

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

In the matter of Missouri Gas Energy's) Purchased Gas Cost Adjustment tariff) Revisions to be reviewed in its 2002-) 2003 Actual Cost Adjustment.)	Case No. GR-2003-0330 et al.
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**Objection, Motion to Quash Notice of Deposition,
Request for Protective Order, and Motion for Expedited Treatment**

Comes now Missouri Gas Energy ("MGE"), a division of Southern Union Company, by and through its counsel, pursuant to Missouri Civil Rules 56 and 57 and 4 CSR 240-2.080(16), 4 CSR 240-2.085 and 4 CSR 240-2.090, and respectfully states as follows.

1. The three-day hearing in this case is set to commence next Monday morning, August 28, 2006, at 8:30 a.m.

2. On Friday, August 18, 2006, at 11:50 a.m., counsel for MGE in this proceeding received an electronic message that said a "Notice" had been filed in this case. Six minutes later, at 11:56 am CDT, an electronic version of a "Notice of Deposition" was sent to MGE's counsel, other counsel in this proceeding, and certain other members of the Staff. That Notice of Deposition is attached as **Appendix A** and is the subject of this pleading.

3. The Notice of Deposition was received approximately 30 minutes after counsel for MGE had responded to an e-mail request sent on August 16, but not actually seen by MGE's counsel until August 17, 2006. The request by Staff counsel consisted of the following: "Mr. Duffy, GCO's office would like to set up a telephone

deposition of your consultant, John J. Reed, when you return. It will have to be the week of August 21, preferably August 22 or 23. Let me know his availability.”

4. MGE’s counsel responded on Thursday, August 17, 2006, at 12:24 pm CDT as follows: “I have just seen your message. I should be able to provide a response by about noon tomorrow.” At 11:20 am CDT on Friday, August 18, 2006, MGE’s counsel responded to Staff counsel’s request as follows: “I have checked on the availability of Mr. Reed next week as you requested. He is in regulatory commission hearings in Connecticut on Monday, Tuesday, Wednesday and Thursday. On Friday he is traveling. Therefore, he is not available for a deposition during the period you requested.”¹

5. John J. Reed is the Chairman and Chief Executive Officer of Concentric Energy Advisors, Inc., which is located in Marlborough, Massachusetts. His company was retained by MGE to provide expert assistance in this proceeding. Mr. Reed filed prepared direct testimony in this case on November 21, 2005, rebuttal testimony on February 1, 2006, and surrebuttal testimony on July 19, 2006. That prepared testimony, consisting of over 100 pages, not including schedules, set out the opinions he has regarding this proceeding and the facts on which he based those opinions.

6. The above-noted informal request to schedule a deposition was the first such indication that Staff wanted to take Mr. Reed’s deposition. Staff has been aware that he is a witness in this proceeding since at least November 21, 2005, when his direct testimony was filed. Staff took the deposition of three other people in Case No.

¹ It is presently uncertain when the Connecticut hearings will conclude. It is also uncertain whether Mr. Reed will return to his office in the Boston area in between the time of the Connecticut and Missouri hearings.

GR-2003-0330 (before it was consolidated with Case No. GR-2002-348) on April 15, 2004. Those depositions were taken at a mutually agreed time and place.

7. MGE has never refused to produce any witness for a deposition in this proceeding. MGE acknowledges that the right of a party to take depositions is absolute, but also acknowledges that it is within the discretion of the governing authority to deny the right to take a deposition where circumstances dictate that result.

8. 4 CSR 240-2.090(1) provides that discovery is available in cases before the Commission on the same basis as in civil cases in circuit court, and that the same time limits and sanctions also apply. ***MCI WorldCom Communications, Inc. et al. v. Southwestern Bell Telephone Co.***, Case No. TC-2000-225, 2000 Mo. PSC Lexis 1292, August 17, 2000. Therefore, the Commission's authority necessarily extends to protective orders under Rule 56.01(c). ***Id.***

9. Mo. Rule Civ. Pro. 56.01(c) provides that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;

- (6) that a deposition after being sealed be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

10. The Commission also has a rule allowing a party to seek a protective order in any case. 4 CSR 240-2.085(1).

11. This pleading seeks an order from the Commission quashing the Notice of Deposition and a protective order specifying that the deposition not be held as noticed on Friday, August 25, 2006, for the reasons more particularly described below.

Lack of Subpoena

12. MGE has not seen, and is not aware of the existence of, any subpoena related to this Notice of Deposition it received.

13. Mo. Rule. Civ. Pro. 57.03(a) clearly sets out that the attendance of witnesses may be compelled by subpoena as provided in Rule 57.09, and that the attendance of a party is compelled by notice as provided in subdivision (b) of that rule. In this case, Mr. John Reed, the specific subject of the Notice of Deposition, is not a party to the case, but rather a witness scheduled to testify.

