

**IN THE SUPREME COURT OF MISSOURI**

State of MISSOURI ex rel. ATMOS )  
ENERGY CORPORATION, et al., )  
Appellants, )  
v. )  
PUBLIC SERVICE COMMISSION of )  
the STATE of MISSOURI, et al., )  
Respondents, )  
and )  
AMEREN CORPORATION, and )  
UNION ELECTRIC CO., d/ba/ )  
AMERENUE, )  
Appellants, )  
v. )  
PUBLIC SERVICE COMMISSION of )  
the STATE of MISSOURI, et al., )  
Respondents. )

Case No. SC84344

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Appeal from the  
Circuit Court of Cole County, Missouri  
19<sup>th</sup> Judicial Circuit

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**SUBSTITUTE BRIEF OF RESPONDENT  
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI**

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## **JURISDICTIONAL STATEMENT**

Respondent, Public Service Commission of Missouri concurs with Appellants' statement of jurisdiction.

## STATEMENT OF FACTS

Respondent Public Service Commission of Missouri generally agrees with the Statement of Facts by Appellant Ameren Corporation and Union Electric Company d/b/a AmerenUE and adopts its Statement of Facts.

### **Please Note**

Respondent is replying to two briefs, so the order of the Commission's Points Relied On does not follow either brief. Immediately following each of the Commission's Points Relied On is a note that indicates the Appellants Point to which it responds.

Atmos Energy Corp., Missouri Gas Energy, Laclede Gas Company and Trigen-Kansas City Energy Corp. (Trigen) will be referred to as the Atmos Appellants, except where Trigen makes a separate argument. Ameren Corporation and Union Electric d/b/a AmerenUE will be referred to as Ameren.

## POINTS RELIED ON

### POINT I

**The Commission properly promulgated the Rules and did not deny Appellants procedural due process required by constitution or statute because there was no protected property interest involved, the Commission provided notice in the Missouri Register, two rounds of comments and public hearings with sworn testimony, in that Chapter 536 prescribes rulemaking by notice and comment procedures with no requirement for a hearing, and the Commission's enabling statutes in Chapter 386 and Chapter 393 do not require hearings before promulgation of this type of rule.**

**(NOTE: This Point responds to Atmos Appellant's Point I and Ameren's Point III.)**

### Cases

*Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197-98 (Mo. banc 1972)

*State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 165 (Mo. 1985)

*De Paul Hosp. Sch. of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo.App. 1976)

*NME Hospitals, Inc. v. Department of Soc. Servs.*, 850 S.W.2d 71 (Mo. 1993)

### Statutes

Section 386.610

Section 536.021

Section 536.010

**Other Authorities**

2 Am.Jur.2d, *Administrative Law* § 231 (1994)

Kenneth Culp Davis, *Administrative Law Treatise*, at §10.5

Black's Law Dictionary, 555 (6<sup>th</sup> ed. 1990)

**POINT II**

**The Commission did not exceed its subject matter jurisdiction in promulgating these Rules and the Rules do not conflict with Section 386.030 or Section 393.140(12) because the Commission is regulating public utilities and is not regulating affiliates in that the Commission has authority under Section 393.140(12) to determine if affiliates are kept substantially separate and to fairly apportion earnings, debts and expenses to be borne by the regulated entity .**

**(Responds to Atmos Appellants Point V)**

**Cases**

*General Telephone*, 537 S.W.2d at 659

*State ex rel. Associated Natl. Gas Co. v. Public Serv. Com'n* 706 S.W.2d 870 (Mo. App. 1985)

*State ex rel. Public Service Comm'n v. Bonacker*, 906 S.W.2d 896, 900 (Mo.App. 1995)

*State ex rel. Dyer v. Public Service Comm'n*, 341 S.W.2d 795, 801 (Mo.1960) *cert. denied*, 366 U.S. 924 (1961)

## **Statutes**

Section 393.130

Section 393.140

## **POINT III**

**The Commission properly promulgated the Rules because it fully complied with the requirements of Section 536.021.2 and Section 536.021.6(4) in that the Commission provided the reasons for the Proposed Rules in the Purpose section and provided concise summaries of the comments received as well as explanations of its findings and the reasons comments did or did not result in changes to the proposed in its Final Order of Rulemaking.**

**Responds to Atmos Appellants Point II.**

## **Cases**

*City of Springfield v. Public Service Comm'n*, 812 S.W.2d 827 (Mo. App 1991) *Kelley v.*

*Iowa Dept. of Social Serv.*, 197 N.W.2d 192, 201 (Ia. 1972)

*NME Hospitals, Inc. v. Dept. of Social Serv.*, 850 S.W.2d 71, 74 (Mo. 1993)

## ***Other Authorities***

*Administrative Law* § 304 at 132-133

**25 Mo. Reg. 55, 59,64, 69 (Jan. 3, 2000)**

## **POINT IV**

**The Rules are not void for failure to comply with the requirements of § 536.016 because § 536.016 is an amendatory act that applies to the way state agencies propose rules and does not apply retrospectively in that amendatory acts do not apply to steps taken prior to the effective date of the amendment, the Commission proposed these Rules four (4) months prior to the effective date of the amendatory act, and review of the amendment reveals legislative intent that it not be retrospective.**

### **Responds to Atmos Appellant's Point III.**

#### **Cases**

*State v. Thomaston*, 726 S.W.2d 448 (Mo.App. 1987)

*Pierce v. State, Dept. of Social Serv.*, 909 S.W.2d 814 823 (Mo.App. 1998)

*Jones by Williams v. Missouri Dept. of Social Serv.*, 966 S.W.2d 324 (Mo.App. 1998)

*Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. 1993)

#### **Statutes**

Section 536.016

Section 536.021

*Other Authorities*

24 Mo.Reg.1340-1345

## **POINT V**

**The Commission properly promulgated these Rules because it was not required by Section 393.140(5) to have an adjudicatory hearing prior to promulgating the Rules, in that Section 393.140(5) was not the source of statutory authority for promulgation of the Rules because that section applies to rates and the Commission has not affected rates through the Rules, the Commission has not prejudged or disallowed utility expenses without a hearing, and because the Rules are not self-enforcing and the Rules allow for variances.**

**(Responds to Atmos Appellant's Point IV, Atmos Point VII where the issue was repeated and to Ameren Point II)**

### **Cases**

*McBride & Son Builders, Inc. v. Union Elec. Co.*, 526 S.W.2d 310 (Mo.1975)

*Laclede Gas Co. v. Public Service Com'n*, 600 S.W.2d 222, 228(Mo.App. 1980)

*Fabick and Co., v. Schafner*, 492 S.W.2d 737 (1973)

*Morton v. Missouri Air Cons. Com'n*, 944 S.W.2d 231, 238 (Mo.App. 1997)

### **Statutes**

Section 393.150

### **Other Authorities**

4 CSR 20.015(10)2

4 CSR 240-40.015 (2)(D)

4 CSR 240-40(2)(A) 1. and 2

4 CSR 240-40.015(10)

## **POINT VI**

**The Rules are not unconstitutionally vague and the issue of the constitutionality of the Rules is not ripe for determination because Appellants lack standing to challenge the constitutionality of the Rules in that they cannot claim any threatened immediacy of application to their detriment and the Rules are not so vague that those subject to them cannot understand what is required.**

**(Responds to Atmos Appellants' Point VI.)**

### **Cases**

*K-Mart Corp. v. St. Louis Co.*, 672 S.W.2d 127, 132 (Mo.App. 1984)

*West County Care Center, Inc. v. Missouri Health Facilities Rev. Comm.*, 773 S.W.2d 474, 477 (Mo.App. 1989)

*City of Festus v. Warner*, 656 S.W.2d 286 (Mo.App. 1983)

*State ex rel. City of Springfield v. Public Serv. Comm'n*, 812 S.W. 2d 827 (Mo.App. 1991)

### **Other Authorities**

4 CSR 240-30.015 (2)(D)

## **POINT VII**

**The Commission gave adequate notice of the legal authority under which it was proceeding in its Notice of Proposed Rulemaking because the Commission was not required to list the statutory section that granted the Commission jurisdiction over heating companies in that Section 393.290 makes Sections 386.250 and 393.140**

**applicable to heating companies just as if the term heating company were included in those sections.**

**Responds to Trigen's argument at Atmos Appellant's Point VII.**

**Cases**

*Corvera Abatement Tech., Inc. v. Air Cons. Comm'n*, 973 S.W.2d 851, 855 (Mo. 1998)

*NME Hospitals, Inc. v. Department of Social Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993)

**POINT VIII**

**The Western District erred in its order because it failed to recognize the various statutory grants of authority to the Commission to promulgate Rules in that § 386.250(6) is not the only grant of rulemaking authority to the Commission.**

**Responds to Ameren I and Atmos Appellants' VIII.**

**Cases**

*EBG Health Care III, Inc., v. Missouri Facilities Review Comm'n*, 12 S.W.3d 354, 360 (Mo. App. 2000)

*Psychcare Management, Inc. v. Department of Soc. Servs.*, 980 S.W.2d 311, 313-14 (Mo. banc 1998)

*Pen-Yan Inv. Inc., v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 304 (Mo.App. 1997)

*State Dept. of Public Safety v. Murr*, 11 S.W.3d 91, 96 (Mo.App. 2000)

**Statutes**

Section 393.150.2

## ARGUMENT

### POINT I

The Commission properly promulgated the Rules and did not deny Appellants procedural due process required by constitution or statute because there was no protected property interest involved, the Commission provided notice in the *Missouri Register*, two rounds of comments and public hearings with sworn testimony, in that Chapter 536 prescribes rulemaking by notice and comment procedures with no requirement for a hearing, and the Commission's enabling statutes in Chapter 386 and Chapter 393 do not require hearings before promulgation of this type of rule.

(NOTE: This Point responds to Atmos Appellant's Point I and Ameren's Point III.)

#### A. Standard of Review

The court is reviewing Final Orders of Rulemaking, promulgated by a Commission engaged in its quasi-legislative, policy-making function, not its quasi-judicial, adjudicative function. In reviewing orders of the Commission, the Court uses a two-pronged test. First, the Court determines if the order is lawful. In determining whether administrative agency rules are lawful, the Court examines whether the agency had the statutory authority to act as it did.<sup>1</sup> The Commission has only the authority that is

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<sup>1</sup> *State ex. rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 217 (Mo.App. 1973).

granted to it by statute, and that it may promulgate rules only to the extent and within the delegated authority granted to it by statute.<sup>2</sup> This delegated authority, however, may either be expressly or impliedly conferred in the statute.<sup>3</sup>

Accordingly, the Court determines if the Rules are within the jurisdiction granted to the Commission by the Legislature in the enabling statutes.<sup>4</sup> Whether the Commission had the statutory authority to act as it did ultimately is for the independent judgment of the review court and will be corrected where erroneous.<sup>5</sup> The question for the Court is then whether the Commission is authorized by either express authority or by implied authority to promulgate the Rules.

When an agency's rules and regulations promulgated under an act are challenged, however, they will be sustained unless they are “unreasonable and plainly inconsistent

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<sup>2</sup> *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 304 (Mo.App. 1997)99999.

<sup>3</sup> *Id.*

<sup>4</sup> *Missourians for Honest Elections v. Missouri Elections Comm’n*, 536 S.W. 2d 766, 771 (Mo.App. 1976).

<sup>5</sup> *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. banc 1972).

with the act.”<sup>6</sup> Rules and regulations are not to be overturned except for weighty reasons.<sup>7</sup>

If the Court determines that the Rules are lawful, then it must determine if the Rules are reasonable. The standard for determining reasonableness cannot be the same as that for contested cases, because agencies promulgate most administrative rules using notice and comment procedures. As this system does not generate an evidentiary record, the issue of whether there is sufficient competent and substantial evidence on the record to support the agency rule does not apply. Accordingly, an order or rulemaking is “considered . . . unreasonable if it bears no substantial relationship to the public health, safety, morals, or general welfare.”<sup>8</sup> The standard for determination of reasonableness of administrative rules is addressed in 2 Am.Jur.2d § 231,<sup>9</sup> which says that reasonableness of a rule is judged by whether it is reasonably related to the statutory scheme (in this case the Public Service Commission Act (PSC Act)):

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<sup>6</sup> *Termini v. Missouri Gaming Comm'n*, 921 S.W.2d 159, 161 (Mo.App.1996) (citations omitted).

<sup>7</sup> *Pen-Yan Inv. v. Boyd Kansas City, Inc.*, 925 S.W.2d 299, 303 (Mo.App. 1997).

