

6. Panhandle's objections were not timely filed. Missouri Supreme Court Rule 58.02(e)(2) states that objections shall be served on all parties to the action within 10 days of service of the subpoena. Panhandle's objections were not filed until the 11th day after service of Staff's subpoena, and therefore those objections should not be considered by the Commission. Untimely objections are waived.¹

7. In the alternative, Staff will respond to Panhandle's objections. Staff is filing this response pursuant to Commission Rule 4 CSR 240-2.080(13), which provides that parties may respond to motions within 10 days unless otherwise ordered by the Commission.

8. Missouri statutes and Commission rules provide that parties may obtain the same discovery as the Missouri Supreme Court rules provide for civil actions in circuit court.²

9. Missouri Supreme Court Rule 58.02 provides that a party may serve a subpoena on a non-party to produce and permit inspection and copying of any designated documents.

10. Rule 58.02(d) provides that with the agreement of all parties, the non-party may be excused from appearance and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect and copy the subpoenaed items.

11. In this matter, Staff filed DR No. 3 requesting review of the work papers now requested through this subpoena. No objection has been filed to this data request;

¹ *Zimmer v. Fisher*, 171 S.W.3d 76, 80 (Mo. App., E.D. 2005).

² Commission Rule 4 CSR 240-2.090(1); § 536.073.2, RSMo.

untimely objections are waived.³ (See Staff Data Request No. 0003 and company response in Case No. GR-2014-0007, attached hereto as Appendix A and incorporated by reference.) Staff's request to review external audits of Southern Union is a typical, routine and generally uncontested aspect of Staff's rate case audit of MGE. (See Staff Data Request No. 0003 and company response in Case No. GR-2009-0355, attached hereto as Appendix B and incorporated by reference.)

12. These work papers are relevant and reasonably calculated to lead to the discovery of admissible evidence, because these work papers constitute the results of an independent, third-party audit of Southern Union Company during the test year.⁴ As explained above, during the test year in this case, MGE was an operating division of Southern Union—that is, during the test year, MGE was Southern Union. During the test year, MGE had no legal existence or capital structure independent of Southern Union.⁵ Therefore, the results of the external audit of Southern Union—an independent review of the regulated utility's operations during the test year—is the exact subject matter of the pending action, this rate case.

13. The facts and law above establish that the Commission should grant Staff's subpoena in this case, and instruct Panhandle to make the requested work papers available for Staff's review at Grant Thornton's Kansas City office. In further response to Panhandle's motion, Staff states as follows:

³ *Zimmer v. Fisher*, 171 S.W.3d 76, 80 (Mo. App., E.D. 2005).

⁴ Missouri Supreme Court Rule 56.01(b)(1) states the general rule: "Parties may obtain discovery on any matter, not privileged, that is relevant to the subject matter involved in the pending action... It is not grounds for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

⁵ *State ex rel. Missouri Office of the Public Counsel v. Public Service Commission*, 293 S.W.3d 63, 67-68 (Mo. Ct. App. S.D. 2009).

Staff's request is not vague

First, Panhandle states that the request is vague, "in that the term 'work paper' is not defined and thus the provision of documents would require speculation or conjecture about what information is sought by the question."

The request is not vague. The term "work paper" is well known in the auditing industry simply as documentation of activities conducted during the audit. In addition, Panhandle's argument that the term "work paper" is vague directly contradicts the content of the officer's certificate provided as Appendix A to Panhandle's motion. Appendix A states that an officer of Panhandle is "familiar with the work of Company's external auditors for 2013" and that the officer is aware of the content of "the audit work papers." Panhandle provided Staff with the external audit work papers of the promotional MGE-only audit,⁶ so, clearly, the term "work paper" describes the subpoenaed documents sufficiently for Panhandle to identify what Staff is requesting.

Staff's request is relevant and reasonably calculated to lead to the discovery of admissible evidence.

