BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Tariff Revisions filed by Missouri Gas Energy, a Division of Southern Union Company, Designed to Increase Rates for Natural Gas Service.	))))	Case No. GR-2006-0422

MISSOURI GAS ENERGY'S MOTION TO EXCLUDE
THE TESTIMONY AND OPINIONS OF RUSSELL TRIPPENSEE

COMES NOW Missouri Gas Energy, a division of Southern Union Company ("MGE" or the "Company"), by and through counsel, and in support of its Motion to Exclude the Testimony and Opinions of Russell Trippensee, respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

A. Introduction and Background

MGE witness Russell Feingold has prepared and filed testimony on the Company's rate design proposals. Mr. Feingold is the managing director of Navigant Consulting, Inc., a firm which has been serving the electric and natural gas industries since 1983. Mr. Feingold is the co-leader of the Litigation, Regulatory & Markets Group within the firm's Energy Practice.[1] The firm focuses on large, regulated industry segments and provides consulting services to assist clients in identifying practical solutions to the challenges of uncertainty, risk and distress. (Feingold Direct, p. 1)

MGE witness Frank Hanley has prepared and filed testimony regarding the Company's capital structure and a fair rate of return. As an expert witness on behalf of investor-owned

[1] Mr. Feingold holds a Bachelor of Science degree in Electrical Engineering, and a Master of Science degree in Financial Management. (Feingold Direct, App. A) He has 30 years of experience in the utility industry, including 27 years in the field of utility management and economic consulting. (Feingold Direct, p. 2) He has presented expert testimony before FERC and various state regulatory commissions, is the past chairman of the Rate Training Subcommittee of the American Gas Association, has organized and spoke at numerous industry seminars, and is a contributing author for the book "Gas Rate Fundamentals." (Feingold Direct, App. A)

companies, municipalities, and state public utility commissions, Mr. Hanley[2] has offered testimony on the subjects of fair rate of return and utility financial matters in more than 300 cases and dockets before various regulatory agencies and courts. He has authored or co-authorized various articles in his field of study and has appeared as a guest speaker at many venues. (Hanley Direct, App. A, pp. 1-8)

Primarily through the testimony of Mr. Feingold, the Company is proposing two rate design proposals. The primary proposal establishes a Straight Fixed-Variable ("SFV") rate structure for the residential class. The alternate proposal consists of a Weather Normalization Adjustment ("WNA") mechanism that would apply to the residential, small general service and large general service classes. The Staff of the Commission ("Staff") is proposing a rate design similar to the SFV rate structure proposed by the Company.

Through the testimony of Mr. Hanley, the Company recommends use of a common equity cost rate of 11.75 percent and a hypothetical capital structure. Mr. Hanley also recommends that the common equity cost rate of 11.75 percent be reduced to 11.6 percent if the Company's proposed WNA is approved or to 11.5 percent if the Company's proposed SFV rate design proposal is approved.

Public Counsel witness Russell Trippensee prepared and filed testimony in this matter to "address the revenue requirement implications of the proposed changes in rate design" and stated that Public Counsel recommends "that the appropriate return on equity be set at an appropriate point between the cost of debt for MGE (7.70%) and the low end of Staff's rate of return recommendation of 8.65%." (Trippensee Rebuttal, pp. 2, 12) At his deposition taken in this matter, Mr. Trippensee confirmed that he is holding himself out as a cost of capital expert

[2] Mr. Hanley holds a Bachelor of Science degree, is certified by the Society of Utility and Regulatory Financial Analysts, and has been with AUS Consultants-Utility Services since 1971. (Hanley Direct, App. A)

witness in this proceeding and is recommending what he believes is the appropriate return on equity for MGE. (Trippensee Deposition, pp. 9, 12, 41-42)[3] Mr. Trippensee's opinions in this regard, however, are only admissible in this proceeding if he is an expert in the field and his testimony comports with Missouri statutes and common law regarding expert testimony.[4]

MGE objects to the admission of Mr. Trippensee's testimony in this proceeding because: (1) a proper foundation has not been laid to show that Mr. Trippensee is qualified as an expert pursuant to the standard set forth in RSMo. §490.065 and the applicable case law; and (2) a proper foundation has not been laid to show that Mr. Trippensee's testimony is reliable pursuant to RSMo. §490.065 and the applicable case law. These failures go not just to weight or credibility, but to the admissibility of Mr. Trippensee's testimony. In this rate case proceeding, it should be the Commission's goal to establish a fair and reasonable rate of return for MGE. The acceptance of Mr. Trippensee's testimony would be contrary to that goal.

B. Standard for Admission of Expert Testimony

Per *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), the standards for admissibility of expert testimony in civil cases in Missouri are those set out in RSMo. §490.065. Reaffirming its decision in *Lasky v. Union Electric Co.*,[5] the Missouri Supreme Court clearly stated in *McDonagh* that the standard for the admission of expert testimony in civil cases is that set forth in section 490.065.[6] The Court also stated that the

[3] The transcript of Mr. Trippensee's deposition is attached hereto as Appendix A and incorporated herein by reference.