<sup>8</sup> *Heidrich v. City of Lee's Summit*, 26 S.W.3d 179, 184 (Mo.App. 2000)(citations omitted).

<sup>9</sup> 2 Am.Jur.2d, *Administrative Law* § 231 (1994).

The requirement of reasonableness of an administrative regulation means no more and no less than that the regulation must be based upon reasonable grounds--that is, it must be supported by good reasons. The reasonableness of rules and regulations, and exemptions therein, is determined by their relationship to the statutory scheme they are designed to supplement, protect, and enforce. Reasonableness is determined in view of the stated objectives of the legislation, and if a regulation is within the purpose of the statute it is reasonable.

Whether a regulation is reasonable depends on the character or nature of the condition to be met or overcome, and the nature of the subject matter of a rule may affect its reasonableness.<sup>10</sup>

This court has stated the issue more succinctly saying: “[t]he court will review [rules] in light of the evil they seek to cure.”<sup>11</sup>

In determining whether the Rules are reasonable and lawful the court may consider the nature of the enabling statute. The PSC Act is a remedial statute designed to protect the public interest. As this Court has noted, “the Legislature has shown concern that utilities which return a profit to shareholders, if left unregulated, would be able to

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<sup>10</sup> 2 Am.Jur.2d *Administrative Law* § 231.

<sup>11</sup> *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197-98 (Mo. banc 1972) (citations omitted).

exact unconscionable charges from the public, with no competitive pressure to inhibit rate increases. Rates charged by investor-owned utilities, in contrast to charges for other products and services, have long been subject to regulation by the Missouri Public Service Commission.”<sup>12</sup> As a remedial statute<sup>13</sup> the PSC Act is read under “the long standing doctrine that the statute is to be liberally construed for the public’s, ergo the consumer’s, protection.”<sup>14</sup> Specifically addressing the PSC Act, in *De Paul Hospital*<sup>15</sup> the court recognized the PSC Law is referable to the police power of the state:

[t]he Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to, the police power of the state, and under

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<sup>12</sup> *State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 165 (Mo. 1985).

<sup>13</sup> Section 386.610 (“The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities”).

<sup>14</sup> *De Paul Hosp. Sch. of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo.App. 1976)(citations omitted).

**Please note** that all references are to MO. REV. STAT. 2000 unless otherwise noted.

<sup>15</sup> *De Paul Hosp. Sch. of Nursing*, 539 S.W.2d 542, 548 (Mo.App. 1976)(citations omitted).

well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. *State ex rel. Laundry, Inc. v. Public Service Commission*, 327 Mo. 93, 34 S.W.2d 37, 42--3(2, 3) (Mo.1931). In its broadest aspects, the general purpose of such regulatory legislation is to substitute regulated monopoly for destructive competition. But the dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental.<sup>16</sup>

Missouri courts have long recognized that, in the PSC Act, the Legislature delegates a large area of authority and discretion to the Commission and “many of its decisions necessarily rest largely in the exercise of a sound judgment.”<sup>17</sup> Any uncertainty about the reasonableness of a [rule] must be resolved in the Commission’s favor.<sup>18</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *State ex rel. Dyer v. Public Serv. Comm’n*, 341 S.W.2d 795, 802 (Mo. 1960), *cert. denied*, 366 U.S. 924, 81 S.Ct. 1351 (1961).

<sup>18</sup> *Heidrich v. City of Lee’s Summit*, 26 S.W.3d 179, 184 (Mo.App. 2000).

## **B. Argument**

### **Introduction**

The Commission was created in 1913 to protect consumers from destructive competition;<sup>19</sup> the Commission was created to protect the public interest and assure that captive consumers of monopoly utilities receive safe and reliable service at only just and reasonable rates. In delegating broad authority to the Commission to regulate public utilities, the Legislature intends the duty to extend to all “possible sources of corporate malfeasance.”<sup>20</sup>

Affiliate transactions are less than arms-length dealings that may result in consumers paying higher than reasonable rates. The Commission promulgated these Rules because, as a Texas court explained, “affiliate transactions are subject to heightened scrutiny because when a utility and its suppliers are both owned and controlled by the same . . . company, the safeguards provided by arms-length bargaining are absent and ever present is the danger that the utility will be charged exorbitant prices which will, by inclusion in its operating costs, become the predicate for excessive rates.”<sup>21</sup> The Commission has not only the authority and but the duty to supervise such

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<sup>19</sup> *De Paul Hosp. Sch. of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo.App. 1976).

<sup>20</sup> *State ex rel. Public Service Com'n v. Bonacker*, 906 S.W.2d 896, 900 (Mo.App. 1995)

<sup>21</sup> *City of Amarillo v. RR Commission of Texas*, 894 S.W2d 491, 498(Tex.App. 1995).

transactions. It has done so, in accord with its statutory mandate, by properly promulgating the Affiliate Transactions Rules.

Appellants are claiming that the Commission did not provide them with adequate procedural due process or the process required by the PSC law. The first issue then is what process is due?

**1. Appellants failed to preserve the issue of denial of procedural due process.**

Appellants claim that they were deprived of required procedural due process such as the right of cross-examination and because of that the Rules are void. (Atmos Br. p. 31; Ameren Br. p. 74) To the extent that Appellants claim that they were denied procedural due process guaranteed by the Constitution, they have failed to preserve this issue for appeal because they have failed to call to the Commission's, or the Court's attention, the specific provisions of the Constitution that they claim were violated.<sup>22</sup> (L.F. p. 450; pp.467-8; pp. 654-5) Additionally there are no federal constitutional guarantees of due process for legislative processes.

**2. There are no constitutional requirements of due process for legislative acts.**

Appellant's claim that they were denied due process because they did not get contested case procedures (Atmos Br. p. 31; Ameren Br. p. 74) fails because adjudicative processes do not apply to rulemaking. The Federal Constitution does not require any

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<sup>22</sup> *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 58 (Mo.App. 1990) *citing* *Perez v. Webb*, 533 S.W.2d 650, 655 (Mo.App.1976).

procedural due process for legislative activity as noted in 1915, when the Supreme Court explained that the public has no federal constitutional rights to the procedural due process of notice and hearing when the Legislature acts because it is impractical in a complex society:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. . . . General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.<sup>23</sup>

Professor Alfred S. Neely notes that, like the Federal Constitution, the Missouri Constitution contains no general provisions requiring notice and comment in rulemaking. He notes that the “Missouri judiciary has not been sympathetic to pleas for the constitutional protections of due process when agencies engage in rulemaking.”<sup>24</sup> This Court has said that participants in the process are entitled only to the process that is due.<sup>25</sup>

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<sup>23</sup> *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915).

<sup>24</sup> Alfred S. Neely, 20 *Missouri Practice* at §6.12 (1995) *citing* *NCR Corp. v. State Tax Comm’n*, 637 S.W.2d 44, 47 (Mo.App. 1982).

<sup>25</sup> *Cade v. State*, 990 S.W.2d 32, 34 (Mo.App. 1999).

Appellants' claims of deprivations of "fundamental" due process in this rulemaking because they did not receive adjudicative procedures will not withstand the scrutiny of this Court. (Atmos Br. at 26-31; Ameren Br. at 71-73.)

The process requirements for rulemaking in Missouri are found, not in the Constitution, but in Chapter 536 of the statutes.

### **3. Chapter 536 requirements.**

The process that is due is found in Missouri statutes at Chapter 536. The process requirements for promulgating rules, as set forth in Chapter 536, are notice and comment procedures.<sup>26</sup> "The principal mechanism for public participation in the rulemaking process of Missouri state agencies is the filing of written comments in response to agency proposals."<sup>27</sup> In fact "[m]ost rulemaking avoids requiring any type of hearing"<sup>28</sup> and, in fact, Chapter 536 does not require more than notice and an opportunity for written comments by interested persons.<sup>29</sup> A state administrative agency may provide a hearing but "no such hearing shall be necessary unless otherwise required by law."<sup>30</sup>

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<sup>26</sup> Section 536.021.2.

<sup>27</sup> Alfred S. Neely, 20 *Missouri Practice*, § 6.37 (1995)

<sup>28</sup> *McBride & Son Builders v. Union Elec. Co.*, 526 S.W.2d 310 (Mo.1975).

<sup>29</sup> Section 536.021.3.

<sup>30</sup> Section 536.021.3.

Additionally in Chapter 536, a rule is defined as an agency’s statement of general applicability that implements, interprets, or prescribes law or policy . . . .<sup>31</sup> The term “rule,” as used in Chapter 536, does not include a determination, decision, or order in a contested case.<sup>32</sup> Indeed, the definition of a rule found in § 536.010(4) specifically excludes a decision or determination in a contested case proceeding. A rule, by statutory definition, cannot be a final decision in a contested case.<sup>33</sup>

The reason for that prohibition is the fundamental difference in the processes. Rulemaking has broad applicability so the public is invited to participate. All interested persons are invited to comment and by that method induce modification.<sup>34</sup> To overlay contested case procedures would act counter to Legislative intent that the public participate because contested case procedures are not designed to encourage public participation.<sup>35</sup>

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<sup>31</sup> Section 536.010(4).

<sup>32</sup> Section 536.010(4)(d).

<sup>33</sup> Section 536.010(4).

<sup>34</sup> *NME Hospitals., Inc. v. Department of Soc. Servs.*, 850 S.W.2d 71(Mo. 1993) (the very 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.)

<sup>35</sup> *Friends of Agric. for Reform of Mo. Envtl. Regs. v. Zimmerman*, 51 S.W.3d 64, 76 (Mo.App. 2001)(stating that the reason for having notice and comment requirements for

*Footnote continued on next page*

In contrast to a rulemaking, the Missouri Administrative Procedure Act (MAPA)<sup>36</sup> defines a “contested case” 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.<sup>37</sup> In *Moseley*<sup>38</sup> the court interpreted the statute explaining that a “‘contested case’ within the meaning of the Act does not mean that every case in which there may be a contest about ‘rights, duties or privileges’ but, instead, one in which the contest is required by law to be decided in a hearing before an administrative agency of which a record must be made unless waived.” Section 536.060.”<sup>39</sup> Nor does the fact that a rulemaking may be controversial, or that the participants in the hearings may actively oppose the rule, transform a rulemaking into an adversarial process. The Eastern District noted that “[o]ur

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rulemaking is to provide both supporters and opponents with the opportunity for comment . . . and to encourage the free exchange of ideas so that the agency may become well informed on the issues . . . rulemaking is founded upon “public input and participation to produce the best possible rule.”

<sup>36</sup> Section 536.018 *et seq.*

<sup>37</sup> *Moseley v. Members of Civil Serv. Bd., City of Berkeley*, 23 S.W.3d 855 (Mo. App. 2000).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 858 (emphasis added).

Supreme Court has said that not every case in which there is a contest about rights, duties or privileges is a 'contested case,' even though a hearing may be held."<sup>40</sup>

The final order will be a rule of general applicability and does not determine the rights of specific parties. "A fundamental and common dimension of a rule, no matter what its more specific nature is, its 'general applicability.' Typically a rule applies to a number of persons or classes of persons, although it need not apply equally or at all to all members of the public."<sup>41</sup> The Affiliate Transactions Rules apply prospectively to all present and future public utilities in the state, not to specific parties as Appellants erroneously suggest. (Atmos Br. p. 28; Ameren Br. p. 67)

Even if the Commission were required by some section to have a hearing, there is no requirement in any of the statutory provisions asserted by Appellants for an adjudicatory hearing.

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<sup>40</sup> *State ex rel. Mitchell v. Dalton*, 831 S.W.2d 942, (Mo. App. 1992) *e.g.*, *City of Richmond Heights v. Bd. of Equalization*, 586 S.W.2d 338, 342 (Mo. banc 1979).

Moreover, in using the term "hearing" in § 536.100 the General Assembly contemplated an "adversary hearing," *Id.* at 342-43, and, thus, the element of adversarial parties is essential to the definition of a "contested case." *St. Louis County v. State Tax Com'n*, 608 S.W.2d 413, 414 (Mo. banc 1980).

<sup>41</sup> Alfred S. Neely, 20 *Missouri Practice*, §5.10; *see also NME Hosps. v. Dept of Social Serv.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

#### 4. Chapter 386 rulemaking requirements.

Chapter 536 provides for rulemaking by notice and comment, and does not require any hearings beyond those required by other statutes.<sup>42</sup> The Commission's enabling statutes do not require hearings except for some specific types of rules<sup>43</sup> and there is no requirement for a hearing for the type of rules the Commission promulgated in this case. The Commission did provide adequate due process in this legislative policy-making process, when it published notice in the Missouri Register, received both initial and reply comments, and held three days of hearings at which the utilities and others gave sworn testimony concerning the Proposed Rules.<sup>44</sup>

This Court has quoted with approval Prof. Kenneth C. Davis's *Administrative Law Treatise* that "[m]ost general administrative procedure legislation avoids the requirement of hearings for rulemaking."<sup>45</sup> The PSC law has sections that require hearings prior to

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<sup>42</sup> Section 536.021.3.

