

in Case No. GA-2007-0168, OEP listed this complaint as the first reason in support of its misplaced request for such relief² and, as fully expected, OEP quickly interjected this matter in such evidentiary hearing.³

However, as SMNG Witness Randal Maffett thoroughly explained during the evidentiary hearing in Case No. GA-2007-0168, the single reference to an “exclusive” franchise contained in the subject market survey was, quite simply, an honest mistake.

Q. [by Mr. Fischer] In the opening statement from Ozark Energy Partners, Mr. Steinmeier raised an issue related to a customer survey that was referenced – that referenced an exclusive franchise. It’s my understanding that there is a complaint that might deal with the details of that. Is that your understanding?

A. [by Mr. Maffett] Yes.

Q. But do you have any comments that you’d like to make to the Commission regarding that particular situation?

A. Yes, I would. When we completed the acquisition of Alliance Gas Energy’s assets in June of 2007, as we began formulating business plans and strategies, we also began working on sending out a market survey to the general public just to find out how close their – what the response and/or the level of interest they had in having natural gas and their willingness to convert.

In the – in the haste of busy workdays and long hours, when I reviewed the final draft of the survey that went out, there was the use of the word that said we had the exclusive franchise to serve the area. It was my mistake. The word “exclusive” should not have been included in that – in that survey. It was an honest mistake.

We do have the only franchise for Branson, so in that sense it is an exclusive franchise, but the City is not prohibited from issuing a – an additional franchise to Ozark or to any other applicants if they so choose. But we did make a mistake, it was my mistake, I was the final proof on the – on the survey form and I have to take responsibility for that.⁴

Appropriately, this Commission denied OEP’s requests for summary relief and expedited treatment in this matter.⁵ While not wishing to perpetuate OEP’s inflammatory prose, “the

² *Id.*, page 2.

³ Evidentiary Hearing, Case No. GA-2007-0168, OEP Opening Statement, Tr. 56; OEP cross-examination, Tr. 154-156.

⁴ *Id.*, Tr. 84-85.

⁵ Order Denying Requests for Summary Relief and Expedited Treatment, Case No. GC-2008-0154, November 20, 2007.

Commission should not willingly participate in this plot”⁶ and should dismiss OEP’s complaint forthwith.

Motion to Dismiss

Pursuant to Commission Rule 4 CSR 240-2.070(6), Respondent hereby moves that the Commission dismiss the above-captioned matter for failure to state a claim upon which relief may be granted, and for lack of jurisdiction over the subject matter now purportedly at issue.

1. The Public Service Commission “is purely a creature of statute” and its “powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.” *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958).

2. In its Statement of Complaint at paragraphs 15 and 16, OEP appears to base its action on purported violations of Section 393.170.1 and .2, RSMo. 2000, concerning prohibitions on beginning construction of a gas plant, and exercising any right or privilege under franchise . . . without first having obtained permission and approval of the commission. On its face, the distribution of a marketing survey to prospective customers does not violate the letter, or the spirit, of these statutory sections. Furthermore, such actions do not fall within the purview of Section 393.140(5), despite OEP’s strained interpretation that suggests they fit “within the meaning of Section 393.140(5).”⁷

3. OEP’s various requests for relief set forth in its Prayer (beginning at page 10 of the Complaint and including, *inter alia*, ordering Respondent to mail written notices to survey

⁶ Ozark Energy Partners’ Response to Order Directing Filing, *supra* Footnote 1, page 6.

⁷ Prayer for relief, subparagraphs (H) and (I), page 12.

recipients, to issue press releases, to send letters to government officials, etc.) amount to equitable and mandated injunctive relief which this Commission is without authority to so order.

4. Based on the foregoing, OEP's complaint should be dismissed.

Answer to Complaint

For its Answer, Respondent states:

1. Except as specifically admitted herein (including those admissions set forth in the transcribed testimony of Randal Maffett quoted above), Respondent denies each and every allegation, averment and statement in the Complaint.

2. Respondent denies the allegations contained in the narrative "Nature of the Complaint" paragraphs contained at pages 1-3 of the Complaint. Respondent admits that OEP and SMNG both have currently-pending applications before the Commission to provide natural gas service in largely the same service area.

3. Respondent admits that it is a gas corporation and a public utility as those terms are defined in Section 386.020, RSMo. 2000, and subject to the lawful jurisdiction of the Commission. Respondent denies the remaining allegations set forth in Paragraph 1 of the Complaint.

4. Respondent admits that the Commission has jurisdiction to pursue and hear complaints in accordance with Sections 386.390 and 386.400, RSMo. 2000. Respondent denies the remaining allegations set forth in Paragraph 2 of the Complaint.

