BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

**MEMORANDUM OF MISSOURI GAS ENERGY, A DIVISION OF SOUTHERN UNION COMPANY, IN RESPONSE TO THE JUNE 3, 2004 QUERIES OF THE MISSOURI PUBLIC SERVICE COMMISSION**


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Missouri Gas Energy, a division of Southern Union Company ("MGE"), submits this memorandum of law in response to the queries raised by the Missouri Public Service Commission ("Commission") during the June 3, 2004 oral argument on MGE's motion to exclude certain testimony of David Murray. Specifically, the Commission asked: (1) what are the minimum qualifications that an expert must possess before he or she can testify as an expert before the Commission, and (2) what is the applicability of the decision in *Whitnell v. State,* 129 S.W.3d 409 (Mo. App. 2004) to MGE's motion?

## I. An Expert Before This Commission Must Demonstrate Sufficient Qualifications To Establish That He or She Understands And Knows How To Apply The Basic Principles Of The Field Of Inquiry

As the Missouri Supreme Court reaffirmed in *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. Sup. Ct. 2003), whether a proffered expert, such as Murray, is qualified to testify as an expert is governed by § 490.065.1 RSMo.:

> In any civil action, 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 thereto in the form of an opinion or otherwise

*Id. at* 152. *See also id.* at 155 (case law interpreting Fed.R. Evid. 702 can assist in interpreting this section). As to expert qualifications, the Missouri Supreme Court has previously stated:

> In order for an expert witness to be qualified it must appear that by reason of education or specialized experience he possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or of drawing correct conclusions.

Shelby County R-IV School Dist. v. Herman, 392 S.W.2d 609, 616 (1965). *See also State v. Stevens*, 467 S.W.2d 10, 23 (Mo. 1971); *Giambelluca v. Missouri P.R. Co.*, 320 S.W.2d 457, 463 (Mo. 1959).

The case law demonstrates that "superior knowledge" exists where, unlike here, a proffered expert demonstrates – through any combination of education, training or experience – that he or she has an understanding of, and ability to apply, the basic principles of the field of inquiry. Accordingly, college degrees are insufficient to demonstrate expertise if they are not directed to the subject matter of the expert testimony.[1] Further, experience is insufficient if it is limited,[2] or unrelated to the field of inquiry at issue.[3]

Here, Murray's education was in broad categories of business and finance and concededly did not focus on utility finance and rate of return calculation. (Murray Dep. at 11-12.) In addition, Murray concedes that he does not have the education (in accounting) that was necessarily required for one of his calculations – *i.e.,* his attempt to remove the Panhandle subsidiary from Southern Union Company's financial statements. (Murray Dep. at 84-85.)

Further, the record also indicates that Murray has no training or certifications in utility finance or rate of return calculation – although such training and certifications are available.

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1 *See, e.g., Mashburn v. Royal Carribean Cruises, Ltd.,* 55 F. Supp.2d 1367, 1370 n.1 (S.D. Fla. 1999) ("college degree in engineering simply not a sufficient basis to render an opinion" regarding jet ski collision); *Sullivan v. Rowan Cos.*, 952 F.2d 141, 144-146 (5th Cir. 1992) (expert testimony regarding metallurgy properly excluded where expert had extensive experience in metal failure analysis, but degrees in earth science and geology, no academic training in metallurgy and only a three-day metallurgy seminar); *Poland v. Beaird-Poulan, Inc.,* 483 F. Supp. 1256, 1259 (W.D. La. 1980) (expert with degree in mechanical engineering properly excluded where he lacked experience in design of chain saws); *Pobor v. Western Pacific Railroad Co.*, 55 Cal.2d 314, 327, 359 P.2d 474, 481-482 (Cal. 1961) (expert's degree in chemistry did not qualify him to testify about the identity of the driver in an automobile accident).

2 *See, e.g., 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 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).

3 *See, e.g., United States v. Fredette,* 315 F.3d 1235, 1239-1240 (10th Cir. 2003) (expert's 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 where expert "never explained why his experience was sufficient basis for his opinion"); *United States v. Chang,* 207 F.3d 1169, 1173 (9th Cir. 2000) (experience in international finance did not qualify proffered expert witness to testify as to whether security was counterfeit where, among other things, witness "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) (training and experience with U.S. Army Corp. of Engineers in construction of dams and reservoirs did not

Moreover, as to any alleged experience, Murray's employment with the Commission does not, in and of itself, create expertise. For example, in *Johnson v. State*, 58 S.W.3d 496 (Mo. 2001), the Missouri 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 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 Blaine 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").