<sup>43</sup> For example § 386.250(6)(requires a hearing concerning rules addressing conditions of rendering public utility service); § 386.310 (rules to promote safety and health of utility employees and the public); § 386.300 (rules establishing charges); §386.410 (procedural rules for hearings)

<sup>44</sup> Tr. Vol. 1 pp. 13-15; Tr. Vol 3 p. 8; Tr. Vol. 3 p. 16; Tr. Vol. 3 at 32.

<sup>45</sup> *McBride & Son Builders, Inc. v. Union Elec. Co.*, 526 S.W.2d 310 (Mo. 1975).

Kenneth C. Davis, *Administrative Law Treatise*, § 604 (Brown & Co, 2nd ed. 1994).

promulgating rules, and sections that do not. Section 386.250(7) as the Commission's broad enabling statute does not. Appellants wrongly postulate that the Commission acted under § 386.250(6). (Atmos Br. Point I; Ameren Br. Point II).

The Commission proceeded under § 386.250(7), its broad enabling statute and not under § 386.250(6) because that section applies only to rules concerning conditions of rendering public utility service, billing and disconnection of service. The type of rule governed by subsection (6) prescribes how a utility treats its end-use customers. The Affiliate Transactions Rules, in contrast, address how a utility deals with bookkeeping accounting and other corporate matters – how a regulated utility conducts business with the non-regulated businesses it controls.

Even though the Commission did not act under subsection (6), it provided ample procedure to satisfy the requirements of §386.250(6) because the Commission provided three (3) days of hearings and took evidence in the form of sworn testimony about the reasonableness of the Rules. Record - Transcript of Proceedings

The Commission did not promulgate these Rules under § 386.250(6) but instead acted under the broad grant of authority to carry out the purpose of the PSC Act contained in § 386.250(7).

##### **5. Chapter 393 requirements.**

Similarly, the sub-sections in § 393.140 under which the Commission acted required did not require hearings. Appellants claim that the Commission promulgated

these Rules under § 393.140 (5). The Supreme Court has already addressed this argument in *McBride*.<sup>46</sup> The *McBride* Court held that § 393.140 (5) generally applies to the setting of rates, while subsection 11 generally applies to rules. This issue was repeated by Appellants in their POINT IV, and POINT VII and the issue of the application of §393.140 (5) to the Rules is addressed in full at Respondent's POINT V.

**6. Even if a hearing were required the Commission provided hearings.**

As noted above, the sections under which the Commission promulgated the Rules required no hearing. In other sections of Chapters 386 and 393, the Legislature has required the Commission, when promulgating certain types of rules, to have a hearing and take evidence as to the reasonableness of the agency action. The section on which Appellants rely, § 386.250(6) refers to a legislative-type hearing. (Atmos Br. Point I; Ameren Br. p. 70)

As Professor Neely<sup>47</sup> points out in *Missouri Practice and Procedure*, many statutes require that a hearing be held before a state agency may engage in rulemaking.<sup>48</sup> That does not mean an evidentiary hearing as would be conducted in an adjudication.<sup>49</sup> Professor Neely notes:

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<sup>46</sup> *Mc Bride & Son Builders v. Union Elec. Co.*, 526 S.W.2d 310 (Mo. 1975).

<sup>47</sup> Alfred S. Neely, 20 *Missouri Practice*, § 6.39 (1995)

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

[t]hat such statutes 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. 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. [T]he agency 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.(emphasis added).

That the Commission provided all of the statutory process that was required is demonstrated by reading §386.250(6) as a whole. “The primary rule of statutory construction is to determine the intent of the Legislature from the language used, and to give effect to that intent.”<sup>50</sup> Provisions of a section must be read together and all provisions must be harmonized.<sup>51</sup> To determine the intent of the Legislature, the Court

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<sup>50</sup> *Lincoln Co. Stone Co., Inc. v. Koenig*, 21 S.W.3d 142, 146 (Mo.App. 2000).

<sup>51</sup> *Id.*

examines the “context in which the words are used, and the problem the Legislature sought to address with the statute's enactment.”<sup>52</sup>

Section 386.250(6) requires that the “proposed rules shall be filed with the secretary of state and published in the *Missouri Register* as provided in chapter 536 and a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule.” The Legislature specifically mentions the rulemaking requirements of: (1) filing with the secretary of state and (2) publication in the Missouri Register, then immediately states that a hearing shall be held. Certainly, if by use of the term “hearing” *in this context*, the Legislature had intended to require more than a legislative-type hearing, it would have stated that intent unmistakably. If after specifically mentioning Chapter 536 rulemaking requirements, the Legislature had intended to require adjudicative procedures it would have stated so unambiguously.

In fact, the Commission did hold hearings, three days of hearings at which evidence of reasonableness was taken and in which all Appellants participated. (*see* Transcript of proceedings). The Commission heard oral argument by the attorneys who wished to speak (Tr. p. 11-16) and took evidence by taking sworn testimony from affected parties. Counsel for Laclede and Missouri Gas Energy in this appeal even stated that he objected to swearing of witnesses at the hearings because that constituted the taking of evidence. (Tr. p. 15, lines 21-23).

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<sup>52</sup> *Id.*

Appellants argue that in using the term “reasonableness” in § 386.250(6), the Legislature intended to require contested case procedures because the “reasonableness” standard for judicial review is whether there is sufficient competent and substantial evidence on the record as a whole. (Atmos Br. p. 24-25) This creates a somewhat circular argument – it suggests that when the Commission takes evidence as to reasonableness of a rule, it would take evidence as to whether there was sufficient competent and substantial evidence on the record as a whole.

When the Court construes this statute to determine the Legislative intent it will become apparent that the Commission did not promulgate the Rules under this Section 386.250(6) and, even if the Court were to determine that this section applies to this rulemaking, the Commission satisfied the process intended by the Legislature.

As a final point, the Commission directs the Court’s attention to § 386.410. 1. that states: (1) “a hearing before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission. And in . . . hearings the commission shall not be bound by the technical rules of evidence.” The statute continues in sub-section 2 that nothing about the manner of taking testimony shall invalidate a rule: “No formality in any proceeding nor in the manner of taking testimony before the commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission.”

## **7. Evidence argument.**

Appellants claim because § 386.250(6) says that affected parties may present “evidence” that the Commission is required to hold an “evidentiary hearing.” (Atmos Br.

25; Ameren Br. p. 70) The Court will note that Appellants use the term “evidentiary hearing” loosely and that the phrase never appears in the statutory sections relied upon by Appellants.

Atmos Appellants rely on trial-based definitions of evidence. Appellants suggest that “evidence” is limited to species of proof “presented at the trial of an issue.” (Atmos Br. at 24-25). This Court will immediately recognize the fallacy of this argument and the consequences if this Court were to agree with the radical assertion that evidence can only exist if it is tested by cross-examination. Atmos Appellants specifically assert that evidence “by definition can only exist in those circumstances where the procedural safeguards designed to test the competence and reliability of a party’s contention or other species of proof have been followed.” (Atmos Br. p. 24).

The *Waltner*<sup>53</sup> case, cited by Atmos Appellants, of course, does not stand for the extraordinary assertion that evidence can only exist where procedural safeguards have been followed, nor does research indicate any other case stands for that extreme notion.

Blacks Law Dictionary defines evidence as “all the means by which any alleged matter of fact . . . is established or disproved.”<sup>54</sup> There is no requirement that the “means” be tested by cross-examination to be evidence. Evidence is evidence whether or not it is presented at trial. The type of evidence necessary to determine Legislative facts

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<sup>53</sup> *State ex rel. Kansas City Public Service Co. v. Waltner*, 169 S.W.2d 697 (Mo. 1943).

<sup>54</sup> Black’s Law Dictionary, 555 (6<sup>th</sup> ed. 1990).

differs from that necessary to prove adjudicatory facts. “Rules of evidence are designed to govern proof of adjudicative facts, They have no application to agency or judicial determinations of legislative facts.<sup>55</sup> The process is not served by applying adjudicative processes to rulemaking because policy making requires consideration of many facts related to a group and not individual facts related to a specific party.<sup>56</sup>

Appellants’ attempts to apply adjudicatory processes to rulemaking must fail because of the fundamental differences between quasi-legislative and quasi-judicial processes and the results of those processes.

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<sup>55</sup> Kenneth Culp Davis, *Administrative Law Treatise*, at §10.5. Proof of Legislative Facts (Brown & Co, 3<sup>rd</sup> ed. 2002) (citation omitted).

<sup>56</sup> *Id.*

## **POINT II**

**The Commission did not exceed its subject matter jurisdiction in promulgating these Rules and the Rules do not conflict with Section 386.030 or Section 393.140(12) because the Commission is regulating public utilities and is not regulating affiliates in that the Commission has authority under Section 393.140(12) to determine if affiliates are kept substantially separate and to fairly apportion earnings, debts and expenses to be borne by the regulated entity .**

*(Responds to Atmos Appellants Point V)*

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

The Standard of review is discussed in Point I above.

### **B. Argument**

Cross-subsidy between the regulated business of a utility and its non-regulated business occurs when a non-regulated business uses assets of the regulated business. The regulatory concern arises when captive customers of the utility pay more for service because of these transactions. The Commission has broad power to assure that a utility provides safe and adequate service at just and reasonable rates and no more,<sup>57</sup> and to supervise utilities in the public interest.<sup>58</sup>

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<sup>57</sup> Section 393.130.1.

<sup>58</sup> Section 393.140(1).

The Commission promulgated these Rules now because the traditional monopoly utility structure is changing. Regulated utilities are expanding into non-regulated areas and utilities have an incentive to shift costs to the regulated operations where recovery of those costs is more certain and predictable.<sup>59</sup> In addition, shifting costs enhances the profits of the non-regulated entity. The cross-subsidization problem has been aptly described by the court in *U. S. v. Western Electric*:

As long as a [public utility] is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to 'milk' the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures . . . . To the extent that a [public utility] use[s] the same facilities, equipment, and personnel to serve both its regulated and its unregulated activities, it [has] the ability to over allocate the costs assigned to the [regulated business] in order to maximize the amount that would be passed on to the rate payers (who have no choice but to pay).<sup>60</sup>

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<sup>59</sup> *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.D.C. 1990).

<sup>60</sup> *United States v. Western Elec. Co., Inc.*, 592 F. Supp. 846, 853 (D.D.C.1984).

## 1. The Commission has not exceeded its jurisdiction.

“The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance.”<sup>61</sup> By seeking to regulate affiliate transactions of public utilities, the Commission seeks to avoid cross-subsidization of non-regulated activities that may result in customers paying for service at more than the proper rate.<sup>62</sup>

Section 386.040 states that the Public Service Commission shall be vested with all powers necessary to carry out the purposes of the Act creating the Commission. Section 386.250(7) states that the Commission’s power extends either expressly or impliedly<sup>63</sup> to all matters necessary or proper to carry out all purposes of the Public Service Commission Law. Professor Neely notes in *Missouri Practice* that even though the grant of authority may be broad it is, nonetheless an express grant of authority.<sup>64</sup>

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<sup>61</sup> *State ex rel. Public Service Comm'n v. Bonacker*, 906 S.W.2d 896, 900 (Mo.App. 1995).

<sup>62</sup> Section 393.130.

<sup>63</sup> *State ex rel. Ferguson v. Donnell*, 163 S.W.2d 940, 944 (Mo. 1942).

<sup>64</sup> Alfred S. Neely, 20 *Missouri Practice* § 6.01 (Notwithstanding the latitude afforded by such grants, they are nevertheless express. If the agency’s rule based on this power is reasonable in relation to the legislative objectives . . . the courts generally will respect and support the rule).

Event though these cases involve adjudications, the Commission’s authority to examine transactions when a utility transacts business with an affiliated entity was judicially recognized in *State ex rel. General Tel. Co. v. Public Serv. Comm’n.*<sup>65</sup> and *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm’n.*<sup>66</sup> The Court in the *General Telephone* case noted that the authority of the Commission did extend to investigation of affiliate transactions, and that such authority could be “implied from the powers otherwise expressly granted the commission.”<sup>67</sup> The Court in *General Telephone*<sup>68</sup> also noted that the Commission has disallowed license contracts and fees charged operating utilities by a parent company in its regulation of other utility industries such as the electric utility industry thus recognizing the Commission’s authority over affiliate transactions.

