

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

In the Matter of the Application of Missouri Gas)
Utility, Inc. for a certificate of public convenience)
and necessity authorizing it to construct, install,)
own, operate, control, manage and maintain a) Case No. GO-2005-0120
natural gas distribution system to provide natural)
gas service in parts of Harrison, Daviess and)
Caldwell Counties, to acquire the Gallatin and)
Hamilton, Missouri natural gas systems and to)
encumber the acquired assets.)

MGU’S BRIEF CONCERNING JURISDICTION

Comes now Missouri Gas Utility, Inc. (“MGU” or “Company”), and, in response to the Missouri Public Service Commission’s (“Commission”) Order Directing Filing, states as follows:

SUMMARY

MGU suggests that the Commission clearly has jurisdiction over MGU’s request for a certificate of public convenience and necessity and MGU’s request for authority to encumber the Gallatin and Hamilton gas system assets it seeks to acquire. There is some question as to whether or not the Commission has jurisdiction to authorize the sale itself. Because the consequences of failing to obtain permission are quite significant, MGU has asked that the Commission also approve this aspect of the transaction. Whether or not the Commission decides it has or does not have jurisdiction over this final aspect of the transaction, MGU asks that the Commission not allow this issue to slow the proceedings.

BACKGROUND

1. On November 4, 2004, the Commission issued its Order Directing Notice, Setting

Date for Submission of Intervention Requests, and Directing Filings (Order). The Order, among other things, directed the Staff of the Commission and MGU to “brief the issue of the extent of the Commission’s jurisdiction in this matter.” The following is intended to comply with that order.

2. MGU’s Application requests Commission approval pursuant to two Missouri statutes –

- Section 393.170, RSMo -

1. No gas corporation . . . shall begin construction of a gas plant . . . without first having obtained the permission and approval of the commission;

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted . . . without first having obtained the permission and approval of the commission. . . .

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. . . .

- Section 393.190.1, RSMo - No gas corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the

commission an order authorizing it so to do.

The Commission has promulgated Rules 4 CSR 240-3.205 and 4 CSR 240-3.210 to govern gas corporation applications seeking approval under these statutes.

3. The approval requested by MGU addresses three subjects - 1) a certificate of public convenience and necessity; 2) approval to encumber the assets to be acquired; and, 3) approval to sell, assign or transfer the assets.

CERTIFICATE

4. MGU seeks to construct, install, own, operate, control, manage and maintain a natural gas distribution system to provide natural gas service in parts of Harrison, Daviess and Caldwell Counties. The primary natural gas distribution system to be used for this area will be the systems located in and around Gallatin and Hamilton, Missouri, which MGU seeks to purchase.

5. The Court of Appeals has stated that a “primary function of the Commission in its regulation of . . . utilities is to allocate territory in which they render service. The Commission is empowered by statute to pass upon the question of public necessity and convenience (1) for any new company or additional company to begin business anywhere in the state, or (2) for an established company to enter new territory.” *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 182 (Ct. App. 1960), citing *Peoples Telephone Exchange v. Public Service Commission*, 186 S.W.2d 531 (Mo.App. 1945). “Those powers were created in 1913 by the enactment of the present Section 393.170” *Id.*

6. MGU does not have a certificate to provide gas service to any area in the State of Missouri. In order to provide the proposed service, MGU is required to obtain a certificate of

public convenience and necessity from this Commission. Thus, the Commission clearly has jurisdiction over MGU’s request for a certificate of public convenience and necessity.

ENCUMBRANCE OF ASSETS

7. Section 393.190, RSMo provides, in part that a gas corporation may not “encumber the whole or any part of its franchise, works or system” without Commission authorization. In order to finance the proposed acquisition of the Gallatin and Hamilton systems, MGU has arranged for a bank loan (the “Loan”). In connection with the Loan, MGU will pledge a first security interest in all assets being acquired to include accounts receivable, inventory and the complete physical utility plant, which will constitute a lien on the MGU property to be acquired in the State of Missouri and contains a provision for subjecting after acquired property to the lien.

