearing was required at all pursuant to the statutory sections under which the Commission proceeded. The Commission stated in its Order Denying Contested Case Procedures that the Commission had authority to promulgate the proposed rule[s] based on the Commission’s general authority at Section 386.250 RSMo. Supp. 1998 (Legal File p. 443).<sup>2</sup> This refers to subsection (7) of 386.250 that states the Commission shall have jurisdiction:

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<sup>2</sup> Hereinafter “L.F.”

To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

The Commission, contrary to Appellants' assertion, did not utilize subsection (6) of 386.250 RSMo. Nor was the Commission required to utilize subsection (6) of § 386.250.

Appellants and Ameren assert that Section 386.250(6) provides that rules can only be adopted after hearing “at which affected parties may present evidence as to reasonableness of [the] proposed rule[s]” (Appellants' Brief at p. 23; Ameren Brief at p. 72). Subsection (6) of 386.250 states:

(6) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service. All such proposed rules shall be filed with the secretary of state and published in the Missouri Register as provided in chapter 536, RSMo., and a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule; and

(Emphasis added).

The rules at issue are not prescribing conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service. The phrase “conditions of rendering public utility service” refers to the provision of natural gas or electric service to the end use customer. The rules at issue are not related to the “conditions” for rendering public utility service to end use customers, the rules are to prevent regulated utilities from subsidizing their unregulated operations through preferential service or treatment, including pricing. 25 Mo. Reg. 55, 59, 64, 69 (2000). The Commission was not prescribing conditions of rendering public utility service. These types of rules would deal with such things as installation and discontinuations of services and the cold weather rule. See: 4 CSR 240-13 et. seq.

Ameren makes much of the fact that in 1979 Public Counsel was successful in arguing at the circuit court level that cross-examination of witnesses was required in Commission rulemaking proceedings under Section 386.250(6). (Ameren Brief at p. 73).<sup>3</sup> Of course, what Ameren fails to point out is that the rulemaking at issue in 1979 related directly to rendering service to end use customers. In the rulemaking

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<sup>3</sup> The 1979 circuit court decision was an unpublished opinion and should not have precedential value in this proceeding. See; Federal Deposit Ins. Corp. v. Newhart, 892 F.2d 47, 50 n.3 (8<sup>th</sup> Cir. 1989).

at question in 1979 certain phone companies had sought to require a deposit from any new telephone customer who failed to meet certain credit criteria as a condition of receiving telephone service. (Report of the Public Counsel, July 1, 1978 through June 30, 1980, Appendix A Ameren Brief, p. A-104). The rules at issue in this proceeding do not relate to the conditions of rendering public utility service directly to end use customers. Thus, Section 386.250(6) does not control the Commission's authority to promulgate the Affiliate Rules.

Appellants' and Ameren's arguments regarding the necessity of on the record evidence and the opportunity to cross-examine are predicated on the applicability of 386.250(6) to these rulemaking proceedings at issue. However, subsection (6) of 386.250 is not applicable to the promulgation of the Affiliate Rules.

Even if subsection (6) of 386.250 RSMo. could be construed as being applicable, that subsection does not entitle Appellants to the procedures afforded in a "contested case" hearing. The term "hearing" in its legal context has a host of meanings. Its meanings undoubtedly will vary, depending on whether it is used in the context of a rulemaking type proceeding or in the context of a proceeding devoted to the adjudication of particular facts. The more precise inquiry in this case is whether the Section 386.250(6) "hearing" requirement necessarily includes

submission of oral testimony, cross-examination and the other procedural safeguards required in a contested case.

That subsection (6) of § 386.250 may require a “hearing” does not mean that the hearing must take the form of an adjudicatory, trial-type hearing in the nature of that in a contested case. Not every case requiring a hearing is a contested case. Cade v. State, 990 S.W.2d 32, 38 (Mo. App. 1999). Administrative law concepts draw a distinction “between proceedings for the purpose of promulgating policy-type rules or standards on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.” United States v. Florida East Coast Ry. Co., 410 U.S. 224, 245, 93 S.Ct. 810, 821, 35 L.Ed. 2d 223 (1973). In Florida East Coast the Court found that the term “after hearing” used in Section 1 (14) of the Interstate Commerce Act did not by its own force require the Interstate Commerce Commission (ICC) to hear oral testimony or argument or to permit cross-examination. Id. at 241. As noted in Missouri Practice Vol. 20 2nd Ed. § 6.39 at p. 152:

In the absence of a clear indication of legislative intent that more is required, the presence of the mandate for hearing in a rulemaking context means only that the agency cannot promulgate the rule on the basis of an invitation for written comments on its proposal. It must

meet interested members of the public face to face with an opportunity for oral presentation and comment, but the legislative quality of rulemaking assures that nothing more is expected than a legislative-style hearing, not unlike that which a legislative committee might hold on a bill before the legislature.

Importantly, subsection (6) does not require that the Commission necessarily conduct an “evidentiary hearing” with all the procedural safeguards of a contested case. Subsection (6) merely requires the Commission hold a “hearing.” The Commission consistent with the legislative-style hearing scheduled and held hearings allowing all parties to present evidence via an oral presentation and written comments with regard to the Affiliate Rules. Nothing more was required of the Commission.

Appellants’ and Ameren claim that the use of the word “evidence” in Subsection (6) of Section 386.250 mandates that the Commission was required to provide them with the right to present evidence (including the right to cross-examine) as to the Rules. (Appellants’ Brief at p. 23, Ameren Brief at p. 72). In support of their assertion Appellants’ and Ameren cite State ex rel. Kansas City Public Service Co. v. Waltner, 169 S.W.2d 697 (Mo. 1943) and Rombach v.

Rombach, 867 S.W.2d 500 (Mo. 1993). Both of these cases are not applicable to the issue raised in this proceeding.

First, neither Waltner nor Rombach are dealing with or construing Subsection (6) of Section 386.250. Second, Appellants' and Ameren's analysis ignores the language contained in Section 386.410.1 that "[a]ll hearings before the commission. . . shall be governed by rules to be adopted and prescribed by the commission. An in all investigations, inquiries or hearing the commission . . . shall not be bound by the technical rules of evidence." Appellants and Ameren seek to force the Commission to adopt and follow strict evidentiary procedures when Section 386.410.1 allows the Commission flexibility to chose how hearings will be conducted before the Commission.

In these proceedings, Appellants and Ameren were given the opportunity to present evidence as to the reasonableness of the proposed rules in the form of written initial and reply comments. Those comments were quite extensive and allowed Appellants' and Ameren the opportunity to rebut Public Service Commission Staff and Public Counsel initial comments via the reply comments. The Commission also allowed sworn testimony at the public hearings. Certainly this sworn testimony constitutes evidence.

Peppered into Appellants' argument is the further suggestion that when the Commission provided notice of the proposed rulemaking; allowed discovery to be utilized;<sup>4</sup> provided for the receipt of oral testimony under oath or affirmation;<sup>5</sup> and provided a printed transcript it necessarily stamped the rulemaking proceeding as adjudicatory. (Appellants' Brief at p. 29). Surely a regulatory rulemaking proceeding does not lose its character when more procedural rights are accorded, or more orderly methods are employed, than may be customary in the conduct of such a proceeding. For a statement of that position, see United States v. Florida East Coast Ry., 410 U.S. 224, 236 n. 6, 93 S.Ct. 810, 35 L.Ed. 2d 223 (1973).

Section 386.410.1 states in pertinent part that “[a]ll hearing before the commission or a commissioner shall be governed by the rules adopted and prescribed by the commission.” Pursuant to statute the Commission has authority to prescribe the procedures by which a hearing will be conducted. Subsection 2 of 386.410 states in pertinent part “[n]o formality in any proceeding nor in the manner

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<sup>4</sup> The discovery allowed Public Counsel was based upon Section 386.450 and 386.710 et. seq. not on the nature of the proceeding. See: Order Granting Public Counsel's Motion to Compel (L.F. p. 436).