14. According to ***Missouri Practice***, Vol. 16, p. 58 (West Group, 1998), commenting on the provisions of Rule 57, “The attendance of a non-party deponent is *not compelled* by the issuance and service of a deposition notice (notices are only directed to parties to the lawsuit) but must be compelled by subpoena as provided in Rule 57.09.” (Emphasis original)

15. In ***State ex rel. Common v. Darnold***, 120 S.W.3d 788, (Mo.App.S.D. 2003), a preliminary writ of prohibition against the trial court was made absolute in a situation where the trial court, in the guise of a sanction, effectively ordered a party to produce a non-party, non-resident witness in Missouri for a deposition although the party had no legal means to require the attendance in order to comply with the order. The Southern District stated in that case that “the attendance of a party for a deposition is compelled by a notice meeting the requirements of Rule 57.03(b), but the attendance of other witnesses is compelled by subpoena as provided in Rule 57.09. It is clear, therefore, that the notice to take depositions [without an accompanying subpoena] served by [defendant’s counsel] was not sufficient to compel the attendance of [a non-party witness domiciled in the State of Washington] at a deposition in Kansas City.” ***Id.***, at 791. The Southern District also commented that, as a general rule, a Missouri court’s subpoena authority *does not reach beyond the geographical boundaries of the state.* ***Id.***, at 792. (emphasis added).

16. Therefore the attendance of John J. Reed, who is not a resident of the state of Missouri, at the deposition noticed by Staff for August 25, 2006, would absolutely require a subpoena as provided in Rule 57.09. In support of this interpretation, and in agreement with the statement in ***Missouri Practice***, the Missouri Court of Appeals has held that Mo. R. Civ. P. 57.03(a) is the counterpart of Fed. R. Civ. Pro. 30(a), and has indicated with respect to the interpretation of the federal rule that “though the rules do not say so expressly, a subpoena is not necessary if the person to be examined is a party or an officer, director, or managing agent of a party.” ***Hi-Plains Elevator Machinery, Inc. v. Missouri Cereal Processors, Inc.***, 571 S.W.2d 273, 277

(Mo. Ct. App. 1978). Therefore, the opposite proposition is supported in this case: that a subpoena is necessary if the person is not a party, but is instead a witness, as Mr. Reed is. See ***In the Matter of the Petition of Southwestern Bell Telephone Company***, PSC Case No. TO-97-397, 6 Mo. P.S.C. 3d 493.

17. MGE has no knowledge as to whether Staff has sought a subpoena. Even if it had done so at the same time it e-mailed the Notice of Deposition, Staff would run head-on into the requirements of 4 CSR 240-2.100(2), which says: “Except for a showing of good cause, a subpoena or subpoena *duces tecum* shall not be issued fewer than twenty (20) days before a hearing.” There is also the substantial question of whether a subpoena issued by a Missouri administrative agency would be effective regarding a non-resident of Missouri. Therefore, without any subpoena evident, Staff’s Notice of Deposition is insufficient under Missouri law to compel the attendance of Mr. Reed at the deposition on August 25, 2006. Given the circumstances, MGE believes it should also state the reasons why, if such an attempt is made by Staff to secure a subpoena at the last minute, that good cause for the issuance of such a subpoena does not exist.

18. Staff cannot possibly claim any form of surprise at this very late date of the existence of John J. Reed, or anything related to the contents of his prepared testimony. His direct testimony and credentials as an expert witness have been on file with the Commission for eight months. Staff has sent numerous data requests seeking information about the material in Mr. Reed’s prepared testimony, and MGE has responded to all such requests, so Staff has had more than an ample opportunity to

conduct, and has in fact, conducted discovery regarding Mr. Reed's statements of fact and opinion.

19. Staff has had the opportunity to request a deposition of Mr. Reed since at least November 21, 2005. The last filing of prepared testimony he made was on July 19, 2006, more than a month ago. Yet no request for a deposition of Mr. Reed was received by MGE's counsel until late last week.

20. There was an indication from a pleading Staff filed recently that there have been changes in Staff counsel relating to this case. MGE is aware of at least six counsel from the Staff (Bob Berlin, Lera Shemwell, Tim Schwarz, Shelley Syler, Kevin Thompson and Steven Reed) that have participated at one time or another in this case. As previously noted, Staff counsel conducted three depositions of MGE witnesses in one of these two consolidated cases back in April of 2004. So any potential claim that there has not been an adequate opportunity for Staff counsel to conduct depositions would be totally unfounded. Based on all of this, and balancing the equities as required by law, there is no conceivable allegation of "good cause" that can overcome those facts.

21. After being specifically informed that Mr. Reed was traveling on August 25, 2006, and would not be available on that date for a deposition, the Staff nevertheless issued the Notice of Deposition for that date. This, coupled with the fact that Friday, August 25, is the last business day before the commencement of the hearing, strongly suggests at least the appearance of an intent by Staff to harass Mr. Reed, or MGE, or both during their necessary preparations for the hearing.

