BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri Gas Energy and Its Tariff Filing to Implement a General Rate Increase for Natural Gas Service	))))	**GR-2009-0355**

MIDWEST GAS USERS' ASSOCIATION
OPPOSITION TO MOTION TO LATE-FILE
PURPORTED SURREBUTTAL TESTIMONY

I. Introduction and Factual Background.

On Friday, October 16, 2009, and two days out of time, Missouri Gas Energy ("MGE") submitted the purported surrebuttal testimony of its witness Kirkland along with a motion to permit the filing out of time.

After initially issuing an order on October 19 to permit the filing, the Commission granted Midwest Gas Users' Association's ("Midwest") motion to rescind that order on October 20, 2009, and in so doing saying: "Because the [October 19 order] is rescinded, MGE's motion for leave to file surrebuttal testimony out of time remains pending."

Shortly thereafter, Midwest filed a renewed notice of intent to respond. This pleading fulfills that commitment and shows why MGE's pending motion to late-file should not be granted.

II. Summary of Argument.

There are at least four reasons why Mr. Kirkland's late-filed testimony should be rejected:

- While labeled as "surrebuttal," it is mislabeled and mischaracterized. In fact, the proffered testimony is ***rebuttal*** and is far, far out of time.

- There is no effective opportunity in the procedural schedule and in the status of this case for opposing parties to "surrebut" or respond to this drastically late-filed rebuttal.

- The constraints of the procedural schedule and the imminence of hearing in this case prevents other parties from employing the tools of discovery to develop any ability to respond even at the hearing through cross-examination.

  Had the testimony been filed in the proper sequence, there would have been such an opportunity and, indeed, the opportunity to properly and timely rebut the contentions made or to otherwise address them.

- Permitting such late-filed rebuttal weeks after it was properly due perverts the Commission's processes and should not be permitted.

III. Argument.

A. The Subject Testimony Is Rebuttal That Has Been Filed Weeks Past Its Proper Filing Date and Should Not Be Permitted.

MGE filed this rate case on April 2, 2009, obviously seeking additional revenue. MGE also proposed a number of changes in the existing terms and conditions of transportation service, all of which were approved by the Commission years ago and many of which have been in place for close to two decades. Disregarding its statutory burden to justify or support these

changes, the proposed changes were filed with no explanation or support other than a basic statement that they were "needed." There were no factual documentation to support these proposed changes.

The Commission has rules that ease resolution of this question. Commission's rules, 4 CSR 240-2.130 Evidence, subpart (7), provide useful definitions:

> (A) Direct testimony shall include all testimony and exhibits ***asserting and explaining that party's entire case-in-chief*** (emphasis added).

MGE wholly failed to comply.

Midwest has historically been an advocate before this Commission and at FERC, for responsible use of the LDC's facilities by larger customers for natural gas transportation consistent with reliable service to system supply customers as well. Accordingly, Midwest is concerned with assertions that the system is not working properly and we want to seek disclosure of the problems. Our intent always is to support provisions that are appropriate for the safe and reliable operation of the system, cost-justified and rational, and avoid those that create or inject subsidies into the system.

But too often, the "operational" cloak has been pulled out to shield utility efforts that would turn transportation services such as the cash-out mechanism into profit centers through "fees" and "penalties" while other more effective solutions to the claimed "problem" are ignored.

Even before direct testimony from other parties was due, Midwest requested MGE representatives to "show me" what the problems were so that responsible solutions, if needed, could be crafted. Those requests were never fulfilled nor was an attempt to respond even made.

When the time came for direct testimony to be filed, and without further information, facts or documentation from MGE, Midwest submitted testimony that challenged the absence of facts, details or support for MGE's proposals. Mr. Johnstone's ***direct*** testimony stated the following proposal:

> ". . . I . . . recommend that transportation terms and conditions remain unchanged, ***because MGE has made no showing or provided any documentation of particular problems to be solved by its proposed changes. As such the MGE proposals appear to be arbitrary.*** To the extent bona fide problems are documented, my clients stand ready to work with MGE and other interested parties to develop reasonable remedies while maintaining the effect of the current terms and conditions for those that participate responsibly in the transportation program. Johnstone Direct, p. 2 (emphasis added).

Mr. Johnstone continued:

> . . . MGE testimony provides no documentation of any need for change. Johnstone Direct, p. 6.