Next, Panhandle argues that because rates to be set in this matter must be just and reasonable "on a going forward basis," and because Panhandle no longer owns MGE, Panhandle argues that Staff's request seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Staff disagrees.

⁶ These work papers related to an audit performed of MGE alone, not including Southern Union's operations, for purposes of marketing MGE for sale to other companies. These work papers were not the product of Grant Thornton's annual audit sought by Staff in DR No. 0003 and this subpoena in this case, and which Staff reviewed in GR-2009-0355 (See Appendices A and B).

This argument misinterprets the concept of the “test year” as used in the Commission’s regulation. Just and reasonable rates cannot be set for the future unless they are based the utility’s actual operations, so the purpose of a test year is to provide a period for which complete data is available in order to permit review by Staff and other parties, and to provide the Commission with a basis to estimate future revenue requirements.⁷ The test year is used to develop a relationship between the various components of the ratemaking process and keep those relationships in synchronization.⁸ For each of the twelve months of the period ending April 30, 2013 Southern Union owed and allocated costs from Southern Union to MGE’s operations. This 12-month period is the starting point and basis for Staff’s audit.

As explained above, Panhandle (formerly Southern Union) owned MGE during the test year, and during that time MGE had no legal existence independent of Southern Union. Therefore these work papers are relevant because they relate directly to the test-year operations of the company that is the subject of this rate case.

Staff’s request is not overbroad

Next, Panhandle argues that Staff’s request is overbroad because Southern Union operated other businesses besides MGE in the years 2012 and 2013.

Courts may quash a subpoena that is overbroad.⁹ For example, a court will likely consider discovery requests to be overbroad when the request is not limited by time constraints or not limited to the issues raised in the case.¹⁰ This is not the case here.

⁷ *In the Matter of KCP&L Greater Missouri Operations Company*, 2011 WL 1827253 (Mo.P.S.C., May 4, 2011).

⁸ *In the Matter of Lake Region Water and Sewer Company*, 2010 WL 3378384 (Mo. P.S.C., August 18, 2010).

⁹ *State ex rel. Kawasaki Motors Corp., USA v. Ryan*, 777 S.W.2d 247, 252-254 (Mo. Ct. App. E.D., 1989).

As explained above, Southern Union operated as a gas utility in Missouri under the name MGE during the test year that is the subject of this case. Southern Union was MGE during the test year. Staff's request is not overbroad because the external audit work papers relate to the entire corporate entity, and so an allocation of the costs for the external auditors' work on the corporate entity and the entities it owns is typically allocated to those various entities. As such, MGE would have been responsible for an allocated share of the costs of the external audit, because the external auditor makes no attempt to separate a corporate entity's regulated operations from its non-regulated operations.

Staff routinely reviews external audit work papers that contain information that relates to a company's regulated and non-regulated activities. For example, in this and other recent cases, Staff reviewed non-regulated information contained in the external audit work papers of The Laclede Group and Laclede Gas Company, and Staff's review of Deloitte and Touche work papers contained both regulated and non-regulated information. Staff is bound by statute¹¹ to protect confidential information, and to Staff's knowledge there is no case where Staff has improperly disclosed information related to an entity's non-regulated information. During its review of external audit work papers, Staff simply ignores non-regulated information that is irrelevant to the regulated operations.

¹⁰ *Id.*

¹¹ Section 386.480 RSMo.: "No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding."

Therefore, the simple fact that the external audit work papers contain non-regulated material does not make the request overbroad. Staff's subpoena was narrowly tailored to the external audit work papers that relate to 2012 and 2013, because that time period includes the test year. Because external audits are generally conducted annually, it would be impractical to segregate the results strictly into the April 2012 through April 2013 test year time frame, the scope of Staff's subpoena is reasonable and not overbroad.

