

**BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI**

In the Matter of the Application of Missouri Gas       )  
Energy, a division of Southern Union Company       )       Case No. GU-2005-0095  
for an Accounting Authority Order Concerning the       )  
Kansas Property Tax for Gas in Storage.               )

**RESPONSE TO PUBLIC COUNSEL'S  
MOTION TO DISMISS AND REQUEST FOR HEARING**

Comes now Missouri Gas Energy, a division of Southern Union Company ("MGE" or "Company"), and, in response to the Public Counsel's Motion to Dismiss Missouri Gas Energy's Application for an Accounting Authority Order, or in the Alternative, Request for Hearing ("Motion"), respectfully states as follows to the Missouri Public Service Commission ("Commission"):

1.       On October 12, 2004, MGE filed its Application with the Commission requesting an accounting authority order ("AAO") to allow it to defer certain taxes on storage gas. This tax was enacted by the Kansas Legislature during its 2004 session. Kansas Senate Bill 147 created a new property tax associated with the inventories of gas held for resale and stored in underground formations in the state of Kansas. The legislation was made retroactive to inventories held as of January 1, 2004. Based upon further discussions with Kansas authorities, MGE now estimates that its liability for this new tax will be approximately \$1.8 million in 2004 (fifty percent (50%) of this amount to be paid no later than December 31, 2004, with the balance to be paid no later than June 30, 2005). *See Appendix A.*

2.       In response to MGE's Application, Public Counsel moved for dismissal pursuant to Commission Rule 4 CSR 240-2.117(2). This section is entitled "Determination on the

Pleadings” and is similar to the civil court rule for motions for judgment on the pleading (Mo.R.Civ.P. 55.27(b)). The Missouri Court of Appeals has stated that a “trial court can properly grant a motion for judgment on the pleadings only if the facts pleaded by the petitioners, together with the benefit of all reasonable inferences drawn therefrom, show that petitioners could not prevail under any legal theory.” *A.R.H. v. W.H.S.*, 876 S.W.2d 687, 688 (Mo.App.E.D. 1994), *citing Bakewell v. Mo. State Employees’ Retirement*, 668 S.W.2d 224, 228 (Mo.App.W.D. 1984).

3. The Commission has previously stated that because of the nature of the ratemaking process, AAO’s should be granted on a limited basis. “This limited basis is when events occur during a period which are extraordinary, unusual and unique and not recurring. These types of events generate costs which require special consideration.” *In the Matter of Missouri Public Service*, 1 MPSC 3d 200, 205 (1991).

4. The Public Counsel argues in this case that the costs associated with the new Kansas property tax on inventories of gas held for resale and stored in underground formations in the state of Kansas -- passed during the 2004 Kansas legislative session and made retroactive to inventories held as of January 1, 2004 -- are not extraordinary nor unique and are recurring. The Public Counsel’s argument is essentially that this tax cannot be extraordinary because utilities have incurred items identified as “property taxes” in the past.

4. The facts establish that the tax at issue in this case is, in fact, extremely unique and, therefore, extraordinary. Marked **Appendix A**, and attached hereto, is the affidavit of Michael R. Noack discussing the background of the subject Kansas tax assessment on gas held in storage. Among other things, Mr. Noack states that MGE has never before been required to pay

property tax on storage gas in Kansas.

5. In its Application, MGE cited numerous cases where the Commission has issued an accounting authority order to address expenses that have come about as the result of government decision and which cannot be adequately or appropriately addressed through the ratemaking process. App., ¶ 7. In fact, the Commission has specifically identified “acts of government” as a type of extraordinary event that may justify the issuance of an AAO. *In the matter of St. Louis County Water Company’s Tariff Designed to Increase Rates*, MoPSC Case No. WR-96-263, p. 13 (December 31, 1996) (These include AAO’s for costs “caused by unpredictable events, acts of government and other matters outside the control of the utility or the Commission.” (emphasis added)).

