

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

<b>In the matter of Missouri Gas Ener-</b>	)	
<b>gy of Kansas City, Missouri re-</b>	)	
<b>quested authority to file a tariff</b>	)	<b>Case No. GR-2004-209</b>
<b>reflecting a change in rates for</b>	)	
<b>its Missouri customers</b>	)	

**MIDWEST GAS USERS' ASSOCIATION, UMKC AND CMSU'S  
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**

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At the portion of the hearing on Thursday, July 1, 2004 concerning class cost of service and rate design testimony, Midwest Gas Users' Association sought to strike portions of Staff Witness Beck's prefiled testimony as follows:

- Direct, p. 2, lines 8-10
- Direct, p. 2, line 16 through p. 4, line 9
- Direct, p. 4, lines 16-23
- Direct, p. 5, line 4, the sentence beginning with "The Results...." and ending on line 5.
- Direct, p. 5, lines 7-17
- Direct, Schedule 1
- Rebuttal, p. 13, line 17 through page 15, line 11.
- Surrebuttal, page 3, line 21 through page 5, line 19.

The basis of Midwest's motion to strike is Commission Rule 4 CSR 240-2.130(7)(A) which provides:

Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief.

Mr. Beck claimed to have performed a class cost of service study that he referred to for the first time in his surrebuttal testimony as a "stand-alone" system.<sup>1/</sup>

Set aside for a moment the conclusion that Mr. Beck's cross-examination exposed that he had done nothing of the sort. Yes, set aside for a moment that Mr. Beck acknowledged that his method was not "a real system".<sup>2/</sup> and that he had sought only to create -- and price -- a fiction that consisted of hundreds of thousands of wayward fibrils of "slightly larger than a garden hose" pipe.<sup>3/</sup> to serve residential customers, but only back as far as the nearest distribution main -- a main he conveniently excluded from his distorted cost calculation.

And set aside for a moment that Mr. Beck's imaginary system is clearly **not** a "stand-alone system" in any meaningful sense of the word. A "stand-alone system" would not rely upon mysterious distribution mains that appear and disappear as apparently required for the purposes of his study.<sup>4/</sup>

For our purposes here, Mr. Beck's testimony clearly failed to "assert and explain his entire case-in-chief." First,

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<sup>1/</sup> Tr. 2194-95.

<sup>2/</sup> Tr. 2225.

<sup>3/</sup> Mr. Beck's actual "measurement" was 0.8888 inch pipe. Tr. 2217. And see, Tr. 2229.

<sup>4/</sup> Tr. 2218-20.

he claimed that he had decided to delay until rebuttal to assert and explain his method.<sup>5/</sup>

But then Mr. Beck's story changed. When his cross-examination arrived at his rebuttal, he was forced to acknowledge that he had not asserted or explained his method their, either (despite his prior sworn testimony (quoted above) that was "exactly what I did").<sup>6/</sup>

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<sup>5/</sup> Tr. 2197:

6           A       Well, my answer would be the same  
7 today, which is that there are a lot of detailed  
8 calculations in a class cost of service study, and  
9 therefore, **it was my belief that it would be best**  
10 **to wait till rebuttal testimony to discuss those**  
11 **issues which were significant. And that's exactly**  
12 **what I did.**

(emphasis added).

<sup>6/</sup> Tr. 2210-11:

1           Q       Now, in response to a prior motion,  
2 your counsel indicated that nothing had been --  
3 should be surprising. I believe he used the Latin  
4 phrase mirabile dictu.

5                   Where in your rebuttal testimony do  
6 you describe the stand alone approach that you  
7 used in your class cost of service study?

8           A       My rebuttal testimony did not  
9 describe -- spend time describing my method. It  
10 talks about others'.

11          Q       So when your counsel was arguing in  
12 opposition of my motion a few moments ago and he  
13 indicated that you had described your method in  
14 rebuttal testimony, he was in error; is that  
15 correct?

16          A       I guess -- I would call it I did not  
17 describe it in detail or --

18          Q       Where did you describe it, Mr. Beck,  
19 in your rebuttal testimony? Show me the page and  
20 line, please.

21          A       What I described was a comparison of  
22 -- of other -- of the results of the cost of

(continued...)

But it appears that Mr. Beck does not know "exactly what [he] did." He acknowledged on cross that neither his direct nor his rebuttal testimony used the "stand-alone" terminology and that neither piece of testimony "asserted and explained" this approach.