The requested documents are under Panhandle's control

The subpoena rule is not limited to documents only in the possession of a party. Rather, Rule 58.02 applies to documents that are "in the possession, custody or control of the non-party."¹² "Control" does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, the documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action.¹³ The word "control" is to be broadly construed."¹⁴

Other workpapers

As Panhandle points out, Staff did review some external audit work papers in this case. Staff reviewed external audit work papers of Laclede Gas Company and the Laclede Group in December 2013. Also, Panhandle gave Grant Thornton permission for Staff to review MGE's stand-alone audit work papers—a unique audit conducted only for Southern Union's purpose of putting MGE up for sale—which Staff reviewed in

¹² *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. banc. 2003).

¹³ *Id.*

¹⁴ *Id.*

January 2014. However, Panhandle did not permit Staff to review external audit work papers of Southern Union itself during the test year—the only work papers that directly relate to the regulated utility during the test year, and thus the *most* relevant of all these materials.

Panhandle’s Officer’s Certificate

Finally, Panhandle’s motion addresses discussions with Staff and the officer’s certificate relating to five topics that Panhandle provided as Appendix A to its objections. This is irrelevant to the issue of whether Staff’s subpoena should be granted. Courts generally do not permit negotiations or terms of settlement to be introduced as evidence, because of the potential of unjust penalty, bias or confusion.¹⁵ The officer’s certificate is the product of negotiation and has no bearing whatsoever on the law of discovery and relevance, which, as discussed above, entitle Staff to the subpoenaed documents.

However, since Panhandle raised the issue, Staff will explain why the officer’s certificate does not satisfy Staff’s inquiry. There are two reasons.

First, the officer’s certificate is the result of Southern Union/Panhandle’s agreement to provide audit support as part of the Continuing Services Agreement (CSA) included in the Stipulation and Agreement in Case No. GM-2013-0254.¹⁶ (The CSA is attached hereto as Appendix C and incorporated by reference.) After Staff submitted its

¹⁵ *Hancock v. Shook* at 799: “Because settlements are encouraged under the law, the general rule is that evidence procured from settlement is to be excluded at trial... Such evidence is normally excluded because a party making a settlement offer should not be penalized by revealing an offer to the jury if negotiations fail... Allowing evidence of settlement and negotiations to come before the jury creates a possibility of bias that has no place in our system of justice... The jury could also be confused by a compromise position acceptable for settlement, but less favorable than the result a party might seek at trial.”

¹⁶ GM-2013-0254, EFIS No. 65, July 2, 2013.

data request for external audit work papers in this case, MGE replied that the information was in the possession of Southern Union, and MGE replied that Southern Union had refused to provide Staff with any access to its external audit work papers and other documents, despite the fact that Southern Union had clearly contemplated providing such auditing support when asking the Commission to approve the sale of MGE.

Meanwhile, both Staff and MGE did not have access to other MGE information that remained in possession of Southern Union after the merger—including basic company information such as property tax receipts.¹⁷ In order to facilitate the timely flow of information as the deadline for Staff's audit approached, Staff agreed, for the purposes of its audit and in the context of Southern Union's violation of the CSA, that Southern Union should at least provide the external audit work papers for five of the most critical, essential topics. Even with this narrowing of topics, Southern Union did not provide any such work papers, and did not provide the officer's certificate until after Staff filed its Cost of Service Report in this case on January 29, 2014. In short, the facts and law of this matter show that Staff is entitled to inspect the subpoenaed external audit work papers, and this legal conclusion cannot be altered by the facts and negotiations that resulted in Panhandle's production of the officer's certificate.

In addition, Panhandle's officer's certificate is not legally acceptable because it merely states that "the audit work papers associated therewith do not contain any additional non-privileged information" besides the information contained in the external

¹⁷ For a complete discussion of this issue, see discovery conference transcripts Vols. 1 and 2, EFIS Nos. 43 and 50, in GR-2014-0007.

audit work papers for the Company's former Missouri Gas Energy with respect to those five topics.

The certificate does not indicate what privilege is being asserted, and Panhandle has refused to provide a privilege log.

