BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Transfer of Assets, Including Much of Southern Union's Gas Supply Department, to EnergyWorx, a Wholly Owned Subsidiary.	))))	**Case No. GO-2003-0354**

Concurring Opinion of Commissioner Jeff Davis

I respectfully concur with the majority's decision in this case. The facts are set out accurately in the opinion of the majority and it is not necessary to repeat them here. The majority reached the right conclusion in that there was no evidence to support further investigation of Southern Union in this matter; however, I strongly disagree with the implication that this commission has the statutory authority to review personnel decisions pursuant to Section 393.190.[1]

I. Personnel are not part of a utility's franchise or property. Thus, the sale, transfer or dismissal of employees does not require the approval of the Missouri Public Service Commission pursuant to Section 393.190.

Section 393.190 sets out the standard of review regarding the Missouri Public Service Commission's authority to approve a utility's transfer of service or property. Section 393.190.1 states in pertinent part:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first

[1] All references are to RSMo 2000 unless otherwise noted.

> secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. (Emphasis added)

Whether or not the transfer of an employee or a group of employees is subject to review by this commission depends on whether the employee or group of employees is part of the corporation's "franchise, works or system." Once this finding is made, it would then be necessary to determine whether those employees were necessary or useful in the performance of the utility's duties to the public. It is not necessary to reach this issue because employees are not part of a utility's franchise, works or system.

There are no Missouri cases interpreting the exact meaning and scope of the phrase "franchise, works or system" as the phrase appears in Section 393.190. (RSMo 2000). Since there appears to be some ambiguity and none of these words are defined by statute, we look to the rules of statutory construction for guidance.

This commission has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. State ex rel. Nixon v. Karpierz, 105 S.W.3d 487 , 489-490 (Mo. banc 2003). The plain and ordinary meaning of statutory language is generally derived from the dictionary where no definition is provided. See Curry v. Ozarks Electric Cooperative 39 S.W.3d 494, 496-497 (Mo. banc 2001).

A. Employees are not part of a "franchise" contemplated in Section 393.190.

Webster's Third New International Dictionary defines "franchise" as "a right or privilege conferred by grant from a sovereign or a government and vested in an

individual or group; *specifically*: a right to do business conferred by government." See, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 902 (1993). "Franchise" is also defined as "a contract for public works or public services granted by a government to an individual or company." *Id.*

The case law cited by Southern Union in this case confirms this finding. In State ex rel. Union Electric Co. v. Public Service Com., 770 S.W.2d 283, 285 (Mo. App.W.D. 1989), the Western District Court of Appeals declared "utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." Thus, the only possible conclusion that can be reached in this case is that a franchise is a right to operate granted by some governmental entity and employees cannot be bootstrapped into being "part of the franchise."

B. Employees are not part of the "works" as defined in Section 393. 190.

The term "works" is not defined by statute or commission rule. The most relevant definitions found in Webster's Dictionary for "works" are as follows:

> **4b** *plural* : structures in engineering (as docks, bridges, or embankments) or mining (as shafts or tunnels).
> **5** *plural but singular or plural in construction* : a place where industrial labor is carried on : **PLANT, FACTORY.**
> **6** *plural* : the working or moving parts of a mechanism <*works* of a clock>.
> everything possessed, available, or belonging <the whole *works,* rod, reel, tackle box, went overboard.

See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2634 (1993).

Further guidance in defining this term has been given to us by the Missouri Supreme Court. In State ex rel. McKittrick v. Missouri Public Service Corp., 351 Mo.

961, 977 (Mo. banc 1943), the Missouri Supreme Court determined "the word 'works' is used as applying to an electric light plant, a gas plant or both."

Statutes passed by the Missouri General Assembly also support this interpretation. The term "gas plant" is defined in Section 386.020(19) as being "all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas, natural or manufactured, for light, heat or power." Moreover, the Missouri General Assembly includes employees in its definition of "gas corporation." See Section 386.020(18). If the Missouri General Assembly had wanted employees to be part of a gas company's "works," they would have inserted such a reference into this section of statute.

C. Employees are not part of a system as defined in Section 393.190.

"System" is defined by Webster's Dictionary as being "a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose <a nationwide dial telephone *system*> <an express highway *system*> <a *system* of public parks> <a hot air heating *system*>." See, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2322 (1993).

