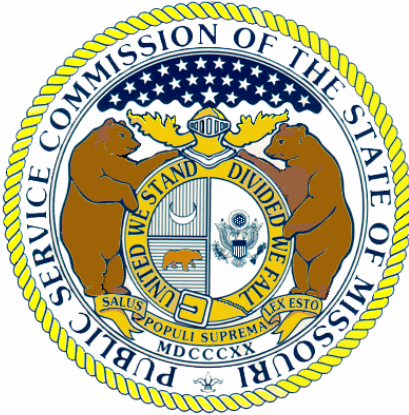


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Application of Missouri Gas)
Energy, a division of Southern Union Company,)
for an Accounting Authority Order Concerning)
Environmental Compliance Activities)

Case No. GU-2007-0480

REPORT AND ORDER

Issue Date: December 17, 2008

Effective Date: December 27, 2008

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Energy, a division of Southern Union Company,)	<u>Case No. GU-2007-0480</u>
for an Accounting Authority Order Concerning)	
Environmental Compliance Activities)	

APPEARANCES

Dean L. Cooper, Brydon, Swearingen & England, P.C. 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102. Attorney for Missouri Gas Energy, a division of Southern Union Company.

Marc D. Poston, Senior Public Counsel, Post Office Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102. Attorney for the Office of the Public Counsel and the public.

Robert S. Berlin, Senior Counsel, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102. Attorney for the Staff of the Missouri Public Service Commission.

JUDGE: **Kennard L. Jones**

REPORT AND ORDER

Background

In June of 2007, Missouri Gas Energy, a division of Southern Union Company, filed with the Missouri Public Service Commission an Application for Accounting Authority Order. MGE requests special accounting treatment for costs associated with the cleanup of former manufactured gas sites purchased by Southern Union so that those costs may be considered for possible recovery in MGE's next rate case.

Manufactured gas facilities were used before the advent of interstate natural gas pipelines in the 1940s. Before there were interstate pipelines, gas could not be transported over long distances so gas companies manufactured gas by heating coal or oil and collecting the gas that was driven off in the process. The primary byproduct that came from this process is tar, which contains hazardous carcinogens.

Because the Staff of the Commission and the Office of the Public Counsel opposed MGE's request, the Commission held an evidentiary hearing. Thereafter, MGE, Staff and Public Counsel filed post-hearing briefs. MGE further filed a motion to strike portions of Public Counsel's brief to which Public Counsel filed a reply.

Upon consideration of the record before it, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Missouri Gas Energy, a division of Southern Union Company is a gas corporation certificated to provide natural gas in the state of Missouri.¹

¹ Commission Case No. GM-94-40.

2. In 1994 Southern Union purchased properties that are now MGE.²
3. MGE owns five former manufactured gas plant sites: St. Joseph, Joplin, Independence and Stations A and B in Kansas City.³
5. The properties, which were sites used for manufacturing gas, may contain coal tar and by-products, heavy metals, petroleum aromatic hydrocarbons and a wide range of chemicals.⁴
6. Under the Comprehensive Environmental Response, Compensation and Liability Act of Congress, the sites may be considered hazardous and required to be cleaned up.⁵
7. Seeking deferred accounting treatment for the costs associated with the cleanup of former manufactured gas plant sites (FMGPs), MGE filed an application for an accounting authority order.⁶
8. Although it has incurred costs for cleanup since 1994⁷, as of March of 2008, MGE had a credit of \$609,166.⁸
9. MGE did not see a net cost until June 30, 2008, in the amount of \$845,000.⁹
10. MGE has a budget of \$3 million for recurring compliance costs it expects to pay from July through December of 2008.¹⁰

² Callaway Direct, p. 2, lines 12-15.

³ Noack Direct, p. 3-4.

⁴ Tr. 165, lines 8-14.

⁵ 42 U.S.C. §§ 9601-9675.

⁶ See Docket.

⁷ Noack Surrebuttal, p. 3, lines 5-6.

⁸ Tr. 43, lines 11-14; Ex. 10, Expenditures and Recoveries by year.

⁹ Tr. 44, line 12 – p. 45, line 7.

¹⁰ Tr. 46, lines 2-4; 47, lines 5-23.

