

4 CSR 235-3.020 Health Service Provider Certification is amended.

A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on September 1, 1999 (24 MoReg 2140-2141). No changes have been made to the text of the proposed amendment, so it is not reprinted here. This proposed amendment becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The State Committee of Psychologists received one comment requesting that the board change the date in subsection (A) and (C) to December 31, 1996 and eliminate subsection (B). The committee determined that the date could not be changed because it is established in statute.

Title 4--DEPARTMENT OF ECONOMIC DEVELOPMENT

Division 235— State Committee of Psychologists
Chapter 4—Public Complaint Handling and Disposition Procedures

ORDER OF RULEMAKING

By the authority vested in the State Committee of Psychologists under section 337.050.9, RSMo Supp. 1999, the board amends a rule as follows:

4 CSR 235-4.030 Public Complaint Handling and Disposition Procedure is amended.

A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on September 1, 1999 (24 MoReg 2141-2142). No changes have been made to the text of the proposed amendment, so it is not reprinted here. This proposed amendment becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: No comments were received.

Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT

Division 240—Public Service Commission
Chapter 20— Electric Utilities

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under sections 386.250, RSMo Supp. 1999, and 393.140, RSMo 1994, the commission adopts a rule as follows:

4 CSR 240-20.015 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on June 1, 1999 (24 MoReg 1340-1345). Those sections with changes are reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: This order of rulemaking was approved by the Missouri Public Service Commission with one dissenting opinion that has been filed with the Commission's Secretary. Extensive written comments and reply comments were submitted and public hearings were held on September 13, 14 and 15, 1999. The Commission's staff supported the proposed rule with a few suggested changes based on the other comments received. The Office of Public Counsel and others in support of

the rule advocated for more stringent provisions. Comments from the regulated utilities supported less stringent provisions or opposed adoption of the rule.

COMMENT: Comments were received from several of the commenters adverse to the jurisdiction of the Commission to promulgate these rules. The Commission's Staff anticipated these arguments in their comments and presented arguments supporting the Commission's jurisdiction.

RESPONSE: The Commission's rulemaking authority is based on proper legal authority and the Commission has jurisdiction to adopt these rules.

COMMENT: Comments were received from several of the commenters suggesting that contested case procedures should be followed in the promulgation of these rules. Related comments addressed whether witnesses at the public hearings should be sworn.

RESPONSE: The Commission has followed proper rulemaking procedures to adopt these rules.

COMMENT: A purpose of the rule is to prevent regulated utilities from subsidizing their unregulated operations. This would occur where costs of unregulated operations are shifted to ratepayers for regulated operations or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. All commenters in support of the rule agreed with the Commission's intended purpose. Commenters in support urged more stringent limits on preferential service or treatment. Most commenters in opposition expressed the view that cost shifting should be limited rather than prevented and that some limits on preferential service or treatment should be imposed but suggested that the proposed rule went too far on both types of subsidies.

RESPONSE: Generally, the rule as proposed, presents a moderate approach by the Commission. Other states that have adopted rules have taken approaches that were more stringent or approaches that were less stringent. The rulemaking record supports full, effective limitations on cost shifting. With respect to preferential service or treatment, the rulemaking record supports clarifying changes and making changes to allow more flexibility to regulated utilities. In most matters more stringent standards of conduct were not supported at this time.

COMMENT: Several commenters objected to the use of fully distributed costs (FDC) and "asymmetrical pricing" under section (2). Under the proposed rule, cost shifting and other subsidies are prohibited by application of the pricing standard under section (2). The standard uses both FDC and fair market price (FMP). FDC is a costing methodology that accounts for all costs by assigning all costs used to produce a good or service through a direct or allocated approach or a combination of direct and allocated costs. Under the standard, when a regulated utility acquires goods or services from an affiliate entity it may not pay more than the FDC for the utility to produce the good or service for itself or FMP, whichever is less. When a regulated utility transfers goods or services to an affiliate entity it must obtain the greater of FMP or FDC to the regulated utility. The term asymmetrical pricing refers to the fact that the pricing standard is reversed depending upon whether the regulated utility is buying or is selling.

RESPONSE: FDC assures that all costs are accounted and recovered and FMP, in conjunction with FDC, assures that the regulated utilities obtain the best prices or lowest costs possible whether buying or selling or producing goods or services. Asymmetrical pricing assures that the pricing standard is always applied to the favor of regulated utility's customers. The commenters that objected to FDC and asymmetrical pricing proposed costing methodologies that would not fully account for direct costs, indirect costs and opportunity costs or that would permit

transactions to occur at a pricing standard that was not optimized to ratepayers. The alternative proposals would allow cost shifting to occur so long as a direct cost increase did not result for ratepayers. Prices for regulated goods and services would be higher over time than if the affiliate transactions occurred using FMP, FDC and asymmetrical pricing. These opponents to the proposed standard believed that transactions reflecting economies of scope and scale would be discouraged, even to the point that the affiliate transactions would not occur at all, and that incremental or marginal benefits under a less stringent standard would be lost to ratepayers. The Commission does not find this assertion to be credible. Foregoing opportunity costs or shifting the costs of unregulated activities to ratepayers will not generally be in the interests of ratepayers, or for that matter, the longer term interests of the regulated companies. If the cost shifting occurs to enhance profits for already profitable unregulated activities then ratepayers are being victimized to obtain predatory profits. The result would be a regulatory and ratepayer backlash. If the cost shifting occurs because the costs of the regulated company and its affiliates are higher than the costs of competitors then ratepayers are again being victimized, and, in addition the Commission would be allowing the misallocation of economic resources to keep an inefficient competitor in business. The solution here is to cut costs, a move that would benefit ratepayers, shareholders and consumers. If the cost shifting occurs merely to increase the rate of return in an otherwise low margin venture that shareholders would disapprove, ratepayers are again being victimized. The solution is to select ventures that offer an acceptable rate of return and to avoid those that do not.

Economies of scope and scale do not result from shifting costs or foregoing profitable pricing opportunities; they result from the efficient and maximized application of resources. A company or group of companies in exclusively competitive markets may experience circumstances where shifting costs or foregoing profitable pricing opportunities serves a business purpose but those circumstances will be tempered by competition, particularly over the long run. A company or group of companies in mixed competitive and regulated markets has incentives to shift costs or forego profitable pricing opportunities that are not tempered by competition, but by regulators. The interests of ratepayers are not served by paying the costs of producing and selling goods and services that they are not buying. Section (10) of the rule permits variances. To the extent that circumstances occur where the best interests of ratepayers would be served by permitting cost shifting to occur for a period of time a waiver could be obtained.

COMMENT: Several commenters in support of the proposed rule advocated additional and more stringent standards to be added in a new section (2) regarding access to customer information, marketing activities including use of names and logos, some degree of physical separation from affiliates, and restrictions on the transfer of employees.

RESPONSE: Generally, additional and more stringent standards are not required. The record shows that the most likely competitors to affiliates of incumbent utilities are large, national or international corporations that have similar or equivalent competitive strengths. It is not the intent or purpose of the proposed rules to handicap any competitor. Doing so would be detrimental to both ratepayers and consumers, resulting in higher costs or less information for ratepayers and consumers. In most cases, the interests of ratepayers will be best served by simply assuring that costs are not shifted to them. In a few instances preferential service or treatment derived from regulated activity or resources should be limited where an unfair advantage is provided to an affiliate entity over its competitors.

COMMENT: Several commenters asserted that the record keeping and documentation requirements for regulated utilities and their affiliates would be unduly burdensome and costly, ultimately to the detriment of ratepayers.

RESPONSE: The anticipated fiscal costs for the proposed rule appear modest and not unduly burdensome. Industry input was requested and considered to develop the estimated fiscal impact. The rulemaking record shows that without the record keeping and documentation requirements it would be either impossible to obtain the information necessary to implement the rule or even more costly to implement the rule through more elaborate and time consuming regulatory audits. Many implementation costs, such as development of cost allocation manuals (CAM), would not be reoccurring. Some utilities already have costing and documentation methodologies in place that would satisfy many of the requirements of the proposed rule. There will be additional accounting and documentation requirements as a result of this rule. However, existing systems that already provide useful information would not be duplicated. Verifying FDC and FMP could produce benefits unrelated to regulatory requirements by providing data to support more efficient market based decision making and allocation of resources by the regulated utilities. Finally, the rule allows a great deal of flexibility to customize CAMs and to obtain variances where circumstances merit. The degree and detail of record keeping and documentation can be varied so that the cost of the regulation does not outweigh the benefits afforded.

COMMENT: Some commenters, both in support and in opposition, suggested a change to the rule to establish a defined dollar threshold for application of exceptions in competitive circumstances. RESPONSE: This type of exception can be addressed through individual variances under the rule. Companies will vary greatly in size, activities and the methods of implementing compliance systems.

COMMENT: Comments were received suggesting that a definition be provided for the term "corporate support" in order to allow greater flexibility to obtain economies in certain areas.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1). Subsection (2)(B) has been modified to provide greater flexibility in that standard.

COMMENT: Comments were received suggesting that a definition be provided for the term "information" since certain standards limit the provision of "preferential" "information" to affiliates and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting that a definition be provided for the term "unfair advantage" since certain definitions and standards use this term and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting the definition of "affiliate entity" posed Hancock Amendment issues and that the definition was not clear as to its application to departments within utilities.

RESPONSE: The Commission does not agree with these comments and did not change this definition.

COMMENT: Comments were received regarding the definition of "control" and particularly regarding the presumption of control based on the beneficial ownership of ten percent or more of voting securities or partnership interest. Comments either supported this presumption or criticized it and offered a presumption only at the fifty percent level.

RESPONSE: The Commission has not changed this definition. The record supports the reasonableness of the presumption as a general measure of an effective controlling interest. This presumption will aid in reducing regulatory burdens and costs. The presumption is not absolute and it is expressly rebuttable. A fifty percent presumption would not serve any efficient regulatory purpose since, in almost every case, it would represent both effective and absolute control.

COMMENT: Comments were received regarding the appropriateness of limiting employee transfers between regulated utilities and affiliates and the application of the pricing standards to these transfers under section (2). Several commenters noted the difficulty of pricing an employee or trained employee services. One commenter suggested simply establishing a fixed fee.

RESPONSE AND EXPLANATION OF CHANGE: Commenters offering explanations of how an employee or trained employee would be valued were not consistent or clear. Commenters acknowledged that valued employees could go to work for a non-affiliated competitor and there would be no payment to the regulated utility at all. Under these circumstances any payment appears to be more of a penalty or a handicap to an incumbent utility and its affiliate entities than a means to prevent cost shifting or unfair preferential treatment. The standards are properly directed at preventing cost shifting and subsidies. This purpose can be accomplished by focusing on the pricing of information and providing fair access to information. Employee transfers do not have to be restricted, penalized or compensated to accomplish this purpose. The Commission has deleted the descriptive list that included the term "trained employees" from paragraph (2)(A)2.

COMMENT: Comments were received from several commenters regarding section (2) concerning the provision of information to consumers and referrals for services provided by a regulated utility regarding an affiliate entity or its competitors. Some commenters proposed that the regulated utility provide information and referrals for competitors or references to marketing or referral services. Some commenters opposed any additional requirements and still others opposed any forced marketing on the behalf of competitors.

