

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

In the Matter of Missouri Gas Energy's )	
Tariff Sheets Designed to Increase )	
Rates for Gas Service in the )	Case No. GR-2009-0355
Company's Missouri Service Area )	

**MISSOURI GAS ENERGY'S REPLY TO STAFF'S RESPONSE TO  
COMMISSION ORDER DIRECTING RESPONSES TO OBJECTIONS TO A  
REQUEST THAT THE COMMISSION TAKE OFFICIAL NOTICE OF CERTAIN  
MATTERS AND TO THE ADMISSION OF PAGES 2 AND 3 OF STAFF  
EXHIBIT 103**

COMES NOW Missouri Gas Energy ("MGE"), a division of Southern Union Company, and submits the following reply to Staff's response to MGE's objections to Public Counsel's request that the Commission take official notice of customer comment cards and to the admission of selected pages of Staff Exhibit no. 103.<sup>1</sup>

**THE CUSTOMER COMMENT CARDS**

1. On November 5, 2009, the Commission directed the parties to this case to file by November 10<sup>th</sup> any responses they might have to the objections lodged by MGE to Public Counsel's request that the Commission take official notice of mailed-in customer comment cards<sup>2</sup> and, also to pages 2 and 3 of Staff Exhibit 103.

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<sup>1</sup> As was the case in its initial filing, MGE has limited its reply to the issue of whether the Commission should take official notice of the comments cards as requested by Public Counsel and to the admission of pages 2 and 3 of Exhibit 103. It continues to reserve the right to submit additional legal argument addressing topics other than the matter directly at hand.

<sup>2</sup> No other proper party to the case made a similar request or otherwise offered the comment cards into the record as direct evidence during the hearing.

2. Staff's response is ambiguous where this topic is concerned. Its statement that the Commission may take official notice of certain of its own records<sup>3</sup> does not address the circumstance presented in that the comment cards are not the Commission's records in that they have not been generated by the Commission or its employees.<sup>4</sup> Where the comment cards are concerned, the Commission is merely a repository for documents mailed in by third parties.<sup>5</sup> There is a world of difference between taking official notice of a prior order of the Commission, for example, and taking official notice of a statement of a random third person, who is not sworn to tell the truth and not available for cross-examination. Official notice is not intended to act as an end-run around the rules of testimonial evidence as set forth in the Missouri Administrative Procedure Act.

3. At the same time, Staff appears to concur with MGE's point that the comment cards (to the extent anything is actually written on them) represent inadmissible hearsay.<sup>6</sup> The best way to make sure the Commission does not rely

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<sup>3</sup> Staff Response ¶¶5 and 6.

<sup>4</sup> Staff seems to point to the fact that summaries of the comment cards are available on the Commission's EFIS. See, Staff Response ¶13. Where this is concerned, (1) no party was given an opportunity to object to their posting on EFIS as a matter of evidence, which would violate principles of due process and (2) the mere fact that a document may be viewable on EFIS does not make it evidence any more than does the posting of pre-filed testimony which is still subject to evidentiary objections if and when offered at the time of hearing.

<sup>5</sup> The Commission should take note of that portion of a newly-proposed rule concerning extra-record communications (4 CSR-240-4.020) which, if adopted as proposed, would expressly state that "extra record communications, shall not be considered part of the record on which a decision is reached" *unless properly admitted into the record*. See, subsection (5). Case No. AX-2010-0128. This makes it clear that messages thrown over the transom, as it were, are not something the Commission can officially notice.

<sup>6</sup> Staff Response ¶¶9 and 10.

on them in formulating its decision in this case is to exclude them from the record as the applicable rules of evidence would require.

**PAGES 2 AND 3 OF EXHIBIT 103**

4. Staff claims that the Commission can consider the “expert” testimony of Gay Fred where her “unchallenged” testimony concerning the nature of the comment cards is concerned.<sup>7</sup> There are a number of misstatements where these claims are concerned.

5. The claim that Ms. Fred was qualified to testify as an expert “in consumer services” is not supported by the record. She was simply offered as a fact witness concerning the level of customer complaints and inquiries concerning MGE. Here is the claimed foundation for her “expert” testimony:

MS. SHEMWELL: And that's all I have, and

17 we're ready to call Ms. Fred if the Commission is ready.

18 JUDGE PRIDGIN: All right. Ms. Fred, if

19 you'll come forward to be sworn, please.

20 (Witness sworn.)