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<sup>65</sup> *State ex rel. General Tel. Co. v. Public Serv. Comm’n*, 537 S.W.2d 655, 659 (Mo. App. 1976)

<sup>66</sup> *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm’n*, 645 S.W.2d 44, 54-56 (Mo.App. 1982)

<sup>67</sup> *General Telephone*, 537 S.W.2d at 659.

<sup>68</sup> *Id.*

In *Re United Telephone Co.*,<sup>69</sup> the Commission clearly indicated its intention to closely scrutinize utilities operating in Missouri that are part of a holding company:

The policy which this commission enunciates in this case is that it will not shut its eyes to the facts of such pyramiding and simply look at the *legal entity*, the Missouri operating company, in determining the level of expense, rate base, revenues, and tax consequences when it is setting the *level of rates* for the Missouri intrastate operating company. This commission recognizes a clear and present danger that affiliated interests can be used to defeat regulation, that to ignore the impact of these affiliated interests is to shirk the commission's duty and responsibility to examine and consider all facets of a regulated utility's operations when the commission engages in the ratemaking process.

Another relevant case is *State ex rel. Associated Natural Gas Co. v. Public Serv. Com'n.*<sup>70</sup> The issue on judicial review was the Commission's use of "double leveraging" in a rate case. The Commission was setting rates for a gas utility subsidiary, of an electric utility subsidiary of an entity, held to be a registered public utility holding

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<sup>69</sup> *Re United Telephone Co.* Case No. 18,264, 20 Mo.P.S.C.(N.S.) 209, 214 (1975).

<sup>70</sup> *State ex rel. Associated Natl. Gas Co. v. Public Serv. Com'n* 706 S.W.2d 870 (Mo. App. 1985).

company under the Public Utility Holding Company Act of 1935 (PUHCA). The Commission held that the economic relationships between the parent and subsidiary companies permitted it to assign the cost of parent company capital as the subsidiary's cost of equity. The Western District determined that the Commission does have jurisdiction over affiliate transactions:

In fact, the jurisdictional argument as presented here was specifically rejected in *General Telephone Company of the Southwest, supra*, 628 S.W.2d at 836-38. Section 393.140(12), which does prohibit regulation of “any other business” of the utility “not otherwise subject to the jurisdiction of the commission,” also states that it shall not restrict the Commission’s “right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be . . . borne by” the utility in question.

The conscious and voluntary corporate business decision that resulted in the hierarchy as exists here should not and cannot shield pertinent financial data from the Commission’s scrutiny just because the ultimate owner does not provide the same service as the applicant and is not regulated . . . . Despite the Company’s contention that it is operationally and financially

independent from [its parent companies], it is hard to believe a wholly owned subsidiary could be as autonomous as here claimed . . . .<sup>71</sup>

The Commission does have statutory authority to promulgate rules to regulate transactions between a utility and its affiliates as these transactions may negatively impact consumer rates.

## **2. The Rules do not regulate affiliates.**

In claiming that the Commission is improperly regulating affiliates. (Atmos Br. p. 42) Appellants ignore the Commission’s statutory mandate under Section 393.140(12) to assure that any other business of a utility are “substantially kept separate.”<sup>72</sup>

Subdivision 12 of Section 393.140 provides, in part, that if a utility is:

engaged in carrying on any other business than owning, operating, or managing utility plant, which business is not otherwise subject to the jurisdiction of the Commission, and is so conducted that its operations are substantially kept separate from owning, operating, managing or controlling of such utility plant, said corporation in respect to such other business shall not be subject to any provisions of the Public Service Commission Law.<sup>73</sup>

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<sup>71</sup> *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm’n*, 706 S.W.2d 870, 880-881 (Mo. App. 1985).

<sup>72</sup> Section 393.140(12).

<sup>73</sup> Section 393.140(12).

This section, in fact, does not limit the Commission’s jurisdiction to inquire into affiliate transactions, but instead, potentially expands Commission jurisdiction to affiliate businesses of a utility, if those other operations are not kept substantially separate from the utility operations. By placing this distinction between activities “substantially separate” from regular utility operations in the PSC law, the Legislature has created a boundary that the Commission, as regulator, must be in a position to establish.

The Affiliate Transactions Rules provide, among other things, methods for determining whether the affiliated operations of utilities are, in fact, being kept substantially separate from the owning, operating or managing of utility operations. Additionally, the Commission has the authority to ensure the proper allocation of revenues, expenses and investment among regulated and unregulated businesses of a corporation and there is nothing section 393.140(12) that restricts the method the Commission may use to investigate and prescribe such apportionment.

The Court in *General Telephone* rejected the argument that the Commission was regulating affiliates and held that the Commission was not regulating the affairs of affiliates but was regulating transactions of the utility insofar as those transactions affected the reasonableness of rates.<sup>74</sup> It is reasonable that when a utility engages in transactions with an entity so closely affiliated with it that it could be said to be doing business with itself, those transactions must be subject to Commission oversight so that

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<sup>74</sup> *General Telephone*, 537 S.W.2d at 659.

the Commission can fulfill its statutory obligation under § 393.130.1 to protect consumers and assure that ratepayers are paying only a just and reasonable rate.

The Commission has the jurisdiction and the duty to supervise public utilities;<sup>75</sup> to prescribe uniform methods of keeping accounts;<sup>76</sup> to inspect property;<sup>77</sup> and to examine records;<sup>78</sup> to require annual financial data to be filed.<sup>79</sup> These powers act in concert with those granted in 393.140(12) to empower the Commission to promulgate Rules governing the public utilities and their relationships with their affiliates as they pertain to rates charged by the utilities.

That the Commission may inquire into and disallow costs associated with transactions of closely related companies has already been determined by this court.<sup>80</sup> The Commission is charged with assuring just and reasonable rates,<sup>81</sup> and the Commission may do this by rulemaking as well as by adjudication. That the Commission

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<sup>75</sup> Section 393.140(1). *See also* § 393.290 which makes the powers of the Commission related to other utility companies fully applicable to heating companies.

<sup>76</sup> Section 393.140 (4).

<sup>77</sup> Section 393.140 (7).

<sup>78</sup> Section 393.140 (8).

<sup>79</sup> Section 393.140 (6).

<sup>80</sup> *General Telephone*, 537 S.W.2d at 661.

<sup>81</sup> Section 386.130.

exercises its regulatory oversight to protect ratepayers from accounting abuses and improper cross-subsidization can scarcely be considered to be outside the Commission's jurisdiction.

### **3. The Commission has not violated § 386.030.**

Appellants suggest that the Rules violate § 386.030 and may be preempted by Federal Energy Regulatory Commission (FERC) regulations. (Atmos Br. p. 45).

Appellants have failed to preserve the federal preemption issue for review. The party challenging the constitutionality of a statute or ordinance must “ raise constitutional questions at the first opportunity; (2) state specifically the constitutional provision claimed to have been violated, (3) state the facts showing such violation; and (4) preserve the constitutional question throughout for appellate review.”<sup>82</sup>

Any issues not raised in a Request for Review of a Commission decision are waived and may not be raised later.<sup>83</sup> Section 386.500.2 currently governs appeals from

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<sup>82</sup> *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 58 (Mo.App. E.D. 1990) citing *Perez v. Webb*, 533 S.W.2d 650, 655 (Mo.App.1976).

<sup>83</sup> *Friendship Village v. Public Serv. Comm'n*, 907 S.W.2d 339, 347 (Mo App W.D. 1995) (holding that issues must be specifically alleged in an application for rehearing as the basis for the claim that the Commission is in error. Failure to make specific allegations bars an appellant from challenging a decision of the Commission on that basis in court.)

Commission decisions and requires that the party challenging the Commission's order file a motion for rehearing before the Commission, setting forth “specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable.” The statute further states that “[t]he applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.” In their applications to the Commission for rehearing Appellants did not set forth specifically the ground or grounds on which [they consider] the Rules to violate § 386.030 or FERC jurisdiction. Appellants failed to cite any FERC regulations<sup>84</sup> (L.F. at 449, 467 and 654), and there was no explanation of the claimed error.

The passing reference to Section 386.030 and preemption was completely insufficient to preserve this issue for appeal. In *State ex rel. Dyer*<sup>85</sup> the court stated, “[w]e are precluded by statute from considering any ground not specifically set forth in the (request). Thus this court is without jurisdiction to rule on this point. . . .”

The question of federal preemption starts with review of both the Constitution and federal statutes involved. “The doctrine of federal preemption is derived from the Supremacy Clause, article VI, cl.2 of the United States Constitution. Since *McCulloch v.*

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<sup>84</sup> *State ex rel. American Tel. & Tel. Co. v. Public Service Comm'n.*, 701 S.W.2d 745, 751 (Mo.App. W.D. 1985).

<sup>85</sup> *State ex rel. Dyer v. Public Service Comm'n.*, 341 S.W.2d 795, 801 (Mo.1960) *cert. denied*, 366 U.S. 924 (1961).

*Maryland*, it has been settled that a state law that conflicts with federal law is without effect. It is assumed, [however] that the historic police powers of the state are not preempted absent ‘the clear and manifest purpose of Congress’ to do so. The Supreme Court has stated that it is reluctant to interpret a federal statute in such a way as to find preemption of subjects traditionally governed by state law.”<sup>86</sup>

Where, as in this case, Appellants allege that preemption applies in an area, such as state utility regulation, which has been “traditionally occupied by the states, a preemption review starts with the assumption that the historic police powers of the states were not to be preempted unless that was the clear and manifest purpose of Congress.”<sup>87</sup> If Congress has not entirely displaced state regulation in a given area, state law may only be preempted to the extent it actually conflicts with federal law.<sup>88</sup> So, unless it is impossible for a utility to comply with both state and federal law, a regulation of public utilities, a matter within historic state police powers, should not fall when it regulates the relationship between a state regulated utility and its affiliates<sup>89</sup>.

In conclusion, the Commission has jurisdiction over publicly-held utility companies and a duty to protect the public from conduct that may affect just and

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<sup>86</sup> *Connelly v. Iolab Corp.*, 927 S.W.2d 851 (Mo. 1996).

<sup>87</sup> *Paul v. Jackson*, 910 S.W.2d 286, 291 (Mo.App. 1995).

<sup>88</sup> *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 857 (Mo.App. 1985) (citations omitted).

<sup>89</sup> *Id.*

reasonable rates. The commission under 4 CSR 240-40.016 is not regulating interstate commerce and has not violated 386.030 because the Commission is regulating transactions between a regulated utility and its affiliates. The Commission has not prohibited a utility from engaging in interstate activities, but has said that such activities should not be done in a discriminatory way. The Commission has acted within its jurisdiction and the Court should, therefore, affirm the Commission's rulemaking.

### **POINT III**

**The Commission properly promulgated the Rules because it fully complied with the requirements of Section 536.021.2 and Section 536.021.6(4) in that the Commission provided the reasons for the Proposed Rules in the Purpose section and provided concise summaries of the comments received as well as explanations of its findings and the reasons comments did or did not result in changes to the proposed in its Final Order of Rulemaking.**

*Responds to Atmos Appellants Point II.*

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

The Standard of review is the same as discussed at Point I above.

#### **B. Argument**

##### **1. The Rules comply fully with Section 536.021.2(1).**

Atmos Appellants suggest that the Rules are void because the Commission could have regulated affiliate transactions on a case-by-case basis in rate cases or by complaint, and in that “context” the Commission did not state a reason for the rule, thus violating Section 536.021.2(1). (Atmos Br. p. 33-34)

Atmos Appellants’ argument raises two issues: (1) what is the “context” in which adequacy of the agency’s statement of purpose is judged, and (2) did the Commission state the purpose in the Notice of Proposed Rulemaking in a way that was sufficient to give notice to interested persons why the Rules were being proposed.

Appellants’ reasoning ignores case law that has determined the “context” in which adequacy of notice provisions are considered. The correct “context” is defined in *State*

*ex rel. City of Springfield*<sup>90</sup> in which the Court observed that the context is whether there is an explanation of the subject matter and whether notice was provided:

The purpose sections of the proposed rules provided an explanation of the general subject matters covered by the rules . . . [t]he “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. 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.”