11. MGE's 2007 net operating income on an adjusted basis was \$36,383,230.¹¹
12. Five percent of \$36,383,230 is \$1,819,162.
13. Including those that it owns, MGE is potentially responsible for the cleanup of 19 or 20 FMGPs.¹²
14. Costs for the remediation of FMGPs are recurring costs.¹³
15. Many companies like MGE incur remediation costs.¹⁴
16. Dennis Morgan, Senior Vice President - Litigation for Southern Union, has done work regarding manufactured gas plant sites for the company's affiliates in Texas, Oklahoma, Arizona, Rhode Island, Massachusetts and Pennsylvania.¹⁵
17. Many natural gas distribution and electric utilities throughout the United States are incurring MGP related costs.¹⁶
18. As the Director of Pricing and Regulatory Affairs¹⁷, Michael Noack is aware of 30 different public utility commissions that have issued orders regarding former manufactured gas plant sites.¹⁸
19. Crystal Callaway is employed with MGE as an Environmental Compliance Specialist.¹⁹

¹¹ Tr. 107, lines 4-11.

¹² Tr. 32, lines 4-13; Tr. 41, line 21 through 42, line 5.

¹³ Tr. 41, lines 8-15.

¹⁴ Tr. 46, lines 5-8. Noack Surrebuttal, p. 15, lines 34-36.

¹⁵ Tr. 68, line 25 - 69, line 3; Tr. 89, line 21 – 90, line 4.

¹⁶ Tr. 96, lines 12-20; Rebuttal Harrison, p. 6, lines 24-26.

¹⁷ Noack Direct, p. 1, lines 7-8.

¹⁸ Noack Surrebuttal, p.5, line 34 – p. 16, line 2.

¹⁹ Callaway Direct, p. 1, lines 7-8.

20. Most of Callaway's duties have to do with permitting activities, hazardous waste operations and related training.²⁰

21. Callaway's job description does not mention remediation nor was it discussed during her interview.²¹

22. Callaway's review of MGE files revealed typical activities associated with natural gas utility company environmental matters, such as regulated underground storage tank removals, spill prevention, control and countermeasure plans, former manufactured gas plant investigations, removal of equipment containing regulated substances, asbestos and lead paint abatement and surveys, storm water permits and hazardous water notifications and reporting.²²

23. Although initially not aware of former manufactured gas plants, Callaway's involvement has recently increased.²³

24. Although Callaway is not on the cleanup sites every day, she has consultants overseeing the projects.²⁴

25. Callaway frequently consults with a project manager in New England about remediation efforts.²⁵

26. At the company's St. Joseph site, an initial assessment is being concluded and right now MGE is in the removal action, which is currently ongoing.²⁶

²⁰ Tr. 151, lines 12-19.

²¹ Tr. 151, line 23 – 152, line 1; p. 169, lines 3-5.

²² Callaway Direct, p. 2, line 19 p. 3, line 2.

²³ Tr. 153, lines 7-15.

²⁴ *Id.*

²⁵ Tr. 154, line 22 – p. 155, line 5.

²⁶ Tr. 143, lines 9-10.

27. Cleanup costs are certain to occur in the near future.²⁷

28. Remediation of former manufactured gas plant sites is a normal cost of doing business for a local distribution gas company.²⁸

29. Remediation actions are not usually a significant part of MGE's normal environmental compliance activity.²⁹

30. Investigation costs at the sites are at "some level" other than significant.³⁰

31. Remediation of FMGP sites is typical of a natural gas utility.³¹

CONCLUSIONS OF LAW

Jurisdiction

Missouri Gas Energy is a gas corporation under Missouri law.³² As a gas corporation, the Commission has jurisdiction over MGE.³³ The Commission further has the jurisdiction "to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."³⁴

The Standard for Granting an AAO

An AAO allows a utility to defer certain costs for later consideration in a general rate case. The deferral of costs in an AAO does not guarantee the utility a right to ultimately recover the amounts deferred in that future rate case.³⁵ Rather, the Commission must

²⁷ Callaway Surrebuttal, p. 1, lines 15-19.

²⁸ Robertson Rebuttal Ex. 12, p. 32.