<sup>5</sup> Commission procedures require when holding a rulemaking hearing, persons wishing to testify at the public hearing be sworn by oath. 4 CSR 240-2.180(7)(B).

of taking testimony before the commission . . . shall invalidate any . . . rule . . . made, approved or confirmed by the commission.” The Commission acted within its statutory authority when it conducted the hearings it held in the rulemaking proceedings at issue.

The Commission cogently explained why the rulemaking proceedings at issue did not require the procedural safeguard for “contested cases” in its Order Denying Contested Case Procedures:

The Movants state that Section 386.250(6), RSMo. Supp. 1998, as requiring that “a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule.” The Movants assert that if the Commission is required to hold a hearing and take “evidence” that a rulemaking proceeding must be considered a “contested case.”

Even if a hearing is required or is held, a rulemaking proceeding does not become a contested case. The APA, at Section 536.021, RSMo. Supp. 1998, expressly allows for an optional or required hearing for a proposed rulemaking (Section 536.021.3) and provides

that the agency shall summarize and state its findings as to the merits of testimony presented at the hearing (Section 536.021.5(4)).

The APA defines and distinguishes the words “rule” and “contested case” and prescribes separate and distinct due process procedures for rulemaking and for contested cases. A “contested case” is defined as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” § 536.010(2), RSMo. 1994 (emphasis supplied). A “rule” is defined as “each agency statement of general applicability that implements, interprets, or prescribes law or policy . . . but does not include: . . . d) a determination, decision, or order in a contested case.” § 536.040(4) RSMo. 1994.

The Missouri Supreme Court has followed the statutory definitions and voided agency actions to set or change a statewide policy where the agency failed to comply with the statutory rulemaking procedures. NME Hospitals, Inc. v. Dept. of Soc. Services, 850 S.W.2d 71 (Mo. banc 1993). “An agency standard is a “rule” if it

announces “[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified facts . . . .” Id. at 74, citing Missourians for Separation of Church and State v. Robertson, 592 S.W.2d 825, 841 (Mo. App. 1979).

The proposed rulemaking in this proceeding is not to determine the legal rights, duties or privileges of specific parties. The culmination of this process will not result in a decision made in a contested case. The proposed rule does provide a statement of general applicability that implements, interprets and prescribes law and policy that will apply in the future on a statewide basis to all public utilities. A requirement for hearing, if any, is consistent with a rulemaking proceeding and does not convert that proceeding into a contested case. (L.F. pp. 445-446).

Because the Affiliate Rules adopted by Commission were not determinations of the rights of specific parties but are rules of general applicability that are prospective in nature, Appellants’ attempt to impose contested case procedures upon the Commission was properly rejected.

Also in support of their claim that “contested case” procedures should be utilized in these rulemaking proceedings, Appellants cite to subsections (5) and (8) of Section 393.140. (Appellants’ Brief at pp. 22-23). These two sections have a “hearing” requirement. Appellants fail to cite subsections (1), (4) and (11) that do not have the alleged hearing requirements. Subsection (1) of 393.140 provides in pertinent part: The Commission shall: (1) Have general supervision of all gas corporations, electric corporations . . . “General supervision” in the regulatory setting includes the ability to promulgate rules. Subsection (4) of 393.140 provides in pertinent part:

The Commission shall:

(4) Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, electrical corporations, water corporations and sewer corporations engaged in the manufacture, sale or distribution of gas and electricity for light, heat or power, or in the distribution and sale of water for any purpose whatsoever, . . .

Via the Affiliate Rules the Commission was prescribing record keeping methods with respect to certain affiliate transactions for public utilities under its jurisdiction.

Finally, subsection (11) of 393.140 provides in pertinent part:

The Commission shall:

. . . have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

In McBride & Son Builders, Inc. v. Union Electric, 526 S.W.2d 310, 313 (Mo. 1975) it was recognized that subsection (11) gives the Commission authority to make rules and that “[t]here is no requirement in subsection (11) for a hearing before adoption of such rules and regulations by the Commission.” The Commission had authority under each of these subsections to promulgate the Affiliate Rules without a hearing at all. However, the Commission held a legislative-style hearing allowing all interested parties an opportunity for oral presentations and written comments with respect to the Affiliate Rules. Nothing more was required by the Commission.

Moreover, subsections (5) and (8) of § 393.140 are addressed to examinations of particular persons or corporations as opposed to a proceeding to formulate general policy. The Commission noted this fact in rejecting Appellants’ request for contested case proceedings:

The Group A Movants also assert that “hearing” requirements found in subsections (5) and (8) of Section 393.140, RSMo. 1994,

require the implementation of contested case procedures. Even if this were so, these subsections are addressed to examinations of particular persons or corporations as opposed to a proceeding to formulate general policy. In addition, nothing in Section 393.140 nullifies other subsections or statutes granting authority to the Commission or restricting the Commission to acting only under certain subsections. (L.F. p. 959).

The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972). Contrary to Appellants' assertions the Affiliate Rules do not directly determine "legal rights, duties or privileges of specific parties."

The fact that the Commission's rulemaking authority should not be deemed to require contested case procedures was illustrated in a case involving the amendment of Commission gas safety rules. One assertion in that case was that the Commission had failed to send a copy of its final rulemaking order, its "Order of Rulemaking," to all parties under § 386.490. The court of appeals noted that § 386.490 pertained to notice of orders in contested cases only and not rulemakings. Thus, the personal notice required of adjudicatory order was not required in

Commission rulemaking orders. State ex rel. City of Springfield v. Public Service Commission, 812 S.W.2d 827, 833-34 (Mo. App. 1991) overruled on other grounds by Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. banc 1996). The same theory applies to this case. Subsections (5) and (8) relate to contested case proceedings not rulemaking proceedings.

## **II.**

**THE PUBLIC SERVICE COMMISSION DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF SECTION 536.021.2 AND SECTION 536.021.6(4) RSMo. 2000 IN THAT THE COMMISSION PROVIDED THE REASONS FOR ALL FOUR OF THE RULES AT ISSUE IN THIS PROCEEDING AS REQUIRED BY SECTION 536.021.2 AND THE COMMISSION PROVIDED CONCISE SUMMARIES OF THE COMMENTS RECEIVED AS WELL AS THE COMMISSION'S EXPLANATION OF ITS FINDINGS AS TO WHY IT MADE OR DID NOT MAKE PROPOSED CHANGES TO THE RULES AT ISSUE AS REQUIRED BY 536.021.6(4).**

### **A. Standard of Review**

The standard of review is stated under Point I.

### **B. Argument**

#### **1. The Commission Satisfied The Requirements Of Subsection 2(1) Of 536.021 RSMo.**

Appellants first allege that the Commission failed to comply with subsection 2(1) of 536.021 because the proposed Affiliate Rules “failed to contain any reasons

why the Proposed Rules were necessary.” (Appellants’ Brief at p. 34). Appellants reason because the Commission “has dealt with affiliate cross-subsidization situations in the past through the process of setting rates for regulated service by including only those costs which it deems reasonable” the Commission failed “in that context” to meet the requirements of subsection 2(1). Subsection 2(1) does not require the Commission to explain the “context” of a proposed rule. Subsection 2(1) requires the Commission to give “an explanation of any new rule or any change in an existing rule, and the reasons therefore;” The Commission provided such explanation in the purpose clause of all four rules at issue in this proceeding. Those purpose clauses satisfy the requirement of subsection 2(1).