The complaint that the Commission’s statement of Purpose was inadequate because the Commission could have chosen another method to regulate these transactions is baseless. “An administrator has a large range of choice in determining what regulations or standards should be adopted. It is not necessarily a valid objection to his choice that another choice could reasonably have been made, that experts disagreed over the desirability of a particular standard, and that some other method of regulation would have accomplished the same purpose and would have been less onerous. It is enough that the [Commission] has acted within the statutory bounds of [its] authority, and that [its]

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<sup>90</sup> *City of Springfield v. Public Service Comm’n*, 812 S.W.2d 827 (Mo. App 1991) *citing* § 536.010(4)(d). RSMo 1986 (overruled on other grounds, *Missouri Mun. League v. State*, 932 S.W.2d 400, 403 (Mo. banc 1996).

choice among possible alternatives adopted is one a rational person could have made.<sup>91</sup> Adopting a statewide policy through rulemaking instead of case-by-case adjudication is not only a rational choice, it is a necessary one.<sup>92</sup> The Court should reject Appellant's argument.

Concerning the second issue of notice, the Court has stated the purpose of the statutory requirement in Section 536.021 is notice.<sup>93</sup> The Purpose section for Heating utilities stated that the purpose is prevention of cross-subsidization so that the public can be assured that rates are not being adversely affected by the non-regulated operations of a regulated utility:

#### **4 CSR 240-80.015 Affiliate Transactions**

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

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<sup>91</sup> *Kelley v. Iowa Dept. of Social Serv.*, 197 N.W.2d 192, 201 (Ia. 1972) *citing* 2 Am.Jur. 2d *Administrative Law* § 304 at 132-133.

<sup>92</sup> *NME Hospitals, Inc. v. Dept. of Social Serv.*, 850 S.W.2d 71, 74 (Mo. 1993).

<sup>93</sup> *City of Springfield v. Public Service Comm'n*, 812 S.W.2d 827 (Mo. App 1991).

(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 sections of the Proposed Rules provided an explanation of the general subject matters covered by the Rules, and specified that the Proposed Rules set forth financial standards, evidentiary standards, and recordkeeping requirements, and stated the reasons therefor: “to prevent regulated utilities from subsidizing their non-regulated operations.”

The Purpose sections of the Rules adequately to meet the statutory requirements of providing *notice* of the reasons the Commission was proposing the Rules. Appellants do not and cannot argue that they suffered any detriment in their ability to participate in or react to the rulemaking as a result of complaints under this point. Just as this Court did, in *City of Springfield*,<sup>94</sup> it should reject this point.

## **2. The rule complies with the requirements of Section 536.021.6(4).**

Appellants assert that the Final Orders of Rulemaking are deficient (Atmos Br. p. 34) because Section 536.021.6(4) requires that final orders of rulemaking contain concise summaries of the comments received and testimony, if any, as well as the Commission's

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<sup>94</sup> *City of Springfield*, 812 S.W.2d 827.

findings as to specific comments in opposition to the rules.<sup>95</sup> The Commission's Final Order is in full compliance with these requirements. It contains concise summaries of the comments received, and the Commission's required findings concerning the comments received are under the headings "Response." Even the most cursory review of the *Missouri Register* reveals that this is exactly the same format used for Final Orders of Rulemaking by other state agencies.

Atmos Appellants suggest that the Commission might argue that the Final Orders do contain Findings of Fact and Conclusions of Law. (Atmos Br. p. 34) The Commission does *not* suggest that the Final Order contains Findings of Fact and Conclusions of Law. A rulemaking does not find facts or make conclusions of law as are required in contested case procedures. Instead the Commission followed Ch 536 requirements for rulemaking.

The Commission's statement of Purpose in the Proposed Rules and the Commission's Final Orders of Rulemaking satisfy the requirements of Chapter 536 and this Court should affirm the Commission's actions. The Commission properly promulgated these Rules in full compliance of the requirements of Chapter 536.

Appellants' complaints should be rejected by this Court.

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<sup>95</sup> 25 Mo. Reg. 55, 59,64, 69 (Jan. 3, 2000).

## **POINT IV**

**The Rules are not void for failure to comply with the requirements of §536.016 because § 536.016 is an amendatory act that applies to the way state agencies propose rules and does not apply retrospectively in that amendatory acts do not apply to steps taken prior to the effective date of the amendment, the Commission proposed these Rules four (4) months prior to the effective date of the amendatory act, and review of the amendment reveals legislative intent that it not be retrospective.**

*Responds to Atmos Appellant's Point III.*

### **A. Standard of review**

The Standard of Review is discussed above under Point I.

### **B. Argument**

#### **1. Section 536.016 does not apply to these Rules.**

Section 536.016 applies to the way administrative rules are to be proposed.<sup>96</sup> A notice of proposed rulemaking must be published in the *Missouri Register*.<sup>97</sup>

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<sup>96</sup> Section 536.016. **Proposal of rules.** 1. 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.

<sup>97</sup> Section 536.021.1.

If the requirements under § 536.016 were to be done by an agency during the process described in § 536.021, the Legislature would have made it part of that Section.

Appellants proposed reading of § 536.016 violates fundamental principles of statutory interpretation. When construing Legislative intent the Court follows certain rules. “[I]t is fundamental that a section of a statute should not be read in isolation from the context of the whole act. In interpreting legislation, ‘we must not be guided by a single sentence . . . , but [should] look to the provisions of the whole law, and its object and policy’” and read it in its entirety.<sup>98</sup>

Section 536.016 is a completely separate section from the actual procedures for the “making, amending, or rescinding” of rules found in § 536.021. It must be read then to apply to a process outside of the actual making of the rule. Section 536.016 specifically applies when a state agency proposes rules, if the two sections are to be read in harmony, § 536.016 must be read to apply to the process before rules are “made” in accord with § 536.021.

Additionally, when § 536.021.3 is also read in *pari materia* it becomes evident that there is no requirement for a hearing when agencies either propose or promulgate rules. In fact, § 536.021.3 specifically states that no hearing is required unless otherwise required by some other statute or provision, and this section cannot be harmonized with

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<sup>98</sup> *State v. Meggs*, 950 S.W.2d 608, 610 (Mo.App. 1997)(citations omitted).

§ 536.016 if it is read to require adjudicative hearings when § 536.021.3 specifically excludes hearings from the rulemaking requirements under Chapter 536.<sup>99</sup> When construing the statute as a whole, the conflict between Atmos Appellant’s suggestion that § 536.016 requires hearings and the principle that the Chapter 536 does not require rulemaking hearings becomes quite clear.

## **2. The amendatory act is not retrospective.**

Section 536.016 became effective on August 28, 1999. The Commission published its Proposed Rules in the *Missouri Register* several months before, on June 1, 1999.<sup>100</sup> In claiming that this section applies to these Rules, Appellants ignore the law on retroactive application of amendatory acts. (Atmos Br. p. 36). Appellants ask this court to apply § 536.016 retrospectively to Rules that were proposed well before the effective date of the statute. (Atmos Br. p. 35)

The Commission agrees that § 536.016 must, govern the way that administrative agencies are to *propose* rules after August 28, 1999. *Thomaston* holds that “steps already taken” and “all things done under the [old] law will stand unless an intention to the contrary is plainly manifested; and pending cases are only affected . . . from the point reached when the new law intervened.”<sup>101</sup>

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<sup>99</sup> Section 536.021.3.

<sup>100</sup> 24 MoReg.1340-1345.

<sup>101</sup> *State v. Thomaston*, 726 S.W.2d 448 (Mo.App. 1987).

This Court recently reiterated the long-standing rule that amendatory acts do not apply to any part of a proceeding already completed, saying “the steps already taken . . . and all things done under the late law will stand unless an intention to the contrary is plainly manifested . . . and pending cases are only affected . . . from the point reached when the new law intervened.”<sup>102</sup> The Eastern District recently affirmed this rule, and relying on *Thomaston*:<sup>103</sup> “[p]rocedural or remedial amendments do not apply to any part of a proceeding completed prior to the effective date of the amendment.”

Since the Rules were proposed well before the effective date of the statute, the act does not apply to this rulemaking. The Missouri Constitution “Article I, section 13, prohibits the enactment of any law that is “retrospective in its operation.” Retrospective laws are generally defined as laws which “take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.”<sup>104</sup>

Second, the act is not just a procedural statute, the Legislature enacted § 536.016, a provision requiring state agencies to propose rules based on “substantial evidence on the record and a finding . . . that the rule is necessary to carry out the purposes of the”

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<sup>102</sup> *Pierce v. State, Dept. of Social Serv.*, 909 S.W.2d 814 823 (Mo.App. 1998).

<sup>103</sup> *Jones by Williams v. Missouri Dept. of Social Serv.*, 966 S.W.2d 324 (Mo.App. 1998).

<sup>104</sup> *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. 1993).

enabling statute. Thus, § 536.016 created a new obligation or imposed a new duty on state agencies, and, therefore, is substantive in nature. To apply the new statute to the Commission’s earlier proposal of the rule would constitute a retrospective application of a substantive law.<sup>105</sup>

Thirdly, § 536.016 is silent on the issue of retrospective application, so when construing the statute. The Court should presume that the Legislature intended for the statute to apply prospectively only.

Indeed, as noted above, not only does the new statute not contain manifest intent that the act apply to rules already proposed, the Legislature clearly intended that the amendatory act only applies prospectively because it requires administrative agencies to adopt procedures to comply with the provisions of the act. This act may not apply retrospectively because it is substantive in nature, the legislature has not shown any intent that it apply retrospectively, and the Court should confirm that.

### **3. State agencies need not hold adjudicative hearings when proposing rules.**

Atmos Appellants interpret § 536.016 to require adjudicative hearings “for all agencies in rulemaking.” (Atmos App. Br. at 37) If the Legislature had intended for a hearing to be required before an agency can propose a rule, it would have so provided in § 536.016. A finding by this court that such procedures are required before an agency could propose rules would impose a substantial burden on all state administrative

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<sup>105</sup> *Id.*

agencies that was not anticipated nor intended by the Legislature. “The courts are without authority to read into a statute a legislative intent that is contrary to the intent made evident by giving the language employed in the statute its plain and ordinary meaning.”<sup>106</sup>

This Court should not impose hearing requirements on all state agencies engaged in proposing rules unless such requirements are mandated by the General Assembly. Section 536.016 deals with the quasi-legislative process that state agencies use to promulgate rules and adjudicatory processes are not mandated by either this Section, or by Chapter 536 as a whole.

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<sup>106</sup> *Director, State Dept. of Public Safety v. Murr*, 11 S.W.3d 91, 96 (Mo.App. 2000).

## **POINT V**

**The Commission properly promulgated these Rules because it was not required by Section 393.140(5) to have an adjudicatory hearing prior to promulgating the Rules, in that Section 393.140(5) was not the source of statutory authority for promulgation of the Rules because that section applies to rates and the Commission has not affected rates through the Rules, the Commission has not prejudged or disallowed utility expenses without a hearing, and because the Rules are not self-enforcing and the Rules allow for variances.**

*(Responds to Atmos Appellant's Point IV, Atmos Point VII where the issue was repeated and to Ameren Point II)*

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

The Standard of Review is the same as discussed under Point I.

### **B. Argument**

#### **1. Section 393.140(5) does not apply to the Rules.**

Atmos Appellants claim that the Commission should have provided an adjudicatory hearing to determine whether the utilities' existing methods are "unjustly discriminatory or unduly preferential" prior to adopting these Rules. (Atmos Br. p. 39; Ameren Br. p. 58-59) The error in this argument is that § 393.140(5), the source of Appellants' argument, does not provide the statutory authority for the Rules.

In a well reasoned decision squarely on point, this Court has already determined the correct application of the provisions of § 393.140 to the functions of the Commission.<sup>107</sup> In *McBride*, the Court held that § 393.140(5) is concerned with ratemaking and determination of improper conduct such as charging unjust, unreasonable or unlawful rates, while subsection (11) addresses rulemaking and prohibits contracts or agreements that are not regularly extended to all persons and corporations under like circumstances.<sup>108</sup> The Court described the purposes of various subsections of 393.140:

Section 393.140(1) provides for the Commission to [h]ave general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations. Subsections (2), (3) and (4) state powers of the Commission to investigate, fix standards and prescribe methods of keeping records. Subsection (5) provides for the Commission to “keep informed as to the methods, practices, regulations and property employed” by persons and corporations under its jurisdiction. It then provides if 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

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<sup>107</sup> *McBride & Son Builders, Inc. v. Union Elec. Co.*, 526 S.W.2d 310 (Mo.1975)

<sup>108</sup> *McBride & Son Builders, Inc. v. Union Elec. Co.*, 526 S.W.2d 310, 313 (Mo.1975).

any provision of law” then the Commission shall prescribe the rates, service and acts to be done.