5. Respondent denies the allegations set forth in Paragraph 3 of the Complaint. Respondent denies that the Commission has specific jurisdiction to hear this matter, and incorporates by reference its arguments set forth in its Motion to Dismiss.

6. Respondent is without sufficient information to admit or deny the allegations regarding OEP as set forth in Paragraph 4 of the Complaint.

7. Respondent admits the allegations set forth in Paragraph 5 of the Complaint.

8. Respondent admits that on October 26, 2006, Alliance Gas Energy Corporation filed an Application, in Case No. GA-2007-0168, seeking a certificate of public convenience and necessity to provide natural gas service in Branson, Branson West, Hollister and Reeds Spring, and surrounding areas, and that on June 29, 2007, Alliance and SMNG filed a Motion for Substitution of Party proposing to substitute SMNG for Alliance as the applicant in Case No. GA-207-0168, which motion was granted on July 11, 2007. Respondent denies the remaining allegations contained in Paragraph 6 of the Complaint.

9. Paragraph 7 of the Complaint makes no factual allegations and does not require a response.

10. Except as specifically admitted previously herein, Respondent denies the allegations contained in Paragraph 8 of the Complaint. Further answering, to the extent that Exhibit A attached to the complaint is the same document marked and entered as Exhibit 8 in the evidentiary hearing in Case No. GA-2007-0168, as identified by SMNG witness Randal Maffett therein, Respondent admits that it is a copy of the "Customer Survey 2007."

11. Except as specifically admitted previously herein, Respondent denies the allegations contained in Paragraph 9 of the Complaint.

12. Except as specifically admitted previously herein, Respondent denies the allegations contained in Paragraph 10 of the Complaint.

13. Respondent admits that the City of Hollister enacted an ordinance earlier this year granting a municipal franchise to either OEP or Alliance Gas Energy to provide natural gas

service in that city, and that SMNG has since replaced Alliance Gas Energy in that ordinance.

Respondent denies the remaining allegations contained in Paragraph 11 of the Complaint.

14. SMNG admits that it holds the only existing municipal franchise from the City of Branson for a natural gas utility. Respondent denies the remaining allegations contained in Paragraph 12 of the Complaint.

15. Respondent denies the allegations contained in Paragraph 13 of the Complaint.

16. Respondent denies the allegations contained in Paragraph 14 of the Complaint.

17. Regarding Paragraph 15 of the Complaint, Respondent states that Section 393.170.1, RSMo 2000 speaks for itself.

18. Regarding Paragraph 16 of the Complaint, Respondent states that Section 393.170.2, RSMo 2000 speaks for itself.

19. Respondent denies the allegations contained in Paragraph 17 of the Complaint.

20. Respondent denies the allegations contained in Paragraph 18 of the Complaint.

21. Except as specifically admitted previously herein, Respondent denies the allegations contained in Paragraph 19 of the Complaint. Further answering, Respondent states that SMNG witness Randal Maffett, testifying in Case No. GA-2007-0168 as to people in what towns the subject survey was sent, included both Branson and Hollister.

22. Respondent denies the allegations contained in Paragraph 20 of the Complaint.

23. Respondent denies the allegations contained in Paragraph 21 of the Complaint.

24. Respondent denies the allegations contained in Paragraph 22 of the Complaint.

25. Respondent denies the allegations contained in Paragraph 23 of the Complaint.

26. Respondent denies the allegations contained in Paragraph 24 of the Complaint.

27. Respondent denies the allegations contained in Paragraph 25 of the Complaint.

28. Respondent denies the allegations contained in Paragraph 26 of the Complaint.
29. Respondent denies the allegations contained in Paragraph 27 of the Complaint.
30. Further answering, Respondent denies that Complainant is entitled to any of the relief set forth in Subparagraphs (A) through (M) of its Wherefore clause, and incorporates by reference its arguments set forth in its Motion to Dismiss.

Affirmative Defenses

1. The Commission lacks jurisdiction over the subject matter now purportedly at issue in this Complaint and Complainant fails to state a claim upon which relief can be granted. Respondent incorporates by reference the statements and allegations contained in its Motion to Dismiss, *supra*.
2. Complainant's claims are barred by estoppel.
3. Complainant's claims are barred by state and federal law.
4. Respondent reserves the right to assert such other and further affirmative defenses that may become known to it during the duration of this proceeding.

WHEREFORE, having fully answered Ozark Energy Partners' Complaint, Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas respectfully requests that OEP's Complaint be dismissed, and that OEP not be granted any of the relief requested in its Complaint.

Respectfully submitted,

/s/ **James M. Fischer**

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, this 19th day of December, 2007, to:

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/s/ **James M. Fischer**

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