Although the Missouri General Assembly has not defined the term "system," they have given us some guidance in this matter by defining the terms "sewer system" and "water system" in Chapter 386 relating to the Missouri Public Service Commission. Sections 386.020(49) and 386.020(59) state respectively:

> "Sewer system" includes all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for

municipal, domestic or other beneficial or necessary purpose.

> "Water system" includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use.

It is impossible to read employees into the dictionary definition of "system." Moreover, the pertinent sections of statute defining "sewer system" and "water system" demonstrate that employees are not part of their "system." Accordingly, we have no authority to determine that employees should be part of a gas pipeline system.

D. Employees are not part of a utility's "franchise, works or system."

The employees of Southern Union's gas purchasing division may have been useful in performing the duties of the utility in this case; however, the definitions of the words making up the phrase "franchise, works or system" reveal that employees were not contemplated when this statute was created and subsequently amended. See generally RSMo 1939 § 5651, A.L. 1967 p. 578, A.L. 1984 H.B. 1477 Section(s) 393.190.1, .3 and .4. "Franchise" refers to the company's right to operate and MGE has given up no rights. Likewise, "works or system" refers to the physical infrastructure owned by the company, not employees. Thus, employees are not part of the "franchise, works or system," a condition necessary to invoking the commission's review under Section 393.190.

This interpretation is further supported by the fact that this statute has been in existence for at least sixty years. **No Missouri Public Service Commission or superior court has ever found the transfer of employees like we have in this case to be a transaction invoking the commission's authority under Section 393.190.** If there were such a case, the authors of the majority opinion and the dissenting opinion would have cited it instead of arguing in favor of public policy.

II. Discussion of Ancillary Issues and Conclusion:

The ancillary issues raised by the dissent in this case will not be discussed in this opinion because they are largely irrelevant in that we do not have the statutory authority to review employment decisions.

In addition to ignoring the plain meaning of the statutes and the case law in this area, those arguing that certain employees constitute part of a company's "franchise, works or system" because of their leadership skills and their high level of compensation would do well to remember the history of the Missouri Public Service Commission and other public utility commissions.

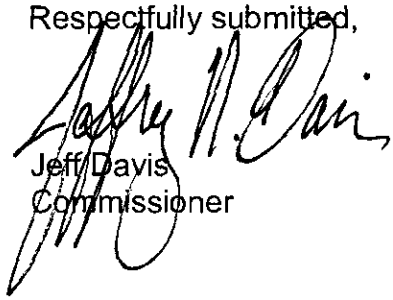
At one time, this commission regulated railroads and most of America's first *billionaires* were the so-called "Robber Barons" of the early 1900's, who made their fortunes from railroads. See J. Bradford DeLong, *Robber Barons*, University of California at Berkeley, and NBER; second draft January 1, 1998. See website: www.econ161.berkeley.edu/Econ_Articles/carnegie/delong_moscow_paper2.html. Men like E.H. Harriman and James J. Hill were recognized for their ability to manage railroads in the same way people idolize Bill Gates and Jack Welch today. *Id.* Great management and a superior product did not turn the early robber barons and Bill

Gates into *billionaires*; what turned these individuals into *billionaires* and icons of American culture was Wall Street's willingness to buy their companies. *Id.* The Missouri General Assembly was not ignorant of these facts in 1939, when the present statute was passed, and it can be inferred that future legislators were also aware of these facts. Therefore, one can only conclude the Missouri General Assembly made a conscious decision not to include employees in Section 393.190 and the dissent's argument is without merit.

The majority and the dissent, no matter how well-intentioned, overstep the bounds of statutory authority by implying that the Missouri Public Service Commission has jurisdiction to review personnel matters of this nature.

The world has changed since Section 393.190 was adopted and amended. The rise of public utilities with arms, both regulated and unregulated, leaves policymakers to resolve cases involving several new questions of first impression. It may be good public policy for the Missouri General Assembly to include a utility's key employees and other intangibles in this statute, but such a decision belongs to the elected representatives of the people and not to the Missouri Public Service Commission.

Respectfully submitted,



Jeff Davis
Commissioner

Dated at Jefferson City, Missouri,
on this 13th day of August, 2004.