The Court goes on to explain that:

Subsection (11) of § 393.140 requires all [utility] corporations to file with the Commission its rates and charges, its forms of contract, its rules and regulations relating to rates and all general privileges and facilities, which shall not be changed without notice to the Commission. It also prohibits any corporation to “refund or remit in any manner or by any device any portion of the rates or charges” specified. It further gives the Commission “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 . . . .”

The Court further explained regarding § 393.140(11) that there is no requirement for a hearing before the Commission adopts rules under this subsection:

. . . There is no requirement in subsection (11) for a hearing before adoption of such rules and regulations by the Commission. It would seem to be a reasonable interpretation of subsection (5) that it is primarily intended to authorize determination of improper conduct such as charging unjust, unreasonable or unlawful rates or engaging in discriminatory conduct, while subsection (11) is primarily concerned with rule making and prohibiting any form of contract or agreement except such as are regularly and uniformly extended to all persons and corporations under like

circumstances. The Commission has authority to make rules for that purpose.(emphasis added).

In conclusion, this Court rejected the exact argument made by Appellants that they were denied due process because no hearing was provided under § 393.140(5). The Court also rejected the argument that subsection 11 applies only to the filing of tariffs. (Atmos Appellants repeated this issue in Point VII). This issue has already been resolved by *McBride*, in which the Court determined that subsection 11 did not apply exclusively to the filing of tariffs<sup>109</sup> so Appellant’s arguments on this issue fail.

In accord with *McBride*, the Commission could have promulgated these Rules without any hearing; yet in addition to inviting comments, the Commission held public hearings at which interested persons were invited to testify. That the Commission gave more process than was required under Section 393.140(11) does not mean that more was required.

***(NOTE: Responds to Ameren’s Point II)***

**2. The Commission did not exceed its jurisdiction in promulgating these Rules.**

Ameren suggests that the Commission exceeded its jurisdiction in promulgating the Rules. Ameren admits that the Commission has “authority over the items, and the amounts expended for those items, that can be properly included in a utility’s operating expenses for the purpose of setting the utility’s rates (Ameren Brief at 59). The

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<sup>109</sup> *McBride & Son Builders*, 526 S.W.2d 310 at 312.

jurisdiction of the Commission to adopt these Rules is addressed more fully in Respondent's POINT II above.

**3. Policy standards must be adopted by rule.**

The Affiliate Transactions Rules are the Commission's statement of general applicability concerning its policy regarding the conduct of transactions between a monopoly utility and the non-regulated businesses that it controls. In adopting this rule the Commission gives advanced notice to all Missouri utilities with affiliates of, among other things, the way the Commission views certain conduct and the ways in which the utility may demonstrate that the conduct is not harmful to its customers.

An agency may not adopt a state-wide policy except by rulemaking.<sup>110</sup> The Commission properly followed the required rulemaking procedures in § 536.021.<sup>111</sup>

**4. Utility expenditures may only be declared unlawful and disallowed in a contested case.**

The Commission agrees that utility expenditures may only be disallowed in a contested case proceeding such as a rate case or complaint. The Commission has not acted by rulemaking to disallow any utility expenses. The fact that it cannot do so by rulemaking has been explained by the Western District: "Administrative rules are analogous to statutory legislation. A rule 'affects the rights of individuals in the abstract

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<sup>110</sup> *Greenbriar Hills Country Club v. Director of Rev.*, 47 S.W.3d 346, 357 (Mo. 2001).

<sup>111</sup> *NME Hospitals, Inc. v. Dept. of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. 1993).

and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it[.]”<sup>112</sup> The Commission will have a hearing pursuant, to § 393.140(5), for example, prior to any such disallowance.

The Commission does provide guidance to utilities state-wide concerning the way the Commission will view certain transactions. The Rules state that a regulated utility “shall not provide a financial advantage to an affiliated entity.” 4 CSR 240-20.015(2)(A). Further, “for the purposes of this rule,” a utility shall be deemed to provide a financial advantage” if it engages in certain types of transactions.<sup>113</sup> Ameren suggests that by using the term “deemed” the Commission has predetermined that certain conduct is unlawful without a hearing. (Ameren Br. 59-60). Ameren reasons that the term “deemed” equates to an irrebuttable presumption that certain conduct is unlawful and thus utility expenditures have been “disallowed” by the rule. (Ameren Br. at 60). This is simply wrong.

While other states have considered that the term “deemed” creates an irrebuttable presumption, this Court has done a more thorough analysis. The word “deemed” has

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<sup>112</sup> *Hedges v. Dep't of Soc. Servs.*, 585 S.W.2d 170, 172 (Mo.App. 1979); *see also* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.1, at 228 (3d. ed.1994) (quoting J. Dickinson, *Administrative Justice and the Supremacy of Law* 2 (1927)).

<sup>113</sup> *See for example* 4 CSR 240-40(2)(A) 1. and 2.

specifically been examined by this Court, and the Court concluded that the word has several meanings including “adjudged, judged, considered, conclusively considered, decreed, accounted, declared, presumed.”<sup>114</sup> The Court explained that “deemed” may have more than one meaning and that the meaning may be “dependent upon the circumstances in connection with which it is used. Its use does *not* justify, in all cases, the interpretation that it signifies an arbitrary exercise of judgment; it may signify a deliberate exercise subject to other proof.” As this Court noted, various cases in this state have given contrary meaning to the word, but that it has been held to create only a rebuttable presumption when the context of its use so indicated.<sup>115</sup>

The Commission, in interpreting its own Rules, notes that the definitions of “considered” or “presumed” are closest to the Commission’s intent.<sup>116</sup> The fallacy of Appellant’s argument and the accuracy of the statement that use of the term deemed does not create an irrebuttable presumption is made evident when the Court reads the context in which the term is used.

In context the term “deemed” does not create an irrebuttable presumption of because the company may demonstrate to the Commission that the utility has not

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<sup>114</sup> *Fabick and Co., v. Schafner*, 492 S.W.2d 737 (1973).

<sup>115</sup> *Id.* citing *Woods v. Cantrell*, 201 S.W.2d 311, 314 (1947).

<sup>116</sup> *Morton v. Missouri Air Cons. Com'n*, 944 S.W.2d 231, 238 (Mo.App. 1997).

engaged in conduct that may harm ratepayers. In other words, the Company may rebut any presumption that it has engaged in improper conduct.<sup>117</sup>

Further, the rule allows for a utility to obtain Commission approval for an alternate method of dealing with accounting for affiliate transactions through submission of a Cost Allocation Manual.<sup>118</sup> Ameren will, thus, have several opportunities before hearing to show that it has not engaged in transactions that may adversely affect its customers.

In addition to the many opportunities Ameren will have to rebut any presumption of ratepayer harm, the Commission has not predetermined that certain costs will be disallowed because the Rules are not self-enforcing. Ameren argues that they are subject to sanctions and “reductions” in rates (Ameren Br. at 63) but fails to explain how that could occur outside of a rate case or some other contested proceeding.

The rule in no way precludes a utility from arguing for inclusion of the costs in a rate case or in a complaint, nor does it limit a utility’s ability to file testimony or briefs on any issue covered by the Rules. Appellants will receive full procedural due process regarding the rates the utility charges *prior* to any determination that conduct by a utility was unjust or unjustly discriminatory or unduly preferential. A utility’s costs would be disallowed only, if after such a hearing, the Commission determines a utility has included or allocated costs improperly.

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<sup>117</sup> 4 CSR 20.015(10)2.

<sup>118</sup> 4 CSR 240-40.015 (2)(D).

## 5. Burden of Proof.

Ameren suggests that the Rules have acted to shift the burden of proof. Section 386.410.1 provides that “all hearings before the commission . . . shall be governed by rules to be adopted and prescribed by the Commission.” However, the Commission continues to consider the reasonableness of utility costs in adjudicatory hearings and the burden of proof will remain the same. The utility, by statute, always has the burden of proof in a rate case<sup>119</sup> and whichever party has the burden of proof always has the initial burden of the evidence, that has not changed.<sup>120</sup> Any party urging disallowance of costs will still have the burden of overcoming any presumption of prudence and showing that there is a detrimental impact on ratepayers, but that party now has a framework for showing that affiliate transactions are unjust or unduly preferential.

Under the Rules, the Commission will view certain transactions as providing a financial advantage to its affiliate. Only upon a showing, however, in a rate case or complaint case, that the utility has done so unreasonably, would any cost be disallowed. The utility has several opportunities to avoid a negative result. The utility may obtain a waiver under the Rules, get its Cost Allocation Manual (CAM) approved or present evidence in a hearing. The Commission makes no disallowance until after a utility has had these opportunities to persuade the Commission that the transaction was not

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<sup>119</sup> Section 393.150.2.

<sup>120</sup> *Hautly Cheese Co. v. Wine Brokers, Inc.*, 706 S.W.2d 920, 922(Mo.App. W.D. 1986).

unreasonable or unduly preferential. This same analysis applies to complaint cases in which the burden of proof will remain with the complainant.

The Rules do not violate § 393.140(5) in that the Commission has not improperly prejudged or predetermined the lawfulness of a utility's affiliate transactions, rather, the Commission has set standards and policies that utilities are to follow if they engage in affiliate transactions and the Commission will adjudicate the necessary facts at the proper time using the methods prescribed under §393.140(5) before determining what costs should be excluded from rate base.

**6. Ameren's PUHCA argument.**

Ameren claims that the Rules are a particular problem for it because it is subject to the Public Utility Holding Company Act. (Ameren Br. p. 67). Ameren did not raise the question in its Request for Rehearing. (Record at 977). Any issues not raised in a Request for Review of a Commission decision are waived and may not be raised later.<sup>121</sup>

In regard to its unreserved Public Utility Holding Company Act (PUHCA) arguments, Ameren fails to mention to the Court that the Rules contain provisions for an electric corporation, such as Ameren, to get a variance from the standards and

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<sup>121</sup> *Friendship Village v. Public Serv. Comm'n*, 907 S.W.2d 339, 347 (Mo App 1995) (holding that issues must be specifically alleged in an application for rehearing as the basis for the claim that the Commission is in error. Failure to make specific allegations bars an appellant from challenging a decision of the Commission on that basis in court.)

requirements of the Rule.<sup>122</sup> Ameren can do that by following the provisions in the Rule at subsection (10) that permit a request for variance, in writing, to the Commission, and also allows a “regulated electrical corporation to engage in affiliate transactions not in compliance with the rule, when to the best of its knowledge and belief, compliance with the rule would not be in the best interest of its regulated customers . . . .” Ameren has the option under the Rule to file for waiver from the standards contained in the Rules,<sup>123</sup> so that it can comply both with PUHCA requirements and the Commission’s Rules.

#### **7. The Commission has not taken over management.**

Ameren has raised on appeal the issue that the Commission is taking over management of the company and Ameren has failed to preserve this issue for appeal. A vague comment that the Commission has exceeded its authority is not sufficient to preserve the “takeover of management” issue for appeal.

Ameren’s argument also ignores relevant case law. A Laclede Gas case<sup>124</sup> concerning advertising is instructive. Laclede claimed that because the Commission had disallowed certain advertising expenses, in a case under Section 393.140(5) which deals with rates as noted above, the Commission was taking over management. The Court reasoned that if the Commission had disallowed all advertising, that would have been

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<sup>122</sup> 4 CSR 240-40.015(10) Variances.

<sup>123</sup> 4 CSR 240-20.015(10).

<sup>124</sup> *Laclede Gas Co. v. Public Service Com’n*, 600 S.W.2d 222, 228(Mo.App. 1980).

violated the managerial rights of Laclede. But since the Commission had good reasons for disallowing only certain advertising that was within the Commission's jurisdiction.<sup>125</sup> In this case, if the Commission had prohibited affiliate transactions, the Commission might have exceeded its jurisdiction and arguably have been considered to have taken over management. The Commission did not exceed its jurisdiction in stating its policy concerning affiliate transactions. Ameren's point should be rejected.

#### **8. Ameren employees will not face jail time.**

Appellant Ameren's claim in a footnote, that Ameren employees might face jail (Ameren Br. at 60) as a result of this rulemaking is so extreme as to require some response. It is beyond imagining that sheriffs are going to march into Ameren and arrest employees for engaging in cross-subsidization. First, it is the Legislature, not the Commission, that determines what sanctions are appropriate for violation of Commission Rules<sup>126</sup> and the Commission's statement that violation of these Rules is subject to those

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<sup>125</sup> *Id.*

<sup>126</sup> *State v. Dixon*, 73 S.W.2d 385 387 (Mo. 1934) (holding that the Legislature and not the Public Service Commission, has declared that a violation of a ... rule promulgated by the Commission shall constitute a misdemeanor. The Legislature, not the Public Service Commission, has prescribed what penalty shall be imposed in case of a conviction of that offense.

penalties is probably redundant because the Legislature has already made that determination.