RESPONSE AND EXPLANATION OF CHANGE: The rule is not intended to handicap incumbent utilities or their affiliated entities. Maintaining a referral list would be an undue and costly burden. Even referral to commercial marketing resources or listings is unfair in that competitors will not be under any reciprocal requirement. As noted previously, competitors are most likely to be large national and international companies with their own marketing capabilities. The abuse or potential abuse to guard against is the possible perception that regulated services and unregulated goods or services are tied or are both regulated services. The Commission has made clarifying changes to this provision and added a subsection to assure that consumers are aware that affiliate entity services are not regulated services.

COMMENT: Several commenters suggested an additional standard to prohibit tying. One commenter noted that existing state and federal antitrust laws already address this matter.

RESPONSE: A standard expressly prohibiting tying is not required. An addition to the rule discussed below assures that state and federal antitrust laws remain applicable.

COMMENT: Several commenters suggested a specific standard related to providing information about customers.

RESPONSE AND EXPLANATION OF CHANGE: The rule as proposed addresses pricing and preferential access for information. However, the suggested standard would incorporate reasonable consumer and ratepayer protections and is desirable. This additional standard has been incorporated into the rule in an additional subsection in section (2).

COMMENT: Comments were received that suggested that approval of a CAM addressing certain matters should suffice for later ratemaking purposes concerning the same matters. The commenters also suggested that information presented in a CAM should be limited to Missouri operations and that non-regulated activities constituting less than ten percent of revenues should be treated as regulated activity and exempted from the rule requirements.

RESPONSE: The Commission does not anticipate that there will be significant cases where ratemaking treatment will be inconsistent with a CAM. However, a CAM addresses or anticipates many issues in a prospective fashion. Additional information may often come to light and be considered in a ratemaking proceeding. In a ratemaking proceeding the CAM does not bind the regulated utility or the Commission. This flexibility does not harm any interest. The rule allows for variances should it be desirable to grant them.

COMMENT: Two commenters recommended that the regulated utility maintain its books, accounts and records separate from those of its affiliates.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist implementation of the rule and has been added to section (4).

COMMENT: A commenter suggested that section (4) include a record keeping requirement to list employee movement between the regulated utility and affiliated entities.

RESPONSE: This is a burdensome requirement that is not necessary based on the information presented in this rulemaking proceeding.

COMMENT: Some commenters suggested exempting small regulated utilities from the rule.

RESPONSE: This is a matter that could be taken up under a variance request.

COMMENT: Some commenters expressed uncertainty as to the permissible scope of variances under the rule.

RESPONSE AND EXPLANATION OF CHANGE: This section has been renumbered from (9) to (10). The scope and terms of variances, whether partial or complete, under section (10) will be determined by the facts and circumstances found in support of the application. Section (10) has been clarified.

COMMENT: Some commenters suggested that regulated utilities should train and advise their employees concerning the requirements of this rule.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist in successfully implementing the rule. An additional section has been added to the rule for this change.

COMMENT: Some commenters referred to antitrust provisions and compared antitrust concepts to the proposed rules in their statements. The proposed rules address similar competitive and monopoly power issues.

RESPONSE AND EXPLANATION OF CHANGE: Under the Missouri Antitrust Law activities or arrangements expressly approved or regulated by a regulatory body of the state may be exempted from the antitrust law. It is not the Commission's intent to create any exemptions. An additional section has been added to the rule to clarify the Commission's intent.

4 CSR 240-20.015 Affiliate Transactions

(1) Definitions.

(A) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county or a

combination of political subdivisions which, directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated electrical corporation.

(B) Affiliate transaction means any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of any product or service, between a regulated electrical corporation and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated electrical corporation and the regulated business operations of an electrical corporation. An **affiliate** transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754 by the General Assembly of Missouri.

(C) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through one (1) or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one (1) or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of ten percent (10%) or more of voting securities or partnership interest of an entity constitutes control for purposes of this rule. This provision, however, shall not be construed to prohibit a regulated electric corporation from rebutting the presumption that its ownership interest in an entity confers control.

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

(E) Derivatives means a financial instrument, traded on or off an exchange, the price of which is directly dependent upon (i.e., "derived from") the value of one (1) or more underlying securities, equity indices, debt instruments, commodities, other derivative instruments or any agreed-upon pricing index or arrangement (e.g., the movement over time of the Consumer Price Index or freight rates). Derivatives involve the trading of rights or obligations based on the underlying product, but do not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for a fixed rate of return.

(F) Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g., general and administrative) **must** also be included in the FDC calculation through a general allocation.

(G) Information means any data obtained by a regulated electrical corporation that is not obtainable by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

(H) Preferential service means information or treatment or actions by the regulated electrical corporation which places the affiliated entity at an unfair advantage over its competitors.

(I) Regulated electrical corporation means every electrical corporation as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapter 393, RSMo.

(J) Unfair advantage means an advantage that cannot be obtained by nonaffiliated entities or can only be obtained at a **competitively prohibitive cost** in either time or resources.

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

(2) Standards.

(A) A regulated electrical corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation shall be deemed to provide a financial advantage to an affiliated entity if—

1. It compensates an affiliated entity for goods or services above the lesser of—

A. The fair market price; or

B. The fully distributed cost to the regulated electrical corporation to provide the goods or services for itself; or

2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of—

A. The fair market price; or

B. The fully distributed cost to the regulated electrical corporation.

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

(C) Specific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders. General or aggregated customer information shall be made available to affiliated or unaffiliated entities upon similar terms and conditions. The regulated electrical corporation may set reasonable charges for costs incurred in producing customer information. Customer information includes information provided to the regulated utility by affiliated or unaffiliated entities.

(D) The regulated electrical corporation shall not participate in any affiliate transactions which are not in compliance with this rule except as otherwise provided in section (10) of this rule.

(E) If a customer requests information from the regulated electrical corporation about goods or services provided by an affiliated entity, the regulated electrical corporation may provide information about its affiliate but must inform the customer that regulated services are not tied to the use of an affiliate provider and that other service providers may be available. The regulated electrical corporation may provide reference to other service providers or to commercial listings, but is not required to do so. The regulated electrical corporation shall include in its annual Cost Allocation Manual (CAM), the criteria, guidelines, and procedures it will follow to be in compliance with this rule.

(F) Marketing materials, information or advertisements by an affiliate entity that share an exact or similar name, logo or trademark of the regulated utility shall clearly display or announce that the affiliate entity is not regulated by the Missouri Public Service Commission.

(4) Record Keeping Requirements.

(A) A regulated electrical corporation shall maintain books, accounts and records separate from those of its affiliates.

(B) Each regulated electrical corporation shall maintain the following information in a mutually agreed-to electronic format (i.e., agreement between the staff, Office of the Public Counsel and the regulated electrical corporation) regarding affiliate transactions on a calendar year basis and shall **provide** such information to the commission staff and the Office of the Public Counsel on, or before, March 15 of the succeeding year:

1. A full and complete list of all affiliated entities as defined by this rule;

2. A full and complete list of all **goods** and services **provided** to or received from affiliated entities;

3. A full and complete list of all contracts entered with affiliated entities;

4. A full and complete list of all affiliate transactions undertaken with affiliated entities without a written contract together with a brief explanation of why there was no contract;

5. The amount of all affiliate transactions by affiliated entity and account charged; and

6. The basis used (e.g., fair market price, FDC, etc.) to record each type of affiliate transaction.

(C) In addition, each regulated electrical corporation shall maintain the following information regarding affiliate transactions on a calendar year basis:

1. Records identifying the basis used (e.g., fair market price, FDC, etc.) to record all affiliate transactions; and

2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.

(9) The regulated electrical corporation shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

(10) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraphs (10)(A)1. or (10)(A)2. The granting of a variance to one regulated electrical corporation does not constitute a waiver respecting or otherwise affect the required compliance of any other regulated electrical corporation to comply with the standards. The scope of a variance will be determined based on the facts and circumstances found in support of the application.

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

2. A regulated electrical corporation may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (10)(A)2.A. and (10)(A)2.B. of this rule—

A. All reports and record retention requirements for each affiliate transaction must be complied with; and

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and the Office of the Public Counsel within ten (10) days of the occurrence of the noncomplying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate transaction was in the best interests of the regulated customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any party shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a party's ability to challenge the affiliate transaction at the time of the annual CAM filing. At the time of the filing of the regulated electrical corporation's annual CAM filing the regulated electrical corporation shall provide to the secretary of the commission a listing of all noncomplying affiliate transactions which occurred between the period of the last filing and the current filing. Any affiliate transaction submitted pursuant to this section shall remain interim, subject to disallowance, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the regulated customers.

(11) Nothing contained in this rule and no action by the commission under this rule shall be construed to approve or exempt any activity or arrangement that would violate the antitrust laws of the state of Missouri or of the United States or to limit the rights of any person or entity under those laws.

**Title 4—DEPARTMENT OF ECONOMIC
DEVELOPMENT
Division 240—Public Service Commission
Chapter 40—Gas Utilities and Gas Safety Standards**

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under sections 386.250, RSMo Supp. 1999, and 393.140, RSMo 1994, the commission adopts a rule as follows:

4 CSR 240-40.015 is adopted

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on June 1, 1999 (24 MoReg 1346-1351). Those sections with changes are reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: This order of rulemaking was approved by the Missouri Public Service Commission with one dissenting opinion that has been filed with the Commission's Secretary. Extensive written comments and reply comments were submitted and public hearings were held on September 13, 14 and 15, 1999. The Commission's Staff supported the proposed rule with a few suggested changes based on the other comments received. The Office of Public Counsel and others in support of the rule advocated for more stringent provisions. Comments from the regulated utilities supported less stringent provisions or opposed adoption of the rule.

COMMENT: Comments were received from several of the commenters adverse to the jurisdiction of the Commission to promulgate these rules. The Commission's Staff anticipated these arguments in their comments and presented arguments supporting the Commission's jurisdiction.

RESPONSE: The Commission's rulemaking authority is based on proper legal authority and the Commission has jurisdiction to adopt these rules.

COMMENT: Comments were received from several of the commenters suggesting that contested case procedures should be followed in the promulgation of these rules. Related comments addressed whether witnesses at the public hearings should be sworn.

RESPONSE: The Commission has followed proper rulemaking procedures to adopt these rules.

COMMENT: A purpose of the rule is to prevent regulated utilities from subsidizing their unregulated operations. This would occur where costs of unregulated operations are shifted to ratepayers for regulated operations or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. All commenters in support of the rule agreed with the Commission's intended purpose. Commenters in support urged more stringent limits on preferential service or treatment. Most commenters in opposition expressed the view that cost shifting should be limited rather than prevented and that some limits on preferential service or treatment should be imposed but suggested that the proposed rule went too far on both types of subsidies.