Accordingly, Murray must demonstrate that he gained "expertise" through his work, and testimony, at the Commission. However, there is nothing about Murray's employment which suggests he has truly learned principles of utility finance or rate of return calculation. For example, he has conceded that he has (a) used "canned" Staff testimony at the Commission, and (b) failed and/or refused to conduct the types of assessments necessary to determine the reliability of his rate of return calculations. (Murray Dep. at 12-13, 23-24, 39, 44-46, 83-84, 87-88.) As one court has recognized:

> [I]t would be absurd to conclude that one can become an expert simply by accumulating experience in testifying.

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provide expertise regarding placement of buoys in reservoirs).

*Thomas J. Kline, Inc.("Kline") v. Lorillard,* 878 F.2d 791, 799 (4th Cir. 1989). *See also Elcock v. K-Mart Corp.,* 233 F.3d 734, 744 (3d Cir. 2000) ("We note that the mere fact that Cooperman 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"); *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).

The Staff is required by statute to lay a reasonable foundation for this Commission showing that Murray understands, and knows how to apply, principles of utility finance, such that he can render an opinion helpful to a person unfamiliar with making rate of return calculations. The Staff has not made – because he cannot make – this showing. Plugging numbers into canned testimony does not make Murray any more "specialized" in his knowledge than any other person who knows how to use a calculator. As MGE counsel noted during the June 3 argument, no attorney would claim to be an "expert" in patent law unless he or she had extensive experience in that area. Thus, the fact that a non-patent attorney may know a few more things about patent law than a lay person does not suggest that such an attorney has "specialized knowledge" sufficient to assist that lay person in this field of inquiry. Murray may know a few things about utility finance and rate of return analysis, but he has not demonstrated that he knows enough about this field of inquiry to make his testimony of any use to this Commission.

## II. The *Whitnell* Decision Supports MGE's Motion

### A. Although *Whitnell* Did Not Involve A Challenge To The Basic Qualifications Of An Expert, The Decision Recognizes That § 490.065.1 RSMo. Governs Expert Qualifications

During oral argument on June 3, the Office of Public Counsel ("OPC"), in opposing MGE's motion, repeatedly cited the *Whitnell* decision, particularly as to issues of Murray's qualifications as an expert. *Whitnell*, however, did not involve a challenge to the expert's basic qualifications to testify in the field of inquiry:

> [Defendant] Whitnell did not challenge psychiatrist's standing as an expert witness at trial. Psychiatrist testified that he is board certified in general psychiatry and in forensic psychiatry. . . .

129 S.W.3d at 412 n.2. Instead, *Whitnell* involved, among other things, a challenge to one opinion rendered by the expert and whether the expert failed to make a necessary psychiatric distinction in rendering that opinion. *Id.* at 412-413.

Nonetheless, *Whitnell* recognizes that § 490.065.1 RSMo. governs the qualifications of experts and requires "that by reason of education or specialized experience he possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or of drawing correct conclusions." *Id.* at 413.

At the June 3 hearing, the OPC seized on the following language from *Whitnell* to suggest that Murray's rate of return calculations should be admissible in this proceeding: "If the witness has some qualifications, the testimony may be permitted." 129 S.W.3d at 413. The OPC suggested that this statement – which comes not from the Missouri Supreme Court, but from a line of Missouri appellate court decisions[4] – means that if Murray knows a few things about utility finance, he can testify about making rate of return determinations.

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[4] *Whitnell* cites *Krame v. Waller*, 849 S.W.2d 236 (Mo.App. 1993) (expert status of neuro- and orthopedic

The facts of the cases cited by the OPC demonstrate that it is wrong. The expert in *Whitnell* – a psychiatrist – had a medical degree in the field of inquiry, as well as board certifications. Moreover, in *Krame v. Waller,* 849 S.W.2d 236, 239-240 (Mo.App. 1993), another case cited by the OPC, the disputed experts were a neurosurgeon and orthopedic surgeon, and the plaintiff – who was attempting to challenge the admission of these two doctors' testimony – *had herself consulted the doctors regarding whether her alleged injuries required surgical intervention.* The qualifications of the three medical doctors at issue in these cases were clear.

Unlike the experts in *Whitnell* and *Krame,* Murray has no certifications or education in utility finance or in the area of rate of return determination. Further, his only experience – recycling "canned" Staff testimony – is insufficient in and of itself to demonstrate expert qualifications. *Johnson, supra; Kline, supra.* The Staff has an obligation to demonstrate Murray's qualifications as a proffered utility finance expert under § 490.065.1 RSMo. and the Staff has failed to make this showing.

