

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

In the Matter of Missouri Gas Energy's)
Tariff Sheets Designed to Increase)
Rates for Gas service in the)
Company's Missouri Service Area)

Case No. GR-2004-0209

**SUGGESTIONS OF MISSOURI GAS ENERGY IN
OPPOSITION TO PUBLIC COUNSEL'S MOTION FOR
RECONSIDERATION AND REQUEST FOR EXPEDITED TREATMENT**

COMES NOW Missouri Gas Energy ("MGE"), and provides the following suggestions in opposition to Public Counsel's Motion or [sic] Reconsideration and Request for Expedited Treatment filed on July 29, 2004. In that regard, MGE states as follows:

**The Ruling of the Administrative Law Judge Striking Certain Portions of
Public Counsel Witness Kimberly Bolin's True-Up Testimony was
Appropriate and Should not be Reversed by the Commission.**

Essentially, the Public Counsel argues the Administrative Law Judge's ("ALJ") ruling striking certain portions of the prepared true-up testimony of Public Counsel witness Kimberly Bolin was erroneous because the objection to her testimony was untimely. This argument should be rejected by the Commission.

MGE's motion to strike certain portions of Ms. Bolin's true-up testimony was made in a timely fashion. The Motion to Strike was made when Ms. Bolin was on the stand being cross-examined by MGE's counsel. The motion to strike was made at the earliest opportunity after the objectionable nature of the testimony was ascertained so that the ALJ had an opportunity to correct the record. This is an entirely appropriate procedure. See, *City of Kansas City v. Thomson*, 208 S.W. 2d 216 (Mo. 1947). The

correctness of this approach becomes apparent on a review of the relevant portions of the transcript.

On cross-examination, Ms. Bolin was asked a series of questions the purpose of which was to determine whether she had any first-hand knowledge about the topic to which her Schedule KKB-7 related and to otherwise determine whether she had any particular expertise about the subject matter (i.e. reasonableness of attorney's fees). (Tr. p. 2571 – 2577.) It was not until after those answers had been elicited from Ms. Bolin that a basis for challenging the offensive testimony and materials on the grounds of hearsay and lack of expertise were known to counsel. This is the precise purpose for cross-examination in proceedings before the Commission which, unlike many other agencies, rely heavily on prepared and pre-filed testimony.

Schedule KKB-7 to Ms. Bolin's Testimony is Impermissible Hearsay Testimony and no Foundation was Provided for its Admission by Witness Bolin

The ALJ correctly ruled that Schedule KKB-7 to Ms. Bolin's testimony (as well as the questions and answers related to the schedule) should be stricken on the grounds that Ms. Bolin has no subject-matter expertise to testify about the reasonableness of attorney's fees and, further, that the material upon which she relied to express her views is impermissible hearsay testimony.

It is fundamental rule of evidence in this state that agencies may not rely on hearsay testimony in reaching their decisions because hearsay testimony is not competent and substantial evidence upon the whole record as is required by the Missouri Constitution. *State ex rel. DeWeese v. Morris*, 221 S.W. 2d 206, 209 (Mo. 1949); *Mo. Const.* Art. V §18.

A careful reading of the principal case upon which Public Counsel relies actually supports MGE's contention that the ALJ's decision to grant the motion to strike was appropriate. That case demonstrates that the Missouri appellate courts have recognized that it is within the Commission's discretion to reject hearsay evidence even if received without an initial objection.

It is true, as KCPL and the Commission argue, that while hearsay evidence received without objection may be used to support an agency's decision, the Commission does not have to accept it as persuasive evidence. *Id.* Indeed, "[e]valuation of expert testimony is left to the Commission which 'may adopt or reject any or all of any witnesses [sic] testimony.'" *Associated Natural Gas*, 37 S.W. 3d at 294 (quoting *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W. 2d 870, 880 (Mo. App. 1985)). When the Commission decides, in a proper exercise of its discretion, whether to adopt or reject an expert's testimony, this court will not second-guess that decision. *Id.*

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

Additionally, it is noteworthy that Public Counsel has cited no other cases involving the Commission which support its argument that MGE has waived any objection to the disputed testimony. Specifically, the case of *Reinert v. Dir. of Revenue*, 894 S.W. 2d 162 (Mo. banc. 1995), cited by Public Counsel, concerned itself with an administrative proceeding involving driving privileges. The evidence at issue in that case was the Petitioner's blood alcohol content and thus, this case was decided in an entirely different context unrelated to the testimonial evidence which is at issue here.

Similarly, Public Counsel relies on *Liszewski v. Union Electric Co.*, 941 S.W. 2d 748 (Mo. App. 1997), which involved the appeal of a civil judgment following the Plaintiff's suit for injuries received when he was electrocuted while employed by the Defendant. The cases of *Moto, Inc. v. Board of Adjustment of City of St. Louis*, 88 S.W.

3d 96 (Mo. App. E.D. 2002) and *Animal Shelter League of Ozarks v. Christian County Board of Adjustment*, 995 S.W. 2d 533 (Mo. App. 1999), are both zoning cases in which the disputed evidence was wholly dissimilar from the testimony which was ordered stricken by the ALJ in this case.