RESPONSE: Generally, the rule as proposed, presents a moderate approach by the Commission. Other states that have adopted rules have taken approaches that were more stringent or approaches that were less stringent. The rulemaking record supports full, effective limitations on cost shifting. With respect to preferential service or treatment, the rulemaking record supports clarifying changes and making changes to allow more flexibility to regulated utilities. In most matters more stringent standards of conduct were not supported at this time.

COMMENT: Several commenters objected to the use of fully distributed costs (FDC) and "asymmetrical pricing" under section (2). Under the proposed rule, cost shifting and other subsidies are prohibited by application of the pricing standard under section (2). The standard uses both FDC and fair market price (FMP). FDC is a costing methodology that accounts for all costs by assigning all costs used to produce a good or service through a direct or allocated approach or a combination of direct and allocated costs. Under the standard, when a regulated utility acquires goods or services from an affiliate entity it may not pay more than the FDC for the utility to produce the good or service for itself or FMP, whichever is less. When a regulated utility transfers goods or services to an affiliate entity it must obtain the greater of FMP or FDC to the regulated utility. The term asymmetrical pricing refers to the fact that the pricing standard is reversed depending upon whether the regulated utility is buying or is selling.

RESPONSE: FDC assures that all costs are accounted and recovered and FMP, in conjunction with FDC, assures that the regulated utilities obtain the best prices or lowest costs possible whether buying or selling or producing goods or services. Asymmetrical pricing assures that the pricing standard is always applied to the favor of regulated utility's customers. The commenters that objected to FDC and asymmetrical pricing proposed costing methodologies that would not fully account for direct costs, indirect costs and opportunity costs or that would permit transactions to occur at a pricing standard that was not optimized to ratepayers. The alternative proposals would allow cost shifting to occur so long as a direct cost increase did not result for ratepayers. Prices for regulated goods and services would be higher over time than if the affiliate transactions occurred using FMP, FDC and asymmetrical pricing. These opponents to the proposed standard believed that transactions reflecting economies of scope and scale would be discouraged, even to the point that the affiliate transactions would not occur at all, and that incremental or marginal benefits under a less stringent standard would be lost to ratepayers. The Commission does not find this assertion to be credible. Foregoing opportunity costs or shifting the costs of unregulated activities to ratepayers will not generally be in the interests of ratepayers, or for that matter, the longer term interests of the regulated companies. If the cost shifting occurs to enhance profits for already profitable unregulated activities then ratepayers are being victimized to obtain predatory profits. The result would be a regulatory and ratepayer backlash. If the cost shifting occurs because the costs of the regulated company and its affiliates are higher than the costs of competitors then ratepayers are again being victimized, and, in addition the Commission would be allowing the misallocation of economic resources to keep an inefficient competitor in business. The solution here is to cut costs, a move that would benefit ratepayers, shareholders and consumers. If the cost shifting occurs merely to increase the rate of return in an otherwise low margin venture that shareholders would disapprove. ratepayers are again being victimized. The solution is to select ventures that offer an acceptable rate of return and to avoid those that do not. Economies of scope and scale do not result from shifting costs or foregoing profitable pricing opportunities: they result from the efficient and maximized application of resources. A company or group of companies in exclusively competitive markets may experience circumstances where shifting costs or foregoing profitable pricing opportunities serves a business purpose but those circumstances will be tempered by competition, particularly over the long run. A company or group of companies in mixed competitive and regulated markets has incentives to shift costs or forego profitable pricing opportunities that are not tempered by competition, but by regulators. The interests of ratepayers are not served by paying the costs of producing and selling goods and services that they are not buying. Section (10) of the rule permits variances. To the extent that circumstances occur where the best interests of ratepayers would be served by permitting cost shifting to occur for a period of time a waiver could be obtained.

COMMENT: Several commenters in support of the proposed rule advocated additional and more stringent standards to be added in a new section (2) regarding access to customer information, marketing activities including use of names and logos, some degree of physical separation from affiliates, and restrictions on the transfer of employees.

RESPONSE: Generally, additional and more stringent standards are not required. The record shows that the most likely competitors to affiliates of incumbent utilities are large, national or international corporations that have similar or equivalent competitive strengths. It is not the intent or purpose of the proposed rules to handicap any competitor. Doing so would be detrimental to both ratepayers and consumers, resulting in higher costs or less information for ratepayers and consumers. In most cases, the interests of ratepayers will be best served by simply assuring that costs are not shifted to them. In a few instances preferential service or treatment derived from regulated activity or resources should be limited where an unfair advantage is provided to an affiliate entity over its competitors.

COMMENT: Several commenters asserted that the record keeping and documentation requirements for regulated utilities and their affiliates would be unduly burdensome and costly, ultimately to the detriment of ratepayers.

RESPONSE: The anticipated fiscal costs for the proposed rule appear modest and not unduly burdensome. Industry input was requested and considered to develop the estimated fiscal impact. The rulemaking record shows that without the record keeping and documentation requirements it would be either impossible to obtain the information necessary to implement the rule or even more costly to implement the rule through more elaborate and time consuming regulatory audits. Many implementation costs, such as development of cost allocation manuals (CAM), would not be reoccurring. Some utilities already have costing and documentation methodologies in place that would satisfy many of the requirements of the proposed rule. There will be additional accounting and documentation requirements as a result of this rule. However, existing systems that already provide useful information would not be duplicated. Verifying FDC and FMP could produce benefits unrelated to regulatory requirements by providing data to support more efficient market based decision making and allocation of resources by the regulated utilities. Finally, the rule allows a great deal of flexibility to customize CAMs and to obtain variances where circumstances merit. The degree and detail of record keeping and documentation can be varied so that the cost of the regulation does not outweigh the benefits afforded.

COMMENT: Some commenters, both in support and in opposition, suggested a change to the rule to establish a defined dollar threshold for an exemption from certain compliance requirements. RESPONSE: This type of exception can be addressed through individual variances under the rule. Companies will vary greatly in size, activities and the methods of implementing compliance systems.

COMMENT: Comments were received suggesting that a definition be provided for the term "corporate support" in order to allow greater flexibility to obtain economies in certain areas.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1). Subsection (2)(B) has been modified to provide greater flexibility in that standard.

COMMENT: Comments were received suggesting that a definition be provided for the term "information" since certain standards limit the provision of "preferential" "information" to affiliates and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting that a definition be provided for the term "unfair advantage" since certain definitions and standards use this term and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting the definition of "affiliate entity" posed Hancock Amendment issues and that the definition was not clear as to its application to departments within utilities.

RESPONSE: The Commission does not agree with these comments and did not **change** this definition.

COMMENT: Comments were received regarding the definition of "control" and particularly regarding the presumption of control based on the beneficial ownership of ten percent or more of voting securities or partnership interest. Comments either supported this presumption or criticized it and offered a presumption only at the fifty percent level.

RESPONSE: **The** Commission has not changed this definition. The record supports the reasonableness of the presumption as a general measure of an effective controlling interest. This presumption will aid in reducing regulatory burdens and costs. The presumption is not absolute and it is expressly rebuttable. A fifty percent presumption would not serve any efficient regulatory purpose since, in almost every case, it would represent both effective and absolute control.

COMMENT: Comments were received regarding the appropriateness of limiting employee transfers between regulated utilities and affiliates and the application of the pricing standards to these transfers under section (2). Several commenters noted the difficulty of pricing an employee or trained employee services. One commenter suggested simply establishing a fixed fee.

RESPONSE AND EXPLANATION OF CHANGE: Commenters offering explanations of how an employee or trained employee would be valued were not consistent or clear. Commenters acknowledged that valued employees could go to work for a non-affiliated competitor and there would be no payment to the regulated utility at all. Under these circumstances any payment appears to be more of a penalty or a handicap to an incumbent utility and its affiliate entities than a means to prevent cost shifting or unfair preferential treatment. The standards are properly directed at preventing cost shifting and subsidies. This purpose can be accomplished by focusing on the pricing of information and providing fair access to information. Employee transfers do not have to be restricted, penalized or compensated to accomplish this purpose. The Commission has deleted the descriptive list that included the term "**trained employees**" from paragraph (2)(A)2.

COMMENT: Comments were received from several commenters regarding section (2) concerning the provision of information to consumers and referrals for services provided by a regulated utility regarding an affiliate entity or its competitors. Some commenters proposed that the regulated utility provide information and referrals for competitors or references to marketing or referral services. Some commenters opposed any additional requirements and still others opposed any forced marketing on the behalf of competitors.

RESPONSE AND EXPLANATION OF CHANGE: The rule is not intended to handicap incumbent utilities or their affiliated entities. Maintaining a referral list would be an undue and costly burden. Even referral to commercial marketing resources or listings is unfair in that competitors will not be under any reciprocal requirement. As noted **previously**, competitors are most likely to be large national and international companies with their own marketing

capabilities. The abuse or potential abuse to guard against is the possible perception that regulated services and unregulated goods or services are tied or are both regulated services. The Commission has made clarifying changes to this provision and added a subsection to assure that consumers are aware that affiliate entity services are not regulated services.

COMMENT: Several commenters suggested an additional standard to prohibit tying. One commenter noted that existing state and federal antitrust laws already address this matter.

RESPONSE: A standard expressly prohibiting tying is not required. An addition to the rule discussed below assures that state and federal antitrust laws **remain** applicable.

COMMENT: Several commenters suggested a specific standard related to providing information about customers.

RESPONSE AND EXPLANATION OF CHANGE: The rule as proposed addresses pricing and preferential access for information. However, the suggested standard would incorporate reasonable consumer and ratepayer protections and is desirable. This additional standard has been incorporated into the rule in an additional subsection in section (2).

COMMENT: Comments were received that suggested that approval of a CAM addressing certain matters should suffice for later ratemaking purposes concerning the same matters. The **commenters** also suggested that information presented in a CAM should be limited to Missouri operations and that nonregulated activities constituting less than ten percent of revenues should be treated as regulated activity and exempted from the rule requirements.

RESPONSE: The Commission does not anticipate that there will be significant cases where ratemaking treatment will be inconsistent with a CAM. However, a CAM addresses or anticipates many issues in a prospective fashion. Additional information may often come to light and be considered in a ratemaking proceeding. In a ratemaking proceeding the CAM does not bind the regulated utility or the Commission. This flexibility does not harm any interest. The rule allows for variances should it be desirable to grant them.

COMMENT: ~~The~~ commenters recommended that the regulated utility **maintain** its books, accounts and records **separate** from those of its affiliates.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist implementation of the rule and has been added to section (4).

COMMENT: A commenter suggested that section (4) include a record keeping requirement to list **employee** movement between the regulated utility and affiliated entities.

RESPONSE: This is a burdensome requirement that is not necessary based on the information presented in this rulemaking proceeding.

COMMENT: Some commenters suggested exempting small regulated utilities from the rule.

RESPONSE: This is a matter that could be taken up under a variance request.

COMMENT: Some commenters expressed uncertainty as to the **permissible** scope of variances under the rule.

RESPONSE AND EXPLANATION OF CHANGE: This section has been renumbered from (9) to (10). The scope and terms of variances, whether partial or complete, under section (10) will be determined by the facts and circumstances found in support of the application. Section (10) has been clarified.

