

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Missouri Gas Energy's)	
Tariff Sheets Designed to Increase)	
Rates for Gas Service in the)	Case No. GR-2009-0355
Company's Missouri Service Area)	

**MISSOURI GAS ENERGY'S OBJECTIONS TO A REQUEST THAT THE
COMMISSION TAKE OFFICIAL NOTICE OF CERTAIN MATTERS AND TO
THE ADMISSION OF PAGES 2 AND 3 OF STAFF EXHIBIT 103**

COMES NOW Missouri Gas Energy ("MGE"), a division of Southern Union Company, and submits the following legal brief in support of its objection to Public Counsel's request that the Commission take official notice of customer comment cards and to selected pages of Staff exhibit no. 103.¹

Summary

On October 26, 2009, Public Counsel asked the Commission to take official notice of customer comments cards it has received from customers of MGE. Public Counsel's request should be denied because it does not comply with the applicable legal standard for agencies to take official notice of matters or facts and, additionally, the request is objectionable on numerous other subsidiary evidentiary grounds.

On November 2, 2009, Staff offered Exhibit 103 which includes a number of graphs and tabulations. One of the graphs (submitted as duplicates on pages

¹ MGE has limited its legal memorandum to the issue of whether the Commission should take official notice of the comments cards as requested by Public Counsel and to the admission of pages 2 and 3 of exhibit 103. It reserves the right to submit additional legal argument addressing topics on other than the matter directly at hand.

2 and 3) purports to show a history of MGE public comments since 2003 and a significant increase in 2009 attributable to the same comment cards that Public Counsel has requested official notice be taken and with respect to which the Company has objected. This chart should not be received into the record because no adequate foundation has been offered for doing so, the chart itself is not relevant to the matters at hand, there is no meaningful context for the charted information and, although certainly not intended by Staff, the chart is grievously misleading.

Failure to Comply with the Missouri Administrative Procedure Act²

Public Counsel's request concerning official notice is governed by Subsection 6 of § 536.070, RSMo which provides as follows:

Agencies shall take official notice of all matters of which the courts take judicial notice. They may also take official notice of technical or scientific facts, not judicially cognizable, within their competence, if they notify the parties, either during a hearing or in writing before a hearing, or before findings are made at hearing, of the facts of which they propose to take notice and give the parties reasonable opportunity to contest such facts or otherwise show that it would not be proper for the agency to take such notice of them.

Public Counsel's request does not comply with this standard because the comment 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.³

² The Commission's evidence rule incorporates by reference the evidence rules as set forth in Chapter 536 RSMo. See, 4 CSR 240-2.130(1).

³ Another question is what fact or facts are the Commission being asked to take official notice of? The comment cards are not even facts. They are cards.

Missouri generally follows federal Rule 201 (Judicial Notice of Adjudicative Facts) where the topic of judicial notice of matters is concerned.⁴ Subsection (b) provides, in part, that “a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned.” The Missouri Supreme Court has stated that judicial notice may be taken of a fact that is “part of the common knowledge.” *Endicott v. St. Regis Investment Co.*, 443 S.W.2d 122, 126 (Mo. 1969). The customer comment cards cannot be qualified under this standard.

The existence of the comment cards is not generally known, nor is the content thereof. Additionally, the facts set forth in the comment cards (to the extent that there are facts set forth thereon) are not capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned. The accuracy, meaning and significance of the comments are necessarily going to be matters of subjective interpretation and categorization. No court of law would even consider taking notice of such things. On this ground alone, Public Counsel's request must be denied.

Additionally, the agency (in this case, the Commission) can take official notice of “technical or scientific facts” that are not judicially cognizable, but only if they notify the parties “of the facts of which they propose to take such notice and give the parties reasonable opportunity to contest such facts or otherwise show

⁴ See, Missouri Practice § 13.53 “Judicial Notice.”

that it would not be proper for the agency to take such notice of them.” (emphasis added) This is a threshold that cannot be cleared because it is not plausible to characterize customer comments as “technical or scientific facts”.

Public Counsel has not authenticated the comment cards so there is no foundation for their admission into the record

Public Counsel has laid no foundation for the admission of the comment cards as document evidence.

The comment cards are inadmissible if offered as testimonial evidence

Taking official notice of the comment cards is only meaningful as a way to induce the Commission to consider the statements written on the cards as fact testimony by customers who are not present at the hearing.⁵ This would be a denial of MGE’s due process rights. Subsection 2 of § 536.070 states as follows:

Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him. (emphasis added)

Taking official notice of the comment cards would bypass these important procedural protections.⁶ Additionally, Subsection (1) of § 536.070 states that “[o]ral evidence shall be taken only on oath or affirmation.” This is to ensure the truthfulness and veracity of the testimony. Taking official notice of the

⁵ It cannot be offered as opinion testimony unless the authors of the comments are duly qualified as expert witnesses.

⁶ This can easily be distinguished from the testimony elicited at the local public hearings which was transcribed and with respect to which MGE had a reasonable opportunity to examine, make inquiry, and offer clarification or rebuttal. In this case, it did so in Surrebuttal Testimony of company witness Russell Feingold at pages 11-12.

statements in the comment cards would be an end run around this fundamental evidentiary requirement.