²⁹ Callaway Surrebuttal, p. 2, lines 13-14.

³⁰ Tr. 166, 10-13.

³¹ Callaway Direct, p. 2, line 19 – p. 3, line 6.

³² Section 386.020 (18). RSMo 2000.

³³ Section 386.250 (2) RSMo 2000

³⁴ Section 393.140 (8).

³⁵ *Missouri Gas Energy v. Pub. Serv. Comm'n*, 978 S.W.2d 434 (Mo. App. W.D. 1998).

consider all other relevant factors when determining in the rate case the appropriate rate the utility may charge.³⁶

As a gas company subject to the Commission's jurisdiction, MGE is required by regulation to keep all its accounts in conformity with the Uniform System of Accounts (USOA) prescribed by the Federal Energy Regulatory Commission.³⁷ In general, the USOA requires that a company's net income reflect all items of profit or loss occurring during the period. The USOA, however, recognizes that special accounting treatment, what this Commission refers to as an AAO, may be appropriate when accounting for extraordinary items of profit or loss. The question then becomes, what is an extraordinary item?

The USOA indicates that an extraordinary item for which special accounting treatment would be appropriate is "of unusual nature and infrequent occurrence." Furthermore, "they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future." In addition, the USOA requires that to be considered extraordinary, the item "should be more than approximately 5 percent of income, computed before extraordinary items."³⁸

The Commission has also established a test to determine when an AAO should be granted. In a 1991 decision, often referred to as the Sibley case,³⁹ the Commission stated that it would consider the appropriateness of granting an AAO on a case by case basis. In doing so, it would approve an AAO for events that it found to be "extraordinary, unusual

³⁶ *Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. App. W.D. 1993).

³⁷ 4 CSR 240-40.040. The USOA for gas companies is found at 18 CFR part 201.

³⁸ 18 CFR part 201, general instruction 7.

³⁹ In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations. In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments. 1 MPSC 3d 200 (1991)

and unique, and not recurring.”⁴⁰ The Commission’s decision in the Sibley case was subsequently affirmed by the Missouri Court of Appeals.⁴¹

The classic example of an event that would be extraordinary, unusual and unique, and not recurring would be a fire, or flood, or ice storm that causes a large amount of damage to the utility’s property. In those circumstances, it is generally agreed that the company should be permitted to defer the costs related to that extraordinary event through an AAO.⁴² However, the Commission has never limited the granting of an AAO to expenses resulting from such natural catastrophes.

On the contrary, the Commission has found that an AAO would be appropriate in a wide variety of circumstances. For example, in the Sibley case – the case in which the Commission set out its standards for the granting of an AAO – the Commission approved an AAO for the deferral of costs relating to refurbishment of the company’s coal-fired generating plant.⁴³ Similarly, the Commission has granted an AAO for the deferral of costs related to a company’s compliance with changed accounting standards,⁴⁴ and for a

⁴⁰ *Id.* at 205.

⁴¹ *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W. 2d 806 (Mo. App. W.D. 1993)

⁴² For an example see: In the Matter of Aquila Inc.’s Application for the Issuance of an Accounting Authority Order Relating to its Electrical Operations in the Aquila Networks-MPS Division as a Result of a Severe Ice Storm. Order Granting Accounting Authority Order, Case No. EU-2002-1053 (June 27, 2002)

⁴³ In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations. In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments. 1 MPSC 3d 200 (1991)

⁴⁴ In the Matter of the Application of Union Electric Company for an Accounting Authority Order. 1 MPSC 3d 329 (1992)

company's costs incurred to enhance security after the terrorist attacks of September 11, 2001.⁴⁵

On several occasions, the Commission has granted AAOs authorizing deferral of costs relating to actions that a utility has been required to take as a result of governmental orders, regulations, or statutes. For example, the Commission has granted AAOs for costs related to a company's compliance with emergency amendments to the Commission's cold weather rule,⁴⁶ and for expenses related to a company's compliance with a gas safety line replacement program.⁴⁷

18 CFR part 201, General Instruction 7

Under this instruction, income shall reflect all items of profit and loss during the period in which such profit and loss occurs, unless such item is extraordinary. The instruction defines extraordinary as follows:

Those items . . . which are of unusual nature and infrequent occurrence . . . [and are] events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.) To be considered as extraordinary, an item should be more than approximately 5 percent of

⁴⁵ In the Matter of the Joint Application of Missouri-American Water Company, St. Louis Water Company, d/b/a Missouri-American Water Company, and Jefferson City Water Works Company, d/b/a Missouri-American Water Company, for an Accounting Authority Order Relating to Security Costs. Report and Order on Remand, Case No. WO-2002-273 (November 10, 2004)

⁴⁶ In the Matter of the Application of UtiliCorp United, Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company for an Accounting Authority Order Relating to Commission Rule 4 CSR 240-13.055(13). 11 MPSC 3d 78 (2002), and In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Relating to Commission Rule 4 CSR 240-13.055(13), 11 MPSC 3d 317 (2002)

⁴⁷ In the Matter of the Tariff Revisions of Missouri Gas Energy, a Division of Southern Union Company, Designed to Increase Rates for Natural Gas Service to Customers in the Missouri Service Area of the Company. 10 MPSC 3d 369 (2001).

income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent as extraordinary.

Thus, for an item to be considered “extraordinary” it must: (1) be of unusual nature; (2) be of infrequent occurrence; (3) be of significant effect; (4) be abnormal and significantly different from the ordinary and typical activities of the company; and (5) not reasonably be expected to recur in the foreseeable future. The Commission will examine each of these qualifiers.

Unusual Nature

The word unusual is defined in the alternative as “rare.”⁴⁸ Since being certificated in 1994, MGE has incurred yearly costs associated with the remediation of the FMGP sites. Those costs have been recurring and MGE expects to incur such costs in the future. Gas companies across the country similarly experience cost to clean up FMGP sites. In fact, 30 public utility commissions have dealt with this issue. Along with other environmental activities, MGE typically investigates former manufactured gas plants.

MGE points out that its Environmental Compliance Specialist’s job description does not include remediation of FMGP sites. MGE further states that this activity was not discussed in her interview. The Specialist adds that in order to affect cleanup efforts, outside expertise is employed. These facts do not support a conclusion that cleanup efforts are rare. The facts that the Specialist’s job description contains no mention of remediation and it wasn’t discussed during her interview are irrelevant in light of the fact that her duties certainly include remediation. That the company must hire outside help also bears no weight on whether the costs are unusual.

⁴⁸ *Thompson v. Anderson*, 107 Utah 331, 153 p.2d 665, 666 (Utah 1944).

An examination of the Commission's decision in Sibley⁴⁹ shows that the company in that case undertook a project that was 23% of the company's net income. The cost included expenditures over a number of previous years and projected costs. MGE has also incurred costs over the years and has set out projected costs. However, MGE's projected costs are only 8% of its net income and the actual incurred costs considered within this case are only 2% of its net income. Therefore, the Sibley case does not per se support a finding that MGE's costs are unusual. Based on the above discussions, the Commission concludes that the cleanup of FMGP sites is not of such significant size and substantial cost to be considered extraordinary or unusual.

Infrequent Occurrence

MGE argues that "the costs associated with [remediation] are unusual and infrequent as to MGE and the individual sites."⁵⁰ MGE further states that, "[s]pecific remediation activities are unlikely to be repeated at each site and will not recur once the remediation of those sites is final."⁵¹ Through these arguments the company posits that each site and each activity in each site should be considered separately. There is, however, no evidence treating the remediation costs as separate sites and activities. The schedule of expenditures shows yearly costs. The company has a budget of a certain amount for remediation costs, not costs at certain sites and for certain activities. Finally, this argument does not address whether the item is of infrequent occurrence.

⁴⁹ *Report and Order*, December 20, 1991, Case Nos. EO-91-358 and EO-91-360, *In the matter of the application of Missouri Public Service for the issuance of an accounting order relating to its electrical operations, and In the matter of the application of Missouri Public Service for the issuance of an accounting order relating to its purchasing power commitments*, 129 P.U.R.4th 381, 1 MPSC 3d 200 (commonly referred to as the Sibley case).

⁵⁰ MGE post-hearing brief, p. 10, par 2.

