BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri Gas Energy's	)	
Tariffs to Implement a General Rate	)	Case No. GR-2004-0209
Increase for Natural Gas Service	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF THE MOTION OF MISSOURI GAS ENERGY, A DIVISION OF SOUTHERN UNION COMPANY, TO EXCLUDE CERTAIN TESTIMONY AND OPINIONS OF DAVID MURRAY

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Preliminary Statement

In responding to MGE's motion to exclude certain testimony of David Murray,[1] both the Staff and the OPC resort to the very tactic that the directives of § 490.065 RSMo., and relevant case law are intended to prevent. In lieu of demonstrating that Murray's testimony is sufficiently reliable and based on accepted practices, the Commission Staff ("Staff") and Office of the Public Counsel ("OPC") contend simply that Murray's opinions and testimony are admissible because they (and he) say it is so. It is axiomatic that such *ipse dixit* does not make expert testimony admissible.

Indeed, neither the Staff nor the OPC cites a single utility finance authority in support of Murray's rate of return testimony. In addition, although MGE cited numerous authoritative sources in support of its motion – and set forth in specific detail the many errors and unreliable datasets incorporated into Murray's return on capital calculations – the Staff and OPC are silent on these issues. Further, the Staff and OPC concede that under § 490.065.3 RSMo., Murray must demonstrate (and the Commission must make an independent finding concluding) that the facts, data and methodologies used by Murray are of a type "reasonably relied" upon by experts in the field of utility finance. However, neither the Staff nor the OPC cites anything that even begins to suggest that Murray's unreliable datasets and erroneous methodologies are typical of those used by real utility finance experts. In short, the Staff admits it has a burden under § 490.065 in offering Murray's testimony, but fails to submit anything to the Commission meeting, or even attempting to meet, that burden.

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[1] On May 18, 2004, MGE filed its motion to exclude certain testimony of David Murray and a memorandum of law in support thereof ("MGE Mem."). The defined terms used herein are the same as those used in the MGE Mem. On May 24, 2004, the Staff ("Staff Resp.") and OPC ("OPC Resp.") both filed responses to MGE's motion.

In the end, the Staff resorts to arguing that "justice" requires the denial of MGE's motion, and the OPC contends that the unreliability of Murray's datasets and methodologies should go to the weight, not admissibility, of his testimony. Both of these arguments are based on fundamental misunderstandings of the law governing expert testimony and ignore the express dictates of § 490.065 RSMo., and *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.2d 146 (Mo. banc 2003). MGE's motion to exclude testimony of Murray should be granted.

ARGUMENT

I. The Staff Has Failed To Demonstrate That Murray Is An Expert Under § 490.065.1 RSMo.

Section 490.065.1 RSMo., provides that an expert must have "scientific, technical or other specialized knowledge" that "will assist the trier of fact." As the Missouri Supreme Court has held:

> In order for an expert witness to be qualified it must appear that by reason of education or specialized experience he possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or of drawing correct conclusions.

Shelby County R-IV School Dist. v. Herman, 392 S.W.2d 609, 616 (1965).

Here, nothing suggests that Murray is any better at DCF analysis, or calculating returns on capital, than a person "having no particular training." As MGE has demonstrated, Murray does not have the education or specialized knowledge necessary to understand and apply the qualitative analyses that reasonable practitioners of utility finance routinely use in making cost of capital projections. (MGE Mem. at 5-8.) For example, Murray does not understand the qualitative limitations of his datasets (*id.* at 7), and refuses to consider altering his recommendations to the Commission even if updated 2003 data might "drastically change" his results:

Q. If the 2003 numbers were available several weeks before you submitted your testimony, was there a reason you didn't use 1998 to 2003 [data]?

A. The study had already been performed. I didn't see any reason to – I don't know if it was available or not. . . .

Q. If the 2003 information was available and that would drastically change the numbers contained on [Murray] Schedule 15.2 and forward, would that cause you any pause in changing your recommendation?

A. No.

(Murray Dep. at 80.)