To the extent the comment cards are offered for the unverified statements written on them, they represent testimony in written form. In this regard, MGE further objects on the grounds that the comment cards are inadmissible hearsay and, consequently, not competent and substantial evidence as required by Art. V, § 22 of the Missouri Constitution. *State of Missouri ex rel. DeWeese v. Morris*, 395 Mo. 194, 221 S.W.2d 206, 208 (Mo. 1949).⁷ This is not just a “technical” rule of evidence. It is a substantive standard the purpose of which is to assure the right of confrontation and cross-examination of the witness having personal knowledge of the facts adduced. 221 S.W.2d at 209.⁸

Pages 2 and 3 of Exhibit 103

Pages 2 and 3 of Exhibit 103 should not be admitted into the record. The fact that 12,008 comment cards have been received by the Commission tells it exactly nothing. Staff witness Ms. Gay Fred testified⁹ that Staff has not vetted the cards and siloed the nature of the comments, if any, into categories

⁷ See also, *State ex rel. GS Technologies Operating Company v. Public Service Commission*, 116 S.W.3d 680 (Mo.App. W.D. 2003).

⁸ Where this point is concerned, the Missouri Supreme Court stated that “[t]he fact that technical rules of evidence do not control has been considered to permit leading questions and other informalities but not to abrogate the fundamental rules of evidence. *Novicki v. Department of Finance*, 373 Il. 342, 26 N.E.2d 130, 131.”

⁹ The transcripts of the proceeding from November 2nd are not yet available so MGE cannot supply page references at this time.

in a like manner to the practice with customer inquiries and complaints.¹⁰ That a particular number of comments cards have been received is a meaningless fact. The cards may or may not have anything to do with rates or rate design.¹¹ Ms. Fred testified that many of the cards were returned with nothing written on them.

Also, the chart is misleading in the extreme in that it suggests, incorrectly, that after a number of years of very few comment cards having been received, there was a dramatic spike between 2008 and 2009, but Ms. Fred testified, correctly, that this was the first rate case in which comment cards have been sent by MGE as part of the customer notification process so the historical information, whatever its source (and the Commission was not told of its source), is suspect at best. There can be no trend shown by a single, isolated data point. A trend, by definition, shows a tendency or inclination. As noted previously, this is the first time comment cards have been sent out with the customer notice,¹² so there is no way to ascertain whether this level of activity is something out of the normal. There simply is no baseline against which to measure the significance of the number of cards sent in. These

¹⁰ See pages 4, 5 and 6 of exhibit 103.

¹¹ For example, the categories appearing on page 4 of Exhibit 103 has entries for damage claims, denial of service, final bill, gas leak and installation delay, just to name a few.

¹² Ms. Fred testified that customer comment cards had been sent out as part of The Empire District Gas Company's customer notification in its pending rate case, but this is not so. The Commission did not require that comment cards be sent out in that case, an indication that the Commission has its own doubts about their efficacy for measuring customer sentiment.

circumstances illustrate the lack of relevance of, and the lack of an adequate foundation for, the information the chart purports to display.

Conclusion

The Commission must deny Public Counsel's request that the Commission take official notice of the customer comment cards because they do not represent facts or matters with respect to which a court could take judicial notice at trial and, additionally, they cannot fairly be characterized as representing "technical or scientific facts" of which the Commission can take notice.

MGE assumes that Public Counsel is requesting that the Commission take official notice of the comment cards so that it can consider the comments written on the cards but these would be impermissible, unverified statements. This is in violation of Subsections (1) and (2) of § 536.070, RSMo in that oral evidence is required to be taken only oath or affirmation and, further, that parties to a contested proceeding have the right to cross-examine, impeach or rebut adverse testimony. MGE will be denied these rights if the Commission takes official notice as requested by Public Counsel.

Finally, the unverified comment cards represent hearsay testimony which is inadmissible and, as such, it does not represent competent and substantial evidence for consideration by the Commission. Granting Public Counsel's request would violate Art. V, § 22 of the Missouri Constitution.

Additionally, the Commission should not admit pages 2 and 3 of Exhibit 103 into the record for the reasons set forth above.

WHEREFORE, Public Counsel's request that the Commission take official notice of the customer comment cards should be denied and pages 2 and 3 of Staff Exhibit 103 should not be admitted into the record of this case for the reasons set forth above.

Respectfully submitted,

/s/ Paul A. Boudreau
Paul A. Boudreau - MO Bar # 33155
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, Missouri 65102-0456
Telephone: (573) 635-7166
Facsimile: (573) 636-6450
Email: paulb@brydonlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 3rd day of November, 2009, to the following:

Lera Shemwell
Missouri Public Service Commission
Governor's Office Building
200 Madison Street
P.O. Box 360
Jefferson City, Missouri 65102
Lera.shemwell@psc.mo.gov

Marc Poston
Governor's Office Building
200 Madison Street
P.O. Box 7800
Jefferson City, Missouri 65102
marc.poston@ded.mo.gov

Stuart Conrad
Finnegan, Conrad & Peterson, LC
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Jeremiah Finnegan
Finnegan, Conrad & Peterson, LC
3100 Broadway, Suite 1209
Kansas City, MO 64111
jfinnegan@fcplaw.com

William D. Steinmeier
William D. Steinmeier, P.C.
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
wds@wdspsc.com

Sarah Mangelsdorf
Shelley A. Woods
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
shelley.woods@ago.mo.gov
sarah.mangelsdorf@ago.mo.gov

Charles W. Hatfield
Stinson Morrison Hecker LLP
230 West McCarty Street
Jefferson City, MO 65101
chatfield@stinson.com

Mark Comley
Newman, Comley & Ruth P.C.
P.O. Box 537
Jefferson City, MO 65102
comleym@ncrpc.com

/s/ Paul A. Boudreau
Paul A. Boudreau