

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

In the Matter of Missouri Gas Energy's)	
Tariff Sheets Designed to Increase Rates)	
for Gas Service in the Company's)	Case No. GR-2009-0355
Missouri Service Area.)	

**PUBLIC COUNSEL'S REPLY TO MGE'S
OBJECTIONS REGARDING CUSTOMER COMMENTS**

COMES NOW the Missouri Office of the Public Counsel ("OPC") and for its reply to Missouri Gas Energy's ("MGE") objections regarding customer comments states:

1. On July 8, 2009 the Commission ordered MGE to notify all of its customers of MGE's request for a rate increase and to invite customers to submit comments to the Commission regarding the request. Over twelve thousand customers submitted comments believing that the Commission would read their comments before rendering its decision. Soliciting comments from the consumers that would be required to pay the rate increase is a common and accepted practice of the Commission.

2. On October 26, 2009, during the evidentiary hearing, OPC requested that the Commission take official notice of the MGE customer comments. MGE objected and the regulatory law judge directed MGE to file written objections to OPC's request.

3. On November 3, 2009 MGE filed its objections to the Commission taking official notice of the ratepayer comments filed in this case, and to the admission of Staff's Exhibit 103, which shows the number of comments filed with the Commission by MGE customers between 2003 and 2009.

Response to Customer Comment Objections

4. MGE argues that the customer “comment cards are inadmissible if offered as testimonial evidence” and would constitute hearsay. OPC’s response is that OPC did not request that the comment cards be considered as testimonial evidence, nor did OPC request that the Commission take notice of the comments to prove the truth of any matters asserted in the comments. The customer comments do not qualify as hearsay because they are not being offered for the truth of any asserted facts. Taking official notice of the comments should be considered akin to the Commission recognizing 12,000 position statements of the consumers that together include a portion of the Residential and Small General Service customers represented by OPC.¹ These comments may or may not be consistent with the positions and arguments of OPC because it is not possible for OPC to represent the individual interests of every one of the 450,000 customers of MGE. The position of each individual customer can vary. Recognizing and reading these customer comments will allow the Commission to better gauge the position of the 12,000 customers that took the time to explain their position to the Commission as requested, which will better assist the Commission in understanding the varying positions of all consumers.

5. MGE also argues that Public Counsel’s request does not comply with the Missouri Administrative Procedure Act. However, a more thorough review of Chapter 536 of the Missouri Revised Statutes reveals that public records of the Commission may be considered part of the record by reference when so offered. § 536.070(5) RSMo. The Commission may take official notice of all matters of which the courts take judicial

¹ Commission rule 4 CSR 240-2.040(5) allows any person to represent themselves before the Commission.

notice. § 536.070(6) RSMo. There is a long case history of courts taking judicial notice of their own public records. The Missouri Supreme Court recognizes that courts may take judicial notice of public records. *Kansas City v. Raytown*, 421 S.W.2d 504, 513 (Mo. 1967); *Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835 (Mo. 1943). In *Arata v. Monsanto Chemical Co.*, 351 S.W.2d 717 (Mo. 1961), the Missouri Supreme Court held that “a trial court may take judicial notice of records of its own court which are offered into evidence.” *Id.* at 721. The Court reasoned that “A court has knowledge of the genuineness of its own records.” *Id.*

6. Even if OPC were seeking to have the customer comments entered into evidence to create a factual record, the Administrative Procedure Act recognizes that Commission surveys of many persons shall be admissible as evidence if it shall appear that such survey was made under the supervision of a witness who testifies to the accuracy of such results and is presented at the hearing for cross-examination. § 536.070(11). The comments are a survey of MGE’s customers on MGE’s request to increase their natural gas service rates. During the evidentiary hearing, Commission Staff witness Ms. Gay Fred, Manager of the Commission’s Consumer Services Department, testified that her department received and processed the comment cards received from ratepayers. Therefore, under § 536.070(11), the customer comments could be accepted into evidence as a survey, the results of which were verified by Ms. Fred. Ms. Fred’s testimony provides a proper foundation for their acceptance into the record of the case.

7. It is well known that “technical rules of evidence do not control in administrative hearings, and reception of inadmissible evidence does not dictate a reversal unless there is not sufficient competent evidence to sustain the decision.” *Green*

v. Department of Revenue, 745 S.W. 818 (Mo. App. 1988); § 386.410(1) RSMo. The Commission is granted broad discretion in evidentiary determinations. *Deaconess Manor Assoc. v. P.S.C.*, 994 S.W.2d 602 (Mo. App. 1999). Accordingly, the Commission is well within its authority to take official notice of its own records, just as the Commission is within its authority to receive inadmissible evidence so long as the evidence is not the sole basis for the Commission's ultimate decision.

Response to Comment History Exhibit 103 Objections

8. The Staff's Exhibit 103 shows the number of MGE customer comments received by the Consumer Services Department between the years 2003 and 2009. MGE objects to this exhibit and argues that the number of comments is "meaningless" and "misleading." It should not be surprising that MGE would have the Commission ignore the huge increase in comments because the natural assumption to be drawn from this data is that MGE's customers have reacted far more loudly to this rate increase request than any prior rate increase request. MGE suggests that the increase in comments could be the result of the new comment card notice format. OCP does not disagree that the comment card format likely resulted in an increase in comments. However, OPC asserts that an additional explanation is that this was the first time customers were notified that MGE was proposing a single customer charge to recover all non-gas costs since such change was not included in the notice from the previous rate case where the straight fixed variable (SFV) rate design was first adopted.² OPC suggests that the number of customer responses also indicate a strong reaction to the new rate design that forces more cost responsibility on low-volume consumers.

² *In the Matter of Missouri Gas Energy's Tariffs Increasing Rates for Gas Service Provided to Customers in the Company's Missouri Service Area*, Case No. GR-2006-0422, Order Regarding Local Public Hearings, August 25, 2006.

Conclusion

9. The Commission's practice of soliciting comments from the customers of a utility company seeking to increase rates may be as old as the Commission itself. OPC is not aware of any prior utility's attempts to keep public comments hidden from review. Given this history, it is surprising to see a public utility blatantly attempting to silence the public from having the ability to voice their positions on MGE's rate request. MGE is desperate to keep the Commission from reading the comments because the public comments voice a loud opposition to MGE's attempt to continue with a rate design that consumers argue is not fair and should be changed.

10. The public trusts that when the Commission solicits comments from the public on a proposed rate increase that those comments will be read by the Commission. OPC asks that the Commission be consistent with the Commission's goal of protecting the public interest by reading the public comments to better understand the public's positions on what is in the public interest.

WHEREFORE, the Signatory Parties respectfully offers this reply to MGE's objections regarding customer comments and Staff Exhibit 103.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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