[4] In the event Public Counsel attempts to offer Mr. Trippensee as a lay witness, as opposed to an expert witness, his testimony should still be excluded. Opinions of lay witnesses are admissible only when the fact at issue is "open to the senses." *State v. Eaton*, 504 S.W.2d 12, 21 (1973). Opinions as to the appropriate return on equity and a fair and reasonable rate of return are not "open to the senses." Mr. Trippensee should not be permitted to offer expert-type testimony by calling himself a fact witness and avoiding the expert testimony admissibility standards.

[5] 963 S.W.2d 797 (Mo. banc 1997).

[6] *McDonagh*, 123 S.W.3d at 149.

same standard should be applied in administrative cases such as proceedings before the Commission.[7]

Pursuant to the statute, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion. The purported expert having *some* qualifications, however, is not the end of the inquiry.

The statutory standard in Missouri is similar to the standard adopted in *Daubert v. Merrill Dow Pharmaceuticals* and set out in FRE 702,[8] but RSMo. §490.065 also requires a showing that the facts and data upon which an expert relies are of a type reasonably relied upon by experts in the applicable field.[9] The statute also requires the agency to make an independent assessment as to whether the facts and data relied upon are otherwise reasonably reliable.[10] A qualified expert's opinion should be admitted unless the information relied upon by that expert "is so slight as to render the opinion fundamentally unsupported." *Alcorn v. Union Pacific Railroad*, 50 S.W.2d 226, 246 (Mo. banc 2001). As illustrated below, that is the case here.

C. Discussion and Argument

First, pursuant to RSMo. §490.065, Mr. Trippensee is not qualified by knowledge, skill, experience, training, or education to provide return on equity testimony in this proceeding, and he does not possess scientific, technical, or other specialized knowledge to assist the Commission with understanding the evidence or determining a fact at issue. Additionally, even if the Commission determines that Mr. Trippensee is qualified as an expert, the facts and data

[7] *Id.* at 155.

[8] *Id.*

[9] *Id.* at 156.

[10] *Id.*

upon which Mr. Trippensee relies are not of a type reasonably relied upon by experts in the applicable field and are not otherwise reasonably reliable. The information relied upon by Mr. Trippensee is so slight that his opinions are fundamentally unsupported.

Mr. Trippensee holds a bachelor of science degree in business administration from the University of Missouri-Columbia. He has passed the certified public accounting exam and took a class in preparation for that exam, and he attended a two-week NARUC seminar in 1981. He does not have any additional degrees, has not taught or lectured on cost of capital calculation at any level, has not written any books or articles and has not been published on any subject.

With regard to his rate of return training, Mr. Trippensee points to his previous role as a supervisor of financial analysts. (Trippensee Deposition, p. 8) Supervising financial analysts does not, however, make one an expert in the field. Mr. Trippensee had not previously calculated a return on equity cost rate for an LDC, and he has never, on his own, performed a DCF or similar type of modeling technique analysis. (Id. at 21-22) This is the second time he has offered a return on equity recommendation in a regulatory proceeding. The pending Atmos rate case (Commission Case No. GR-2006-0387) being the first time. (Id. at 12)

Based on his educational and professional background, Mr. Trippensee simply does not satisfy the standards set out in RSMo. §490.065. He is not qualified by knowledge, skill, experience, training, or education to provide return on equity testimony in this proceeding. When asked the methodology utilized to produce his opinion, Mr. Trippensee said his opinion is "based on basic financial concepts of risk" which he learned during college (Trippensee Deposition, pp. 16, 17) Mr. Trippensee does not possess scientific, technical, or other specialized knowledge which will assist the Commission with understanding the evidence or determining a fact at issue.

Mr. Trippensee stated that he reviewed the Staff's filed case and "did not find any issues with it, so that set the upper boundary." (Id. at 16) He did not perform any mathematical calculations or take any steps to calculate what would be a fair return on equity for MGE in this proceeding. (Id.) Mr. Trippensee has not conducted any studies to justify his position regarding risk reduction or the appropriate ROE for MGE. There is simply no mathematical or analytical support behind his recommendations.

When asked what data he relied upon in rendering his opinion, Mr. Trippensee replied, "The data is from Staff's testimony." (Id. at 18) Mr. Trippensee saw no reason to "replicate the Staff's work" or "verify all of their sources." (Id., pp. 16, 20) Mr. Trippensee acknowledges that return on equity is not directly observable and must be estimated and inferred by looking at capital market data and trading activity, but Mr. Trippensee looked only to the testimony of Staff and the Company for this information. When asked if he looked outside the Staff's or the Company's testimony, Mr. Trippensee replied, "No, I did not. This is rebuttal testimony." (Id., p. 20)

When asked if he performed any studies or took any steps to determine whether the proxy companies utilized by either Staff or the Company have in place any revenue decoupling mechanisms or similar mechanisms, Mr. Trippensee said many of the proxy companies have "some sort of weather mitigation" but nothing similar to what is being proposed in this case. (Id., pp. 23-24) In fact, Mr. Trippensee stated that he is aware of only one company which has something similar to what is being proposed in this case. (Id., p. 25)