The purpose clauses for the rules state:

#### 4 CSR 240-20.015 Affiliate Transactions

**PURPOSE:** This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. In order to accomplish this objective, the rule sets forth financial standards, evidentiary standards and record keeping requirements applicable to any Missouri Public Service Commission (commission) regulated electrical corporation whenever such corporation participates in transactions with any

affiliated entity (except with regard HVAC services as defined in section 396.754, RSMo. Supp. 1998, by the General Assembly of Missouri). The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.

#### 4 CSR 240-40.015 Affiliate Transactions

**PURPOSE:** This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. In order to accomplish this objective, the rule sets forth financial standards, evidentiary standards and record keeping requirements applicable to any Missouri Public Service Commission (commission) regulated gas corporation whenever such corporation participates in transactions with any affiliated entity (except with regard to HVAC services as defined in section 386.754, RSMo. Supp. 1998, by the General Assembly of Missouri). The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.

#### 4 CSR 240-40.016 Marketing Affiliate Transactions

PURPOSE: This rule sets forth standards of conduct, financial standards, evidentiary standards and record keeping requirements applicable to all Missouri Public Service Commission (commission) regulated gas corporations engaging in marketing affiliate transactions (except with regard to HVAC services as defined in section 386.754, RSMo. Supp. 1998, by the General Assembly of Missouri).

#### 4 CSR 240-80.015 Affiliate Transactions

PURPOSE: This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. In order to accomplish this objective, the rule sets forth financial standards, evidentiary standards and record keeping requirements applicable to any Missouri Public Service Commission (commission) regulated steam heating corporation whenever such corporation participates in transactions with any affiliated entity (except with regard to HVAC services as

defined in section 386.754, RSMo. Supp. 1998, by the General Assembly of Missouri). The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.

The purpose clause of the proposed rules provided the reasons for the rules, and specified that the rules set forth financial standards, evidentiary standards, and record keeping requirements, and stated the reasons therefore: "to prevent regulated utilities from subsidizing their non-regulated operations." The purpose clauses satisfy the notice requirements of subsection 2(1) of 536.021.

In rejecting a similar argument the Western District Court of Appeals stated:

The purpose sections of the proposed rules provided an explanation of the general subject matters covered by the rules and specified that the proposed rules related to safety practices and procedures. Furthermore, the purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification. St. Louis Christian Home v. Missouri Commission on Human Rights, 634 S.W.2d 508, 515 (Mo. App. 1982). The record does not reflect that appellants

suffered any detriment in their ability to participate in or react to the rulemaking process as a result of their complaints under this point.

State ex rel. City of Springfield v. Public Service Commission, 812 S.W.2d 827, 832 (Mo. App. 1991), overruled on other grounds by Missouri Municipal League v. State, 932 S.W.2d 400 9Mo. banc 1996). Appellants do not and cannot argue that they suffered any detriment in their ability to participate in or react to the rulemakings at issue. Each Appellant participated fully in the rulemaking proceeding.

## **2. The Commission Satisfied The Requirements Of Subsection 6(4) Of 536.021 RSMo.**

Appellants also assert that the Commission failed to comply with subsection 6(4) of 536.021 RSMo. because it failed to provide a concise summary of the testimony presented at the hearing and failed to provide a concise summary of the state agency's findings." (Appellants' Brief at p. 34). Each of these claims are without merit.

The Final Orders of the Commission contain concise summaries of the comments received (25 Mo. Reg. 55, 59, 63, 69 Jan. 3, 2000) as well as the Commission's explanation of its findings as to why it made or did not make

proposed changes in the Affiliate Rules. These findings are in compliance with subsection 6(4) of § 536.021.

### III.

**THE PUBLIC SERVICE COMMISSION DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF SECTION 536.016 RSMo. 1999 IN THAT THE COMMISSION PROPOSED THE RULES AT ISSUE A FULL FOUR MONTHS BEFORE THE EFFECTIVE DATE OF SECTION 536.016 AND THERE IS NO INDICATION THE GENERAL ASSEMBLY HAD ANY INTENT TO APPLY THIS STATUTE TO ANY PORTION OF ANY RULEMAKING PROCEEDING PRIOR TO THE EFFECTIVE DATE OF THE STATUTE.**

#### **A. Standard of Review**

When determining whether a Commission decision is lawful, a reviewing court must exercise independent judgment and need not defer to the Commission. State ex rel. Midwest Gas Users' Assoc. v. Public Service Commission, 976 S.W.2d 470, 476 (Mo. App. 1998). However, the interpretation and construction of a statute by an agency charged with its administration is entitled to great weight. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972).

## **B. Argument**

Appellants allege that the Commission acted unlawfully in adopting the Affiliate Rules “because it did not comply with the provisions of § 536.016 RSMo.” (Appellants’ Brief at p. 35). As noted by Appellants, this provision of law became effective on August 28, 1999. Section 536.016 relates to procedures that all state agencies must follow when they desire to propose new rules. The Commission was not required to comply with the provisions of § 536.016 because the Commission proposed the Affiliate Rules prior to the effective date of § 536.016.

The Commission filed proposed rules 4 CSR 240-20.015 (Electric Utilities Affiliate Transactions); 4 CSR 240-40.015 (Gas Utilities Affiliate Transactions); 4 CSR 240-40.016 (Marketing Affiliate Transactions); and 4 CSR 240-80.015 (Steam Heating Utilities Affiliate Transactions) on April 26, 1999. (L.F. p. 17, 496, 686 and 1015). The proposed rules were published on June 1, 1999 in the Missouri Register (Volume 24, No. 11 pp. 1346-1364). (L.F. p. 32, 511, 701 and 1031). Subsection 1 of 536.016 provides that:

Any state agency shall propose rules based upon substantial evidence on the record and a finding by the agency that the rule is necessary to

carry out the purposes of the statute that granted such rulemaking authority. (Emphasis Added.)

Relators focus on the phrase “based on substantial evidence on the record” and neglect the fact that the statute applies at the time any state agency “proposes” rules.<sup>6</sup>

The Commission proposed its Affiliate Rules a full four months prior to the effective date of Section 536.016. Section 536.016 does not apply to any portion of the Commission’s rulemaking process undertaken prior to the effective date of Section 536.016. In Clark v. Kansas City, St. L. & C.R. Co., 219 Mo. 524, 118 S.W. 40, 43 (1909) the Missouri Supreme Court set out the rule applicable in this proceeding stating:

If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in and all things done under the late law will stand unless an intention to the

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<sup>6</sup> Webster’s Ninth New Collegiate Dictionary defines “propose” 1: to form or put forward a plan or intention.

contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. (Emphasis Added.)<sup>7</sup>

Prior to the effective date of Section 536.016, the Commission was not required by statute to “propose rules based upon substantial evidence on the record.” Nor is there any indication that the General Assembly had any intent to apply the statute to any portion of any rulemaking proceeding prior to the effective date of the statute.

Subsection 2 of § 536.016 is equally not applicable to the Commission’s actions in this proceeding. Subsection 2 in pertinent part provides that “[e]ach state agency shall adopt procedures by which it will determine whether a rule is necessary to carry out the purposes of the statute authorizing the rule.” The subsection contemplates such a decision being made prior to any agency proposing any rule. However, the Commission proposed its Affiliate Rules a full four months prior to the effective date of Section 536.016.2. Section 536.016.2 is not applicable because the Commission had made the decision to propose the rules prior to the effective date of Section 536.016.2. Section 536.016 does not apply to any part of the rulemaking proceeding completed prior to the effective date of § 536.016.

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<sup>7</sup> Appellants cite Clark at page 37 of their brief but fail to include the emphasized portion of the Clark opinion.