### B. *Whitnell* Expressly Recognizes The Independent Reliability Assessments Required By *McDonagh*

Even if this Commission were to find that Murray is qualified as a utility finance expert, his testimony must still be excluded because Murray has completed no reliability assessment of his calculations, and it is not possible for this Commission to conclude – as it must under the law

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surgeons), which cites *Hord v. Morgan*, 769 S.W.2d 443 (Mo. App. 1989) (expert status of child counselor), which cites *York v. Daniels*, 259 S.W.2d 109 (Mo. App. 1953 ) (laboratory technician experts). *York* cites *Bebout v. Kurn*, 154 S.W.2d 120 (Mo. 1941), in which the Missouri Supreme Court confirmed the basic qualifications an expert must demonstrate:

> [T]he expert must possess knowledge from education or experience which will aid an ordinary jury in forming an opinion on the subject of the inquiry, when from common experience they could not do it correctly.

*Id.* at 126 (citations omitted).

– that Murray's testimony is based on reliable facts, data and/or methodologies. Both of these assessments (by Murray and the Commission) are required by *McDonagh, supra*, 123 S.W. 3d at 156, and expressly recognized in *Whitnell, supra,* 129 S.W.3d at 417-418.

Nonetheless, at the June 3 hearing, the OPC cited to pre-*McDonagh* language in *Whitnell, see id.* at 414 ("Any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility. . .") and argued that this language supports the admission of Murray's testimony without any additional assessment of its reliability.

The OPC is once again wrong and for at least two reasons. First, in language the OPC did not cite, *Whitnell* clearly states that this Commission has an independent duty to make its own assessment of the reliability of expert testimony:

> The cases suggest that the language of section 490.065.3 "otherwise reasonably reliable," simply imposes on the trial court the responsibility of independently deciding the reliability of facts and data that the expert witness relies on in forming his or her opinion or inference, *and somewhat limits the deference that the trial court gives to the expert on the reliability of facts and data.*

129 S.W.3d at 417 (emphasis added). *See also id.* at 418 ("Section 490.065.3 addresses this situation because it requires first that an expert evaluate evidence that might otherwise be inadmissible or provided by an incompetent source and find that it is reasonably reliable, and second that the trial court makes its own determination that the foundational facts are at least minimally reliable").[5]

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[5] The *Whitnell* court's statement that § 490.065.3 RSMo. "somewhat limits" a court's deference to an expert and requires the court only to find that expert testimony is "minimally reliable" are arguably not accurate interpretations of § 490.065.3. In fact, in *McDonagh,* the Missouri Supreme Court held that the reliability assessment requirements of § 490.065.3 RSMo. were more demanding than those of even Fed.R.Evid. 703. *See* 123 S.W.3d at 156. In any event, *Whitnell* recognized that uncritical deference to a proffered expert is not allowed.

Second, and more significantly, even if this Commission could defer to an expert's testimony regarding the reliability of his or her data, facts or methodology, it could not do so here *because Murray's submissions to this Commission are completely devoid of any such testimony.* This is the most obvious deficiency in Murray's proffered opinions. Absolutely no effort is made by Murray or the Staff to substantiate the reliability of his calculations. In fact, Murray has not engaged and/or refused to engage in the kinds of analyses essential to any such reliability assessment. (Murray Dep. at 44-46, 83-84, 87-88.) For example, Murray testified as follows:

> Q. Have you ever tested the methodologies that you are using to make sure that they comply with the Supreme Court precedents as it relates to expert testimony?
>
> A. No, I haven't.

(Murray Dep. at 47.) This is a patent violation of § 490.065.3 RSMo. *See Whitnell, supra,* 129 S.W.3d at 418.

The record before this Commission demonstrates that Murray is no better qualified as a utility finance analyst seeking to make rate of return determinations than any person who can operate a calculator and read and edit canned testimony. Mechanically plugging data into a formula set forth in such canned testimony is not sufficient experience under § 490.065.1 RSMo.[6] Further, Murray and the Staff has failed to conduct the reliability assessments demanded by § 490.065.3 RSMo. There is simply no basis for admitting his testimony in this proceeding.

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[6] However, in this case, all parties agree that to provide testimony related to return on equity or rate of return, expert qualifications are necessary.

## Conclusion

For the foregoing reasons, and those set forth in MGE's opening and reply memoranda of law in support of this motion, MGE respectfully submits that the Commission should exclude Murray's opinions and testimony regarding a rate of return for MGE from this proceeding.

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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, mailed by U.S. mail or electronically transmitted on this 7TH day of June, 2004, to all parties of record.