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April 22, 2003

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

**FILED**<sup>4</sup>  
APR 22 2003  
Missouri Public  
Service Commission

**Re: Southern Union Company d/b/a Missouri Gas Energy  
Case No. GO-2003-0354**

Dear Mr. Roberts:

On behalf of Southern Union Company, I deliver herewith an original and eight (8) copies of a **Response of Southern Union Company in Opposition to Staff's Motion to Open a Case to Investigate Southern Union's Transfer of its Gas Supply Department to a Wholly Owned Subsidiary** for filing with the Commission in the referenced matter. I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel. Service copies have been mailed or hand-delivered this date.

I have also enclosed an extra copy of the document which I request that you stamp "Filed" and return to the person delivering it to you.

Thank you for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 

Paul A. Boudreau

PAB/ccp

Enclosures

cc: All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>4</sup>  
APR 22 2003

Missouri Public  
Service Commission

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

**RESPONSE OF SOUTHERN UNION COMPANY IN OPPOSITION TO STAFF'S  
MOTION TO OPEN A CASE TO INVESTIGATE SOUTHERN UNION'S TRANSFER  
OF ITS GAS SUPPLY DEPARTMENT TO A WHOLLY OWNED SUBSIDIARY**

COMES NOW, Southern Union Company ("Southern Union") d/b/a Missouri Gas Energy ("MGE"), by and through counsel, and submits the following response in opposition to Staff's Motion to Investigate what Staff characterizes as Southern Union's "transfer of a portion of its gas supply function which served Missouri customers to EnergyWorx, Inc., a wholly owned subsidiary" (hereinafter the "Motion"). In that regard, for its response, Southern Union states as follows:

**Synopsis of Southern Union's Response**

1. Staff's Motion should be denied because: (1) it requests authority to investigate an event that has not taken place, (2) it would be unlawful and inappropriate for the Commission to authorize an investigation into the employment or personnel assignment practices of Southern Union and (3) if any investigation is to occur, then an investigation of the movement of personnel from regulated utilities to unregulated affiliates should be taken up in a generic investigation because the issues are of industry-wide relevance and applicability. Nevertheless, if the Commission is intent on engaging in a Southern Union-specific investigation as to matters which are within the discretion of management and entirely beyond the authority of the Commission, then the Commission

should undertake that investigation exclusively in this case and the companion complaint (Case No. GC-2003-0348) should be dismissed.

**The Motion Apparently is Premised on Incorrect Facts**

2. The purpose to be served by opening an investigation of the type requested by Staff is unclear. The Motion states that Southern Union has transferred the gas supply department that served its MGE operating division to a company named EnergyWorx, Inc. ("EnergyWorx"). Motion, ¶3.<sup>1</sup> This is not so. EnergyWorx is a wholly owned subsidiary of Southern Union with a present contractual obligation to manage the AIG's Southern Star Central Corp. ("Southern Star") interstate gas transportation business, Central Pipeline. Southern Star acquired the Central Pipeline from the Williams Companies in November of 2002. No employees of EnergyWorx are shared employees with MGE and, additionally, the employees of EnergyWorx function entirely independently of MGE. No employees of EnergyWorx are allowed to obtain from or provide to MGE any information related to the transportation of natural gas provided to all shippers served by the Central Pipeline.<sup>2</sup> Simply put, Southern Union has not transferred any portion of MGE's gas supply "function" to EnergyWorx, so the event or circumstance Staff proposes to investigate has not taken place.<sup>3</sup> In fact, during the transitional period following the creation of EnergyWorx and the

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<sup>1</sup> Staff also refers to the creation of EnergyWorx as a "reorganization" of Southern Union. Motion, ¶ 3. This, too, is emphatically not so. As will be explained, *infra.*, EnergyWorx was created to manage an interstate natural gas pipeline owned by an unaffiliated company.

<sup>2</sup> The Commission was advised of these arrangements by virtue of letter dated November 26, 2002 to Commission Chairman Kelvin Simmons from Southern Union's President and Chief Operating Officer, Thomas F. Karam. A copy of that letter is attached hereto as **Appendix 1**.