8. Because this lien will constitute an “encumbrance” of the works or systems to be acquired, MGU believes that Section 393.190 requires MGU to obtain authority from the Commission to do so and that the Commission has jurisdiction over the proposed encumbrance of assets.

SELL, ASSIGN OR TRANSFER

9. Section 393.190 further provides that no “*gas corporation may sell, assign, . . . transfer, . . . or otherwise dispose of . . . the whole or any part of its franchise, works or system without the Commission’s approval*” (emphasis added). A “gas corporation” is said to include “every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or

franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof.” Section 386.020(18), RSMo.

10. Because the statute focuses on the seller, the jurisdictional question as to this matter is whether the seller of the Gallatin and Hamilton systems is a “gas corporation,” within the meaning of the statutes.

11. Construction of both the Gallatin and Hamilton systems was financed through the use of a lease-purchase agreement. Under this agreement, the municipalities leased and operated the systems. The systems were owned by holders of certain certificates of participation. The leases were between the municipalities and an agent or trustee for the certificate of participation holders. In December 2003, the cities assigned the legal title to certain rights of way and easements and personal property related to the systems to the agent for the certificate holders because the cities did not appropriate funds to pay under the lease agreements for the 2004 fiscal year and therefore defaulted on the leases.

12. Before and after this event, the systems were operated by the municipalities. Rates and rules were set by municipal ordinance. A municipal corporation does not qualify as a gas corporation. However, the cities did not have legal title to the systems. The legal title was held by an agent/trustee for the certificate of participation holders.

13. The next question is therefore whether the certificate holders and the agent/trustee qualify as a gas corporation. Section 386.020(18) (emphasis added), again, states that a gas corporation is “*every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use.*” An

argument could be made that the certificate holders and their agent/trustee were a gas corporation within the meaning of the statute as they “owned” gas plant operating for public use. The statute contemplates that an owner may not operate the system as it includes in the definition both “lessees” and “trustees.”

14. In the first instance, this is an issue for the Commission and the potential seller as it is the existing “gas corporation” that must have the Commission’s authority to sell, assign or transfer, not the purchaser. However, the stakes are high for MGU if there is a failure to obtain the Commission’s approval where it is necessary. “Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same *shall be void.*” Section 393.190.1, RSMo (emphasis added).

15. With this in mind, MGU pled this Application broadly so as to ask for the Commission’s approval of the sale transaction. A Commission decision that the Commission has jurisdiction over the seller and that the proposed transaction is approved or that the Commission has no jurisdiction over the seller and, thus, there is no need for Commission approval of the transaction, would satisfy MGU’s purposes.

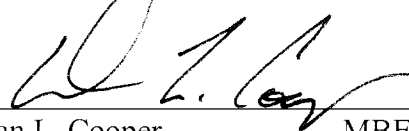
16. MGU believes that the answer to this final jurisdiction question will not, as a practical matter, change the processing of this case. As stated above, the Commission clearly has jurisdiction over MGU’s request for a certificate of convenience and necessity and MGU’s request to encumber the assets to be acquired. The sale of the underlying assets, in this case, is a necessary part of both the certificate application and the encumbrance. Therefore, the documentation to be provided and reviewed does not change whether or not the Commission

must approve the sale itself.

17. MGU would ask that the Commission not allow this issue to slow the processing of the case. Both the Seller of the Gallatin system and the Seller of the Hamilton system will be conducting Uniform Commercial Code, Article 9 sales (Sections 400.9-101 - 400.9-710, RSMo), on Tuesday, November 30, 2004. At the conclusion of these sales, i.e. on December 1, 2004, the Sellers should be in a position to sell the systems and MGU will be in a position to own and operate the systems, upon receipt of Commission authorization.

WHEREFORE, MGU respectfully requests that the Commission give appropriate consideration to the matters contained herein.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI GAS UTILITY, INC.

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 November 15, 2004, to the following:

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