The party asserting a privilege has the burden of proof to show that the privilege applies.¹⁸ Blanket assertions of privilege are insufficient to invoke protection.¹⁹ The party challenging privilege must have sufficient information to assess whether the claimed privilege is applicable. A privilege log may identify documents individually or by categories if that provides sufficient clarity for the court to rule on the asserted privilege claim.²⁰

Panhandle's certificate is ultimately unsatisfactory because it is the product of negotiations necessitated by Panhandle's own violation of its promise to assist in Commission audits, and it merely asserts a blanket, unspecified privilege that does not even meet the requirements of discovery law. This does not overcome the Commission's statutory power to review utility books and records to fulfill its statutory duty to set just and reasonable rates.

WHEREFORE, Staff respectfully submits this response to Panhandle's Motion to Quash.

¹⁸ *State ex rel. Ford v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc. 2004).

¹⁹ *Id.*

²⁰ *Id.*

Respectfully Submitted,

/s/ John D. Borgmeyer

John D. Borgmeyer
Deputy Legal Counsel
Missouri Bar No. 61992
Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
Telephone: (573) 751-5472
Fax: (573) 751-9285
Email: john.borgmeyer@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served electronically to all counsel of record this 7th day of March, 2014.

/s/ John D. Borgmeyer

Missouri Public Service Commission

Respond Data Request

Data Request No.	0003
Company Name	Missouri Gas Energy (Southern Union)-Investor(Gas)
Case/Tracking No.	GR-2014-0007
Date Requested	9/16/2013
Issue	General Information and Miscellaneous - Company Information
Requested From	Michae R Noack
Requested By	John Borgmeyer
Brief Description	External Auditors Reports and Work Paper Review
Description	1. Please identify the outside auditors and the length of time they have been engaged by Missouri Gas Energy and/or its parent companies. 2. For Missouri Gas Energy and/or its parent companies, provide copies of all correspondence with the outside auditors during the past three years. 3. Provide all management letters from the outside independent auditors during the past three years. 4. Please make available for Staff to review the external auditor work papers of Missouri Gas Energy and/or its parent companies, along with any affiliate doing business with the regulated entity for the most recent audited year 2012 and previous year 2011. (MGE Case No. GR-2009-0355 DR 3) Data request submitted by Cary Featherstone (Cary.Featherstone@psc.mo.gov)
Response	Grant Thornton has been auditing the MGE books since March 31, 2012 when ETE closed on the purchase of Southern Union, prior to that Southern Union used Price-Waters Coopers. This will be set up between the Grant Thornton auditors and the Staff auditors.
Objections	NA

The attached information provided to **Missouri Public Service Commission** Staff in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform the **Missouri Public Service Commission** if, during the pendency of Case No. **GR-2014-0007** before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information. If these data are voluminous, please (1) identify the relevant documents and their location (2) make arrangements with requestor to have documents available for inspection in the **Missouri Gas Energy (Southern Union)-Investor(Gas)** office, or other location mutually agreeable. Where identification of a document is requested, briefly describe the document (e.g. book, letter, memorandum, report) and state the following information as applicable for the particular document: name, title number, author, date of publication and publisher, addresses, date written, and the name and address of the person(s) having possession of the document. As used in this data request the term "document(s)" includes publication of any format, workpapers, letters, memoranda, notes, reports, analyses, computer analyses, test results, studies or data, recordings, transcriptions and printed, typed or written materials of every kind in your possession, custody or control or within your knowledge. The pronoun "you" or "your" refers to **Missouri Gas Energy (Southern Union)-Investor(Gas)** and its employees, contractors, agents or others employed by or acting in its behalf.

