

**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

MOTION TO STRIKE DIRECT TESTIMONY

COMES NOW Southern Union Company, d/b/a Missouri Gas Energy ("MGE"), and requests an order of the Missouri Public Service Commission ("Commission") striking certain portions of the prepared direct testimony of Staff witnesses Charles R. Hyneman, Deborah Ann Bernsen, Ann M. Allee and Mark L. Oligschlaeger and, also, of Office of the Public Counsel ("OPC") witnesses Barbara A. Meisenheimer and Kimberly K. Bolin. Generally, the testimony sought to be struck is either beyond the scope of the matters properly before the Commission in this proceeding or are otherwise inappropriate direct testimony in violation of the Commission's practice rules. In support thereof, MGE states as follows:

**Preliminary Observations Concerning the Legal Authority for
MGE's Tariff Filing and the Commission's Rule of Evidence**

1. In this case, MGE has filed tariffs containing proposed revised rate schedules and related regulations as permitted under §393.150 RSMo 2000. That statutory provision authorizes a gas corporation to file schedules stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service. It also gives the Commission the authority to enter upon a hearing "concerning the propriety of such rate, charge, form of

contract or agreement, rule, regulation or practice” and to suspend the effective date of the tariff to permit the Commission to undertake its investigation.

2. The only issue presented by the Commission in such a circumstance is whether the charges proposed by MGE are “just and reasonable.” See, § 393.130 RSMo 2000. If the Commission determines a different level or design of rates or charges are appropriate, it may by order direct an appropriate level of rates to be charged by MGE to its customers in this state for service provided, no more.

3. The Commission has promulgated a rule governing the use of prepared testimony in its proceedings. 4 CSR 240-2.130(7). That rule sets forth specific purposes of prepared direct, rebuttal and surrebuttal testimony. It states that “direct testimony shall include all testimony and exhibits asserting and explaining that party’s entire case-in-chief.” 4 CSR 240-2.130(7)(A).

4. A number of the witnesses in this case have filed testimony that is either beyond the scope of the solitary issue presented for decision in this case or violates the Commission’s rule concerning the purpose of prepared direct testimony.

Direct Testimony of Staff Witness Charles R. Hyneman

5. MGE requests that the Commission strike that portion of the direct testimony of Staff witness Charles R. Hyneman commencing on page 34, line 17 (starting with the word “However”) through page 35, line 2. This testimony contains Mr. Hyneman’s request that Southern Union be ordered by the Commission to keep certain time reports associated with Southern Union’s M&A activities.

6. This recommendation is beyond the scope of the issue presented to the Commission in this case. As noted above, the Commission is only authorized by law to

determine whether the rates proposed by MGE in this case are “just and reasonable.” The applicable statutory provisions do not provide the Commission with any statutory authority to enforce any provisions set forth in any other order of the Commission or impose new or additional conditions with respect to the Commission’s decision in this case.¹ No party other than MGE is entitled to any affirmative relief in the context of this case. Consequently, Mr. Hyneman’s recommendation that the Commission order MGE to keep certain time records is unauthorized by law and should be stricken as inappropriate direct testimony.

7. To the extent that Mr. Hyneman’s recommendation has merit, the issue should not in any event be imposed on MGE specifically. Rather, such a proposal should be part of a proposed rulemaking that, if adopted, would have industry-wide applicability. It is inappropriate to single out MGE for such an obligation.

Direct Testimony of Staff Witness Deborah Ann Bernsen

8. MGE requests that the Commission strike that portion of Staff witness Deborah Ann Bernsen’s direct testimony commencing on page 9, line 10 through line 16. This testimony contains Ms. Bernsen’s recommendation that MGE be required to respond to Staff inquiries regarding customer complaints within specified periods of time. As already noted, no party other than MGE is entitled to any affirmative relief from the Commission in this case. The only issue presented to the Commission is whether the rate schedules proposed by MGE are “just and reasonable.” Accordingly, Ms.

¹ Compare, §393.170 RSMo 2000 addressing the grant of certificates of convenience and necessity. Subsection 3 of that statute specifically states that “the Commission may be its order impose such condition or conditions as it may deem reasonable and necessary.” The express authority appearing in §393.170 RSMo negates the suggestion that the Commission has commensurate implied authority under §393.150 RSMo.

Bernsen's request that a reporting obligation be imposed on MGE is beyond the scope of this case.

9. To the extent that Ms. Bernsen's recommendation has merit, the issue should not in any event be imposed on MGE specifically. Rather, such a proposal should be part of a proposed rulemaking that, if adopted, would have industry-wide applicability. It is inappropriate to single out MGE for such an obligation.

Direct Testimony of Staff Witness Anne M. Allee

10. MGE requests that the Commission strike that portion of Staff witness Anne M. Allee's direct testimony commencing at page 6, line 8 and continuing through page 9, line 2. This testimony contains a recommendation by Ms. Allee that MGE file with the Commission certain gas purchasing plans and capacity or reliability reports/information. This recommendation is beyond the scope of the solitary issue presented in this case, that is, whether the proposed rate schedules of MGE are "just and reasonable." No other party to this proceeding is entitled to any affirmative relief in the context of this case. Consequently, the testimony is beyond the scope of this case.

11. To the extent that Ms. Allee's recommendation has merit, the issue should not in any event be imposed on MGE specifically. Rather, such a proposal should be part of a proposed rulemaking that, if adopted, would have industry-wide applicability. It is inappropriate to single out MGE for such an obligation.

Direct Testimony of Mark L. Oligschlaeger

12. MGE requests that the Commission strike that portion of Staff witness Mark L. Oligschlaeger's direct testimony commencing at page 9, line 14 and continuing through page 10, line 18. The testimony contains a recommendation by Mr.