Murray – in his steadfast refusal even to consider a critical assessment of or modification to his datasets (even though accepted utility finance practice requires such assessments and/or modifications[2]) – demonstrates that he is no better at utility finance analysis than any other person having no particular training. Once again, anyone can read a formula, arbitrarily collect data from public sources and mechanically plug such data into the formula. The capacity to engage in such mechanistic behavior does not make one an "expert."

In arguing that Murray is an expert, the Staff and OPC rely on Murray's education and the fact that he has testified in prior proceedings. (Staff Resp. at 2-3; OPC Resp. at 7.)[3] However, Murray conceded in his deposition that while in college, he did not take any courses where financial techniques were applied to utilities' cost of capital. (Murray Dep. at 11-12.) Further, Murray admitted that (a) the first time he used DCF methodologies to calculate utilities' cost of capital was after his employment with the Commission four years ago, (b) since his employment, he has reused "canned" Staff testimony, and (c) "some portions" of his April 14,

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2 *See*, authorities and decisions cited in MGE Mem. at 6-20. *See also* the numerous criticisms of Murray's data and methodologies in Dr. Roger A. Morin's rebuttal testimony, filed with the Commission on May 24, 2004. Murray has testified that Dr. Morin is an "authoritative figure" in the field of utility finance. (Murray Dep. at 70.)

3 In a true *non sequitur*, the Staff attaches the job description for Murray's position and then suggests that since Murray is supposed to be qualified for his job, he must be. (Staff Resp. at 2 and Exhibit 1.)

2004 direct testimony regarding MGE had been "used back in 2001" and were "based on prior depositions . . . from years ago from other witnesses." (*Id.* at 10, 12-13, 23-24, 39, 46.)

MGE respectfully submits that four years of reusing canned Staff testimony does not make a person an expert in utility finance and is insufficient to meet the requirements of § 490.065.1 RSMo.

II. The Staff Fails To Demonstrate That The Data And Methodologies Used By Murray Are Reliable Under § 490.065.3 RSMo.

After affirmatively conceding that it has a burden under § 490.065.3 to demonstrate that Murray's data and methodologies are reliable – and the kind of data and methodologies reasonably relied upon by utility finance experts – the Staff does nothing to meet this burden. (Staff Resp. at 5.) More specifically, the Staff is completely silent as to:

(a) Murray's unprincipled use of Southern Union's, and not MGE's, capital structure in his cost of capital analysis (MGE Mem. at 9-12);

(b) Murray's failure to account in any way for the restrictions that the Commission placed on Southern Union's ownership of Panhandle, as set forth in the Stipulation (*id.* at 9-10);

(c) Murray's use of unreliable data in his DCF model, including stale historic data that does not include available 2003 results, aberrational EPS data, aberrational DPS data, negative historic data and "spot" historic data (*id.* at 12-17);

(d) Murray's unreliable and unrepresentative proxy group of "comparable" utilities and his failure to make required adjustments for differences between MGE and that proxy group (*id.* at 17-19);

(e) Murray's unprincipled use of Southern Union's, and not MGE's, cost of long-term debt (*id.* at 19-20); and

(f) Murray's arbitrary calculations for removing Panhandle from the financial statements of Southern Union (*id.* at 20-21).

In fact, in a demonstration of its basic failure to understand the purpose or requirements of § 490.065, the Staff actually *ridicules* MGE's citation to "no less than seven" finance and utility finance authorities in its showing that Murray uses datasets and methodologies upon which no utility finance expert would reasonably rely. (Staff Resp. at 3-4.) Not surprisingly, the Staff cites not a single finance or utility finance authority in support of Murray's testimony.

The OPC demonstrates an equally flawed understanding of the law governing experts by arguing – in direct contravention of § 490.065.3 – that the unreliability of Murray's data and methodologies goes to the weight, not admissibility, of Murray's testimony. (OPC Resp. at 8, 11.) The Missouri Supreme Court has ruled otherwise:

> Section 490.065.3 . . . requires the court to consider whether the facts and data used by the expert are of a type reasonably relied on by experts in that field or if the methodology is otherwise reasonably reliable. If not, then the testimony does not meet the statutory standard and is *inadmissible*.

