

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 2nd day of  
December, 2009.

In the Matter of Missouri Gas Energy and       )  
Its Tariff Filing to Implement a General Rate       )  
Increase for Natural Gas Service                        )

**File No. GR-2009-0355**

**ORDER REGARDING CUSTOMER COMMENTS**

Issue Date: December 2, 2009

Effective Date: December 12, 2009

**Background**

On October 26<sup>1</sup>, during the evidentiary hearing, the Office of the Public Counsel (hereafter “OPC”) requested the Commission to take official notice of customer comment cards (hereafter “Cards”) sent to the Commission regarding Missouri Gas Energy’s (hereafter “MGE”) proposed rate increase.<sup>2</sup> MGE sent the Cards at the Commission’s behest.<sup>3</sup>

The Cards included a portion that a customer could write comments on and return to the Commission. MGE objected to OPC’s request during the evidentiary hearing,<sup>4</sup> and filed written objections on November 3.<sup>5</sup>

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<sup>1</sup> All calendar references are to 2009 unless otherwise noted.

<sup>2</sup> Tr. Vol. 8, p. 95.

<sup>3</sup> The Commission notes that OPC and MGE disagreed on the form of the notice the customers should receive. The Commission resolved that dispute by incorporating both the information OPC wanted and the information MGE wanted into the customer notice. See *Order Directing Customer Notice And Setting Local Public Hearings* (July 8, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> This order pertains only to MGE’s objections concerning customer comment cards. MGE’s motion to deny admission of certain pages of Staff Exhibit 103 remains pending.

MGE states that OPC's request does not comply with § 536.070 RSMo, in that the Cards are not matters of which courts may take judicial notice at trial, nor are they technical or scientific facts that would permit the Commission to otherwise take notice of them. Further, MGE argues that OPC has failed to lay a proper foundation for the Cards, and that the Cards are hearsay.

On November 5, the Commission ordered its Staff and OPC to respond to MGE's objections no later than November 10. Staff replied on November 10.

Staff stated that the Commission has a long history of keeping a "letter file" with rate case filings. In this case, the file is part of the rate case in the Commission's Electronic Filing Information System (hereafter "EFIS"). Staff believes that the Commission may take official notice of the **number** of Cards, but not rely on the comments themselves, for much the same reasons that MGE states the Cards are inadmissible. Staff points out that a Commission employee testified generally about the Cards, and that her testimony may be relied upon.

OPC filed a response on November 11, one day out of time. OPC argues that the Commission may take official notice of its own records, which includes the Cards. Further, OPC states that the Cards are not being offered for the truth of any asserted facts; therefore, they are not hearsay. OPC also claims that the comments are a survey of customers made under the supervision of a witness subject to cross-examination, with said survey being admissible under § 536.070(11).

MGE responded on November 13. MGE denigrates OPC's assertion that the Cards are not being offered for the truth of the matter asserted, asking rhetorically what other value could possibly be derived from offering the Cards. Moreover, MGE states that those

Cards do not become an official record of the Commission merely because the Commission is a passive repository of customer comments. In addition, MGE states that OPC failed to meet the foundational requirements of § 536.070(11) for admitting results of a survey, in that Staff's witness testified merely that Staff received the Cards, and did not perform any analysis of them. Indeed, MGE argues that the entire process of issuing the Cards was a novel approach that MGE objected to strenuously before the Commission ultimately ordered MGE to send them.

OPC filed another response on November 20. It again stated that the Cards are admissible as a "survey" pursuant to § 536.070(11) RSMo, and as position statements of MGE customers pursuant to Commission Rule 4 CSR 240-2.040(5), as well as official records of the Commission under § 536.070(6) RSMo.

## **Analysis**

### **Official Notice**

The Commission may take official notice of those things of which courts may take judicial notice.<sup>6</sup> Judicial notice is a rule of evidence that allows a court to dispense with proof of certain facts. Such facts include matters of common knowledge and facts capable of accurate and ready determination.