22. The right to take depositions is subject to limitation and must be measured in equitable terms as to the adverse consequences or hardship on the party from whom the deposition is sought as opposed to the party seeking discovery. **State v. Jovanovic**, 615 S.W.2d 533 (Mo.App.E.D. 1981). In that case, the appellate court upheld the discretion of the trial court in denying a second deposition as unnecessary.

Staff Already Possesses What it Would Be Entitled to Obtain in a Deposition

23. Missouri Civil Rule 56.01(b) governs the scope of discovery. Subsection (4) applies particularly to expert witnesses. It provides:

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule 56.01(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(b) A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.

24. This clearly indicates that Staff is entitled to discover “the facts and opinions to which the expert is expected to testify.” It also clearly contemplates normal civil procedure whereby a deposition would be taken well before the trial commences and direct testimony is heard live from the witness stand. It is not typically done that way before the Public Service Commission, though. The PSC requires the filing of *prepared* testimony well in advance of the hearing. Therefore, the “facts and opinions to which the expert is expected to testify” have already been supplied to Staff in the form of Mr. Reed’s prefiled direct, rebuttal and surrebuttal testimony, dating back as far as

November of last year. Clearly, the Staff has already “discovered” the facts and opinions on which this expert is expected to testify, and without having to pay “a reasonable hourly fee.”

Rule Violation Concerning the Notice and Service Thereof

25. Rule 57.03 was amended June 25, 2001, effective January 1, 2002. The amendment rewrote subsection (b)(1). The revised version is substantially the same with one exception. The amendment makes very clear that non-party deponents must be given at least seven days written notice of their deposition: “(1) A party desiring to take the deposition of any person upon oral examination shall give not less than seven days notice in writing to every other party to the action and to a non-party deponent.”

26. The Staff has failed to comply with that provision. The electronic version of the Notice of Deposition that is attached to this Motion was addressed to the following people or entities: Gary Duffy, OPC Service, Jeff Keevil, Rob Hack, and Brian McCartney. It also indicated that “cc’s” went to Steven Reed, Kevin Thompson, Carla Schneiders, and Rosemary Robinson.” John J. Reed, the non-party deponent, is not an indicated recipient of the Notice of Deposition sent by Staff, even if sending something by email can be considered “written notice” sufficient for Rule 57.03. Given that the Notice was issued on a date that gave the recipients then only the minimum seven days notice required by Rule 57.03, Staff cannot now correct that failure in time for a deposition to take place prior to the commencement of the hearing.

27. In summary, while Staff has taken the requisite steps necessary to compel the attendance of all the parties to this proceeding at a deposition set for Friday, August 25, 2006, at the offices of the Missouri Public Service Commission, it has failed to take

the appropriate steps necessary to compel the attendance of the only person it seeks to depose.

Motion for Expedited Treatment

28. Because Staff chose to initiate this situation at the last minute before the hearing commences, and set the deposition for the last weekday before the hearing begins, MGE is forced to request expedited treatment of this Motion since allowing Staff the normal ten days in which to respond would make the issue moot. In accordance with 4 CSR 240-2.080(16), MGE therefore states as follows.

29. The last date by which MGE desires the Commission to act is Thursday, August 24, 2006, which is the day before the date for the deposition in the Notice of Deposition.

30. The harm that will be avoided if the Commission acts on or before Thursday, August 24, 2006, is that counsel for MGE and all the other parties will be relieved of the obligation to comply with a notice compelling the attendance of the parties, where the Staff has failed to take the steps necessary to compel the attendance of the only deponent. Further, Mr. John J. Reed will be able to avoid the inconvenience, annoyance, substantial expense, and harassment of having to rearrange previously scheduled activities and apparently travel to Jefferson City, Missouri to deal on very short notice with a Notice of Deposition that (a) was never sent to him, and (b) even if he should receive it, is not enforceable against him because he has not been served with a proper subpoena.

31. MGE started doing legal research and preparing this pleading on Friday afternoon, August 18, 2006, shortly after the Notice of Deposition was received. Further

work was done on it over the intervening weekend, with it being finalized on the afternoon of Monday, August 21, 2006, just prior to filing. Therefore, this pleading was filed as soon as it could reasonably be completed under the circumstances.

32. MGE expects that Mr. Reed will be taking the witness stand as the first witness in this proceeding when it commences on Monday, August 28, 2006, and that the Staff will be able to cross-examine him on that date.

WHEREFORE, for the foregoing reasons, MGE states its objection to the Notice of Deposition attached hereto, and requests that the Commission (a) act on an expedited basis to issue an order no later than Thursday, August 24, 2006, that quashes the Notice of Deposition, and (b) also issue a protective order that no discovery in the form of a deposition of Mr. John J. Reed be had in this proceeding prior to the commencement of the hearing.

Respectfully submitted,

/s/ Gary W. Duffy

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was either mailed or hand delivered or sent electronically this 21st day of August, 2006, to:

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