McDonagh, supra, 123 S.W.3d at 157 (emphasis added). The cases cited by the OPC (OPC Resp. at 8) are pre-*McDonagh* and inapposite.[4]

MGE's motion to exclude addressed in detail the unreliable facts, data and methodologies utilized by Murray. (MGE Mem. at 5-21.) The Staff and OPC respond to these particularized showings with a single conclusory assertion: Murray uses a DCF model and that is good enough. (Staff Resp. at 5; OPC Resp. at 9-12.) This is the equivalent of concluding that since a

[4] For example, in *Alcorn v. Union Pacific Railroad Co.*, 50 S.W.3d 226, 246 (Mo. banc 2001), the issue before the Missouri Supreme Court was not the reliability of the facts, data or methodology utilized by a simulation expert, but rather a disagreement between the experts over how similar a well-accepted collision simulation process was to the actual accident. As another example, in *State ex rel. Missouri Highway & Transp. Comm'n v. Sturmfels Farm Ltd. Partnership,* 795 S.W.2d 581, 590 (Mo. App. 1990), the court criticized expert testimony based on inadmissible hearsay and held: "a witness' expertise is an acceptable substitute for traditional authentication techniques only if the witness can, by virtue of his expertise, *vouch for the reliability of the facts which form the basis of his opinion*" (emphasis added).

person uses a lug wrench, that person is an expert mechanic. *See, Blue Dane Simmental Corp. v. American Simmental Ass'n*, 178 F.3d 1035, 1040-1041 (8th Cir. 1999) (mere fact that an expert "utilized a method of analysis typical within his field," did not render his testimony admissible where he did not consider "all independent variables that could affect the conclusion"). *Ipse dixit* does not make an expert's opinions – or the data and methodologies that he or she uses – reliable. *See, e.g., General Electric. Co. v. Joiner,* 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); *McDonagh, supra,* 123 S.W.2d at 155 (*Daubert* principles provide guidance in the interpretation of § 490.065 RSMo.).[5]

Once again, anyone can use a DCF model. Only an expert who critically analyzes his or her datasets – and applies the DCF model in an industry-accepted manner – can offer testimony based on a DCF model that will be of any assistance to this Commission. Murray has not met this threshold qualification.

Ultimately, the Staff and OPC resort to complaining that MGE's motion to exclude is "overtaxing," "frivolous" and contrary to "fundamental justice." (Staff Resp. at 6; OPC Resp. at 11.) Clearly, the Staff and OPC – in their haste to place result-oriented testimony before this Commission – have lost sight of one of the fundamental purposes of proceedings like this one. As this Commission has recognized, MGE has a "statutory procedural right" to seek a rate

5 The OPC attempts to make light of the *McDonagh* decision's guidance regarding the importance of *Daubert* and its progeny in interpreting Section 490.065. (OPC Resp. at 1, 5-6.) However, the language of the Missouri Supreme Court in *McDonagh* is clear: "[t]o the extent that section 490.065 mirrors FRE 702 and FRE 703, as interpreted and applied in *Daubert* and its progeny, the cases interpreting those federal rules provide relevant and useful guidance in interpreting and applying section 490.065." 123 S.W.3d at 155. The Court then held that Section 490.065.1 and the version of FRE 702 interpreted in *Daubert* were almost identical, and that Section 490.065.3 is actually a stricter standard for admissibility than FRE 703. *Id.* at 155-156.

increase, and the Commission's conduct should not have a "dampening effect" on the exercise of that right. *See, In the Matter of St. Joseph Light & Power Co.*, Case Nos. ER-93-41 & EC-93-252, 2 Mo.P.S.C.3d 248, 260-261 (June 25, 1993). In furtherance of this right, MGE is justified in moving to exclude from the Commission's consideration rate of return testimony that not only violates § 490.065 RSMo., but is also clearly meant to have just such a dampening effect on MGE.

Conclusion

For the foregoing reasons, and those set forth in MGE's opening memorandum of law in support of this motion, MGE respectfully submits that the Commission should exclude Murray's opinions and testimony regarding a rate of return for MGE from this proceeding.

Dated: May 26, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, mailed by U.S. mail or electronically transmitted on this 28th day of May, 2004, to all parties of record.

_/s/ Paul Boudreau_____