<sup>3</sup> Southern Union's former Vice-President of Gas Supply, Michael Langston, took a position with EnergyWorx in early 2002, however, the gas supply department for regulated operations was not transferred to EnergyWorx.

sale of Southern Union's Texas division, MGE has been in the process of taking over direct responsibility for procurement of natural gas for its own operations, a process which is now virtually complete. Contrary to the representations set forth in the Motion, the reason for the creation of a stand-alone gas supply department at MGE's offices in Kansas City is the sale of Southern Union's Texas division.<sup>4</sup>

**The Motion is Redundant of Another Pending Proceeding**

3. Another concern of Southern Union is that there is virtually total subject matter overlap between the investigation the Staff seeks herein and the Complaint Staff filed against Southern Union that has been docketed by the Commission as Case No. GC-2003-0348<sup>5</sup> (hereinafter the "Complaint"). The Complaint seeks authority to file a lawsuit for monetary penalties. There are no fewer than three (3) striking similarities or areas of overlap between the two cases.

4. First, Staff makes reference to §393.190 RSMo 2000 in each case. That statutory section addresses, among other things, the sale, transfer, assignment or other disposition of a public utility's franchise, works or system necessary or useful in the performance of its duties to the public. In the Complaint, Staff has asserted that a Transition Services Agreement by and between Southern Union and ONEOK, Inc. ("ONEOK") for the provision of gas procurement services to MGE during a brief transitional

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<sup>4</sup> Mr. Karam's November 26, 2002 letter to Commissioner Simmons makes specific reference to the fact that MGE's gas supply functions will be taken over by MGE and that Robert J. Hack, Vice-President – Pricing and Regulatory Affairs and Assistant Secretary, will be heading that department.

<sup>5</sup> Staff of the Missouri Public Service Commission v. Southern Union Company.

period of time evidences a violation of this provision of law.<sup>6</sup> Similarly, Staff's Motion suggests that a transfer of a portion of MGE's gas supply function to EnergyWorx (an incorrect premise as noted above) violates the same provision of law. Thus, both cases concern the very same provision of the law; §393.190.1 RSMo 2000.

5. Second, as it does in the Complaint, Staff makes reference in the Motion to the transfer of a "major function" from a regulated utility to another company. Thus, both cases concern the very same general topic, that is, whether a public utility may lawfully move or reassign personnel and make alternative arrangements for the performance of the responsibilities formerly provided by such personnel.

6. Third, the "major function" identified in the Motion is MGE's gas procurement activities. The Complaint specifically targets the alleged transfer of the MGE "gas supply function" in the context of the sale by Southern Union of Southern Union Gas, its Texas operating division, to ONEOK.<sup>7</sup> Similarly, the Motion makes reference to the claimed transfer of Southern Union's "gas supply department." Motion at ¶13. Thus, both cases concern MGE's gas supply function.

7. To further confuse matters, the Motion asserts that the Commission's jurisdiction under §393.190.1 RSMo 2000 is unclear. Motion at ¶15. Staff claims that this

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<sup>6</sup> Southern Union denies that contracting with ONEOK to provide gas supply services to MGE during a short transition period evidences an unlawful transfer of the whole or any part of its franchise, works or system as that term is used in §393.190.1 RSMo 2000. See, United States Gypsum, Inc., et. al., v. Indiana Gas Company, et. al., 735 N.E.2d 790, 802 (Ind. S. Ct. 2000). [Held: Transfer of gas supply function by regulated companies to unregulated affiliate not prohibited by statute requiring Indiana Public Service Commission approval before selling, assigning, leasing or encumbering the "franchise, works or system".]

<sup>7</sup> This creates the paradox of MGE's gas supply function being transferred to ONEOK (as alleged in the Complaint) and also to EnergyWorx (as alleged in the Motion).

investigation should examine “whether the Commission has jurisdiction over the proposed transaction [i.e., the transfer of the gas supply function] pursuant to §§386.250 and 393.190 RSMo 2000.” (Emphasis added.) Conversely, in the Complaint, Staff specifically claims that the alleged transfer of MGE’s gas supply function violates the provisions of §393.190.1 RSMo 2000. If the Commission’s jurisdiction is problematic, as Staff admits in the Motion, one is left to wonder why the Complaint has been filed. On this basis alone the Complaint should be dismissed.