Statutes are generally presumed to operate prospectively unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. Great Southern Sav. And Loan v. Payne, 771 S.W.2d 940, 943 (Mo. App. 1989). If the legislature had intended §536.016 to apply to rulemakings for which agencies had already begun prior to the effective date of §536.016, the legislature would have used clear and express language indicating retrospective application such as “any state agency that has proposed rules” or “all pending rulemaking must comply” with the provisions of §536.016. The express language of § 536.016 does not indicate that this statute was meant to operate retroactively. Nor is it the necessary or unavoidable implication of the statute that it is to operate retroactively. Thus the Court should reject Appellants’ claims with respect to Section 536.016.

#### IV.

**THE PUBLIC SERVICE COMMISSION DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF 393.140(5) RSMo. 2000 IN THAT IN PROMULGATING THE RULES AT ISSUE THE COMMISSION WAS NOT REQUIRED TO MAKE A DETERMINATION, AFTER HEARING, THAT APPELLANTS' EXISTING METHODS OR PRACTICES ARE "UNJUSTLY DISCRIMINATORY OR UNDULY PREFERENTIAL" BECAUSE SUCH A DETERMINATION IS ONLY REQUIRED IN A CONTESTED CASE PROCEEDING AND THESE RULEMAKINGS WERE NOT A CONTESTED CASE PROCEEDING.**

##### **A. Standard of Review**

The standard of review is stated under Point III.

##### **B. Argument**

Appellants allege that the Commission's Affiliate Rules are unlawful because the Commission must hold a hearing and determine that existing methods and practices are "unjustly discriminatory or unduly preferential." (Appellants' Brief at p. 39). The underlying premise of Appellants' claim of error is that the Commission promulgated the Affiliate Rules pursuant to § 393.140(5). Appellants'

premise that subsection (5) of 393.140 is the controlling statutory authority for the Affiliate Rules promulgated by the Commission is simply incorrect.

As discussed in Section I of the argument portion of this brief, the Commission promulgated the Affiliate Rules at issue in this proceeding pursuant to the authority found in subsection (7) of 386.250 and subsection (1), (4) and (11) of 393.140. The Commission was not required to make a finding that the utility's existing method or practices are "unduly discriminatory or unduly preferential" as claimed by Appellants.

Appellants' reliance on the second clause of subsection (5) of 393.140 is incorrect. This second clause of subsection 5 states:

Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been

authorized by statute, and the just and reasonable acts and regulations to be done and observed;

This clause relates to decisions made when a dispute arises between **specific parties** regarding “rates,” “charges” or “acts” of particular individual regulated utility companies and specifically relates to a contested case proceeding. McBride & Son Builders, Inc. v. Union Electric, 526 S.W.2d 310 (Mo. 1975). By definition rulemaking proceedings are not contested cases. See § 536.010(4)(d). In promulgating the Affiliate Rules the Commission was not required to make a determination, after hearing, that Appellants’ existing methods or practices are “unjustly discriminatory or unduly preferential.” Such a determination is only required in a contested case proceeding. These rulemakings were not a “contested case” proceeding.

**V.**

**THE ORDERS OF RULEMAKING MADE BY THE PUBLIC SERVICE COMMISSION THAT ARE THE SUBJECT OF THIS PROCEEDING WERE NOT BEYOND THE COMMISSION’S SUBJECT MATTER JURISDICTION AND DO NOT CONFLICT WITH SECTION 386.030 RSMo. 2000 AND SECTION 393.140(12) RSMo. 2000 IN THAT THEY**

**ONLY REGULATE DOCUMENTATION OF COSTS ASSOCIATED WITH AFFILIATE TRANSACTIONS THAT ARE INCURRED BY THE PARENT OR AFFILIATE ENTITY AND CHARGED TO THE REGULATED ELECTRIC OR GAS UTILITY NOWHERE DO THE RULES PURPORT TO GOVERN THE ACTIVITIES OF AFFILIATES.**

**A. Standard of Review**

The standard of review is stated under Point III.

**B. Argument**

**1. The Affiliate Rules Do Not Conflict With § 393.140(12)**

**RSMo.**

Appellants allege that the Affiliate Rules conflict with § 393.140(12) “because they purport to bring the unregulated business under the jurisdiction of the Commission.” (Appellants’ Brief at p. 41). Contrary to Appellants’ assertions the Affiliate Rules are only intended to prevent regulated utilities from subsidizing their non-regulated operations. Such actions are consistent with the jurisdictional authority of the Commission and subsection (12) of § 393.140.

Subsection (12) of § 393.140 provides in pertinent part:

But this subdivision shall not restrict or limit the powers of the commission in respect to the owning, operating, managing or

controlling by such corporation of such gas plant, electric plant, water system or sewer system, and said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant, electric plant, water system or sewer system as distinguished from such other business. (Emphasis added).

This language gives the Commission the right to inquire into affiliate transactions that relate to regulated activities. The Affiliate Rules at issue do just that. Appellants cite 4 CSR 240-80.015(5) and 4 CSR 240-40.015(5) and (6) to support their position. These rules are in place to ensure that proper costs are charged to the regulated utility e.g. 4 CSR 240-40.015(5)(A)1. Documentation of costs associated with affiliate transactions that are incurred by the parent or affiliate entity and charged to the regulated gas corporation.

Appellants assert that the Commission has adequately dealt with the possibility of a regulated utility subsidizing unregulated operations through the process of setting rates for regulated services. (Appellants' Brief at p. 42). The fact that the Commission has dealt with these costs in the past in rate cases does not negate the Commission's authority to set appropriate record keeping requirements

via rules so that information will be available in the rate setting process. Certainly, if the Commission has authority to review these matters in a rate case setting, the Commission has authority to order the regulated utility to keep records of these transactions via a rulemaking proceeding. See: Section 393.140(4).

Simply put, these Affiliate Rules do not conflict with Section 393.140(12). These rules work in harmony with the goals of subsection (12), ensuring the proper allocation of revenue, expenses and investments among regulated and unregulated businesses of a regulated utility.

## **2. The Commission’s Affiliate Rules Do Not Expand Commission Regulation To Non-Jurisdictional Activities.**

Appellants argue the Commission has “greatly exceeded the scope of its subject matter jurisdiction by attempting to control the price of non-regulated transactions.” (Appellants’ Brief at p. 43). Appellants are incorrect in their assertion that the Commission’s Affiliate Rules attempt to control the price of non-regulated transactions. In promulgating these rules the Commission is only exercising its jurisdiction over investor-owned public utilities in the State of Missouri.

Appellants concede, as they must, that the Commission has statutory authority to set the price of gas, electricity, or steam sold by regulated corporations

in Missouri, and to prescribe the terms and conditions under which services are to be sold to customers of the regulated corporation in Missouri. The Affiliate Rules only regulate how transactions are going to be handled for the regulated utility. Stated another way, the regulated utility is the only party required to comply with the Commission's Affiliate Rules. In State ex rel. General Telephone Co. v. Public Service Commission, 537 S.W.2d 655, 661 (Mo. App. 1976) the court of appeals held the Commission had the authority to determine the reasonableness of amounts paid by a telephone company to an affiliated supplier of telephone equipment. Requiring regulated utilities to comply with Commission rules is wholly consistent with the Commission's regulatory authority. State ex rel. Dail v. Public Service Commission, 203 S.W.2d 491, 499 (Mo. App. 1947).

Public Counsel agrees with the Appellants that the Commission "does not have the authority to dictate the manner in which a utility shall conduct its business or takeover the general management of the utility" (Appellants' Brief at p. 44), provided that in managing its business the utility does not injuriously affect the public. State ex rel. City of St. Joseph v. Public Service Commission, 30 S.W.2d 8, 14 (Mo. banc 1930). By adopting the Affiliate Rules the Commission attempted to lay ground rules to protect the public from the injurious consequences of affiliate transactions between regulated utilities and their unregulated operations. Such

action by the Commission is wholly consistent with the Commission's jurisdictional authority to protect the public. DePaul Hospital School of Nursing v. Southwestern Bell Tel. Co., 539 S.W.2d 542 (Mo. App. 1976).

