BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service	)))	Case No. GR-2004-0209

MOTION OF MISSOURI GAS ENERGY, A DIVISION OF OF SOUTHERN UNION COMPANY, FOR RECONSIDERATION OF THE JUNE 7, 2004 ORDER DENYING ITS MOTION TO EXCLUDE CERTAIN TESTIMONY OF DAVID MURRAY

KASOWITZ, BENSON, TORRES
& FRIEDMAN, LLP
Eric D. Herschmann
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700

Robert J. Hack MO #36496
Vice President – Pricing and Regulatory
Affairs and Assistant Secretary
Missouri Gas Energy
3420 Broadway
Kansas City, Missouri 64111
(816)360-5755
Fax: (816)360-5536
rhack@mgemail.com

James C. Swearengen MBE#21510
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
(573) 635-7166
(573) 634-7431 facsimile
Lrackers@brydonlaw.com

Missouri Gas Energy, a division of Southern Union Company ("MGE"), hereby moves for reconsideration of the June 7, 2004 Order ("Order") of the Missouri Public Service Commission ("Commission") denying MGE's motion to exclude certain testimony of David Murray and in support of its motion states the following:[1]

I. The Order Incorrectly Holds That MGE Has Not Challenged The Reliability Of Murray's Data

1. In addressing the requirements of § 490.065.3 RSMo, the Order states that "MGE does not . . . challenge the reliability of the data that [Murray] uses in his analysis." (Order at 4, a copy of which is attached hereto as Exhibit A.) MGE respectfully submits that nothing could be further from the truth.

2. As MGE's opening memorandum of law demonstrates, MGE's motion was expressly based on Murray's failure to use reliable data:

> [E]ven if Murray were assumed to be an expert in utility finance, his opinions are based on unreliable data and unreasonable applications of utility finance techniques. In *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003), the Missouri Supreme Court recognized that expert testimony in administrative proceedings like this one is subject to § 490.065 RSMo. and that such testimony should be excluded where, like here, that testimony is based on unreliable facts, data or methodologies.

(MGE Mem. at 2.)

[1] MGE makes this motion for reconsideration pursuant to Commission rule, 4 CSR 240-2.160. MGE has previously filed an opening memorandum of law, dated May 7, 2004 ("MGE Mem.") and a reply memorandum, dated May 28, 2004. On June 7, 2004, MGE filed a memorandum in response to certain queries that were raised by the Commission at the June 3, 2004 oral argument on MGE's motion to exclude. MGE filed its June 7 memorandum solely because it believed that the Chairman of the Commission had agreed to MGE counsel's offer to make a supplemental filing. (*See* Transcript of June 3, 2004 hearing, at 65.)

3. MGE then set forth in detail numerous unreliable datasets upon which Murray relied, including stale, aberrational, negative and "spot" historic growth data (*id.* at 12-17) and a proxy group of companies that was not comparable, without adjustment, to MGE (*id.* at 17-19).[2]

4. Unreliability is an admissibility issue and not – as the Order suggests (Order at 5) – a question of credibility. The Missouri Supreme Court made this point clear in the following passage from *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 157 (Mo. 2003), a decision that never once mentions the concept of credibility:

> Section 490.065.3 . . . requires the court to consider whether the facts and data used by the expert are of a type reasonably relied on by experts in that field or if the methodology is otherwise reasonably reliable. If not, then the testimony does not meet the statutory standard and is *inadmissible*.

(Emphasis added.) MGE has demonstrated the unreliability of Murray's data and methodologies and despite repeated opportunities to do so, neither Murray nor the Staff has submitted anything rebutting MGE's showing.[3]

5. Even if this Commission believes that Murray has sufficient qualifications to testify as an expert, those qualifications are insufficient to establish the reliability, and thus admissibility, of his testimony under § 490.065.3. *See* Order at 4 ("The determination that Murray generally qualifies as an expert under Section 490.065.1 does not, however, resolve the question of whether his direct testimony in this case should be struck. In addition to the general requirements of its first subsection, the controlling statute, at Section 490.065.3 provides that

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[2] Indeed, at page five, the Order recognizes that "MGE's memorandum in support of this motion, as well as the rebuttal testimony that it has filed, cites many instances in which Murray has failed to properly apply cost of capital methodologies." Misapplied methodologies go to admissibility, not credibility. *See, e.g., Heavy Bros. Lightning Protection Co., Inc. v. Lightning Protection Institute,* 287 F.Supp.2d 1038, 1066-1068 (D. Ariz. 2003) (because expert "misapplied" economic model, his report was excluded).

[3] Despite MGE's conviction that Murray's testimony – which serves as approximately 50 percent of the revenue requirement difference between the Staff and MGE – is fatally flawed such that it cannot support any Commission finding, MGE remains hopeful that the Staff will respond in a meaningful way to the alternative resolutions MGE has put forward on all of the revenue requirement matters at issue.

'[t]he facts or data in a particular case upon which an expert bases an opinion or inference ... must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.'")

