

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

In the Matter of the Application of Missouri Gas )  
Energy, a division of Southern Union Company ) Case No. GU-2010-0015  
for an Accounting Authority Order Concerning )  
Kansas Property Tax for Gas in Storage. )

**MGE’S RESPONSE TO PUBLIC COUNSEL’S MOTION TO DISMISS**

Comes now Missouri Gas Energy, a division of Southern Union Company (“MGE” or “Company”), and, in response to Public Counsel’s Motion to Dismiss MGE’s Request for an Accounting Authority Order, or in the Alternative, Request for Hearing (Motion to Dismiss), respectfully states as follows to the Missouri Public Service Commission (“Commission”):

**SUMMARY**

The Commission has previously addressed the issues raised by the Office of the Public Counsel’s (Public Counsel) Motion to Dismiss in its Report and Order in Case No. GU-2005-0095. Case No. GU-2005-0095 was a contested case that resulted in the grant to MGE of an AAO concerning the 2004 Kansas property tax legislation concerning property tax on gas held in storage. There is no reason for a contrary result in this proceeding related to the 2009 Kansas property tax legislation.

**BACKGROUND**

1. On July 13, 2009, MGE filed its Application for an Accounting Authority Order, which is the subject of this case. The Application sought a Commission order authorizing deferred accounting treatment for new Kansas property taxes related to the storage of natural gas incurred pursuant to a statute enacted this year and signed into law on April 21, 2009.

2. On July 14, 2009, the Commission issued its Order Directing Notice and Establishing Time for Requests to Intervene.

3. On August 5, 2009, the Commission issued its Order Directing Staff to File Recommendation, therein noting that no party had requested to intervene in this matter.

4. On August 6, 2009, Public Counsel filed its Motion to Dismiss. In support of its Motion to Dismiss, Public Counsel argued that the Application should be “summarily dismissed because: 1) Property tax is a typical business expense and is therefore not extraordinary as required by the Uniform System of Accounts (USOA) for AAO deferrals; 2) If MGE is required to pay the Kansas property tax it would be an annual recurring expense and is therefore not extraordinary as required by the USOA for AAO deferrals; and 3) The filing is premature because no taxes have been assessed and the amount of any future tax is not known and measurable.” Motion to Dismiss, p. 1.

### **STANDARD**

5. Public Counsel’s Motion to Dismiss essentially alleges that MGE Application fails to state a claim or cause of action. “[O]n a motion to dismiss for failure to state a cause of action, a court reviews the allegations of the petition to determine whether the facts pled therein are sufficient as a matter of law” and “assumes that all of a plaintiff's averments are true.” *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77 (Mo. 2008).

6. The standard to be applied in regard to the issuance of an accounting authority order (AAO), and the order’s import, has developed through a combination of statute, regulation and case law. The Commission, pursuant to Section 393.140, RSMo, has promulgated Commission Rule 4 CSR 240-40.040, which prescribes the

use of the Uniform System of Accounts (USOA) adopted by the Federal Energy Regulatory Commission. The USOA provides for the deferred treatment of extraordinary costs. An application for an AAO contains a single factual issue -- whether the costs, which are asked to be deferred, are extraordinary in nature. *In the matter of the application of Missouri Public Service*, 1 Mo.P.S.C.3d 200, 203-204 (1991). “By seeking a Commission decision [regarding the issuance of an AAO] the utility would be removing the issue of whether the item is extraordinary from the next rate case. All other issues would still remain, including, but not limited to, the prudence of any expenditures, the amount of recovery, if any, whether carrying costs should be recovered, and if there are any offsets to recovery.” *Id.*

## **RESPONSE**

### **A. Argument that Subject is Typical Business Expense and Not Recurring is Insufficient to Defeat MGE’s Application**

7. The first two reasons cited by Public Counsel – that property tax is a typical expense and a recurring expense, and therefore not extraordinary within the meaning of the USOA – were previously addressed by the Commission in Case No. GU-2005-0095, referenced above.

8. The legislation that is the subject of this case is not the first time the Kansas legislature has attempted to enact a statute to tax gas held in storage in the state of Kansas. The first attempt was thwarted by an October 2003 Kansas Supreme Court decision holding that out-of-state natural gas distributors, such as MGE, were entitled to an exemption. In 2004, the Kansas Legislature attempted to change this result with new legislation.

9. Case No. GU-2005-0095 concerned MGE’s request for an AAO to defer

its taxes associated with the 2004 legislation. In deciding to grant the AAO, the Commission considered the fact that the expenses at issue were a form of property tax. In spite of this, the Commission found that these taxes were “extraordinary, unusual and unique, and not recurring” because of the special facts surrounding them such as the fact that MGE had never had to pay this tax in the past, the significant dollar amount at issue, the fact that MGE could not file a rate case to recover the expense because of the ongoing appeal and the general uncertainty related to the tax. Report and Order, p. 14-16.

10. This result was not without precedent. Prior to Case No. GU-2005-0095, the Commission had issued AAO’s for costs “caused by unpredictable events, acts of government and other matters outside the control of the utility or the Commission.” *In the matter of St. Louis County Water Company’s Tariff Designed to Increase Rates*, MoPSC Case No. WR-96-263, p. 13 (December 31, 1996) (emphasis added). The Commission had further stated that it “has periodically granted AAOs and subsequent ratemaking treatment for various unusual occurrences such as flood-related costs, changes in accounting standards, and other matters which are unpredictable and cannot adequately or appropriately be addressed within normal budgeting parameters.” *Id.* at p. 14.