COMMENT: Some **commenters** suggested that regulated utilities should train and advise their employees concerning the requirements of this rule.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist in successfully implementing the rule. An additional section has been added to the rule for this change.

COMMENT: Some commenters referred to antitrust provisions and compared antitrust concepts to the proposed rules in their statements. The proposed rules address similar competitive and monopoly power issues.

RESPONSE AND EXPLANATION OF CHANGE: Under the Missouri Antitrust Law activities or arrangements expressly approved or regulated by a regulatory body of the state may be exempted from the antitrust law. It is not the Commission's intent to create any exemptions. An additional section has been added to the rule to clarify the Commission's intent.

4 CSR 240-40.015 Affiliate Transactions

(1) Definitions.

(A) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated gas corporation.

(B) Affiliate transaction means any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of any product or service, between a regulated gas corporation and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated gas corporation and the regulated business operations of a gas corporation. An affiliate transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754, RSMo by the General Assembly of Missouri.

(C) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through one (1) or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of ten percent (10%) or more of voting securities or partnership interest of an entity constitutes control for purposes of this rule. This provision, however, shall not be construed to prohibit a regulated gas corporation from rebutting the presumption that its ownership interest in an entity confers control.

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

(E) Derivatives means a financial instrument, traded on or off an exchange, the price of which is directly dependent upon (i.e., "derived from") the value of one or more underlying securities, equity indices, debt instruments, commodities, other derivative instruments, or any agreed-upon pricing index or arrangement (e.g., the movement over time of the Consumer Price Index or freight rates). Derivatives involve the trading of rights or obligations based on the underlying product, but do not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for fixed rate of return.

(F) Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and

services that are produced. FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

(G) Information means any data obtained by a regulated gas corporation that is not obtainable by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

(H) Preferential service means information or treatment or actions by the regulated gas corporation which places the affiliated entity at an unfair advantage over its competitors.

(I) Regulated gas corporation means every gas corporation as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapter 393, RSMo.

(J) Unfair advantage means an advantage that cannot be obtained by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

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

(2) Standards.

(A) A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if—

1. It compensates an affiliated entity for goods or services above the lesser of—

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation to provide the goods or services for itself; or

2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of—

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation.

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

(C) Specific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders. General or aggregated customer information shall be made available to affiliated or unaffiliated entities upon similar terms and conditions. The regulated gas corporation may set reasonable charges for costs incurred in producing customer information. Customer information includes information provided to the regulated utility by affiliated or unaffiliated entities.

(D) The regulated gas corporation shall not participate in any affiliated transactions which are not in compliance with this rule, except as otherwise provided in section (10) of this rule.

(E) If a customer requests information from the regulated gas corporation about goods or services provided by an affiliated entity, the regulated gas corporation may provide information about its affiliate but must inform the customer that regulated services are not tied to the use of an affiliate provider and that other service providers may be available. The regulated gas corporation may provide reference to other service providers or to commercial listings, but is not required to do so. The regulated gas corporation shall include in its annual Cost Allocation Manual (CAM), the criteria, guidelines and procedures it will follow to be in compliance with the rule.

(F) Marketing materials, information or advertisements by an affiliate entity that share an exact or similar name, logo or trademark of the regulated utility shall clearly display or announce that the affiliate entity is not regulated by the Missouri Public Service Commission.

(4) Record Keeping Requirements.

(A) A regulated gas corporation shall maintain books, accounts and records separate from those of its affiliates.

(B) Each regulated gas corporation shall maintain the following information in a mutually agreed-to electronic format (i.e., agreement between the staff, Office of the Public Counsel and the regulated gas corporation) regarding affiliate transactions on a calendar year basis and shall provide such information to the commission staff and the Office of the Public Counsel on, or before, March 15 of the succeeding year:

1. A full and complete list of all affiliated entities as defined by this rule;
2. A full and complete list of all goods and services provided to or received from affiliated entities;
3. A full and complete list of all contracts entered with affiliated entities;
4. A full and complete list of all affiliate transactions undertaken with affiliated entities without a written contract together with a brief explanation of why there was no contract;
5. The amount of all affiliate transactions, by affiliated entity and account charged; and
6. The basis used (e.g., fair market price, FDC, etc.) to record each type of affiliate transaction.

(C) In addition each regulated gas corporation shall maintain the following information regarding affiliate transactions on a calendar year basis:

1. Records identifying the basis used (e.g., fair market price, FDC, etc.) to record all affiliate transactions; and
2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.

(9) The regulated gas corporation shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

(10) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraphs (10)(A)1. or (10)(A)2. The granting of a variance to one regulated gas corporation does not constitute a waiver respecting or otherwise affect the required compliance of any other regulated gas corporation to comply with the standards. The scope of a variance will be determined based on the facts and circumstances found in support of the application—

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

2. A regulated gas corporation may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (10)(A)2.A. and (10)(A)2.B. of this rule—

A. All reports and record retention requirements for each affiliate transaction must be complied with; and

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and the Office of the Public Counsel within ten (10) days of the occurrence of the noncomplying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate transaction was in the best

interests of the regulated customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any party shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a party's ability to challenge the affiliate transaction at the time of the annual CAM filing. At the time of the filing of the regulated gas corporation's annual CAM filing the regulated gas corporation shall provide to the secretary of the commission a listing of all noncomplying affiliate transactions which occurred between the period of the last filing and the current filing. Any affiliate transaction submitted pursuant to this section shall remain interim, subject to disallowance, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the regulated customers.

(11) Nothing contained in this rule and no action by the commission under this rule shall be construed to approve or exempt any activity or arrangement that would violate the antitrust laws of the state of Missouri or of the United States or to limit the rights of any person or entity under those laws.

Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT

Division 240—Public Service Commission

Chapter 40—Gas Utilities and Gas Safety Standards

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under sections 386.250, RSMo Supp. 1999 and 393.140. RSMo 1994. the commission adopts a rule as follows:

4 CSR 240-40.016 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on June 1, 1999 (24 MoReg 1352-1358). Those sections with changes are reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: This order of rulemaking was approved by the Missouri Public Service Commission with one dissenting opinion that has been tiled with the Commission's Secretary. Extensive written comments and reply comments were submitted and public hearings were held on September 13, 14 and 15, 1999. The Commission's staff supported the proposed rule with a few suggested changes based on the other comments received. The Office of Public Counsel and others in support of the rule advocated for more stringent provisions. Comments from the regulated utilities supported less stringent provisions or opposed adoption of the rule.

COMMENT: Comments were received from several of the commenters adverse to the jurisdiction of the Commission to promulgate these rules. The Commission's staff anticipated these arguments in their comments and presented arguments supporting the Commission's jurisdiction.

RESPONSE: The Commission's rulemaking authority is based on proper legal authority and the Commission has jurisdiction to adopt these rules.

COMMENT: Comments were received from several of the commenters suggesting that contested case procedures should be followed in the promulgation of these rules. Related comments addressed whether witnesses at the public hearings should be sworn.

RESPONSE: The Commission has followed proper rulemaking procedures to adopt these rules.

COMMENT: A purpose of the rule is to prevent regulated utilities from subsidizing their unregulated operations. This would occur where costs of unregulated operations are shifted to ratepayers for regulated operations or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. All commenters in support of the rule agreed with the Commission's intended purpose. Commenters in support urged more stringent limits on preferential service or treatment. Most commenters in opposition expressed the view that cost shifting should be limited rather than prevented and that some limits on preferential service or treatment should be imposed but suggested that the proposed rule went too far on both types of subsidies.

RESPONSE: Generally, the rule as proposed, presents a moderate approach by the Commission. Other states that have adopted rules have taken approaches that were more stringent or approaches that were less stringent. The rulemaking record supports full, effective limitations on cost shifting. With respect to preferential service or treatment, the rulemaking record supports clarifying changes and making changes to allow more flexibility to regulated utilities. In most matters more stringent standards of conduct were not supported at this time.

COMMENT: Several commenters objected to the use of fully distributed costs (FDC) and "asymmetrical pricing" under section (3). Under the proposed rule, cost shifting and other subsidies are prohibited by application of the pricing standard under section (3). The standard uses both FDC and fair market price (FMP). FDC is a costing methodology that accounts for all costs by assigning all costs used to produce a good or service through a direct or allocated approach or a combination of direct and allocated costs. Under the standard, when a regulated utility acquires goods or services from an affiliate entity it may not pay more than the FDC for the utility to produce the good or service for itself or FMP, whichever is less. When a regulated utility transfers goods or services to an affiliate entity it must obtain the greater of FMP or FDC to the regulated utility. The term asymmetrical pricing refers to the fact that the pricing standard is reversed depending upon whether the regulated utility is buying or is selling.

RESPONSE: FDC assures that all costs are accounted and recovered and FMP, in conjunction with FDC, assures that the regulated utilities obtain the best prices or lowest costs possible whether buying or selling or producing goods or services. Asymmetrical pricing assures that the pricing standard is always applied to the favor of regulated utility's customers. The commenters that objected to FDC and asymmetrical pricing proposed costing methodologies that would not fully account for direct costs, indirect costs and opportunity costs or that would permit transactions to occur at a pricing standard that was not optimized to ratepayers. The alternative proposals would allow cost shifting to occur so long as a direct cost increase did not result for ratepayers. Prices for regulated goods and services would be higher over time than if the affiliate transactions occurred using FMP, FDC and asymmetrical pricing. These opponents to the proposed standard believed that transactions reflecting economies of scope and scale would be discouraged, even to the point that the affiliate transactions would not occur at all, and that incremental or marginal benefits under a less stringent standard would be lost to ratepayers. The Commission does not find this assertion to be credible. Foregoing opportunity costs or shifting the costs of unregulated activities to ratepayers will not generally be in the interests of ratepayers, or for that matter, the longer term interests of the regulated companies. If the cost shifting occurs to enhance profits for already profitable unregulated activities then ratepayers are being victimized to obtain predatory profits. The result would be a regulatory and ratepayer backlash. If the cost shifting occurs because the costs of the regulated company and its affiliates are higher than the costs of competitors

then ratepayers are again being victimized, and, in addition the Commission would be allowing the misallocation of economic resources to keep an inefficient competitor in business. The solution here is to cut costs, a move that would benefit ratepayers, shareholders and consumers. If the cost shifting occurs merely to increase the rate of return in an otherwise low margin venture that shareholders would disapprove, ratepayers are again being victimized. The solution is to select ventures that offer an acceptable rate of return and to avoid those that do not. Economies of scope and scale do not result from shifting costs or foregoing profitable pricing opportunities; they result from the efficient and maximized application of resources. A company or group of companies in exclusively competitive markets may experience circumstances where shifting costs or foregoing profitable pricing opportunities serves a business purpose but those circumstances will be tempered by competition, particularly over the long run. A company or group of companies in mixed competitive and regulated markets has incentives to shift costs or forego profitable pricing opportunities that are not tempered by competition, but by regulators. The interests of ratepayers are not served by paying the costs of producing and selling goods and services that they are not buying. Section (11) of the rule permits variances. To the extent that circumstances occur where the best interests of ratepayers would be served by permitting cost shifting to occur for a period of time a waiver could be obtained.