Courts take judicial notice of things such as geographical facts, maps, populations, mortality tables, state law, laws of other states, court rules and court records.<sup>7</sup> The

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<sup>6</sup> Section 536.070.6

<sup>7</sup> W. Schroeder, 33 *Missouri Practice-Courtroom Handbook on Missouri Evidence*, Sec. 201.2 at 46-59 (2003).

Commission may also take official notice of technical or scientific facts within its competence.<sup>8</sup>

The statements in the Cards are not the type of facts courts judicially notice. The statements are not matters of common knowledge or facts capable of ready and accurate determination. The Commission will not take official notice of Cards.

### Non-hearsay

However, the comment Cards may still be admissible if they are relevant. The Cards are relevant in much the same way testimony from ratepayers at a local public hearing is relevant. The public, who is represented by OPC before the Commission, is a party, and has a right to comment on a proposed rate increase, just like any other party. The Cards are logically probative of a party's position, and are therefore relevant and admissible unless excluded by a rule of policy or law.<sup>9</sup>

MGE objects that, even if relevant, the Cards are hearsay. But the Cards are admissible as non-hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.<sup>10</sup> OPC states that the Cards are not being offered for the truth of the matters asserted within them.<sup>11</sup> If the relevance of the Cards is that customers made certain comments, rather than the truthfulness of the comments themselves, then the Cards are

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<sup>8</sup> *Id.*

<sup>9</sup> See *Albertson v. Wabash R. Co.*, 253 S.W.2d 184, 189 (Mo. 1952).

<sup>10</sup> See, e.g., *Lauck v. Price*, 289 S.W.3d 694, 698 (Mo. App. 2009).

<sup>11</sup> See *Public Counsel's Reply to MGE's Objections Regarding Customer Comments*, p. 2 (November 11, 2009).

not hearsay.<sup>12</sup> Also, the Commission may admit them to consider such matters as the state of mind of the customers who submitted the Cards.<sup>13</sup>

Moreover, even if the Cards were hearsay, which they are not, the Commission is not bound by the technical rules of evidence.<sup>14</sup> Courts may exclude relevant evidence where its probative value is outweighed by its tendency to inflame, mislead, or confuse a jury.<sup>15</sup> Thus, hearsay or not, the Commission can consider the Cards and give them, as well as all other evidence, the proper weight.

Furthermore, § 386.410.2 states that no formality before the Commission in any proceeding or in the manner of taking testimony shall invalidate any Commission order. In admitting the customer cards, as in admitting any other evidence, the Commission is mindful of its goal to set rates that are just and reasonable for the ratepayers and the utility, based upon competent and substantial evidence.<sup>16</sup>

#### **THE COMMISSION ORDERS THAT:**

1. Missouri Gas Energy's Objections to a Request that the Commission Take Official Notice of Certain Matters are denied.

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<sup>12</sup> See, e.g., *Doe v. McFarlane*, 207 S.W.3d 52, 73 (Mo. App. E.D. 2006); *Coon v. American Compressed Steel, Inc.*, 207 S.W.3d 629, 635 (Mo. App. W.D. 2006).

<sup>13</sup> See, e.g., *Kelly v. St. Luke's Hosp. of Kansas City*, 826 S.W.2d 391, 396-97 (Mo. App. 1992); *Estate of Oden v. Oden*, 905 S.W.2d 914, 918 (Mo. App. E.D. 1995); *State v. Chambers*, 891 S.W.2d 91, 104 (Mo. banc 1994).

<sup>14</sup> Section 386.410 RSMo. 2000.

<sup>15</sup> See, e.g., *Stapleton v. Grieve*, 602 S.W.2d 810, 814 (Mo. App. 1980).

<sup>16</sup> Section 393.130.1 RSMo.

2. The Office of the Public Counsel's request that the Commission take official notice of the content of the Cards is denied, but the Cards are admitted into evidence.<sup>17</sup>

3. This order shall become effective no later than December 12, 2009.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Clayton, Chm., Gunn and Kenney, CC., concur.  
Davis and Jarrett, CC., dissent, with separate  
dissenting opinions to follow.

Pridgin, Senior Regulatory Law Judge

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<sup>17</sup> The Commission assigns the Cards Exhibit No. 106.