**The Commission has Previously Decided not to Interfere with Transfers of Employees from Utilities to Unregulated Affiliates**

8. Additionally, an investigation of the matters set forth in the Motion will do nothing more than re-plow old regulatory ground. Staff states that it is motivated to investigate transfers of utility functions from a regulated utility to an unregulated affiliate.<sup>8</sup> However, Southern Union believes that Staff’s use of the term “functions” is a euphemism for movements of employees from a regulated utility to a non-utility affiliate.

9. The movement of employees within a company is not something the Commission (or its Staff) has any authority to control. As a matter of fact, the Commission quite recently rejected a Staff proposal to require that utilities be compensated by their affiliates when experienced employees are transferred within a company. In rejecting this proposal the Commission stated that “employee transfers do not have to be restricted, penalized or compensated” to accomplish the legitimate regulatory objectives of preventing

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<sup>8</sup> The Commission needs to keep in mind that no utility “function” has been transferred by MGE to EnergyWorx. Certain former employees of Southern Union are now employed by EnergyWorx.

cost shifting or cross subsidies. Mo. Reg., Vol. 25, No. 1, p. 61, January 3, 2000.<sup>9</sup> In enacting its affiliate transaction rules for gas utilities, the Commission made it clear that it was not going to interfere with a utility's decisions with regard to personnel assignments and movements throughout a company.

10. Were the Commission to open an investigation in response to Staff's Motion, implicitly it would be authorizing another effort by Staff (via a different procedural route) to impede the free movement of utility employees who want to better their situation and career opportunities or whose reassignment would better serve their employer's objectives and needs. Wisely, the Commission has already declined to adopt the notion that it should substitute its judgement for the management decisions of the companies it regulates, particularly with respect to employment practices. The Commission should decline the Staff's request to revisit this topic.

**Southern Union has the Right to Manage the Manner in which it Conducts its Business**

11. Furthermore, Staff's effort to induce the Commission to investigate utility employment decisions ignores Missouri case law specifically stating that the Commission's authority to regulate a public utility's operations and practices does not include the right to dictate the manner in which the company conducts its business. State ex rel. City of St. Joseph v. Public Service Commission, 30 S.W. 2d 8 (Mo banc. 1930). In that case, the Missouri Supreme Court found that "it is of no concern of either the customers of a [utility] or the Commission if the [utility] obtains necessary material, labor, supplies, etc. from the [utility's] holding company, so long as the quality and price of the service rendered by the

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<sup>9</sup> Order of Rulemaking, 4 CSR 240-40.015. Case No. GX-99-444.

[utility] are what the law says it should be. Id. at 14.<sup>10</sup> The law on this specific topic is clear. Southern Union has the right in its sole discretion to obtain material, labor, supplies and services from any source.

### **Alternatives to Staff's Motion**

12. As a general proposition, Southern Union does not object to an investigation of the broad issues contained in Staff's Motion as they relate to the topics of reassigning personnel within a company and the performance of certain common utility "functions" by affiliates or other third party providers. These are long-standing customs that have served the utility industry well and Southern Union believes an investigation will validate the appropriateness of these practices. However, Southern Union would find such an investigation appropriate only in the event (1) the Complaint is dismissed by the Commission<sup>11</sup> and (2) the investigation is industry-wide. To the extent the Commission believes this is a topic that should be re-examined, a generic investigation would permit Southern Union, Staff and all other interested parties to explore the question of what, if any, additional safeguards need to be put in place for affiliate-provided services.<sup>12</sup> After

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<sup>10</sup> See also, State ex rel. Harline v. Public Service Commission, 343 S.W. 2d 177 (Mo App. 1960). [Held: The Commission's power to regulate does not "clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its affairs and conduct its business as it may chose, so long as it performs its legal duty, complies with lawful regulation and does no harm to the public welfare."]

<sup>11</sup> It would not be reasonable, and in fact would be a denial of due process, to expect Southern Union simultaneously to defend against a penalty action and to cooperate in an investigation about substantially the same issues.