COMMENT: Several commenters in support of the proposed rule advocated additional and more stringent standards to be added in a new section (2) regarding access to customer information, marketing activities including use of names and logos, some degree of physical separation from affiliates, and restrictions on the transfer of employees.

RESPONSE: Generally, additional and more stringent standards are not required. The record shows that the most likely competitors to affiliates of incumbent utilities are large, national or international corporations that have similar or equivalent competitive strengths. It is not the intent or purpose of the proposed rules to handicap any competitor. Doing so would be detrimental to both ratepayers and consumers, resulting in higher costs or less information for ratepayers and consumers. In most cases, the interests of ratepayers will be best served by simply assuring that costs are not shifted to them. In a few instances preferential service or treatment derived from regulated activity or resources should be limited where an unfair advantage is provided to an affiliate entity over its competitors.

COMMENT: Several commenters asserted that the record keeping and documentation requirements for regulated utilities and their affiliates would be unduly burdensome and costly, ultimately to the detriment of ratepayers.

RESPONSE: The anticipated fiscal costs for the proposed rule appear modest and not unduly burdensome. Industry input was requested and considered to develop the estimated fiscal impact. The rulemaking record shows that without the record keeping and documentation requirements it would be either impossible to obtain the information necessary to implement the rule or even more costly to implement the rule through more elaborate and time consuming regulatory audits. Many implementation costs, such as development of cost allocation manuals (CAM), would not be reoccurring. Some utilities already have costing and documentation methodologies in place that would satisfy many of the requirements of the proposed rule. There will be additional accounting and documentation requirements as a result of this rule. However, existing systems that already provide useful information would not be duplicated. Verifying FDC and FMP could produce benefits unrelated to regulatory requirements by providing data to support more efficient market based decision making and allocation of resources by the regulated utilities. Finally, the rule allows a great deal of flexibility to customize CAMs and to obtain variances

where circumstances merit. The degree and detail of record keeping and documentation can be varied so that the cost of the regulation does not outweigh the benefits afforded.

COMMENT: Some commenters, both in support and in opposition, suggested a change to the rule to establish a defined dollar threshold for an exemption from certain compliance requirements. RESPONSE: This type of exception can be addressed through individual variances under the rule. Companies will vary greatly in size, activities and the methods of implementing compliance systems.

COMMENT: Comments were received suggesting that a definition be provided for the term "corporate support" in order to allow greater flexibility to obtain economies in certain areas.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1). Subsection (3)(B) has been modified to provide greater flexibility in that standard.

COMMENT: Comments were received suggesting that a definition be provided for the term "information" since certain standards limit the provision of "preferential" "information" to affiliates and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting that a definition be provided for the term "unfair advantage" since certain definitions and standards use this term and the meaning or scope is not clear.

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COMMENT: Comments were received suggesting the definition of "affiliate entity" posed Hancock Amendment issues and that the definition was not clear as to its application to departments within utilities.

RESPONSE: The Commission does not agree with these comments and did not change this definition.

COMMENT: Comments were received regarding the definition of "control" and particularly regarding the presumption of control based on the beneficial ownership of ten percent or more of voting securities or partnership interest. Comments either supported this presumption or criticized it and offered a presumption only at the fifty percent level.

RESPONSE: The Commission has not changed this definition. The record supports the reasonableness of the presumption as a general measure of an effective controlling interest. This presumption will aid in reducing regulatory burdens and costs. The presumption is not absolute and it is expressly rebuttable. A fifty percent presumption would not serve any efficient regulatory purpose since, in almost every case, it would represent both effective and absolute control.

COMMENT: Comments were received suggesting that this rule, which contains additional provisions specifically addressing conduct of regulated gas companies toward gas marketing affiliates could be combined into proposed rule 4 CSR 240-40.016.

RESPONSE AND EXPLANATION OF CHANGE: The rules will not be combined at this time. However, section (2) has been re-titled and a subsection added to make clear that the additional non-discrimination standards concerning marketing affiliates are to be applied in conjunction with all the standards presented in the

COMMENT: Comments were received concerning the burden, effectiveness and the need for non-discrimination standards segregating employees, limiting access to employees and controlling support services.

RESPONSE AND EXPLANATION OF CHANGE: The rule-making area does not show that these areas have been abused. The record also shows that these areas present economies of scope and scale and possible competitive advantages for incumbent utilities and marketing affiliates. However, restrictions in these areas at this time would represent an undue handicap to the marketing affiliate. Non-affiliated marketers will have to make-do with fair, though less convenient, access and purchase support services at market rates. Subsections (G), (H), and (J) have been deleted from the rule and the subsections have been relettered accordingly.

COMMENT: Comments were received concerning joint marketing and the need for consumers to know whom they are doing business with.

RESPONSE AND EXPLANATION OF CHANGE: The Commission agrees and has deleted subsection (I) from section (2) and modified subsection (R) to remove restrictions limiting the information that a regulated gas corporation may provide about a marketing affiliate. This subsection has also been relettered as (O).

COMMENT: Comments were received regarding the appropriateness of limiting employee transfers between regulated utilities and affiliates and the application of the pricing standards to these transfers under section (3). Several commenters noted the difficulty of pricing an employee or trained employee services. One commenter suggested simply establishing a fixed fee.

RESPONSE AND EXPLANATION OF CHANGE: Commenters offering explanations of how an employee or trained employee would be valued were not consistent or clear. Commenters acknowledged that valued employees could go to work for a non-affiliated competitor and there would be no payment to the regulated utility at all. Under these circumstances any payment appears to be more of a penalty or a handicap to an incumbent utility and its affiliate entities than a means to prevent cost shifting or unfair preferential treatment. The standards are properly directed at preventing cost shifting and subsidies. This purpose can be accomplished by focusing on the pricing of information and providing fair access to information. Employee transfers do not have to be restricted, penalized or compensated to accomplish this purpose. The Commission has deleted the descriptive list that included the term "trained employees" from paragraph (3)(A)2.

COMMENT: Comments were received from several commenters regarding section (3) concerning the provision of information to consumers and referrals for services provided by a regulated utility regarding an affiliate entity or its competitors. Some commenters proposed that the regulated utility provide information and referrals for competitors or references to marketing or referral services. Some commenters opposed any additional requirements and still others opposed any forced marketing on the behalf of competitors.

RESPONSE AND EXPLANATION OF CHANGE: The rule is not intended to handicap incumbent utilities or their affiliated entities. Maintaining a referral list would be an undue and costly burden. Specific nondiscrimination standards under section (2) address the provision of information to consumers and referral information for services based on the unique advantages that a gas marketing affiliate would otherwise have over a nonaffiliate marketing entity. Similar or more stringent standards are not required for non-marketing entities. Even referral to commercial marketing resources or listings is unfair in that competitors will not be under any reciprocal requirement. As noted previously, competitors are most likely to be large national and international companies with their own marketing capabilities. The abuse or potential abuse to guard against is the possible perception that regulated services and

unregulated goods or services are tied or are both regulated services. The Commission has made clarifying changes to this provision and added a subsection to assure that consumers are aware that affiliate entity services are not regulated services.

COMMENT: Several commenters suggested an additional standard to prohibit tying. One commenter noted that existing state and federal antitrust laws already address this matter.

RESPONSE AND EXPLANATION OF CHANGE: A standard expressly prohibiting tying is not required. An addition to the rule discussed below assures that state and federal antitrust laws remain applicable.

COMMENT: Several commenters suggested a specific standard related to providing information about customers.

RESPONSE: The rule as proposed addresses pricing and preferential access for information. However, the suggested standard would incorporate reasonable consumer and ratepayer protections and is desirable. This additional standard has been incorporated into the rule in an additional subsection in section (3).

COMMENT: Comments were received that suggested that approval of a CAM addressing certain matters should suffice for later ratemaking purposes concerning the same matters. The commenters also suggested that information presented in a CAM should be limited to Missouri operations and that non-regulated activities constituting less than ten percent of revenues should be treated as regulated activity and exempted from the rule requirements.

RESPONSE: The Commission does not anticipate that there will be significant cases where ratemaking treatment will be inconsistent with a CAM. However, a CAM addresses or anticipates many issues in a prospective fashion. Additional information may often come to light and be considered in a ratemaking proceeding. In a ratemaking proceeding the CAM does not bind the regulated utility or the Commission. This flexibility does not harm any interest. The rule allows for variances should it be desirable to grant them.

COMMENT: Two commenters recommended that the regulated utility maintain its books, accounts and records separate from those of its affiliates.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist implementation of the rule and has been added to section (5).

COMMENT: A commenter suggested that section (5) include a record keeping requirement to list employee movement between the regulated utility and affiliated entities.

RESPONSE: This is a burdensome requirement that is not necessary based on the information presented in this rulemaking proceeding.

COMMENT: Some commenters suggested exempting small regulated utilities from the rule.

RESPONSE: This is a matter that could be taken up under a variance request.

COMMENT: Some commenters suggested that regulated utilities should train and advise their employees concerning the requirements of this rule.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist in successfully implementing the rule. An additional section has been added to the rule for this change.

COMMENT: Some commenters expressed uncertainty as to the permissible scope of variances under the rule.

RESPONSE AND EXPLANATION OF CHANGE: This section has been renumbered from (10) to (11). The scope and terms of variances, whether partial or complete, under section (11) will be determined by the facts and circumstances found in support of the application. Section (11) has been clarified.

COMMENT: Some commenters referred to antitrust provisions and compared antitrust concepts to the proposed rules in their statements. The proposed rules address similar competitive and monopoly power issues.

RESPONSE AND EXPLANATION OF CHANGE: Under the Missouri Antitrust Law activities or arrangements expressly approved or regulated by a regulatory body of the state may be exempted from the antitrust law. It is not the Commission's intent to create any exemptions. An additional section has been added to the rule to clarify the Commission's intent.

4 CSR 240-40.016 Marketing Affiliate Transactions

(I) Definitions.

(A) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county, or a combination of political subdivisions, which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated gas corporation. This term shall also include "marketing affiliate" (as hereinafter defined) and all unregulated business operations of a regulated gas corporation.

(B) Affiliate transaction means any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of any product or service, between a regulated gas corporation and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated gas corporation and the regulated business operations of a gas corporation. An affiliate transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754, RSMo by the General Assembly of Missouri.

(C) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through one (1) or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one (1) or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of ten percent (10%) or more of voting securities or partnership interest of an entity constitutes control for purposes of this rule. This provision, however, shall not be construed to prohibit a regulated gas corporation from rebutting the presumption that its ownership interest in an entity confers control.

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

(E) Derivatives means a financial instrument, traded on or off an exchange, the price of which is directly dependent upon (i.e., "derived from") the value of one (1) or more underlying securities, equity indices, debt instruments, commodities, other derivative instruments, or any agreed-upon pricing index or arrangement (e.g., the movement over time of the Consumer Price Index or freight rates). Derivatives involve the trading of rights or

obligations based on the underlying product, but do not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for a fixed rate of return.