Second, and most importantly, the Rules are not self-enforcing. The Commission must determine in an adjudication whether Ameren has violated the Rules or any statutory provisions. Ameren would have ample opportunity to defend itself at such hearing. Third, the Commission then must go to the Circuit Court for enforcement of the sanctions, when Ameren would have further opportunity to argue its case. There is no immediate concern whatsoever, and Ameren's suggestion is quite misleading.

## POINT VI

**The Rules are not unconstitutionally vague and the issue of the constitutionality of the Rules is not ripe for determination because Appellants lack standing to challenge the constitutionality of the Rules in that they cannot claim any threatened immediacy of application to their detriment and the Rules are not so vague that those subject to them cannot understand what is required.**

*(Responds to Atmos Appellants' Point VI.)*

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

The Standard of Review is discussed above under Point I.

### **B. Argument**

Appellants allege that the Rules are void for vagueness and that the Rules are unconstitutional. (Atmos Br. at 49). Appellants have failed to preserve this constitutional argument for appeal. “[T]here are four mandatory prerequisites, to preserving a constitutional issue for review after an administrative decision. The party challenging the constitutionality of a statute or rule must: raise the constitutional question at his first available opportunity; designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the Article; state

the facts showing such violation; [and] preserve the constitutional question throughout for appellate review.<sup>127</sup>

In their Requests for Rehearing, Appellants failed to state specifically which constitutional provisions they claim were violated by the so-called “impermissibly vague” terms. (L.F. at 449, 467, 630). Such enumeration is required to preserve the issue for appeal. This issue should be dismissed by this Court because of Appellant’s failure to preserve it for appeal.

Not only was this issue not preserved for appeal, but it also is not ripe for decision. A statute or law is presumed constitutional and will not be held otherwise unless it clearly contravenes some constitutional provision.<sup>128</sup> To have standing to challenge this administrative rule on constitutional grounds, Appellants must not only preserve the issue for appeal following the standards noted above, but must also show, not only that the rule is invalid, but that they have sustained or are in immediate danger of sustaining some

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<sup>127</sup> *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 58 (Mo.App. 1990) *citing* *Perez v. Webb*, 533 S.W.2d 650, 655 (Mo.App.1976). *See also* *Gray v. City of Florissant*, 588 S.w.2d 722, 724 (Mo.App. 1979)(citations omitted).

<sup>128</sup> *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980).

direct injury as the result of the rule's enforcement.<sup>129</sup> In other words, there must be a justiciable controversy produced by an attempted application of the rule to a specific set of facts. Appellants have obtained a stay order from the Circuit Court of Cole County so application of the rule is not imminent.

“[Standing] is the indispensable basis for the exercise by a court of its constitutional power to adjudicate and give remedies.”<sup>130</sup> Appellants have no standing to challenge the constitutionality of the Rules as void for vagueness because they have made absolutely no showing that they are in immediate danger of having any penalty imposed on them.

The requirement that a party have standing to bring an action is a component of the general requirement of justiciability.<sup>131</sup> In the federal context, this requirement of justiciability arises from the language of Article III, § 2 of the United States Constitution.<sup>132</sup> The Missouri counterpart to this provision is found in Mo. Const. art. V,

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<sup>129</sup> *West County Care Center, Inc. v. Missouri Health Facilities Rev. Comm.*, 773 S.W.2d 474, 477 (Mo.App. 1989) *citing* *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-05 (1975).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

§ 14(a), which states that "[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal . . . ."

Addressing the subject under the Federal Constitution, the United States Supreme Court has stated: "[a]s an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."<sup>133</sup> This "personal stake," in turn, generally depends upon whether the plaintiff can allege "some threatened or actual injury resulting from the putatively illegal action."<sup>134</sup> The same requirement of justiciability exists under Missouri law.<sup>135</sup>

The cases Appellants cite to support their contention that the Rules are ripe for decision do not support their claim. The case of *Verbeck v. Schnicker*<sup>136</sup> is not only not helpful to their cause, it is particularly illustrative of the weakness of their argument. In *Verbeck*, police officers and their police association brought an action for injunctive and declaratory relief alleging that certain provisions of the police department regulations

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<sup>133</sup> *Warth v. Seldin*, 422 U.S. 490, 498(1975).

<sup>134</sup> *Id.*

<sup>135</sup> *West County Care Center*, 773 S.W.2d at 477.

<sup>136</sup> *Verbeck v. Schnicker*, 660 F.2d 1260 (8<sup>th</sup> Cir. 1981).

were unconstitutional. The case was dismissed because the court said that there was no present case or controversy.

Appellants fail to discuss the case of *City of Springfield*,<sup>137</sup> and even though that case was overturned on other grounds, the holding on constitutionality remains valid and the case is squarely on point. The court in *City of Springfield* rejected this argument saying:

In their fourth point, appellants argue that certain of the provisions of the New Rules adopted by the Commission are unconstitutionally void for vagueness. As previously noted in this opinion, duly promulgated rules of a state administrative agency have the force and effect of law. A statute or law is presumed constitutional and will not be held otherwise unless it clearly contravenes some constitutional provision. 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.

Appellants argue that multiple provisions within the Rules are unconstitutionally vague. (Atmos App. Br at 49-50). Appellants do not represent that the Commission is

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<sup>137</sup> *State ex rel. City of Springfield v. Public Serv. Comm'n*, 812 S.W. 2d 827 (Mo.App. 1991)(citations omitted).

threatening to enforce or has enforced any of the "vague" provisions. 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. (Atmos App. Br. at 48). Appellants have not shown that they have standing to attack the Rules on constitutional grounds.

The cases Appellants cite are not helpful. The Rules are not criminal statutes. The *Connally*<sup>138</sup> case involved criminal penalties for failure to pay mandated wages. The Eighth Circuit distinguished *Connally* in a civil case noting that: “greater precision is required of statutes defining and punishing crimes”<sup>139</sup> than is required in civil matters. “Due process will tolerate more vagueness in the context of non-criminal laws because the consequences of such imprecision are ‘qualitatively less severe.’”<sup>140</sup>

The *City of Festus*<sup>141</sup> case also does not supportive Atmos Appellant’s cause because the *Festus* appellant had already been convicted of violating a city ordinance. The matter was ripe for review because, not only did the City threaten application of the ordinance, the ordinance was a criminal statute and the appellant had already been

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<sup>138</sup> *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926).

<sup>139</sup> *Board of Trade of Kansas City v. Milligan*, 90 F.2d 855 (C.A. 8 1937).

<sup>140</sup> *U-Haul Co., Inc. v. City of St. Louis*, 855 S.W.2d 424, 426 (Mo.App. 1993).

<sup>141</sup> *City of Festus v. Warner*, 656 S.W.2d 286 (Mo.App. 1983).

convicted. Similarly, the *Young*<sup>142</sup> case involved the constitutionality of a criminal statute prohibiting cockfighting after Appellant had been convicted. Both of these cases involved actual threatened application of criminal statutes so they are not helpful to Appellants' arguments.

Neither the *McDonalds*<sup>143</sup> or the *Marine Equipment*<sup>144</sup> cases provide support or relevant precedents. The *McDonalds* case actually involved the threatened application of the Act in question. The *Marine Equipment* court determined that there was no threatened application and "to present an actual controversy sufficient to justify the exercise of jurisdiction, the threat of enforcement must have some sort of immediate coercive consequences."

Furthermore, the provisions about which Appellants complain (Atmos App. Br. at 48) are not so unclear that "men of ordinary intelligence must necessarily guess at its meaning . . . . If the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty."<sup>145</sup>

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<sup>142</sup> *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985).

<sup>143</sup> *McDonald's Corp. v. Nelson*, 822 F. Supp 597 (8<sup>th</sup> Cir. 1994).

<sup>144</sup> *Marine Equipment Mgt. Co. v. United States*, 4 F.3d 643 (8<sup>th</sup> Cir. 1993).

<sup>145</sup> *State Bd. of Regis. for Healing Arts v. Southworth*, 704 S.W.2d 219, 223 (Mo. 1986).

The first term complained of, “unfair advantage,” is quite similar to terms used in the statute at § 393.130.3 which says that a utility may not give any “undue or unreasonable preference or advantage.” The standard applied in *K-Mart*<sup>146</sup> is helpful. The standard asks “whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”<sup>147</sup> The Court continues to explain that the “standard is applied in light of the presumption that the ordinance is constitutional and the proposition that unless it is ‘clearly and undoubtedly’ violative of a constitutional provision, it will not be declared unconstitutional . . . . Further, where the regulation pertains to business activities, . . . rather than to the general public, the standard is less restrictive.”<sup>148</sup> In this case, all of the provisions of the Rules complained about pertain to business activities.

The terms are not so unclear that Appellants must guess at the meaning. This is especially true when the terms are virtually identical to terms in a statute under which all Appellants operate.

An additional term about which Appellants complain (Atmos Br. p. 51) relates to the filing of a Cost Allocation Manual (CAM), which should scarcely be a problem for companies that constantly make filings with the Commission. These Rules are business

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<sup>146</sup> *K-Mart Corp. v. St. Louis Co.*, 672 S.W.2d 127, 132 (Mo.App. 1984).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

regulations of utilities that have been regulated by the Commission, some of them since 1913. In addition, the Rules are clear about what should be included in a CAM.<sup>149</sup> The CAM should “set forth cost allocation, market valuation and internal cost methods. This CAM can use benchmarking practices that can constitute compliance with market valuation requirements of this section . . . .”<sup>150</sup> Appellants additional complaints about terms used in the Rules suffer from the same infirmities. (Atmos Br. p. 51-53).

The Rules are sufficiently specific and clear under the *U-Haul* and *K-Mart* standards to give notice to the regulated companies when measured by common understanding and practices. A statute or law is presumed constitutional and will not be held otherwise unless it clearly contravenes some constitutional provision.<sup>151</sup> Appellants have not overcome this presumption.

Moreover, not only have Appellants failed to show that the Rules are unconstitutionally vague, Appellants have no standing to challenge the constitutionality of the Rules as void for vagueness because they have made absolutely no showing that they are in immediate danger of having any penalty imposed on them.

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<sup>149</sup> 4 CSR 240-30.015 (2)(D).

<sup>150</sup> 4 CSR 240-30.015 (2)(D).

<sup>151</sup> *Marine Equipment Mgt. Co. v. United States*, 4 F.3d 643 (8<sup>th</sup> Cir. 1993).

This Court should dismiss Appellants complaints concerning the constitutionality of the Rules and should decline to decide this issue prematurely because it is not ripe for decision and Appellants have failed to preserve it for appeal.

## **POINT VII**

**The Commission gave adequate notice of the legal authority under which it was proceeding in its Notice of Proposed Rulemaking because the Commission was not required to list the statutory section that granted the Commission jurisdiction over heating companies in that Section 393.290 makes Sections 386.250 and 393.140 applicable to heating companies just as if the term heating company were included in those sections.**

*Responds to Trigen's argument at Atmos Appellant's Point VII.*

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

The Standard of Review is the same as discussed above at Point 1.

### **B. Argument**

Chapter 536 requires the Commission to state the legal authority upon which a proposed rule is based, not the basis for its jurisdiction over utility companies. The lack of support for Trigen's assertion (Atmos App. Br. at 53) that because the Commission did not list § 393.290 as the authority for promulgation of the Rules, notice was insufficient, is made apparent by reference to § 393.290. This Section specifically states: “[a]ll of the provisions of chapters 386, 387, 390, 392 and 393 . . . are hereby made applicable to such heating companies as designated in said chapters and shall have full application thereto.”

The requirement in Section 536.021.2(2) is “designed to provide notice to affected parties that the agency has the power to promulgate the proposed rule.”<sup>152</sup> “The notice of proposed rulemaking provides notice to affected parties to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification.”<sup>153</sup> Section 536.021.2(2), is designed to provide notice to affected parties that the agency has the statutory authority to promulgate the proposed rule, not to give notice of the agency’s jurisdiction over affected parties.<sup>154</sup>

In the Proposed Rules, the Commission cited § 386.250, its general jurisdiction statute, and § 393.140, its general supervision of public utilities statute, as authority to promulgate these Rules. The question is whether this is sufficient notice to Trigen to allow its participation in the rulemaking process. Trigen participated fully in the process. Trigen suffered no detriment whatsoever as a result of its complaints under this point. There are no processes that Trigen failed to notice, there are no other rights that Trigen

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<sup>152</sup> *Corvera Abatement Tech., Inc. v. Air Cons. Comm'n*, 973 S.W.2d 851, 855 (Mo. 1998).