Had Mr. Trippensee made any reasonable effort to ascertain the facts, however, he would have learned that many of the proxy companies utilized by Staff witness Murray and MGE witness Hanley enjoy protections from weather variance and some also have protections in the

form of revenue decoupling mechanisms. (Hanley Surrebuttal, p. 22; Murray Surrebuttal, p. 18) The American Gas Association published its December 2006 issue of the *Natural Gas Rate Round-Up – A Periodic Update on Innovative Rate Designs* on the issue of "a rate design method that stabilizes customers' bills as well as stabilizes the utility's earnings."[11] According to the American Gas Association, revenue or rate stabilization is "a rate design mechanism that decouples a utility's profits from its gas throughput. . . . revenue stabilization is one of several innovative rate designs that break the link between recovery of a utility's fixed costs and the energy consumption of the utility's customers." According to this current issue of the *Natural Gas Rate Round-Up*, natural gas utilities in five states have received approval for revenue stabilization.

Mr. Trippensee's failure to verify the data relied upon by him, and Mr. Trippensee's failure to conduct any meaningful due diligence regarding the facts and data relied upon by Staff's and the Company's witnesses, are evidence that Mr. Trippensee's opinions in this case are unreliable and fundamentally unsupported. If an expert's information "is so slight as to render the opinion fundamentally unsupported," the opinions offered by that expert should be excluded. *Alcorn*, 50 S.W.2d at 246.

In his filed testimony, Mr. Trippensee argues that if the fixed delivery charge proposed by Staff witness Ross is put into place, MGE will "effectively be guaranteed to earn the authorized rate of return" with regard to a particular class of customers. (Trippensee Rebuttal, p. 6) This, of course, is not a true statement. In fact, regarding the risk borne by common shareholders, Mr. Trippensee himself admitted that, under Staff's proposed capital structure, "they would be bearing the risk that debt holders have first obligation or first right to the assets

[11] The complete article is attached hereto as Appendix B and incorporated herein by reference.

of the company before the stockholder, so that is an additional risk that they face." (Trippensee Deposition, p. 27) He also acknowledged that ROE is never guaranteed. (Id.)

At page 12 of his rebuttal testimony, Mr. Trippensee accuses Company witness Hanley of ignoring certain data and trends. Mr. Trippensee then points to an average of authorized returns for natural gas companies for the third quarter of 2006. What Mr. Trippensee fails to mention in his testimony is that the "average" of 9.6 percent consists of the authorized rate of return for only one company. Mr. Trippensee was also unaware of the fact that this number resulted from a settlement, and he did not know whether the test year in that case was a future or historical test year, whether the rates authorized provide for any sharing mechanism, and whether the rates are to be phased-in or implemented all at once. (Trippensee Deposition, p. 39) This is yet another example of Mr. Trippensee's failure to verify the data relied upon by him in rendering his opinions, and is yet another example of the unreliability of his testimony.

Mr. Trippensee's responses to questions regarding Missouri utilities being able to earn their authorized rates of return are further evidence of the unreliability of Mr. Trippensee's testimony. Despite the fact that the information was readily available to Mr. Trippensee in the Company's direct testimony, Mr. Trippensee had not reviewed MGE's earnings history and was unaware of MGE's specific earnings for recent years. (Trippensee Deposition, pp. 31, 38) To support his opinion that utility companies are winners under traditional rate design, Mr. Trippensee noted that Missouri utilities have not gone bankrupt. (Id., p. 53) Surely this is not the standard to be applied pursuant to *Bluefield Water Works v. Public Service Comm'n.*, 262 U.S. 679 (1923) and *Fed. Power Comm'n. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Mr. Trippensee looked at the testimony filed by the Company and by Staff; he took no steps to verify this information; he made no independent calculations, conducted no studies, and

performed no tests. Mr. Trippensee simply cannot satisfy the requirements of RSMo. §490.065 with regard to his cost of capital testimony.

D. Conclusion

Mr. Trippensee's testimony does not satisfy the requirements of RSMo. §490.065. He is not an expert qualified by knowledge, skill, experience, training, or education. Additionally, and quite notably, the facts and data he relies upon are not of a type reasonably relied upon by experts in the field of cost of capital and regulatory finance, and Mr. Trippensee's testimony is not otherwise reasonably reliable. Consequently, Mr. Trippensee's filed testimony should not be admitted into evidence in this proceeding, and Mr. Trippensee should otherwise be prohibited from offering "expert" testimony related to the issue of return on equity in this matter.

WHEREFORE, for the reasons stated above, MGE respectfully requests that the Commission issue its order granting this motion to exclude the testimony and opinions of Public Counsel witness Russell Trippensee. MGE requests such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, sent by U.S. mail, or electronically transmitted on this 21st day of December, 2006, to all parties of record.

_____/s/ Diana C. Carter_____