(F) Fully distributed cost (**FDC**) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

(G) **Information** means any data obtained by a regulated gas corporation that is not obtainable by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

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

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

(J) **Opportunity sales** means sales of unused contract entitlements necessarily held by a gas corporation to meet the daily and seasonal swings of its system customers and are intended to maximize utilization of assets that remain under regulation.

(K) **Preferential service** means information, treatment or actions by the regulated gas corporation which places the affiliated entity at an unfair advantage over its competitors.

(L) **Regulated gas corporation** means every gas corporation as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapter 393, RSMo.

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

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

(O) **Transportation** means the receipt of gas at one point on a regulated gas corporation's system and the redelivery of an equivalent volume of gas to the retail customer of the gas at another point on the regulated gas corporation's system including, without limitation, scheduling, balancing, peaking, storage, and exchange to the extent such services are provided pursuant to the regulated gas corporation's tariff, and includes opportunity sales.

(P) **Unfair advantage** means an advantage that cannot be obtained by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

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

(2) **Nondiscrimination Standards.**

(A) **Nondiscrimination standards** under this section apply in conjunction with all the standards under this rule and control when a similar standard overlaps.

(B) A regulated gas corporation shall apply all tariff provisions relating to transportation in the same manner to customers similarly **situated** whether they use affiliated or nonaffiliated marketers or brokers.

(C) A regulated gas corporation shall uniformly enforce its tariff **provisions** for all shippers.

(D) A regulated gas corporation shall not, through a tariff provision or otherwise, give its marketing affiliate **and/or** its customers, any preference over a customer using a nonaffiliated marketer in matters relating to transportation or curtailment priority.

(E) A regulated gas corporation shall not give any customer using its marketing affiliate a preference, in the processing of a request for transportation services, over a customer using a non-affiliated marketer, specifically including the manner and timing of such processing.

(F) A regulated gas corporation shall not disclose or cause to be disclosed to its marketing affiliate or any nonaffiliated marketer any information that it receives through its processing of requests for or provision of transportation.

(G) If a regulated gas corporation provides information related to transportation which is not readily available or generally known to **other** marketers to a customer using a marketing affiliate, it shall provide that information (electronic format, phone call, facsimile, etc.) contemporaneously to all nonaffiliated marketers transporting on its distribution system.

(H) A regulated gas corporation shall not condition or tie an offer or agreement to provide a transportation discount to a shipper to any service in which the marketing affiliate is involved. If the regulated gas corporation seeks to provide a discount for transportation to any shipper using a marketing affiliate, the regulated gas corporation shall, subject to an appropriate protective order—

1. File for approval of the transaction with the commission and provide a copy to the Office of the Public Counsel;

2. Disclose whether the marketing affiliate of the regulated gas corporation is the gas supplier or broker serving the shipper;

3. File quarterly public reports which provide the aggregate periodic and cumulative number of transportation discounts provided by the regulated gas corporation; and

4. Provide the aggregate number of such agreements which involve shippers for whom the regulated gas corporation's marketing affiliate is or was at the time of the granting of the discount the gas supplier or broker.

(I) A regulated gas corporation shall not make opportunity sales directly to a customer of its marketing affiliate or to its marketing affiliate unless such supplies **and/or** capacity are made available to other similarly situated customers using nonaffiliated marketers on an identical basis given the nature of the transactions.

(J) A regulated gas corporation shall not condition or tie agreements (including prearranged capacity release) for the release of interstate or intrastate pipeline capacity to any service in which the marketing affiliate is involved under terms not offered to nonaffiliated companies and their customers.

(K) A regulated gas corporation shall maintain its books of account and records completely separate and apart from those of the marketing affiliate.

(L) A regulated gas corporation is prohibited from giving any customer using its marketing affiliate preference with respect to any tariff provisions that provide discretionary waivers.

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

1. The records should contain a log detailing the date the complaint was received by the regulated gas corporation, the name of the complainant, a brief description of the complaint and, as applicable, how it was been resolved. If the complaint has not been recorded by the regulated gas corporation within thirty (30) days, an explanation for the delay must be recorded.

(N) A regulated gas corporation will not communicate to any customer, supplier or third parties that any advantage may accrue to such customer, supplier or third party in the use of the regulated gas corporation's services as a result of that customer, supplier or third **party** dealing with its marketing affiliate and shall refrain from giving any appearance **that** it speaks on behalf of its affiliated entity.

(O) If a customer requests information about a marketing affiliate, the regulated gas corporation may provide the requested information but shall also provide a list of all marketers operating on its system.

(3) **Standards.**

(A) A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if—

1. It compensates an affiliated entity for information, assets, goods or services above the lesser of—

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation to provide the information, assets, goods or services for itself; or

2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of—

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation.

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

(C) Specific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders. General or aggregated customer information shall be made available to affiliated or unaffiliated entities upon similar terms and conditions. The regulated gas corporation may set reasonable charges for costs incurred in producing customer information. Customer information includes information provided to the regulated utility by affiliated or unaffiliated entities.

(D) The regulated gas corporation shall not participate in any affiliated transactions which are not in compliance with this rule, except as otherwise provided in section (11) of this rule.

(E) If a customer requests information from the regulated gas corporation about goods or services provided by an affiliated entity, the regulated gas corporation may provide information about the affiliate but must inform the customer that regulated services are not tied to the use of an affiliate provider and that other service providers may be available. Except with respect to affiliated and nonaffiliated gas marketers which are addressed in section (2) of this rule, the regulated gas corporation may provide reference to other service providers or to commercial listings, but is not required to do so. The regulated gas corporation shall include in its annual Cost Allocation Manual (CAM), the criteria, guidelines and procedures it will follow to be in compliance with the rule.

(F) Marketing materials, information or advertisements by an affiliate entity that share an exact or similar name, logo or trademark of the regulated utility shall clearly display or announce that the affiliate entity is not regulated by the Missouri Public Service Commission.

(5) Record Keeping Requirements.

(A) A regulated gas corporation shall maintain books, accounts and records separate from those of its affiliates.

(B) Each regulated gas corporation shall maintain the following information in a mutually agreed-to electronic format (i.e., agreement between the staff, Office of the Public Counsel and the regulated gas corporation) regarding affiliate transactions on a calendar year basis and shall provide such information to the commission staff and the Office of the Public Counsel on, or before, March 15 of the succeeding year:

1. A full and complete list of all affiliated entities as defined by this rule;

2. A full and complete list of all goods and services provided to or received from affiliated entities;

3. A full and complete list of all contracts entered with affiliated entities;

4. A full and complete list of all affiliate transactions undertaken with affiliated entities without a written contract together with a brief explanation of why there was no contract;

5. The amount of all affiliate transactions, by affiliated entity and account charged; and

6. The basis used (e.g., market value, book value, etc.) to record each type of affiliate transaction.

(C) In addition each regulated gas corporation shall maintain the following information regarding affiliate transactions on a calendar year basis:

1. Records identifying the basis used (e.g., fair market price, fully distributed cost, etc.) to record all affiliate transactions; and

2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.

(10) The regulated gas corporation shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

(11) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraphs (11)(A)1. or (11)(A)2. The granting of a variance to one regulated gas corporation does not constitute a waiver respecting or otherwise affect the required compliance of any other regulated gas corporation to comply with the standards. The scope of a variance will be determined based on the facts and circumstances found in support of the application—

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

2. A regulated gas corporation may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (11)(A)2.A. and (11)(A)2.B. of this rule—

A. All reports and record retention requirements for each affiliate transaction must be complied with; and

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and the Office of the Public Counsel within ten (10) days of the occurrence of the noncomplying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate transaction was in the best interests of the regulated customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any party shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a party's ability to challenge the affiliate transaction at the time of the annual CAM filing. At the time of the filing of the regulated gas corporation's annual CAM filing the regulated gas corporation shall provide to the secretary of the commission a listing of all noncomplying affiliate transactions which occurred between the period of the last filing and the current filing. Any affiliate transaction submitted pursuant to this section shall remain interim, subject to disallowance, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the regulated customers.

(12) Nothing contained in this rule and no action by the commission under this rule shall be construed to approve or exempt any activity or arrangement that would violate the antitrust laws of the state of Missouri or of the United States or to limit the rights of any person or entity under those laws.

**Title 4--DEPARTMENT OF ECONOMIC
DEVELOPMENT
Division 240--Public Service Commission
Chapter 80--Steam Heating Utilities**

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under sections 386.250, RSMo Supp. 1999 and 393.140, RSMo 1994, the commission adopts a rule as follows:

4 CSR 240-80.015 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on June 1, 1999 (24 MoReg 1359-1364). Those sections with changes are reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: This order of rulemaking was approved by the Missouri Public Service Commission with one dissenting opinion that has been tiled with the Commission's Secretary. Extensive written comments and reply comments were submitted and public hearings were held on September 13, 14 and 15, 1999. The Commission's staff supported the proposed rule with a few suggested changes based on the other comments received. The Office of Public Counsel and others in support of the rule advocated for more stringent provisions. Comments from the regulated utilities supported less stringent provisions or opposed adoption of the rule.

COMMENT: Comments were received from several of the commenters adverse to the jurisdiction of the Commission to promulgate these rules. The Commission's staff anticipated these arguments in their comments and presented arguments supporting the Commission's jurisdiction.

RESPONSE: The Commission's rulemaking authority is based on proper legal authority and the Commission has jurisdiction to adopt these rules.

COMMENT: Comments were received from several of the commenters suggesting that contested case procedures should be followed in the promulgation of these rules. Related comments addressed whether witnesses at the public hearings should be sworn.

RESPONSE: The Commission has followed proper rulemaking procedures to adopt these rules.

COMMENT: A purpose of the rule is to prevent regulated utilities from subsidizing their unregulated operations. This would occur where costs of unregulated operations are shifted to ratepayers for regulated operations or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. All commenters in support of the rule agreed with the Commission's intended purpose. Commenters in support urged more stringent limits on preferential service or treatment. Most commenters in opposition expressed the view that cost shifting should be limited rather than prevented and that some limits on preferential service or treatment should be imposed but suggested that the proposed rule went too far on both types of subsidies.

RESPONSE: Generally, the rule as proposed, presents a moderate approach by the Commission. Other states that have adopted rules have taken approaches that were more stringent or approaches that were less stringent. The rulemaking record supports full, effective limitations on cost shifting. With respect to preferential service or treatment, the rulemaking record supports clarifying changes and making changes to allow more flexibility to regulated utilities. In most matters more stringent standards of conduct were not supported at this time.

COMMENT: Several commenters objected to the use of fully distributed costs (FDC) and "asymmetrical pricing" under section (2). Under the proposed rule, cost shifting and other subsidies are prohibited by application of the pricing standard under section (2). The standard uses both FDC and fair market price (FMP). FDC is a costing methodology that accounts for all costs by assigning all costs used to produce a good or service through a direct or allocated approach or a combination of direct and allocated costs. Under the standard, when a regulated utility acquires goods or services from an affiliate entity it may not pay more than the FDC for the utility to produce the good or service for itself or FMP, whichever is less. When a regulated utility transfers goods or services to an affiliate entity it must obtain the greater of FMP or FDC to the regulated utility. The term asymmetrical pricing refers to the fact that the pricing standard is reversed depending upon whether the regulated utility is buying or is selling.