The rejection of MGE's proposed changes and the absence of support therefor was directly set out and proposed and MGE had every opportunity imaginable, first in its direct testimony and then in response to the direct challenge laid out in Mr. Johnstone's direct testimony. At each earlier stage MGE could have simply come forward with support and documentation. Indeed,

Midwest even ***invited*** MGE to provide documentation of the claimed "problems" so that responsible solutions could be discussed and crafted if needed -- an invitation that was, again, ignored, even though rebuttal testimony, under the Commission's rules, provided that opportunity:

> (B) Where all parties file direct testimony, ***rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case.*** A party need not file direct testimony to be able to file rebuttal testimony . . . . (emphasis added).

Rather obviously, the Commission requires rebuttal to be directed to "the testimony and exhibits contained in any other party's direct case." It is irrefutable that Midwest's direct case addressed the absence of support for MGE's proposals and recommended that they be rejected. Rebuttal testimony was the opportunity for MGE to respond to this proposal. The testimony tendered on October 16 is and should be regarded as rebuttal and should now be rejected as roughly four weeks out of time. MGE should not be permitted to "lie in the weeds" while the procedural time passes, then engage in "trial by ambush" using the very absence of an opportunity to respond as a justification for trying to "game" the process. Were one more cynical, they might suggest that MGE's ploy demonstrates the weakness of its claims and its unwillingness to subject them to scrutiny.

B. Permitting This Late-Filed Rebuttal Denies Opposing Parties the Ability to Surrebut the Testimony.

Given the existing procedural schedule and the imminent hearing commencing Monday (10/26), there is no opportunity for other parties to surrebut this late-filed rebuttal testimony. Although acknowledging this lack of opportunity, MGE perverts it as justification for ***permitting*** the late-filed testimony to be received.[1/]

There is, we believe, no coherent argument that can be made that these proposed changes were not and are not disputed -- there was informal notice of the possibility even before the filing. Examination of the freshly-filed List of Issues will confirm this. Certainly the list of disputed issues concerns the proposed modifications to the terms and conditions of transportation.

On May 27, 2009 the Commission issued its order establishing the procedural schedule for the case. This order, like many others, scheduled two rounds of direct from other parties, rebuttal and surrebuttal. The other parties' direct was set for August 21, and September 3 for revenue and rate design/class cost of service, respectively. Rebuttal for all was set for September 25, 2009 -- weeks -- and not two days -- prior to the proffer of this late-filed testimony.

[1/] MGE's Motion, p. 2, states: "No party will be prejudiced in that there are no further rounds of pre-filed prepared testimony pursuant to which any party needs to respond to Mr. Kirkland's prepared testimony . . . ."

As noted earlier, Midwest timely responded to MGE's initial filing in a manner consistent with the Commission's rules and certainly in a manner that would apprise MGE that it had, in our view, failed wholly to support its proposals, while simultaneously inviting MGE to come forward with documentation to support them. Midwest's proposal, in the terms of the Commission Rules, was that the proposed changes be rejected because of insufficient factual support. MGE had its opportunity to rebut this proposal on September 25, 2009 but failed to do so.

Midwest, on the other hand, having put forward its proposal in its case-in-chief on direct, then used its rebuttal opportunity to (as directed by the Commission's rules) rebut the proposals of ***other*** parties on these and other issues, including Staff's cost of service study and its transportation tariff proposals -- not MGE's that had already been addressed.

MGE filed its case with unexplained changes to its transportation tariff. An existing tariff is presumed to be just and reasonable. The burden of proof is on MGE to support any changes it proposes as a matter of law. In the direct testimony of MGE there was no identification of any problems with the current tariff and no explanation of how any of the changes would solve any alleged problems.

MGE now attempts at this late date to repair its empty record and through a late-filed proffer introduce its case in chief for changes to the transportation terms and conditions.

The Commission Rules do not permit such behavior and justice should not allow it.

MGE on page 3 states: "The proposal to change the cost of system transportation when selling supply has not been opposed by any parties to the proceeding." Based on direct testimony of MGUA/Superior, it is inconceivable that MGUA/Superior could be construed to be in support of any proposed change.

C. The Procedural Schedule and the Imminence of the Hearing Provide No Opportunity for Opposing Parties to Employ Tools of Discovery Even to Prepare a Response Through Cross-Examination.