11. There are many examples of AAO’s based upon government action (i.e. new statutes, regulations and the like). These include AAO’s for costs associated with: new gas safety rules (GO-97-301, GO-2002-0048); the implementation of FAS 87 for pension expense (*In the matter of Missouri Cities Water Company*, 2 Mo.P.S.C.3d 60 January 8, 1993); the implementation of FAS 106 (*In Re Union Electric*, 1 Mo.P.S.C.3d

328, 330 (EO-92-179) (June 12, 1992); *In Re St. Joseph Light and Power Company*, 2 Mo.P.S.C.3d 248, 270 (ER-93-41, EC-93-252) (June 25, 1993) (In referring to the Western Resources proceeding, “[t]he Commission also found that expenses related to the adoption of FAS 106 are extraordinary or unusual items which qualify for deferral and later amortization.”); *In Re Missouri Gas Energy*, 3 Mo.P.S.C.3d 203 (GO-94-255) (September 28, 1994); *In re Empire District Electric Company* (EO-93-35) (February 2, 1993)); compliance with the Clean Air Act (*In the matter of the application of Missouri Public Service*, 1 Mo.P.S.C.3d 200, 203-204 (1991)); and the emergency cold weather rule (GA-2002-285, GA-2002-377).

**B. Fact that the Tax is Not Known and Measurable is Not a Reason to Grant the Requested Dismissal**

12. The Public Counsel further argues that the Application should be dismissed because the tax is not known and measurable. Interestingly, in Case No. GU-2005-0095, this was a reason the Commission used to *grant* the requested AAO. The Commission stated as follows as to this issue:

By granting MGE an AAO, it will be allowed to defer the cost of paying the Kansas property taxes for consideration in a future rate case after the legality of those taxes is determined and the costs are known and measurable. If those taxes are found to be illegal and MGE does not have to pay them, then the deferred amounts will simply be written off the balance sheet and neither the ratepayers nor the shareholders will be harmed. If, on the other hand, MGE ultimately must pay the taxes, it will be able to make its case for the inclusion of its additional tax liability into its cost of service in a future rate case.

13. The Commission recognized the predicament that this process created for MGE and did not want to discourage MGE’s efforts to challenge the new property taxes:

The amount of taxes that MGE might have to pay in Kansas is significant,

both to MGE and to its ratepayers. It would not be appropriate to allow MGE to recover millions of dollars from its ratepayers for taxes that it might never have to pay. On the other hand, these taxes are a legitimate cost of doing business for which the ratepayers should be responsible. It would not be fair to MGE's shareholders to shift that burden on to them if those taxes ultimately must be paid. Furthermore, it was MGE's decision to challenge the legality of the Kansas taxes, a decision that could greatly benefit its ratepayers, that has placed MGE in this difficult position. If MGE had accepted the Kansas taxes without challenge, it could have simply passed the added taxes on to its ratepayers by filing a rate case. Instead, by looking out for the interest of its ratepayers, it has created the possibility that it will not be able to recover several million dollars to which it would otherwise be entitled. It is that conundrum that makes an AAO the appropriate means for dealing with the potential Kansas tax liability.

Case No. GU-2005-0095, Report and Order, p. 15-16.

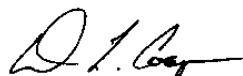
14. The Commission's reasoning has been sound as this deferral and challenge process is one that has operated worked to the benefit of MGE's customers thus far, as MGE's previous two challenges have prevailed.

15. MGE has pleaded sufficient facts to state a claim for an AAO. The arguments raised by the Public Counsel have been previously rejected by this Commission under essentially identical facts and there is no basis to dismiss MGE's Application based on those arguments.

**WHEREFORE**, MGE respectfully requests that the Commission deny the Public counsel's Motion to Dismiss and, thereafter, issue an Accounting Authority Order as

described in MGE's Application.

Respectfully submitted,



---

Dean L. Cooper MBE#36592  
BRYDON, SWEARENGEN & ENGLAND P.C.  
312 E. Capitol Avenue  
P. O. Box 456  
Jefferson City, MO 65102  
(573) 635-7166  
(573) 635-3847 facsimile  
[dcooper@brydonlaw.com](mailto:dcooper@brydonlaw.com)

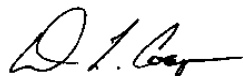
ATTORNEYS FOR MISSOURI GAS ENERGY,  
A DIVISION OF SOUTHERN UNION COMPANY

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, or sent by electronic mail, on August 14, 2009, to the following:

Mr. Bob Berlin  
General Counsel  
Missouri Public Service Commission  
Governor Office Building  
P.O. Box 360  
Jefferson City, MO 65102  
[bob.berlin@psc.mo.gov](mailto:bob.berlin@psc.mo.gov)

Mr. Marc Poston  
The Office of the Public Counsel  
Governor Office Building, 6<sup>th</sup> Floor  
P.O. Box 7800  
Jefferson City, MO 65102-7800  
[marc.poston@ded.mo.gov](mailto:marc.poston@ded.mo.gov)



---