6. MGE provided numerous examples of governmental action type AAO’s that have been granted by the Commission in its Application. These examples included AAO’s based on gas safety rule changes. Gas safety deferrals have even expressly provided for the deferral of traditional property taxes as one of the expenses associated with gas safety rule compliance. *In the Matter of Missouri Gas Energy’s Tariff Sheets*, 2000 Mo. PSC LEXIS 1585, p. 6, GR-98-140 (October 10, 2000) (“While implementing the [safety line replacement program (“SLRP”)], MGE has been granted a series of accounting authority orders that permit MGE to accumulate expenditures that would normally be expensed in the period in which they were incurred. These items are depreciation expense, property tax expense, and carrying costs associated with the installed SLRP plant after the actual SLRP plant was placed in service, but prior to these related expenses being directly reflected in rates.” (Emphasis added)). Thus, even traditional property taxes are not automatically inappropriate for deferral where they are brought about by an

extraordinary event.

7. Moreover, if the Public Counsel is correct that this new tax is part of the “typical and customary business activities of the Company” (Mot., p. 3), it begs the question as to why the Commission decided to not include these taxes in MGE’s rates that were recently set in Case No. GR-2004-0209. The Commission found in that case that this “potential tax liability is not currently known or measurable and on that basis it cannot be included in MGE’s cost of service.” *In the Matter of Missouri Gas Energy*, Report and Order, Case No. GR-2004-0209, p. 79-80. These expenses cannot be “typical and customary,” as alleged by the Public Counsel, and yet only a “potential tax liability” that is not “known and measurable” and inappropriate for inclusion in rates.

8. The Kansas property tax on gas in storage is nothing like the purchased power contracts that were the subject of the *Missouri Public Service* case cited by the Public Counsel. Purchased power contracts were said by the Commission in that case to be a “fundamental undertaking of a regulated utility” and a “proper function of management.” The fact that “these contracts contain rate increases or additional charges as they mature” was said to “not render them extraordinary or unique.” *In the Matter of Missouri Public Service*, 1 MPSC 3d at 210-211.

9. The subject of the AAO requested in this case is a new tax, never before experienced by the Company, that is being retroactively imposed on the Company by a governmental entity. MGE’s management has no control over this expense, nor did it have the ability to budget for the expense. The tax liability involved is approximately \$1.8 million, in 2004, and estimated to be approximately \$3.4 million in 2005, significant amounts and amounts that, if ignored, would by themselves eliminate any reasonable opportunity for the Company to

earn the rate of return recently authorized by the Commission in Case No. GR-2004-0209. The Public Counsel's motion to dismiss is inappropriate in light of these facts and should be denied by the Commission.

### **REQUEST TO SET FOR HEARING**

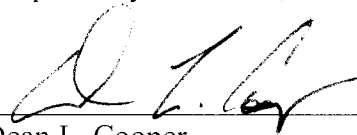
10. The Public Counsel states, in the alternative, that "if the Commission does not dismiss MGE's Application, Public Counsel requests the Commission set this matter for hearing to allow Public Counsel to file prepared testimony to support its position. . . ." Mot., p. 4.

11. MGE agrees that this matter should be set for hearing and would encourage the Commission to set the matter for hearing at the earliest available date. However, MGE disagrees with the Public Counsel's suggestion that such a hearing would require prepared testimony. This matter is not factually complex. The relevant facts are not in dispute and the primary question is what decision the Commission should reach in light of those facts. Accordingly, MGE does not believe that prepared testimony is necessary and suggests that this matter be set for a hearing utilizing live testimony.

**WHEREFORE**, MGE respectfully requests that the Commission deny Public Counsel's

Motion to Dismiss and, thereafter, set this matter for hearing.

Respectfully submitted,



Dean L. Cooper MBE#36592  
BRYDON, SWEARENGEN & ENGLAND P.C.  
312 E. Capitol Avenue  
P. O. Box 456  
Jefferson City, MO 65102  
(573) 635-7166  
(573) 635-3847 facsimile  
[dcooper@brydonlaw.com](mailto:dcooper@brydonlaw.com)

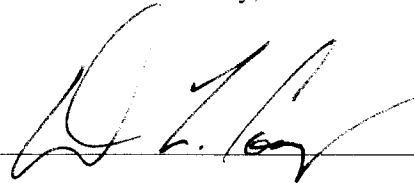
ATTORNEYS FOR MISSOURI GAS ENERGY,  
A DIVISION OF SOUTHERN UNION COMPANY

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, or sent by electronic mail, on October 28, 2004, to the following:

Tim Schwarz  
Office of the General Counsel  
Governor Office Building, 8<sup>th</sup> Floor  
Jefferson City, Mo 65101

Douglas Micheel  
Office of the Public Counsel  
Governor Office Building, 6<sup>th</sup> Floor  
Jefferson City, MO 65101



# AFFIDAVIT OF MICHAEL R. NOACK


STATE OF MISSOURI     )  
                                  )     ss  
COUNTY OF JACKSON    )

Michael R. Noack, Director of Pricing and Regulatory Affairs for Missouri Gas Energy, a division of Southern Union Company, of lawful age, on his oath states:

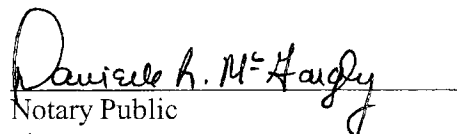
1. In 2004, the State of Kansas enacted a new law, through the passage of Senate Bill 147, imposing property taxes on gas held in storage in Kansas for tax years beginning January 1, 2004.
2. By correspondence dated July 2, 2004, property tax assessment authorities in the State of Kansas advised MGE of their belief that MGE "has gas in a Kansas storage field as of January 1, 2004" and of their intent that "inventories of gas held for resale in Kansas . . . will become taxable by the state to the owner of the gas." MGE has never before been required to pay property taxes on storage gas in Kansas.
3. Based on discussions between MGE personnel and Kansas property tax assessment authorities, MGE believes that the property tax assessed to MGE on Kansas storage gas for tax year 2004 will amount to approximately \$1.8 million. 50% of this amount will be paid no later than December 31, 2004, with the balance to be paid no later than June 30, 2005.
4. Based upon market conditions currently prevailing (which are approximately 87% higher than NYMEX prices in effect as of January 2, 2004), MGE expects Kansas storage gas property taxes for tax year 2005 to amount to approximately \$3.4 million, assuming volumes in 2005 comparable to those in 2004, 50% of which will need to be paid no later than December 31, 2005 with the balance to be paid no later than June 30, 2006.
5. Rates from MGE's most recent rate case (Case No. GR-2004-0209), which became effective on October 2, 2004, do not include any provision for recovery of Kansas storage gas property taxes. In fact, the Commission expressly rejected MGE's request to include approximately \$1.2 million in rates for Kansas storage gas property taxes. (Report and Order, pages 78-80 of 92, Case No. GR-2004-0209, September 21, 2004).
6. MGE is among a number of companies challenging the lawfulness of the new Kansas law enacted through the passage of Senate Bill 147. That challenge is being pursued through administrative and judicial processes in an effort to obtain a favorable resolution as expeditiously as possible.

Given its nature, however, this challenge is unlikely to be finally resolved prior to the third quarter of 2006. Only if the challenge to this new law is successful will MGE be able to obtain a refund of the Kansas storage gas property taxes it will have paid.

7. If the challenge to this new Kansas law is unsuccessful, MGE will not obtain a refund of the Kansas storage gas property taxes it will have paid, and such taxes will continue to be incurred. In that event, because MGE's current rate levels have been set without making any provision for the recovery of Kansas storage gas property taxes, the only way for MGE to have any reasonable opportunity to achieve the earnings level authorized by the Commission in Case No. GR-2004-0209, is for the Commission to grant an accounting authority order ("AAO") permitting MGE to defer such property taxes to be considered for rate recovery in a future MGE general rate proceeding.
8. If the Commission grants MGE the requested AAO and the challenge to the new Kansas law is successful, any amounts deferred will be reversed upon MGE's receipt of the refunds. In that event, MGE would obviously not seek rate recovery of any Kansas storage gas property taxes that had been refunded.
9. I have knowledge of the matters set forth in this affidavit and such matters are true and correct to the best of my knowledge and belief.

  
Michael R. Noack

Subscribed and sworn to before me this 28<sup>th</sup> day of October, 2004.

  
DANIELLE R. MCGAUGHY Notary Public  
Notary Public - State of Missouri  
Commissioned in Jackson County

My Commission expires Nov. 7, 2004