Missouri Public Service Commission**Respond Data Request**

Data Request No.	0003
Company Name	Missouri Gas Energy-Investor(Gas)
Case/Tracking No.	GR-2009-0355
Date Requested	4/23/2009
Issue	General Information and Miscellaneous - Other General Info & Misc.
Requested From	Michael R Noack
Requested By	Amanda McMellen
Brief Description	External auditor workpapers
Description	Please arrange for a review of the 2007 and 2008 external auditors workpapers related to MGE and of any entity that charges cost, either directly or indirectly, to MGE.
Response	This will be set up between the PWC auditors and the Staff auditors.
Objections	NA

The attached information provided to **Missouri Public Service Commission** Staff in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform the **Missouri Public Service Commission** if, during the pendency of Case No. **GR-2009-0355** before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information. If these data are voluminous, please (1) identify the relevant documents and their location (2) make arrangements with requestor to have documents available for inspection in the **Missouri Gas Energy-Investor(Gas)** office, or other location mutually agreeable. Where identification of a document is requested, briefly describe the document (e.g. book, letter, memorandum, report) and state the following information as applicable for the particular document: name, title number, author, date of publication and publisher, addresses, date written, and the name and address of the person(s) having possession of the document. As used in this data request the term "document(s)" includes publication of any format, workpapers, letters, memoranda, notes, reports, analyses, computer analyses, test results, studies or data, recordings, transcriptions and printed, typed or written materials of every kind in your possession, custody or control or within your knowledge. The pronoun "you" or "your" refers to **Missouri Gas Energy-Investor(Gas)** and its employees, contractors, agents or others employed by or acting in its behalf.

Security :	Public
Rationale :	NA

Continuing Services Schedule

Laclede Gas Company (Laclede) has requested certain continuing services support from Southern Union Company/Energy Transfer Partners, L.P. (SUG/ET) pursuant to the terms of the Continuing Support Agreement (“CSA”) from the time the acquisition of the assets of MGE by Laclede closes for an initial term until December 31, 2013 (the “Initial Term”).

IT and Accounting:

Laclede has requested certain pre-closing services from SUG/ET with regards to data extracts, conference calls, file transfers and process research. The IT systems and resource support requirements of Laclede are:

Oracle General Ledger		
	Oracle Accounts Payable (p-card, iExpense, iProcurement)	
	Oracle Human Resources (HCM, Self Service)	General financial spreadsheet support
Oracle Purchasing and Inventory	Discoverer (Oracle EBS and PowerPlant)	ADP GL Interface Support
MSCA	FileNet	PowerPlant Support (Capital, Fixed Assets, Project Acct)
	Microsoft Exchange	
	Microsoft Active Directory	
	Oracle Database Support Services	
Wells Fargo (Visa support)		
EDI Translation (EC Power)		
Chase Bank support		

SUG/ET will not be creating new and/or additional interfaces to support communication of interaction of legacy ETP/SUG systems as such systems are no longer supported as part of the CSA.

See separate Benefits Schedule attached

Through the Initial Term, the services will be provided on a time, direct cost or allocation basis pursuant to the CSA. To simplify the allocation basis, SUG/ET will use the allocation costs charged by SUG to MGE prior to the transaction with ET was completed. Direct cost shall include any costs charged by outside vendors, counsel and/or other providers in performing these services. In the event Laclede wishes to extend IT and Accounting services (**SUG/ET will not agree to extend benefits or other services**) described herein beyond the Initial Term, Laclede may elect at its option, upon 10 days notice prior to the end of the Initial Term or any one month extension, to extend the Initial Term on a month by month basis for a period not to exceed four (4) months, provided however, SUG/ET shall be able to add a premium to the time, direct cost or allocation cost of 7% in the first month after the Initial Term, 10% in the second month after the Initial Term, 15% in the third month after the Initial Term and 20% in the fourth month after the Initial Term. Any extension beyond those described above must be agreed to in writing by the parties and shall have a premium of 50% added to the time, direct costs or allocation charge.

Services SUG/ET Need from Laclede

1. Unclaimed property audit – SUG/ET may need to provide data that is only available from the MGE customer information system. Term associated with this item is four years from date of close, at cost.

Additional Services Laclede may need from SUG/ET

1. Audit support – Laclede may need to provide data that is only available from SUG/ET systems in support of future audits (i.e., IRS, DOL, MPSC, FERC, etc.). Term associated with this item is four years from date of close, at cost.