In fact, it was only after Midwest's witness Johnstone filed rebuttal testimony that Mr. Beck decided it was appropriate to describe his approach as a "stand-alone" system. Mr. Beck did this only in his surrebuttal testimony. Surrebuttal, the Commission Rule (4 CSR 240-2.130(7)(D)) provides,

. . . shall be limited to material which is responsive to matters raised in **another** party's rebuttal testimony.

By definition, surrebuttal is not the place to make the initial exposition of a witness' selected methodology. It was not "responsive" to Mr. Johnstone's testimony for Mr. Beck to initially reveal the "method" he had used to allocate costs in his **direct** testimony.

Mr. Beck never identified, discussed or even referred to his "method" until he filed his surrebuttal, filed on the eve

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<sup>6/</sup>(...continued)  
23 service study and discussion of the -- one of the  
24 other methods used by other parties.  
25 Q In fact, sir, is it not true that

02211  
1 the words stand alone costs do not appear in your  
2 rebuttal testimony?  
3 A **To the best of my knowledge, no,**  
4 **they do not.**

(emphasis added).

of hearing. Other parties, particularly Midwest, deserved to know and have access (including discovery) to the Staff's "entire case-in-chief" on this important issue. Concealing a methodology as did Mr. Beck deprives opposing parties of the ability to propound data requests or to seek other discovery regarding this claimed "method," lengthened the hearing while these matters were explored on cross, and essentially frustrated the process of fair play. Trial by ambush should not be a part of Commission procedure, certainly from the Commission Staff. But if permitted, the Commission should not thereafter be surprised to see others employ the same tactics. Midwest often empathizes with Staff's complaint that the utility has engaged in "sandbagging," but empathy is diluted when the Staff engages in the same practice. The rule is clear and salutary. The identified portions of Mr. Beck's testimony should be struck from the record.

Moreover, as Mr. Beck's cross-examination proceeded it became further apparent that there was another independent ground on which to strike the same testimony. Mr. Beck only "borrowed" what some other Staff witness had done in some prior case (several years ago) and that departed Staff witness was neither offered or available for cross-examination regarding the details of this method. Mr. Beck was seemingly unable to recall details of the work he claimed to have done on this long-ago Staff project and seemed surprisingly unable to understand that data requests were still available to the Commission Staff to obtain data that it

said it needed from the City of Kansas City.<sup>7/</sup> Nor is it supported by referring to testimony in GR-98-140 which in turn refers to testimony in GR-96-285. Made-up, stale or interpolated data from non-representative service areas was used, simply because it was available while relevant data was not. Regard-

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<sup>7/</sup> Tr. 2213-14:

3 Q (By Mr. Conrad) Who are the people  
4 that sponsored the estimate, Mr. Beck?  
5 A I did.  
6 Q You and you alone, sir?  
7 A Yes.  
8 Q So you collectively refer to  
9 yourself as Staff; is that it?  
10 A I did in this case.  
11 Q When was this work done, Mr. Beck?  
12 A That work was done in -- as for the  
13 specific length, was done in probably 1996.  
14 Q By whom?  
15 A Um, as you mentioned earlier, Eve  
16 Lissek was one of the people working to gather  
17 this data in this calculation.  
18 Q Who else?  
19 A Myself. Um -- to the best of my  
20 memory, I believe that Anne Ross did some  
21 calculations. There may have been others.  
22 Q Again, Mr. Beck, we're talking about  
23 the Staff that estimated the lengths of the main  
24 that borders an average customer's property for  
25 each customer class. And your testimony here

02214

1 today under oath is that this was done in 1996?  
2 A Uh-huh.  
3 Q Correct? Your testimony was filed,  
4 your direct was, in April of 2004.  
5 A That's correct.  
6 Q That's roughly eight years. Right?  
7 A That's correct.  
8 Q And you testified that Ms. Lissek  
9 did part of this work.  
10 A That's correct.  
11 Q Correct? And that you did not  
12 supervise her, nor was she under your supervision  
13 or direction.  
14 A That's correct.


less, the work was not done by Mr. Beck, nor under his supervision or direction.<sup>8/</sup>

For these reasons, the identified portions of Mr. Beck's testimony in this proceeding should be struck.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

/s/ Jeremiah D. Finnegan  
Jeremiah D. Finnegan 18416

  
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ATTORNEYS FOR UNKC, CMSU and MID-  
WEST GAS USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by U.S. mail, postage prepaid addressed, or by electronic mail, to all parties upon their attorneys of record as disclosed by the pleadings and orders herein.

  
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Stuart W. Conrad

Dated: July 13, 2004

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<sup>8/</sup>  
Id.