The examples proffered by the Appellants do not demonstrate that the Commission is acting beyond its jurisdiction. The first example used by Appellants is the asymmetrical pricing standards found in 4 CSR 240-40.015(2)(A) and 4 CSR 240-40.016(3)(A). This standard only applies to the regulated utility. As noted by the Commission in its final order of rulemaking, "fully distributed costs (FDC) assures that all costs are accounted and recovered and fair market price (FMP), in conjunction with FDC, assures that the regulated utilities obtain the best prices or lowest cost possible whether buying or selling or producing goods or services. Asymmetrical pricing assures that the pricing standard is always applied to the favor of regulated utility's customers." (L.F. p. 992). Moreover, regulated utilities can seek waivers of these provisions pursuant to subsection 10 of the rules.

Next Appellants allege that 4 CSR 240-40.016(2)(F), (G) and (N), 4 CSR 240-40.015(2)(C) and 4 CSR 240-80-015(2)(c) concerning the provision of information by a regulated gas corporation and heating corporations are beyond Commission jurisdiction. These sections of the Affiliate Rules only apply to the regulated utility. These rule sections do not in any way attempt to control what

non-regulated affiliates do with information. Subsection (1) of § 393.140 states the Commission shall “[h]ave general supervision of all gas corporations . . .” Under its powers of general supervision, the Commission may accomplish that oversight through more than one method. The Commission also can make and interpret rules to carry out its statutory authority. State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 110 S.W.2d 364 (Mo. App. 1937).

Appellants’ next example alleges the Commission via 4 CSR 240-40.016(2)(I) and (J) is attempting “to prohibit, or impose conditions on, a gas corporation making agreements regarding off-system commodity sales and interstate pipeline capacity releases.” Subsection (I) and (J) of 4 CSR 240-40.016(2) do not prohibit such agreements as claimed by Appellants. Subsection (I) and (J) state as follows:

(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.

All these sections do is require the regulated utility to offer these particular services on comparable terms to both affiliate and nonaffiliate marketers.

Next, Appellants allege 4 CSR 240-40.016(2)(M) purports to require “a gas corporation to maintain records regarding marketing activities of another corporation or entity.” Subsection M states:

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

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 regulated gas corporation has not recorded the complaint within thirty (30) days, an explanation for the delay must be recorded.

This section only requires the regulated utility to keep a log of complaints the regulated utility receives against an affiliated entity when it is made aware of such

complaint. The Commission has authority to require the regulated utility to keep such information under its general supervisory powers found in subsection (1) of 393.140.

Relators assert section (5) and (6) of 4 CSR 240-40.015 and sections (6) and (7) of 4 CSR 240-40.016 are in “excess of the jurisdiction of the Commission because they require a gas corporation to ‘ensure’ that its affiliates keep their records in a certain way and require the gas corporation to ‘make available’ the records of the affiliates.” As conceded by Appellants these rules do not apply directly to unregulated affiliates. (“These provisions thus purport to impose indirect controls . . . “ Appellants’ Brief at p. 46). The regulated utilities are the only party required to comply with the Affiliated Rules.

Finally, subsection 6(A) of Rule 015 and subsection 7(A) of Rule 016 allow access to records “[t]o the extent permitted by applicable law . . .” Thus, regulated utilities are free to argue in the context of a rate proceeding that certain requests are not permitted by law.

## **VI.**

**THE PUBLIC SERVICE COMMISSION ORDERS OF RULEMAKING  
DO NOT CONTAIN IMPERMISSIBLY VAGUE, AMBIGUOUS AND**

**INCONSISTENT PROVISIONS VIOLATING APPELLANTS' DUE PROCESS, AS GUARANTEED BY ARTICLE I §10 OF THE MISSOURI CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE STANDING TO ATTACK THE RULES AT ISSUE ON CONSTITUTIONAL GROUNDS AND THERE IS NOT A CONTROVERSY RIPE FOR THIS COURT'S DETERMINATION BECAUSE THE COMMISSION IS NOT SEEKING TO ENFORCE ANY PROVISION OF THE RULES AGAINST ANY SPECIFIC ACT OR OMISSION COMMITTED BY ANY OF THE APPELLANTS IN THE PROCEEDING NOW BEFORE THE COURT AND APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THE COMMISSION'S RULES ARE IMPERMISSIBLY VAGUE BECAUSE THE RULES PROVIDE FAIR NOTICE TO APPELLANTS OF THE RULES' REQUIREMENTS.**

**A. Standard of Review**

Duly promulgated rules of the Commission have the force and effect of law.

State ex rel. City of Springfield v. Public Service Commission, 812 S.W.2d 827

(Mo. App. 1991) overruled on other grounds, Missouri Municipal League v. State of Missouri, 932 S.W.2d 400, 403 (Mo. banc 1996) (hereinafter City of Springfield). A statute or law is presumed constitutional and will not be held otherwise unless it clearly contravenes some constitutional provision. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). A court determines standing to challenge an agency rule under the same standards as standing to challenge a statute or municipal ordinance. EBG Health Care v. Mo. Health Facilities, 12 S.W.3d 354, 362 (Mo. App. 2000). In order to have standing to challenge a statute or administrative rule on constitutional grounds, a party must show not only that the statute or rule is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement. Harrison v. Monroe County, 716 S.W.2d 263, 266 (Mo. banc 1986).

## **B. Argument**

### **1. Appellants' Claims Are Not Ripe For Review.**

In the present case, there is no justiciable controversy that is ripe before this Court. The Commission is not seeking to enforce any provision of the Affiliate Rules against any specific act or omission committed by any of the Appellants in the proceeding now before the Court. The Appellants have brought forth no evidence of an application of any of these rules to any factual situation involving them. Indeed, Appellants cannot even make such a claim inasmuch as the Circuit Court has entered its Order staying the effective date of the Affiliate Rules as to Appellants. (L.F. p. 1310-1312).

In Missouri, the ripeness doctrine was set-out in Buechner v. Bond, 650 S.W.2d 611, 614 (Mo. banc 1983):

In order that a controversy be ripe for adjudication a “sufficient immediacy” must be established. *Nations v. Ramsey*, 387 S.W.2d 276, 279 (Mo. App. 1965). Ripeness does not exist when the question rests solely on a probability that an event will occur. *Lake Carriers Ass’n v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257 (1972).

Appellants are seeking to demonstrate vagueness on the face of these rules by alleging hypothetical applications or facts which Appellants assert demonstrate the vague nature of certain isolated portions of the Affiliate Rules. In City of Springfield the Court of Appeals rejected vagueness claims similar to Appellants in this proceeding stating:

Appellants argue that 14 separate provisions within the New Rules are unconstitutionally vague. Appellants do not represent that any of the “vague” provisions either have or are threatened to be enforced against them to their detriment. At best, appellants express concern that they may be held to be in violation at some point in the future because they are not able to interpret and comply with the provisions of which they complain. Appellants have not shown that they have standing to attack the New Rules on constitutional grounds.

City of Springfield at 833. Just as in City of Springfield, Appellants do not represent to this Court that any of the alleged “vague” provisions in the Affiliate Rules either have been or are threatened to be enforced against them to their detriment.

The Appellants cite a number of cases to support their vagueness claim. The first case cited is Verbeck v. Schnicker, 660 F.2d 1260 (8th Cir. 1981), cert. den.