The Order Setting Procedural Schedule allowed for a shorter time for data request responses (10 days) for requests tendered after September 25 (scheduled rebuttal). But even with this, data requests tendered instantly on receipt of the proffered testimony would only be due on the day the hearing is to commence. Review of the suggested schedule for the hearing puts major issues of concern to Midwest just two days later. Being a private entity, Midwest does not have multiple attorneys or consultants to dissect testimony while litigation on contested issues of interest moves on.[2/] Were the tables turned, one can be sure that MGE would no less loudly cry "foul" -- and they would be justified in doing so! The proffered testimony should simply be rejected and should not be part of this proceeding.

[2/] MGE even has the effrontery to suggest the "press of business" as a basis for late filing.

D. Permitting This Late-Filed Rebuttal At This Time Would Disrupt the Sequence of Testimony Ordered By the Commission.

Part of the reason that the Commission sequences testimony in the manner directed by its rules is to facilitate examination of the issues, *i.e.*, the facts, and to encourage resolution or settlement of these issues subject to later examination by the Commission from the perspective of the public interest. Filing testimony out of sequence frustrates these objectives, does a disservice to the Commission's processes, and ultimately denies opposing parties basic procedural due process.

Moreover, and although this part of the process goes on out of the Commission's direct view, frequently issues are discussed, additional documentation is provided, and solutions are crafted that will avoid consumption of Commission time and resources to try them. Not infrequently, Commissioners have requested that the parties try to solve a problem on their own and bring back a solution for Commission review. MGE's approach of "hide the ball" harms not only businesses and captive transport customers, but also denigrates the Commission and its processes.

IV. Conclusion.

Under Missouri law, a utility's current rates, terms, and conditions of service are presumed reasonable and the burden is upon MGE to justify its claims and at a time that those justifications may be examined and evaluated using, among other things, the tools of discovery.

Changes to long-established and essentially settled procedures that were approved many years ago require more than a wave of the hand from the LDC, nor should a regulated utility be permitted to hide behind the "operational" smokescreen. Certainly, system reliability is critical for all customers, including transporters. Similarly, mechanisms that are not arbitrary, but rather presented with documentation and subject to scrutiny are far less likely to yield unintended consequences that are in the interest of all to avoid.

Ironically, a strong opponent of unjustified changes in transportation terms and conditions at the interstate level have been the LDCs (including MGE) who have continually pressed the pipelines for the "whys" behind proposed changes and have struggled, alongside Midwest, for rational rules that avoid unintended consequences.[3/]

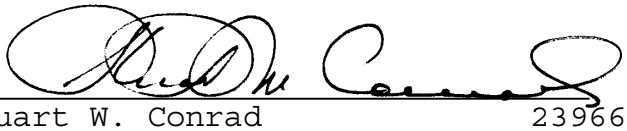
[3/] It perhaps deserves note that, with FERC Order 636, all customers of interstate pipelines such as Southern Star Central, are transporters and essentially work under the same set of rules embodied in the pipeline's respective tariffs. The LDCs, however, as a part of that rule, were provided with a preferential LDC service which requires neither nomination nor notice, or "no nom, no notice." This service on Southern Star is referenced as the TransStorage Service ("TSS") and MGE transports a sizeable

(continued...)

When a car gets dirty, most owners will wash it, not buy a new car. Because many parties are involved in transportation as well as the marketplace, without thorough review, major changes risk introducing unintended consequences that can be harmful to the interests of all customers. If there are problems that need to be addressed, the particular problems should first be defined and documented. That is MGE's obligation, but it is also MGE's responsibility to do so within the context of the rate case schedule and not "sandbag" or have a "trial by ambush."

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



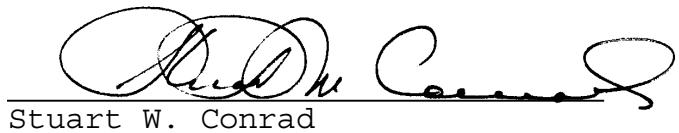
Stuart W. Conrad 23966
David L. Woodsmall 40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR MIDWEST GAS USERS' ASSOCIATION

[3/] (...continued)
portion of its supplies under this tariff provision. Under TSS, nominations and notice of changes are not required as for other firm or interruptible transporters. Although Panhandle's and KPC's tariff designations vary, both have similar service offerings, but only for LDCs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by U.S. mail, postage prepaid addressed to all parties by their attorneys of record as disclosed by the pleadings and orders herein per the Commission's EFIS records.



Stuart W. Conrad

Dated: October 23, 2009