⁵¹ *Id.*

In Missouri, “words and phrases shall be taken in their plain or ordinary and usual sense. . . .”⁵² The definition of frequent is: common, familiar, current, usual, habitual and persistent.⁵³ MGE has testified: that it *frequently* consults with a project manager in New England about remediation efforts and that at the St. Joseph site, an initial assessment is being concluded, and right now they’re in the removal action, and it’s *currently* ongoing. Notably, remediation costs have persisted for 14 years. Finally, when asked why the costs are infrequent, MGE states that they are infrequent because they are variable. An analogy would be to say that because one spends varying amounts to purchase lunch every day, that person does not eat lunch frequently. The company’s Specialist testified that although remediation actions are not usually significant, they are typical. Though the company may not actively clean a site every day, MGE has spent an average of \$62,967 per month since 1994; with a low of \$345 in 1994 to a high of \$534,339 in 2003. As MGE argues, those figures do vary. However, that those costs usually occur is not belied by their variability. MGE has incurred costs for remediation every year since it was certificated by this Commission. Therefore, the costs are not infrequent.

Significant Effect

Under the definition of “extraordinary”, the events and transactions must be of “significant effect.” The Commission has no legal guidance as to what a significant effect is under these circumstances. On the record, Callaway, the Environmental Specialist, states that investigation costs at the sites are at “some level”, rather than being “significant.”

⁵² Section 1.090 RSMo 2000.

⁵³ Webster’s Third New International Dictionary (1961).

As the party asserting this issue, MGE carries the burden of showing that remediation has a significant effect.⁵⁴ MGE has not carried that burden. The Commission therefore concludes that the events and transactions are not of significant effect.

Further, for an item to be considered extraordinary under the USOA, the item “should be more than approximately 5 percent of income, computed before extraordinary items.”⁵⁵

Although not determinative in this case, it should be noted that MGE’s costs of remediation efforts, through June of 2008, have been approximately 2% of its income and MGE projects that it will incur, through the remainder of this year, what is the equivalent of 8% of its income.

Abnormal and Significantly Different From the Ordinary and Typical Activities of the Company

The Commission has concluded that the activities are not unusual. To now conclude that the same activities are abnormal would be inconsistent. With regard to the activities being significantly different from the ordinary and typical activities of the company, the Commission has determined that cleanup activities are typical for MGE. Although it is not MGE’s purpose to remediate FMGP sites, it has necessarily done so since being certificated 14 years ago. The Commission concludes that the remediation of FMGP sites is not abnormal or significantly different from the ordinary and typical activities of the company.

⁵⁴ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680 (Mo. App. 2003).

⁵⁵ 18 CFR part 201, general instruction 7.

Not Reasonably Expected To Recur in the Foreseeable Future

There is no evidence suggesting that MGE does not expect remediation activities to recur in the foreseeable future. In fact, all of the evidence that is relevant to this point suggests that remediation will certainly recur in the foreseeable future.

The company has a \$3 million budget for remediation costs that are to be incurred in the foreseeable future. Company witnesses testified that the cost are recurring; even to the point of stating that cleanup costs are certain to occur in the near future.

The Commission concludes that it is reasonable to expect remediation costs to recur in the foreseeable future.

DECISION

Having made the above findings of fact and conclusions of law the Commission determines that MGE's costs associated with the remediation of FMGP sites is not extraordinary. The Commission will therefore deny MGE's application for an accounting authority order.

MGE's Motion to Strike

MGE filed a motion to strike portions of OPC's brief. In its motion, MGE argues that OPC has alleged certain facts which have no support in the records. The Commission points out that statements made by OPC in its brief do not change what is in the record. Although the Commission appreciates MGE's effort to bring to light what may be possibly misleading statement made by OPC, the Commission will deny this motion.

THE COMMISSION ORDERS THAT:

1. Missouri Gas Energy's application for an accounting authority order to treat as extraordinary costs associated with the cleanup of former manufactured gas plant sites is denied.
2. Missouri Gas Energy's motion to strike portions of the Office of the Public Counsel's brief is denied.
3. This order shall become effective on December 27, 2008.
4. This case shall be closed on December 28, 2008.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur and
certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 17th day of December, 2008.