21 JUDGE PRIDGIN: Thank you very much.

22 Ms. Shemwell, anything before she has Bench  
questions?

23 MS. SHEMWELL: Yes, thank you, Judge.

24 GAY FRED testified as follows:

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<sup>7</sup> Staff Response ¶¶12 -14. For the record, MGE is objecting to Ms. Fred’s testimony as it may bear on the content or evaluation of customer comment cards. MGE did not object to her testimony concerning the number or type of customer complaints or inquiries as were charted and tabulated on Exhibit 103 (excluding, of course, pages 2 and 3), a document prepared by her.

25 DIRECT EXAMINATION BY MS. SHEMWELL:

1 Q. Ms. Fred, would you spell your name for  
2 the -- give your full name to the court reporter and --

3 A. Yes. My full name is Gay Fred, G-a-y,  
4 F-r-e-d. My title is consumer services manager for the  
5 Missouri Public Service Commission.

6 Q. Ms. Fred, have you marked a document,  
7 prepared a document for the Commission today?

8 A. Yes.

9 MS. SHEMWELL: Judge, I've handed this out  
10 to all of the parties but not the Commission. I would  
11 like to mark it as 103.

12 JUDGE PRIDGIN: All right.

13 BY MS. SHEMWELL:

14 Q. Ms. Fred, is this document true and  
15 accurate to the best of your knowledge and belief?

16 A. Yes, it is.

17 Q. Have you previously filed this with the  
18 Commission?

19 A. No, I have not.

20 MS. SHEMWELL: I think I will wait until  
21 after she explains the document to move for its  
admission,

22 but I would like to give it to the Commission.

23 Judge, I tender Ms. Fred for Commission

24 questions.

That is the sum and substance of the foundation for her testimony. There is no description of her educational background or professional qualifications or even her duties as an employee of the Commission (other than her title). How could anyone be expected to understand that she was being asked to testify as other than a fact witness? Staff's apparent assumption that all of its witnesses are presumed to be expert witnesses is not valid. Certainly, there is no basis in the record for allowing her testimony about the comment cards as information she used to form her "expert" opinion because she was not qualified as an expert witness.

6. Staff's claim that her testimony about the comment cards was "unchallenged" is likewise unjustified. In fact, it is just plain wrong. Counsel for MGE objected repeatedly to any questions put to any witness about the content of the comment cards and, in that regard, the bench ruled that MGE had a valid, continuing objection. To be precise, counsel objected at the outset. Tr. 95-97. Counsel renewed his objection when Public Counsel witness Barbara Meisenheimer was on the witness stand. Tr. 537-539. At this time, the Presiding Officer stated the following:

JUDGE PRIDGIN: All right. Mr. Boudreau,

16 thank you. I'll overrule the objection understanding

17 you've still got it pending and you still plan to

18 file something in -- in writing to object to this.

19 So with that, I'll -- and you can have your standing

20 objection on this line of questioning if you'd like.

21 MR. BOUDREAU: Well, I would like to

22 renew the objections that I made the other day, then.

23 I mean, I don't want it -- I don't want the record to

24 reflect that somehow I've waived the objections.

25 There's no basis for taking official notice, there's

1 no evidentiary foundation that's been laid for any of

2 these documents. It's -- it's -- frankly, is not

3 admissible under any standard that I'm aware of, and

4 I do object and it is a continuing objection to any

5 testimony about this until a proper foundation has

6 been laid.

7 JUDGE PRIDGIN: And I'll -- and **I'll**

**8 certainly show it as a continuing objection, and let**

**9 the record reflect you're not waiving any -- any**

**10 objection on this line of questioning.** I'm sorry.

11 Mr. Chairman? (emphasis added)

Counsel nevertheless continued to renew his objections on the record. (Tr. 550)

To suggest that testimony concerning the content of the comment cards was "unchallenged" is not at all consistent with the numerous objections transcribed.

7. As to its suggestion that the Commission should take notice of the number (but not the content) of customer comment cards, Staff offers no basis for the Commission to do so. Staff makes no effort to explain the relevance of the information. As MGE pointed out in its written objection, the fact that any particular number of comment cards was received tells the Commission nothing. There is no historical context (unlike the case with complaints/inquiries) so this single, isolated data point is meaningless.

### **CONCLUSION**

Staff has provided no basis for the Commission to take official notice of the comment cards, or even the number of comment cards received by the Commission. Additionally, Staff incorrectly states that Ms. Fred offered expert testimony that was unchallenged. Both assertions are demonstrably wrong.

WHEREFORE, Public Counsel's request that the Commission take official notice of the customer comment cards should be denied and pages 2 and 3 of Staff Exhibit 103 should not be admitted into the record.

Respectfully submitted,

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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, electronic mail or hand delivery, on the 11<sup>th</sup> day of November, 2009, to the following:

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