455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462. This case is particularly illustrative of the inadequacy of attempting to use vagueness to attack the Commission's Affiliate Rules in this circumstance. In this case, certain police officers and the Police Officer's Association brought an action for injunctive and declaratory relief alleging that there were certain provisions of personnel regulations of the police department which were unconstitutional. The regulations were ultimately upheld and the judgment dismissing the complaint was affirmed, because the Court found that there was no case or controversy which had been pleaded. Throughout the opinion, the Court commented that, although the regulations were quite broad and even vague, absent an actual controversy or application of them, they would be presumed to be legitimate:

Again, we recognize that the regulations at issue here are cast in broad terms. We also recognize that such breadth may lend itself to excesses and arbitrariness in enforcement, but assume that these regulations will, as a matter of legitimate governmental interest, be made more specific in their individual application to concrete situations and thus, be substantially limited in their administration. No excesses have been demonstrated here. No case or controversy has been pleaded. (Id., F.2d at p. 1267).

Citing to an earlier United States Supreme Court case, the 8th Circuit Court of Appeals also stated:

The question that would now have to be asked is “whether [the plaintiffs] can demonstrate that there is no rational connection between the regulation, . . . and the promotion of safety of persons and property.”

Id. at F.2d 1266 and Kelley v. Johnson, 425 U.S. 238, at 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976). The Verbeck case also cited to an earlier Missouri Supreme Court case dealing with police regulations which stated:

We may legitimately assume that by custom, usage and ‘experience’ a reasonable degree of ‘specificity’ has been afforded in the applications of the regulations involved here. Milani v. Miller, 515 S.W.2d 412, 418-19 (Mo. 1974).

Appellants also argue the vagueness standard of lack of notice to a potential offender when a statute or rule is so unclear that “men of common intelligence must necessarily guess at its meaning.” Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 332 (1925); Broaderick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2980, 37 L.Ed.2d 830 (1973). In the Connally case, there

was an actual case in controversy in that a construction company was threatened with violation of an Oklahoma statute for certain payment practices. The Court ultimately found the statute language to be unconstitutionally vague. No application of the new rules to a specific fact situation is being asserted by any of the Appellants here, nor has the Commission as yet alleged any violations.

In Broaderick, the constitutionality of a state statute regulating political activity by state employees was upheld. In the context of the opinion, however, Justice White took time to comment on the principal that a constitutional challenge must involve an actual application of that law and that personal constitutional rights may not be asserted vicariously,

Constitutional judgements, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the court: . . . (Id. at 610, 93 S.Ct. 2908 at 2915).

Likewise, Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), also quoted by the Appellants, involved an application of a law to a specific fact situation. In that case, a defendant was convicted for his part in a demonstration in front of a high school in Rockford, Illinois. The Court upheld the constitutionality of an anti-noise ordinance and found that although the quantum of

noise that would constitute a violation was not specified in the ordinance, it was measurable as to its ability to interrupt normal school activity. Given the context, the Court found that the ordinance gave “fair notice to those to whom [it] is directed.” (Id. at 112, 92 S.Ct. 2294 at 2301). This case is particularly illustrative of the fact that a rule or law must be applied to a particular fact situation in order for the Court to make a determination of whether or not it is unconstitutionally vague.

Even the two Missouri cases which the Appellants cite are distinguishable on the basis that they concerned laws that were applied to specific fact situations. City of Festus v. Werner, 656 S.W.2d 286 (Mo. App. 1983) overturned the conviction of the operator of a roofing company who had violated a city ordinance against “disagreeable odors.”

The case of State v. Young, 695 S.W.2d 882 (Mo. banc 1985), which overturned the conviction of an individual on an anti-cockfighting statute, states that:

. . . on a challenge that a statute or ordinance is unconstitutionally vague, it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand.

(Id. at 884). Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). Here there are no facts to apply; Appellants merely offer hypotheticals and possibilities.

## 2. The Affiliate Rules Are Not Unconstitutionally Vague.

Assuming *arguendo* that the Court determines Appellants’ “void for vagueness” arguments are ripe for review, Appellants have failed to carry their burden to demonstrate that the Affiliate Rules are unconstitutionally vague. The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depend in part on the nature of the enactment. Due process will tolerate more vagueness in the context of non-criminal laws because the consequences of such imprecision are “qualitatively less severe.” U-Haul Co. v. City of St. Louis, 855 S.W.2d 424, 427 (Mo. App. 1993) (citations omitted.)<sup>8</sup> Language which reasonable people can understand is not impermissibly vague merely because it requires interpretation on a case-by-case basis. State ex rel. Cook v. Saynes, 713 S.W.2d 258, 261 (Mo. banc 1986).

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<sup>8</sup> Appellants in footnote 4 at page 48 and Ameren in footnote 18 at page 60 infer that the failure to comply with these Affiliate Rules could result in the Commission imposing civil or criminal penalties. However, the Commission has no power to award pecuniary relief or declare or enforce any principle of law or equity. State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo.App. 1980).

A rule or standard is not objectionable merely because it is stated in general terms and is not susceptible of precise application. Familiar examples of such general standards abound in our law; e.g. negligence, unjust discrimination, unconscionability, fraud. Public Counsel doubts anyone would seriously argue today that these standards are unconstitutionally vague.

Nor do the examples proffered by Appellants demonstrate that the Affiliated Rules are unconstitutionally vague. The standard applicable to this type of attack is “whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” K-Mart Corp. v. St. Louis County, 672 S.W.2d 127, 132 (Mo. App. 1984) (citations omitted). This standard is applied in light of the presumption that the rules are constitutional and the proposition that unless it is “clearly and undoubtedly” violative of a constitutional provision, the rules will not be declared unconstitutional. Id. Neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 995, 957 (Mo. banc 1999) (citation omitted.)

The first example Appellants cite is the term “unfair advantage” found in 4 CSR 240-40.016(K), and 4 CSR 240-80-015(H). (Appellants’ Brief at p. 49). The

definition of “unfair advantage” provided in the rules provides Appellants a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

Indeed, the Public Service Law is littered with terms similar to “unfair advantage.” Section 393.140(5) prevents “unduly preferential” and “unjustly discriminatory” rate treatment. Neither term is defined, however it cannot be seriously argued that the terms “unduly preferential” or “unjustly discriminatory” are unconstitutionally vague. Nor can it seriously be argued that the term “unfair advantage” is unconstitutionally vague.

Next, Appellants assert that the term “as appropriate” contained in section (9) of 4 CSR 240-40.015, and section (9) of 4 CSR 240-80.015 is unconstitutionally vague. (Appellants’ Brief at p. 49). Nothing contained in these provisions renders the rules unconstitutionally vague. These provisions adequately notify Appellants that their employees should receive training regarding compliance with the Affiliate Rules. The language used in 4 CSR 240-40.015(9) and 4 CSR 240-80.015(9) are words of common usage, understandable by persons of normal intelligence. If terms or words used in a statute or rule are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional

requirements as to definiteness and certainty. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980).

Appellants allege that the reference to the Cost Allocation Manual (“CAM”) is unconstitutionally vague because it fails to explain how the CAM is to be filed for Commission approval, what the CAM is to contain or what effect approval of the CAM will have. (Appellants’ Brief at p. 49). 4 CSR 240-40.015(2)(E) provides in pertinent part:

The regulated gas corporation shall include in its annual Cost Allocation Manual (CAM), the criteria, guidelines and procedures it will follow to be in compliance with the rule.

This language adequately notifies Appellants what their obligations are regarding the Cost Allocation Manual. The Commission also noted in its Orders of Rulemaking that “the rule allows a great deal of flexibility to customize CAMs and to obtain variances where circumstances permit.” (L.F. p. 472, 665 and 992). The Commission went on to note “[i]n a ratemaking proceeding the CAM does not bind the regulated utility or the Commission” (L.F. p. 473, 666 and 993).