Thus, with the exception of *State ex rel. GS Technologies Operating Company, Inc. v. Public Service Commission*, which validates the ALJ's ruling as noted above, Public Counsel has failed to cite any authority which would mandate that MGE's objection be deemed waived in this context.

It is important that the Commission's decision be based on competent testimony because otherwise its decision may end up being premised on unreliable information. It is perfectly appropriate for the ALJ (on behalf of the Commission) to act as the gatekeeper of the evidentiary record and to screen out unreliable hearsay testimony offered to support the opinion of a witness who is shown after cross-examination to be not qualified to render an opinion about the subject matter.

Ms. Bolin's stricken testimony also is not admissible under Chapter 536 RSMo. The rules of evidence as applied to agency proceedings only permit the use of statistical examinations, studies, audits, compilations of figures or surveys offered by a witness at the time of hearing "under whose supervision such examination, study, audit, compilation of figures, or survey was made [and] was basically qualified to make it." §536.070(11) RSMo. Cross-examination of Ms. Bolin at the time of hearing clearly demonstrated none of these circumstances applied to her proffered Schedule KKB-7.

The ALJ's Ruling was Appropriate Because to Have Received the Stricken Material Would be Tantamount to Permitting an Attorney of Record in the Case to Also Act as a Witness in Support of His Own Argument

The ruling of the ALJ in striking Schedule KKB-7 to Ms. Bolin's testimony, beyond being correct as a matter of strict evidentiary ruling, also obviates the necessity for the Commission to deal with a troubling implication of what Public Counsel proposes to accomplish. The Commission should keep in mind that Schedule KKB-7 to Ms. Bolin's true-up testimony, which has now been stricken, includes a memorandum prepared by Michael Dandino. Mr. Dandino is another attorney in the Office of the Public Counsel who, like Mr. Micheel, has entered an appearance as counsel of record and actively participated in the case in opposition to MGE's motion to exclude the testimony of Staff witness David Murray.¹ The memorandum contains Mr. Dandino's analysis of the legal fees billed to MGE by the law firm of Kasowitz, Benson, Torres & Friedman, including his purported expert opinion about the capabilities and experience of that firm and the reasonableness of the charges for services rendered by it.

It is a concern to MGE, and it should be of concern to the Commission, that a factual analysis prepared by an attorney of record in this case to be used in this case is being offered as the foundation for the conclusions offered by Ms. Bolin with respect to customary and reasonable attorney's fees in the State of Missouri. This is tantamount to one attorney (Mr. Micheel) indirectly offering the testimony of co-counsel (Mr. Dandino) as a witness through the artifice of Ms. Bolin's sponsoring testimony. Not only does this constitute a boot-strapping argument of the most transparent nature, but it raises the potential issue of Mr. Dandino's apparent dual role as advocate and witness

¹ The relevant portion of the transcript evidencing Mr. Dandino entering his appearance of record is attached hereto as **Appendix 1**.

in this case.² This concern cannot be alleviated or circumvented by a technical ruling on the admissibility of evidence.

In any event, it is unfortunate that a lawyer would become a witness in the case for the purpose of disallowing the legal fees of opposing counsel. The motivation for this action is seriously suspect in that it appears to be retaliatory in nature. At oral argument on June 3, 2004, Mr. Dandino was forceful in stating his view that MGE's motion to exclude the testimony of Staff witness David Murray was frivolous.

And once more, in the end, the most tragic part of this is that MGE, and as most companies will or do, ask for recover[y] of fees and expenses for bringing this motion. And I think that's unconscionable in this situation where it's not really a – a legal question, but they're trying to get an advanced ruling on credibility.

(Tr. 55, l. 14-19) It is apparent that the rejected Dandino memo in no way reflects an objective and dispassionate evaluation of the issue. To the contrary, it appears to be an effort to stifle legitimate debate on important emerging legal issues presented in cases before the Commission. Finally, it presents a serious due process issue because it appears to be calculated impede MGE's ability to present its case to the Commission by hiring counsel of its choice.

Mr. Dandino should not be permitted to testify as a witness in this case by permitting Ms. Bolin to offer his analysis and opinion as an exhibit to her testimony. As a practical matter, the ALJ's ruling with respect to Ms. Bolin's testimony and the fact that

² See, Missouri Supreme Court Rule of Professional Conduct 4-3.7 "Lawyer as Witness." None of the exceptions to the rule would appear to apply in these circumstances. Paragraph (a)(2) permits testimony by a lawyer going to the nature and value of legal services rendered by him or his firm. In this case, Mr. Dandino is not offering testimony about the nature and value of his own legal services but, rather, he is offering his opinion of the value of legal services rendered by opposing counsel.

he sustained MGE's Motion to Strike these materials alleviates the need to address this issue and, consequently, should not be overruled.