II. The Order Incorrectly Concludes That Murray's Failure To Understand His Analysis Is A Credibility Issue

6. The Order also states that "[i]n short, MGE's experts are attacking Murray's credibility because they indicate that he does not know how to perform his analysis." (Order at 5.) MGE respectfully submits that this is fundamentally flawed logic. Section 490.065.1 – like Fed.R.Evid. 702 – requires that an expert have "specialized knowledge" in order to testify. If Murray lacks that specialized knowledge (*i.e.*, if "he does not know how to perform his [DCF] analysis") he is not an expert. For example, in *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 98 F. Supp. 2d 729, 734 (W.D. Va. 2000), the court excluded a proffered antitrust expert's testimony because, among other things, he "lack[ed] a clear understanding of basic economic principles." Here, Murray lacks a clear understanding of basic utility finance principles, and his testimony should also be excluded.[4]

7. Further, expertise cannot be presumed from Murray's employment at the Commission. (Order at 3.) In *Johnson v. State*, 58 S.W.3d 496 (Mo. 2001), the Missouri

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[4] *See also United States v. Fredette*, 315 F.3d 1235, 1239-1240 (10th Cir. 2003) (expert properly excluded where purported expertise with rebate programs – based on "personal knowledge or experience" and not scientific evidence – was insufficient basis for opining about defendant's specific rebate program and expert "never explained why his experience was sufficient basis for his opinion"); *United States v. Chang*, 207 F.3d 1169, 1173 (9th Cir. 2000) (expert properly excluded because experience in international finance did not qualify him to testify as to whether security was counterfeit and "did not testify as to any training or experience, practical or otherwise, detecting counterfeit securities"); *Jenkins v. Arkansas Power & Light Co.*, 140 F.3d 1161, 1165 (8th Cir. 1998) (expert properly excluded because training and experience with U.S. Army Corp. of Engineers in construction of dams and reservoirs did not provide expertise regarding placement of buoys in reservoirs); *Pan Am. World Airways, Inc. v. Port Authority of New York and New Jersey*, 995 F.2d 5, 9-10 (2d Cir. 1993) (air traffic expert properly excluded where he had failed to complete training, had little experience with large airports, was unfamiliar with procedures at airport in question and had only worked with National Transportation Safety Board for eighteen months).

Supreme Court found that a Department of Corrections psychologist, working toward his license in professional counseling, was not qualified to "diagnose" a prison inmate. In so finding, the court stated:

> While his experience [for the Department of Corrections] treating sex offenders conceivably would qualify him to testify as an expert on many issues, diagnoses of mental disorders is not even arguably within his area of expertise and his testimony on that point should have been excluded.

Id. at 499. *See also Irwin v. St Louis-San Francisco Railway Co.*, 30 S.W.2d 56, 59 (Mo. 1930) (thirty-five years employment with railroad and understanding of the workings of train brakes insufficient qualifications for testimony regarding time necessary to apply such brakes: "[t]he witness might know the manner of working air brakes and how they are applied and know nothing of the time necessary to effectively apply them").

8. Lastly, Murray's testimony in prior rate proceedings (Order at 2) – *i.e.*, proceedings which occurred before the decision in *McDonagh* – cannot, in and of itself, create expertise. *See, e.g., Elcock v. K-Mart Corp.*, 233 F.3d 734, 744 (3d Cir. 2000) (mere fact that expert "was previously admitted as an expert witness qualified to give testimony on vocational rehabilitation is irrelevant to the determination whether he is qualified to give such testimony in this case"); *Thomas J. Kline, Inc. v. Lorillard,* 878 F.2d 791, 799 (4th Cir. 1989) ("[I]t would be absurd to conclude that one can become an expert simply by accumulating experience in testifying"); *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1175 n.3 (1st Cir. 1992) ("The fact that a person spends substantially all of her time consulting with attorneys and testifying in trials is not a disqualification, but it is not an automatic qualification guaranteeing admission of expert testimony") (quotation omitted).

9. An expert's lacking of specialized knowledge – including a basic lack of understanding of the analyses necessary to his proffered expert testimony – is an admissibility, and not a credibility, issue.

Conclusion

For the foregoing reasons, MGE respectfully submits that the Commission should reconsider its Order and upon reconsideration, grant MGE's motion to exclude Murray's opinions and testimony regarding a rate of return for MGE from this proceeding.

Dated: June 14, 2004

Respectfully submitted,

KASOWITZ, BENSON, TORRES
& FRIEDMAN, LLP
Eric D. Herschmann
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700

Robert J. Hack MO #36496
Vice President – Pricing and Regulatory
Affairs and Assistant Secretary
Missouri Gas Energy
3420 Broadway
Kansas City, Missouri 64111
(816)360-5755
Fax: (816)360-5536
rhack@mgemail.com

James C. Swearengen MBE#21510
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
(573) 635-7166
(573) 634-7431 facsimile
Lrackers@brydonlaw.com

ATTORNEYS FOR MISSOURI GAS ENERGY

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, mailed by U.S. mail or electronically transmitted on this 14TH day of June, 2004, to all parties of record.