Appellants complain that 4 CSR 240-40.016(1)(B) does not provide any guidance on what constitutes an “unregulated business operation,” or what

constitutes a “transaction” for purposes of such definition, or on how a transaction can take place within or between a single entity. (Appellants’ Brief at p. 50). The requirements of 4 CSR 240-40.016(1)(B) are not unconstitutionally vague.

The phrase “unregulated business operation” is understandable to a person of ordinary intelligence. It is quite possible that a regulated utility can have an unregulated business operation. For example, Appellant Laclede Gas Company had a gas marketing affiliate known as Laclede Energy Resources (L.F. p. 1040). Although Laclede Gas Company is a regulated utility it conducted unregulated business operations. There is nothing impermissibly vague about the requirements of 4 CSR 240-40.016(1)(B) – when a regulated utility conducts a transaction with its unregulated business operation, e.g. its gas marketing affiliate, it must comply with the requirements of 4 CSR 240-40.016.<sup>9</sup>

Finally, Appellants allege the prescribed treatment of transportation information found in 4 CSR 240-40.016(2)(F), and 4 CSR 240-40.016(2)(G) and 4

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<sup>9</sup> It should be noted that 4 CSR 240-40.016 only applies to regulated gas utilities engaging in marketing affiliate transactions. Such transactions are defined in 4 CSR 240-40.016(I) Marketing affiliate means an affiliated entity which engages in or arranges a commission-related sale of any natural gas service or portion of gas service, to a shipper.

CSR 240-40.016(3)(C) are unconstitutionally vague because they are allegedly inconsistent. There is no inconsistency in these three provisions.

Section (2)(F) contains standards that gas utilities are expected to adhere to with respect to disclosing information that it has received “through its processing of requests for or provision of transportation” **to the gas utility’s marketing affiliate or a non-affiliated marketer**. In other words, if the utility receives, for example, valuable information about likely future conditions in pipeline transportation or gas commodity markets as a result of fulfilling its monopoly role of transporting gas from the city gate to the customers premises, it is prohibited from disclosing this information to its affiliated marketer or to any other marketer.

Section (2)(G) contains standards that gas utilities are expected to adhere to with respect to disclosing information **to a customer of the gas utility’s marketing affiliate**. Appellants’ brief is in error when it states that this provision relates to making “certain information available to an affiliate.” This provision is intended to discourage gas utilities from encouraging customers to use their affiliated gas marketer by offering “information not readily available or generally known to other marketers” as an inducement to using the utility’s marketing affiliate. Since this provision addresses the disclosure of information to customers and (2)(F) and (3)(C) pertain to disclosing information to affiliated or unaffiliated

marketers, there is no possibility of a conflict between this provision and (2)(F) and (3)(C).

Section (3)(C) **permits**, but does not require gas utilities to make certain aggregated (rather than customer specific) customer information to its affiliates. If a gas utility **chooses** to make aggregated information available to its affiliates, then (3)(C) **requires** that this same information be made available to unaffiliated entities on similar terms and conditions. This standard is in the rule in order to prevent gas utilities from offering “preferential service” to its affiliate that would place “the affiliated entity at an unfair advantage over its competitors.” If a utility has a concern about this provision being inconsistent with the prohibitions in (2)(F), then it can be sure that it stays in compliance and avoid any inconsistencies that it perceives to exist by not providing any aggregated customer information to its affiliates.

Appellants’ claims that portions of the Affiliate Rules are void for vagueness should be rejected by this Court. Appellants have not shown that they have standing to attack the Affiliate Rules on constitutional grounds nor have they carried their burden to prove the questioned provisions are clearly and undoubtedly violative of a constitutional provision.

## VII.

**THE COMMISSION’S ORDER OF RULEMAKING REGARDING 4 CSR 240-86.015 (STEAM) IS NOT VOID PURSUANT TO SECTION 536.021.7 RSMo. 2000 IN THAT SECTION 393.290 RSMo. 2000 MAKES SECTION 393.140 AND SECTION 386.250 APPLICABLE TO HEATING COMPANIES, JUST LIKE THE TERM HEATING COMPANY WERE INCLUDED IN THOSE STATUTORY SECTIONS.**

### **A. Standard of Review**

The standard of review is stated under Point III.

### **B. Argument**

Appellant Trigen asserts that the Commission lacks authority to adopt affiliate rules relating to heating companies. Specifically, Trigen asserts that the legal authority for the Affiliate Rule cited by the Commission - §§ 386.250 and 393.140 RSMo. - do not authorize adoptions of rules for heating companies because neither statute specifically mentions “heating companies.” (Appellants’ Brief at p. 54). Trigen’s claim is without merit and ignores Section 393.290 that makes Section 393.140 applicable to heating companies.

Section 393.290 makes Section 393.140 applicable to heating companies:

All provisions of chapters 386, 387, 390, 392 and 393, RSMo., in reference to railroad corporations, street railroad corporations, common carriers, gas corporations, electrical corporations, water corporations, telephone and telegraph corporations, and sewer corporations, in reference to hearings, . . . RSMo., excessive charges for product, service or facilities, proceedings before the commission, and proceedings in any court mentioned in chapters 386, 387, 390, 392 and 393, RSMo., and **in all other sections, paragraphs, provisions and parts of chapters 386, 387, 390, 392 and 393, RSMo., in reference to any other corporations subject to any of the provisions of chapters 386, 387, 390, 392 and 393, RSMo., so far as the same shall be practically, legally or necessarily applicable to heating companies in this state, are hereby made applicable to such heating companies as designated in said chapters, and shall have full application thereto.** (Emphasis added.)

The language of Section 393.290 clearly makes § 393.140 and 386.250 applicable to heating companies, just like the term heating company were included in those sections.

The remainder of Appellant Trigen’s arguments are a rehash of issues already discussed elsewhere in this brief. The Commission has authority to promulgate these rules pursuant to 386.250(7) and subsection (1), (4) and (11) of § 393.140. The Commission followed the appropriate procedural requirements in adopting 4 CSR 240-80.015 (Steam Heating Utilities Affiliate Transactions).

### VIII.

**THE COMMISSION’S DECISION TO UTILIZE “ASYMMETRICAL PRICING” STANDARDS IN 4 CSR 240-20.015 (ELECTRIC UTILITIES): 4 CSR 240-40.015 (GAS UTILITIES) AND; 4 CSR 240-80.015 (STEAM) IS NOT BEYOND THE COMMISSION’S LEGISLATIVE AUTHORITY IN THAT THE COMMISSION’S “ASYMMETRICAL PRICING” STANDARDS DO NOT ADJUDGE ACTS OF A PUBLIC UTILITY TO BE UNREASONABLE, UNJUST, UNJUSTLY DISCRIMINATORY OR UNDULY PREFERENTIAL WITHOUT ADJUDICATION AS REQUIRED BY SECTION 393.140(5) RSMo. 2000. (AMEREN’S POINT RELIED ON II.)**

#### **A. Standard of Review**

The standard of review is stated under Point III.

**B. Argument**

Appellant Ameren at pages 56 through 70 of its brief argues that the Missouri Public Service Commission cannot lawfully adopt asymmetrical pricing standards via a rulemaking. Ameren asserts that the asymmetrical pricing standards found in 4 CSR 240-20.015(2)(A), 4 CSR 240-40.015(2)(A) and 4 CSR 240-80.015(2)(A) “amount to a declaration in advance that expenditures and acts of a public utility not in compliance with the Rules are unlawful.”<sup>10</sup> (Ameren Brief at p. 60) Ameren states

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<sup>10</sup> Asymmetric Pricing – Lower of Cost or Market/Higher of Cost or Market

The lower of cost of market is utilized for transfers from an affiliate to a regulated utility to ensure that the utility is not paying a price more than the regulator would consider fair to ratepayers for the services or products or for the capital asset. By definition, the utility will not pay more than the market price and could pay less than market price if the cost is below market.