<sup>12</sup> That any such investigation should be industry-wide (as opposed to company-specific) is validated by Staff's recent Motion in Case No. GO-2002-1099 to investigate Laclede Gas Company's transfer of its gas supply "function" to an affiliate, Laclede Energy Services. These are issues that should be resolved on other than an *ad hoc* basis.



the conclusion of the investigation, Staff and all other parties could file a joint report or separate reports with the Commission addressing the concerns set forth in the Motion. At that point, the Commission would be in the position to determine whether further proceedings would be necessary or appropriate.

13. Conversely, Southern Union does not dispute the authority of the Commission to investigate the methods employed by MGE to procure supplies of natural gas to meet the needs of its customers<sup>13</sup> and to keep informed of MGE's business methods and practices for the purpose of ensuring safe and adequate service.<sup>14</sup> Consequently, Southern Union would not object to an investigation to examine MGE's progress in developing an in-house gas supply department as was announced to the Commission on November 26, 2002. It is worth pointing out, however, that this is not the relief that Staff has requested in the Motion.

WHEREFORE, Southern Union opposes Staff's Motion for the reasons aforesaid. Southern Union would not, however, oppose an investigation to examine MGE's progress in developing an in-house gas supply department as previously announced.

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<sup>13</sup> §393.140(2) RSMo 2000.

<sup>14</sup> §393.140(5) RSMo 2000.

Respectfully submitted,



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Paul A. Boudreau MO #33155  
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Jefferson City, MO 65102  
(573) 635-7166

Attorneys for Southern Union Company

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 22<sup>nd</sup> day of April 2003 to the following:

Ms. Lera L. Shemwell  
Office of the General Counsel  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102-0360

Mr. Douglas Micheel  
Deputy Public Counsel  
Office of the Public Counsel  
200 Madison Street, Suite 650  
P.O. Box 7800  
Jefferson City, MO 65102



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Thomas E. Karam  
President and Chief Operating Officer

November 26, 2002

The Honorable Kelvin Simmons  
Chairman, Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, Missouri 65102

Dear Chairman Simmons:

As you may know, effective November 21, 2002, Southern Union Company's wholly-owned subsidiary, Energy Worx, Inc., entered into an agreement with AIG's Southern Star Central Corp. ("Southern Star") to manage its Central Pipeline. Southern Star acquired the Central Pipeline from the Williams Companies, Inc. on November 15, 2002. As you are aware, the Federal Energy Regulatory Commission ("FERC") has promulgated certain rules on the relationship between interstate gas pipelines and their marketing affiliates. Also, FERC is considering a rulemaking to extend these standards of conduct to other energy affiliates of interstate pipelines, including local distribution companies like our Missouri Gas Energy division ("MGE").

Southern Union Company intends to be proactive in complying with these standards. Accordingly, pending FERC action, and to ensure structural and operational separation, there will be no shared employees between Energy Worx, Inc. and MGE. Moreover, the employees of Energy Worx, Inc. will function entirely independently of MGE. Further, no employee of Energy Worx, Inc. will be allowed to obtain from or provide to MGE any information related to the transportation of natural gas that is not contemporaneously provided to all shippers. In this way, no confidential, non-public transportation information learned by one company will be shared with the other.

Finally, MGE will be announcing that Robert J. Hack, Vice President - Pricing and Regulatory Affairs and Assistant Secretary, will now be assuming the additional duty of responsibility for MGE's gas supply function. By placing full responsibility for MGE's gas supply with MGE officers in Kansas City, we reinforce our Company's commitment to upholding FERC standards of conduct.

The Honorable Kelvin Simmons  
Chairman, Missouri Public Service Commission  
November 26, 2002  
Page 2

If you have any questions on these matters, please contact Dennis Morgan at (570) 820-2420 or James Moriarty at (202) 939-7919.

Sincerely,

A handwritten signature in dark ink, appearing to read 'T. Karam', with a long horizontal flourish extending to the right.

Thomas F. Karam

TFK/bmn

cc: Commissioner Sheila Lumpe  
Commissioner Connie Murray  
Commissioner Steven Gaw  
Commissioner Brian Forbis  
Mr. Robert Quinn, Public Service Commission Executive Director  
Dan Joyce, Esquire, Public Service Commission General Counsel  
Douglas Michael, Esquire, Office of the Public Counsel