<sup>153</sup> *Id.*

<sup>154</sup> *NME Hospitals, Inc. v. Department of Social Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

could have asserted, there are no other actions that Trigen could have taken if, as it claims, notice of authority was inadequate. There was no harm.<sup>155</sup>

Moreover, jurisdiction of the Commission over a heating company such as Trigen is not the issue. Section 536.021.2(2) requires the Commission to list the legal authority under which it is promulgating rules, not its jurisdiction over any specific utility. There is no question that the Commission has jurisdiction over heating companies such as Trigen. The issue of the Commission's jurisdiction has been addressed in POINT I and will not be repeated here.

The citations to the broad grant of authority in § 386.250, and to § 393.140 satisfy the requirement of § 536.021.2(2). The Commission cited proper and adequate authority to promulgate this rule. The rulemaking is reasonable and lawful and should be upheld.

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<sup>155</sup> *Corvera Abatement Tech., Inc. v. Air Cons. Comm'n* 973 S.W.2d 851, 854 (Mo. 1998)(citation omitted).

## **POINT VIII**

**The Western District erred in its order because it failed to recognize the various statutory grants of authority to the Commission to promulgate Rules in that § 386.250(6) is not the only grant of rulemaking authority to the Commission.**

*Responds to Ameren I and Atmos Appellants' VIII.*

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

The Western District's dismissal for lack of subject matter jurisdiction is a question of law that this Court will review de novo.

### **B. Argument**

The Commission generally agrees with Ameren's historical analysis of the method of judicial review of Commission orders and the associated cases. The Commission also generally agrees with Ameren's discussion of the confusion created by the Western District's (W.D. Order) determination that only complaints should be reviewed by writ of review. The order as written could result in rate cases being reviewed by at least two different methods based solely on how they were filed. The current process of judicial review by writ of review remains appropriate for all Commission orders.

Besides the confusion created by the Western District's decision, the court's opinion overlooks various statutory provisions when it apparently recognizes (March 5, Slip Op. at 12) § 386.250(6) as the only authority under which the Commission has power to promulgate rules regulating public utility companies. Even a cursory review of Chapters 386, 393, and 394 reveal numerous sections under which there is explicit rulemaking authority, and many others in which there is implicit rulemaking authority.

In addition, “[s]tatutory provisions relating to the same subject matter are considered *in pari materia* . . . .”<sup>156</sup>

The Western District in making its determination, states that in its review of Chapter 386, other than in § 386.250(6), it “find[s] no reference to the power of the PSC to enter orders promulgating rules regarding utility companies” so that the only authority for the Commission to promulgate rules lies in § 386.250(6). March 5, Slip Op. at 12. The Court uses this limited reading to support its conclusion that the terms “decision and orders” as used in §§ 386.500 and 386.510 do not include orders or decisions concerning rulemaking. This limited reading, however, is incorrect.

The Commission notes that Chapters 386, 393, and 394, all contain numerous grants of rulemaking authority, as detailed below. The Commission urges the Court to correct this factual misstatement in the W.D. Order. It was error for the Western District to hold that Commission rulemaking authority rests in § 386.250(6) alone when there are numerous explicit and implicit grants of rulemaking authority that the Commission may exercise in its regulation of public utility companies. It is true that an agency is restricted in its promulgation of rules to rules within its legislatively delegated authority.<sup>157</sup> As

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<sup>156</sup> *EBG Health Care III, Inc., v. Missouri Facilities Review Comm’n*, 12 S.W.3d 354, 360 (Mo. App. 2000).

<sup>157</sup> *Psychcare Management, Inc. v. Department of Soc. Servs.*, 980 S.W.2d 311, 313-14 (Mo. banc 1998)

noted in *Psychcare Management*, only rules promulgated by an administrative agency with properly delegated authority have the force and effect of law. It is also a basic tenet of administrative law, however, that the “delegated authority can either be expressly or impliedly conferred in the statute.”<sup>158</sup>

When engaging in statutory interpretation, the Court also presumes that statutes referring to the same subject matter are to be read consistently with one another and to be harmonized if possible.<sup>159</sup> When §§ 386.250(7) and 386.040 are read *in pari materia* with § 386.250(6), it is apparent that Subsection 7 of § 386.250 and § 386.040 extend the Commission’s authority to “all other and further things as may appear either expressly or impliedly” in Chapter 386 and grants all powers necessary or proper to enable the Commission to fully and effectively carry out the purposes intended by the Legislature. This Court should clarify that § 386.250(6) is certainly not the only statutory section that permits the Commission to promulgate rules pursuant to the statutory imperative to regulate and generally supervise public utilities.

Some examples of **express** authority include: § 386.410.1, which reads in pertinent part:

All hearings before the commission or a commissioner shall be governed by **rules to be adopted and prescribed by the commission.** And in all

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<sup>158</sup> *Pen-Yan Inv. Inc., v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 304 (Mo.App. 1997).

<sup>159</sup> *Id.*

investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence. (emphasis added).

Section 386.310.1, which reads as follows, also contains express rulemaking authority:

The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, **rules or regulations**, or otherwise, to require every person, corporation, municipal gas system and public utility to maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public . . . . (emphasis added).

Even though a “power may be implied only if it necessarily follows from the language of the statute,”<sup>160</sup> when this Court reviews § 386.250(6) *in pari materia* with § 386.250(7) it becomes clear that subsection (7) extends the Commission’s authority broadly to regulate generally all other matters that may appear in the statute either expressly or impliedly. Section 386.250(7) reads in applicable part:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

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<sup>160</sup> *State Dept. of Public Safety v. Murr*, 11 S.W.3d 91, 96 (Mo.App. 2000) (citations omitted).

. . .

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.

Review of this subsection shows that the Legislature expressly grants the Commission broad authority to carry out its intent to regulate utilities. This authority, which necessarily includes rulemaking, is “either expressly or impliedly” granted in a variety of statutory sections authorizing the Commission to regulate utilities. Section 386.250(7) contains an exceptionally broad grant of authority in a remedial statute which, must be read broadly in order to accomplish the intent of the Legislature.<sup>161</sup> Additionally, § 386.040 states that the Commission shall be vested with all powers necessary to carry out the purposes of the Act creating the Commission. When this section is read *in pari materia* with § 386.250(7), it indisputably gives the Commission broad authority to accomplish its statutory mandate by rulemaking, or by adjudication of contested cases, or by any other method necessary to carry out the purposes of the Public Service Commission Law.

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<sup>161</sup> *De Paul Hosp. Sch. of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo.App. 1976).

Besides the statutory grants of rulemaking authority found in Chapter 386, Chapter 393 contains numerous grants of rulemaking authority, and the Western District overlooked all of them. For example:

Section 393.140(11) grants the Commission the power to:  
require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. . . . **The commission shall also 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.** (emphasis added).

Referring to this very section, the Western District said that “[t]he Commission can make and interpret rules to carry out its statutory authority.” *State ex rel. Hoffman v. Public Service Comm’n.*, 530 S.W.2d 434, 439 (Mo.App. 1975).

There are also explicit grants of rulemaking authority found in §§ 393.180, (the power of gas corporations, electrical corporations . . . to issue stocks, bonds, notes and other evidences of indebtedness and to create liens upon their property situated in this

state is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe); 393.240 (the commission shall have power, after hearing, to require any or all gas corporations, electrical corporations . . . to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the commission may prescribe); and 393.292 (the commission shall have power, after hearing, to require any or all gas corporations, electrical corporations . . .to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the commission may prescribe).

Moreover, there are various sections of Chapter 393 where rulemaking authority is implied from the statutory language. For example, the section that charges the Commission with “general supervision” of utilities does not limit the Commission’s choice of method to accomplish this legislatively mandated role. Section 393.140.1. The Court recognizes in its Slip Opinion that administrative agencies, including the Commission, exercise two distinct functions: quasi-legislative and quasi-judicial. March 5 Slip Opinion at 20. There is nothing in § 393.140.1 that limits the Commission to one or the other of these functions in supervising and regulating public utility companies.

Throughout Chapter 393, the Legislature has used the term “prescribe” when denoting the Commission’s authority to regulate utilities. The term “prescribe” is defined in Black’s Law Dictionary, 1183, (6<sup>th</sup> ed. 1990), as “to lay down authoritatively as a guide, direction, or rule . . .” Certainly when using the term “prescribe” the Legislature

has expressly granted the Commission authority to adopt rules as necessary to regulate public utility companies. These instances include: §§ 393.140 (3), (4), (5) (8), (11) and(12), all of which give the Commission authority to “prescribe” some conduct of the utilities. For example, § 393.140(12) states that the Commission has authority “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 the utility plant as distinguished from the [affiliate] business.” (emphasis added). Thus, the Commission has the authority to ensure by rulemaking the proper allocation of revenues, expenses and investment among regulated and unregulated businesses of a corporation.

Another example of rulemaking authority is found in Chapter 392 which includes a grant of rulemaking authority in Section 392.290.1 which states:

The power of telecommunications companies to issue stocks, bonds, notes and other evidence of indebtedness and to create liens upon their property situated in this state is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and **under such rules and regulations as the commission may prescribe** . (emphasis added).

Furthermore, Chapter 394 contains grants of authority to the Commission to promulgate rules. Section 394.312.2 reads in pertinent part: “Petitions shall be made pursuant to the **rules and regulations of the commission governing applications for certificates of public convenience and necessity.**” (emphasis added). Section

394.312.3 has similar language granting rulemaking authority. Moreover, § 394.312.7 contains the following grant of rulemaking authority: “[n]otwithstanding the provisions of section 386.410, RSMo, the commission shall **by rule** set a schedule of fees based upon its costs in reviewing proposed territorial agreements for approval or disapproval.” (emphasis added)

In conclusion, § 386.250(7) contains a grant of authority that confers broad “jurisdiction, powers and duties” to the Commission including to carry out the intent of the Legislature in this remedial statute. There is no question of the legislative intent to grant the Commission broad authority to accomplish the purposes of this remedial act. Explicit grants of rulemaking authority are found throughout Chapter 386, 392, 393 and 394, as are implied grants of such authority, so that a holding that the Commission’s rulemaking authority is restricted to § 386.250(6) is unsupported by review of these statutes. The Court should clarify that there are numerous sections of Chapters 386, 392, 393, and 394 which contain language that grants the Commission rulemaking authority either expressly or impliedly and that § 386.250 is not, by any means, the only section that grants the Commission rulemaking authority to regulate public utility companies.

## CONCLUSION

The Commission has been granted broad power to regulate public utilities to protect captive consumers of monopoly utilities from improper cost shifting that may occur between a regulated company and its non-regulated affiliates. The Commission seeks to accomplish this by, among other things, promulgating rules to govern affiliate transactions. The Commission followed the mandates of Chapter 536 and provided all necessary process. In its three days of hearings, the Commission did, in fact, grant even more due process than was required.

Promulgation of these Rules indicates that the Commission will be taking a close look at affiliate transactions. This scrutiny is justified because the Commission regulates utilities to assure just and reasonable rates, and when utilities engage in transactions that are not at arm's length, the Commission realizes that enormous pressures may exist to benefit the affiliate at the expense of the captive customers. Such concerns go to the heart of the Commission's regulatory jurisdiction, and, through the Rules, the Commission recognizes that such transactions should not always receive the same presumption of prudence as arms-length transactions. By promulgating the Rules, the Commission is notifying utilities of the generally applicable standards it will apply when evaluating certain transactions, and the steps a utility may take to maintain a presumption of prudence. In supervising these transactions, the Commission is fulfilling its statutory responsibility to assure just and reasonable rates for Missouri consumers.

Neither the Commission nor any other state agency is required to provide an adjudicative type hearing when either proposing or promulgating rules, absent a clear

Legislative intent that an adjudicatory type hearing is required. There is no such intent in either § 536.016 or in § 386.250(6), and the Court should reject Appellants arguments.

The Commission, therefore, respectfully requests that this Court enter its order affirming the Rules promulgated by the Commission.

Respectfully submitted,

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## CERTIFICATE

I hereby certify that the foregoing brief of Respondent Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and pursuant to Missouri Supreme Court Special Rule No. 1, I further certify that this brief complies with the provisions of Special Rule No. 1(b), and that:

- (1) The signature block above contains the information required by Rule 55.03;
- (2) The entire brief contains 20,740 words, as determined by the word count feature of Microsoft Word;
- (3) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and
- (4) That the attached computer disk has been scanned for viruses and that it is virus free.

I further certify that two (2) copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 3rd day of June 2002.

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