The higher of cost or market is utilized for transfers from a regulated utility to an affiliate to ensure that the affiliate is not paying a price less than the regulator would consider fair to ratepayers for the services or products or for the asset. For sales from the utility to an affiliate, the utility will be paid at least its costs and could receive payments in excess of its costs if the market price exceeds its costs.

its belief that Section 393.140(5) does not grant the Commission authority to predetermine, by rule, the treatment to be afforded to particular cost of service items in future rate cases for Missouri utilities. Contrary to Ameren's claims, the asymmetrical pricing standards do not predetermine in advance that expenditures and acts of a public utility not in compliance with 4 CSR 240-20.015(2)(A), 4 CSR 240-40.015(2)(A) and 4 CSR 240-80.015(2)(A) are unlawful.

The asymmetrical pricing standards are the Commission's statement of policy indicating the treatment that the Commission intends to afford a particular cost of service item. This statement of policy does not preclude any party from presenting testimony and argument within the context of a general rate proceeding indicating why the Commission policy should not be followed in a particular case. If a rule or statement of policy is not applied in a manner to preclude testimony and argument on the issue, then the rule has not predetermined the issue, nor has it had the effect of eliminating it as a contested issue from a general rate case.

As Ameren is undoubtedly aware, the Commission has made statements of policy on the treatment it would afford in future rate cases to particular cost of service items, and these statements have not precluded parties from continuing to address the issues in future rate cases. For example, it is April 23, 1986, Order in Re: Kansas City Power & Light, Case No. ER-85-185, 28 Mo.P.S.C. (N.S.) 228,

269, the Commission indicated its policy regarding treatment of advertising expenses in future rate cases. The Commission, however, has not precluded Kansas City Power & Light, nor any other Missouri utility, from addressing that issue in its rate cases. See e.g. In re Laclede Gas Company, GR-99-315 Report and Order of Missouri Public Service Commission dated December 24, 1999, “The Commission finds that the proposal of a cap on advertising expenses set at .5 percent of total utility revenues of Laclede is not supported by competent and substantial evidence . . . The Commission will continue to follow the standards set out in the KCPL case.” Slip. Opin. p. 31.

The Commission has also issued statements of policy in rulemaking proceedings concerning the treatment to afford to particular cost of service items in future rate cases. For example, in its Cold Weather Rule (4 CSR 240-13.055), which is applicable to both gas and electric utilities in Missouri, the Commission indicated in Paragraph (10) that:

- (10) The commission shall recognize and permit recovery of reasonable operating expenses incurred by a utility because of this rule.

Given the above examples of previous Commission rules or policy statements regarding rate case treatment of particular cost of service items, it is

difficult to understand Ameren's current argument that the Commission may not lawfully indicate its policy on transfer pricing. Nowhere do the Rules at issue prevent Ameren or any other Missouri utility from presenting testimony and argument within the context of a general rate proceeding indicating why the Commission policy should not be followed in a particular case. Ameren has not pointed to any part of the Affiliated Rules at issue that would prevent Ameren from making such arguments.

Ameren also attempts to portray the asymmetrical pricing standards as a blanket rule for which absolutely no variances are allowed. This portrayal is incorrect and wholly ignores the variance procedures set out in paragraph (10) of 20.015, 40.015 and 80.015.<sup>11</sup> Paragraph (10) provides as follows in each of the three rules at issue:

(10) Variances.

(A) a variance from the standards in this rule may be obtained by compliance with paragraphs (10)(A)1. or (10)(A)2. The granting of a variance to one regulated gas corporation does not constitute a

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<sup>11</sup> In fact, the Commission has already granted Missouri Public Service Company a waiver from compliance with certain aspects of the Rules. A copy of the Commission's decision in GE-2000-639 is attached as Appendix A.

waiver respecting or otherwise affect the required compliance of any other regulated gas corporation 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 –

1. The regulated gas corporation shall request a variance upon written application in accordance with commission procedures set out in 4 CSR 240-2.060(11); or

2. A regulated gas corporation may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, 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 (10)(A)2.A. and (10)(A)2.B. of this rule –

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 the Office of the Public Counsel within ten (10) days of the 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 party 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 party's ability to challenge the affiliate transaction at the time of the annual CAM filing. At the time of the filing of the regulated gas corporation's annual CAM filing the regulated gas corporation shall provide to the secretary of the commission a listing of all noncomplying 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.

These variance procedures give the regulated utility two opportunities to seek an upfront variance from the standards regarding asymmetrical pricing. The utility can

seek a variance upon written application or can receive a variance when compliance with the standards are not in the best interest of its regulated customers. The existence of the variance procedures allow Ameren or any other Missouri utility the ability to avoid compliance with the standards set-out in the rules regarding asymmetrical standards.

In establishing the asymmetrical pricing standards the Commission has not prejudged whether the particular transaction is or is not unreasonable or otherwise unlawful. The Commission in a general rate case proceeding will determine the appropriate ratemaking treatment to be afforded a utilities transactions with its affiliates. Such a determination is wholly consistent with the Commission statutory authority found in Section 393.140(5).

Ameren also alleges that the asymmetrical pricing standards unlawfully shift the burden of going forward with evidence as to the prudence of utility expenditures to the utility. (Ameren Brief at p. 64). Contrary to Ameren's claim the Affiliate Rules do not unlawfully shift the burden of going forward or the burden of proof.

Section 393.150.2 RSMo. provides the burden of proof at any rate hearing involving a rate sought to be increased is upon the gas corporation or electric corporation. The Affiliate Rules at issue do not in any way alter the fact that the regulated utility has the burden of proof in a rate case proceeding. The statement of

policy regarding asymmetrical pricing does not preclude any party from presenting testimony within the context of a general rate proceeding in directing why the Commission policy should not be followed in a particular case.

Ameren also asserts concerns regarding the asymmetrical pricing standards because it is a registered holding company under the Public Utility Holding Company Act of 1935 (“PUHCA”). (Ameren Brief at p. 67). According to Ameren, Ameren Services provides accounting, financial, statistical, legal, engineering, regulatory compliance, tax, information technology and purchasing services to the regulated utility operations.

Ameren fails to note that generally corporate support functions of the type provided by Ameren Services are not required to comply with the asymmetrical pricing standards set out in the Affiliated Rules, 4 CSR 240-20.015(2)(B) provides:

(B) Except as necessary to provide corporate support functions, the regulated electrical corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.

Corporate support functions are defined in the Affiliate Rules in 4 CSR 240-20.015(D) and 4 CSR 240-40.015(D):

(D) Corporate support means joint corporate oversight, governance, support systems and personnel, involving payroll, shareholder services, financial reporting, human resources, employee records, pension management, legal services, and research and development activities.

Thus, Ameren's concerns that the corporate support functions provided by Ameren Services will somehow run afoul of the asymmetrical pricing rules is unfounded. In fact, the asymmetrical pricing rules specifically exclude corporate support transactions.

## CONCLUSION

For the above reasons, this Court should uphold the Final Orders of Rulemaking by the Commission in 4 CSR 240-20.015 (Electric Utilities Affiliate Transactions); 4 CSR 240-40-015 (Gas Affiliate Transactions); 4 CSR 240-40.016 (Marketing Affiliate Transactions); and 4 CSR 240-80.015 (Steam Heating Utilities Affiliate Transactions).

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## CERTIFICATE OF SERVICE

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**CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)**

I hereby certify that the foregoing Brief of Intervenor-Respondent Office of the Public Counsel complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare the Brief (excepting therefrom the cover, certificate of service, this certificate, and the signature block and the appendix), contains 16,793 words. I hereby further certify that the disk containing this Brief and submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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