RESPONSE: FDC assures that all costs are accounted and recovered and FMP, in conjunction with FDC, assures that the regulated utilities obtain the best prices or lowest costs possible whether buying or selling or producing goods or services. Asymmetrical pricing assures that the pricing standard is always applied to the favor of regulated utility's customers. The commenters that objected to FDC and asymmetrical pricing proposed costing methodologies that would not fully account for direct costs, indirect costs and opportunity costs or that would permit transactions to occur at a pricing standard that was not optimized to ratepayers. The alternative proposals would allow cost shifting to occur so long as a direct cost increase did not result for ratepayers. Prices for regulated goods and services would be higher over time than if the affiliate transactions occurred using FMP. FDC and asymmetrical pricing. These opponents to the proposed standard believed that transactions reflecting economies of scope and scale would be discouraged, even to the point that the affiliate transactions would not occur at all, and that incremental or marginal benefits under a less stringent standard would be lost to ratepayers. The Commission does not find this assertion to be credible. Foregoing opportunity costs or shifting the costs of unregulated activities to ratepayers will not generally be in the interests of ratepayers, or for that matter, the longer term interests of the regulated companies. If the cost shifting occurs to enhance profits for already profitable unregulated activities then ratepayers are being victimized to obtain predatory profits. The result would be a regulatory and ratepayer backlash. If the cost shifting occurs because the costs of the regulated company and its affiliates are higher than the costs of competitors then ratepayers are again being victimized, and, in addition the Commission would be allowing the misallocation of economic resources to keep an inefficient competitor in business. The solution here is to cut costs, a move that would benefit ratepayers, shareholders and consumers. If the cost shifting occurs merely to increase the rate of return in an otherwise low margin venture that shareholders would disapprove, ratepayers are again being victimized. The solution is to select ventures that offer an acceptable rate of return and to avoid those that do not. Economies of scope and scale do not result from shifting costs or foregoing profitable pricing opportunities; they result from the efficient and maximized application of resources. A company or group of companies in exclusively competitive markets may experience circumstances where shifting costs or foregoing profitable pricing opportunities serves a business purpose but those circumstances will be tempered by competition, particularly over the long run. A company or group of companies in mixed competitive and regulated markets has incentives to shift costs or forego profitable pricing opportunities that are not tempered by competition, but by regulators. The interests of ratepayers are not served by paying the costs of producing and selling goods and services that they are not buying. Section (10) of the rule permits variances. To the extent that circumstances occur where the best interests of ratepayers would be served by permitting cost shifting to occur for a period of time a waiver could be obtained.

COMMENT: Several commenters in support of the proposed rule advocated additional and more stringent standards to be added in a new section (2) regarding access to customer information, marketing activities including use of names and logos, some degree of physical separation from affiliates, and restrictions on the transfer of employees.

RESPONSE: Generally, additional and more stringent standards are not required. The record shows that the most likely competitors to affiliates of incumbent utilities are large, national or international corporations that have similar or equivalent competitive strengths. It is not the intent or purpose of the proposed rules to handicap any competitor. Doing so would be detrimental to both ratepayers and consumers, resulting in higher costs or less information for ratepayers and consumers. In most cases, the interests of ratepayers will be best served by simply assuring that costs are not shifted to them. In a few instances preferential service or treatment derived from regulated activity or resources should be limited where an **unfair** advantage is provided to an affiliate entity over its competitors.

COMMENT: Several commenters asserted that the record keeping and documentation requirements for regulated utilities and their affiliates would be unduly burdensome and costly, **ultimately** to the detriment of ratepayers.

RESPONSE: The anticipated fiscal costs for the proposed rule appear modest and not unduly burdensome. Industry input was requested and considered to develop the estimated fiscal impact. The rulemaking record shows that without the record keeping and documentation requirements it would be either impossible to obtain the information necessary to implement the rule or even **more** costly to implement the rule through more elaborate and time consuming regulatory audits. Many implementation costs, such as development of cost allocation manuals (CAM), would not be reoccurring. Some utilities already have costing and documentation methodologies in place that would satisfy many of the requirements of the proposed rule. There will be additional accounting and documentation requirements as a result of this rule. However, existing systems that already **provide** useful information would not be duplicated. Verifying FDC and FMP could produce benefits unrelated to regulatory **requirements** by providing data to **support** more efficient market based decision making and allocation of resources by the regulated utilities. Finally, the rule allows a great deal of flexibility to customize **CAMs** and to obtain variances where circumstances merit. The degree and detail of record keeping and documentation can be varied so that the cost of the regulation does not outweigh the benefits afforded.

COMMENT: Some commenters, both in support and in opposition, suggested a change to the rule to establish a defined dollar threshold for an exemption from certain compliance requirements.

RESPONSE: This type of exception can be addressed through individual variances under the rule. Companies will vary greatly in size, activities and the methods of implementing compliance systems.

COMMENT: Comments were received suggesting that a definition be provided for the term "corporate support" in order to allow greater flexibility to obtain economies in certain areas.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1). Subsection (2)(B) has been modified to provide greater flexibility in that standard.

COMMENT: Comments were received suggesting that a definition be provided for the term "information" since certain standards limit the provision of "preferential" "information" to affiliates and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting that a definition be provided for the term "unfair advantage" since certain definitions and standards use this term and the meaning or scope is not clear.

RESPONSE AND EXPLANATION OF CHANGE: The Commission accepts this suggestion and has added a definition for this term in section (1).

COMMENT: Comments were received suggesting the definition of "affiliate entity" posed Hancock Amendment issues and that the definition was not clear as to its application to departments within utilities.

RESPONSE: The Commission does not agree with these comments and did not change this definition.

COMMENT: Comments were received regarding the definition of "control" and particularly regarding the presumption of control based on the beneficial ownership of ten percent or more of voting securities or partnership interest. Comments either supported this presumption or criticized it and offered a presumption only at the fifty percent level.

RESPONSE: The Commission has not changed this definition. The record supports the reasonableness of the presumption as a general measure of an effective controlling interest. This presumption will aid in reducing regulatory burdens and costs. The presumption is not absolute and it is expressly rebuttable. A fifty percent presumption would not serve any efficient regulatory purpose since, in almost every case, it would represent both effective and absolute control.

COMMENT: Comments were received regarding the appropriateness of limiting employee transfers between regulated utilities and affiliates and the application of the pricing standards to these transfers under section (2). Several commenters noted the difficulty of pricing an employee or trained employee services. One commenter suggested simply establishing a fixed fee.

RESPONSE AND EXPLANATION OF CHANGE: Commenters offering explanations of how an employee or trained employee would be valued were not consistent or clear. Commenters acknowledged that valued employees could go to work for a non-affiliated competitor and there would be no payment to the regulated utility at all. Under these circumstances any payment appears to be more of a penalty or a handicap to an incumbent utility and its affiliate entities than a means to prevent cost shifting or **unfair** preferential treatment. The standards are properly directed at preventing cost shifting and subsidies. This purpose can be accomplished by focusing on the pricing of **information** and providing fair access to information. Employee transfers do not have to be restricted, penalized or compensated to accomplish this purpose. The Commission has deleted the descriptive list that included the term "trained employees" from paragraph (2)(A)2.

COMMENT: Comments were received from several commenters regarding section (2) concerning the **provision** of information to consumers and referrals for services provided by a regulated utility regarding an affiliate entity or its competitors. Some commenters proposed that the regulated utility provide information and referrals for competitors or references to marketing or referral services. Some commenters opposed any additional requirements and still others opposed any forced marketing on the behalf of competitors.

RESPONSE AND EXPLANATION OF CHANGE: The rule is not intended to handicap incumbent utilities or their affiliated entities. Maintaining a referral list would be an undue and costly burden. Even referral to commercial marketing resources or listings is unfair in that competitors will not be under any reciprocal requirement. As noted previously, competitors are most likely to be large national and international companies with their own marketing capabilities. The abuse or potential abuse to guard against is the possible perception that regulated services and unregulated goods

or services are tied or are both regulated services. The Commission has made clarifying changes to this provision and added a subsection to assure that consumers are aware that affiliate entity services are not regulated services.

COMMENT: Several commenters suggested an additional standard to prohibit tying. One commenter noted that existing state and federal antitrust laws already address this matter.

RESPONSE: A standard expressly prohibiting tying is not required. An addition to the rule discussed below assures that state and federal antitrust laws remain applicable.

COMMENT: Several commenters suggested a specific standard related to providing information about customers.

RESPONSE AND EXPLANATION OF CHANGE: The rule as proposed addresses pricing and preferential access for information. However, the suggested standard would incorporate reasonable consumer and ratepayer protections and is desirable. This additional standard has been incorporated into the rule in an additional subsection in section (2).

COMMENT: Comments were received that suggested that approval of a CAM addressing certain matters should suffice for later ratemaking purposes concerning the same matters. The commenters also suggested that information presented in a CAM should be limited to Missouri operations and that non-regulated activities constituting less than ten percent of revenues should be treated as regulated activity and exempted from the rule requirements.

RESPONSE: The Commission does not anticipate that there will be significant cases where ratemaking treatment will be inconsistent with a CAM. However, a CAM addresses or anticipates many issues in a prospective fashion. Additional information may often come to light and be considered in a ratemaking proceeding. In a ratemaking proceeding the CAM does not bind the regulated utility or the Commission. This flexibility does not harm any interest. The rule allows for variances should it be desirable to grant them.

COMMENT: Two commenters recommended that the regulated utility maintain its books, accounts and records separate from those of its affiliates.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist implementation of the rule and has been added to section (4).

COMMENT: A commenter suggested that section (4) include a record-keeping requirement to list employee movement between the regulated utility and affiliated entities.

RESPONSE: This is a burdensome requirement that is not necessary based on the information presented in this rulemaking proceeding.

COMMENT: Some commenters suggested exempting small regulated utilities from the rule.

RESPONSE: This is a matter that could be taken up under a variance request.

COMMENT: Some commenters expressed uncertainty as to the permissible scope of variances under the rule.

RESPONSE AND EXPLANATION OF CHANGE: This section has been renumbered from (9) to (10). The scope and terms of variances, whether partial or complete, under section (10) will be determined by the facts and circumstances found in support of the application. Section (10) has been clarified.

COMMENT: Some commenters suggested that regulated utilities should train and advise their employees concerning the requirements of this rule.

RESPONSE AND EXPLANATION OF CHANGE: This change would assist in successfully implementing the rule. An additional

section has been added to the rule for this change.

COMMENT: Some commenters referred to antitrust provisions and compared antitrust concepts to the proposed rules in their statements. The proposed rules address similar competitive and monopoly power issues.

RESPONSE AND EXPLANATION OF CHANGE: Under the Missouri Antitrust Law activities or arrangements expressly approved or regulated by a regulatory body of the state may be exempted from the antitrust law. It is not the Commission's intent to create any exemptions. An additional section has been added to the rule to clarify the Commission's intent.

4 CSR 240-80.015 Affiliate Transactions

(I) Definitions.