Oligschlaeger that the parties to this case discuss during the prehearing conference certain commitments made by Southern Union in the context of Case No. GM-2003-0238. Setting aside the fact that Southern Union disputes Staff's allegation that it has not adequately complied with the terms of the Stipulation and Agreement identified by Mr. Oligschlaeger, this is quite clearly a matter that is beyond the scope of the solitary issue presented in this case, that is, whether the proposed rate schedules of MGE are "just and reasonable." The tariffs filed by MGE in this case provide no lawful basis for the Commission to make a determination concerning Southern Union's compliance with the terms of the Stipulation in Case No. GM-2003-0238.

Direct Testimony of OPC Witness Barbara A. Meisenheimer

13. MGE requests that the Commission strike that portion of OPC witness Barbara A. Meisenheimer's direct testimony commencing at page 2, line 6 (beginning with the phrase "The final adjustment") through line 8 and, also, that testimony commencing at page 10, line 13 through page 13, line 3. This testimony contains a recommendation by Ms. Meisenheimer that the Commission direct the funding through customer rates of new experimental efficiency programs. Though couched in the jargon of a revenue adjustment, this is merely an effort to impose upon MGE the obligation to implement a number of public interest programs. Setting aside the arguable merits of such programs, this testimony is beyond the scope of the solitary issue in this case, that is, whether or not the rates proposed by MGE are "just and reasonable." The fact that the proposed programs are well-intentioned, does not change the fact that the relief requested by OPC is unauthorized by law.

14. To the extent that Ms. Meisenheimer's recommendation in this regard has merit, the issue should not in any event be imposed on MGE specifically. Rather, such proposals should be the part of a rulemaking docket that, if adopted, would have industry-wide applicability. It is inappropriate to single out MGE to implement such programs.

Direct Testimony of OPC Witness Kimberly K. Bolin

15. MGE requests that the Commission strike that portion of OPC witness Kimberly K. Bolin's direct testimony commencing on page 9, line 10 and continuing through page 12, line 14. This testimony is not valid direct testimony. Rather, Ms. Bolin's testimony concerning the environmental response fund is rebuttal testimony in the guise of direct testimony.

16. It is apparent from the reading of Ms. Bolin's discussion of the environmental response fund that it is no more than a rebuttal of the fact that MGE's manufactured gas plant (MGP) remediation costs are to be received by way of MGE's environmental response fund. Ms. Bolin voices OPC's position that it is opposed to including MGP remediation costs in MGE's cost of service. This is testimony that is in the nature of rebuttal.

17. The Commission's rule on prepared testimony makes this clear. Commission rule 4 CSR 240-2.130(7)(B) states that rebuttal testimony "shall include all testimony which is responsive to the testimony and exhibits contained in any other parties direct case." OPC's proposed exclusion of MGP remediation costs from MGE's cost of service clearly is not part of OPC's case-in-chief. To the contrary, Ms. Bolin's recommendation with respect to MGE's environmental response fund is rebuttal of

MGE's case-in-chief and, consequently, it is improper direct testimony. This is prejudicial to MGE's right as the party with the ultimate burden of proof in this case to have the final word with respect to the issue.²

Summary and Conclusion

18. For the reasons aforesaid, the identified portions of Staff and OPC witnesses' direct testimony is either beyond the scope of this case or is otherwise inappropriate direct testimony and should be stricken. The Commission is a creature of statute and has only that authority granted to it by the General Assembly. As is relevant to this case, the statutory authority can be found in §393.150 RSMo 2000 and §393.130 RSMo 2000. The subject matter of this rate case solely involves the determination of the appropriate level and design of MGE's rates to be charged in the future. The testimony of the parties concerning conditions or obligations to be imposed on MGE are not authorized by law and should not be permitted to be offered into the record. Moreover, MGE should not be burdened with rebutting testimony that is beyond the scope of the case.

19. The Commission's rule concerning evidence appearing at 4 CSR 240-2.130 (7) sets forth with specificity the purpose for which prepared direct testimony may be offered. Testimony which is not part of a proponent's case-in-chief is not proper direct testimony and should be stricken.

20. To the extent Staff or OPC suggest or claim that MGE has failed to comply with the requirements of the law or the Commission's rules or orders, the manner to

² Section 393.150.2 RSMo 2000 provides, in part, that "[a]t any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate proposed increased rate is just and reasonable shall be upon the gas corporation. . . ."

address these alleged compliance or reporting deficiencies is the Commission's procedures governing complaints. §386.390 RSMo 2000. This statute requires the filing of a written complaint setting forth the act or thing done, or omitted to be done, by MGE which is asserted to be in violation of law, rule or order. This is a fundamental procedural notice requirement that may not be circumvented merely by offering testimony in a rate case.

21. As noted above, to the extent any of the proposed projects, programs or reporting obligations addressed by the Staff/OPC witnesses represent meritorious ideas or sound public policy, they first should be discussed informally with industry representatives and, if the Commission desires to pursue those matters, they should be proposed in a notice of rulemaking. Any consequent rule would be one having general applicability. These matters should not be pursued or implemented in a haphazard, piecemeal fashion.

WHEREFORE, MGE requests an order of the Commission striking those portions of the direct testimony of Staff Witnesses Charles R. Hyneman, Deborah Ann Bernsen, Anne M. Allee and Mark L. Oligschlaeger and OPC witnesses Barbara A. Meisenheimer and Kimberly K. Bolin identified above for the reasons aforesaid.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'P. A. Boudreau', written over a horizontal line.

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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 22nd day of April 2004 to the following:

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