

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

In the Matter of Missouri Gas Energy's)
Tariff Sheets Designed to Increase)
Rates for Gas service in the)
Company's Missouri Service Area)

Case No. GR-2004-0209

**REPLY OF MISSOURI GAS ENERGY TO RESPONSES OF PUBLIC COUNSEL AND
STAFF TO MISSOURI GAS ENERGY'S MOTION TO STRIKE**

COMES NOW Southern Union Company, d/b/a Missouri Gas Energy ("MGE"), and offers the following reply to the responses of the Office of the Public Counsel ("OPC") and the Commission's Staff ("Staff"):

A. Reply to Response of OPC

1. In its response, OPC claims that the testimony of OPC witness Barbara A. Meisenheimer regarding the proposed Pay As You Save ("PAYS") program is relevant to whether rates proposed by MGE are just and reasonable on the grounds that "unaffordable rates are not reasonable rates." See, OPC Response, ¶16. This justification does not make Ms. Meisenheimer's testimony relevant to the case.

2. As pointed out in MGE's Motion to Strike ("Motion"), the solitary issue presented by MGE's filing of revised tariffs pursuant to §393.130 RSMo 2000 is whether MGE's rates are "just and reasonable." The statute makes no reference at all to the concept of affordability and, to the knowledge of MGE, neither the Missouri General Assembly nor the Commission has ever determined that the terms "affordable" and "reasonable" are synonymous. In fact, the term "unaffordable" used by OPC does not

appear as a term in Chapter 393 RSMo. As such, OPC's Response provides no lawful basis for a denial of the Motion.

3. In paragraph 7 of its Response, OPC suggests that the remedy available to MGE is not that Ms. Meisenheimer's be stricken but, rather, that MGE file a Motion for Partial Summary Judgment under Commission rule 4 CSR 240-2.117. This argument, too, misses the point.

4. The issue presented by MGE's Motion is an evidentiary issue, that is, whether the testimony concerning the proposed PAYS program is relevant to the issue presented in this case. If the testimony is not relevant, it is inadmissible.

5. A Motion for Summary Determination, on the other hand, only comes into play when there is no dispute as to any material fact and the moving party is entitled to relief with respect to the merits of the issue as a matter of law. See, 4 CSR 240-2.117(1)(E). MGE is not asking the Commission to decide the merits of OPC's proposed PAYS program. Rather, MGE is requesting that the Commission strike the testimony because it is not pertinent to any issue presented in this case.

6. In paragraph 8 of its Response, OPC points to the case of *State ex rel. McKittrick v. Missouri Public Service Commission*, 175 S.W. 2d 857 (Mo. banc. 1943) as legal justification for its proposed PAYS program. This case is factually distinguishable from the circumstances presented in this case. The *McKittrick* case dealt with post-merger divisional rates which had been challenged on the grounds that they constituted an unlawful special rate or advantage. The Missouri Supreme Court concluded that the divisional rates were interim and did not violate the law concerning granting preferential treatment in charging for services rendered. There is no parallel between those

circumstances and the circumstances presented by MGE's filing. The footnoted cases to which OPC refers are factually distinguishable as well. Each of those cases dealt with interim rate orders put in place to assist the Commission in developing a factual record for permanent rates. It is not the circumstance with which the Commission is presented in this case.

7. With respect to MGE's Motion concerning portions of OPC witness Kimberly K. Bolin's prepared direct testimony, OPC contends that Ms. Bolin's testimony is an appropriate part of its positive case-in-chief. This argument does not withstand scrutiny.

8. That portion of Ms. Bolin's testimony sought to be struck by MGE clearly is testimony in the nature of rebuttal because there would have been no purpose to propose excluding manufactured gas plant costs from MGE's cost of service had not MGE proposed to include them in its environmental response fund in the first instance. The proper place for OPC to address this issue is in its rebuttal to MGE's direct case. Permitting this testimony to be filed as part of OPC's direct testimony places MGE at a disadvantage in that it impairs its ability to carry the burden of proof with respect to this issue by denying the company the final word on the topic.

B. Reply to Response of Staff

9. Staff has filed a lengthy response to MGE's Motion, however, in doing so, Staff essentially has conceded in paragraphs 10 and 11 of its Response that the only issue presented in this case is whether MGE's proposed rates are "just and reasonable," the standard set forth in §393.130 RSMo 2000.

10. Staff's Response is an impassioned plea that the Commission open up this rate case proceeding as a clean-up venue for miscellaneous or ancillary proposals concerning MGE's mode of operation or management, including a determination of its compliance with conditions ordered in an entirely different case. This is not a principled argument. No matter how well-intentioned Staff's proposals may be in the abstract, the law (not convenience) determines the scope of the issues presented in a rate case. MGE contends that if the miscellaneous reporting conditions sought by Staff have independent merit, they are issues best addressed on an industry-wide level in a rulemaking of general applicability. They should not be implemented in a haphazard fashion. Questions about compliance with this condition from Case No. GM-2003-0238 should be taken up by way of an appropriate enforcement procedure.

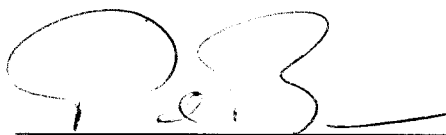
11. Staff points to authority for the proposition that company operating performance is relevant in a rate case. MGE agrees insofar as company performance goes to the issue of determining what level of rates for the Commission to authorize. The company's proposal for an adjustment to allowed ROE for management efficiency and customer service is consistent with that past practice and prior Commission authority. Seeking to impose miscellaneous reporting conditions/obligations which have no direct connection to a determination of revenue requirement is a quite different thing altogether. Contrary to Staff's claims, there is no inconsistency in the company's approach to this topic.

12. MGE reserves the right to supplement its rebuttal testimony in the event that some or all of its Motion is denied. In that regard, MGE urges the Commission to

rule expeditiously on the Motion so that MGE has a reasonable opportunity to determine to which ancillary issues it may need to submit rebuttal testimony.

WHEREFORE, having replied to the responses of OPC and Staff, MGE renews its request that the Commission strike those portions of the direct testimony of Staff Witnesses Charles R. Hyneman, Deborah Ann Bernsen, Anne M. Allee and Mark L. Oligschlaeger and OPC witnesses Barbara A. Meisenheimer and Kimberly K. Bolin identified in its Motion to Strike.

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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 or by hand delivery, on this 16th day of May 2004 to the following:

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