WHEREFORE, for the reasons aforesaid, MGE requests that the Commission deny Public Counsel's motion to reconsider the ruling of its ALJ with respect to his decision to grant MGE's motion to strike certain portions of Public Counsel Witness Kimberly Bolin's true-up testimony.

Respectfully submitted,

/s/ Paul A. Boudreau
Paul A. Boudreau MO #33155
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166 Phone
(573) 635-0427 Fax
paulb@brydonlaw.com

Attorneys for Applicant, Southern Union
Company d/b/a Missouri Gas Energy

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 5th day of August, 2004 to the following:

Mr. Robert V. Franson
General Counsel's Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Mr. Douglas E. Micheel
Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230

Mr. Jeremiah D. Finnegan
Finnegan, Conrad & Peterson
1209 Penntower Office Center
3100 Broadway, Ste. 1209
Kansas City, MO 64111

Mr. Stuart W. Conrad
Finnegan, Conrad & Peterson
1209 Penntower Office Center
3100 Broadway, Ste. 1209
Kansas City, MO 64111

Mr. Mark W. Comley
Newman, Comley & Ruth
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102

Major Craig Paulson
Federal Executive Agencies
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Mr. Marc Ellinger
Blitz, Bardgett & Deutsch, LC
308 E. High, Suite 301
Jefferson City, MO 65101

/s/ Paul A. Boudreau

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Oral Argument

June 3, 2004
Jefferson City, Missouri
Volume 9

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

MORRIS L. WOODRUFF, presiding,
SENIOR REGULATORY LAW JUDGE
STEVE GAW, Chairman
CONNIE MURRAY,
ROBERT M. CLAYTON, III,
JEFF DAVIS,
LINWARD "LIN" APPLING,
COMMISSIONERS

REPORTED BY:
Jennifer L. Leibach
MIDWEST LITIGATION SERVICES

A P P E A R A N C E S

PAUL A. BOUDREAU
BRYDON, SWEARENGEN, ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65101
(573) 635-7166

FOR: Missouri Gas Energy

DANIEL HERSCHMANN
KASOWITZ, BENSON, TORRES & FRIEDMAN
1633 Broadway
New York, NY 10019

FOR: Missouri Gas Energy

STUART W. CONRAD
FINNEGAN, CONRAD & PETERSON
1209 Penntower
3100 Broadway
Kansas City, Missouri 64111
(816) 753-1122

FOR: Midwest Gas User's Association

ROBERT S. BERLIN, General Counsel
TIM SCHWARZ, General Counsel
P.O. Box 360
Jefferson City, Missouri 65102
(573) 751-5239

FOR: Staff of the Public Service
Commission

MICHAEL DANDINO, General Counsel
DOUGLAS MICHEEL, General Counsel
P.O. Box 2230
Jefferson City, Missouri 65102
(573) 751-4857

FOR: Office of the Public Counsel and
the Public

PROCEEDINGS

JUDGE WOODRUFF: Let's go ahead and go on the record. This is Case No. GR-2004-0209, which concerns Missouri Gas Energy's tariffs to implement a general rate increase for their natural gas service. We're here today for oral arguments on a motion that was filed by Missouri Gas Energy to exclude certain testimony and opinions of David Murray, who is a witness for the Staff.

We'll begin today by taking entries of appearance for the parties that are here today, and we'll begin with MGE.

MR. BOUDREAU: Thank you, let the record reflect the Boudreau with the law firm of Brydon, Swearengen, England, 312 East Capital Avenue, Jefferson City, Missouri.

With me today is -- also appearing on behalf of MGE is Eric Daniel Herschmann with the law firm of Kasowitz, Benson, Torres & Friedman, 1633 Broadway, New York, New York, appearing pro hock visa.

JUDGE WOODRUFF: Okay. Thank you. For Staff.

MR. SCHWARZ: If I might with respect to Mr. Herschmann's appearance pro hock visa, Supreme Court rule 9.03 requires that the attorney present the receipt required by rule Supreme Court Rule 6.01 at the time of his entry.

JUDGE WOODRUFF: I believe that rule does not go into effect until like, I believe, the end of this month.

MR. SCHWARZ: Very well.

JUDGE WOODRUFF: And if there was a motion there, I will deny it. Okay. Entry of appearance for Staff.

MR. BERLIN: Appearing on behalf of Staff, Bob Berlin and Tim Schwarz, Post Office Box 360, Jefferson City, Missouri, 65102.

JUDGE WOODRUFF: And for Public Counsel.

MR. DANDINO: Michael Dandino and Douglas Micheel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri, 65102, representing the Office of Public Counsel and the Public.

JUDGE WOODRUFF: All right. Any other parties here?

MR. CONRAD: Your Honor, let the record show the appearance of Stuart Conrad, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri, 64111, on behalf of Midwest Gas Users Association.

JUDGE WOODRUFF: Any other parties represented here?

All right. What we'll do, then, is allow for oral argument, beginning with MGE since it is their motion. Then I'll give all the other parties a chance to respond, and finally giving MGE the chance for the last shot. Since we have Commissioners here, I'm going to advise the Commissioners that I intend to run this essentially the same