(A) Affiliated entity means any person, including an individual, corporation, service company, corporate subsidiary, firm, partnership, incorporated or unincorporated association, political subdivision including a public utility district, city, town, county or a combination of political subdivisions which, directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated heating company.

(B) Affiliate transaction means any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of any product or service, between a regulated heating company and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated heating company and the regulated business operations of a heating company. An affiliate transaction for the purposes of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754, RSMo by the General Assembly of Missouri.

(C) Control (including the terms "controlling," "controlled by," and "common control") means the possession, directly or indirectly, of the power to direct, or to cause the direction of the management or policies of an entity, whether such power is exercised through one (1) or more intermediary entities, or alone, or in conjunction with, or pursuant to an agreement with, one (1) or more other entities, whether such power is exercised through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, affiliated entities, contract or any other direct or indirect means. The commission shall presume that the beneficial ownership of ten percent (10%) or more of voting securities or partnership interest of an entity constitutes control for purposes of this rule. This provision, however, shall not be construed to prohibit a regulated heating company from rebutting the presumption that its ownership interest in an entity confers control.

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

(E) Derivatives means a financial instrument, traded on or off an exchange, the price of which is directly dependent upon (i.e., derived from) the value of one or more underlying securities, equity indices, debt instruments, commodities, other derivative instruments or any agreed-upon pricing index or arrangement (e.g., the movement over time of the Consumer Price Index or freight rates). Derivatives involve the trading of rights or obligations based on the underlying product, but do not directly transfer property. They are used to hedge risk or to exchange a floating rate of return for a fixed rate of return.

(F) Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated

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

(G) Information means any data obtained by a heating company that is not obtainable by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

(H) Preferential service means information or treatment or actions by the regulated heating company which places the affiliated entity at an unfair advantage over its competitors.

(I) Regulated heating company means every heating company as defined in section 386.020, RSMo, subject to commission regulation pursuant to Chapter 393, RSMo.

(J) Unfair advantage means an advantage that cannot be obtained by nonaffiliated entities or can only be obtained at a competitively prohibitive cost in either time or resources.

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

(2) Standards.

(A) A regulated heating company shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated heating company shall be deemed to provide a financial advantage to an affiliated entity if—

1. It compensates an affiliated entity for goods or services above the lesser of—

A. The fair market price; or

B. The fully distributed cost to the regulated heating company to provide the goods or services for itself; and

2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of—

A. The fair market price; or

B. The fully distributed cost to the regulated heating company.

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

(C) Specific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders. General or aggregated customer information shall be made available to affiliated or unaffiliated entities upon similar terms and conditions. The regulated heating company may set reasonable charges for costs incurred in producing customer information. Customer information includes information provided to the regulated utility by affiliated or unaffiliated entities.

(D) The regulated heating company shall not participate in any affiliate transactions which are not in compliance with this rule except as otherwise provided in section (10) of this rule.

(E) If a customer requests information from the regulated heating company about goods or services provided by an affiliated entity, the regulated heating company may provide information about its affiliate but must inform the customer that regulated services are not tied to the use of an affiliate provider and that other service providers may be available. The regulated heating company may provide reference to other service providers or to commercial listings, but is not required to do so. The regulated heating company shall include in its annual Cost Allocation Manual (CAM) the criteria, guidelines, and procedures it will follow to be in compliance with this rule.

(F) Marketing materials, information or advertisements by an affiliate entity that share an exact or similar name, logo or trademark of the regulated utility shall clearly display or announce that the affiliate entity is not regulated by the Missouri Public Service Commission.

(4) Record Keeping Requirements.

(A) A regulated heating company shall maintain books, accounts and records separate from those of its affiliates.

(B) Each regulated heating company shall maintain the following information in a mutually agreed to electronic format (i.e., agreement between the staff, Office of the Public Counsel and the regulated heating company) regarding affiliate transactions on a calendar year basis and shall provide such information to the commission staff and the Office of the Public Counsel on, or before, March 15th of the succeeding year:

1. A full and complete list of all affiliated entities as defined by this rule;

2. A full and complete list of all goods and services provided to or received from affiliated entities;

3. A full and complete list of all contracts entered with affiliated entities;

4. A full and complete list of all affiliate transactions undertaken with affiliated entities without a written contract together with a brief explanation of why there was no contract;

5. The amount of all affiliate transactions by affiliated entity and account charged; and

6. The basis used (e.g., fair market price, FDC, etc.) to record each type of affiliate transaction.

(C) In addition, each regulated heating company shall maintain the following information regarding affiliate transactions on a calendar year basis:

1. Records identifying the basis used (e.g., fair market price, FDC, etc.) to record all affiliate transactions; and

2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.

(9) The regulated heating company shall train and advise its personnel as to the requirements and provisions of this rule as appropriate to ensure compliance.

(10) Variances.

(A) A variance from the standards in this rule may be obtained by compliance with paragraph ~~(10)(A)1.~~ or (10)(A)2. The granting of a variance to one regulated heating company does not constitute a waiver respecting or otherwise affect the required compliance of any other regulated heating company to comply with the standards. The scope of a variance will be determined based on the facts and circumstances found in support of the application—

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

2. A regulated heating company may engage in an affiliate transaction not in compliance with the standards set out in subsection (2)(A) of this rule, when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the procedures required by subparagraphs (10)(A)2.A. and (10)(A)2.B. of this rule.

A. All reports and record retention requirements for each affiliate transaction must be complied with; and

B. Notice of the noncomplying affiliate transaction shall be filed with the secretary of the commission and the Office of the Public Counsel within ten (10) days of the occurrence of the noncomplying affiliate transaction. The notice shall provide a detailed explanation of why the affiliate transaction should be exempted from the requirements of subsection (2)(A), and shall provide a detailed explanation of how the affiliate transaction was in the best interests of the regulated customers. Within thirty (30) days of the notice of the noncomplying affiliate transaction, any party shall have the right to request a hearing regarding the noncomplying affiliate transaction. The commission may grant or deny the request for hearing at that time. If the commission denies a request for hearing, the denial shall not in any way prejudice a party's ability to challenge the affiliate transaction at the time of the annual CAM filing. At the time of the filing of the regulated heating company's annual CAM filing the regulated heating company shall provide to the secretary of the commission a listing of all noncomplying affiliate transactions which occurred between the period of the last filing and the current filing. Any affiliate

transaction submitted pursuant to this section shall remain interim, subject to **disallowance**, pending final commission determination on whether the noncomplying affiliate transaction resulted in the best interests of the regulated customers.

(11) Nothing contained in this rule and no action by the commission under this rule shall be construed to approve or exempt any activity or arrangement that would violate the antitrust laws of the state of Missouri or of the United States or to limit the rights of any person or entity under those laws.

Title 5—DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
Division 80—Urban and Teacher Education
Chapter 800—Teacher Certification and Professional Conduct and Investigations

ORDER OF RULEMAKING

By the authority vested in the State Board of Education under sections 161.092, 168.011 and 168.081, RSMo 1994 and 168.021 and 168.071. RSMo Supp. 1999, the board adopts a rule as follows:

5 CSR 80-800.290 Application for Substitute Certificate of License to Teach **is adopted.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on September 1, 1999 (24 MoReg 2143-2144). No changes have been made in the text of the proposed rule, so it is not reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: No comments were received.

Title 9—DEPARTMENT OF MENTAL HEALTH
Division 30—Certification Standards
Chapter 4--Mental Health Programs

ORDER OF RULEMAKING

By the authority vested in the director of the Department of Mental Health under section 630.050, RSMo Supp. 1999, the director amends a rule as follows:

9 CSR 30-4.030 is amended.

A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on September 15, 1999 (24 MoReg 2215-2216). Those sections with changes are reprinted here. This proposed amendment becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The Department received several comments in support of the proposed amendment.

COMMENT: Regarding 9 CSR 40-4.030(2)(CC), four comments were received objecting to physician assistants being dropped as qualified providers of medication services.

RESPONSE: Community Psychiatric Rehabilitation (CPR) is a highly specialized service and treatment program designed to serve persons with severe and persistent mental illness. These are by definition persons who continue to have significant symptoms and impairment after receiving the usual general treatment available for their mental illnesses. Physician assistants are trained in a generalist primary care model. This does include some mental health training but not a sufficient amount or intensity to consider them specialist providers for treatment resistant populations. The pro-

fession of physician assistant has not developed any specialty certification for mental health or psychiatric care. While physician assistants training may be adequate for them to provide medication services for routine mental conditions commonly seen in primary practice settings, their training does not adequately prepare them for caring for persons who are severely and persistently mentally ill in highly specialized programs. The department disagrees with the comments and has not revised the amendment as requested.

COMMENT: One commenter recommended that psychiatric pharmacists as described in the proposed amendment be included in the definition of qualified mental health professional as defined in 9 CSR 30-4.030(2)(GG).

RESPONSE AND EXPLANATION OF CHANGE: We have reviewed the curriculum covered in the two (2)-year postgraduate mental health specialty training that persons qualifying for psychiatric pharmacists complete and have determined that it is as extensive as the training received by several other types of professionals currently considered as qualified mental health professionals and is adequate to competently provide services that are mandated to be done by a qualified mental health professional. The department agrees with this comment; therefore, psychiatric pharmacist has been included as a qualified mental health professional in the revised amendment.

9 CSR 30-4.030 Certification Standards Definitions

(2) As used in 9 CSR 30-4.031-9 CSR 30-4.047, unless the context clearly indicates otherwise, the following terms shall mean:

(GG) Mental health professional— any of the following:

1. A physician licensed under Missouri law to practice medicine or osteopathy and with training in mental health services or one (1) year of experience, under supervision, in treating problems related to mental illness or specialized training;

2. A psychiatrist, a physician licensed under Missouri law who has successfully completed a training program in psychiatry approved by the American Medical Association, the American Osteopathic Association or other training program identified as equivalent by the department;

3. A psychologist licensed under Missouri law to practice psychology with specialized training in mental health services;

4. A professional counselor licensed under Missouri law to practice counseling and with specialized training in mental health services;

5. A clinical social worker with a master's degree in social work from an accredited program and with specialized training in mental health services;

6. A psychiatric nurse, a registered professional nurse licensed under Chapter 335, RSMo with at least two (2) years of experience in a psychiatric setting or a master's degree in psychiatric nursing;

7. An individual possessing a master's or doctorate degree in counseling and guidance, rehabilitation counseling and guidance, rehabilitation counseling, vocational counseling, psychology, pastoral counseling or family therapy or related field who has successfully completed a practicum or has one (1) year of experience under the supervision of a mental health professional;

8. An occupational therapist certified by the American Occupational Therapy Certification Board, registered in Missouri, has a bachelor's degree and has completed a practicum in a psychiatric setting or has one (1) year of experience in a psychiatric setting, or has a master's degree and has completed either a practicum in a psychiatric setting or has one (1) year of experience in a psychiatric setting;

9. An advanced practice nurse as set forth in section 335.011, RSMo, a nurse who has had education beyond the basic nursing education and is certified by a nationally recognized professional organization as having a nursing specialty, or who meets criteria for advanced practice nurses established by the board of nursing; and

10. A psychiatric pharmacist as defined in 9 CSR 30-4.030;